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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIMBERLY BANKS and CAROL)	Case No. 20-cv-06208 DDP (RAOx)
CANTWELL, on behalf of themselves)	
and all others similarly situated)	ORDER GRANTING CLASS
)	CERTIFICATION, DENYING
Plaintiff,)	MOTIONS TO STRIKE
)	
v.)	[Dkt. 39, 49, 50, 51]
)	
R.C. BIGELOW, INC., a Corporation;)	
and DOES 1 through 10, inclusive,)	
)	
Defendants.)	
_____)	

Presently before the Court are Plaintiffs’ Motion to Certify Class and Defendants’ Motions to Strike the Expert Reports of Colin B. Weir, J. Michael Dennis, and Cory Carter. Having considered the parties’ submissions, and heard oral argument, the Court adopts the following order.

I. BACKGROUND

The parties are aware of the factual background in this case, as detailed in the Court’s previous order. (Dkt. 22). Plaintiffs Kimblerly Banks and Carol Cantwell bring suit against Defendants R.C. Bigelow, Inc. and Does 1 through 10 for allegedly selling tea

1 that was processed abroad with a label reading “Manufactured in the USA 100% Family
2 Owned” (hereinafter the “Label”). Plaintiffs seek class certification as to (1) the California
3 Consumer Legal Remedies Act (“CLRA”), (2) common law fraud and intentional
4 misrepresentation, (3) negligent misrepresentation, and (4) breach of express warranty.
5 Plaintiffs propose the following class:

6 All natural persons who purchased at least one 18/20 count box of Bigelow Earl
7 Grey Black Tea Caffeine, Green Tea Caffeine, Constant Comment Black Tea
8 Caffeine, Green Lemon Tea Caffeine, Vanilla Chai Black Tea Caffeine, English Tea
9 Time Black Tea Caffeine, Spiced Chai Black Tea Caffeine, French Vanilla Black Tea
10 Caffeine, or Vanilla Caramel Black Tea Caffeine, labeled as “Manufactured in the
11 USA 100% American Family Owned,” at a retail store in the state of California, at
12 any time from July 13, 2017 to the present.

13 **II. LEGAL STANDARD**

14 In determining the propriety of a class action, the question is not whether the
15 plaintiff has stated a cause of action or will prevail on the merits, but rather whether the
16 requirements of Rule 23 are met. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974)
17 (citations omitted). The party seeking class certification bears the burden of showing that
18 each of the four requirements of Rule 23(a) and at least one of the requirements of Rule
19 23(b) are met. *Blake v. Arnett*, 663 F.2d 906, 912 (9th Cir. 1981). Rule 23(a) sets forth four
20 prerequisites for class certification:

- 21 (1) the class is so numerous that joinder of all members is impracticable;
- 22 (2) there are questions of law or fact common to the class;
- 23 (3) the claims or defenses of the representative parties are typical of the
24 claims or defenses of the class; and
- 25 (4) the representative parties will fairly and adequately protect the
26 interests of the class.

27 Fed. R. Civ. P. 23(a).

1 Relevant here, Rule 23(b)(3) requires that “questions of law or fact common to
2 class members predominate over individual questions . . . and that a class action is
3 superior to other available methods for fairly and efficiently adjudicating the
4 controversy.” Fed. R. Civ. P. 23(b)(3).

5 **III. DISCUSSION**

6 **A. Rule 23(a) Requirements**

7 To show that class certification is warranted, Plaintiffs must show that all four
8 prerequisites listed in Rule 23(a) are satisfied.

9 **1. Numerosity**

10 Numerosity is satisfied if “the class is so numerous that joinder of all members is
11 impracticable.” Fed. R. Civ. P. 23(a)(1). Defendants do not contest numerosity. Here, the
12 products at issue were sold to at least 100 (and likely a great deal more) different
13 consumers in California during the class period. (Dkt. 39-49). Thus, numerosity is met.

