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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALEX KHASIN, individually and on behalf of all others similarly situated, Plaintiff, v. R.C. BIGELOW, INC., Defendant.	Case No.: 3:12-CV-02204-WHO **CLASS ACTION** **DEFENDANT R.C. BIGELOW, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION, FOR APPOINTMENT OF CLASS REPRESENTATIVE, AND FOR APPOINTMENT OF CLASS COUNSEL** Date: January 20, 2016 Time: 2:00 p.m. Dept.: Courtroom 2 Judge: Hon. William H. Orrick

Defendant R.C. Bigelow ("Defendant" or "Bigelow") submits the following opposition to Plaintiff's Motion for Class Certification ("Motion" or "Mot.," Dkt. 107).

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STATEMENT OF ISSUES TO BE DECIDED

Plaintiff's Motion raises the following issues:

1. **Class Representative Standing**. Does Plaintiff Alex Khasin have standing to represent a class of purchasers based on claims and theories (i) that he, as the class representative, has rejected and/or (ii) products he never purchased? Has Plaintiff shown that proposed class members incurred injury as a result of non-misleading labeling statements where he admits he received the exact product he expected and did not rely on (or even know of) the regulations under which the products were allegedly "misbranded?"

2. **Class Member Standing**. Has Plaintiff shown by a preponderance of the evidence that proposed class members incurred injury as a result of non-misleading labeling statements, where factors other than labeling statements drive purchasing decisions for a majority of purchasers, and where Bigelow does not price products based on their labeling?

3. **Ascertainability**. Has Plaintiff shown by a preponderance of the evidence that his proposed class is ascertainable, where no company records identify purchasers, how many products or which products each purchased, or which label iteration appeared on each purchased product, and where there is no showing that purchasers kept receipts?

4. **Typicality**. Has Plaintiff shown by a preponderance of the evidence that he is typical of the proposed class, where he incurred no injury as a result of the alleged conduct, is suing over products he did not purchase and statements on which he did not rely, and his reasons for purchasing the products vary from that of the putative class?

5. **Adequacy**. Has Plaintiff shown by a preponderance of the evidence that he is an adequate class representative, where he does not know what products or labeling statements are at issue in his lawsuit, and his only understanding about the alleged "illegality" of Bigelow's labels come from his conversations with his attorneys?

6. **Rule 23(b)(3) Commonality and Predominance as to Liability**. Has Plaintiff shown by a preponderance of the evidence that he can prove his claims by common evidence and that common questions predominate where (i) the labels were different throughout the class

period, (ii) his theories of materiality and deception raise individual issues, (iii) his theory of "misbranding" raises individual issues, and (iv) consumer survey evidence refutes a finding of materiality or deception?

7. **Rule 23(b)(3) Commonality and Predominance as to Damages**. Has Plaintiff shown by a preponderance of the evidence that damages can be proven on a class-wide basis, when he offers no feasible damages model that can avoid individualized assessments, and where the evidence shows no one paid a premium as a result of the labeling statements at issue?

8. **Rule 23(b)(2) Class**. Has Plaintiff shown by a preponderance of the evidence that his purported "injunctive relief" class can be certified where his monetary damages claims are not merely incidental to his injunctive relief remedy, where the products he challenges no longer use the labeling statements at issue, and where Plaintiff testified that he will not buy Bigelow products again and could never show future deception?

9. **Uncertainty in Class Certification**. Has Plaintiff addressed this Court's concerns about and risks of maintaining class certification, as stated in *Larsen v. Trader Joe's Co.*, 2014 U.S. Dist. LEXIS 95538 (N.D. Cal. July 11, 2014) (Orrick, J.), where the Court held: "In particular, recent decisions have made class certification in food labeling cases an uncertainty." (Citing *Sethavanish*, *Astiana*, and *Mazza*, cited herein.)

10. **Illegality of Bigelow's Labeling Statements**. Has Plaintiff shown, through expert or other evidence, that Bigelow's two challenged labeling statements – *Healthy Antioxidants* and *Packed Powerful Antioxidants* – are even unlawful or a violation of FDA regulations, for Plaintiff to argue that some elements of his claims are presumed?

I. INTRODUCTION

In the middle of 2012, a steadfast group of plaintiffs' attorneys set its sights on a new wave of litigation, challenging not the tobacco industry or the chemical companies like the consumer attorney groups before it, but rather U.S. food manufacturers. Its targets run the gamut, from baby food makers like Gerber to packaged food super-giants like ConAgra and Nestle. Here, class representative Alex Khasin, by and through that group of attorneys, has attacked the Fairfield, Connecticut family-owned tea company R.C. Bigelow.[1]

Now, after years of litigation, Plaintiff seeks to certify a class action over all of Bigelow's green tea products. Class counsel says this case is "tailor-made" for class certification, because all labels are misbranded with the "same labels, packaging, and sizes." Mot., 1:6, 8:28. Not so. For seven standalone reasons, this case is "tailor-made" for defeating class certification:

- **No Ascertainability**: The large number of products at issue, label variations, and changes to product labels during the class period make ascertaining class members impossible. Self-identification of class members lacks reliability.
- **No Administrative Feasibility**: Class members are not ascertainable because there exists no verifiable, objective proof of purchase, and Bigelow have records that would identify individual purchasers and their purchases.
- **Class Over-Inclusive**: Plaintiffs' proposed class impermissibly includes consumers that did not see or rely on the antioxidant statements at issue or purchased the tea for other reasons.
- **No Classwide Proof of Materiality and Reliance**: Plaintiff failed to show that materiality and reliance on the antioxidant statements can be subject to common proof on a classwide basis as required for his UCL, FAL and UCL claims, and in fact, Bigelow conducted a survey which conclusively establishes that the subject statements have no material impact on purchasing decisions.
- **Plaintiff's Manufactured Claims Not Typical**: Plaintiff's claims are not typical of the class he seeks to represent, as he never purchased most of the products at issue, never bought or even saw the redesigned labels, which changed or removed the challenged statements, and unlike Plaintiff, most if not all potential class members viewed the statements as immaterial and purchased Bigelow's products for reasons *other than* the antioxidant statements.
- **No Accepted Damages Model**: Plaintiff failed to present a damages model consistent with his theory of liability in his Complaint, which is restitution

[1] Since its founding in 1945 by Ruth Campbell Bigelow, who developed the first recipe for *Constant Comment* in her family's kitchen, Bigelow has produced high-quality teas. Now in its third generation of family leadership, Bigelow maintains Grandma Ruth's commitment to happy employees, satisfied customers, and strong business practices. McCraw Decl., ¶ 3.

based on the price premium attributable to the challenged label statement, and instead attempts to certify a class based on the oft-rejected full refund model.

- **No Standing for Injunction**: Plaintiff lacks standing to seek injunctive relief where he has stopped buying Bigelow products, and since then, antioxidant statements have changed or been removed from tea products.

Denying class certification would put this Court in good company. In other food labeling cases, judges in the Northern District offer ample support for denying Plaintiff's Motion:

- ***Kosta v. Del Monte***: Class certification denied on Rule 23(a) threshold grounds, finding no common questions, no typicality of class representative, and no ascertainability, all evident here. (Gonzalez-Rogers, J.)
- ***Jones v. ConAgra***: Class certification denied because the class was not ascertainable, lacked common questions, was not manageable, and the plaintiff lacked standing, as here. (Breyer, J.))
- ***Bruton v. Gerber***: Certification denied on ascertainability grounds. (Koh, J.)
- ***Werdebaugh v. Blue Diamond***: Class decertified for lacking common, classwide damages, both issues present here. (Koh, J.)
- ***Major v. Ocean Spray***: Class certification denied due to products (as here) that plaintiff did not buy. (Davila, J.)
- ***Lanovaz v. Twinings***: Damages class rejected based on class counsel's flawed damages models. (Whyte, J.)
- ***Ogden v. Bumble Bee***: Class stripped of monetary relief. (Koh, J.)

All those same flaws are here, and then some. The Court should deny Plaintiff's Motion.

II. LEGAL STANDARD

A. The Burden Rests on Plaintiff to Show His Claims Warrant the Strict Standards Required for a Class Action to Proceed

"Before certifying a class, the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (citations omitted).[2] That analysis can "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011). The moving party bears the burden of affirmatively demonstrating that class certification is appropriate. *Wal-Mart*, 131 S. Ct. at 2551.

