IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CLASS REPRESENTATION

CASE NO: 16-2017-CA-004794-XXXX-MA
DIVISION: CV-E

BRENDAN C. HANEY, individually
and on behalf of all others similarly situated,

Plaintiff,

v.

COSTA DEL MAR INC.,
a Florida corporation,

Defendant.
_____/

ORDER GRANTING CLASS CERTIFICATION

This cause came before the Court on December 4 through December 6, 2018, for a three-day evidentiary hearing upon Plaintiff's Motion for Class Certification and Incorporated Memorandum of Law filed November 1, 2018 ("Motion for Class Certification"). Defendant filed its Response in Opposition to Plaintiff's Motion for Class Certification ("Response") on November 20, 2018. Thereafter, on November 29, 2018, Plaintiff filed his Reply in Support of Motion for Class Certification ("Reply").[1] Following the evidentiary hearing, the Court ordered the parties to submit written closing arguments in the form of proposed judgments, to include citations to record testimony and exhibits relied upon in argument. Plaintiff filed its written submission on

[1] Plaintiff and Defendant each filed Statements of Facts, respectively, in support and opposition to the Motion for Class Certification.

January 14, 2019 (having provided it to the Court's chambers on January 11, 2019). Defendant filed its written submission on January 11, 2019. Thereafter, the Court held an additional hearing on February 25, 2019, pronouncing its ruling granting class certification and discussing matters pertaining to the entry of this Order. Having considered the record, testimony, evidentiary submissions, deposition designations, and oral and written arguments of counsel,[2] the Court finds that Plaintiff's Motion for Class Certification is due to be granted and this Order Granting Class Certification is appropriately entered.

I. INTRODUCTION

This is a consumer class action in which Plaintiff Brendan C. Haney ("Mr., Haney" or "Plaintiff"), individually and on behalf of a class of Florida consumers, sues Defendant Costa Del Mar, Inc. ("Costa" or "Defendant") for claims arising out of the sale of non-promotional, non-prescription Costa sunglasses. In the Second Amended Complaint ("Complaint"), Mr. Haney contends that Costa promotes and advertises its sunglasses as being "backed for life," and touts its sunglasses warranty as "the best in the industry," with "no gimmicks" and "no disclaimers." Further, Mr. Haney contends that, on the side of every Costa sunglasses box, Costa warrants: "[I]f our sunglasses are damaged by accident, normal wear and tear, or misuse, we replace scratched lenses, frames, and other parts ***for a nominal fee***." (emphasis added). Mr. Haney contends that this nominal fee promise is false, deceptive, and misleading and that purchasers of

[2] This Order will not cite for every finding the precise location within the record providing the testimony upon which a particular finding is based. Exhibits relied upon by the Court are cited, as is select portions of testimony as determined appropriate. To the extent needed, the written arguments of counsel for the parties, provides detailed and specific citations to the record.

Costa sunglasses are charged more than a nominal fee for damage to sunglasses due to accident, normal wear and tear, or misuse.

More specifically, Plaintiff alleges that he purchased a pair of non-prescription, non-promotional Costa sunglasses in Jacksonville, Florida for approximately $150. Subsequently, Plaintiff's sunglasses were accidentally damaged when one of his lenses shattered. Plaintiff sent his sunglasses to Costa for evaluation and paid the cost of shipping to do so. After inspecting the sunglasses, Costa advised Plaintiff that he would need to pay $89 plus tax and shipping and handling, for a total of $105.18, for Costa to repair his sunglasses.

Plaintiff asserts two causes of action against Costa. Count 1 is brought under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201 *et seq.* ("FDUTPA") and Count 2 is brought under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.* ("MMWA"). Plaintiff seeks to certify two subclasses of Florida consumers who purchased Costa sunglasses:

FDUTPA SUBCLASS:

> All citizens of the State of Florida who, within the four years preceding the filing of this Complaint, purchased non-prescription, non-promotional Costa sunglasses for personal use.

MMWA SUBCLASS:

> All citizens of the State of Florida who, within the five years preceding the filing of this Complaint, were charged a fee by Costa to replace damaged components of their non-prescription, non-promotional Costa sunglasses.

The class period for each of these subclasses concludes with purchases made prior to January 31, 2018. *See* Motion for Class Certification at 6, n.2.

II. FINDINGS OF FACT[3]

A. Costa is in the business of manufacturing, marketing, and/or selling sunglasses. Costa sells a variety of types of sunglasses, including its regular (plano) sunglasses, limited edition sunglasses, special collection sunglasses, and prescription sunglasses. [Def. Ex. 31A – 31G]. With the exception of its direct to consumer online sales from Costa's website, Costa sells its sunglasses to retailers who then sell to end-user consumers. Retail locations selling sunglasses throughout the State of Florida consist of approximately 1,500 unique "doors." [Def. Ex. 2].

B. Plaintiff purchased a pair of non-prescription, non-promotional Costa sunglasses in Jacksonville, Florida for approximately $150.

C. At the center of this case is the Costa sunglass box ("the box"). [Pl. Ex. 2]. The box is central to this case because Costa sunglasses are sent to customers and retailers in the box and Costa intends to provide its sunglasses to the consumer in the box. Further, for purposes of the Court's determination on class certification, the evidence shows that Costa intends for the statements on the box to be part of every customer's deal, no matter where they purchase the sunglasses, and no matter whether or not they actually receive the box.

D. Plaintiff and Costa disagree as to the significance this Court should place on the box. Plaintiff argues the box is of substantial importance because the messaging on the box is directed to the end consumer, including *inter alia* Costa's lifetime

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[3] The facts stated herein are the facts found by the Court for purposes of class certification. Nothing herein is intended to or shall operate as a ruling on the merits of this action. *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 106 (Fla. 2011) ("[T]he trial court's consideration of the merits during class certification review must not result in a determination on the merits or a shift in focus from deciding whether a litigant's claim is suited for class certification.").

warranty (which, as Plaintiff argues, includes a nominal fee repair promise). Costa contends the box is nothing more than a brown "craft paper box" in which sunglasses were shipped to retailers and is of little to no import in this case. Rather, Costa contends that the "official" statement of the warranty and repair program offered by Costa at issue in this case is set forth on a "warranty and information card" contained in the clamshell box contained within the box.

E. The box is not just a shipping box, as Costa suggests. Instead, every scintilla of ink on the box is communicating messages to the end user.

F. On the box, used with every pair of non-prescription, non-promotional Costa sunglasses, under the heading "**BACKED FOR LIFE,**" Costa prominently states:

> **BACKED FOR LIFE.**
>
> We stand behind our craftsmanship with a rock solid Limited Lifetime Warranty against manufacturer's defects. ***And if our sunglasses are damaged by accident, normal wear and tear, or misuse, we replace scratched lenses, frames, and other parts for a nominal fee.*** Our product quality, backed by our Limited Lifetime Warranty, make Costa Sunglasses the best value available in the sunglass industry today. No other manufacturer offers a combination that even comes close.

[Pl. Ex. 2, COSTA(HOWLAND)000525-526] (emphasis added).

G. On the box, one side panel describes "**WHAT MAKES THEM COSTAS?**" [Pl. Ex. 2] The final characteristic listed as "making them Costas" is that the glasses are "backed by our lifetime warranty."[4] At that statement, there is a

[4] While not relevant for this case, the Court notes that the Box did reference a Lifetime Warranty rather than a Limited Lifetime Warranty for a brief period of time. [Def. Ex. 35A-35D].

line/arrow which directs the observer to the opposite panel of the box where the nominal fee statement quoted *supra* is presented.

H. In advancing its arguments, Costa asserts that "nominal" is synonymous with "reasonable." In other words, Costa contends that the fees it charges for sunglass repairs are reasonable and, therefore, those fees are also nominal. But contrary to Costa's arguments, the English language makes clear "nominal" does not have the same meaning as "reasonable."[5] Black's Law Dictionary defines "nominal" as "(Of a price or amount) trifling, esp. as compared to what would be expected <the lamp sold for a nominal price of ten cents>." Black's Law Dictionary defines "reasonable" as "Fair, proper, or moderate under the circumstances; sensible."

I. Costa's argument that "nominal" is synonymous with "reasonable" is wholly unsustainable. Simply put, there is no basis under any aspect of the English language for such a position.

Costa's lifetime warranty to repair sunglasses for a "nominal fee" was part of every consumer's bargain.

J. The evidence demonstrates Costa's lifetime warranty is an important part of the Costa brand.

K. Costa believes this lifetime warranty is what sets it apart from its competitors. The lifetime warranty appears in Costa's Brand Handbook (Pl. Ex. 7), Employee Manual (Pl. Ex. 13), and Retailer Training Modules (Pl. Ex. 33), among other places.

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[5] By way of analogy, if a car's transmission fails and must be replaced and the mechanic charges $1,000 for a replacement transmission, such amount is eminently reasonable - but in no sense nominal.

L. Costa knows its customers buy Costa sunglasses in part because of the lifetime warranty.

M. Costa's lifetime warranty includes its promise to replace damaged parts for a nominal fee.

N. Each and every Costa box – for at least the past 10 years – contains this nominal fee repair promise.

O. The evidence demonstrates Costa understood customers had an expectation – based on the language on the box – that repairs to their Costa sunglasses would be completed for a nominal fee. [Pl. Ex. No. 40].

P. The evidence demonstrates Costa employees were trained to understand that the nominal fee repair promise was part of the lifetime warranty. [Pl. Ex. 13, COSTA(HOWLAND)003378].

Q. Costa's Brand Handbook promotes the nominal fee repair promise as a component of its lifetime warranty. [Pl. Ex. 7, COSTA(HOWLAND)109284].

R. Costa retailers were trained to understand that the nominal fee repair promise is an important part of the lifetime warranty, and that accidental damage and normal wear and tear will be fixed by Costa for a nominal fee. [Pl. Ex. 33, COSTA(HOWLAND)110842].

S. Millions of boxes containing the nominal fee repair promise have been delivered to retailers and consumers.

T. According to Costa, the nominal fee promise is available to every consumer because (in addition to it being printed on every box), any purchaser can view the Costa box online, and on hundreds of websites.

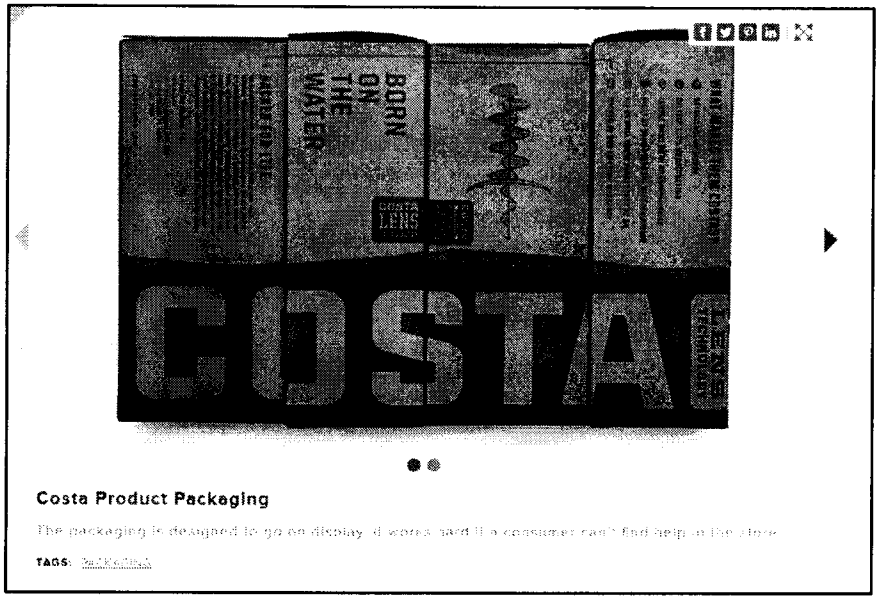
U. Costa sunglasses are sent to customers and retailers in the box and are intended to be provided to the consumer in the box. The evidence presented to the Court at this stage suggests: (i) Costa had a policy to distribute its sunglasses in the box; (ii) Costa's online direct sunglass sales are shipped from Costa facilities to the end customer in the box; (iii) Costa sunglasses are shipped from Costa facilities to retailers in the box; (iv) Third party retailers selling Costa sunglasses online – including Dick's Sporting Goods, Academy Sports, and Amazon – ship Costa sunglasses to end customers in the box.

V. Costa does not direct its retailers to discard the boxes before selling its sunglasses to customers. Indeed, the box in its very design contains messaging designed for the end consumer.

W. Instead, the boxes are intended to be maintained by the retailers and provided to customers at the point of purchase.

X. The boxes are designed to be able to go on display at the retailer. [Pl. Ex. 133, 134].

Y. When lined up one-by-one in a row, the boxes are designed to spell "COSTA." The box is intended to "work hard if a consumer can't find help in the store." [Pl. Ex. 133, 134]. When lined up, the boxes appear as follows:



Z. As shown above, the language printed on the box presents communications and messaging that clearly seems intended for the end consumer.

AA. Costa "wants" its customers to read the box. Crockett Deposition, 39:16-19.

BB. Costa claims that its customers can "assume" and "feel safe no matter what" that when they buy Costa sunglasses, Costa will honor the nominal fee repair promise printed on the box.

CC. Costa admits that every customer receives the nominal fee repair promise, regardless of whether the consumer received, read, or understood the box. In other words, every customer who purchases an authentic pair of Costa sunglasses receives the nominal fee repair promise, regardless of the circumstances of purchase.

DD. Costa intends for the statements on the box – including the nominal fee repair promise – to be part of every customer's deal, no matter where they purchase the sunglasses, and no matter whether or not they actually receive the box. Costa's marketing and consumer behavior expert, Hillary Ellner, agreed in her testimony that

customers of Costa receive the nominal fee repair promise, regardless of whether the customer receives the box.

EE. Costa provides advertising content to various spokesmen to influence the market. Through one such paid spokesman, Chris Fisher (a fisherman known for his television series), Costa advertised consistent with its lifetime warranty that "even if somebody steps on them, or drives over the tops of them, if you send them in they'll replace them for free." [Pl. Ex. No. 162].

FF. When customers send their sunglasses to Costa for repair, Costa honors the repair promise on the box (albeit for a price Plaintiff contends is *not* nominal) regardless of whether the customer received the box.

GG. As a matter of practice, Costa has never required proof of purchase or a receipt for a customer to have his or her Costa sunglasses repaired.

HH. As a matter of practice, Costa has never required customers to prove that they received the box in order to have their Costa sunglasses repaired. In fact, Costa "discourage[s]" customers from sending the box in with their sunglasses for repair.

II. The word "nominal" is neither confusing nor ambiguous to Costa.

JJ. According to Costa, "nominal" means what it means, and it is defined in the English language.

KK. Costa's Head of Marketing (and corporate representative), Terri Hannah, testified that Costa customers should be able to take the language Costa uses on its sunglass boxes literally.

LL. Costa admits that it would be prudent for Costa to understand the English meaning of the word "nominal" if it is going to make a representation on its product.

MM. The former head of Costa's Care and Repair Department, Dean Rosenberg, admitted that "nominal" means "an insignificant amount."

NN. In certain testimony, Costa acknowledges that a nominal fee is materially different than a reasonable fee. Crockett Deposition, 61:13-21; Rosenberg Deposition, 22:4-7; Hannah Deposition, 103:19-23.

Notwithstanding the nominal fee promise, Costa began charging uniform and substantial repair costs and generating significant revenues.

OO. In 2004, at the request of Costa's then-CEO Chas Macdonald, Costa created a "Repair Task Force Initiative" because Costa's internal execution of its warranty policy was "much too expeditious and liberal," and was causing Costa's warranty expense to "go[] through the roof." *See* [Pl. Ex. 35, COSTA(HOWLAND)070070].

PP. Costa created and maintained a list of internal repair charges which detailed the cost to repair certain component parts of sunglasses. *See* [Pl. Ex. 9]. These costs range from $49 for plastic frames to $89 for 580G lenses.

QQ. According to Dean Rosenberg and Costa's service and training supervisor within the Care and Repair Center, Jacqlyn Mazza, these charges imposed by Costa are not nominal.

RR. According to Costa's former CEO, Mr. McDonald, Costa did not honor the statement on the box that Costa would repair sunglasses for a nominal fee.

SS. Instead, and directly contrary to the nominal fee promise, Costa told its employees to advise consumers that accidental damage and normal wear and tear are *excluded* from coverage. [Pl. Ex. 58, 92WEST(HANEY)000089, 93].

TT. Instead of the nominal fee promised, Costa advised consumers that they could get their sunglasses repaired at a "discount" to the price of a new pair. [Pl. Ex. 90, COSTA(HOWLAND)000574].

UU. And, despite training its employees that the nominal fee repair promise was part of the lifetime warranty, Costa's practice was to ignore the nominal fee wording in training its employees. Crockett Deposition, 180:21-181:24.

VV. If sunglasses are broken by accident, misuse, or normal wear and tear, the customer *also* has to pay Costa a $9.95 "shipping" fee in addition to the substantial repair charges. Costa does not disclose the repair charges or the $9.95 fee to customers on the box.

WW. As a matter of policy, Costa does not disclose the repair charges to customers until the customer mails their damaged sunglasses to Costa (at the customer's expense), the customer pays an undisclosed $9.95 fee, and the glasses are assessed by an employee. Costa customers were/are not provided with a schedule of repair charges prior to making a warranty claim.

XX. Costa's repair charges were not posted on Costa's website or on the product packaging, and Costa did not otherwise make the repair charges available to its customers. In that regard, Costa's corporate representative testified as follows:

> Q: If a consumer accidentally damages his glasses, what should be his or her first step?
>
> A: To go online and fill out the request to have it sent in for assessment.
>
> Q: Because, if I understand, if he picks up the phone right away and calls Costa Del Mar on the number that's on the box, your representatives are trained not to tell that customer what the repair charges will be, correct?

MS. TOBIAS: Objection to form.

THE WITNESS: They tell them to send the frames in for assessment. Correct.

Even Costa's head of marketing was not privy to the repair schedule.[6]

YY. Indeed, in 315 secret shopping exercises performed at the direction of Costa's expert, Michael Bare, wherein each secret shopper was directed to report and photograph any information regarding sunglass repairs, not a single shopper received Costa's menu of repair charges at the point of sale or otherwise. Consistent with its treatment of the sunglass repair charges, Costa's charging schedules produced in this case were marked "Confidential." *See* [Pl. Ex. 9].