14 **2. Commonality**

15 Commonality is satisfied if “there are questions of law or fact common to the
16 class.” Fed. R. Civ. P. 23(a)(2). “The requirements of Rule 23(a)(2) have been construed
17 permissively, and all questions of fact and law need not be common to satisfy the rule.”
18 *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (citations omitted).
19 Defendants dispute that the labels were consistent enough to satisfy the commonality
20 requirement. Because the commonality inquiry is subsumed by the more stringent
21 predominance inquiry, *infra* Section III.C, the court does not analyze commonality here.
22 *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 609 (1997).

23 **3. Typicality**

24 Typicality is satisfied if “the claims or defenses of the representative parties are
25 typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “The test of
26 typicality is whether other members have the same or similar injury, whether the action
27 is based on conduct which is not unique to the named plaintiffs, and whether other class
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1 members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*,
2 976 F.2d 497, 508 (9th Cir. 1992) (citations omitted).

3 Plaintiffs began buying Bigelow tea in the 1980s (Cantwell) and in 2015 (Banks).
4 (Dkt. 52-22 & 57-3, Cantwell Depo., 25:11-18, 68:17-70:4); (Dkt. 52-24 & 57-2, Banks Depo.,
5 26:24-27:19). Banks first recalled seeing the Label in 2019, four years after she began
6 consuming the tea and two years after the Label was launched in 2017. Banks Depo. 72:1-
7 18. Cantwell first saw the Label around 2018. Cantwell Depo. 125:3-17. Both plaintiff
8 representatives stopped purchasing the Products after learning that the tea was not
9 grown in the United States. Banks Depo. 25:25-26:1.

10 Plaintiffs assert that they are typical of other class members, because they
11 purchased the Products "in part based on their belief the Products were [m]ade in the
12 USA." (Mot. at 11). Defendants argue that Plaintiffs "cannot credibly demonstrate
13 reliance" on the Label and are thus subject to unique defenses not applicable to other
14 class members. (Opp. at 12-13). In support of their contention, Defendants represent that
15 Plaintiffs, more concerned with other factors such as taste, could not even remember
16 when the Products began to bear the Label. (Opp. at 13). Instead, Defendants characterize
17 Plaintiffs as longtime Bigelow consumers who "do not actually care about the source of
18 their tea." (Opp. at 10).

19 That Plaintiffs may have considered other factors in their purchasing decisions
20 does not make them atypical. *Astiana v. Kashi Co.*, 291 F.R.D. 493, 503 (S.D. Cal. 2013). It is
21 unlikely that Plaintiffs are uniquely concerned about taste compared to the rest of the
22 class of tea purchasers, and Defendants would use the defense of lack of reliance against
23 any plaintiffs. *See Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 609
24 (N.D. Cal. 2018) (finding that, because defendants would contest that any Canada Dry
25 purchaser made their purchase in reliance on the "made with real ginger" label, this
26 defense was not unique to named plaintiffs and did not defeat typicality). Thus, Plaintiffs
27 have established typicality.

4. Adequacy

Adequacy of representation is satisfied if “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). Inasmuch as it is conceptually distinct from commonality and typicality, this prerequisite is primarily concerned with “the competency of class counsel and conflicts of interest.” *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n.13 (1982). Thus, “courts must resolve two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Ellis*, 657 F.3d at 985.

Defendant argues that Plaintiffs cannot adequately represent the class because they were solicited to participate in a class action lawsuit via a website. Opp. at 20. Defendant cites *Bodner v. Oreck Direct* for the proposition that an attorney who solicits clients for a class action does not meet the adequacy requirement. *Bodner v. Oreck Direct, LLC*, No. C 06-4756 MHP, 2007 WL 1223777 (N.D. Cal. Apr. 25, 2007). In *Bodner*, the court stressed that the named plaintiff had never read the complaint and exhibited “overwhelming ignorance regarding the nature of this action, the facts alleged, and the theories of relief against defendant.” *Id.* at *2. Moreover, the court noted that plaintiff’s attorney had previously been disqualified for bringing a class action suit using a relative as the named plaintiff. *Id.*

