

United States District Court
Northern District of California

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NOT FOR CITATION
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARC ANDERSON, et al.,
Plaintiffs,
v.
SEAWORLD PARKS AND
ENTERTAINMENT, INC.,
Defendant.

Case No. [15-cv-02172-JSW](#)

**ORDER GRANTING, IN PART, AND
DENYING, IN PART, DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. No. 136

Now before the Court for consideration is the motion for summary judgment filed by Defendant SeaWorld Parks and Entertainment, Inc. (“SeaWorld”). The Court has considered the parties’ papers, relevant legal authority, and the record in this case, and the Court has had the benefit of oral argument. For the reasons set forth herein, the Court GRANTS, IN PART, AND DENIES, IN PART, SeaWorld’s motion.

BACKGROUND

The Court has recited the underlying facts and the procedural history of this lawsuit in several prior orders and shall not repeat them here. (See Dkt. Nos. 46, 90; see also Dkt. No. 80, published at *Anderson v. SeaWorld Parks and Entertainment, Inc.*, 15-cv-2172-JSW, 2016 WL 4076097 (N.D. Cal. Aug. 1, 2016).) The Court will address the facts specific to the motion in its analysis.

(1) Plaintiff Mark Anderson brings individual claims and putative class claims for alleged violations of California’s False Advertising Law, Business and Professions Code sections 17500, *et seq.* (“FAL”), and California’s Unfair Competition Law, Business and Professions Code

1 sections 17200, *et seq.* (“UCL”). Those claims are premised on Anderson’s purchase of a Shamu
2 stuffed animal (the “Shamu toy”) that he alleges he purchased in reliance on the following two
3 statements from SeaWorld’s website: (1) “orca lifespans in captivity are comparable to orca
4 lifespans in the wild”; and (2) “SeaWorld does not separate calves from mother orcas.” (TAC
5 ¶ 18.) For ease of reference, the Court refers to these statements, and the similar statements that
6 Plaintiff Kelly Nelson (“Nelson”) alleges she relied on as the “mother-calf separation” statement
7 and the “captive orca lifespan” statement.

8 (2) Nelson brings individual and putative class claims for alleged violations of the FAL,
9 UCL, and California’s Consumer Legal Remedies Act, Civil Code sections 1750, *et seq.*
10 (“CLRA”) based on the purchase of tickets to SeaWorld. Nelson alleges that when making the
11 decision to purchase a ticket to SeaWorld, she relied the mother-calf separation statement and the
12 orca lifespan statement. (TAC ¶ 19.) According to the TAC, Nelson saw each of those statements
13 on television and on SeaWorld’s website. (*Id.*)

14 (3) Plaintiff Juliette Morizur brings individual and putative class claims for alleged
15 violations of the unfair prong of the UCL based on her purchase of a Shamu toy. Morizur alleges
16 that she purchased the Shamu toy based on the following statements: (1) collapsed dorsal fins are
17 “normal, and also equally common in the wild”; and (2) “captivity in general does not harm
18 orcas.” (*Id.* ¶ 20.) Nelson alleges that a SeaWorld trainer made the statements to her at SeaWorld
19 before she purchased the Shamu toy. (*Id.*)¹

20 ANALYSIS

21 A. Legal Standards Applicable to Motion for Summary Judgment.

22 “A party may move for summary judgment, identifying each claim or defense ... on which
23 summary judgment is sought.” Fed. R. Civ. P. 56(a). A principal purpose of the summary
24 judgment procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v.*
25 *Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment, or partial summary judgment, is
26 proper “if the movant shows that there is no genuine dispute as to any material fact and the movant
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28 ¹ For each of the Plaintiffs, these are the claims that remain as a result of the Court’s rulings
on SeaWorld’s motions to dismiss.

1 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The Court may not weigh
2 evidence or make determinations of credibility. Rather, “[t]he evidence of the non-movant is to be
3 believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby*,
4 477 U.S. 242, 255 (1986).

5 The party moving for summary judgment bears the initial burden of identifying those
6 portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue
7 of material fact. *Celotex*, 477 U.S. at 323; *see also* Fed. R. Civ. P. 56(c). An issue of fact is
8 “genuine” only if there is sufficient evidence for a reasonable fact finder to find for the non-
9 moving party. *Anderson*, 477 U.S. at 248-49. A fact is “material” if it may affect the outcome of
10 the case. *Id.* at 248. If the party moving for summary judgment does not have the ultimate burden
11 of persuasion at trial, that party must produce evidence which either negates an essential element
12 of the non-moving party’s claims or show that the non-moving party does not have enough
13 evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire &*
14 *Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

15 Once the moving party meets its initial burden, the non-moving party must ““identify with
16 reasonable particularity the evidence that precludes summary judgment.”” *Keenan v. Allan*, 91
17 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th
18 Cir. 1995). It is not the Court’s task ““to scour the record in search of a genuine issue of triable
19 fact.”” *Id.* (quoting *Richards*, 55 F.3d at 251); *see also* Fed. R. Civ. P. 56(c)(3) (“The court need
20 consider only the cited materials, but it may consider other materials in the record.”). “A mere
21 scintilla of evidence will not be sufficient to defeat a properly supported motion for summary
22 judgment; rather, the nonmoving party must introduce some significant probative evidence
23 tending to support the complaint.” *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th
24 Cir. 1997) (citation and internal quotation marks omitted). If the non-moving party fails to point
25 to evidence precluding summary judgment, the moving party is entitled to judgment as a matter of
26 law. *Celotex*, 477 U.S. at 323.