ZZ. With its substantial repair charges, Costa began to generate higher gross profit on repairs than on sales. [Pl. Ex. 11, COSTA(HOWLAND)127813].

AAA. Costa reported to the SEC that these repair charges drove the growth of Costa business. [A. T. Cross 2010 10-K] ("The Costa increase was due to new product launches ... and an increase in repair revenue.").

BBB. Costa reported to its parent company Essilor that the Repair Department had a gross margin of 75 percent.

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[6] At the class certification hearing, Costa introduced an audio recording of a telephone call between the prior named Plaintiff, Nicholas C. Howland, and Costa representatives. Costa had represented to the Court that it has approximately 25,000 hours of consumer audio recordings in its possession but was unable to produce any recordings responsive to Plaintiff's request during discovery. In any event, the audio recording introduced into evidence, which occurred *after* Mr. Howland had purchased his sunglasses and *after* they had been damaged, merely reflects that Costa disclosed limited pricing information commensurate with Mr. Howland's warranty claim. There is no evidence that Costa provided or disclosed its schedule of repair charges to any consumers at the point of sale.

CCC. Bonuses were paid to repair center employees based upon revenue generated from repairs.

DDD. The practices of the Care and Repair Center were set up to make it a profit generator.

EEE. Al Perkinson, the former Vice President of Marketing for Costa, advised Costa executives that its internal policies "are geared toward making our repair shop a profit generator, instead of a loyalty generator." [Pl. Ex. 88, COSTA(HOWLAND)003489].

FFF. Costa's current CEO, Holly Rush, reported to Essilor her serious concerns with the Care and Repair Center's revenue-driven mindset, which "keeps [her] up at night":

> To further complicate things, our Care and Repair dept, whose mission it is to solve the consumer's problem when they have one, was set up as a Sales/Profit Center, NOT a Service Center and while it generates revenue each year that can't be ignored ($9M+), we've instilled a mindset and culture that every consumer who calls in, is an opportunity to make a sale. This mindset and approach coupled with a high defective rate and frustrated consumer, equates to a challenging situation.

[Pl. Ex. 157, COSTA(HOWLAND)123623].

GGG. That mindset and culture resulted in additional policies which violated the nominal fee promise:

- In order to increase repair revenues, previously-warranted items were shifted from a covered warranty claim to excluded "wear and tear" to generate additional revenues. This is true despite the fact that Costa knew of significant quality issues – including defective temples, delamination, lenses popping out of frames, and defective rubber gaskets.

- Costa's Repair Center assessors began to deny claims for damage due to salt, water, and heat - the very environments for which Costa sunglasses are marketed.

- Costa's Repair Center assessors began charging repair charges (that Plaintiff argues was excessive) for sunglasses with known manufacturer defects.

- Costa put in practice a policy that accidental damage trumps manufacturer defects. In other words, if sunglasses are sent in with a manufacturer defect (such as lens delamination) but also show signs of accidental damage (a broken lens), the customer is charged the substantial repair cost instead of the claim being processed as a defect.

Costa knew that its nominal fee repair promise was deceiving customers.

HHH. Costa knew that its warranty language was not being properly communicated to customers at the point of purchase. Crockett Deposition, 99:22-25

III. Costa's corporate representative testified that it would be false for Costa to advertise that its lifetime warranty has no gimmicks, no disclaimers, and is the best in the industry.

JJJ. Laurie Fontenot, Costa's Consumer Liaison and "the voice of Costa" – the individual at Costa responsible for responding to customer warranty complaints – explained to her colleagues that Costa's "warranty statement does suck." Her colleagues agreed that customer complaints "aren't completely unfounded. Costa is pretty unclear in their warranty." [Pl. Ex. 65].

KKK. *In 2013*, Dean Rosenberg, the head of the Care and Repair Department, advised Costa executives that the company needed to remove the nominal fee language from the Costa boxes. [Pl. Ex. 40, COSTA(HOWLAND)002956].

LLL. Mr. Rosenberg knew that the nominal fee warranty language was unfair and misleading or deceptive to customers. Rosenburg Deposition, 21:3-22, 22:16-22.

MMM. Mr. Rosenberg knew that the prices charged by Costa for sunglass repairs were not nominal.

NNN. According to Costa's CEO, Costa "embraced" Mr. Rosenberg's suggestion to remove the nominal fee language from the box. And Terri Hannah – Costa's Senior Marketing Manager – agreed that the nominal fee language on the box needed to be removed.

OOO. However, Costa did not change its warranty policies or messaging until after this litigation ensued.

PPP. As a result of Costa's warranty practices, consumer complaints dramatically increased in frequency. According to Costa, customer complaints were being submitted "all day, every day, on all channels." [Pl. Ex. 165; Pl. Ex. No. 40].

QQQ. The majority of tracked complaints to Costa concerned the price charged by Costa for repairs. [Pl. Ex. 62, 92WEST(HANEY)104].

RRR. Costa's CEO believed that the amount of customers complaining about the cost of repairs was a "disconcerting trend."

SSS. It was typical for customers to complain to Costa about the repair fees charged, that the repair fees were misrepresented at the time of purchase, and that the practice of charging repair fees was unfair.

TTT. Further, it was typical for customers to complain to Costa about the false nominal fee repair promise.

UUU. During this time and through at least July 2018, Costa's Better Business Bureau rating "improved" to a D-. [Pl. Ex. 171].

VVV. Based upon the volume and frequency of complaints, Costa was aware that its warranty policy was confusing and misleading to customers. [Pl. Ex. 65, 92WEST(HANEY)986].

WWW. Despite using the term "nominal" on Costa's sunglass boxes and outward-facing client materials for years, until this litigation began, certain of Costa's corporate representatives and senior executives testified they had never looked up the meaning of the word.

XXX. Travis Owens, Costa's corporate representative and Senior Director of Sport and Sun Specialty, who is responsible for training retailers about the warranty, testified that he did not know the definition of "nominal."

YYY. According to various Costa representatives:

- "[N]ominal is what I'm willing to pay for something."
- Any repair to a consumer's sunglasses that falls below what that consumer paid at retail is considered by Costa to be a "nominal fee."
- "Nominal is the price that we charge for a service."

ZZZ. Costa's corporate representative and Senior Marketing Manager, who is responsible for creating and promoting the warranty, testified that she does not understand how Costa treats the warranty and repair policy internally:

- She has "zero knowledge" about repair pricing at any point in time in the history of the company.
- She has no knowledge about how the warranty policy is treated internally at Costa – how warranty claims are processed, what is charged, or what exclusions exist.
- She was unaware that Costa charges customers a $9.95 repair fee in addition to repair charges.

AAAA. Even Costa's Consumer Liaison testified that she did not read or "study the box" until after this lawsuit was filed.

Costa knew that its sunglasses had significantly higher failure rates than its purported competitors.

BBBB. Costa advertises that its sunglasses are durable, built to last, and made to withstand extreme and intense conditions:

- Costa makes "hardcore sunglasses for hardcore fishermen and adventurers."
- Costa advertises and promotes that no one is harder on their equipment than fishermen.
- Costa advertises and promotes that durability is absolutely essential for fishermen.
- Costa sunglasses are "the toughest sunglasses in the world" and "hold up under the most extreme conditions, protecting against harsh wind, sand and sun."

CCCC. However, Costa knows that its sunglasses have a significantly higher failure rate than its competitors. Each year, 16% of Costas are sold in a defective condition. [Pl. Ex. 157, COSTA(HOWLAND)123623].

DDDD. Costa knows that its sunglasses, when used in the environments for which they are marketed, "will fold":

> What surprises me is that our product is made with rubber and plastic, materials that don't mesh well with varying temperatures. In essence great for fit and comfort but under extreme temperature changes and salt water dips they will fold.

[Pl. Ex. 122, COSTA(HOWLAND)003650].

EEEE. Costa's own materials acknowledge that normal wear and tear can be expected.

After this litigation, Costa eliminated its nominal fee promise and changed the customer purchase experience.

FFFF. As of January 31, 2018, Costa stopped shipping boxes with the nominal fee repair promise included on them.

GGGG. Plaintiff emphasizes that there have been numerous changes to Costa's consumer-facing materials, boxes, and other advertising material since the filing of this lawsuit. Those changes include:

1. Costa covered up the nominal fee promise on the box with a sticker;
2. For new boxes being printed, Costa entirely removed the "backed for life" language or any nominal fee repair language from the box;
3. Costa developed new frames and different boxes for some of its sunglasses (and those boxes do not contain any nominal fee promise);
4. Costa developed new displays for its products that do not contain adequate space to store the boxes;
5. Costa now provides retailers with separate MSRP stickers (each with a bar code for scanning at the point of sale) so retailers have no need to retain the sunglass box;
6. Costa has re-written its warranty on its website; and
7. Costa does not offer for sale plaques that say "backed for life, no gimmicks, no disclaimers."

HHHH. Costa's CEO testified that, if a customer buys a pair of Costa sunglasses today, the customer could or would receive one of three boxes: (1) a promotional box that does not have the nominal fee language on it; (2) a box with a sticker covering the nominal fee language — that does not have the nominal fee promise; or (3) a new box that does not have the nominal fee promise on it.

IIII. As of late January or early February 2018, Costa utilized a sticker to cover up the nominal fee promise on the side of every box leaving Costa's facility. [Pl. Ex. 132].

Costa ordered approximately 250,000 stickers and had its operations team in Daytona Beach physically place the stickers on each Costa sunglasses box to obscure the nominal fee repair promise. Thus, any old inventory sitting in Costa's warehouse would, as of about January of 2018, be sent to retailers with the sticker on it. Those stickers were intended to and, in fact, did cover the nominal fee repair promise on the box.

JJJJ. In approximately March or April 2018, Costa changed its sunglass boxes to remove the nominal fee language.

KKKK. The prior version of the Costa box told consumers two things: (1) Costa offers a warranty against manufacturers' defects, and (2) if the sunglasses are broken by accident, normal wear and tear, or misuse, Costa will replace scratched lenses, frames, or other parts for a nominal fee. All of that language was removed by Costa on the new box.

LLLL. Costa also launched its new display program. As part of this new display program, retailers are no longer able to order certain marketing material that Costa previously offered to retailers, including certain Costa plaques with warranty and repair language visible to consumers.

MMMM. Additionally, Costa now offers retailers new display cases for the Costa sunglasses. These new showcase displays are different than the displays previously utilized. The rollout of these new displays began in the fourth quarter of 2017, and Costa's CEO conceded that "if a customer walks into a store today, he or she may see very different displays."

NNNN. The new displays make it more difficult and cumbersome for retailers to store the Costa sunglass boxes. [*See* Pl. Ex. 136].

OOOO. Additionally, Costa's prior practice was to ship sunglass boxes to retailers with a single sticker on the box reflecting the Manufacturer's Suggested Retail Price ("MSRP") and a bar code for the retailers to scan at the point of sale. But, Costa now ships its boxes to retailers with a separate sticker that displays the MSRP and a bar code for scanning. [Pl. Ex. 138]. And now, Costa's boxes have no MSRP.

PPPP. The new practice for retailers is to take the glasses out of the box, find the appropriate sunglasses for the sticker, and attach the sticker to the sunglasses. This new practice for Costa began in August of 2018. The result of this new practice is that, if retailers use the temple sticker provided by Costa, the retailer has no need for the box.

QQQQ. Since this lawsuit, Costa has also revamped the warranty section of its website. Now, the website does not contain any nominal fee language.

Costa's "nominal fee" promise has value and is capable of being measured.

RRRR. A promise to repair a product for a lifetime for a nominal fee has value to consumers.

SSSS. A pair of sunglasses with a nominal fee repair warranty commands a greater demand than an identical pair of sunglasses without a nominal fee repair warranty.

TTTT. A meaningful percentage of consumers of sunglasses believe that a sunglass warranty is an important component of their purchase.

UUUU. As outlined below, it is possible to calculate the difference in value between sunglasses with a nominal fee repair promise and sunglasses without a nominal fee repair promise.

VVVV. Costa maintains data regarding the repairs it has performed for consumers, and the cost of those repairs charged to consumers.

WWWW. For purposes of certifying the class, the testimony of the parties' expert witnesses establishes that a pair of sunglasses with a "nominal fee" promise is more valuable than an identical pair of sunglasses without the nominal fee repair promise, and that there is a reasonable methodology for calculating that value.

Class members are identifiable, and a class award can be managed and administered.

XXXX. Given the available data and the objective definition of the proposed classes, both the MMWA Class and the FDUTPA Class are identifiable. During class administration, the class members would be able to be identified, provided with reasonable notice, and a class award could be managed and administered.

III. STANDARD OF REVIEW FOR CLASS CERTIFICATION

"To certify a class, a trial court must engage in an analysis with regard to whether the class representative and putative class members meet the requirements for class certification promulgated in Florida Rule of Civil Procedure 1.220." *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 105 (Fla. 2011). "When determining whether to certify a class, a trial court should focus on the prerequisites for class certification and not the merits of a cause of action. . . . However, if consequential to its consideration of whether to certify a class, a trial court may consider evidence on the merits of the case as it applies to the class certification requirements." *Id.* "To obtain class certification, the proponent of class certification carries the burden of pleading and proving the elements required under rule 1.220." *Id.* at 106. This includes the four elements of rule 1.220(a)."

Id. As set forth in Rule 1.220(a), the four elements that a party must satisfy to obtain class certification are:

> (1) the members of the class are so numerous that separate joinder of each member is impracticable [*numerosity*], (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class [*commonality*], (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class [*typicality*], and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class [*adequacy*].

Fla. R. Civ. P. 1.220(a) (emphasis added). In addition, the proponent of class certification must satisfy one of the three subsections contained in Rule 1.220(b). Subsections (1) and (2) of Rule 1.220(b) are as follows:

> (1) the prosecution of separate claims or defenses by or against individual members of the class would create a risk of either:
>
> (A) inconsistent or varying adjudications concerning individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications concerning individual members of the class which would, as a practical matter, be dispositive of the interests of other members of the class who are not parties to the adjudications, or substantially impair or impede the ability of other members of the class who are not parties to the adjudications to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate; or

Fla. R. Civ. P. 1.220(b)(1)-(2). "Rule 1.220(b)(3) states that if sections 1.220(b)(1) and 1.220(b)(2) are not satisfied, then a party may satisfy the requisites of 1.220(b) by fulfilling rule 1.220(b)(3)." *Sosa*, 73 So. 3d at 106. Rule 1.220(b)(3) provides as follows:

> (3) the claim or defense is not maintainable under either subdivision (b)(1) or (b)(2), but the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class ***predominate*** over any question of law or fact affecting only individual members of the class, and class representation is ***superior*** to other available methods for the fair and efficient adjudication of the controversy. The conclusions shall be derived from consideration of all relevant facts and circumstances, including (A) the respective interests of each member of the class in individually controlling the prosecution of separate claims or defenses, (B) the nature and extent of any pending litigation to which any member of the class is a party and in which any question of law or fact controverted in the subject action is to be adjudicated, (C) the desirability or undesirability of concentrating the litigation in the forum where the subject action is instituted, and (D) the difficulties likely to be encountered in the management of the claim or defense on behalf of a class.

Fla. R. Civ. P. 1.220(b)(3) (emphasis added).

In order to certify a class, a plaintiff need not demonstrate that his claim is identical to every other member of the class. Instead, only the relevant circumstances of the class members matter. As the Supreme Court of Florida has stated:

> It would be a perversion of the spirit behind rule 1.220, and the cases interpreting the rule, to hold, as defendants urge, that plaintiffs' class action allegations fail because plaintiffs do not present identical claims. If class actions were dependent on class members presenting carbon copy claims, there would be few, if any, instances of class action litigation. It is virtually impossible to design a class whose members have identical claims. . . Defendants' proposed holding would nullify the class action rule, a course of conduct we decline to follow.

Sosa, 73 So. 3d at 109.

"'[T]he determination that a case meets the requirements of a class action is a factual finding,' which falls within a trial court's discretion." *Id.* at 103. "The class action rule has a real and meaningful position in the administration of justice to address the ever-increasing caseload burden placed upon our trial courts." *Id.* "A trial court should resolve doubts with regard to certification ***in favor of*** certification." *Id.* at 105 (emphasis added).

In the instant case, Defendant does not dispute and concedes that certain requirements have been satisfied. First, Defendant concedes that the members of each proposed class are so numerous that separate joinder of each member is impracticable. Additionally, Defendant concedes that Mr. Haney and Holland & Knight LLP can fairly and adequately protect and represent the interests of each member of the class. As such, numerosity and adequacy are established.[7] Notwithstanding, based on the Court's independent review, both elements have been satisfied by the Plaintiff. The Court will proceed to analyze the remainder of the class certification requirements as to each proposed class.

IV. CONCLUSIONS OF LAW

The FDUTPA Class

1. Plaintiff contends that Costa violated FDUTPA because its promise to repair sunglasses for a nominal fee is false, unfair, deceptive, and likely to mislead a reasonable consumer. Plaintiff seeks to certify a FDUTPA class defined as follows: All citizens of the State of Florida who, within the four years preceding the filing of this Complaint, purchased non-prescription, non-promotional Costa sunglasses for personal use.[8] The proposed classes also exclude: (1) Defendant, any entity or division in which Defendant has a controlling interest, and their legal representatives, employees, officers,

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[7] At the evidentiary hearing, Costa did not dispute the numerosity and adequacy requirements for class certification purposes under Rule 1.220(a), Florida Rules of Civil Procedure. Further, during discovery Costa objected to the issuance of subpoenas to third party retailers, arguing that the identification of potential class members, including names, physical and email addresses, and phone numbers is unnecessary and irrelevant prior to the Court's ruling on class certification. The Court agreed. *See* Order on Retailer Subpoenas, March 29, 2018.

[8] At the hearing, Plaintiff indicated that Costa's promotional sunglasses, which are sold with a different warranty, are excluded from the proposed classes.

directors, assigns, and successors; and (2) the judge to whom this case is assigned and the judge's staff. (2d Am. Compl. ¶ 40).