[2] The *Mazza* court outlines the four prerequisites under Rule 23(a), which are "numerosity, commonality, typicality, and adequacy."

A class action is an extraordinary "exception" to default individual lawsuits, and to depart from the default, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *East Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 (1977) (citations omitted). Plaintiff must do more than identify common questions; he must show that litigation will produce a classwide answer. *Wal-Mart* at 2551.

Plaintiff must meet all the threshold requirements of Rule 23(a), show that his class is ascertainable, and then must satisfy at least one of the prongs of Rule 23(b), based on the nature of the class he seeks to certify. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 394 (2010). An injunctive class under Rule 23(b)(2) is proper when damages claims are incidental and future deception is shown. Courts may certify a Rule 23(b)(3) damages class if there is "evidentiary proof" showing a classwide method of awarding relief that is consistent with the plaintiff's theory of liability. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

B. To Certify Either Class, Plaintiff Must Meet the "Reasonable Consumer" Standard Applicable to His State Law Claims

Plaintiff's state law UCL, FAL, and CLRA claims are subject to a "reasonable consumer" standard, which requires Plaintiff to show that a "reasonable consumer" is likely to be deceived by the business practice or advertising at issue. *See Williams v. Gerber Prods.*, 552 F.3d 934, 938 (9th Cir. 2008); *Kasky v. Nike Inc.*, 27 Cal. 4th 939, 951 (2002). Materiality and reliance are analyzed under this standard, not the subjective understanding of individual plaintiffs. *See Benson v. Kwikset Corp.*, 152 Cal.App.4th 1254, 1274 (2007) (courts "must view the labeling from the perspective of those consumers for whom the [challenged] designation is important"). A "representation is 'material' ... if a reasonable consumer would attach importance to it […] in determining his choice of action.'" *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013), as amended on denial of reh'g and reh'g en banc (July 8, 2013) (quoting *Kwikset Corp. v. Sup. Ct.*, 51 Cal. 4th 310, 333 (2011) and Restatement 2d Torts, § 538 (2)(b)).

III. THE COURT SHOULD DENY CERTIFICATION

A. Plaintiff's Self-Defined Class Includes All Purchasers of Bigelow's Entire Green Tea Line from 2008 to Present

1. Plaintiff Challenges *All* Green Tea Products

Plaintiff defines his class as "all purchasers" of the so-called "Misbranded Food Products," defined by Plaintiff as **"all green tea products."** *See* Fourth Amended Complaint ("Complaint," Dkt. 104), 3:12-15. He lists 12 green tea products in the Complaint (¶ 4), but says the list is not inclusive, stating that "*at least* the following green tea products" are part of the class, along with "all [unlisted] green tea products." *Id*. at 2:23-3:16 (emphasis added). Plaintiff reiterates that "[s]imilar unlawful statements appear on all Bigelow Green tea products." *Id*. at 21:6-8. The Complaint continues to remind us of the defined class: "Defendant's Misbranded Food Products, ***i.e.*, all green teas**, are substantially similar." *Id*. at 32:14-18; Mot., 8:27. Plaintiff purchased three green tea products: Green Tea, Green Tea with Lemon, and Green Tea Naturally Decaffeinated. Complaint, ¶ 111; Declaration of Timothy K. Branson ("Branson Decl."), Exh. 1, excerpts of Deposition of Alex Khasin ("Depo.") at 55:12-14; Mot., 7:3-5.

Plaintiff's Complaint conveniently shows images of the front labels of just 12 green tea products. Dkt. 104-1. These hard-to-read images purportedly depict Bigelow's former label design with the phrase "*Healthy Antioxidants*" in a dark, italicized font on the front panel. Yet Bigelow makes not 12, but at least **35 varieties** of green tea, all of which are included in Plaintiff's class definition. *See* McCraw Decl., ¶ 6, Exh. 2 (listing the many varieties of green tea products Bigelow produces). *Many* of these products have labels entirely different from those hand-selected by Plaintiff. *Id*. at ¶ 7; Exh. 2. Likewise, Plaintiff refuses to show the Court the back panel of the labels, where the second labeling statement at issue, "packed powerful antioxidants," appears on some, but again not all, of Bigelow's green tea products. *Id*.

2. Plaintiff's Class Includes Two Distinct Labeling Versions for All Green Tea Products, and Many Lack the Challenged Statements

Plaintiff defines his class as "all persons in California who, **since May 2, 2008 to the present (the "Class Period")**, purchased Defendant's Green tea products [...]." Complaint, 1:24-26. Yet **in 2013, during the defined "Class Period," Bigelow redesigned every one of its green tea labels.** McCraw Decl., ¶¶ 8-9, Exhs. 3-4.[3] Plaintiff admits that he stopped purchasing

[3] The 2013 redesigned labels differ critically from the old designs. McCraw Decl., ¶¶ 7-10. On

Bigelow's green teas in 2012, and thus never purchased or relied upon any products with the redesigned labels. Depo., 78:15-79:4. Plaintiff had no knowledge of any changes to Bigelow's green tea labels (*id*. at 78:8-12) and had never seen them before his deposition. *Id*. at 78:21-22 (Green Tea), 90:25-91:2 (Green Naturally Decaffeinated), 93:12-21 (Green with Lemon).

Plaintiff alleges that the challenged products are "substantially similar," notwithstanding the fact that the *very different* product labels were produced through discovery. Mot., 8:27; Complaint, 32:14-18. Those labels show that there are significant variations in the labels across Bigelow's green tea varieties. *Compare* Mot., 8:27-9:2; McCraw Decl., ¶¶ 7-10 (identifying that some green tea products have *never* had an antioxidant statement on the back label). Objective evidence shows that the class includes purchasers of products with entirely different labels from the ones Plaintiff bought, and that all the labels were redesigned during the Class Period.

B. Plaintiff Lacks Standing to Represent a Class Action Premised on Products He Did Not Purchase or Claims He Has Abandoned

Rule 23(a)(2) is satisfied only if Plaintiff proves that he "suffer[ed] the same injury as the class members." *Wal-Mart*, 131 S. Ct. at 2550-51. This requires more than allegations that the class "suffered a violation of the same provision of law." *Id*. The class representative must be a member of the class he seeks to represent. *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1067-68 (9th Cir. 2014) ("class certification of UCL claims is available only to those class members who were actually exposed to the business practices at issue.").[4] Since Plaintiff never saw, relied upon, or bought products with the redesigned label, he lacks standing.

First, Plaintiff has abandoned many of his claims, through his sworn testimony that he did not find a particular label misleading or did not rely upon it in making his purchase. This Court has held that the plaintiff lacked standing where her testimony contradicted the complaint about certain label statements being misleading. *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB,

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the products once depicting "*Healthy Antioxidants*" on the front of the label, the statement still appears but is much less noticeable, with a different font type, size, color, and location. *Id*. at ¶ 9. "*Packed powerful antioxidants*" **does not appear on any** of the new labels. *Id*. at ¶ 10.

[4] Plaintiff suffered no economic injury because he received exactly what he expected. Depo., 107:2-13. Plaintiff received value from Bigelow's products, liked their taste and quality, and enjoyed them up until class counsel told him about an opportunity to be involved in this lawsuit. *Id*.; *see Lee v. Toyota Motor Sales, U.S.A.*, 992 F. Supp. 2d 962, 972 (C.D. Cal. 2014).