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1 **B. The Court Denies SeaWorld’s Motion for Summary Judgment on the Issue of**
2 **Standing to Seek Injunctive Relief.**

3 SeaWorld argues that Plaintiffs’ deposition testimony establishes they lack Article III
4 standing to seek injunctive relief. Because this issue comes before the Court on a motion
5 summary judgment, Plaintiffs must show there are triable issues of fact on the issue of standing.
6 *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (“each element” of the standing
7 inquiry “must be supported in the same way as any other matter on which the plaintiff bears the
8 burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of
9 the litigation”). “In a class action, standing is satisfied if at least one named plaintiff meets the
10 requirements.” *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007); *cf.*
11 *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999) (“Unless the named plaintiffs
12 themselves are entitled to seek injunctive relief, they may not represent a class seeking that
13 relief.”). Nelson is the only plaintiff whose claims are premised on the purchase of tickets to
14 SeaWorld. Although Anderson and Morizur each base their claims on the purchase of a Shamu
15 toy, they did not rely on the same statements when they made those purchases. Therefore, the
16 Court will evaluate each named Plaintiff’s standing to seek injunctive relief.

17 “Past exposure to harmful or illegal conduct does not necessarily confer standing to seek
18 injunctive relief if the plaintiff does not continue to suffer adverse effects.” *Mayfield v. United*
19 *States*, 599 F.3d 964, 970 (9th Cir. 2010). In the context of requests for injunctive relief, the
20 standing inquiry requires a plaintiff to “demonstrate that he has suffered or is threatened with a
21 concrete and particularized legal harm coupled with a sufficient likelihood that he will again be
22 wronged in a similar way.” *Bates*, 511 F.3d at 985 (internal quotations and citations omitted); *see*
23 *also City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). The latter inquiry turns on whether
24 the plaintiff has a “real and immediate threat of repeated injury.” *Id.* (quoting *O’Shea v.*
25 *Littleton*, 414 U.S. 488, 496 (1974)).

26 The Ninth Circuit recently addressed the issue of what is necessary to allege standing to
27 seek injunctive relief when a plaintiff brings claims under the CLRA, FAL, and UCL based on
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1 allegedly false advertising. In *Davidson v. Kimberly-Clark Corp.*, the plaintiff sued manufacturers
2 of pre-moistened wipes that were marketed and labeled as flushable. 873 F.3d 1103, 1113 (9th
3 Cir. 2017). According to the plaintiff, the term “flushable” meant the wipes were suitable to
4 dispose of in a toilet, and defendants’ wipes were not flushable. The plaintiff also alleged she paid
5 a premium for the defendants’ flushable wipes and would not have purchased them if she had
6 known they were not flushable. *Id.* at 1107-08. The district court found the plaintiff did not have
7 standing to seek injunctive relief, reasoning that the plaintiff was unlikely to purchase the wipes in
8 the future and could not show the risk of a future injury. *Id.* at 1109.

9 The Ninth Circuit reversed and held the “inability to rely in the future upon a
10 representation made on a package, ... is an ongoing injury that may justify an order barring the
11 false advertising.” *Id.* at 1107. The court reasoned that a consumer previously deceived by false
12 advertising could have standing to pursue injunctive relief in at least two situations.

13 In some cases, the threat of future harm may be the consumer’s
14 plausible allegations that she will be unable to rely on the product’s
15 advertising or labeling in the future, and so will not purchase the
16 product although she would like to. ... In other cases, the threat of
17 future harm may be the consumer’s plausible allegations that she
18 might purchase the product in the future, despite the fact it was once
19 marred by false advertising or labeling, as she may reasonably, but
20 incorrectly, assume the product was improved.

21 *Id.* at 1115 (citations omitted). The plaintiff in *Davidson* alleged that she wanted to purchase
22 wipes that were truly flushable and would purchase defendants’ wipes if it were possible, but
23 when she was presented with their packaging at stores, she had “no way of determining whether
24 the representation ‘flushable’ is in fact true.” *Id.* at 1116.

25 We are required at this stage of the proceedings to presume the truth
26 of Davidson’s allegations and construe all of the allegations in her
27 favor. ... Though we recognize it is a close question, based on the
28 FAC’s allegations, we hold that Davidson adequately alleged that
she faces an imminent or actual threat of future harm due to
[defendants’] false advertising. Davidson has alleged that she
desires to purchase [defendants’] flushable wipes. Her desire is
based on her belief that “it would be easier and more sanitary to
flush wipes than to dispose of them in the garbage.”

Id. (internal citations omitted).

The court found there were no allegations to discount the plaintiff’s intent and concluded

1 that the plaintiff's allegation that she had "no way of determining whether the representation
2 'flushable' is in fact true' when she 'regularly visits stores ... where Defendants' 'flushable wipes
3 are sold,'" was sufficient to establish Article III standing to seek injunctive relief. *Id.* (quoting *Ries*
4 *v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 533 (N.D. Cal. 2012)).

5 SeaWorld contends that the Plaintiffs' deposition testimony establishes that none of them
6 intend to return to SeaWorld in the future and, therefore, they have not shown they face a realistic
7 threat of future injury. SeaWorld fails to focus on the difference between the Plaintiffs' claims
8 and the products or services at issue. For Anderson and Morizur, the appropriate inquiry is
9 whether their testimony establishes that they would consider purchasing merchandise from
10 SeaWorld in the future. The Court finds SeaWorld has failed to meet its burden on the question of
11 whether Anderson has standing to seek injunctive relief. That is because all of the testimony on
12 which it presented on this issue relates to whether Anderson would purchase tickets to SeaWorld
13 in the future; not whether he would purchase SeaWorld merchandise if he could rely on its
14 advertising.² (*See generally* Dkt. No. 136-1, Declaration of John M. Simpson ("Simpson Decl."),
15 ¶ 5, Ex. D, Excerpts of Mark Anderson Deposition ("Anderson Depo.") at 210:25-215:6.)

16 In contrast to Anderson, SeaWorld did ask Morizur about whether she would purchase
17 merchandise from SeaWorld in the future. She testified that if the Court ordered SeaWorld to
18 correct its advertising and state that collapsed dorsal fins are not normal and that captivity is
19 harmful to orcas, she would not purchase merchandise from SeaWorld and testified that
20 "currently" she does not plan on buying SeaWorld merchandise. (Simpson Decl., ¶ 11, Ex. J,
21 Excerpts of Deposition of Juliette Morizur ("Morizur Depo.") at 175:7-16, 176:1-13.) She also
22 testified that if SeaWorld changed perhaps it could win her back as a customer, and that if she
23 could be sure that SeaWorld was not lying about its orca program, she would consider purchasing
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25 ² During his deposition, Anderson testified about what would be necessary for him to go
26 back to SeaWorld, which included changes in practices and the need to believe statements that
27 those practices had changed. As discussed in the following section, there is testimony in the
28 record relating to whether Anderson would purchase SeaWorld merchandise. For the reasons
outlined in that section, the Court also would find there are disputed issues of fact about whether
Anderson would purchase SeaWorld merchandise in the future, at SeaWorld or at some other
location.