2. FDUTPA provides a civil cause of action for "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." § 501.204(1), Fla. Stat. The elements of a FDUTPA claim are as follows: "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA 2006); *City First Mortg. Corp. v. Barton*, 988 So. 2d 82, 86 (Fla. 4th DCA 2008). "Under Florida law, an objective test is employed in determining whether the practice was likely to deceive a consumer acting reasonably." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 983 (11th Cir. 2016). Thus, it is well-settled that whether a "reasonable consumer" would be misled by Costa's actions under FDUTPA is an objective question susceptible to objective proof, regardless of variations in the beliefs, motivations, knowledge, and experiences of different Florida consumers who purchased Costa sunglasses during the class period. *See Davis v. Powertel, Inc.*, 776 So. 2d 971, 974 (Fla. 1st DCA 2000) ("[T]he question is not whether the plaintiff actually relied on the alleged deceptive trade practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances."). Here, and under the facts of this particular case, these elements are susceptible to class-wide proof.

Reliance is Not Required Under FDUTPA, and Causation is Established on a Class-wide Basis.

3. Florida law is clear that a Plaintiff need not prove reliance as part of his FDUTPA claim. *See Davis v. Powertel, Inc.*, 776 So. 2d 971, 973 (Fla. 1st DCA 2000) ("A party asserting a deceptive trade practice claim need not show actual reliance on the

representation or omission at issue."); *Fitzpatrick v. Gen. Mills, Inc.*, 635 F.3d 1279, 1283 (11th Cir. 2011) (under FDUTPA, "a plaintiff need not prove reliance on the allegedly false statement . . . but rather a plaintiff must simply prove that an objective reasonable person would have been deceived."); *Turner Greenberg Assocs., Inc. v. Pathman*, 885 So. 2d 1004, 1009 (Fla. 4th DCA 2004) ("[A] demonstration of reliance by an individual consumer is not necessary in the context of FDUTPA.").

4. As the First District Court of Appeal stated in *Davis*, "[t]he plaintiff need not prove the elements of fraud to sustain an action under the statute . . . because the question is not whether the plaintiff actually relied on the alleged deceptive practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstance." *Davis*, 776 So. 2d at 973. "The standard of proving that an act is deceptive and, therefore, a violation of the statute is the same in a class action as it is in an action initiated by an individual consumer." *Id.*

5. Additionally, causation is established on a class-wide basis in a FDUTPA case such as this. In *Davis*, the First District Court of Appeal held that: "Because proof of reliance is unnecessary, the plaintiffs' inability to show reliance in every case cannot be used to justify a finding that individual issues will predominate over the class claims. . . . Issues pertaining to the proof of the alleged deceptive practice and issues relating to ***causation and damages*** will be common to all members of the class." 776 So. 2d 971 (emphasis added). Eight years later, that same court reaffirmed the binding effect of this ruling:

> In his concurring opinion in *Powertel,* Judge Webster noted that the Legislature was free to amend the statute to include the element of reliance if it wished to do so. It has been six years since Judge Webster made that observation, and the statute has not been amended. We think that our reading of the statute was correct at the time of the *Powertel*

> decision for the reasons given in the opinion and that it continues to be correct.

Egwuatu v. South Lubes, Inc., 976 So. 2d 50 (Fla. 1st DCA 2008). The First District's analysis and reasoning was discussed in *Nelson v. Mead Johnson Nutrition Co.*:

> Some Florida District Courts of Appeal have determined that causation is an element of a consumer FDUTPA action for damages. *See, e.g., Rollins, Inc. v. Butland*, 951 So.2d 860, 869 (Fla.Dist.Ct.App.2006). ***Because those cases identify a causation element, they appear to be at odds with Davis and Latman.*** Indeed, the concepts of causation and reliance can be deeply intertwined, for a deceptive practice seemingly cannot have caused an aggrieved party damages unless the aggrieved party relied on the deceptive practice. Upon closer inspection, however, a deceptive practice can cause a consumer damages even if the consumer does not rely on the deceptive practice when purchasing a particular product. Ostensibly, a deceptive practice allows a manufacturer or vendor to charge a premium for a product that the manufacturer would not be able to command absent the deceptive practice. Thus, even if an individual consumer does not rely on a deceptive practice when deciding to purchase that product, the consumer will have paid more for the product than she otherwise would have. Consequently, the consumer suffers damages.
>
> ***The undersigned finds Judge Padavano's decision in Davis particularly persuasive. To find otherwise would eviscerate the protections that FDUTPA is designed to afford consumers. Indeed, if the Act requires a consumer to prove reliance, it becomes impossible for a court to ever certify a class in a FDUTPA action.*** In many instances, if consumers cannot attain class certification, they cannot pursue their claim. For example, in FDUTPA actions like the case at bar, the amount in controversy for an individual plaintiff is too insignificant to make the claim worth pursuing. This is particularly true given the enormous expense associated with litigating the complex questions that invariably arise when a consumer challenges a defendant manufacturer's representations about the qualities or contents of a particular product. Because a reliance element would effectively deprive those plaintiffs of a remedy, the Court agrees with Judge Padavano that FDUTPA does not require plaintiffs to prove reliance.

270 F.R.D. 689, 692 n.2 (S.D. Fla. 2010) (emphasis added).

FDUTPA Damages can be Established on a Class-wide Basis.

6. FDUTPA affords civil private causes of action for both declaratory and injunctive relief and for damages. With respect to damages, FDUTPA provides: "[i]n

any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney's fees and court costs as provided in s. 501.2105." § 501.211(2), Fla. Stat. The standard for determining the actual damages recoverable under FDUTPA is as follows:

> [T]he measure of actual damages is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties. [...] A notable exception to the rule may exist when the product is rendered valueless as a result of the defect—then the purchase price is the appropriate measure of actual damages.

Rollins, 951 So. 2d at 869. Damages in a FDUTPA matter are susceptible to class-wide proof. *Davis*, 776 So. 2d 971, 974–75.

7. As Florida law recognizes, even if an individual consumer does not rely on a deceptive practice when deciding to purchase a product, the consumer will have been aggrieved by purchasing a product of reduced value. *Id.* at 974–75 ("Based on these principles, we conclude that the claims for damages in this case can be asserted on behalf of a class under rule 1.220(b)(3). All of the claims share one essential common feature; that is, the alleged defective practice reduced the value of the telephones."); *see also Nelson*, 270 F.R.D. at 692 n.2 ("Thus, even if an individual consumer does not rely on a deceptive practice when deciding to purchase that product, the consumer will have paid more for the product than she otherwise would have. Consequently, the consumer suffers damages."); *Carriuolo* 823 F.3d at 987 ("Thus, because a vehicle with three perfect safety ratings may be able to attract greater market demand than a vehicle with no safety ratings, the misleading sticker arguably was the direct cause of actual damages for the certified class even if members individually value safety ratings differently."). This concept was explained in *Carriuolo*:

> As the district court recognized here, a manufacturer's misrepresentation may allow it to command a price premium and to overcharge customers systematically. Even if an individual class member subjectively valued the vehicle equally with or without the accurate Monroney sticker, she could have suffered a loss in negotiating leverage if a vehicle with perfect safety ratings is worth more on the open market. As long as a reasonable customer will pay more for a vehicle with perfect safety ratings, the dealer can hold out for a higher price than he would otherwise accept for a vehicle with no safety ratings. Thus, for example, a dealer would likely not discount a pickup truck with superior towing capacity for a customer with only a suburban commute, since most customers willingly pay more for that feature. Nor would a dealer be likely to lower the price for a hearing impaired customer who demands to pay less for a vehicle equipped with satellite radio, even though she might value it equally to a vehicle equipped with no audio capabilities. Obviously, prices are determined in substantial measure according to market demand. Thus, because a vehicle with three perfect safety ratings may be able to attract greater market demand than a vehicle with no safety ratings, the misleading sticker arguably was the direct cause of actual damages for the certified class even if members individually value safety ratings differently.

823 F.3d at 987. Thus, whether a purported class member suffered a loss does not depend on the class member's awareness of the language on (or receipt of) the sunglass box, or the individual's reason for purchasing Costa sunglasses, or actual knowledge concerning fees charged by Costa. As the applicable cases recognize, imposing such requirements on consumers would merely seek to impose "a reliance inquiry by another name." *Carriuolo*, 823 F.3d at 985 ("Thus, General Motors is incorrect to suggest that the plaintiffs must prove that every class member saw the sticker and was subjectively deceived by it. As the district court correctly observed, these arguments simply seek a reliance inquiry by another name.").

Plaintiff Meets the Requirements of Rule 1.220(a)

Numerosity & Adequacy: Both are Conceded, but Satisfied in any Event.

8. At the evidentiary hearing on class certification, Costa did not dispute and conceded the numerosity and adequacy requirements of Rule 1.220. Additionally, the Court finds that both are satisfied.

9. Plaintiff is an adequate class representative and his counsel, Holland & Knight LLP, is qualified to serve as class counsel in this action.

Commonality: Plaintiff's Claims Present Common Issues of Law and Fact.

10. "The threshold of commonality is not high." *Sosa*, 73 So. 3d at 107. The commonality requirement is aimed at determining whether there is a need for, and benefit derived from, class treatment. *Id.* "More specifically, the commonality prong only requires that resolution of a class action affect all or a substantial number of the class members, and that the subject of the class action presents a question of common or general interest." *Id.* "This core of the commonality requirement is satisfied if the questions linking the class members are substantially related to the resolution of the litigation, even if the individuals are not identically situated." *Id.* It is a "relatively light burden" that "does not require that all the questions of law and fact raised by the dispute be common." *Vega v. T–Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir. 2009) (internal quotations omitted). "[F]or purposes of Rule 23(a)(2) even a single common question will do." *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2556 (2011). "A mere factual difference between class members does not necessarily preclude satisfaction of the commonality requirement." *Sosa*, 73 So. 3d at 107. "Individualized damage inquiries will also not preclude class certification." *Id.*; *Broin v. Phillip Morris*

Co., Inc., 641 So. 2d 888, 891 (Fla. 3d DCA 1994) ("Entitlement to different amounts of damages is not fatal to a class action.")).

11. Here, Plaintiff's FDUTPA claim raises questions of law and fact that are common to the questions of law and fact raised by each class member. Costa engaged in standard, uniform conduct by promising customers that it will replace sunglasses damaged by accident, normal wear and tear, or misuse for a nominal fee, and Plaintiff claims that Costa does no such thing as a policy and practice.

12. Thus, there are numerous common questions which are implicated here, including but not limited to the following:

a. Whether Costa advertised and offered to repair or replace sunglasses damaged by accident, normal wear and tear, or misuse for a nominal fee;

b. What constitutes a nominal fee;

c. Whether Costa actually repairs or replaces sunglasses damaged by accident, normal wear and tear, or misuse for a nominal fee;

d. Whether Costa's representation that it would repair sunglasses for a nominal fee would deceive an objective consumer acting reasonably under the circumstances;

e. Whether Costa failed to honor the nominal fee promise as to the class;

f. Whether the nominal fee promise has value;

g. Whether Plaintiff and members of the class were deprived of the value of the nominal fee promise;

h. Whether Plaintiff and the class members are entitled to damages, and if so, the method for calculating them; and

i. Whether the class is entitled to declaratory and/or injunctive relief.

13. The claims of Plaintiff and the class rise and fall on these straightforward questions — Costa's representations are either true or false, and are either deceptive or

not. Accordingly, Plaintiff's claims arise from the same practice or course of conduct — *i.e.*, Costa's nominal fee promise — that gives rise to the claims of each and every class member, and all claims are based on the same legal theory.

Typicality: Plaintiff's Claims are Typical of Class Members' Claims Because They are Based on the Same Conduct and the Same Injury.

14. Before a claim may be maintained on behalf of a class, the trial court must be satisfied that "the claim or defense of the representative party is typical of the claim or defense of each member of the class." Fla. R. Civ. P. 1.220(a)(3). The typicality test is "not demanding" and "focuses generally on the similarities between the class representative and the putative class members." *Sosa*, 73 So. 3d at 114. Mere factual differences between the class representative's claims and the claims of the class members will not defeat typicality. *Id.* The typicality requirement is satisfied when there is a similarity in legal theories upon which those claims are based and when the claims of the class representative and class members are not antagonistic to one another. *Id.* (citing *Morgan v. Coats*, 33 So. 3d 59, 65 (Fla. 2d DCA 2010) ("The typicality requirement may be satisfied despite substantial factual differences . . . when there is a strong similarity of legal theories.") (emphasis added)).

15. Here, Plaintiff's claims satisfy the typicality standard. Both legally and factually, Plaintiff's claims are substantially similar to the claims of every other member of the class. Plaintiff Haney purchased non-prescription, non-promotional Costa sunglasses in 2016 for approximately $150. After his sunglass lens shattered, he sent in his sunglasses for repair. Plaintiff was charged over $105 to repair his sunglasses, despite the nominal fee promise made by Costa. Plaintiff's FDUTPA claim is premised on Costa offering a lifetime nominal fee repair promise for sunglasses damaged by

accident, normal wear and tear, or misuse, but failing to abide by that advertised promise. Like Plaintiff Haney, each class member in the FDUTPA subclass purchased Costa sunglasses that came with the same allegedly false promise that Costa would repair sunglasses for a nominal fee. Indeed, Costa's witnesses and corporate representatives concede that each and every consumer of Costa sunglasses receives the nominal fee promise along with their sunglasses, regardless of the circumstances of purchase. At a minimum, there is a strong similarity in legal theories upon which the FDUTPA claim of Plaintiff and the class members are based. Thus, Plaintiff meets the typicality prong for class certification for purposes of the FDUTPA class.

Plaintiff Meets the Requirements of Rule 1.220(b).

16. In evaluating Plaintiff's Motion for Class Certification, the Court must next consider whether Rule 1.220(b) is satisfied. The rule requires that (i) the party opposing the class has acted or refused to act on grounds generally applicable to all members of the class, making final injunctive or declaratory relief concerning the class as a whole appropriate; or (ii) questions of law or fact common to the claims or defenses predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy. Fla. R. Civ. P. 1.220(b). Here, Plaintiff satisfies both subsections for the FDUTPA subclass.

Certification of the FDUTPA Subclass is Proper under Rule 1.220(b)(3).

17. Plaintiff's claims are appropriate for class certification under Rule 1.220(b)(3). The Rule requires that Plaintiff meet a two-prong test: (1) that common questions of law or fact predominate over any individual questions of the separate class members; and (2) that class representation is superior to other available methods for

the fair and efficient adjudication of the controversy. Fla. R. Civ. P. 1.220(b)(3); *see also Braun v. Campbell*, 827 So. 2d 261, 269 (Fla. 5th DCA 2002). "Florida courts have held that common questions of fact predominate when the defendant acts toward the class members in a similar or common way." *Sosa*, 73 So. 3d at 111. "The predominance and commonality requirements parallel one another, but are not identical. . . The predominance requirement is more stringent because, to satisfy this requirement, common questions must not only exist but also predominate and pervade." *Sosa*, 73 So. 3d at 111. However, "it is not the burden of the class representative to illustrate that all questions of fact or law are common. . . . Rather, the class representative must only demonstrate that some questions are common, and that they predominate over individual questions." *Id.* at 112. Here, Plaintiff and the putative class members have brought suit against Costa based on Costa's routine and uniform course of conduct in offering a nominal fee repair promise, while at the same time charging consumers uniform charges that Plaintiff contends are not nominal. As explained below, Plaintiff has satisfied both prongs of Rule 1.220(b)(3).

Common Questions of Law and Fact Predominate.

18. During the class period, every pair of Costa's non-promotional, non-prescription sunglasses left Costa's facility in a uniform box stating that, if Costa's sunglasses are damaged by "accident, normal wear and tear, or misuse," Costa will replace "scratched lenses, frames, and other parts for a nominal fee." The evidence at the class certification hearing establishes that Costa's "lifetime warranty" is a significant part of its brand, and is what Costa believes sets it apart from its competitors.

19. In that regard, Costa's corporate representatives and witnesses concede that Costa's lifetime warranty includes replacing damaged parts for a nominal fee. Costa

employees are trained to understand that the nominal fee repair promise is part of the lifetime warranty. And, Costa admits that it is the *combination* of its promise to fix manufacturer's defects, and its promise to fix glasses damaged by accident, normal wear and tear, or misuse for a nominal fee that sets it apart from others in the industry. Costa's experts indicated that they have never seen a product with such a warranty. Indeed, Costa admits that consumers bought Costa sunglasses because of the warranty.

20. Costa's corporate representatives and witnesses (including Costa's CEO) testified that Costa's nominal fee repair promise attaches to each and every pair of non-promotional, non-prescription Costa sunglasses, regardless of whether the consumer received, read, or understood the box. According to Costa, it was part of every customer's deal or bargain. And, it was Costa's practice to honor the warranty that it sends out on its product, regardless of whether the consumer actually physically receives or views the warranty. In other words, Costa honors the nominal fee repair warranty (for what Plaintiff contends was not a nominal fee), whether or not the consumer received the box, no matter where the customer bought his Costa sunglasses, and no matter the circumstances of purchase.

21. Under the facts of this case, the nominal fee repair promise attaches to each and every pair of Costa sunglasses, regardless of the circumstances of purchase or individual issues encountered by a consumer. Costa's argument that individual class members may have experienced "disparate" purchasing experiences ignores these facts, as well as the pertinent law, and attempts to impose a requirement on consumers that Costa never had imposed before (which also is inconsistent with Costa's uniform course of dealing. The evidence establishes for purposes of class certification that, if a

consumer purchased a pair of non-promotional, non-prescription sunglasses, he or she received the nominal fee repair promise as part of the bargain.

22. While offering and promoting its nominal fee repair warranty, Costa developed an internal policy to turn its repair center into a profit generator and impose substantial charges to undertake repairs. Costa created confidential repair charges, but refused to disclose actual charges to customers unless and until the customers' sunglasses broke. The repair charges were not posted on Costa's website during the class period, were not on the product packaging, and Costa did not otherwise make the repair charges available to its customers. In fact, there is no evidence that any customer was ever exposed to Costa's full menu of prices or that customers were informed of *any* of the prices for repairs at the point of sale.