Here, Plaintiffs do not have a perfect memory of the labels on the products they purchased. *See, e.g.*, Banks Depo. 56:7-9, 55:22-24; Cantwell Depo 45:5-14. Nonetheless, Plaintiffs clearly reviewed the pleadings and understand the basis for their claims. *See, e.g.*, Banks Depo 91:11; Cantwell 22:1. Unlike the *Bodner* plaintiff, Plaintiffs here are not “overwhelming[ly] ignoran[t]” of the case such that they cannot adequately represent the class. Moreover, Plaintiffs’ counsel have not been accused of the kind of conflicts of interest that led the *Bodner* court to refuse to certify the class. *Bodner*, 2007 WL 1223777 at *3 (“In short, the conduct in this action does not look good, does not sound good, and

1 does not smell good. In fact, it reeks. The court will not participate in this scheme by
2 certifying a class.”). On the contrary, Plaintiffs have participated actively in their case and
3 declared their loyalty to the putative class. *See* Banks Decl. ¶ 12; Cantwell Decl. ¶ 12.
4 Accordingly, Plaintiffs have established adequacy.

5 **B. Daubert motions**

6 In support of their 23(b)(3) arguments, Plaintiffs supplied expert reports and
7 testimony from Colin B. Weir, J. Michael Dennis, and Cory Carter. Defendants moved to
8 strike the reports and testimony of all three witnesses, on the grounds that they fail to
9 meet the standards required by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow*
10 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

11 Where “scientific, technical, or other specialized knowledge will assist the trier of
12 fact” to understand evidentiary or factual issues, an expert witness who is qualified by
13 “knowledge, skill, experience, training, or education” may “testify thereto in the form of
14 an opinion or otherwise.” Fed. R. Evid. 702. Trial courts have a gatekeeping function
15 regarding expert testimony. *Daubert* 509 U.S. at 597. The focus should be “solely on
16 principles and methodology, not on the conclusions they generate.” *Id.* at 595. Factors
17 relevant to reliability include, but are not limited to, “whether the theory or technique
18 employed by the expert is generally accepted in the scientific community; whether it’s
19 been subjected to peer review and publication; whether it can be and has been tested; and
20 whether the known or potential rate of error is acceptable.” *Wendell v. GlaxoSmithKline,*
21 *LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) (citations omitted). The proponent of the expert
22 testimony has the burden of establishing that the relevant admissibility requirements are
23 met by a “preponderance of the evidence.” *Daubert*, 509 U.S. at 592 n.10 (citations
24 omitted).

25 Here, Plaintiffs rely on their three experts to prove that their claims satisfy the
26 elements of Rule 23(b)(3). Each expert’s admissibility is discussed in turn.

1 **1. Carter**

2 Carter is a regulatory specialist in the food labeling field. (Carter Decl. ¶19).
3 Plaintiffs offer Carter’s opinion to establish how the food labeling industry analyzes
4 “Made in USA” claims. (Carter Opp. at 4). Specifically, Plaintiffs refer to Carter’s opinion
5 to establish that the Label is an “unqualified Made in USA claim” satisfying the
6 deception element of their breach of warranty claim. (Mot. at 17).

7 Defendants move to strike Carter’s report and testimony on three grounds. First,
8 they argue that Carter’s conclusions about the Label are irrelevant, because they apply
9 only to federal and state “Made in USA” statutes that do not form the basis of any of
10 Plaintiffs’ remaining claims. Second, they argue that Carter’s opinions about the
11 applicability of federal and statute statutes to the Label are impermissible legal
12 conclusions.

13 To the extent that Carter’s report contains extraneous information not relevant to
14 the Court’s decision on class certification, or states impermissible legal conclusions, the
15 Court disregards that information without striking the entire report. Nonetheless,
16 Carter’s opinion is relevant and admissible to support Plaintiffs’ contention that the
17 deceptiveness of the Label can be proved through common evidence. Carter’s report and
18 testimony incorporates FTC and California statutory guidance, as well as Carter’s own
19 opinion, regarding what a reasonable consumer would come to believe based on the
20 Label.