1 merchandise from SeaWorld. (*Id.* at 175:17-24, 263:1-5.)³ SeaWorld cites to other testimony
2 about Ms. Morizur’s views of SeaWorld that may impact her credibility, but the Court cannot
3 make credibility determinations at this stage of the proceedings. The Court concludes Morizur has
4 presented triable issues of fact on the issue of whether she has standing to seek injunctive relief.

5 Nelson’s claims are premised on the purchase of SeaWorld tickets. Nelson testified that
6 she is uncertain about whether she can rely on SeaWorld’s statements. When queried why
7 SeaWorld’s honesty might make a difference to her and whether she intended to return to
8 SeaWorld, Nelson testified “I could. ... If things were different.” (Dkt. No. 145, Declaration of
9 Tracy O. Zinsou (“Zinsou Decl.”), ¶ 2; Dkt. No. 143-4, Zinsou Decl. Ex. A, Excerpts of Kelly
10 Nelson Deposition (“Nelson Depo.”) at 232:19-233:10.) Nelson further explained it would require
11 “more objective information about how the animals are treated. ... It’s a question of satisfying
12 whether ... orcas live as long in captivity as they do in the wild and whether they’re separated
13 from their mothers.” (*Id.* at 233:11-23; *see also id.* at 233:24-234:2.) Finally, Nelson affirmed the
14 allegation that “[a]ssuming SeaWorld’s practices were to evolve to improve the level of animal
15 care and to be honest about the health and status of the orcas,” she “may be inclined to purchase
16 SeaWorld tickets or merchandise in the future.” (*Id.* at 234:10-17.)

17 Nelson also testified that, if SeaWorld’s practices were to evolve and it was honest, “at the
18 moment” she could not say whether she would be “willing” to think about going back or whether
19 she would “actually go back.” Yet, almost immediately thereafter, SeaWorld asked “Do you have
20 any intention, as you sit here today, of ever going back to SeaWorld,” and Nelson responded “I
21 might.” (Simpson Decl., Ex. H, Nelson Depo. at 240:24-241:15, 242:1-3; *see also* Zinsou Decl.,
22 Ex. A, Nelson Depo. at 81:18-82:17.) SeaWorld cites to other portions of Nelson’s testimony that
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24 ³ During Morizur’s deposition, SeaWorld objected to the form of the question posed at
25 263:1-3, and it argues the Court should not consider this leading testimony. The Court overrules
26 SeaWorld’s objections. *See Celotex*, 477 U.S. at 324 (stating non-moving party need not
27 “evidence in a form that would be admissible at trial in order to avoid summary judgment”);
28 *accord Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001). The facts elicited by
the leading question are evidence that would be admissible at trial, and the Court shall consider
those facts.

1 relates to her involvement with People for the Ethical Treatment of Animals and her past views
 2 about SeaWorld. While this testimony may cast doubts on the credibility of Nelson’s intention to
 3 return to SeaWorld, the Court cannot make credibility determinations or weigh evidence at this
 4 stage of the proceedings. The Court finds Nelson has presented triable issues of fact on the issue
 5 of whether she has standing to seek injunctive relief.

6 Accordingly, the Court DENIES, IN PART, SeaWorld’s motion for summary judgment on
 7 the issue of standing.

8 **C. The Court Grants, in Part, SeaWorld’s Motion on Anderson’s Individual Claims.**

9 Sea World argues that it is entitled to summary judgment on Anderson’s claims, because
 10 he has not established reliance, an essential element of each of Anderson’s claims. A plaintiff
 11 bringing claims under the UCL and the FAL can prove reliance

12 by showing that the defendant’s misrepresentation or nondisclosure
 13 was an immediate cause of the plaintiff’s injury-producing conduct.
 14 A plaintiff may establish that the defendant’s misrepresentation is an
 15 immediate cause of the plaintiff’s conduct by showing that in its
 absence the plaintiff *in all reasonable probability would not have*
engaged in the injury-producing conduct.

16 *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009) (internal quotations and citations omitted,
 17 emphasis added). Here, the “injury-producing conduct” is Anderson’s purchase of the Shamu toy.

18 While a plaintiff must show that the misrepresentation was an
 19 immediate cause of the injury-producing conduct, the plaintiff need
 20 not demonstrate it was the only cause. It is not necessary that the
 21 plaintiff’s reliance upon the truth of the fraudulent misrepresentation
 22 be the sole or even the predominant or decisive factor influencing
 his conduct. *It is enough that the representation has played a*
substantial part, and so had been a substantial factor, in influencing
his decision.

23 *Id.* (internal quotations, ellipses, citations and brackets omitted, emphasis added.) In order to
 24 survive SeaWorld’s motion, Anderson “must point to specific facts indicating that [he] actually
 25 saw the misrepresentations about which” he complains, “and that those misrepresentations were
 26 ‘substantial factor[s]’ in” his decision to purchase the Shamu toy. *In re iPhone Application*
 27 *Litigation*, 6 F. Supp. 3d 1004, 1019-20 (N.D. Cal. 2013).