23. Further, Costa implemented a uniform policy that effectively disavowed the "nominal fee" repair promise. It trained its employees to advise complaining consumers that accidental damage and wear and tear were excluded from coverage. (Pl. Ex. 163). Costa advised its customers that repairs could be performed for a "repair price" or a "discounted repair cost," instead of a nominal fee. (Pl. Ex. 58) (emphasis added); . Costa told the Better Business Bureau that repair fees are "assessed at the customers' expense." In fact, the individual who trains Costa's customer care representatives, Jacqlyn Mazza, testified that the prices charged by Costa are not nominal. Costa's former CEO admitted that, while he was president and CEO of Costa, the company did not honor the warranty on the box.[9]

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[9] Former CEO Mr. Macdonald later submitted an errata sheet purporting to remove the "not" from his answer. However, the Court has considered and weighted the video deposition testimony.

24. While undertaking this pattern of practice, Costa's repair center gross margins grew to the highest in the company — 75%. The evidence reflects that Costa often makes more money on a repair than on a *sale* of sunglasses. *See* (Pl. Ex. No. 6). The evidence also reflects that substantial repair charges were driving the growth of Costa's business. Aggressive repair revenue targets were established, bonuses were paid on repair revenue targets, warranted items were shifted to "wear and tear" to maximize revenues, and Costa began to charge an undisclosed $9.95 "shipping fee" to consumers.

25. Costa was aware that its nominal fee repair promise was misleading consumers. Its high-level executives believed that poor repair experiences were "a cancer," and that Costa had "instilled a mindset and culture that every consumer who calls in, is an opportunity to make a sale." (Pl. Ex. 88); (Pl. Ex. 157). Costa's corporate representatives admitted that its warranty was not being properly communicated to customers at purchase. And, its employees wrote in company documents that Costa's "warranty statement does suck" and that "Costa is pretty unclear in their warranty." (Pl. Ex. No. 65). Dean Rosenberg, former head of the repair department, testified that, although the nominal fee repair warranty was part of every customer's deal regardless of whether they received the box, Costa's charges were not nominal and Costa's practice of imposing substantial charges (including an undisclosed shipping fee unrelated to the actual cost of shipping) was unfair and deceptive. According to Mr. Rosenberg, Costa consumers would actually copy the "Backed for Life" warranty printed on the box on complaints to the Florida Attorney General.

26. Accordingly (and for purposes of determination of class certification), customers of Costa were deceived. Costa's Consumer Liaison, Laurie Fontenot, testified that the complaints were coming in "all day, every day, on all social media channels."

(Pl. Ex. No. 165). The majority of tracked complaints to Costa concerned the price charged by Costa for repairs. (Pl. Ex. 62); *see also* (Pl. Ex. 122).

27. It was *typical* for customers to complain about the repair fees charged. It was *typical* for customers to complain that they were deceived or misled at the time of purchase. It was *typical* for customers to complain to Costa that the practice of charging the repair fees was unfair. It was *typical* for customers to complain to Costa about the false nominal fee repair promise.

28. Accordingly, the common questions of law and fact (outlined above) predominate over individual issues in this case. Indeed, to prove their claims, Plaintiff and the class will rely on the same pool of evidence, namely:

1. Costa's nominal fee repair promise to customers is uniform, in writing, and part of every consumer's bargain;

2. All consumers were subject to the same schedule of undisclosed repair charges (regardless of receipt of the box or amount paid for the sunglasses); and

3. All consumers were deprived of the value of the nominal fee repair promise – which, as set forth below, is capable of being measured on a class wide basis.

Moreover, the amount of the nominal fee is a question of fact applicable to all claims. Costa acted toward class members in a substantially similar if not uniform manner. Thus, the Court is satisfied that the claims in this case emanate from Costa's common course of conduct. Common questions of law and fact predominate over individual issues in this case. *See Sosa*, 73 So. 3d at 111; *Stone v. CompuServe Interactive Servs., Inc.*, 804 So. 2d 383, 388 (Fla. 4th DCA 2001). Plaintiff has established that common questions of law and fact predominate

Costa's reliance-based defenses to certification lack merit.[10]

29. As set forth above, reliance is irrelevant to Plaintiff's FDUTPA claim. *See Davis*, 776 So. 2d at 973. While acknowledging that reliance is unnecessary as a matter of law (Response at 2), Costa nonetheless argues, through a variety of means, that Plaintiff's class claims fail for lack of reliance.

30. For instance, at the class certification hearing, Costa offered the testimony of Hillary Ellner, who appeared by telephone and opined on the purchasing behavior of consumers of premium sunglasses. Ms. Ellner's opinion, in essence, was that consumers of premium sunglasses do not rely on sunglass warranties when making their purchasing decision.[11]

31. The Court does not find Ms. Ellner's testimony persuasive for purposes of determining class certification. Ms. Ellner testified that she reached her conclusions without speaking to Costa or a single Costa customer or retailer, and without the benefit of any evidence regarding Costa's intent with its nominal fee repair warranty. Significantly, Ms. Ellner seemed to offer opinions contrary to Costa's own admissions

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[10] Some of these arguments are made by Costa with respect to the FDUTPA subclass, as well as the MMWA subclass. To the extent Costa's arguments are applicable to both subclasses, the Court's reasoning is restated and incorporated by reference for both subclasses.

[11] The documents Ms. Ellner relied upon were inconsistent with her opinion. Ms. Ellner relied upon a Vision Council survey, which concluded that 34 percent of all consumers think that a warranty is a very important component of their purchase. Another 29 percent of consumers thought that a warranty was an important consideration in buying sunglasses. And, another 25 percent of purchasers thought that a warranty is somewhat important in their decision. In other words, a majority of all purchasers, according to the Vision Council survey, ascribe some level of importance to a sunglass warranty or protection plan. Another survey that Ms. Ellner relied upon, the Jacobson Optical Survey, did not even measure what was important to consumers; it was directed to *retailers* and did not address the importance of a warranty in connection with purchasing sunglasses.

that: (i) Costa's lifetime warranty, which includes fixing or replacing accidentally broken or worn parts for a nominal fee, is an important part of its brand; (ii) Costa believes its lifetime warranty is what sets it apart from competitors; and (iii) Costa believes its customers buy its sunglasses because of its warranty.

32. Ms. Ellner candidly testified that she does not have any knowledge of, or expertise in, Costa's warranty policies or procedures, or how Costa's warranty is offered and marketed to consumers.

33. Another of Costa's expert witnesses, Keith R. Ugone, Ph.D., testified that there are individual inquiries related to the calculation of damages that predominate common issues. The individual inquiries identified by Dr. Ugone included: (1) whether each of the consumers was exposed to the nominal fee promise; (2) whether each of the consumers had different reasons, other than the nominal fee repair promise, for purchasing the sunglasses; and (3) whether each of the consumers knew of the repair prices charged before buying the sunglasses and bought them anyway.[12]

34. These "individual inquiries" identified by Dr. Ugone, which he contends are required to establish the "nexus" between the wrongful conduct and the damages, are merely reliance by another name.[13]

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[12] Dr. Ugone identified two other individual inquiries – the prices paid to purchase the sunglasses and the prices paid for repairs – which will be addressed below.

[13] Dr. Ugone's conclusion is not only contrary to the law, but it is inconsistent with the facts. There is no evidence in the record that any purchaser received Costa's schedule of repair charges *before* purchasing sunglasses. To the contrary, the evidence establishes that, as a matter of policy, repair pricing was not made available to a consumer until after the purchase, if and when he sent his sunglasses in for repair. During the class period, repair pricing was not publicly available.

Purported individual purchasing experiences do not defeat class certification.

35. Costa argues that variations in consumer purchasing experiences – what each saw, heard, read, knew or received – defeat class certification. Costa's argument fails for several reasons.

36. Initially, by suggesting that each class member must have an identical or cookie-cutter purchase experience, Costa relies upon factually inapposite case law, and seeks to impose a standard that has been rejected by the Supreme Court of Florida. Costa relies upon *Deere Constr., LLC v. CEMEX Constr. Materials Fla., LLC*, No. 15-24375-CIV, 2016 WL 8542540, at *1 (S.D. Fla. Dec. 1, 2016), a proposed class action arising out of the defendant's methodology for imposing allegedly deceptive fees in its contracts, a fuel surcharge and an environmental fee. *Id.* at *1. The court denied certification, finding that "[t]he contracts were individually negotiated, including whether the fuel surcharge or environmental charge would be flat or variable or eliminated entirely." *Id.* at *4. In the words of the court, "the contracts were not uniform" and "therefore distinguishable from the types of form contracts more amenable to class certification." *Id.* *Deere* is the opposite of the circumstance here, where Costa offered a uniform nominal fee repair promise to each and every class member.

37. As the Supreme Court of Florida has stated: "It would be a perversion of the spirit behind rule 1.220, and the cases interpreting the rule, to hold, as defendants urge, that plaintiffs' class action allegations fail because plaintiffs do not present identical claims." *Sosa*, 73 So. 3d at 109 (quoting *Broin v. Philip Morris Companies, Inc.*, 641 So. 2d 888, 891 (Fla. 3d DCA 1994)). Moreover, the standard advanced by

Costa — whereby each class member must have cookie-cutter claims — would eviscerate the consumer protections of FDUPTA and nullify all class actions. *Id.*

38. Class members simply need to be in the same ***relevant*** circumstances. Here, each class member's relevant circumstances are the same (*i.e.*, each: (i) is a Florida resident; (ii) purchased Costa sunglasses that came with the benefit of the nominal fee repair promise; (iii) was allegedly deprived of the value of the nominal fee repair promise; and (iv) was damaged). These consumers did not individually negotiate the nominal fee repair promise and how it must be applied; each received the same nominal fee repair promise, regardless of the circumstances of purchase.

39. Next, contrary to binding precedent, Costa's argument seeks to impose a reliance or individualized causation element to Plaintiff's claim. However, as set forth above, a cause of action under FDUTPA does not require proof of a class members' subjective opinion, knowledge or individual purchase experience. A FDUTPA claim requires ***objective*** proof that will not vary from customer to customer. *See Davis*, 776 So. 2d 971 ("Issues pertaining to the proof of the alleged deceptive practice and issues relating to causation and damages will be common to all members of the class."); *Carriuolo*, 823 F.3d at 983 ("Under Florida law, an objective test is employed in determining whether the practice was likely to deceive a consumer acting reasonably."); *Fitzpatrick*, 263 F.R.D. at 697 ("[B]ecause each plaintiff seeking damages under the FDUTPA is only required to prove that [defendant's] conduct would deceive an objective reasonable consumer, and not that the deceptive act motivated their particular purchase decision ... the putative class members would rely on the same pool of evidence to prove their claims.").

40. Moreover, the First DCA has already held that causation and damages in a FDUTPA matter are susceptible to class-wide proof. *Davis*, 776 So. 2d 974–75. Each member of the class did suffer a loss — *i.e.*, they were "aggrieved" — when he or she purchased Costa sunglasses subject to an alleged false and deceptive nominal fee repair promise, regardless of whether they saw or relied upon that promise.

41. Other unrelated class action defendants have made these arguments before, and they have been rejected by courts. In *Carriuolo v. Gen. Motors Co.*, the Eleventh Circuit addressed a similar argument and stated:

> General Motors claims that the liability determination will be highly individualized because the buying and leasing experiences of each proposed class member were not uniform. ***General Motors points out that some class members may have known that the safety ratings were inaccurate; some may not have been aware of the Monroney sticker; and each member negotiated the purchase or lease price individually with the dealer from whom the member purchased or leased the vehicle.***
>
> But these objections do not defeat the district court's determination that common questions predominate. Because a plaintiff asserting a FDUTPA claim "need not show actual reliance on the representation or omission at issue," *Davis*, 776 So.2d at 973, the mental state of each class member is irrelevant.

823 F.3d 977, 985 (11th Cir. 2016) (emphasis added). In a case decided last year, the Southern District of Florida correctly addressed this point:

> Defendant further argues that Plaintiffs fail to plead causation because they fail to allege that they actually saw the allegedly deceptive advertisements and that seeing the advertisements caused them to purchase their vehicles. In other words, Defendant objects that Plaintiffs have not alleged actual reliance. Defendant misunderstands the FDUTPA standard, which requires only an objective inquiry.

Vazquez v. Gen. Motors, LLC, No. 17-22209-CIV, 2018 WL 447644, at *7 (S.D. Fla. Jan. 16, 2018); *see also Nelson*, 270 F.R.D. at 696 (granting certification on FDUTPA claim and stating, "[b]ecause Plaintiff can prove a FDUTPA claim without proving that she

relied on a particular representation, Defendant's argument that other members of the class viewed different representations than Plaintiff does not render Plaintiff's claim atypical of the class."); *Fitzpatrick*, 635 F.3d at 1282–83 (remanding to the district court to correct class definition, and stating "the district court held that 'recovery under the FDUTPA does not hinge on whether a particular plaintiff actually relied on General Mills' claims about Yo–Plus' alleged digestive health benefits'; rather, 'whether that allegedly deceptive conduct would deceive an objective reasonable consumer [is a] common issue[ ] for all the putative class members, amenable to class-wide proof.' . . . Thus, should the class prevail on the liability issue, each putative class member would only need to show that he or she paid a premium for YoPlus to be entitled to damages under the FDUTPA. . . . The district court's analysis in its Order on Motion for Class Certification is sound and in accord with federal and state law."). These cases appropriately recognize that attempts to argue that individual "consumer experiences" preclude certification simply seek reliance by another name. *Carriuolo*, 823 F.3d at 985.

42. This case is on all fours with *Carriuolo* where every pair of sunglasses, like every car in *Carriuolo*, was shipped with the offending representation. In fact, the common questions predominate in this case more so than in *Carriuolo* because Costa admits that it simply does not matter whether individual consumers saw the box, relied on the box, understood the language, or had other individual purchasing experiences. If a class member purchased Costa sunglasses, according to Costa, the nominal fee repair promise was part of his or her bargain.

43. Even if Costa's legal argument were to be accepted, Costa presented no persuasive evidence of any disparate purchase experiences of class members during the

class period. Substantially all of the evidence that Costa purported to offer in support of its argument was derived from Costa's expert, Michael Bare. Mr. Bare was retained by Costa to conduct a secret shopper survey study, in which he sent employees into Costa retailers and asked them to record a variety of aspects of their purchase experience. As a primary objective, Mr. Bare's secret shoppers were directed to carefully listen and look for the phrase "nominal fee" in connection with their purchase of Costa sunglasses. From the results of this study, Mr. Bare concludes,[14] among other things, that only 5% of respondents indicated that they saw the Costa sunglass box visible upon approaching the display; only 53% of the respondents received the box at some point during the transaction; only 72% of respondents were verbally provided information about Costa's warranty policy or repair program; and only 2% of respondents indicated seeing or hearing the phrase "nominal fee" at any point during the purchase transaction. *See* (Def. Ex. No. 33).

44. However, Mr. Bare did not survey class members, and he did not survey Costa consumers or retailers *during the class period.* In fact, although Mr. Bare's secret shopper analysis commenced in September 2018 and concluded in late October 2018, he was unaware that the class period in this case ended in late January 2018.

45. More importantly, Mr. Bare's study was conducted in a retail environment that was materially changed by Costa, at least in part to respond to the issues raised in this lawsuit.[15] Neither Mr. Bare nor his shoppers were advised by Costa that its

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[14] Mr. Bare generated his report having reviewed only 40 of approximately 315 surveys.
[15] Prior to the final class certification hearing, Plaintiff asserted that Costa may have committed fraud on the Court by surveying a materially changed purchasing environment, knowing that the result was manufactured, and attempting to use such evidence to defeat certification. At the class certification hearing, the Court permitted

practices and procedures had materially changed since early 2018. Thus, Mr. Bare unwittingly sent secret shoppers into retail locations where: (i) Costa no longer offered the nominal fee repair promise; (ii) Costa had changed the box to remove the nominal fee repair promise or otherwise covered it up with a sticker; and (iii) Costa discouraged retailers from keeping and displaying the box through the implementation of new retailer procedures and new displays. According to Mr. Bare, his study recorded results at a "moment in time." But, that "moment in time" was the wrong time and the wrong environment. Mr. Bare specifically testified as follows:

> Q. If Costa changed its displays and procedures relating to the distribution of boxes, if it changed the boxes themselves, eliminating all nominal fee promises, you would agree with me that your survey collects data in a very much changed environment?
>
> A. I would agree with your statement as it's phrased.

In fact, Mr. Bare admitted that his study did not collect any evidence regarding: (i) Costa's retailer procedures prior to September 2018, (ii) whether any consumer prior to September 2018 received the box or not, or (iii) any disparities in customer experiences of Costa consumers prior to September 2018. And, Mr. Bare admitted that he knows

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Ms. Rush, Costa's CEO, to testify regarding Costa's implementation of its new display program. In light of the testimony presented at the class certification hearing, Plaintiff abandoned its "fraud on the court" argument. Further – and to be clear – the Court finds utterly no evidence that Costa endeavored or planned to perpetrate a fraud upon the Court. However, the differing circumstances in which that survey was conducted, including the updated displays, product packaging, and procedures that were introduced by Costa *after the class period*, are a consideration for the Court in determining the weight to afford Mr. Bare's expert testimony in defense of the class certification. Regardless of Costa's motivations for changing certain aspects of its marketing program, the Court finds that Mr. Bare's survey was conducted in a materially different environment than the environment encountered by actual class members. Indeed, Costa did not even offer the "nominal fee" repair promise during the time when Mr. Bare conducted his survey. Beginning in January 2018, Costa implemented a sticker to cover up the "nominal fee" promise, and changed its boxes to eliminate the "nominal fee" promise altogether, as a direct result of this lawsuit.

nothing about Costa's retailer procedures prior to September 2018, or whether Costa's practices changed after January of 2018. Bare acknowledged that he did not collect any evidence of any purchaser's experience during the class period. And, he admitted that his study did not, and could not, reflect the experience of class members.