21 **2. Weir**

22 The motion to strike Weir’s report is discussed *infra*, section III.C.3.

23 **3. Dennis**

24 Dennis is a consumer survey expert whom Plaintiff retained to measure consumer
25 perceptions of the Label. (Dennis Decl. ¶20). Dennis concludes, based on his survey, that
26 84.4% of consumers understood the Label to mean that the tea was “processed” in the USA.

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1 Defendants first move to strike Dennis' report because it does not test what the word
2 "processed" means to consumers in this context. As discussed below, the Court does not
3 find the word "processed" to be as inherently ambiguous as verbiage in the cases
4 Defendants cites.

5 Defendants further argue that the Court should strike Dennis' report because it uses
6 only close-ended questions, leading to biased and unreliable results. But unlike the close-
7 ended questions in *In re Kind LLC "Healthy & All Natural" Litig.*, 2022 WWL 4125065 (SDNY
8 Sep. 9, 2022), here the survey included contrasting options consistent with Defendants'
9 competed theory. That is, Dennis surveyed consumers about whether the Label conveyed
10 that the tea was "blended" and "packaged" in the United States, which is Defendants'
11 suggested interpretation of the Label. *See, e.g.*, Dkt. 49 (arguing that consumers polled in
12 Weir's survey may have "believed correctly that Bigelow's product is blended and
13 packaged in the United States."). Thus, the Court finds Dennis' report is sufficiently
14 reliable and relevant to support Plaintiffs' argument that consumers interpret the Label to
15 convey that the tea was 100% "processed" in the United States.

16 **C. Rule 23(b)(3) Requirements**

17 A class action may be certified under Rule 23(b)(3) if "the questions of law or fact
18 common to class members predominate over any questions affecting only individual
19 members, and that a class action is superior to other available methods for fairly and
20 efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).¹ In making its findings
21 on these two issues, courts may consider "the class members' interests in individually
22 controlling the prosecution or defense of separate actions," "the extent and nature of any

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25 ¹ Defendants do not dispute the superiority element of the 23(b)(3) inquiry. As Plaintiffs assert, individual
26 Class members' damages are modest relative to the time and expense required to properly prosecute these
27 claims. *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1123 (9th Cir. 2017) (affirming finding of superiority in
28 case where individual damages are too small "to make litigation cost effective in a case against funded
defenses and with a likely need for expert testimony"). Accordingly, the Court finds the superiority
element is met here.

1 litigation concerning the controversy already begun by or against class members,” “the
2 desirability or undesirability of concentrating the litigation of the claims in the particular
3 forum,” and “the likely difficulties in managing a class action.” *Id.*

4 “The Rule 23(b)(3) predominance inquiry tests whether proposed classes are
5 sufficiently cohesive to warrant adjudication by representation.” *Amchem Products, Inc. v.*
6 *Windsor*, 521 U.S. 591, 623 (1997). “Even if Rule 23(a)'s commonality requirement may be
7 satisfied by [a] shared experience, the predominance criterion is far more demanding.”
8 *Id.* at 623-24. Predominance cannot be satisfied if there is a much “greater number” of
9 “significant questions peculiar to the several categories of class members, and to
10 individuals within each category.” *Id.* at 624. However, Rule 23(b)(3) predominance
11 “requires a showing that questions common to the class predominate, not that those
12 questions will be answered, on the merits, in favor of the class.” *Amgen Inc. v. Connecticut*
13 *Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

14 1. Exposure

15 Defendants argue that individual questions predominate about class members’
16 exposure to the Label, because: (1) products with the Label appeared at different times,
17 for different durations, due to “haphazard” shipment to stores; and (2) the Label was not
18 prominent enough to infer class-wide exposure. (Opp. at 16, 23).