28 In *In re iPhone*, the court granted summary judgment in favor of the defendant where the

1 plaintiffs either disavowed reading the privacy policies about which they complained or could not
2 recall reading them or any other representation by the defendant. *See id.*, 6 F. Supp. 3d at 1018-
3 22. The Court concludes that, like the plaintiffs in *In re iPhone*, Anderson has not met his burden
4 to overcome Sea World’s motion to the extent his claims are premised on the mother-calf
5 separation statement. Anderson was asked about the statements from SeaWorld’s website that he
6 saw and relied on before he visited SeaWorld. (Zinsou Decl., ¶¶ 6-7; Zinsou Decl., Ex. E,
7 Anderson Depo. at 231:10-18, 231:23-233:11, 264:16-266:9; Zinsou Decl., Ex F, Anderson Depo.
8 Ex. 28.) Anderson testified that he saw a statement on the website that reads “Breeding and the
9 mother/calf bond.” (*Id.*, Ex. E, Anderson Depo. at 266:2-4; Anderson Depo. Ex. 28 at p. 9.) That
10 heading does not say anything about whether SeaWorld separates calves from its mothers, and
11 there is no testimony in the record about what Anderson understood the statement to mean.

12 The text below the heading states “SeaWorld understands the importance of keeping
13 mothers and their dependent calves together” and states that, in general, SeaWorld does not
14 separate calves and mothers. (Anderson Depo. Ex. 28 at p. 9.) Anderson, however, testified that
15 he did not read the text of “the article.” (Zinsou Decl., Ex. E, Anderson Depo. at 266:2-9.)
16 Anderson has not shown that he saw the mother-calf separation statement and, therefore, he could
17 not have relied on that statement when he purchased the Shamu toy. *See, e.g., Doe v. Successful*
18 *Match.com*, 70 F. Supp. 3d 1066, 1082 (N.D. Cal. 2014) (“[I]f Plaintiffs did not see the specified
19 representations before they purchased Defendant’s services, then Plaintiffs did not rely on these
20 representations and suffered no injury.”); *cf. Cohen v. DirecTV, Inc.*, 178 Cal. App. 4th 966, 980
21 (2009) (stating, in context of motion for class certification, that “we do not understand the UCL to
22 authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never
23 exposed in any way to an allegedly wrongful business practice”).

24 Whether Anderson relied on the captive orca lifespan statement is a closer issue. When
25 questioned further about Exhibit 28, Anderson testified that he remembered reading the statement
26 “[O]ur killer whales live as long as those in the wild” before he visited SeaWorld, although he
27 admitted he did not read the text following that statement. (Zinsou Decl., Ex. E, Anderson Depo.
28 at 265:18-21.) Anderson testified that when he purchased the Shamu toy, he intended it to be a

1 gift for his sister and was thinking about “[m]any different things. Mainly the show we just saw.
2 Souvenir of SeaWorld.” (Simpson Decl., Ex. D, Anderson Depo., at 74:10-16, 74:23-24, 75:20-
3 21, 121:16-22.)

4 In *Baghdasarian v. Amazon.com*, the plaintiff alleged the defendant’s shipping and
5 handling policy for the Amazon Marketplace was deceptive, because the defendant charged a
6 higher price for shipping and handling on items sold by independent sellers than the estimated
7 rates and retained the difference for itself. No. 05-cv-8060 AG (CTX), 2009 WL 4823368, at *1
8 (C.D. Cal. Dec. 9, 2009), *aff’d*, 458 Fed. Appx. 622 (9th Cir. 2011). The defendant argued that
9 plaintiff’s deposition testimony precluded a finding of reliance, and the court agreed. The plaintiff
10 testified that his “primary” reasons for purchasing goods from defendant were “cost and security.”
11 *Id.*, 2009 WL 4823368, at *5. The court recognized that this testimony was not dispositive,
12 because the plaintiff “does not need to show that a misrepresentation was the primary factor in his
13 decision to engage in injury causing conduct as long as it was a significant factor.” *Id.*, 2009 WL
14 4823368, at *6. However, the plaintiff testified that “[i]t’s not that if they had told me of the fees
15 ... I would have never bought something from Amazon. But the fact that they hid it ... kind of
16 turned me off” *Id.* The court reasoned that this testimony demonstrated the “alleged
17 misrepresentation was not an influential factor in [plaintiff’s] decision to buy from the
18 marketplace” and also precluded plaintiff from relying on a presumption or inference of reliance.
19 *Id.* (citing *Tobacco II*, 46 Cal. 4th at 327).

20 Plaintiff’s deposition testimony is that he would still have bought
21 items from Amazon Marketplace if he had known about the
22 holdback fees, and that the reason he stopped buying from Amazon
23 Marketplace was because he learned that the money he was paying
24 was for a hidden fee. [Record citation.] This establishes at most that
25 he stopped transacting on Amazon Marketplace because he believed
26 Defendant to be deceitful. But Plaintiff’s evidence falls short of
27 establishing the crucial point. Plaintiff does not show that he would
28 have declined to enter into the transactions in the absence of the
shipping policy.

26 *Id.*

27 Anderson testified that he was “motivated” to purchase the Shamu plush because it was
28 big, soft, and something a girl would like. (*Id.* at 122:21-25.) This testimony elucidates

1 Anderson’s primary reasons for purchasing the Shamu toy, which are unrelated to the alleged
2 misrepresentations set forth in the TAC. However, as in the *Baghdasarian* case, the testimony is
3 not dispositive, because Anderson need not show the misrepresentations were the only factor
4 motivating his decision to purchase the Shamu Toy. *Baghdasarian*, 2009 WL 4823368, at *6;
5 *accord In re Tobacco II*, 46 Cal. 4th at 326.

6 The Court also finds guidance in *Wilson v. Frito-Lay North America, Inc.*, 260 F. Supp. 3d
7 1202 (N.D. Cal. 2017). There, the plaintiffs challenged two statements on the defendant’s potato
8 chip packages: “0g Trans Fat” and “Made with All Natural Ingredients.” One plaintiff admitted he
9 did not notice any statements on the packaging during the relevant time period. He also testified
10 he purchased the defendant’s potato chips because of taste, the brand and the packaging. The
11 court found this testimony showed the statement “played no part at all” in his decision to purchase
12 defendant’s products and found that the plaintiff failed to establish a triable issue of fact on
13 reliance. *Id.* at 1209-10.⁴

14 The other plaintiff similarly failed to put forth any “specific facts to indicate that the ‘0
15 grams Trans Fat’ label was a substantial factor in [his] decision to purchase” the defendant’s
16 products. *Id.* at 1213. That plaintiff also challenged the “Made with All Natural Ingredients”
17 statement and testified that he purchased the product because “they tasted good” and he liked the
18 flavor. *Id.* at 1213-14. When asked “whether there are ‘other things he likes about the product,’
19 he simply responded, ‘Well, they taste good.’” *Id.* at 1214 (internal brackets omitted). The
20 plaintiff also affirmed “that it was fair to say that the natural label isn’t the reason that he bought
21 them.” *Id.* (internal quotations and brackets omitted). The court, therefore, granted the
22 defendant’s motion for summary judgment.