46. Additionally, there are significant discrepancies with the secret shopper data presented by Mr. Bare. For instance, Mr. Bare testified that if his secret shoppers did not follow the instructions, it would "absolutely" be reasonable to throw out the report. However, approximately 80 secret shoppers who received a box containing the nominal fee promise (*i.e.*, old inventory) failed to report seeing or reading the phrase "nominal fee" in connection with their purchase. Another 73 shoppers received boxes that did not exist during the class period — and thus, could not be commensurate with class member purchase experiences. Another 25 shoppers purchased Costa special edition glasses contrary to the express written directions provided to the shoppers and which did not contain any nominal fee promise. Another 95 shoppers purchased glasses from Costa retailers containing a temple sticker — reflecting the new procedures put in place by Costa as of August 2018 (procedures that may render the box unnecessary and which did not exist during the class period). Another 9 shoppers failed to adequately photograph the box received in connection with their purchase. With respect to the remainder of shoppers, Mr. Bare did not ask them to identify what style of sunglasses were purchased, thus the Court cannot determine whether the shopper purchased a new style for 2018 or old inventory shipped in 2018, or whether it was a promotional pair of sunglasses. However, it has been established that all sunglasses shipped by Costa after January 2018 did not come with a nominal fee repair promise as part of the bargain. Considering that fact, along with the materially new procedures implemented by Costa,

it is no surprise that Mr. Bare's secret shoppers may not have received a box containing the nominal fee promise at the point of sale.

47. Accordingly, the Court accords Mr. Bare's study and the evidence derived therefrom little, if any, weight for purposes determination of class certification. Costa has not pointed to a single consumer of Costa sunglasses during the class period — or any other credible evidence — demonstrating that consumers of Costa sunglasses had relevant "disparate" customer experiences.

48. Finally, the evidence submitted to the Court belies Costa's arguments. Although Costa argues that class members may not have received, read or understood the box, its key witnesses, including its corporate representatives, admitted that the nominal fee repair promise is part of Costa's lifetime warranty, and attaches to each and every pair of Costa sunglasses, *regardless of whether the consumer, received, read or understood the box and regardless of other individualized purchasing decisions.* Similarly, Costa's CEO, Ms. Rush, testified that it is Costa's practice to honor the warranty it sends out on its product, regardless of whether the consumer actually physically received the warranty or views it. Finally, Costa's marketing and consumer behavior expert, Hillary Ellner, agreed that Costa must honor the nominal fee repair promise, even if the consumer does not receive the box.

49. In addition, Costa argues that a consumer with prior knowledge of Costa's repair charges cannot be harmed.[16] However, the evidence presented to this Court

[16] This argument seeks a reliance inquiry as well. According to Costa, a hypothetical consumer who purchased sunglasses with prior knowledge of Costa's repair charges could not have relied upon Costa's promise on the side of the box because the consumer knew better. But, because reliance is not required for a FDUTPA claim under Florida law, the mental state of class members is irrelevant. *Davis*, 776 So. 2d at 973 (certifying

showed that it was Costa's policy ***not*** to disclose the repair charges unless and until the customer sent his or her sunglasses in to Costa for an assessment. (Pl. Ex. 107) ("I cannot quote for repairs, or determine whether your damages are covered under our warranty until they are sent in and inspected by one of our professionals."). Costa's schedule of repair charges was not disclosed to customers at the point of sale. Costa's expert, Michael Bare, sent 315 secret shoppers into Costa stores around the state and instructed them to use their eyes and ears, and to look for any information regarding Costa's repair program. If there were prices related to the repair charges imposed by Costa as part of the repair program available to the shoppers, Mr. Bare's secret shoppers were required to take a photo of the repair schedule or note it on their questionnaires. Consistent with Costa's policy, not a single shopper reported seeing or receiving Costa's schedule of repair charges. Even Costa's own Senior Marketing Manager, Terri Hannah, testified that she did not know what Costa charges to repair lenses and frames for its sunglasses — in her words, she was "not privy to that information." There is no evidence of any consumers in the class having any knowledge of Costa's schedule of repair charges prior to purchasing their sunglasses.[17]

50. This is why Costa's cited authorities lack persuasive force. Costa principally relies upon *Egwuatu v South Lubes, Inc.*, No. 16-2005-CA-1015, 2007 WL 6467471 (Fla.Cir.Ct. Jan. 23, 2007). But *Egwuatu* is inapposite on these facts. In

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the class and dismissing the argument that *"[s]ome of Powertel's customers may have purchased the modified phones at the same price even if they had known that they would not work with another provider."* (emphasis added)); *Carriuolo*, 823 F.3d at 985 (rejecting the argument that *"some class members may have known that the safety ratings were inaccurate"* because "the mental state of each class member is irrelevant").

[17] According to Costa's CEO, Holly Rush, Costa only began to publish repair charges on its website after this lawsuit was filed, in late 2017.

Egwuatu, the plaintiff sought to represent a class of consumers, and alleged that the assessment of an "environmental fee" was a deceptive trade practice, in that it appeared to be a tax the company was collecting from consumers. The trial court denied certification, and the First DCA affirmed. The First DCA explained the trial court's reasoning as follows:

> [T]he trial court concluded that class litigation would be impractical because there would be many differences in the facts supporting the claims of the individual plaintiffs. ***This conclusion was based on the fact that the defendants have employed a variety of methods over the years to inform customers that the environmental fee was not a tax.*** For example, they posted menu boards stating that the environmental fee was added for the handling of hazardous products; they gave verbal explanations of the fee to customers who asked about it; they posted in all of their stores a letter from defendant Huntley explaining the fee; and they posted a fee notice explaining the environmental fee on written estimates exceeding $100. In these circumstances, the trial court reasoned that it would be necessary to make a number of individual inquiries to determine which potential class members had actual knowledge that the fee was not a tax.

Egwuatu v. S. Lubes, Inc., 976 So. 2d 50, 53 (Fla. 1st DCA 2008) (emphasis added).

51. This case is unlike *Egwuatu*.[18] In this case, the repair charges were actually kept secret and treated by Costa as such. Where a defendant has a policy to uniformly withhold the information from which class members could determine the truth behind a representation, individual issues will not predominate.

52. In the instant case, there is no evidence that any consumer of Costa sunglasses knew of Costa's repair charges at the point of purchase. In fact, the evidence

[18] This case is also unlike *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1093 (Fla. 4th DCA 2003) and *Maor v. Dollar Thrifty Auto. Grp., Inc.*, No. 15-22959-CIV, 2018 WL 4698512, at *6 (S.D. Fla. Sept. 30, 2018) where the allegedly deceptive representation was *disclosed to consumers at the time of purchase.*

is that Costa had a policy to ***not*** inform consumers of the prices for repairs, even if the consumers asked.[19]

53. Finally, Costa contends that "differing experiences and interpretations of 'nominal' precludes common evidence of causation and damages, defeating typicality and predominance." (Response at 39). However, because FDUTPA requires that an objective standard be utilized, *Davis*, 776 So. 2d at 974, the question is how a reasonable consumer would interpret the term, not how each individual class member interpreted it. Moreover, where a defendant uses a uniform term — like here — across class members, the interpretation of that term is for the jury. *Brodeur v. Dale E. Peterson Vacations, Inc.*, 7 So. 3d 567, 569 (Fla. 1st DCA 2009) ("It appears clear to us, based on the trial court's findings, that the predominant issue will be the interpretation of identical language in contracts between one defendant and many similarly situated plaintiffs."); *Paladino v. Am. Dental Plan, Inc.*, 697 So. 2d 897, 899 (Fla. 1st DCA. 1997) (reversing denial of class certification, and stating "the interpretation of the contract's capitation provision predominates over the other questions of law or fact affecting the individual class members."). Just as in *Brodeur*, the predominant issue will be the interpretation of identical language in a bargain between one defendant and many similarly situated plaintiffs. As such, predominance here is satisfied.

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[19] The Court notes that Haney purchased another pair of Costa sunglasses after the purchase at issue in this lawsuit. This does not aid Costa for numerous reasons. First, Costa has stipulated that Haney is an adequate class representative. Second, a class member's (or a class Plaintiff's) prior knowledge is irrelevant as a matter of law because it simply seeks to impose a reliance inquiry by another name. *Davis*, 776 So. 2d at 973; *Carriuolo*, 823 F.3d at 985. Third, as a matter of fact, there is no evidence that the full menu of prices was ever disclosed to Haney, so at most, he only knew that glass lenses may cost $89. Finally, regardless of Haney's motivation for the second purchase, he still did not receive the benefit of the nominal fee repair promise.

Costa's Warranty Card Argument Fails as a Matter of Law.

54. At the class certification hearing, Costa appeared to suggest that consumers of Costa sunglasses may have seen Costa's "warranty card," rather than (or in addition to) the sunglass box,[20] at the point of purchase. Costa contends that this is significant because the warranty card does not use the "nominal fee" language at issue in this case, and instead states that consumers can obtain repairs of their accidentally-damaged sunglasses for a "reasonable fee." The evidence in this case reflects: (i) the nominal fee repair promise was a component of Costa's lifetime warranty offered to every purchaser whether or not they received the box; and (ii) the card, which contains the word "reasonable," is placed *inside* the sunglass box.

55. Courts have rejected the notion that a deceptive statement can be "cleared up" by additional disclosures on or in a product packaging. For instance, in *Marty v. Anheuser-Busch Companies, LLC*, 43 F. Supp. 3d 1333, 1341 (S.D. Fla. 2014), the court held that "[a] reasonable consumer is not required to open a carton or remove a product from its outer packaging in order to ascertain whether representations made on the face of the packaging are misleading." *Id.* In *Marty*, the plaintiffs alleged that the defendant made misrepresentations about Beck's beer that caused confusion among customers. *Id.* at 1336. Namely, the plaintiffs believed they were purchasing beer imported from Germany and made using German ingredients, when they were in fact purchasing beer brewed in St. Louis. *Id.* The defendant argued that any mistaken belief that Beck's is

[20] Throughout the class certification hearing, Costa referred to the box as a "shipping box." The evidence in this case is that the box at issue was used by Costa during the class period as the product packaging for the sunglasses — hence, the warranty language, marketing material, and other graphics and language on the sides of the box. [Pl. Ex. 133, 134].

brewed in Germany is clarified by the statement "Product of USA, Brauerei Beck & Co., St. Louis, MO" on the label and by the words "BRAUEREI BECK & CO., BECK'S © BEER, ST. LOUIS, MO" on the bottom of the carton. *Id.* at 1340. The court disagreed, noting that the "Product of USA" disclaimer is blocked by the carton such that "[a] consumer would have to either open the cartons ... or lift the bottle from the six-pack carton in order to see the 'Product of USA' disclaimer." *Id.* at 1341. The court noted that "[a] reasonable consumer may not necessarily look at the underside of the carton in deciding whether to purchase a product." *Id.* In other words, the court concluded that a reasonable consumer should not be expected to look beyond misleading representations on the outer packaging to discover the truth of those representations.

56. *Marty* relied primarily on the case of *Williams v. Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008), in which the court reversed an order granting a motion to dismiss and held that reasonable consumers should not "be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box." *Id.* ("We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misrepresentations and provide a shield for liability for the deception.").

57. Similarly, in *Dye v. Bodacious Food Co.*, No. 14-80627-CIV-DIMITROULEAS, 2014 WL 12469954, at *4 (S.D. Fla. Sept. 9, 2014), the plaintiff initiated a FDUTPA action against the defendant for stating on product packaging that its products were "All Natural" when the products actually contained unnatural, synthetic, and artificial ingredients. The defendant argued that there could be no

misrepresentation as a matter of law, as the packaging disclosed the product's actual ingredients. But the court rejected this argument, stating:

> A consumer might be misled by the statement "all natural," *regardless of additional disclosures on the back of a Product's packaging*. It is plausible that a consumer might rely on the "all natural" representation without scrutinizing the ingredients or, alternatively, that a consumer might incorrectly believe that sugar, canola oil, dextrose, corn starch, and citric acid are "all natural" ingredients.

Id. at *4 (emphasis added); *see also Ackerman v. Coca–Cola Co.*, No. 09-CV-0395 (JG)(RML), 2010 WL 2925955, at *16 (E.D.N.Y. 2010) (noting that "the presence of a nutritional panel, though relevant, does not as a matter of law extinguish the possibility that reasonable consumers could be misled by the [product's] labeling and marketing"). In sum, as the above-listed cases make clear, deception on a product's packaging cannot be "cleared up" by other disclosures on or in the packaging. As a matter of law, Costa's warranty card — which the evidence reflects is placed on the *inside* of the product packaging — cannot "clear up" or otherwise negate the nominal fee promise Costa made on the outside of the box.

58. Additionally, even *assuming arguendo* Costa could negate a representation on the outside of the box with information on the inside of the box, the Court finds that the information on the Warranty Card here does nothing of the sort. The Court finds that Costa's use of essentially the same language — except replacing the word "nominal" with "reasonable" — on the inside of the box would not adequately advise consumers that repairs would <u>not</u> be nominal. As a matter of common sense, nominal fees are likely to be perceived by consumers as "reasonable fees." It does not follow, however, that what Costa believes to be "reasonable" fees are also "nominal."

59. Finally, whether Costa's warranty practice is unfair and deceptive is a question of fact for the jury. *See Siever v. BWGaskets, Inc.*, 669 F. Supp. 2d 1286, 1293 (M.D. Fla. 2009) ("Whether particular conduct constitutes such an unfair or deceptive trade practice is a question of fact."); *Wright v. Emory*, 41 So. 3d 290, 292-93 (Fla. 4th DCA 2010) ("Whether Emory's representations constitute "deceptive and unfair" conduct is an issue of fact to be resolved by the judge at the conclusion of the trial."); *see also Suris v. Gilmore Liquidating, Inc.*, 651 So. 2d 1282, 1283 (Fla. 3d DCA 1995).

Plaintiff has Proffered a Reasonable Methodology for Calculating Class-wide FDUTPA Damages.

60. To demonstrate that damages can be established on a class-wide basis under Florida Supreme Court precedent, Plaintiff need only proffer a "reasonable methodology" for generalized proof of class-wide impact. *Sosa*, 73 So. 3d at 112. Under the FDUTPA claim, Plaintiff's "actual damages" are measured as the difference in the value of the product in the condition in which it was delivered and its value in the condition in which it should have been delivered. *Rollins*, 951 So. 2d at 869. "[T]he proper question is not how much the [false nominal fee repair promise] may have reduced the [sunglasses] perceived value for any individual purchaser." *Carriuolo*, 823 F.3d at 986. Rather, damages should reflect the difference between the value of Costa sunglasses *with* a nominal fee repair promise and the value of Costa sunglasses *without* a nominal fee repair promise. *Id.* "[T]he plaintiff's out-of-pocket payment is immaterial" under FDUTPA. *Id.*[21] For the FDUTPA subclass, Plaintiff has proffered two

[21] The out-of-pocket expenses of individual class members are irrelevant to Plaintiff's FDUTPA damage calculation. Plaintiff's FDUTPA damage calculation assigns a value to Costa's lifetime "nominal fee" promise itself. As Plaintiff's experts testified, the promise is valued in the same way as a warranty or protection plan — it is the inherent value in

alternative methodologies for determining this difference in value, both of which quantify the value of the warranty that consumers were denied.

61. First, Plaintiff's expert, Alex Rey, has opined regarding the appropriate method for valuing a warranty or protection plan, such as the lifetime nominal fee repair promise offered by Costa. Mr. Rey utilizes Costa's own data to value the nominal fee promise. Second, Plaintiff's expert, Stefan Boedeker, has opined regarding the use of a conjoint analysis to determine the value that a reasonable consumer would place on Costa's lifetime nominal fee repair promise.[22] Mr. Boedeker has provided detailed information regarding conjoint analysis generally, as well as specific information concerning the conjoint study that he proposes to perform during the merits phase of this action, and has opined (consistent with the numerous cases upholding the use of conjoint analysis under similar circumstances) that conjoint analysis can be used to reliably calculate the value of a specific attribute of a product -- here, the lifetime nominal fee promise. The Court finds that both of Plaintiff's proffered theories are appropriate and reasonable methodologies for calculating class-wide damages.

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the particular promise itself that is being valued. It simply does not matter whether a Plaintiff received the promise in connection with sunglasses purchased at a going-out-of business sale or otherwise discounted. The promise itself is what is being valued. Accordingly, how much each class member paid for his or her glasses, or whether or not they have failed or may fail in the future, is irrelevant to damages under FDUTPA. *Carriuolo,* 823 F.3d at 986 ("General Motors received the same benefit of the bargain from the sale or lease to each class member-even if individual class members negotiated different prices-because a vehicle's market value can be measured objectively."). And, there was no evidence presented that Costa's repair charges changed or fluctuated based on the fact that a customer may have purchased his or her sunglasses on sale or for a discounted price.

[22] Mr. Boedeker also opined that Mr. Rey's methodology is reasonable and utilizes appropriate empirical principles.

62. Mr. Rey is a certified valuation analyst, master analyst in financial forensics, and certified fraud examiner. He has twenty years of experience in forensic consulting, valuation services, and corporate planning and analysis, and he specializes in business valuations and economic damage calculations. Mr. Rey testified that there is a standard methodology for calculating class-wide damages for both the FDUTPA and MMWA subclass.

63. In regards to the FDUTPA subclass, Mr. Rey opined that it is possible to calculate the difference in value between sunglasses with a nominal fee repair promise and sunglasses without the nominal fee repair promise. Mr. Rey testified that the value of a warranty is the average cost of repair (*i.e.*, the utility of the warranty) multiplied by the likelihood that the repair will be needed over a consumer's lifetime. He testified that his methodology is consistent with an expected value discounted cash flow approach, which Dr. Ugone testified was a reasonable methodology for calculating damages.[23] More specifically, Mr. Rey opined that, to calculate the value of the nominal fee repair promise, he would (a) calculate a weighted average of the list prices for the repairs actually performed by Costa using extensive and current repair data from Costa's

[23] Mr. Rey testified that the expected value portion of his analysis is the weighted average repair value multiplied by the probability that a repair will be needed. The discounted cash flow portion of his analysis has to do with the timing of the expected repairs, which he considered and analyzed as part of his methodology. Based on his analysis, he determined that it is not necessary to discount the calculated value to a present value because the applicable rate of return would likely be outpaced by appreciation and price increases, leading to a higher calculation of the promise's value. Mr. Rey testified that his calculations and methodology do not amount to an advance on potential future repairs, and do not constitute a back-end mechanism to calculate a full refund. Instead, Mr. Rey testified that he used Costa's historical data to place a value on what consumers already paid for — the "nominal fee" promise.

records, (b) then subtract what a jury determines is a nominal fee, and (c) then apply a probability that the repair would be needed.