19 a) Staggered Rollout

20 Plaintiffs’ proposed class targets products bearing the Label at a retail “at any time
21 from July 13, 2017 to the present.” Defendants’ argue that this timeframe contains
22 “tremendous variability in the distribution timeline of products” bearing the Label, such
23 that individual questions about “when and what version of the packaging consumers
24 purchased” predominate. Defendants represent that they approved the Label on October
25 17-18, 2017, and products bearing the Label were then “haphazardly shipped over a nine-
26 week period.” (Opp. at 16; *see* Dkt. 52-1 at ¶14 (breakdown of ship dates)).

1 The issue of label variability is not unique to this case. In *McCrary v. Elations*,
2 Plaintiffs sought to certify a class consisting of all purchasers of a product since January
3 28, 2009, when “clinically-proven” claims were on the packaging. *McCrary v. Elations Co.,*
4 *LLC*, 2014 WL 1778243 at *7 (C.D. Cal. Jan. 13, 2014). The defendants argued that the
5 allegedly false representation was not on every available product during the class period.
6 *Id.* at *9. The court nevertheless certified the class, noting that the class definition—as
7 here—excluded purchasers whose products did not bear “clinically-proven” claims. *Id.* at
8 *13. In doing so, the court distinguished *Pfizer*, in which plaintiffs sought to certify a class
9 consisting of “[a]ll persons who purchased Listerine with labels that state ‘as effective as
10 floss,’ in California, from June 28, 2004 through January 7, 2005.” *Id.*; *Pfizer Inc. v. Superior*
11 *Court*, 182 Cal. App. 4th 622, 626 (Cal. Ct. App. 2010)).

12 The *Pfizer* court noted that the many Listerine bottles purchased during the class
13 period, “if not most,” did not actually contain the allegedly misleading claim, because
14 Listerine only included the claim on 19 out of their 34 kinds of mouthwash. *Pfizer*, 182
15 Cal. App. 4th at 631. The label in *McCrary*, on the other hand, was featured on “the
16 packaging of every unit for an extended period.” *McCrary*, 2014 WL 1778243 at *13 (citing
17 *Johns v. Bayer Corp.*, 280 F.R.D. 551, 558 (S.D. Cal. 2012); *Wiener v. Dannon Co.*, 255 F.R.D.
18 658, 669 (C.D. Cal. 2009)).

19 Likewise here, even accounting for the nine-week delay between Label approval
20 and shipping for some products, the Label was printed on all products identified in the
21 class definition throughout the vast majority of the period between October 2017 and
22 2021. See Declaration of John McGraw ISO Opp., Dkt. 52-1 at ¶ 9, 10. Thus, like *McCrary*
23 and unlike *Pfizer*, the staggered rollout of the Label here does not create individual
24 questions that predominate over common questions. That said, the class definition
25 should not begin months before the Label was first approved, let alone shipped. The class
26 definition must be adjusted to begin in October 2017. See *Brown v. Hain Celestial Group*,

1 *Inc.*, 2014 WL 6483216 at *8 (N.D. Cal. Nov. 18, 2014) (permitting similar class redefinition
 2 and collecting relevant cases).

3 **b) Prominence of Label**

4 Defendants further argue that even as to products that did bear the Label, the
 5 Label was not sufficiently prominent to assume that all purchasers saw the Label.
 6 Defendants cite to *Zakaria v. Gerber* and *Hadley v. Kellogg Sales Co.* to support their
 7 arguments.

8 In *Zakaria v. Gerber*, the court held that a statement on an infant formula label was
 9 not prominent enough to infer that consumers would have seen the statement. 2016 WL
 10 6662723 at *8.



25 In *Hadley v. Kellogg Sales Co.*, the court cited *Zakaria* for the proposition that the
 26 phrase “wholesome goodness” in small font, in the middle of a block of text, on the back
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1 panel of a package was not “sufficiently prominently displayed to warrant an inference
2 of class-wide exposure.” 324 F.Supp. 3d 1084, 1099-1100 (citations omitted).

3 Here, the Label is on the back of tea boxes, but it is not in the middle of a block of
4 text. It is set off to the side in bold type.

5 The Label is more prominent than those defeating predominance in the cases Defendant
6 cites. “It is reasonable that at least some consumers noticed it.” *Zakaria*, 2016 WL 6662723
7 at *18.