23 In contrast to *Wilson* and *Baghdasarian*, in *Rahman v. Mott’s LLP*, the court denied
24 summary judgment on the issue of reliance. No. 13-cv-03482-SI, 2014 WL 5282106, at *6-*7

25 _____
26 ⁴ The plaintiff did testify recalling seeing the “0 grams trans fat” statement on the last
27 package of defendant’s chips that he purchased. However, the court found that purchase could not
28 support a claim, because it was made at the direction of plaintiff’s counsel. The court did not
consider testimony elicited on re-direct that attempted to rebut that testimony and to show the
plaintiff had seen the 0 grams trans fat statement. *Id.* at 1210-11. For reasons set forth in this
Order, this court shall consider the facts elicited in response to leading questions.

1 (N.D. Cal. Oct. 15, 2014). In that case, the plaintiff alleged the statement “No Sugar Added” on
2 defendant’s apple juice did not comply with federal and state regulations for such claims and, as a
3 result, caused him to believe that it had fewer calories than other kinds of apple juice. The
4 plaintiff testified that “taste and price [were] the two most important factors he relie[d] on when
5 purchasing food and beverage products,” that he had purchased defendant’s apple juice even when
6 the “No Sugar Added” statement was not on the label, and that he had not relied on that label “to
7 tell how many calories or sugar were in the beverage, or how healthy it was.” *Id.*, 2014 WL
8 5282106, at *7. However, he also testified that the statement “caused him to believe that there
9 were fewer calories than comparable apple juice products,” that it caused him to “believe the
10 product was healthier than other juices,” and that he “purchased more” of the product “because
11 when I saw the label that said ‘No sugar added,’ I thought it would be less sugar content than the
12 other apple juice products.” *Id.* The court noted the conflicts in the plaintiff’s testimony and
13 concluded there was a triable issue of fact on the issue of reliance. *Id.*

14 In addition to the testimony discussed above about Anderson’s reasons for purchasing the
15 Shamu toy, when asked by defendant’s counsel whether he had identified “all the reasons [he]
16 made a decision to purchase that souvenir orca for [his] sister,” Anderson responded “[t]o the best
17 of my knowledge, yes.” (Simpson Decl., Ex. D, Anderson Depo. at 123:5-8.) Anderson also
18 denied that at the time he purchased the Shamu toy, he was thinking “that the whales at SeaWorld
19 don’t live as long as whales in the wild[.]” (*Id.* at 139:3-10; *see also* Dkt. No. 151-1, Reply
20 Declaration of John M. Simpson (“Simpson Reply Decl.”), ¶ 2, Ex. A, Anderson Depo. at 237:7-
21 11.)

22 Anderson argues that notwithstanding this testimony there are triable issues of fact about
23 reliance. For example, he relies on the testimony that if he “would have known what [he does]
24 now regarding the treatment or mistreatment of the animals, that [*sic*] I probably would not have
25 purchased a ticket. In fact, I’m pretty sure I would not have purchased a ticket[.]” (Zinsou Decl.,
26 Ex. E, Anderson Depo. at 174:25-175:2; *see also id.* at 175:3-8 (if he had not purchased the
27 tickets, he would not have been at the park and “would not have purchased a souvenir as well”).
28 It is reasonable to infer that the captive orca lifespan statement influenced Anderson’s decision to

1 visit the park and, consistent with the allegations in the TAC, may have reassured him that
2 “SeaWorld takes good care of its orcas.” (TAC ¶ 18.) It does not necessarily follow that the
3 captive orca lifespan statement also played a substantial factor in his decision to purchase the
4 Shamu toy.

5 However, Anderson testified that as part of his general commitment to animal welfare, he
6 tries not to patronize parks that mistreat animals. (Zinsou Decl., Ex. E, Anderson Depo. 210:2-
7 211:4). Anderson’s deposition testimony also shows that, at the time he purchased the Shamu toy,
8 he had not seen *Blackfish* and was not aware of the allegedly misleading nature of the captive orca
9 lifespan statement. (Zinsou Decl., Ex. E, Anderson Depo. at 120:6-121:8, 231:9-234:5; *see also*
10 Dkt. No. 187, Declaration of Udit Sood, Ex. A, Anderson Depo. at 140:18-141:8.)⁵ Finally,
11 Anderson did testify that he would not buy merchandise outside of the park, because of what he
12 learned about captive orca lifespans. (Zinsou Decl., Ex. E, Anderson Depo. at 135:18-136:21,
13 176:12-19.) When the Court considers Anderson’s testimony in its entirety, the Court finds the
14 record is sufficient for a reasonable juror to find that if Anderson had known what he contends to
15 be the truth about orca lifespans in captivity, in all reasonable probability he would not have
16 purchased the Shamu toy. SeaWorld is, of course, free to “attempt to impeach [Anderson] at trial
17 with prior statements” it believes “are inconsistent, but such disputes preclude judgment as a
18 matter of law at this stage.” *Ries*, 287 F.R.D. at 531.

19 Accordingly, the Court GRANTS, IN PART, AND DENIES, IN PART, SeaWorld’s
20 motion for summary judgment on Anderson’s claims.