2014 U.S. Dist. LEXIS 81292 (N.D. Cal. June 13, 2014). Plaintiff cannot certify a class as to labeling that he did not find misleading or rely upon. *See id*. at *16-18. Plaintiff testified that he did not buy Bigelow products because of the "*packed powerful antioxidants*" statement on the back label.[5] While he ***currently*** believes that statement is misleading, it is only because of what his attorney told him (Depo., 75:19-76:3), and concedes that he would have purchased those same products even if it the label did not include those statements[6]

Second, Plaintiff lacks standing to represent purchasers of products he did not purchase and labels he never saw or relied upon. Plaintiff purchased just three Green Tea varieties, bearing only the older label designs and none of the redesigned labels. The rest of Bigelow's green teas escaped Bigelow's motions to dismiss because Plaintiff alleged they were "substantially similar," an inquiry based only on the allegations. *See* Dkt. 62, Order Granting in Part Bigelow's Motion to Dismiss FAC (May 31, 2013).[7]

This implicates both standing and typicality. Judge Davila held "the typicality requirement has not been met" where "Plaintiff's proposed classes ... encompass products that she herself did not purchase." *Major v. Ocean Spray Cranberries, Inc.*, No. 5:12-CV-03067 EJD, 2013 U.S. Dist. LEXIS 81394, *11 (N.D. Cal. June 10, 2013); *see also Lewis Tree Serv., Inc. v. Lucent Techs. Inc.*, 211 F.R.D. 228, 234 (S.D.N.Y. 2002) (no typicality where plaintiff bought two of 60 products). Forcing Bigelow to defend phantom claims with no real adversary – and one to cross-examine – violates its due process rights. *Cf. Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 35 (May 29, 2014). Finally, Plaintiff cannot adequately represent a class of post-2012 purchasers allegedly misled by the redesigned labels which Plaintiff never even saw. *See*

[5] *See* Depo., 76:4-77:5; *cf id*. at 108:25-109:23 (changing his testimony when questioned by class counsel, affirming that he read the back label prior to purchase).

[6] Plaintiff testified that he would have bought Bigelow products even without "*Healthy Antioxidants*" on the front label (Depo., 70:25-71:60, 89:6-21) or "*packed powerful antioxidants*" on the back label (*id*. at 76:15-77:5, 89:11-21).

[7] In that Order, Judge White dismissed claims challenging Bigelow's *black* tea products because the statement "*delivers healthful antioxidants*," appearing on certain black tea labels, differed too significantly from "*Healthy Antioxidants*" and "*packed powerful antioxidants.*" Khasin lacked standing. *Id*. at *10-11. *See also Kosta v. Del Monte Corp.*, 2013 U.S. Dist. LEXIS 69319, *51 (N.D. Cal. May 15, 2013) (on motion to dismiss, holding that "concerns regarding the differences among products at issue are better resolved at the class certification stage.")

Berger, 741 F.3d at 68 (reiterating that "class certification of UCL claims is available only to those class members who were actually exposed to the business practices at issue.")

C. Plaintiff's Proposed Class is Not Ascertainable Under Rule 23(a)

Perhaps the most glaring shortcoming in Plaintiff's Motion is its failure to spend more than a mere *16 lines* of argument on the required element of ascertainability. Mot., 10:16-11:5. "[T]he party seeking certification must demonstrate that an identifiable and ascertainable class exists." *Xavier v. Philip Morris USA*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011) (Alsup, J.). Class members must be identifiable by objective criteria "without extensive and individualized fact-finding or mini-trials." *Id.*; *Carrera v. Bayer Corp.*, 727 F.3d 300, 303-04 (3d Cir. 2013).

Plaintiff concedes that he must prove ascertainability by showing objective criteria. Mot., 10:16-17. Yet he makes no effort to distinguish, or even cite, the highly-relevant Northern District cases where class certification was denied because, among other reasons, the **class was not ascertainable**. These include *Kosta v. Del Monte Foods, Inc.*, 308 F.R.D. 217, 227-28 (N.D. Cal. 2015) (Gonzalez-Rogers, J.); *Jones*, 2014 U.S. Dist. LEXIS 81292 (Breyer, J.); *Bruton v. Gerber Prods.*, 2014 U.S. Dist. LEXIS 86581 (N.D. Cal. June 23, 2014) (Koh, J.); *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 U.S. Dist. LEXIS 18600 (N.D. Cal. Feb. 13, 2014) (Conti, J.), and *In re Clorox Consumer Litig.*, 301 F.R.D. 436 (N.D. Cal. 2014) (Conti, J.).[8]

Plaintiff fails to propose any method – much less an administratively-feasible method – to identify class members. *Carrera*, 727 F.3d at 307 ("Administrative feasibility means that

[8] Plaintiff "concludes" that his class is sufficiently definite. *Id.* Without addressing the blatant factual distinctions, Plaintiff cites to two decisions in *Brazil v. Dole* where ascertainability was met (but damages class not certified). *Brazil v. Dole Packaged Foods, LLC*, No.: 12-CV-01831-LHK, 2014 U.S. Dist. LEXIS 74234, *20 (N.D. Cal. May 30, 2014) (ascertainability established because, unlike here, the products "bore the same alleged misstatements"); 2014 U.S. Dist. LEXIS 157575, *45-48 (N.D. Cal. Nov. 6, 2014) (although Dole changed its labels in 2008, ascertainability met because the plaintiff agreed that the class period could begin in 2009, unlike here where the redesign occurred in 2013, making the label change unfeasible to reconcile). In her second *Brazil* opinion, Judge Koh distinguished Dole's 2008 label change from *Bruton*, where class members would have to recall, as here, "whether the product was labeled with a challenged label statement" along with flavor and packaging. *Brazil* at *47-48. Judge Koh distinguished *Jones* on the basis that, unlike in *Brazil* (and here), "class members there would have had to remember whether they purchased the challenged products and whether those products contained the allegedly misleading label statement." *Brazil* at *48. Judge Koh's opinions in *Brazil* distinguish *Bruton* and *Jones* on the **very same facts** at issue here.

identifying class members is a manageable process that does not require much, if any, individual factual inquiry."). A class definition must be (i) **clearly defined** and (ii) **objectively ascertainable**, *i.e.*, Plaintiff must establish some mechanism to accurately determine class members, apart from self-identification. *Id.* at 305. **Objective, collective evidence** must establish who meets the class definition, and every Court of Appeal will refuse to certify classes where class members must self-identify their class membership without objective evidence.[9]

1. Plaintiff Cannot Prove His Own Purchases

Plaintiff exemplifies these self-identification and due process issues, serving as an unsolicited case study for why ascertainability is required before a class can proceed. *See Carrera*, 727 F.3d at 307. Ascertainability is particularly important in cases going back several years (like here, since 2008), where different labels are involved, and where there are no purchase receipts. Ascertainability also serves to avoid individualized factual inquiries and ensures that identifying class members is "a manageable process." *Id.*

Plaintiff has no receipts, credit card statements, canceled checks, or other documents to show that he ever purchased any of Bigelow's green tea products, much less (i) where he bought them; (ii) how often, and (iii) at what price. Depo., 21:1-5, 23:4-14.[10] Asked whether he was ever able to find any receipts from any purchase of Bigelow products, Plaintiff responded, "No," that despite searching, he had no proof of purchase. *Id.* at 23:4-9.[11] Furthermore, there is no evidence to parse out purchases of some products versus others, or whether or not the redesigned labels had been rolled-out to that retailer at the time of purchase.[12]

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[9] Ascertainability is an "axiomatic" rule. *See* Moore's Federal Practice § 23.21 (3d ed. 2012) (every one of the numbered Courts of Appeal endorses ascertainability requirement).

[10] In finding no ascertainability, Judge Gonzalez-Rogers stated, "[T]he Court **declines Plaintiffs' suggestion to simply narrow the class definition** to account for the labeling discrepancies, since that would not solve the problem of class members having to engage in a complicated memory test to establish class membership." *Kosta*, *supra* at 229 (emphasis added). Bigelow asks that the Court hold similarly should Plaintiff make such a plea.

[11] Verifiable proof of purchase is essential to a named plaintiff's claim because a defendant "has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera*, 727 F.3d at 307 (rejecting customer affidavits to show class membership as unreliable).

[12] Plaintiff's own confusion highlights these issues; Plaintiff even testified that the labeling statement, "*delivers healthful antioxidants*," which appears *only* on certain *black* tea products

Plaintiff testified that he had purchased other Bigelow products, including Constant Comment and Earl Grey, black teas that are subject to the claims in the related *Victor* lawsuit. Depo., 21:21-23, 55:12-18; *Victor v. R.C. Bigelow*, 3:13-CV-02976-WHO. Yet Plaintiff does not know whether Constant Comment contained the same labeling statements (it does not) or whether his lawsuit challenged Constant Comment (it does not). *Id*. at 54:14-20; 87:11-22; 107:15-18 (testifying that while he is unsure whether Constant Comment is part of his claims, that he "think[s] that's a different type of label").