64. Mr. Rey relies upon relevant evidence in determining a probability for a claim, including Costa's testimony and Costa's internal records (which indicate a very high likelihood of repairs being needed over the lifetime of the customer if the sunglasses are used as intended). Specifically, Mr. Rey testified that there are a number of factors regarding probability for failure. The first factor is the intended use of the sunglasses and the way that these sunglasses are marketed and intended to be used in harsh outdoor environments, especially salt water environments. [24] The second factor is the quality level of the sunglasses. Mr. Rey testified that Costa records indicate that Costa sunglasses have a defect rates of five or six times as high as Costa's purported competitors. *See* (Pl. Ex. No. 157). The third factor is that Costa's own management and experts have acknowledged that the sunglasses will fail if repeatedly exposed to sun and salt water environments. Finally, Mr. Rey considered the scope of the nominal fee promise itself, which promises to cover a lifetime of any damage or any wear and tear. Mr. Rey testified that wear and tear, by definition, is simply natural deterioration from ordinary use. Mr. Rey testified that, if the sunglasses are used, there is going to be some wear and tear. Indeed, Costa's own materials acknowledge that wear and tear can be expected. In other words, according to Mr. Rey, it is a very broad promise with a very low threshold for repairs being needed. In his calculations, Mr. Rey did not rely on

[24] The evidence reflects that Costa intends its customers to use the sunglasses in "hardcore" environments, including exposure to saltwater. *See, e.g.*, (Pl. Ex. Nos. 122, 157).

repair data associated with a manufacturer's defect, and solely used data for repairs associated with damage resulting from accident, normal wear and tear, or misuse.

65. Mr. Rey testified that this methodology is how a reasonable consumer would value the warranty, and it is no different than a warranty on a washing machine, a television set, or other consumer products. In fact, Defendant's own marketing expert, Hillary Ellner, agrees that this is a reasonable approach for a consumer to value a warranty or protection plan, and that a consumer would employ these same factors in valuing a warranty.

66. Importantly, in this case, the parties and the Court have the benefit of data to use in determining the value of Costa's nominal fee promise. This is not a case about the value of the label "all natural" or "flushability" or other characteristics of products that may not lend themselves as easily to quantification. In this case, the evidence reveals how much Costa charged for repairs and how much consumers paid for such repairs. The relevant question that Plaintiff will address on a class-wide basis is the value of the uniform warranty provided to all consumers of Costa sunglasses.

67. Placing a specific value on the lifetime "nominal fee" promise is not new or novel. Mr. Rey testified that Dick's Sporting Goods offers customers a ***two-year*** warranty — not a "lifetime" — on Costa sunglasses for $69.99. This amount is on top of the amount that a consumer pays for the sunglasses. In other words, in the real world, similar warranties (albeit, not nearly as generous as the promise offered by Costa) are offered to customers and have been valued.

68. Here, Mr. Rey measures the lost benefit of the bargain — the consumers were promised a lifetime of repairs for a nominal fee, and they allegedly did not receive that promise. This is the appropriate measure of damages in FDUTPA cases. *Carriuolo,*

823 F.3d at 986 ("Rather, damages should reflect the difference between the market value of a 2014 Cadillac CTS with perfect safety ratings for three standardized categories and the market value of a 2014 Cadillac CTS with no safety ratings . . . Unlike the calculation of an individual consumer's direct pecuniary loss, which would limit the plaintiff to the difference of what she paid and the actual value received, the FDUTPA 'benefit of the bargain' model provides a standardized class-wide damages figure because the plaintiff's out-of-pocket payment is immaterial."); *Davis*, 776 So. 2d at 975 ("All of the claims share one essential common feature; that is, the alleged defective practice reduced the value of the telephones."). Indeed, even Defendant's expert, Dr. Ugone, agrees that: (i) there is inherent, objective value to a nominal fee repair promise that lasts a lifetime; (ii) demand is greater for a product with a nominal fee promise, and (iii) such a promise is capable of being valued.

69. However, Dr. Ugone testified that Mr. Rey's proposed methodology fails to provide a uniform method of calculating damages because the Court must consider the individual price each consumer paid for sunglasses in order to ascertain each consumer's actual damages. As discussed *infra*, the price paid for the product is irrelevant as a matter of law. Further, the Court finds that Plaintiff's methodology for calculating damages, which does not vary based upon the price charged or paid for a pair of sunglasses, addresses this concern. In short, whether a consumer paid $150 or $300 for a pair of sunglasses is inconsequential because the value of the repair promise is derived from the *cost of repairs* to those sunglasses. As Mr. Rey testified, Plaintiff ascertains the value of the nominal fee promise based on *Costa's repair data* which is homogeneous across the various models. While there may exist 12 to 14 retail price points in Costa's sunglass collection, repairs may be broken down simply into the type of

lens (glass or plastic) and type of frame (metal or plastic), along with a limited number of miscellaneous small repair items, such as screws and nose pads. Accordingly, Mr. Rey's calculation of the value of the lifetime nominal fee repair promise is price agnostic and ascertained based upon homogeneous repair data. Further, Mr. Rey testified that, if necessary, he can calculate the value of the promise for the four types of models that drive repair pricing (i.e., glass lens/plastic frame; plastic lens/plastic frame; glass lens/metal frame; plastic lens/metal frame).

70. After considering Mr. Rey's analysis and opinions, the Court is satisfied that Plaintiff has proffered an appropriate damages methodology for his FDUTPA subclass.

71. Mr. Boedeker, Plaintiff's economic damages expert, is a Managing Director at Berkeley Research Group where he focuses on the application of economic, statistical, and financial models to a variety of areas such as solutions to business issues, complex litigation cases, and economic impact studies. He has experience applying economic and statistical theories and methodologies to a wide variety of cases, including class actions. Mr. Boedeker has a BS in Statistics, BA in Business Administration, and MS in Statistics from the University of Dortmund, Germany. He has a MA in Economics from the University of California, San Diego. And, he has met all Ph.D. requirements, except dissertation, in Economics from the University of California, San Diego. Mr. Boedeker has worked on numerous matters, including multi-district litigation, applying his expertise to determine the value of a component or attribute of a particular consumer good. In this case, Mr. Boedeker proposed to perform a conjoint analysis to value the specific attribute of Costa's sunglasses at issue in this litigation — Costa's lifetime "nominal fee" promise.

72. "Conjoint analysis is a statistical technique capable of using survey data to determine how consumers value a product's individual attributes...." *In re Dial Complete Mktg. & Sales Practices Litig.*, 320 F.R.D. 326, 334 (D.N.H.); *Khoday v. Symantec Corp.*, 93 F. Supp. 3d 1067, 1082 (D. Minn. 2015), as amended (Apr. 15, 2015) ("The Court finds that Gaskin's conjoint analysis is generally a permissible method for calculating damages."). The conjoint analysis is generally accepted as a methodology for attaining a value to a product's attribute in both industry and in litigation.

73. Courts have recognized that conjoint analysis can effectively determine the value customers ascribe to a particular product attribute by measuring the "part worth" of that attribute. *See, e.g., Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.D. 529, 538–39 (S.D. Fla. 2015) ("To the extent that Defendant contends that conjoint analysis, an analytic survey method used to measure customer preferences for specific features of products, is an improper damages theory post-Comcast, the Court rejects that position as unfounded."); *Guido v. L'Oreal, USA, Inc.*, No. 2:11-CV-01067-CAS, 2014 WL 6603730, at *12 (C.D. Cal. July 24, 2014) ("As such, the Court concludes that Dr. Misra's testimony concerning Conjoint analysis satisfactorily establishes that common issues predominate with respect to the California class.").

74. Initially, the Court rejects Costa's argument that Mr. Boedeker must have actually completely performed a *full* conjoint analysis at this stage of the proceedings. Costa's argument misperceives Plaintiff's burden at the class-certification stage. Consistent with the requirements of *Sosa*, courts have rejected similar arguments in the past. For example, in *Sanchez-Knutson v. Ford Motor Co.*, the Southern District of Florida stated:

> Defendant also argues that the Court should reject Plaintiff's expert Steven P. Gaskin's proposed conjoint analysis damages model. To the extent that Defendant contends that conjoint analysis, an analytic survey method used to measure customer preferences for specific features of products, is an improper damages theory post-Comcast, the Court rejects that position as unfounded. *See, e.g., Guido v. L'Oreal, USA, Inc.*, 2014 WL 6603730, *4–14 (C.D.Cal. Jul. 24, 2014) (holding that plaintiff's expert's proposed—but not yet performed—conjoint analysis theory for calculating damages was not junk science, could be applied on a class-wide basis for predominance purposes under Comcast, and was consistent with plaintiff's theory of liability); *Khoday v. Symantec Corp.*, 2015 WL 1275323, *12 (D.Minn. March 19, 2015) ("The Court finds that Gaskin's conjoint analysis is generally a permissible method for calculating damages."); *In re ConAgra Foods, Inc.*, 2015 WL 1062756 (C.D.Cal. Feb. 23, 2015) (holding that plaintiff's expert's proposed conjoint analysis damages model satisfied Comcast, was tied to plaintiff's theory of liability, and met Rule 23(b)(3)'s predominance element). ***Additionally, the Court disagrees with Defendant that Mr. Gaskin, must have already performed his proposed conjoint analysis for the Court to consider the proffered methodology.*** *See, e.g., Guido*, 2014 WL 6603730 at *8 (rejecting defendant's argument that the plaintiff's expert's proposed conjoint analysis testimony should be inadmissible because plaintiff's expert had not yet performed the conjoint analysis in that case).

310 F.R.D. 529, 538–39 (S.D. Fla. 2015) (emphasis added). Similarly, the Court in *Guido v. L'Oreal, USA, Inc.* stated:

> L'Oreal contends that Dr. Misra's testimony is inadmissible because Dr. Misra has not yet performed either an RCDE or a Conjoint analysis in this case. Because Dr. Misra has not yet run either of the models, the Court cannot determine whether Dr. Misra has "reliably applied the principles and methods to the facts of the case." Fed.R.Evid. 702(d).
>
> ***This argument misconstrues Dr. Misra's testimony, and misstates plaintiffs' burden on class certification. As discussed at greater length below, plaintiffs need not show on class certification that they paid a premium for Serum due to the absence of a flammability warning. Instead, they must merely provide a method for calculating that premium on a classwide basis.***

No. 2:11-CV-01067-CAS, 2014 WL 6603730, at *8 (C.D. Cal. July 24, 2014) (emphasis added). Under *Sosa*, Plaintiff need only proffer a reasonable methodology for class-wide proof. *Sosa*, 73 So. 3d at 112.

75. Mr. Boedeker's testimony provides specific information regarding the study that would be performed at the merits stage of this action, and has opined that conjoint analysis is capable of reliably calculating the value of the specific product attribute at issue in this case — the lifetime nominal fee repair promise. Before performing the survey-based conjoint analysis, Mr. Boedeker testified that he would identify the attributes of the product that would be included in the study. Here, Mr. Boedeker was able to rely upon a Vision Council study presented by Costa's expert, Hillary Ellner, that identified the key attributes deemed to be important by consumers of specialty, sport sunglasses such as Costa's sunglasses. In Mr. Boedeker's proposed conjoint analysis, the nominal fee promise would be one amongst several key attributes of sunglasses identified in the Vision Council Study. And, Mr. Boedeker testified that, with respect to the nominal fee attribute, he would use the exact language on the box in introducing the concept to the consumers completing the survey.

76. Mr. Boedeker opined that a conjoint analysis will isolate and measure the value of the nominal fee repair warranty. A conjoint analysis can be used to determine the market value for the warranty based on well-accepted economic theories. Mr. Boedeker testified that conjoint analysis can be used to provide damages as either a discount of percentage of what consumers paid or an actual figure to be applied class-wide. And, more specifically, Mr. Boedeker testified that: (i) the conjoint analysis is capable of ascertaining the value of the nominal fee repair promise across the price points; and (ii) the conjoint analysis could be performed for subcategories of Costa's sunglasses based upon the key materials used in the sunglasses, which minimizes any price-point variation.

77. Courts have adopted conjoint analysis to quantify the value of product attributes, such as "100% Natural," "flushability," and "Kills 99% of Germs."[25] And, Florida federal courts have rejected attacks on this methodology. Indeed, in a FDUTPA and breach of warranty case arising out of the defendant's sale of Ford Explorer model vehicles with an allegedly dangerous and defective condition, the Southern District of Florida accepted conjoint analysis as an appropriate measure of damages for a product's attribute. *Sanchez-Knutson*, 310 F.R.D. at 538–39.

78. Defendant's criticisms[26] of the methodology employed by Mr. Boedeker go to the weight of the opinions, and are properly directed to the jury. Indeed, in other unrelated cases, Defendant's expert, Dr. Keith Ugone, and Mr. Boedeker have been opposing experts on these issues before, and courts have accepted Mr. Boedeker's methodology, stating that disputes go to the weight of the opinions. *In re Dial Complete Mktg. & Sales Practices Litig.*, 320 F.R.D. 326, 329 (D.N.H.) ("Boedeker developed a 'Choice Based Conjoint' consumer survey, in which survey participants were shown hand soap profiles (or 'choice sets') with five different attributes, including the claims: 'Kills 99.99% of Germs,' 'antibacterial,' 'foaming,' and 'moisturizing.'"). Citing the same criticisms of Mr. Boedeker's opinion that Costa makes in this case, the defendant in *In*

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[25] *In re Dial Complete Mktg. & Sales Practices Litig.*, 320 F.R.D. 326, 329 (D.N.H.) ("Kills 99% of Germs"; conjoint analysis permitted); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 946 (C.D. Cal. 2015) ("100% Natural;" conjoint analysis permitted); *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 535 (E.D.N.Y. 2017) ("Flushability"; "Plaintiff's claims will succeed or fail based on proof of a "unitary course of conduct" by the defendants: misrepresenting a material characteristic of its product and charging a higher price for that product because of that characteristic. . . . All consumers who paid a premium price for a mislabeled product are economically injured in the same way without regard to the motivations behind the purchases.").

[26] Defendant's expert, Keith Ugone, Ph.D., has never performed a conjoint study. But, he believes that conjoint analyses may be employed to value the attributes of certain products.

re Dial moved to strike Mr. Boedeker's report on the grounds that it was flawed, unreliable, and did not meet the *Daubert* standard. But, the court denied the defendant's motion and certified a class. In relying on Mr. Boedeker's methodology, the court stated:

> . . . Boedeker's proffered means of calculating class wide damages is sufficient to demonstrate that a price premium for the allegedly falsely-claimed feature(s) exists, and that it can be reliably calculated, using means and methods generally understood and accepted in the fields of economics and statistics.

Id. at 337.

79. Mr. Boedeker's testimony seeks to place a value on the specific product attribute at issue in this litigation — Costa's lifetime nominal fee promise — which Plaintiff contends Costa failed to provide consumers in the class. In that sense, Mr. Boedeker's testimony enables Plaintiff to calculate FDUTPA damages — the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.

80. Costa's reliance on Dr. Ugone's price comparisons – which he contends negate the existence of any price premium attributable to its nominal fee repair promise – is misplaced.

81. Dr. Ugone testified that there was no price premium associated with the nominal fee repair promise. To reach this conclusion, Dr. Ugone compared Costa sunglasses shipped in boxes containing the nominal fee repair promise with: (i) Costa sunglasses shipped in boxes in which the nominal fee repair promise is covered up or removed; (ii) Costa Limited Edition sunglasses shipped in a box that does not contain

the nominal fee repair promise; and (iii) competitive sunglass brands. He testified that there was no difference in price between the compared products.

82. Dr. Ugone's observation that the manufacturer-set prices on the subject sunglasses are similar to the prices on other sunglasses (without the nominal fee repair promise) does not lead to the conclusion that the nominal fee repair promise has no measurable value. There are many factors, economic and otherwise, affect the pricing of a consumer product and Dr. Ugone did not control for those factors. It is common sense that a lifetime of repairs for a nominal fee to a pair of sunglasses has *some* value in the market. In fact, Dr. Ugone testified that the nominal fee repair promise has value that can be measured.

83. The comparisons performed by Dr. Ugone fall short of persuading the Court, at this stage of the case, that the lifetime nominal fee repair promise has no discernible value in the marketplace.

84. Dr. Ugone also compared sunglasses shipped in boxes containing the nominal fee repair promise to Costa's Limited Edition sunglasses shipped in boxes that do not contain the nominal fee repair promise. The Limited Edition sunglasses included sunglasses promoting the OCEARCH charitable cause, American patriotism, and the singer Kenny Chesney. The Limited Edition sunglasses came with additional items, such as a baseball hat and bottle opener (Kenny Chesney) or canteen (OCEARCH). When conducting the comparison, Dr. Ugone did not place any value on the additional items provided with the sunglasses or the limited edition nature of the product. The Court found Dr. Ugone's testimony on this point confusing, and after extensive testimony on the point, it appeared as though Dr. Ugone's analysis was based on the lack of difference in pricing between sunglasses shipped in boxes with and without the

nominal fee repair promise. Nevertheless, Dr. Ugone testified that there was additional value or a price premium associated with the additional items (hat, bottle opener, canteen) provided with the limited edition sunglasses. If a price premium is embedded in the Limited Edition sunglasses, the sunglasses being compared are otherwise identical (other than the nominal fee repair promise), and the prices are the same, all as Dr. Ugone testified, it is self-evident that there is a price premium or value attributable to the nominal fee repair promise.

85. Dr. Ugone finally compared prices charged for sunglasses shipped in boxes containing the nominal fee repair promise with prices charged for other brands of sunglasses. In conducting this comparison, however, Dr. Ugone did not conduct an independent analysis to find the brands of sunglasses that are most similar to Costas in terms of brand value, quality, durability, strength, defect rate, warranty, reputation, or any other attribute. He simply compared Costas offer with the nominal fee repair promise to similarly-priced sunglasses, and reached the conclusion that because there is no price difference, there is no price premium associated with the nominal fee repair promise. The Court finds this study unpersuasive, incomplete, and unreliable.

86. Costa relies on *Green v. McNeil Nutritionals, LLC*, No. 2004-0379-CA, 2005 WL 3388158, at *1 (Fla. Cir. Ct. Nov. 16, 2005) (Schemer, J.), which is readily distinguishable from this case.