8 2. Reliance

9 Defendants next argue that individual questions predominate about whether
10 consumers relied on the Label. Namely, Defendants argue that consumers have different
11 understandings of what “Manufactured in the USA means” and consumers bought the
12 products for “a myriad of reasons” unrelated to the Label.

13 a) Common meaning



25 Plaintiffs do not dispute that Defendants blend and package their tea in the United
26 States, but they assert that Defendants at least partially “process” their tea abroad. (See
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1 Complaint ¶2). Plaintiffs submitted an expert report using survey data to conclude that
2 84.4% of consumers understand “Manufactured in the USA” to mean that the tea was
3 “processed” in the United States and 69.8% of consumers understand “Manufactured in
4 the USA” to mean that the tea was “processed, blended, and packaged” in the United
5 States.² (See Dkt. 39-55, Dennis Report ¶¶ 31-32). Defendants argue, in turn, that
6 individual questions about what “manufactured” or “processed” means defeat
7 predominance.

8 Courts have held that where challenged representations are “inherently
9 ambiguous,” the issue of consumers’ likely deception is not subject to common proof and
10 predominance is not met. See *Viczarra v. Unilever*, 339 F.R.D. 530, 547 (N.D. Cal. 2021).
11 Specifically, misrepresentation claims concerning the terms “natural vanilla,” “all
12 natural,” and “energy” have been found ambiguous enough to defeat class certification
13 on predominance grounds. *Id.*; *Astiana v. Kashi Co.*, 291 F.R.D. 493, 508 (S.D. Cal. 2013); *In*
14 *re 5-Hour Energy Mktg. & Sales Pracs. Litig.*, No. ML 13-2438, 2017 WL 2559615, at *4 (C.D.
15 Cal. June 7, 2017). Courts have rejected ambiguity arguments, on the other hand, as to the
16 terms “real ginger” and “imported from Italy,” *Fitzhenry-Russell v. Dr. Pepper Snapple*
17 *Grp., Inc.*, 326 F.R.D. 592, 613 (N.D. Cal. 2018); *Kumar v. Salov N. Am. Corp.*, No. 14-CV-
18 2411-YGR, 2016 WL 3844334, at *9 (N.D. Cal. July 15, 2016).

19 Plaintiffs’ theory of liability is that the Label is misleading since Defendants grow
20 and partially process their tea abroad. (Mot. at 4) (asserting that Defendants grow, pick,
21 roll, oxidize, dry, and sort their tea abroad); (Opp. at 4) (acknowledging that the tea
22 leaves are at least partially processed abroad). Here, the term “manufactured” is less
23 ambiguous than “natural” and “energy;” as discussed in this Court’s previous order,
24 “manufacture” means to make something from raw materials by hand or machinery.

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26
27 ² In their Reply, Plaintiffs state that “Dennis’s findings also show that consumers believe the tea is sourced
28 in the USA,” but the Court was unable to locate any such finding in Dennis’s report. *Cf.* Reply at 20-21.

1 (Dkt. 22 at 7). Furthermore, Plaintiffs have pointed to evidence that consumers
2 understand “manufactured” in this context to mean “processed.” (Dkt. 39-55, Dennis
3 Report ¶31). The Label is not so ambiguous as to create individual questions defeating
4 predominance.

5 **b) Materiality to Consumers**

6 Lastly, Defendants argue that individual questions predominate about materiality,
7 because Plaintiffs cannot show that the Label factored into consumers’ purchase
8 decisions. (Opp. at 18). A misrepresentation is “material” under the CLRA if a reasonable
9 consumer would attach importance to its existence. *Townsend*, 303 F.Supp.3d at 1029-30.
10 Because of this objective standard, courts have held that CLRA and related California
11 common law claims are “particularly suited for class treatment.” *See Brickman v. Fitbit*,
12 2017 WL 5569827 at *6 (N.D. Cal. Nov. 20, 2017). That said, Plaintiffs must still “point to
13 some type of common proof” establishing that the Label factors into consumers’
14 purchase decisions. *See Badella v. Deniro Marketing*, 2011 WL 5358400 at *9 (N.D. Cal. Nov.
15 4, 2011).