2. Plaintiff Cannot Ascertain Which Products Class Members Purchased

Courts in food misbranding cases deny certification where, as here, the defendant is a wholesale manufacturer with no records to identify consumer purchases and no other objective and administratively-feasible criteria exist to determine class membership. *Carrera*, 727 F.3d at 303-04. As Judge Breyer said of class counsel's claims challenging Hunt's canned diced tomatoes, "it is hard to imagine that [class members] would be able to remember which particular Hunt's products they purchased from 2008 to the present, and whether those products bore the challenged statements." *Jones*, 2014 U.S. Dist. LEXIS 81292 at *35 (citing *Xavier*, 787 F. Supp. 2d at 1089).[13] In *Kosta*, the Court held that the plaintiff failed to satisfy ascertainability when the labels and packaging were different, and "that variability is compounded over the course of the class period […] making it difficult for a purchaser to recall which particular product, with which packaging and labeling, they purchased." *Kosta*, 308 F.R.D. at 228-29. Likewise, "where purported class members purchase an inexpensive product for a variety of reasons, and are unlikely to retain receipts or other transaction records, class actions may present such daunting administrative challenges that class treatment is not feasible." *In re POM*

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and never on green tea packaging, is part of his claims. Depo., 109:14-20; *see also* Khasin Decl., Dkt. 105-2 at ¶¶ 3-4 (declaring that the ***black tea*** labeling statement, "*delivers healthful antioxidants*," was a "major factor" in his decision to buy ***green tea*** products).

[13] *Accord Algarin v. Maybelline, LLC*, 2014 U.S. Dist. LEXIS 65173, *23 (S.D. Cal. May 12, 2014) (self-identification is *sufficient* "where consumers are likely to retain receipts"); *Red v. Kraft Foods, Inc.*, 2012 U.S. Dist. LEXIS 186948, *16 (C.D. Cal. Apr. 12, 2012); *Sethavanish*, 2014 U.S. Dist. LEXIS 18600 at *16-17 ("Court finds the reasoning of *Carrera* and *Xavier* more persuasive"); *Hodes v. Van's Int'l Foods*, 2009 U.S. Dist. LEXIS 72193, *11 (C.D. Cal. July 23, 2009) (concerns about "how Plaintiffs will identify each class member and prove which brand of Van's frozen waffles each member purchased, in what quantity, and for what purpose").

Wonderful LLC, 2014 U.S. Dist. LEXIS 40415, *23 (C.D. Cal. Mar. 25, 2014)

Here, like so many other failed ascertainability cases, no Bigelow records exist to identify all individual purchasers, how much they bought, or which products they bought. McCraw Decl., ¶¶ 11-15. The Court could deny certification for this reason alone. Self-identification of purchasers is an inadequate method of ascertaining class members. *Karhu v. Vital Pharma., Inc.*, 2015 U.S. App. LEXIS 9576 (11th Cir. June 9, 2015) (self-identification of would-be class members seeking some financial benefit does not fit the requirement of objective, collective evidence). Self-identification is unreliable and raises due process issues that, absent "case-specific and demonstrably reliable" screening methods, are fatal to ascertainability. *Id*. at *3-5.

This case illustrates those very issues. Objective data must verify actual purchases, a key to class membership. There must be some verifiable proof of quantities bought and prices paid, because those facts are the basis of Plaintiff's proposed remedies. Plaintiff can't rely on Bigelow's data, which sells 99 percent of its teas to distributors and wholesalers and has no record of whom bought at retail. McCraw Decl., ¶¶ 12-13; *see Karhu,* 2015 U.S. App. LEXIS 9576 at *6-7 ("cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records.") Plaintiff offers no solution to these issues. *See Martin v. Pac. Parking Sys. Inc.*, 583 F. App'x 803, 804 (9th Cir. 2014) cert. denied, 135 S. Ct. 962 (2015) (no ascertainability where plaintiff offered no plan for reliably identifying class members).

Instead, Plaintiff falsely implies that because "[o]nly those consumers who purchased Defendant's products whose labels bore the challenged statements are included," the class definition is "sufficiently definite" to identify members. Mot., 11:1-5. This questions what evidence will be used to distinguish between who purchased and who did not, when they purchased, and which labels were on the products; it does not speak to administrative feasibility at all. *See Carrera*, 727 F.3d at 306 ("A plaintiff may not merely propose a method of ascertaining a class without any evidentiary support that the method will be successful."). This shortcoming is fatal to class certification.[14]

[14] *See Sethavanish*, 2014 U.S. Dist. LEXIS 18600 at *17-18 (holding that it was "unclear" how

3. Changes in Product Labels Destroy Ascertainability

There is no objective evidence, or administratively-feasible way, to connect California residents to purchases of Bigelow's products to the challenged products with the challenged labeling statements. This failure is exacerbated by Bigelow's label redesign in 2013, during the Class Period. Plaintiff's Motion is based on a faulty premise, that all of Bigelow's green tea products "bear[] the same unlawful statements." Mot., 11:17-19. In fact, the labels varied substantially, not only as between one tea flavor to another, but also as between the new and old designs. Judges Koh and Breyer denied class certification in two of class counsels' other food misbranding cases because label changes during the class period made it impossible to determine by "objective" means who (if anyone) was injured. *Bruton*, 2014 U.S. Dist. LEXIS 86581 at *24-30 (N.D. Cal. June 23, 2014); *Jones*, 2014 U.S. Dist. LEXIS 81292 at *35-38.

Bigelow's 2013 labeling changes hinder Plaintiff's ability to prove ascertainability, yet he fails to address these issues in his Motion. As addressed *supra*, at III(A), the "*packed powerful antioxidants*" statement was not retained in the redesign on all labels which it earlier appeared. McCraw Decl., ¶¶ 8-9. "*Healthy Antioxidants*" got a makeover, and after the redesign was less prominent, with a substantially different font type, size, color, visibility, and location. *Id.*; *see* fn. 3, *supra*. Bigelow rolled out its newly-designed labels gradually, and has no way of knowing which retailers continued to keep inventory of the old labels and when they began selling the redesigned labels. *Id*. Indeed, Plaintiff agreed in his deposition that the labels were different, but had never seen the redesigned versions prior to that day. Depo., 78:8-22, 90:25-91:2, 93:12-21.

Bigelow's 2013 removal of "*packed powerful antioxidants*" is important. **No consumer of the redesigned products could be deceived** as Plaintiff alleges, because that statement no longer appears. McCraw Decl., ¶¶ 8-9. The design and placement changes to the "*Healthy Antioxidants*" are equally important. *See Bruton*, 2014 U.S. Dist. LEXIS 86581 at *27 (no

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plaintiff intended to determine the specific products and quantities bought by each class member and "how Plaintiff intends to weed out inaccurate or fraudulent claims."); *In re POM Wonderful LLC*, 2014 U.S. Dist. LEXIS 40415, *23 (C.D. Cal. Mar. 25, 2014) (class of retail buyers not ascertainable); *Hodes v. Van's Int'l. Foods*, 2009 U.S. Dist. LEXIS 72193, *11 (C.D. Cal. July 23, 2009) (certification denied where no plan for "how Plaintiffs will identify each class member and prove which brand […] each member purchased, in what quantity, and for what purpose").

ascertainability where "some statements printed on the labels were moved from the front of the package to less prominent places"). The statement on the original labels is more noticeable; on the redesigned product, it is more obscure. McCraw Decl., ¶¶ 8-9. It is possible that absent class members never even saw that statement on the new labels, did not rely on it, or did not believe it was material to their purchasing decision. The consumer survey of Bigelow's expert, Dr. David W. Stewart, assessed whether respondents would likely purchase the product upon reviewing the old label ("Green Label 1") and also the redesigned label ("Green Label 2"). Declaration of David W. Stewart. ¶¶ 15-16, Appendix D. The results show that consumer perception differed upon viewing the old label versus the new design, showing a need for individual inquiries. *Id.*[15]

For this lawsuit to move forward, class members would have to pass memory test to ascertain whether they purchased Bigelow teas featuring the old or redesigned label, what statements they relied upon from each label type, and whether or not they suffered the same strained and manufactured injury as Plaintiff alleges.