21 **D. The Court Grants, in Part, and Denies, in Part, Denies SeaWorld’s Motion on**
22 **Nelson’s Individual Claims.**

23 SeaWorld argues that it is entitled to judgment on Nelson’s claims because: (1) she has not
24

25 ⁵ In this testimony, Anderson is referring to a meeting he had with Mark Palmer of the
26 International Marine Mammal Project at Plaintiffs’ counsel’s office. (Simpson Decl., Ex. D,
27 Anderson Depo. at 21:7-21, 22:7-23:3, 24:17-25:12.) The import of this meeting is relevant to
28 SeaWorld’s motion for sanctions, but the Court concludes it is not material to this motion.
Further, to the extent it may impact Anderson’s credibility, the Court cannot make credibility
determinations at this stage of the litigation.

1 shown she suffered an economic injury and, therefore, lacks Article III and statutory standing; (2)
 2 she has not shown she was exposed to the captive orca lifespan and to the mother-calf separation
 3 statements; and (3) her claims are premised on a “lack of substantiation theory,” which she cannot
 4 pursue as a private plaintiff.

5 **1. There Are Triable Issues of Fact About Whether Nelson Suffered an**
 6 **Economic Injury.**

7 In order to prove she has Article III and statutory standing to bring each of her claims,
 8 Nelson must be able to show injury in fact and that she lost money or property as a result of
 9 SeaWorld’s conduct. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011); *see also*
 10 *Hinojos v. Kohls Corp.*, 718 F.3d 1098, 1103-04, 1107-08 (9th Cir. 2013). Nelson claims to have
 11 spent money on a ticket she would not have spent if she had known the truth, and lost money is “a
 12 classic form of injury in fact.” *Kwikset*, 51 Cal. 4th at 323.

13 It is undisputed that it was Nelson’s husband exchanged money, either in cash or with a
 14 credit card, for the tickets.⁶ (Simpson Decl., Ex. H, Nelson Depo. at 154:20-155:6.) SeaWorld
 15 argues this fact precludes Nelson from pursuing her claims, because she has not established that
 16 *she* lost money or property, and it relies on *Bird v. First Alert, Inc.*, No. 14-cv-3585-PJH, 2015
 17 WL 3750225 (N.D. Cal. June 15, 2015). In that case, the plaintiff alleged the defendant violated
 18 the CLRA by misrepresenting the safety of a particular type of smoke detector. *Id.*, 2015 WL
 19 3750225, at *1. The defendant moved to dismiss on the basis that the plaintiff alleged that her
 20 husband purchased the smoke detector and, therefore, had not alleged an economic injury. The
 21 plaintiff argued that she did have standing and asserted that her husband had used community
 22 property when he purchased the smoke detector.

23 The court agreed that plaintiff lacked standing and was “not persuaded” by the plaintiff’s
 24 community property argument, reasoning that “the fact remains that it was [plaintiff’s husband],
 25 not plaintiff, who chose to purchase” the smoke detector. *Id.*, 2015 WL 3750025, at *3, *5-6. The
 26 court also reasoned that because her husband made the decision about which smoke detector to

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 28 ⁶ Nelson testified that if her husband used a credit card, it would have been in his name.
 (Simpson Decl., Ex. H, Nelson Depo. at 155:2-6.)

1 purchase, “plaintiff could not have relied on anything disclosed (or not disclosed) on the
2 packaging in making the decision to purchase that particular smoke alarm and could not have been
3 injured by the purchase.” *Id.*; *see also id.*, 2015 WL 3750225, at *7 (“Because plaintiff did not
4 make the decision as to which alarm to buy, and did not review the packaging until after [her
5 husband] had purchased the smoke alarm, she cannot establish reliance, causation, or damages.”).

6 SeaWorld argues that “[o]nly the actual purchaser of the product at issue, not the person
7 for whose benefit or on whose behalf it the item was purchased has standing.” (SeaWorld Mot. at
8 11 n.7) To support this proposition, SeaWorld cites *Peviani v. Natural Balance, Inc.*, 774 F. Supp.
9 2d 1066 (S.D. Cal. 2011). In that case, the plaintiff purchased a product for her husband, and the
10 defendant argued the plaintiff “could not have relied on the statements because she is a woman,
11 and the product is a men’s formula.” *Id.* at 1070. The court was not called upon to consider
12 whether, or under what circumstances, her husband might also have had standing. Therefore, the
13 Court finds *Peviani* inapposite.

14 SeaWorld also relies on *Millett v. Experian Information Solutions, Inc.*, 319 Fed. Appx.
15 562 (9th Cir. 2009) and *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949 (2005). In
16 each case, the courts determined that a plaintiff who had not purchased a product could not assert a
17 claim under the CLRA. *Millet*, 319 Fed. Appx. at 563; *Schauer*, 125 Cal. App. 4th at 960.
18 Neither of those two cases addressed the issue of whether the plaintiff acted in reliance on the
19 representations and there is no discussion of whether that plaintiff’s money was used to conduct
20 the transaction.

21 Nelson testified that she relied on the captive orca lifespan statement and on the mother-
22 calf separation statement when she made the decision to visit SeaWorld. (Simpson Decl., Ex. H,
23 Nelson Depo. at 155:13-22, 167:21-168:17, 168:9-23, 160:1-12; Zinsou Decl., ¶ 4, Ex. C, Nelson
24 Depo. Ex. 50; Zinsou Decl., Ex. A, Nelson Depo. at 151:3-21, 151:25-152:3; *see also* Dkt. No.
25 147, Declaration of Kelly Nelson (“Nelson Decl.”), ¶¶ 3-4.) Thus, unlike the situation presented
26 in *Bird*, the record here supports an inference that it was Nelson, not her husband, who made the
27 decisions to visit SeaWorld and to purchase tickets and that she relied on the alleged
28

1 misrepresentations when making those decisions.⁷

2 Nelson also attests that she and her husband have two joint bank accounts, that she places
3 her earnings in those accounts, and that she and her husband pay their bills, including credit card
4 bills, from those joint accounts. (Nelson Decl., ¶ 2.) SeaWorld counters that Nelson has not
5 provided any further evidence to show that the funds used were community property. However,
6 “if parties to an account are married to each other, whether or not they are so described in the
7 deposit agreement, their net contribution to the account is presumed to be and remain their
8 community property.” Cal. Prob. Code § 5305(a); *see also* Cal. Fam. Code § 760.⁸

9 The Court concludes that Nelson has put forth sufficient evidence to create a triable issue
10 of fact about whether she suffered an economic injury. Absent further guidance from the
11 California Supreme Court and the Ninth Circuit, the Court is not willing to find as a matter of law
12 that Nelson lacks standing simply because her husband turned over the funds that were used to
13 purchase the tickets, when there is sufficient evidence in the record from which the trier of fact
14 could conclude that she made the decision to purchase those tickets and did so based on
15 SeaWorld’s alleged misrepresentations. For that reason, the Court finds SeaWorld’s reliance on
16 *Millett* and *Schauer* unpersuasive.