87. In *Green*, the plaintiff brought a class action claiming that the defendant engaged in deceptive advertising with regard to its product, Splenda. *Id.* at *1, *9. The plaintiff contended that the defendant's deceptive advertising caused consumers to believe that Splenda is natural and contains sugar. The plaintiff sought a complete return of the purchase price and contended that the ***only*** attribute to Splenda worthy of

value was the fact that it was represented to be "made from sugar." [27] The *Green* Court distinguished the First DCA's decision in *Davis* by stating that, in *Davis*:

> each member of the respective class sustained a loss whether or not he relied on the defendant's alleged violation of FDUPTA. Equally important is the fact that each person could establish the loss without further individualized proof. In *Davis*, it could be done by simply establishing the reduced value of the telephone . . . .

Id. *7. In *Green*, the plaintiff did not offer a proper measure of damages — the reduced value of the Splenda without the "made from sugar" representation. Instead, the plaintiff demanded a full refund, which required the court to assume that the ***only*** reason consumers buy Splenda is because it is "made from sugar." Plaintiff was required to proffer a model that established the reduced value of the Splenda, but it failed to do so.

88. Here, Plaintiff is not seeking a "return of the purchase price" or suggesting that the only valuable attribute to the sunglasses is the warranty. Plaintiff here has done what the plaintiff in *Green* failed to do and what the First DCA in *Davis* held is required — establish the reduced value of the sunglasses without the attribute in question. Plaintiff here is not seeking an improper full-refund windfall. Plaintiff has proposed two separate damages methodologies to establish that Costa's nominal fee promise is an attribute of Costa sunglasses worthy of value (and which Costa allegedly deprived consumers of), and the methodologies place a specific value on that "nominal fee" promise. In sum, the Court is satisfied that Plaintiff has met his burden of proffering a

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[27] In *Green*, the true ingredients of Splenda were listed on the packaging. As explained above, Costa hides its repair charges from customers and makes customers send their glasses in for an "assessment" prior to providing the charges to customers. The actual repair charges were not on the sunglass packaging or available to customers elsewhere.

reasonable methodology for class-wide damages for Plaintiff's FDUTPA subclass using the two separate methodologies described above.

89. Finally, disagreement and conflict between experts interpreting the same evidence is not grounds to exclude an expert's opinion. *See Berry v. CSX Transp.*, 709 So.2d 552, 571 (Fla. 1st DCA 1998) (explaining that mere disagreement among experts interpreting the same evidence "is not a valid reason for excluding the plaintiffs' experts' opinions altogether" under *Frye*); *Vorsteg v. Thomas*, 853 So.2d 1102, 1103 (Fla. 4th DCA 2003) (explaining that the jury was free to determine the credibility and weight to attach to conflicting expert testimony concerning damages). As long as the basis of Plaintiff's experts' opinions are "based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation" (and the Court finds that they are), the Court need not invade the province of the jury and determine the proper weight to attribute to said opinions. *Berry,* 709 So. 2d at 569 n. 14 (citing *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997)).

Certification of the FDUTPA Class is Proper Under Rule 1.220(b)(2).

90. Class certification under Rule 1.220(b)(2) requires a showing that "the party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate." Fla. R. Civ. P. 1.220(b)(2); *see also Hess Corp. v. Grillasca*, 27 So. 3d 684, 686 (Fla. 2d DCA 2009). Whether grounds for relief are generally applicable to the class as a whole requires a determination of whether the opposing party "has acted in a consistent manner towards members of the class so that his actions may be viewed as part of a pattern of activity." *Freedom Life Ins. Co. of Am.*

v. Wallant, 891 So. 2d 1109, 1117 (Fla. 4th DCA 2004) (citing *In re Managed Care Litig.*, 209 F.R.D. 678, 685-86 (S.D. Fla. 2002)).

91. Here, Plaintiff and the class members seek declaratory and injunctive relief under FDUTPA. As Florida courts have recognized, Section 501.211(1), Florida Statutes, is broadly worded to authorize declaratory and injunctive relief even if those remedies might not benefit the individual consumers who filed the suit. A consumer must simply establish that he or she is aggrieved by the alleged violation and that the violation has occurred, is now occurring, or is likely to occur in the future. *See Davis v. Powertel, Inc.*, 776 So. 2d 971, 975 (Fla. 1st DCA 2000) (further stressing that "[n]othing in the statute requires proof that the declaratory or injunctive relief would benefit the consumer filing the suit"). An aggrieved party may pursue a claim for declaratory or injunctive relief under FDUTPA, even if the effect of those remedies would be limited to the protection of consumers who have not yet been harmed by the unlawful trade practice. *Id.* In other words, Plaintiff and the class members need not demonstrate that they are likely to buy Costa sunglasses in the future. It is sufficient that Plaintiff and the class members have been aggrieved by Costa's deceptive and unfair trade practices, and that the violations have occurred and are likely to occur in the future.

92. Costa contends that Plaintiff's "[a]lternative Rule 1.220(b)(2) ground is inapplicable and moot" (Response at 15), but that is not the case. It is premature at this juncture for the Court to determine whether Plaintiff's request for an injunction is moot, or whether Plaintiff can seek injunctive relief on behalf of the class. Costa advertised and provided customers with a lifetime nominal fee promise for sunglasses purchased during the class period. While it is true that Costa stopped offering its nominal fee promise as of January 31, 2018, the evidence reflects that Costa has not changed the

prices that Costa charges for such repairs. Thus, while consumers of Costa sunglasses *after* January 31, 2018 may not have purchased sunglasses subject to a lifetime nominal fee repair promise, consumers in the Class *did* and may be entitled to receive the benefit of that promise going forward — *i.e.* for their "lifetime." As such, Plaintiff's Second Amended Complaint explicitly seeks the entry of an injunction "barring Costa . . . from charging more than a nominal fee for repairs." (2d Am. Compl. at 15). If the Court were to determine that Plaintiff is not entitled to seek damages on a class-wide basis (which has not been determined), Plaintiff may still seek an injunction and a declaration, on behalf of the class, requiring Costa to comply with its lifetime nominal fee promise for each consumer in the class, and thereby require Costa to honor the lifetime nominal fee promise on the sunglasses previously purchased during the class period. At this juncture it is premature for the Court to determine that Plaintiff cannot maintain his or her claims for injunctive relief on behalf of the class.

93. Further, as explained in detail herein, Costa has acted or refused to act on grounds generally applicable to all members of the class. Indeed, Plaintiff's claims center on Costa's consistent, uniform, and allegedly deceptive practice of promising customers via a written warranty that damaged sunglasses will be replaced for a nominal fee and then charging customers confidential and uniform fees that are, allegedly, not nominal. The Court finds that Costa's actions may be viewed as part of a pattern of activity generally applicable to all members of the class, making certification appropriate under Rule 1.220(b)(2).

The MMWA Class

94. For his MMWA claim, Plaintiff contends that Costa's nominal fee repair promise amounts to a warranty, and that Costa has breached its warranty by charging

consumers more than a nominal fee to repair sunglasses damaged by accident, normal wear and tear, or misuse. Plaintiff seeks to certify a MMWA class defined as follows: All citizens of the State of Florida who, within the five years preceding the filing of this Complaint, were charged a fee by Costa to replace damaged components of their non-prescription, non-promotional Costa sunglasses. (Motion for Class Certification at 5-6).

95. The MMWA provides a cause of action for consumers to sue a warrantor for violations of a written or implied warranty. *Gill v. Blue Bird Body Co.*, 147 F. App'x 807, 810 (11th Cir. 2005). The MMWA generally "calls for the application of state written and implied warranty law." *Davenport v. Thor Motor Coach, Inc.*, No. 3:14-cv-537-J25-PDB, 2015 WL 13021664, at *3 (M.D. Fla. Aug. 6, 2015). Thus, to state a claim under the MMWA, a plaintiff must adequately plead a cause of action for breach of warranty under Florida law. *Ocana v. Ford Motor Co.*, 992 So. 2d 319, 323-24 (Fla. 3d DCA 2008).

96. To state a claim for breach of an express warranty under Florida law, a plaintiff must allege: (1) the sale of goods; (2) the existence of an express warranty; (3) breach of that warranty; (4) notice to seller of the breach; and (5) injuries sustained by the buyer as a result of the breach of the express warranty. *Dye*, 2014 WL 12469954, at *5; *see also Egbebike v. Wal-Mart Stores East, LP*, No. 3:13-cv-865-J-34-MCR, 2014 WL 3053184, at *5 (M.D. Fla. July 7, 2014). Further, under Florida law, "*[a]ny* affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Fla. Stat. 672.313(1)(a) (emphasis added); *see also Garcia*, 43 F. Supp. 3d at 1389.

97. Under the MMWA, whether Costa breached an express *written* warranty is a question of objective proof that will not vary from customer to customer. In other words, a consumer need not prove that he read, saw, knew about, or even received the box containing the nominal fee promise. Under the particular facts of this case, the elements of Plaintiff's MMWA claim are susceptible to class-wide proof.

Under Florida law, reliance is not required for an express written warranty claim.

98. Under Florida law, an express written warranty is treated as a contract between buyer and seller. *See, e.g., Brennan v. Dow Chem. Co.*, 613 So. 2d 131, 132 (Fla. 4th DCA 1993) (noting that a warranty is a "voluntarily undertaken contractual commitment."). Accordingly, reliance is unnecessary to enforce a warranty which is memorialized in a writing.

99. Multiple courts confronted with this question have held that Florida law does not require reliance in breach of express written warranty cases. *See, e.g., Southern Broadcast Grp., LLC v. Gem Broadcasting, Inc.*, 145 F. Supp. 2d 1316, 1324 (M.D. Fla. 2001) ("the Florida Supreme Court would embrace the modern view that express [written] warranties are bargained-for terms of a contractual agreement, any breach of which is actionable notwithstanding proof of non-reliance."); *Lennar Homes, Inc. v. Masonite Corp.*, 32 F. Supp. 2d 396, 399 (E.D. La. 1998) (recognizing that Florida courts treat written warranties as contracts between buyer and seller and stating that to require reliance for an express written warranty claim would improperly blur the line between tort principles and breach of contract).

100. The court's rationale in *Lennar* is instructive. In *Lennar*, the court stated that "[a]lthough at first blush it appears that reliance is required to recover for breach of

an express warranty . . . *the reliance element must be confined under Florida law to cases which do not involve express written warranties.*" 32 F. Supp. 2d at 399 (emphasis added). The *Lennar* court looked to "instructive themes" in Florida law that served as guideposts for the court's determination that Florida law does not require reliance as part of a claim for breach of an express written warranty. First, the court stated that "a written warranty is treated as a contract between buyer and seller" and that "[r]equiring reliance for claiming breach of an express written warranty would dissolve Florida's distinction between the tort of misrepresentation and breach of contract." *Id.* The court reasoned that "reliance is unnecessary to demonstrate a binding contract if the warranty is memorialized in writing" and that "[t]he warranty is as much a part of the contract as any other part, and the right to damages on the breach depends on nothing more than the breach of the warranty." *Id.* The *Lennar* court further reasoned that "injecting reliance into this recovery model would defeat countless claims by consumers who are not well-versed in the 'intricacies of the law of sale,' clashing with the public policy favoring liberalized customers' recovery rights." *Id.* at 400. As the *Lennar* court appropriately recognized:

> The Court imagines that few consumers rely, in the strict sense, on warranties when making purchases. Rather, consumers' reliance materializes only at the moment of disappointed expectations. When an appliance breaks, for instance, one might peruse the owner's manual to discover a little-known warranty buried in the fine print. What matters most is the fact that the buyer has purchased the seller's promises as part of the bargain . . . and now seeks to invoke the promised terms when things have gone awry.

Id. at 400. The court concluded that, under Florida law, "[defendant] cannot escape plain contractual terms by arguing that unsophisticated home buyers did not rely on their written promises." *Id.*

101. Florida law is consistent with the *Lennar* court's reasoning and recognizes that reliance is unnecessary to demonstrate a binding contract *when the warranty is memorialized in a writing*. Express warranties are created when any affirmation or promise relating to the goods becomes part of the basis of the bargain — "no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement." *See* Fla. Stat. § 672.313 cmt. 3. "[A]ll affirmations made by the seller are presumed a part of the basis for the bargain unless proven otherwise . . . ." *Carter Hawley Hale Stores, Inc. v. Conley*, 372 So. 2d 965, 968 (Fla. 3d DCA 1979) (citing Fla. Stat. § 672.313 cmt. 3).

102. As set forth above, for purposes of determining class certification, the evidence supports Plaintiff's position that the nominal fee repair promise was part of every consumer's bargain. "[T]he whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell . . . ." *See* Fla. Stat. § 672.313 cmt. 1. In that regard, Costa has admitted that the lifetime nominal fee repair promise attached to every non-promotional, non-prescription pair of Costa sunglasses, regardless of whether the consumer received, read, or understood the box. More specifically, Costa has admitted that its nominal fee repair promise was intended to be part of the basis of the bargain with every customer, regardless of the circumstances in which the customer purchased Costa sunglasses. It was part of every consumer's deal. If the customer purchased Costa sunglasses, he or she received the nominal fee repair promise and customers could "rest assured" that it was part of their deal. Similarly, Costa's CEO testified that it is Costa's practice to honor the warranty it sends out on its product, regardless of whether the consumer actually physically received the warranty or views it.

103. Costa's course of dealing, which is an important part of construing the bargain, reflects that Costa never required proof of the box or other particular circumstances of purchase in order to perform repairs under its warranty. *See* Fla. Stat. § 671.205 (course of performance or course of dealing relevant to ascertaining the agreement). Plaintiff's claim here is based on an asserted express written warranty and, as such, reliance need not be shown.

104. Costa argues that "[u]nder settled and binding case law from the First DCA, 'an express warranty is generally considered to arise only where the seller asserts a fact of which the buyer is ignorant prior to the beginning of the transaction, and on which the buyer justifiably relies as part of the 'basis of the bargain.'" (Response at 34) (citing *Thursby v. Reynolds Metals Co.*, 466 So. 2d 245, 250 (Fla. 1st DCA 1984)). However, the law treats express <u>verbal</u> warranties different than express <u>written</u> warranties; critically, express written warranties do not require reliance. Accordingly, *Thursby*, an express <u>verbal</u> warranty case about statements made during the course of negotiations, is inapposite to this case, which concerns an alleged <u>written</u> warranty.[28]

Whether a Promise to Repair Sunglasses for a Nominal Fee is a Warranty Under the MMWA is a Question of Fact.

105. Under the MMWA, the term "written warranty" is defined as follows:

(6) The term "written warranty" means--

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[28] The First DCA made clear that *Thursby* was a case regarding *verbal* representations during the course of negotiations, not *written* representations: "[a]lthough appellants urge the existence of language constituting express warranties in several documents allegedly passing between Reynolds and Apache during the negotiations between them, *we think the issue finally boils down to statements related to the 'safety' of the machine and its components.*" *Id.* (emphasis added). Indeed, the entire basis of the First DCA's decision was that the appellants failed to demonstrate reliance on any affirmations of particular facts *made during the course of negotiations* for the machine. *Id.*

> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,
>
> which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C. § 2301(6).

106. Here, Costa's nominal fee promise is a "written promise made in connection with the sale of a consumer product [sunglasses] by a supplier [Costa] to a buyer [the class] which promises that such workmanship [the sunglasses] will meet a specific level of performance [will remain in a like-new condition for a nominal fee] for a specified period of time [the consumer's lifetime]." *See* 15 U.S.C. § 2301(6)(A). In addition, the nominal fee promise is an "undertaking in writing in connection with the sale by a supplier [Costa] of a consumer product [sunglasses] to . . . repair, replace, or take remedial action with respect to such product [the sunglasses] in the event that such products fails to meet the specifications in the undertaking [are damaged by accident, normal wear and tear, or misuse], which written affirmative, promise, or undertaking becomes part of the basis of the bargain [Costa admits it was intended to be part of the bargain with each customer] between a supplier and a buyer." *See* 15 U.S.C. §

2301(6)(B). Thus, a reasonable jury could conclude that Costa provided a warranty to all members of the class, under subsections (A) or (B) of the MMWA.[29]

107. Importantly, the question of whether the nominal fee repair promise constitutes a warranty is a question of fact for resolution by the jury. *See, e.g., DA Air Taxi LLC v. Diamond Aircraft Indus. Inc.*, No. 09-60157-CIV, 2009 WL 10668151, at *2 (S.D. Fla. May 15, 2009) ("Whether a statement gives rise to an express warranty is a question of fact for the fact-finder."); *see Bohlke v. Shearer's Foods, LLC*, No. 9:14-CV-80727, 2015 WL 249418, at *11 (S.D. Fla. Jan. 20, 2015) ("[t]he existence of an express warranty is a factual issue for the jury to decide." (brackets in original)). Here, there are no deviations in the promise Costa made to its customers; each purchase came with the same nominal fee repair promise, and Costa has admitted that each consumer holding a pair of Costa sunglasses received that promise — and can "rest assured" that the promise was part of their deal.

Numerosity & Adequacy Are Conceded, but Satisfied in Any Event.

108. As with Plaintiff's FDUTPA class, at the evidentiary hearing on class certification Costa did not dispute and, thus, conceded the numerosity and adequacy prongs of Rule 1.220. Further, the Court finds that both are satisfied.

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[29] Defendant's expert, Michael Bare, was advised by Costa's counsel that (i) Costa's lifetime warranty, which includes the promise to replace damaged parts for a nominal fee, was an important part of Costa's brand, and; (ii) Costa knew that its consumers bought its brand of sunglasses because of the lifetime warranty offered with the purchase. That testimony is consistent with the documentary evidence in the case, which reflects that Costa's promise to fix damaged sunglasses for a "nominal fee" is part of its lifetime warranty. *See* (Pl. Ex. No. 158).

Commonality: Plaintiff's MMWA Claim Presents Common Issues of Law and Fact.