4. Even if Plaintiff Could Identify Purchasers, There is No Ascertainable Class Because the Class Would Include People Who Were Never Injured, Who Did Not Rely, or Were Not Misled

Because the class is defined as "all purchasers" of Bigelow's green tea products, it must include people who did not see or rely on the alleged misrepresentations, or were not misled. Even Plaintiff's own testimony shows that his claims were largely manufactured by class counsel.[16] Purchasers who did not read or rely upon the statements could not have been injured. For this reason, courts regularly find that overbroad classes of *all buyers* or *all purchasers* are not ascertainable and lack common questions.[17]

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[15] 2.5 percent of respondents said they "definitely would not" purchase the green tea with the redesigned label, while 4.2 percent of respondents said they "definitely would not" purchase the product with the original label. The changed label garnered different perceptions. *Id.*

[16] Plaintiff first testified that he did not read or rely upon "*packed powerful antioxidants*" on the back label prior to purchase (Depo., 76:4-77:5), but then changed his tune when questioned by his attorney (*id.* at 108:25-109:23). *See also* Depo., 66:21-67:12 (only knowing about labeling regulations based on what counsel told him in 2012); 73:2-16 (only now believing that "*Healthy Antioxidants"* is false and misleading based on what counsel told him; 75:19-76:3 (only now believing that the back label panel is false and misleading based on what counsel told him).

[17] *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (class of *all purchasers* was unascertainable, and "could include millions who were not deceived and thus have no grievance"); *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) (class of *all*

It is implausible for Plaintiff, or any consumer, to feign injury from the statement "*Healthy Antioxidants*" on a tea label, especially when the statement is plainly true: the product contains antioxidants and *is* healthy. The class would improperly, though unavoidably, includes consumers who consider Bigelow's teas to be "healthy" (which is true) and those who believe Bigelow's teas contain antioxidants (also true).[18] Consumers, including Plaintiff (shown through his own testimony, at 66:6-16), take nothing of the FDA's nutrient daily value labeling standards and would not know what disclaimers are missing or appropriate.

The class would also improperly include consumers for whom health and antioxidant content was not a purchasing factor, those who did not read or rely upon the two labeling statements at issue (just like Plaintiff Khasin), and those who were not misled. None of these categories of consumers are legitimate class members, yet they all would be improperly included, and Plaintiff has no way of excising them from the class.

D. Plaintiff Cannot Meet the Remaining Threshold Requirements of Rule 23 to Maintain His Class Action

In order to certify a class action, Plaintiff bears the burden of proof to show *all* of Rule 23(a)'s threshold requirements, including ascertainability. Failure to satisfy any one of these requirements is fatal to Plaintiff's bid for class certification, even before analyzing whether Plaintiff satisfies Rule 23(b)'s class types or state law standards (which he does not).

1. The Proposed Class May Not Be Certified Because There is No Commonality and Individual Issues Predominate

Plaintiff cannot certify a class action under the threshold requirements of Rule 23(a)(2) because individual questions predominate over common questions. First, individual issues

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purchasers improperly included "individuals who either did not see or were not deceived … [and] suffered no damages"); *Diacakis v. Comcast Corp.*, 2013 U.S. Dist. LEXIS 64523, *12 (N.D. Cal. May 3, 2012) (class improperly included *all buyers* regardless of whether deceived); *Moheb v. Nutramax Labs. Inc.*, 2012 U.S. Dist. LEXIS 167330, *7 (C.D. Cal. Sept. 4, 2012) (class of *all buyers* improperly included those "who derived benefit … and are satisfied users").

[18] Bigelow's zero-calorie teas offer tremendous health benefits, as recognized by numerous peer-reviewed scientific journals. McCraw Decl., ¶ 4, Exh. 1. Further, the teas with those labeling statements *do* contain antioxidants. *Id*. at ¶ 5. Class counsel challenges the lack of a disclaimer about the daily value of antioxidants. Complaint, ¶¶ 38-108. Yet Plaintiff has no independent understanding of daily value guidelines or FDA regulations. Depo., 66:6-16.

predominate because the labels are different, defeating commonality. Not all class members bought Bigelow products bearing the same labels. *See Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022-23 (9th Cir. 2011). Second, the labeling statements are not material or deceptive, also defeating commonality. There is no method of classwide proof to show a reasonable consumer finds the challenged statements deceptive or material to purchasing decisions.

a. Individual Issues Predominate Because the Labels Are Different, Which Defeats Commonality

In the same way that the different labels defeat Plaintiff's showing of ascertainability and typicality, the label variations also pose individual questions. There is no classwide, common question when class members read, relied upon, or purchased various labels and packages. *See supra*, III(C)(2-3) (outlining the label differences and their affect on Plaintiff's claims).

b. Individual Issues Predominate Because the Labeling Statements are Not Material or Deceptive to Most Consumers

The Court will have to probe each person's understanding of Bigelow's labeling statements, and in doing so will find that the statements were not material and did not deceive most consumers. Plaintiff cannot show that consumers are influenced by "*packed powerful antioxidants*" and "*healthy antioxidants*," and fails to "offer some means of proving materiality and reliance by a reasonable consumer on a classwide basis in order to certify a class." *See Kosta*, 308 F.R.D. at 225. Plaintiff's only evidence of materiality is his self-serving declaration, in which he offers what one individual (himself) allegedly perceived to be material, albeit only after coaching from his attorney.[19] He then argues that "a reasonable consumer would attach

[19] His declaration claims that the antioxidant statements "were a major factor in [his] decision to buy Bigelow green tea." *See* Mot., Exh. 1 at ¶ 3. Aside from the obvious flaw that a single declaration is not proof of "common evidence as to what consumers perceived" to be material, it lacks credibility. Plaintiff testified that he was a consumer of Bigelow green tea since 1996. Depo., 57:1-3. Here's the rub: Bigelow did not put the challenged statements on its labels until 2004. *See* Branson Decl., ¶ 3, Exh. 2 (Response to Interrogatory No. 2). Plaintiff purchased Bigelow's teas for *eight years* before he ever saw the offending labels. It is thus impossible that the alleged mislabeling was a factor in his decision to first purchase. Also affecting his credibility, Plaintiff says he stopped buying Bigelow's products because of the alleged mislabeling, and now buys Twinings tea instead. Depo., 39:3-4; Dkt. 105-2, ¶ 4. But Twinings also promotes antioxidants on its labels, is the target of another of class counsel's lawsuits. (*Lanovaz v. Twinings*, No. 12-cv-02646-RMW.)

significance to the challenged label statement" and cites to three separate attorney declarations that say nothing of the sort. Mot., Exh. 1 at 14:20.

In *Jones*, Judge Breyer found class counsel's same conclusory statement insufficient: "Plaintiffs' materiality argument – that '[u]ndoubtedly, a reasonable consumer would attach significance to the challenged label statements' ... is rather weak." *Jones*, 2014 U.S. Dist. LEXIS 81292 at *56-58. At least in *Jones*, class counsel relied upon a declaration by a materiality expert. Here, Plaintiff does not even do that.[20] Instead of offering any evidence of materiality or reliance, class counsel simply alleges that "[t]he challenged label statements are undoubtedly material." Mot., 20:24-25. But attorney rhetoric is not evidence.

As in *Jones* and *Kosta*, Plaintiff offers nothing to explain how consumers viewed the *factually-accurate* labeling statements and their effect in purchasing decisions. *Id.*; *see* McCraw Decl., ¶¶ 4-5.[21] Plaintiff fails to address the glaring issue of handling class members who choose not to read food labels, or read them as non-material. *Id.* These are all individual, not common, questions.[22] Plaintiff also fails to link any such consumer understanding of the label with actual purchasing decisions. A misrepresentation is only material "'if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" *See Stearns*, 655 F.3d at 1022 (citation omitted); *Pizza Hut, Inc. v. Papa John's Int'l*, 227 F.3d 489, 502 (5th Cir. 2000) (requiring evidence that the statements "had a tendency to influence the purchasing decisions of ... the consumers to which they were directed").

i. Consumer Surveys Show That the Antioxidant Statements Are *Not* Material to Purchasing Decisions

Actual evidence shows that a reasonable consumer would not attach the same significance to Bigelow's labels as Plaintiff. Plaintiff's self-serving statement about the

[20] Counsel abandoned its previous strategy, omitting the declaration from a "materiality" expert (Caswell) used in their other cases, but repeatedly found inadequate. *See id.*; *Kosta* at 230.