17 Accordingly, the Court DENIES, IN PART, SeaWorld’s motion for summary judgment on
18 this basis.

19 **2. There Are Triable Issues of Fact About Whether Nelson Was Exposed to**
20 **SeaWorld’s Alleged Misrepresentations on Its Website.**

21 SeaWorld also moves for summary judgment on the basis that Nelson has not shown she
22 was exposed to the captive orca lifespan and mother-calf separation statements. According to the
23 TAC, Nelson saw those statements on television and on SeaWorld’s website.⁹ Nelson also

24 _____
25 ⁷ The Court addresses whether there is sufficient evidence of exposure to those
26 representations in the following section.

27 ⁸ This presumption is rebuttable. *See id.* § 5305(b).

28 ⁹ The only evidence in the record to support the allegation that Nelson saw these statements
on television is her statement that she saw them in *Blackfish* when it aired on CNN. That
testimony is not entirely consistent with the allegations in the TAC, in which Nelson alleged that

1 testified she *saw* the captive orca lifespan and the mother-calf separation statements. (Simpson
2 Decl., Ex. H, Nelson Depo. at 155:13-19, 156:1-3, 11-22.) The real issue is *where* and *when*
3 Nelson saw these statements.

4 When questioned about where she saw the captive orca lifespan statement, Nelson testified
5 she had seen articles in the *Los Angeles Times*, but did not specify when she had seen such
6 articles, and that “it ... might have been something online” but could not be sure of a “specific
7 site.” (*Id.* at 132:2-12.) She also testified that she had “no idea” whether any of the statements
8 were on SeaWorld’s website, and she could not recall where SeaWorld made such statements. (*Id.*
9 at 132:13-20, 155:21-157:7.) Nelson also was questioned about Exhibits 48 and 50, documents
10 produced in response to SeaWorld’s requests for production. (Simpson Decl., ¶¶ 7-8, 10, Exs. F-
11 G, I, Ex. H, Nelson Depo. at 167:21-169:12 (discussing Exhibit 50); Zinsou Decl., ¶¶ 3-4, Exs. B-
12 C, Ex. A, Nelson Depo. at 163:4-165:19 (discussing Exhibit 48).)¹⁰ Nelson testified that “I know I
13 have never seen this [Exhibit 50] as a document before” but testified the content was familiar, in
14 particular the second and fourth bullet points. (Simpson Decl., Ex. H, Nelson Depo. at 167:21-
15 169:12.) Those bullet points state that SeaWorld does not separate calves from their mothers and
16 that its orcas’ life spans are equivalent to those in the wild. (Zinsou Decl., Ex. C.)

17 Nelson also testified that Exhibit 48 “look[ed] familiar” and that it looked like a website
18 “but I don’t know for sure.” (Zinsou Decl., Ex. A, Nelson Depo. at 163:6-19.) Nelson also
19 identified the “content” that looked familiar in Exhibits 48 and 50 was the captive orca lifespan
20 and mother-calf separation statements. (*Id.*, Nelson Depo. at 163:20-164:20, 166:11-16 (“I don’t
21 know if it’s this document, but it’s the content here that looks familiar.”).) The Court concludes
22

23 she saw *Blackfish* and then saw statements on SeaWorld’s website and on television “disputing the
24 allegations of mistreatment of the orcas raised in *Blackfish*.” (TAC ¶ 19.) Nelson then alleged
25 that the particular statements at issue were the mother-calf separation statement and the captive
26 orca lifespan statement. (*Id.*) Those allegations do not suggest that Nelson relied on statements
27 SeaWorld may have made in *Blackfish* as part of her decision making process. Instead, the
28 allegations suggest that the statements she allegedly saw on television were statements that were
not contained in *Blackfish*. Accordingly, because Nelson has not established that she saw the
captive orca lifespan statement or the mother-calf separation statement on television after she saw
Blackfish, her claims shall be limited to statements made on SeaWorld’s website. The Court
grants, in part, SeaWorld’s motion on that basis.

¹⁰ SeaWorld does not dispute the Exhibits are excerpts of SeaWorld’s website.

1 that Nelson has put forth sufficient evidence to show that there are triable issues of fact as to
2 whether Nelson saw the statements at issue on SeaWorld's website.

3 SeaWorld also argues that during her deposition Nelson could not state when she saw the
4 captive orca lifespan and mother-calf separation statements. (Simpson Decl., Ex. H, Nelson Depo.
5 at 173:20-174:2; Simpson Reply Decl., Ex. B, Nelson Depo. at 163:6-15, 163:24-164:2.) On
6 redirect, Nelson explicitly testified that she saw those statements before the visit to SeaWorld.
7 (Simpson Decl., Ex. H, Nelson Depo. at 249:7-23.)¹¹ The Court finds that Nelson has put forth
8 sufficient evidence to show there are triable issues of fact as to when she saw the statements at
9 issue. SeaWorld is, of course, free to "attempt to impeach [Nelson] at trial with prior statements"
10 it believes "are inconsistent, but such disputes preclude judgment as a matter of law at this stage."
11 *Ries*, 287 F.R.D. at 531.