16 Here, Plaintiffs cite to “Made in USA laws,” which assertedly prove that “the
17 legislature has deemed that the practice constitutes a ‘material’ misrepresentation.”
18 (Reply at 10) (citing *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013); *Vizcarra*, 339
19 F.R.D at 548). Indeed, statutory and case law support the proposition that a reasonable
20 consumer would attach importance to the allegedly misleading statement at issue here.
21 *See, e.g., Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 329 (2011) (statutory and internal
22 case citations omitted); *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 682
23 (citing FTC guidance). Thus, unlike the cases cited by Defendants, individual questions
24 about the materiality of the 100% Manufactured in the USA label do not defeat
25 predominance. *Cf. Townsend*, 303 F.Supp.3d at 1044-45.

1 **3. Damages**

2 To show that common questions predominate over individual ones, Plaintiffs
3 must also show that “damages are capable of measurement on a classwide basis.” *Just*
4 *Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017) (quoting *Comcast v. Behrend*, 569 U.S.
5 27, 34 (2013)). Plaintiffs plan to establish classwide damages by using conjoint analysis to
6 calculate a price premium, as set forth in Weir’s report. Defendants argue that Weir’s
7 report should be excluded for the below reasons, and that the Court should, for the same
8 reasons, hold that Plaintiffs have not carried their burden to establish a method for
9 calculating classwide damages.

10 Defendants first argue that Weir lacks “specialized education, training, or
11 experience” in conducting the survey portion of conjoint analysis. Defendants list several
12 cases in which Weir appeared as an expert witness, but another expert conducted the
13 survey portion of the conjoint analysis. In a rebuttal declaration, Weir clarified that he did
14 design the survey portion of several conjoint analyses. (Dkt. 59-1 at ¶22). Further, Weir
15 reports he has completed graduate-level coursework on conjoint analysis. (Dkt. 39-56 at
16 ¶3). The Court finds that Weir has sufficient education and experience under Rule 702. *See*
17 *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014).

18 Defendants further argue that Weir’s conjoint analysis should be excluded because:
19 (1) it tests the entire Label (“Manufactured in the USA 100% American Family Owned”)
20 rather than the “Manufactured in the USA 100%” message alone, and (2) it fails to account
21 for supply-side factors.³

22 **a) Lack of Specificity**

23 Any price premium in Weir’s results is, according to Defendants, attributable to
24 the “Family Owned” statement and therefore not at issue in this suit. But unlike in
25

26 ³ Defendants also argue that Weir’s report does not account for those consumers who believe
27 “manufactured” means “blended and packaged” and therefore were not deceived by the label. For the
28 reasons discussed in section III.C.2, the Court disagrees.

1 *McMorrow v. Mondolez*, Plaintiffs seek damages related to the whole Label. (Complaint
2 ¶57; *see also* Dkt. 57-2 at 67:6-13 (opining that repeated references to “America” on
3 product packaging “screamed America”); Dennis Decl. (opining that the Label is an
4 express unqualified Made in USA Claim under federal law and FTC guidance relating to
5 “Made in USA” claims); Order re: MTD, Dkt. 22 (“Collectively, the representations
6 “America’s Classic”, “Manufactured in the USA,” “100%,” and “American Family
7 Owned” contribute to the alleged deceptive impression that the Products are
8 manufactured in the United States.”); *cf McMorrow v. Mondolez*, 2020 WL 1157191 (S.D.
9 Cal. March 9, 2020). Defendants, for their part, dispute that any component of the Label
10 influenced purchasers. (Opp. at 19) (“The labeling statements that refer to “American” or
11 “America” on the packaging of Bigelow tea, including “America’s Classic” and
12 “Manufactured in the USA,” had zero impact on purchasing interest.”). That Defendants’
13 expert disagrees with Weir on the impact of the Label on purchasing interest goes to the
14 weight of Weir’s testimony rather than its admissibility. *See Primiano v. Cook*, 598 F.3d
15 558, 565 (9th Cir. 2010).