[21] Plaintiff offers no evidence to show that the statements affect purchasing, or that consumers interpret the labels as he does. Even Plaintiff testified that Bigelow's "all natural" claim on one of the labels also affected his decision to purchase Bigelow green teas. Depo., 59:18-60:5.

[22] *See Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008) (plaintiff must show "a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care" and while anecdotal evidence may suffice, "a few isolated examples of deception are insufficient.")

materiality of Bigelow's labels is unique to him, because consumer surveys show the opposite to be true. In his consumer survey, Dr. Stewart found that the presence of the antioxidant claims had no effect on most consumers' interest in purchasing Bigelow tea. Across the Bigelow products used in the survey, 62.2 percent of respondents (1,200 of 1,928) who saw a package label with the antioxidant statement said that they would definitely or probably be interested in purchasing the product. Stewart Decl., ¶ 36. In contrast, 64.9 percent of respondents who saw a package label without the antioxidant statement said they would definitely or probably purchase the product. *Id.* The challenged statement had no material effect on purchasing decisions. *Id.*

The survey results and lack of contrary evidence defeat class certification. Plaintiff offers no means to prove classwide materiality and reliance. *Kosta*, 308 F.R.D. at 225. Courts reject certification where consumers purchase the products for varying reasons. *Davis-Miller v. Auto. Club of S. Cal.*, 201 Cal.App.4th 106, 122-23 (2011) ("[I]f the issue of materiality or reliance […] would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action."); *Stearns*, 655 F.3d at 1022-23 (if statement is not "material to all class members," then "the issue of reliance would 'vary from consumer to consumer' and the class should not be certified")

ii. Plaintiff Must Prove Reliance and His Argument for Presumed Reliance Fails

Plaintiff's argument that "[t]here are no individual reliance issues on the CLRA claim because class-wide reliance is presumed when the misrepresentations or omissions would have been material to 'reasonable persons'" is unavailing. Mot., 20:14-15. There is no presumption of reliance, even in light of an expert declaration (not present here) attempting to establish materiality. *Jones*, 2014 U.S. Dist. LEXIS 81292 at *68-71. Plaintiff can't show a presumption of reliance, which would require "common evidence as to what consumers perceived or what they would find material." *See In re Vioxx Class Cases*, 180 Cal.App.4th 116, 133 (2009).

Further, Plaintiff cannot bypass his obligation to show materiality or reliance under his UCL "unlawful" prong.[23] The Court was explicit in *Kosta*:

[23] In fact, Plaintiff has not proven that the labels are unlawful.

> The Court is not persuaded by Plaintiffs' argument that their claim under the UCL's unlawful prong, based on violation of California's Sherman Law, is subject to classwide proof without the need to show material or reliance. As the California Supreme Court held in *Kwikset*, with respect to similar statutory violations, the question of consumer deception still requires a showing of reliance. *Kwikset* (requiring proof of reliance where "statutory provisions simply codify prohibitions against certain specific types of misrepresentations…[t]he theory of the case is that Kwikset engaged in misrepresentations and deceived consumers"); *see also Figy v. Amy's Kitchen, Inc.*, 2013 WL 6169503, at *3 (N.D. Cal. Nov. 25, 2013) (following *Kwikset* on this point).

Kosta, 308 F.R.D. at 230-31. Plaintiff fails to demonstrate that common issues of fact or law could be determined "in one stroke." *Wal-Mart*, 131 S. Ct. at 2545. Conversely, Bigelow affirmatively shows that the challenged labels are not material and not relied upon by reasonable consumers. The evidence precludes a finding of classwide materiality and reliance, and the lack of commonality weighs against class certification.

2. Plaintiff is Not a Typical Class Representative

"The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis*, 657 F.3d at 984. Bigelow has conclusively demonstrated that (1) unlike Plaintiff, the antioxidant statements have no material effect on consumer purchasing decisions and (2) the proposed class includes those who purchased products for numerous other reasons. A class representative fails the typicality test if he himself could not assert the claims for which he seeks certification. *Stearns*, 655 F.3d at 1019-20 (rejection of two proposed representatives appropriate where one did not see challenged website statements and the other was not deceived by those statements). Plaintiff's claims fail the typicality test for at least three reasons.

First, as described *supra*, III(B), Plaintiff lacks standing and, thus, cannot be "typical" of the class he seeks to represent. Second, also addressed *supra*, Plaintiff cannot assert claims based on products he did not buy. *See Major*, 2013 U.S. Dist. LEXIS 81394 at *8-14; *Lewis Tree Serv., Inc. v. Lucent Techs., Inc.*, 211 F.R.D. 228, 232-34 (S.D.N.Y. 2002) (typicality not met where named plaintiff bought two of 60 products at issue). Plaintiff admits he purchased only three of the products encompassed within the class definition, and only saw or purchased the

products before the labels were redesigned. *See supra*. The other products – including those redesigned during the class period – include different packaging, with different labels, containing different labeling statements in different locations and different contexts. Plaintiff is not a member of a class of people who purchased other products. *See Berger*, 741 F.3d at 1068-69.

Third, *Plaintiff's* reasons for purchasing those three products vary from those of putative class members. *See Fine v. ConAgra Foods, Inc.*, 2010 U.S. Dist. LEXIS 101830, *9-11 (C.D. Cal. Aug. 26, 2010) (when reliance is required, plaintiff is not typical where the class includes individuals with varying rationales behind their purchases). Plaintiff claims he purchased Bigelow's products because of the "*Healthy Antioxidant*" labeling statement.[24] The proposed class includes those who purchased products for many other reasons. *See* Stewart Decl., ¶ 5.[25]

Plaintiff testified that he saw "*Healthy Antioxidants*" on the front label of old-version green tea products he purchased. Depo., 65:16-66:5. He believed the products were "healthy" and contained "antioxidants" (both true statements). *Id*. at 70:14-21.[26] Later, he learned from class counsel that he might "qualify" to sue Bigelow in a class action lawsuit and recover compensation for doing so. *Id*. at 25:3-19; 51:20-24. After filing suit, despite enjoying Bigelow teas for *16* years and still having no understanding of these regulatory claims, he stopped purchasing them and somehow thinks that antioxidants are unhealthy (they are not). *Id*. at 61-64.

3. Plaintiff is Not an Adequate Class Representative

"The adequacy-of-representation requirement tend[s] to merge with the commonality and typicality criteria of Rule 23(a)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997). Because Plaintiff is not a typical representative, the Court should also find that he is not an adequate representative. Plaintiff does not "possess a sufficient level of knowledge and

[24] But *see supra*, fn. 6. Plaintiff admits that he probably would have purchased the products notwithstanding the antioxidant claims because of his enjoyment of the products.

[25] Dr. Stewart's customer survey shows that the "Antioxidant Claims [had] no material impact on purchasing decisions of California consumers, and unlike the allegations of the named plaintiffs, California consumers did not have materially different purchase intentions or perceptions of the price based upon the presence or absence of the Antioxidant Claims." *Id*., ¶ 5(c).

[26] Note this critical distinction: Plaintiff testified that he believed the products were *healthy*, but now understands from his attorneys that they are *not healthy*. But the Complaint challenges the labels for not disclaiming a daily value of antioxidants. Depo., 66:14-73:16.

understanding to be capable of 'controlling' ... the litigation." *Berger v. Compaq Comp. Corp.*, 257 F.3d 475, 482-83 (5th Cir. 2001). He does not know what products are at issue in this case, which labeling statements he is suing over, what claims remain, the proposed class period, or the relief he seeks. *See* Depo., 48:14-51:10, 78:8-22, 90:25-93:21, 106:7-14, 109:14-20. He knows nothing of FDA's nutrient daily value requirements, the very regulations on which he sues. *Id*. at 66:6-16. He defers to his lawyers for litigation decisions, exhibiting a "blinding reliance" on counsel. *See Stuart v. Radioshack Corp.*, 2009 U.S. Dist. LEXIS 12337, *32 (N.D. Cal. Feb. 5, 2009); *see, e.g.*, Depo., 75:19-76:3 (stating that he now knows that the back labeling claim is false and misleading because counsel said so). Plaintiff lacks the knowledge or the desire to control this action on behalf of the putative class.

