UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

ROBIN G. THORNTON, on behalf of herself and others similarly situated, et al., Plaintiffs, v. **THE KROGER COMPANY, et al.**, Defendants.	Case No. 1:20-CV-1040-JB/LF

DEFENDANT THE KROGER COMPANY'S
PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW

Defendant The Kroger Company ("Kroger") hereby submits its proposed Findings of Fact and Conclusions of Law as to Plaintiff Thornton's Motion for Class Certification as to Defendant Kroger (Doc. 214), Kroger's Motion to Exclude Expert Testimony of Dr. Chadelle Robinson (Doc. 232), and Kroger's Motion to Exclude Survey Evidence (Doc. 234).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

RULES

PROPOSED FINDINGS OF FACT

I. Background

A. The Parties

1. Plaintiff Robin Thornton ("Thornton") lives in Edgewood, New Mexico. (Class Cert. Hr'g Tr., Doc. 255 at 180:2.) According to her complaint, she is a "long-time purchaser of beef products" and has purchased beef products in New Mexico from Smith's and Albertsons grocery stores. (Doc. 1, ¶ 12.)

2. Plaintiff Wendy Irby ("Irby") is a resident of Otero County, New Mexico. (Doc. 97, ¶ 13.) She has purchased beef products in New Mexico from Pay and Save, Inc. and Albertsons grocery stores. (*Id.*)

3. Defendant Kroger started as a small grocery store in Cincinnati, Ohio in 1883. (11/18/22 Schmitz Decl., Doc. 235-1, ¶ 3.)[1] Today, nearly 2,800 grocery stores in 35 states operating under 28 different names fall within the Kroger umbrella. (*Id.* ¶ 4.) Smith's is the Kroger banner store for Arizona, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. (*Id.* ¶ 5.)

4. Defendant Pay and Save, Inc. ("Pay and Save") is a Texas Corporation that operates grocery stores under a variety of names in New Mexico.

B. Kroger's Advertising of Beef Products

5. Kroger sells thousands of different beef products. (*Id.* ¶ 6.) Some of those products are USDA Choice beef, which alone number in the thousands of different UPCs. (*Id.* ¶ 6.)

6. Kroger's marketing executive, Jennifer Schmitz, explained via declaration that Kroger advertises products it sells in circulars, which are typically distributed as standalone

[1] Kroger submitted two declarations from Jennifer Schmitz, its Director in Analytics & Execution, Promo Execution, one dated March 28, 2022 (Doc. 135-1) and another dated November 18, 2022. (Doc. 235-1.)

mailers or as part of the newspaper on Wednesday, and the promotions within them run from Wednesday to Tuesday of the following week. (*Id.* ¶ 8.) Circulars vary by location depending on factors such as competition, product cost, and availability. (*Id.* ¶ 9.) For example, the beef product(s) advertised in a weekly circular distributed in Albuquerque is not necessarily the same as the ones advertised in the circular distributed in Santa Fe. (*Id.*) Circulars can also differ by stores within one city. (*Id.* ¶ 10.) Neither Kroger nor any third party tracks who received circulars that advertised beef with the "USDA Choice: Produced in the USA" graphic either as a standalone mailer or in the newspaper. (*Id.* ¶ 12.)

7. Schmitz also testified that from October 2018 to November 2021, Kroger used the following graphic in print circulars to advertise some USDA Choice muscle cuts of beef:

(3/28/22 Schmitz Decl., Doc. 135-1 at 36, ¶ 4.) Schmitz averred that Kroger never used the graphic to advertise ground beef.[2] (*Id.* at 37, ¶ 5.) Further, of the thousands of USDA Choice beef products that Kroger sells, only a handful of these are advertised in any given week, if at all. (11/18/22 Schmitz Decl., Doc. 235-1, ¶ 11.)

8. Kroger submitted declarations from its beef suppliers, Cargill Meat Solutions Corporation ("Cargill"), National Beef Packing Company, LLC ("National Beef"), Tyson Fresh

[2] Throughout this litigation, Thornton has insisted that Kroger uses the "USDA Choice Produced in the USA" logo to advertise ground beef, but has failed to present evidence to support this assertion. For this reason, the Court has denied Thornton discovery from Kroger on ground beef. (Tr. of July 7, 2022 proceedings, Doc. 183, at 7:19-22.)