16 **b) Supply-Side Factors**

17 Defendants additionally ask the Court to “follow the line of cases finding conjoint
18 analysis does not properly account for supply-side factors.” (Dkt. 64 at 5). Indeed, a few
19 District Court opinions have held that conjoint analysis did not appropriately estimate
20 class-wide damages “by looking only to consumer demand while ignoring supply.”
21 *Saavedra v. Eli Lilly & Co.*, No. 2:12-CV-9366-SVW, 2014 WL 7338930, at *5 (C.D. Cal. Dec.
22 18, 2014); *see also In re NJOY, Inc. Consumer Class Action Litig.*, No. 14-cv-428-JFW (JEMx),
23 2016 WL 787415 (C.D. Cal. Feb. 2, 2016); *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs.,*
24 *& Prod. Liab. Litig.*, 500 F. Supp. 3d 940, 949 (N.D. Cal. 2020); *In re Gen. Motors LLC Ignition*
25 *Switch Litig.*, 407 F. Supp. 3d 212, 238-39 (S.D.N.Y. 2019).

26 Plaintiffs distinguish the present case from Defendants’ proffered cases, and
27 Defendants do not rebut these distinctions. (*See* Dkt. 64 at 5:1-12). Indeed, the allegations
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1 and products at issue here resemble the “classic mislabeling case” in which conjoint
2 analysis “makes sense.” See *In re GM*, 407 F.Supp. at 238-39. Weir used actual historic
3 prices and quantities as the basis for his survey, thus sufficiently accounting for supply-
4 side factors. See *Hadley*, 324 F. Supp. 3d at 1105 (collecting cases supporting the
5 proposition that conjoint analysis is acceptable to calculate classwide damages “when (1)
6 the prices used in the surveys underlying the analyses reflect the actual market prices
7 that prevailed during the class period; and (2) the quantities used (or assumed) in the
8 statistical calculations reflect the actual quantities of products sold during the class
9 period”) (citations omitted). Thus, the Court declines to “wade into” the so-called
10 “debate” about whether conjoint analysis categorically fails to satisfy *Comcast* and instead
11 holds that the cases Defendants cite are distinguishable. To the extent that Defendants’
12 expert can challenge Plaintiffs’ price premium by showing that Defendants did not
13 charge more for products with the Label, that evidence goes to the weight of Weir’s
14 testimony rather than its admissibility. In sum, the Court finds that Weir’s report is
15 admissible and adequate, at the class certification stage, to show that damages are
16 capable of measurement on a class-wide basis.

17 4. Conclusion

18 For the forgoing reasons, the Court finds that common questions predominate
19 over individual ones. The class is bound by common questions, including: (1) whether
20 reasonable consumers would believe, based on the Label, that Defendants’ products were
21 100% manufactured and processed in the United States, and (2) whether Defendants’
22 products actually were 100% manufactured and processed in the United States.

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1 **IV. CONCLUSION**

2 For all the above reasons, the Court GRANTS Plaintiffs’ Motion for Class
3 Certification, modifying its definition to reflect the first ship-date:

4 All natural persons who purchased at least one 18/20 count box of Bigelow Earl Grey
5 Black Tea Caffeine, Green Tea Caffeine, Constant Comment Black Tea Caffeine, Green
6 Lemon Tea Caffeine, Vanilla Chai Black Tea Caffeine, English Tea Time Black Tea
7 Caffeine, Spiced Chai Black Tea Caffeine, French Vanilla Black Tea Caffeine, or Vanilla
8 Caramel Black Tea Caffeine, labeled as “Manufactured in the USA 100% American
9 Family Owned,” at a retail store in the state of California, at any time from October 17,
2017 to the present.

10 **IT IS SO ORDERED.**

11 Dated: July 31, 2023

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14 DEAN D. PREGERSON
15 UNITED STATES DISTRICT JUDGE
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