E. Plaintiff Cannot Prove Measurable, Classwide Damages to Maintain a Rule 23(b)(3) Damages Class for Monetary Relief

Rule 23(b)(3) certification is improper unless a plaintiff establishes that damages are "capable of measurement on a classwide basis." *Comcast*, 133 S. Ct. at 1433. In *Kosta*, Judge Gonzalez-Rogers firmly held that the Court's analysis could (and *did*) end upon class counsel's failure to meet Rule 23(a)'s requirements; Court declined any analysis under Rule 23(b) because the threshold requirements and ascertainability were not met. *Kosta*, 308 F.R.D. at 231. While we urge the Court to consider a similar ruling, the obligations of Rule 23(b) are addressed *infra*, to show that Plaintiff cannot establish either an injunction or damages class.

1. Plaintiffs' Damages are Unprovable as a Matter of Law

A Rule 23(b)(3) damages class can be certified "only if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." *Comcast*, 133 S.Ct. at 1430; Fed. R. Civ. P. 23(b)(3). Plaintiff must show that restitution "damages [can] feasibly and efficiently be calculated once the common liability questions are adjudicated." Here, Plaintiff shows nothing. Plaintiff and his expert, Dr. Hooker, fail to provide any evidence showing damages on a classwide basis through common proof. *See* Ugone Declaration, ¶¶ 9, 46-53. Dr. Hooker proposes a methodology for calculating damages that" does not provide a relevant or reliable method for evaluating or quantifying economic

industry." *Id.*, ¶ 43. Dr. Ugone notes several deficiencies in Dr. Hooker's methodology, each fatal to Plaintiff's damages claim.[27] Dr. Hooker proposes a methodology based on the claim that a full refund/restitution is the proper remedy and does not opine on the value received by Plaintiff. This approach fails to consider the individualized issues present here, including Plaintiff's own testimony about the value he received from Bigelow's teas and admission that he did not attribute any particular price value to the challenged labeling statements. This lack of evidence and improper reliance is fatal to the certification of a damages class.

Instead of even attempting to meet its burden on damages, Plaintiff punts, making the bizarre and unsupported allegation that it is *the defendant* who bears the burden of proving that Plaintiff and the putative class received value in their purchase. Mot., 22:26-28. It is not Bigelow's burden to prove damages (or lack thereof), but Plaintiff's burden to show damages on a classwide basis through common proof. *See Domingo v. New England Fish Co.*, 727 F.2d 1429, 1437 n.5 (9th Cir. 1984). Plaintiff provides no evidence – no expert declaration or even a self-serving declaration – that supports his claim for restitution.[28]

Second, to satisfy the predominance requirement of Rule 23(b)(3), Plaintiff must present a damages model consistent with his theory of liability. *Comcast*, 133 S. Ct. at 1433. Plaintiff's damages model "must measure only those damages attributable to [Bigelow's conduct]. **If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class**." *Id.* (citations omitted) (emphasis added). Here, Plaintiff's so-called damages model does not establish common classwide damages. And Plaintiff's claim for a full refund, as opposed to a price premium, is legally and factually flawed.

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[27] First, Dr. Hooker fails to account for value received by class members. *Id.* at ¶¶ 44-45. Second, he ignores individualized issues that must be considered to determine economic injury. *Id.* at ¶ 46-48. Third, Dr. Hooker ignores significant variation in prices paid. *Id.* at ¶ 49. Fourth, he makes no attempt to demonstrate that prices paid were affected by the challenged claims. *Id.* at ¶ 50-52. Last, he does not provide a method for allocating claimed damages to individual class members. *Id.* at ¶ 53.

[28] Significantly, Plaintiff's counsel only asked its expert to opine on the average purchase price of the product and was instructed not provide an opinion on the "price of the product without the claimed characteristic." Dkt. 105-6, Declaration of Neal H. Hooker, ¶¶ 7, 12. *See Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 U.S. Dist. LEXIS 1640, *39 (N.D. Cal. Jan. 7, 2014) (certification denied because Plaintiff provided no expert evidence of price premium, *i.e.*, that product value *without* challenged label statements differed from actual retail price).

a. Plaintiff's Full Restitution Theory Has Been Rejected.

Unlike class counsel's other cases where multiple models are offered to calculate damages, here they rely on one theory of recovery: a full refund. Full restitution, however, is unavailable to him. Even Plaintiff's counsel acknowledges this fact:

> Regarding restitution, the Court has enunciated the only formula that Plaintiff may use to measure restitution. On August 12, 2015, the Court stated, '[t]he proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the **difference** between a product as labeled and the product as received, **not the full purchase price** or all profits.' While Plaintiff respectfully disagrees with the Court…"

Mot., 21:10-13 (emphasis added). Undeterred by this Court's previous ruling and California law, Plaintiff wants a full refund because the products are "worthless." But this argument has repeatedly been rejected. Even Plaintiff's own testimony does not support a full refund.

The UCL, FAL and CLRA allow restitution for private litigants. *Colgan v. Leatherman Tool Grp.*, 135 Cal.App.4th 663, 700 (2006). This Court measures restitution by the **difference between the product as labeled and the product as received**, that is, the price premium attributable to challenged label statement. *Brazil v. Dole Packaged Foods, LLC*, No.: 12-CV-01831-LHK, 2014 U.S. Dist. LEXIS 157575, *14-15 (N.D. Cal Nov. 6, 2014). "[T]o go beyond the price premium ... would result in a windfall to plaintiff." *Ivie v. Kraft Foods Global*, No. C-12-02554-RMW, 2015 U.S. Dist. LEXIS 5196, *5 (N.D. Cal. Jan. 14, 2015).[29]

Plaintiff alleges that no reasonable consumers would choose to purchase a misbranded product for the privilege of committing a criminal act. Mot., 21:27-22:1. But, even assuming that some consumers had such a practice, identifying them would only create more individual issues precluding class certification. Proof that one consumer refused to buy "misbranded" products indeed shows that individual proof would be required as to every single consumer's personal practices in buying (or refusing to buy) "misbranded" products.

Plaintiff cites to *In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145 (2010), to

[29] Holding that "plaintiffs may only recover restitutionary damages, which would be the price premium attributable to the offending labels, and no more"); *see also Trazo v. Nestle USA*, No. 5:12-cv-02272-PSG, 2015 U.S. Dist. LEXIS 90705, *8-11 (N.D. Cal. July 10, 2015) ("[t]he proper measure of restitution is [...] **not** the full purchase price or all profits").

support his "criminal act" theory. But this case is not analogous to the matter at hand. There, the plaintiff alleged that GNC deceptively sold prescription-only drug products as over-the-counter supplements, and was damaged because he never would have bought them had he known they were illegal without a prescription. The Supreme Court found that a reasonable person would not knowingly commit a criminal act, and would find it important to know the drug was illegally sold and possessed. *Id.* at 157. The problem was **not the label but the ingredient**. But conversely, here Plaintiff purchased healthy and nutrient-rich tea that arguably lacked a daily value percentage, a far cry from a controlled substance which is illegal to possess without a prescription. *See Jones*, 2014 U.S. Dist. LEXIS 81292 at *18. In *Gitson v. Trader Joe's*, No. 13-1333, 2013 U.S. Dist. LEXIS 144917, *20 (N.D. Cal. Oct. 4, 2013) (Orrick, J.), this very Court distinguished *Steroid Hormone*, holding that it would "not presume that a reasonable person would not have purchased the products at issue had the person known of the alleged mislabeling".[30] Possessing Bigelow tea is not illegal, and we cannot presume that a reasonable person would not buy a "mislabeled" box of tea. If *some* consumers would not have bought Bigelow teas simply because they were "misbranded," individual inquiries are necessary to identify those customers and evaluate the benefit they received.[31]

b. Plaintiff's "Legally Worthless" Theory has also Been Repeatedly Rejected

Plaintiff next alleges that Bigelow's green teas are legally worthless, a by-product of his "criminal act" theory. Mot., 21:19. But restitution must be *measurable* to be awarded, and where a challenged product is alleged to be worth less than what a consumer paid, restitution is measured by *the difference* between the amount paid and the product's true worth. *In re Vioxx*,

[30] Numerous courts in this District have ruled that *In re Steroid Hormone Prod. Cases* is irrelevant because it was decided before *Kwikset*, *supra*, which established that reliance was required even for UCL "unlawful" claims.