12 Accordingly, the Court DENIES, IN PART, SeaWorld's motion for summary judgment on
13 this basis.

14 **3. The Court Concludes Nelson Is Not Relying on a Lack of Substantiation**
15 **Theory of Liability.**

16 SeaWorld argues that Nelson's testimony demonstrates that her claims are premised on a
17 theory that SeaWorld has not been able to substantiate the captive orca lifespan and mother-calf
18 separation statements. "Consumer claims for a lack of substantiation are not cognizable under
19 California law." *In re Clorox Consumer Litig.*, 894 F. Supp. 2d 1224, 1232 (N.D. Cal. 2012); *see*
20 *also National Council Against Health Fraud, Inc. v. King Bio Pharm, Inc.*, 107 Cal. App. 4th
21 1342-43 (2003). Nelson argues that her claims are not based on the theory that SeaWorld failed to
22 substantiate its statements.

23 Nelson did testify that she, personally, could not say whether particular statements were
24 true or false and that there were certain statements she believed were not backed up by
25 independent parties or were not verifiable. (Simpson Decl., Ex. H, Nelson Depo. at 170:4-16,

26 _____
27 ¹¹ The Court overrules SeaWorld's objections to that testimony as leading. The underlying
28 facts would be admissible at trial, and the Court shall consider them. *See Celotex*, 477 U.S. 324;
Block, 253 F.3d at 418-19.

1 179:6-181:4, 226:14-21, 255:14-2578:25; Zinsou Decl., Ex. A, Nelson Depo. at 233:24-234:4.)¹²
 2 Nelson also testified that if the Court required SeaWorld to publicly state that its orcas do not live
 3 as long as those in the wild that would not necessarily redress her injury, because “we still don’t
 4 know for sure if that is the case.” (Simpson Decl., Ex. H, Nelson Depo. at 229:4-12.) However,
 5 Nelson testified that information from other sources led her to believe that the mother-calf
 6 separation statement is incorrect and testified that she continues to believe that statement and the
 7 captive orca lifespan statement are misleading. (*Id.*, Nelson Depo. at 169:17-23, 170:17-171:16;
 8 Zinsou Decl., Ex. A, Nelson Depo. at 214:9-215:20.) The Court concludes that there is sufficient
 9 evidence in the record to show Nelson is not relying on a lack of substantiation theory of liability
 10 on her claims. Further, the Court shall hold her to her representation that she is not.¹³

11 Accordingly, the Court DENIES, IN PART, SeaWorld’s motion for summary judgment on
 12 this basis as well.

13 **E. The Court Denies SeaWorld’s Motion on Morizur’s Claim for Restitution.**

14 SeaWorld argues that Morizur has abandoned her claim for restitution, because she
 15 testified that she does not “care about the money”; is not “in this for the money”; and is asking the
 16 Court to give her “0.00 dollars.” (Simpson Decl., Ex. J, Morizur Depo.” at 163:2-164:5.) Morizur
 17 also testified that she “spent that money” on the Shamu toy “after being lied to” and then
 18 explained that “the money part is not my biggest concern.” (Zinsou Decl., ¶ 9; Dkt. No. 143-6,
 19 Zinsou Decl., Ex. H, Morizur Depo. at 160:1-3, 17-18.) Morizur also clarified on re-direct that
 20 she still was asking for the money she spent on the Shamu toy to be returned but was not asking
 21 for “damages.” (*Id.*, Morizur Depo. at 261:15-23.)¹⁴

22 _____
 23 ¹² Plaintiffs suggest that the Court should “not attach significant weight” to the testimony at
 24 pages 255:14-258:25. (Opp. Br. at 9 n.5.) The Court cannot weigh the testimony at this stage of
 the litigation, and it has not done so.

25 ¹³ Whether Nelson and the other Plaintiffs can meet their burden to show a reasonable
 consumer would be likely to be deceived by those statements is not at issue in this motion.’

26 ¹⁴ In its opposition, SeaWorld objects to this testimony on the basis that it was obtained
 27 through improper leading questions. SeaWorld did not object to that testimony during Morizur’s
 deposition. Accordingly, the Court overrules SeaWorld’s objection as waived. Fed. R. Civ. P.
 28 32(d)(3)(B)(i)-(ii). Even if SeaWorld had not waived the objection, for reasons previously stated
 in this Order, the Court would overrule the objection and would consider the testimony that she is

1 The Court concludes Morizur has put forth sufficient evidence to create a genuine issue of
2 material fact on the issue of whether she abandoned her claim for restitution and concludes that
3 resolution of this issue may involve issues relating to Morizur’s credibility as a witness, which
4 cannot be resolved on this motion.

5 Accordingly, the Court DENIES, IN PART, SeaWorld’s motion on this basis.

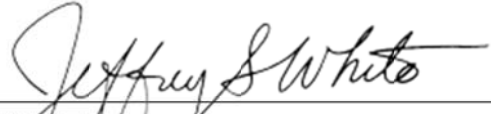
6 **CONCLUSION**

7 For the foregoing reasons, the Court GRANTS, IN PART, AND DENIES, IN PART,
8 SeaWorld’s motion for summary judgment. Under this Court’s standing orders, “[a]bsent of a
9 showing of good cause, the Court will address only one motion for summary judgment per side.”
10 See Civil Standing Orders, ¶ 9. The Court issued an Order advising SeaWorld it would consider
11 its motion, if SeaWorld wished to proceed with the knowledge of the Court’s standing order.
12 SeaWorld chose to proceed. Accordingly, if SeaWorld seeks to file a second motion for summary
13 judgment, it must file a properly noticed motion for leave to do so, which shows good cause for
14 the request. In order to ensure the record is clear on this point, SeaWorld cannot file a second
15 motion for summary judgment with an administrative motion under Northern District Local Rule
16 7-11 asking for the Court to consider a second motion for summary judgment. Before the Court
17 will permit a second motion for summary judgment to be filed, SeaWorld must file a properly
18 noticed motion under Local Rule 7-2 asking for leave to file a second motion for summary
19 judgment and setting forth good cause to do so.

20 **IT IS SO ORDERED.**

21 Dated: February 20, 2018

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JEFFREY S. WHITE
United States District Judge

27 asking for the money she spent on the toy to be returned to her. The Court has not relied on the
28 declaration submitted by Morizur. Accordingly, SeaWorld’s objections to that declaration on the
basis that it is a sham affidavit are overruled as moot.