109. Plaintiff's MMWA claim raises questions of law and fact that are common to the questions of law and fact raised by each class member. As explained above, Costa engaged in standard, uniform conduct by promising customers that it will replace sunglasses damaged by accident, normal wear and tear, or misuse for a nominal fee, and then charging customers a sum that Plaintiff contends exceeds a nominal fee. Thus, there are common questions that are implicated here, including but not limited to the following:

1. Whether Costa offered a warranty that it would repair or replace sunglasses damaged by accident, normal wear and tear, or misuse for a nominal fee;

2. Whether Costa's nominal fee promise amounts to a warranty under the MMWA;

3. What constitutes a nominal fee;

4. Whether Costa breached the nominal fee repair promise by charging customers more than a nominal fee to repair their sunglasses in the form of uniform repair charges; and

5. Whether members of the class were damaged by paying Costa's repair charges to fix their accidentally damaged sunglasses.

110. As with Plaintiff's FDUTPA claims, the MMWA claims of Plaintiff and the class rise and fall on these straightforward questions — if Costa's "nominal fee" promise amounts to a warranty (which is a question of fact for the jury), Costa either complied with its warranty or it did not. The evidence reflects that Plaintiff's claims arise from the same, standard practice or course of conduct that gives rise to the claims of each and every class member, and all class members' claims are based on the same legal theory — Costa's policy and practice to disavow the nominal fee promise printed on the side of every sunglass box.

Typicality: Plaintiff's Claims are Typical of Class Members' Claims Because They are Based on the Same Conduct and the Same Injury.

111. Plaintiff's claims satisfy the typicality standard. From both a legal and factual perspective, Plaintiff's claims are substantially similar to the claims of every other member of the class. Plaintiff Haney purchased non-promotional Costa sunglasses in 2016, and was charged over $105 by Costa to repair his sunglasses after they shattered. Plaintiff's MMWA claim is premised on Costa's failure to abide by the terms of its written lifetime warranty, which is printed on the side of every non-promotional Costa sunglass box, and which is part of every consumer's bargain. Like Haney, every member of the MMWA subclass was charged a sum that Plaintiff contends exceeds a nominal fee to repair sunglasses damaged by accident, normal wear and tear, or misuse. The jury will determine, for Haney and the rest of the class, what amount constitutes a nominal fee.

112. At minimum, there is clearly a strong similarity in legal theories upon which the MMWA claim of Plaintiff and the class members are based. Haney and the rest of the MMWA Class:

1. Purchased non-promotional Costa sunglasses that came with a lifetime nominal fee repair promise;
2. Damaged their sunglasses through accident, normal wear and tear, or misuse;
3. Sent their sunglasses to Costa to take advantage of the nominal fee repair promise within five years of the filing of the Complaint; and
4. Were charged a sum by Costa that Plaintiff contends exceeds a nominal fee.

Thus, Plaintiff meets the typicality prong for class certification for purposes of the MMWA class.

113. As explained herein, Costa has not offered any persuasive evidence of any disparate customer experiences for class members or for consumers of Costa during the class period. Substantially all of the evidence that Costa purported to offer in support of its argument that customers had individualized "purchase experiences" is from Costa's expert, Michael Bare who — for the reasons explained above — did not survey class members and whose study did not collect a scintilla of evidence regarding the experiences of actual class members during the class period. Importantly, even if Costa did present evidence of individual customer experiences (which it did not), the relevant evidence in this case establishes that the nominal fee repair promise was part of every class members' bargain, regardless of individual experiences.

114. Plaintiff's claims are typical of the claims of the rest of the MMWA class from a legal and factual perspective — Plaintiff and the class complain that they purchased a product that came with a nominal fee repair promise, but were charged more than a nominal fee to repair the product. As explained below, Haney and the class all seek damages amounting to the difference between a "nominal fee" to repair the sunglasses and what they actually paid.

Certification of the MMWA Subclass is Proper under Rule 1.220(b)(3) Because Common Questions Predominate Over Individual Inquiries.

115. As set forth in detail above, Costa's lifetime warranty — which Costa admits encompasses its nominal fee repair promise — is a significant component of Costa's brand. The lifetime warranty, including the nominal fee promise, was uniformly printed on the side of every non-promotional box of Costa sunglasses and set Costa apart from its competitors. Each and every pair of non-promotional, non-prescription Costa sunglasses comes with the nominal fee repair promise, regardless of the

circumstances of purchase; regardless of whether the customer saw, received, or reviewed the box; and regardless of whether the customer relied on any specific language on the box, Costa's website, or otherwise. The testimony in this case is uniform that, if a customer of Costa purchased non-promotional, non-prescription sunglasses, he or she received the nominal fee promise.

116. Nevertheless, unbeknownst to customers and without changing its warranty language, Costa developed an internal policy to turn its repair center into a profit center. Costa's former CEO admitted at his deposition that Costa did not honor the nominal fee repair promise. Instead, Costa created confidential repair charges, but refused to disclose actual charges to customers unless and until the customers' sunglasses broke. Those charges, according to Costa's customer care trainer and former manager of the repair center, are *not* nominal.

117. Moreover, a central predominating issue in this case is the interpretation of an identical warranty that Costa provided to each and every member of the class. *Brodeur v. Dale E. Peterson Vacations, Inc.*, 7 So. 3d 567, 569 (Fla. 1st DCA 2009) ("It appears clear to us, based on the trial court's findings, that the predominant issue will be the interpretation of identical language in contracts between one defendant and many similarly situated plaintiffs."); *Paladino v. Am. Dental Plan, Inc.*, 697 So. 2d 897, 899 (Fla. 1st DCA. 1997) (reversing denial of class certification, and stating "the interpretation of the contract's capitation provision predominates over the other questions of law or fact affecting the individual class members."). These inquiries apply equally to Plaintiff and all of the class members, as the claims in this case emanate from Costa's common course of conduct. *See, e.g., Sosa*, 73 So. 3d at 111; *Stone v. CompuServe Interactive Servs., Inc.*, 804 So. 2d 383, 388 (Fla. 4th DCA 2001). Indeed,

to prove their claims, Plaintiff and the class will rely on the same pool of evidence. Accordingly, in regards to the MMWA claim, the common questions in this case predominate over individual issues.

Plaintiff has Satisfied the Notice Requirement Under the MMWA.

118. The Court rejects Costa's argument that "a pre-suit notice for a breach of warranty claim cannot be satisfied based on a single notice by a putative class representative; each class member must provide Costa with separate notice and an opportunity to remedy the 'defect.'" (Response at 38). The MMWA provides otherwise.

119. Plaintiff's breach of warranty claim is brought under the MMWA, which includes a specific provision addressing class actions. It states, in pertinent part:

> **(e) Class actions; conditions; procedures applicable**
>
> No action (other than a class action or an action respecting a warranty to which subsection (a)(3) applies) may be brought under subsection (d) for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) applies) brought under subsection (d) for breach of any written or implied warranty or service contract, ***such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class***. . . .

15 U.S.C. § 2310(e) (emphasis added). In other words, a class may not proceed unless and until Costa is given a reasonable opportunity to cure its noncompliance. A "reasonable opportunity to cure" can be met by the named plaintiffs when they notify the defendant that they are acting on behalf of the class. *Id.*; *see Porter v. Chrysler*

Group LLC, 6:13-CV-555-ORL-37, 2013 WL 3884141, at *2–3 (M.D. Fla. July 26, 2013) (holding that plaintiffs may actually go so far as to file a class action without issuing notice to the defendant, so long as the defendant is given a reasonable opportunity to cure before the suit goes forward).[30]

120. Here, Plaintiff has satisfied the requirements of the MMWA. Plaintiff gave Costa a reasonable opportunity to cure by having the class plaintiff notify Costa that he was acting on behalf of the class. *See* (Def.'s Ex. No. 11). All of the cases cited by Costa are breach of warranty cases that are *not* brought under the MMWA. *See Cohen v. Implant Innovations, Inc.*, 259 F.R.D. 617 (S.D. Fla. 2008) (breach of warranty claim; no MMWA claim asserted); *Seaberg v. Atlas Roofing Corp.*, 321 F.R.D. 430 (N.D. Ga. 2017) (breach of warranty; no MMWA claim); *Hummel v. Tamko Building Prod., Inc.*, 303 F. Supp. 3d 1288 (M.D. Fla. 2017) (breach of warranty under Fla. Stat.

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[30] It is worth noting that, even accepting *arguendo* Costa's argument, the statute imposes different requirements on classes of consumers than it does on individuals. While Section 2310(e) requires that sellers be afforded an opportunity to cure before an individual may bring an action under the MMWA, classes of consumers are prohibited only from proceeding in a class action unless the seller is afforded a reasonable opportunity to cure the defect. "Thus, a named plaintiff in a class action may bring an action prior to affording the defendant an opportunity to cure, for the purpose of establishing his or her representative capacity." *In re Shop-Vac Mktg. & Sales Practices Litig.*, 964 F. Supp. 2d 355, 362 (M.D. Pa. 2013). The Court could proceed to determine Plaintiff's representative capacity, *even if notice was not provided to Costa*:

> The Act also provides that a plaintiff may file a class action, but may not proceed with that action, until she has afforded the defendant a reasonable opportunity to cure its alleged breach. While the class action is held in abeyance pending possible cure, the district court may rule on the representative capacity of the named plaintiffs, its determination to be made 'in the application of rule 23 of the Federal Rules of Civil Procedure.

Walsh v. Ford Motor Co., 807 F.2d 1000, 1004 (D.C. Cir. 1986). Here, Costa was provided an opportunity to cure. *See* (Def.'s Ex. No. 11).

672.607(3)(a); no MMWA claim); *Tershakovec v. Ford Motor Co.*, 2018 WL 3405245 (S.D. Fla. July 12, 2018) (breach of warranty; no MMWA claim).

Plaintiff has Proffered a Reasonable Methodology for Calculating MMWA Damages on a Class-wide Basis.

121. To demonstrate that damages can be established on a class-wide basis, Plaintiff need only show a "reasonable methodology" for generalized proof of class-wide impact. *Sosa*, 73 So. 3d at 112. In terms of the MMWA subclass, Plaintiff contends that each member of the MMWA subclass paid Costa far more than a nominal fee to repair their damaged sunglasses. Plaintiff seeks reimbursement for those putative class members for all amounts paid above and beyond a nominal fee.

122. The correct measure of damages for breach of an express warranty is the cost of remedying the breach by making the work performed or article furnished conform to the contract. *See Koplowitz v. Girard*, 658 So. 2d 1183, 1184 (Fla. 4th DCA 1995). Under Florida's Uniform Commercial Code, the measure of damages in a breach of warranty action where the goods have been accepted also includes any consequential damages proximately caused by the breach. *Id.* In other words, for the MMWA claim, each class member is entitled to an amount equal to the amount he or she paid for the repair minus what a jury concludes is a nominal fee. The correct formula, and the formula Mr. Rey proposes to utilize, is as follows:

(Amount paid for repair) – (nominal fee) = damages

That measure of damages compensates consumers all amounts paid over and above a nominal fee, which is what Plaintiff contends consumers were obligated to pay under Costa's warranty.

123. Plaintiff's damages analysis for the MMWA subclass is supported by common sense and Costa's own repair data. *Sosa*, 73 So. 3d at 113 (recognizing that the "lack of complexity in the damage assessment" supported a finding of class certification). Costa maintains repair records in an Excel file that provide, for each MMWA class member, exactly how much each class member was charged for repair of their sunglasses. Plaintiff's expert, Alex Rey, has testified that Plaintiff can calculate the amount of each class members' damages based on what he or she paid for repairs. In order to determine the appropriate amount of damages for each MMWA class member, a claims administrator need only match up the putative class member's name to the information contained in Costa's records and subtract the "nominal fee" as determined by the finder of fact. Thus, once a jury determines a nominal fee, that value can be subtracted from what a class member actually paid Costa to have his or her sunglasses repaired, to arrive at the damages suffered by the class member under the MMWA. Thus, while specific damages may vary from class member to class member for the MMWA subclass, the injury is uniform. *Cohen v. Camino Sheridan, Inc.*, 466 So. 2d 1212, 1214 (Fla. 4th DCA 1985) (entitlement to different amounts of damages between class members is not sufficient to defeat class certification); *Broin v. Philip Morris Companies, Inc.*, 641 So. 2d 888, 891 (Fla. 3d DCA 1994) ("Entitlement to different amounts of damages is not fatal to a class action.").

124. This damage calculation is simple, straightforward, and utilizes Costa's own data regarding the amounts charged for sunglass repairs to class-members.

Class Representation is Superior to Other Available Methods for the Fair and Efficient Adjudication of the Controversy.

125. To satisfy the "superiority" requirement, Plaintiff and the putative class members must show that a class action is "the most manageable and efficient way to resolve the individual claims of each class member." *Sosa*, 73 So. 3d at 116; *see also Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1141 (Fla. 3d DCA 2008) (recognizing that, "[t]o find superiority, a court must find all other methods of resolving the issues in a case to be inferior to a class action"). The Court may consider: (1) whether a class action would provide the class members with the only economically viable remedy; (2) whether there is a likelihood that the individual claims are large enough to justify the expense of separate litigation; and (3) whether a class action is manageable. *Sosa*, 73 So. 3d at 116 (citing *Morgan v. Coats*, 33 So. 3d 59, 66 (Fla. 2d DCA 2010)).

126. Here, each of the above-listed superiority factors weigh in favor of class certification. This case involves potentially hundreds of thousands of class members, each of whom purport to possess a claim likely worth less than the filing fee in Circuit Court. Each of the class members' claims are premised on the purchase of sunglasses that retail, at most, for about $300. Allowing Plaintiff and the putative class members to proceed with this class action is the most economically feasible remedy given the potential individual damage recovery for each class member. The Supreme Court of Florida's reasoning in *Sosa* is applicable here:

> In this case, Sosa's cause of action is suitable for class certification because it is the superior form of adjudication for this controversy. There are potentially thousands of prospective class members and their small individual economic claims involving a $20 overcharge are not so large as to economically justify each individual filing a separate action. Allowing Sosa and the putative class members to proceed with this class action is the most economically

> feasible remedy given the potential individual damage recovery for each class member. Furthermore, because of the large number of potential class members who based their claims on the same common course of conduct by Safeway, a class action would be a more manageable and more efficient use of judicial resources than individual claims.

Id. And, even if class members here could afford individual litigation (which is doubtful), particularly in this circumstance, individualized litigation creates the potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, permitting this action to proceed as a class action presents far fewer management difficulties, and provides the benefit of single adjudication, economy of scale, and comprehensive supervision by a single court.

127. This is a quintessential class action. For purposes of determining class certification, the evidence in this case demonstrates that Costa made a representation to hundreds of thousands of customers across the state that it would repair accidentally damaged sunglasses for the lifetime of the customer for a nominal fee. This nominal fee repair promise was a meaningful part of Costa's brand, and what Costa believed set it apart from its competitors. While Costa offered its nominal fee repair promise to customers, it instituted a uniform schedule of repair charges that customers were not privy to, were hidden from customers at the point of sale, and then charged to customers after their glasses were accidentally damaged or worn out. Plaintiff alleges that these confidential repair charges drastically exceed any reasonable definition of a nominal fee. The class action device likely provides the only mechanism through which consumers in the class can realistically seek redress.

128. Importantly, this case involves common issues of liability, a common course of conduct, and common sources of evidence. Costa offered a uniform "nominal fee" promise to its customers, all of Costa's customers received the "nominal fee" promise regardless of any individual circumstances of purchase, and Costa charged uniform confidential repair charges to its customers.

129. Furthermore, the undisputed evidence in the case is that both the FDUTPA and MMWA classes are readily identifiable and manageable — *i.e.*, during class administration, a claims administrator would be able to identify and provide reasonable notice to the class members, and manage and administer any class award. The Affidavit of Cameron R. Azari, Director of Legal Notice for Hilsoft Notifications, details the methods by which class members can be identified, notice can be provided to class members, and a class award can be managed and administered. This testimony is unrebutted and persuasive.

130. In sum, a class action is the most manageable and efficient use of judicial resources and superior to requiring each putative class member to file individual claims against Costa. Plaintiff and the putative class members' claims satisfy Rule 1.220(b)(3)'s superiority requirement.

I. CONCLUSION

In conclusion, Plaintiff has satisfied all of the requirements under Rule 1.220. Accordingly, it is, thereupon,

ORDERED:

1. Plaintiff's Motion for Class Certification is **GRANTED**.

2. The Court certifies the following classes:

i. All citizens of the State of Florida who, within the four years preceding the filing of the Complaint, purchased non-prescription, non-promotional Costa sunglasses for personal use.

ii. All citizens of the State of Florida who, within the five years preceding the filing of the Complaint, were charged a fee by Costa to replace damaged components of their non-prescription, non-promotional Costa sunglasses.

The proposed classes exclude: (1) Defendant, any entity or division in which Defendant has a controlling interest, and their legal representatives, employees, officers, directors, assigns, and successors; and (2) the judge to whom this case is assigned and the judge's staff. The class period concludes for both subclasses with purchases made prior to January 31, 2018.

3. The law firm of Holland & Knight LLP is appointed as class counsel.

4. Plaintiff, Brendan C. Haney, is appointed class representative.

5. At an appropriate time, by separate Order, the Court will set a status conference for the purpose of addressing class notice, pursuant to Florida Rule of Civil Procedure 1.220(d), and how the parties intend to proceed in this matter. At the status conference, counsel for the Plaintiff shall propose an appropriate form of notice to all class members.

6. In accordance with Florida Rule of Civil Procedure 1.220(d), the Court may alter or amend this Order before entry of a judgment on the merits of this action.

DONE AND ORDERED in Chambers, Jacksonville, Duval County, Florida this 12th day of April, 2019.

Adrian G. Soud
Circuit Court Judge

Copies to:

Peter P. Hargitai, Esquire
Joshua H. Roberts, Esquire
Laura B. Renstrom, Esquire
Attorneys for Plaintiff, Brendan C. Haney
peter.hargitai@hklaw.com
joshua.roberts@hklaw.com
laura.renstrom@hklaw.com

R. Eric Bilik, Esquire
Scott S. Cairns, Esquire
Sara F. Holladay-Tobias, Esquire
Cameron G. Kynes, Esquire
Justin R. Opitz, Esquire
Attorneys for Defendant, Costa Del Mar Inc.
ebilik@mcguirewoods.com
scairns@mcguirewoods.com
stobias@mcguirewoods.com
ckynes@mcguirewoods.com
Jopitz@mcguirewoods.com