[31] Plaintiff cites *Park v. Welch Foods, Inc.*, No. 12-cv-06449, 2013 U.S. Dist. LEXIS 139715 (N.D. Cal. Sept. 26, 2013), where Judge Grewal *declined to strike* an allegation that consumers could be prosecuted for "hold[ing]" a misbranded food product. That ruling, at the pleading stage, does not assist Plaintiff, where he offers no evidence of any threat of prosecution (let alone criminal liability), or common proof that consumers believe such a risk exists (or are influenced by it). As *Park* later held, consumers are not subject to criminal penalties for purchasing food that is noncompliant in some respect with an FDA regulation. 12-cv-06449, Dkt. 63, pp. 15-17.

180 Cal. App. 4th at 131. Plaintiff fail to satisfy *Comcast's* requirements because the price premium attributable to Bigelow's labels is the only legally permissible measure of damages. *See, e.g.*, *In re Vioxx, Colgan, Ivie,* and *Trazo*, cited *supra*.

Under his theory, Plaintiff gets a refund without any proof of deception or reliance. Every court to have considered this issue has held that reliance is required even for a UCL "unlawful" claim when the underlying alleged violation was adopted to prevent deceptive advertising. *See supra*. Applying this principle, this Court has rejected a refund theory when the product was misbranded or illegal. *Swearingen v. Pac. Foods of Oregon, Inc.*, No. 13-CV-04157-JD, 2014 U.S. Dist. LEXIS 105730 (N.D. Cal. July 31, 2014), *2 (rejecting "legally worthless" theory and dismissing complaint).

Plaintiff's "legally worthless" theory falsely assumes that purchasers received no benefit whatsoever from purchasing the challenged products. But "[t]his cannot be the case, as consumers received benefits in the form of calories, nutrition, vitamins, and minerals." *Werdebaugh v. Blue Diamond Growers*, 2014 U.S. Dist. LEXIS 71575, *78-79 (N.D. Cal. May 23, 2014); *In re POM Wonderful LLC*, *supra* at *11-13 (rejecting full refund because consumers benefited from and enjoyed products). Class members may not "retain some unexpected boon, yet obtain the windfall of a full refund and profit from a restitutionary award." *Id.* Bigelow's challenged products were never without value. Plaintiff admits that, notwithstanding the challenged labels, he derived value and enjoyment from the taste and consistent quality of Bigelow's teas. Depo., 107:2-25. For this reason, Plaintiff cannot recover a full refund.

Plaintiff cites to *U.S. v. Gonzalez-Alvarez*, 277 F.3d 73 (1st Cir. 2002), to conjure support for his "legally worthless" theory. There, the defendant obtained a required license from Puerto Rico's Department of Agriculture to produce milk. *Id.* at 75. Extensive regulations ensured that only unadulterated milk, suitable for consumption, was sold, and the defendant was caught tainting his product with additives. *Id.* at 76. He pleaded guilty to conspiracy to adulterate milk and to delivering adulterated food into interstate commerce. The court found that the milk could not lawfully be distributed in interstate commerce, 21 U.S.C. § 331(a), and was subject to seizure, 21 U.S.C. § 334(a)(1). *Id.* at 78. As a matter of law, the value of the milk, sitting in its

tainted condition inside a silo, was zero; it could not be modified to make safe and saleable. *Id.*

Bigelow's tea, conversely, can be lawfully distributed in interstate commerce and safely consumed. Taken out of its box, the tea can be sold for market value. Unlike the adulterated milk, Bigelow's teas have value. According to this District and California law, that value must be subtracted from the price paid to determine "[t]he proper measure of restitution." Plaintiff fails to do this, and thus his damages model should be rejected.

2. Plaintiffs' "Nominal Damages" Theory Also Fails

Plaintiff asserts that nominal or statutory damages are available under the CLRA. Mot., 23:9-24:9. But nominal damages are not available in CLRA claims. The Court has rejected class counsel's same theory in another of their food labeling cases: "Plaintiffs' CLRA claim has nothing to do with a breach of duty ... Nor do Plaintiffs point to any CLRA case permitting nominal damages, let alone a CLRA class action." *Jones*, 2014 U.S. Dist. LEXIS 81292 at *86 (citing *Stilson v. Reader's Digest Ass'n*, 28 Cal. App. 3d 270, 274 (1972)); *see also Brazil*, 2014 U.S. Dist. LEXIS 157575 at *45 ("[N]ominal damages are not even available in this case, where Brazil seeks damages only under the CLRA"); *Lanovaz*, 2014 U.S. Dist. LEXIS 174404 at *8 ("the court has found no support for such a theory in class actions"). Similarly, the only monetary relief permitted under the UCL and the FAL is restitution.[32]

Plaintiff contends that all class members are entitled to $1,000 in statutory damages under the CLRA. Mot., 24:1-2. But that is for the entire class, not each class member. *Jones*, 2014 U.S. Dist. LEXIS 81292 at *86-87. Plaintiff fails to describe how he will arrive at a damages amount and how it is tied to class members' injuries under *Comcast*. He offers no explanation for Bigelow to oppose. The Court must reject these nominal and statutory damages theories.

F. Plaintiff Cannot Maintain a Rule 23(b)(2) Class for Injunctive Relief

Class certification of an injunctive class must be denied for failure to satisfy Rule 23(b)(2). *See* Mot., 17:18-18:7. Plaintiff must show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P.

[32] Plaintiff provides no legal authority showing a statutory right to nominal damages.

23(b)(2). Without an ascertainable class and common questions, this must fail.

Injunctive relief is available only if monetary relief is merely "incidental to the injunctive or declaratory relief." *Wal-Mart*, 131 S. Ct. at 2557. Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.; accord Wang v. Chinese Daily News, Inc.*, 737 F.3d 538 (9th Cir. 2013) (monetary claims under (b)(2) cannot stand in light of *Wal-Mart*); *see Faulk v. Sears Roebuck & Co.*, 2013 U.S. Dist. LEXIS 57430, *15 fn.4 (N.D. Cal. Apr. 19, 2013). Plaintiff seeks monetary relief, devoting multiple pages in his Motion to explain why "full restitution" is the proper remedy and why the challenged products are "legally worthless." Mot., 20:28-23:7. But here, firstly, monetary relief is not "merely incidental" to injunctive relief. It monopolizes his brief. Plaintiff ignores the controlling *Wal-Mart* opinion and instead relies on pre-*Wal-Mart* authorities from the Third Circuit and District of Maryland. *Id.* at 18:2-4.

Second, Plaintiff cannot obtain injunctive relief because he cannot plausibly allege that he will be duped by the same statements again. Plaintiff must allege that a "real and immediate threat" exists that he will be wronged again. *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1670 (1983). Plaintiff makes no such allegation.[33] Plaintiff cannot certify an injunctive class because he would not again be "deceived" in the way he currently describes. Even if he could somehow allege future deception, Plaintiff disclaims any further desire to purchase Bigelow products. Depo., 60:10-62:13. Further, injunctive relief is unavailable because there is no behavior to enjoin; the labels *as Plaintiff last saw them*, back in 2012, have changed.

IV. CONCLUSION

Bigelow respectfully submits that, for these reasons, the Court deny class certification.

[33] "Absent showing a likelihood of future harm, a plaintiff may not manufacture standing for injunctive relief simply by expressing an intent to purchase the challenged product in the future." *Rahman v. Mott's LLP*, No. 13-CV-3482 SI, 2014 U.S. Dist. LEXIS 147102, *17 (N.D. Cal. Oct. 15, 2014) (Illston, J.). *See, e.g.,*; *Morgan v. Wallaby Yogurt Co.*, No. 13-CV-00296-WHO, 2014 U.S. Dist. LEXIS 34548, *21 (N.D. Cal. Mar. 13, 2014) (Orrick, J.) ("plaintiffs ... have unambiguously stated that they would not have purchased the product had they known it contained added sugar. They cannot plausibly allege that they would purchase the challenged products in the future if they were properly labeled."); *Garrison v. Whole Foods Mkt.*, No. 13-CV-05222-VC, 2014 U.S. Dist. LEXIS 75271, *20 (N.D. Cal. June 2, 2014) (Chhabria, J.) (rejecting "public injunction" theory).

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