Meats Inc. ("Tyson"), and JBS Packerland, Inc. ("JBS") attesting to the facts that they (1) represented to Kroger that the USDA Choice beef Kroger purchases is a "Product of the USA" and (2) provided no further information regarding the sourcing of the beef product. (Doc. 176, ¶¶ 5-6; Doc. 182, ¶¶ 5-6; Doc. 185, ¶¶ 5-6; Doc. 197, ¶¶ 4-5.)

C. Kroger's Loyalty Card Program

9. Kroger also submitted a declaration from Robert Welch, Senior Vice President of Personalization & Loyalty at 84.51, a retail data science, insights and media company owned by Kroger, regarding the loyalty card program Kroger has for its customers. (Welch Decl., Doc. 235-2, ¶¶ 2-3.) Welch testified that purchases made with a loyalty card number are tracked and stored in a database by loyalty card number, not customer name. (*Id.* ¶ 4.) Although Kroger retains contact information associated with loyalty card members to the extent provided, there is no guarantee that the information provided to Kroger is accurate, and it may not always correlate to who made the purchase, as cards can be shared with family members and friends. (*Id.* ¶ 5.)

II. Thornton's Action Against Kroger

A. Thornton's Complaints

10. On September 3, 2020, Thornton filed a class action complaint against Kroger and Albertsons in the 2nd Judicial District Court for Bernalillo County. (Doc. 1.) Thornton alleged that Kroger's and Albertsons' use of advertising circulars "about 'Product of the U.S. or similar statements" falsely represented to consumers that the advertised beef was born, raised, and slaughtered in the United States. (*Id.* ¶¶ 5, 8, 13.) She claims that she (and other consumers) relied on these advertisements to purchase beef products. (*Id.* ¶ 13.) She asserted claims for violation of the New Mexico Unfair Practices Act ("NMUPA"), breach of express warranty, and unjust enrichment. (*Id.* ¶¶ 48-69.)

11. Kroger and Albertsons removed the case to this Court (Doc. 1) and moved to dismiss. (Doc. 14.) The Court issued an order denying the motion to dismiss and directing Thornton to file an amended complaint including "high resolutions pictures which are labeled or indexed with information identifying which Defendant circulated each advertisement, where, and when, and whether Thornton or other putative class members purchased that meat, and on what date." (Doc. 28 at 15.)

12. On October, 15, 2021, Thornton filed an Amended Class Action Complaint. (Doc. 30.) Thornton included examples of the Kroger and Albertsons advertisements at issue but did not provide any information regarding whether she or other class members had actually purchased the beef advertised. (*Id.*) Based on examples provided in the Amended Complaint, the Court deduced that the logo at issue in the Kroger advertisements is the "USDA Choice Produced in the USA" shield:

(Doc. 30-1.) The logo at issue in the Albertsons advertisements is the "USDA Choice" shield:

(Doc. 30-2.)

13. On November 30, 2021, Thornton filed a Second Amended Complaint, which made the same allegations and claims against Kroger and Albertsons, but joined co-plaintiff Wendy Irby who asserted similar claims against Lowe's Supermarkets, Inc. based on its allegedly deceptive advertising of beef products. (Doc. 60.)

14. Kroger and Albertsons moved to dismiss the Second Amended Complaint (Doc. 74) and the Court dismissed Thornton's claims against Albertsons, finding that it was "not plausible that consumers would be misled about the beef products' origin based on Albertsons Companies' advertisements," that "the official USDA grade shield states merely the beef's grade and implies that it has passed USDA inspection," and that the advertisement "did not warrant expressly anything about the origin of their beef products." *Thornton v. Kroger Co.*, 2022 U.S. Dist. LEXIS 29699, at *310-20 (D.N.M. Feb. 17, 2022). The Court dismissed Thornton's breach of express warranty claim against Kroger. (Doc. 198.) It allowed the remaining claims against Kroger related to the "USDA Choice: Produced in the USA" graphic in mailed circulars to proceed to discovery.

15. Thornton filed a Third Amended Complaint, which is the operative complaint, simply substituting Lowe's Supermarket, Inc. for the name of the proper defendant, Pay and Save. (Doc. 97.)

B. Thornton's Motion for Class Certification as to Kroger[3]

16. Thornton filed a motion for class certification as to Kroger (the "Motion") on October 17, 2022. (Doc. 214.) She seeks to certify two classes: (1) "A class consisting of all persons from New Mexico that reviewed the advertisements of Kroger's New Mexico stores known as Smith's that they received in a mailer or newspaper from November 2018 to the cessation

[3] It is Kroger's understanding that Pay and Save will submit separate proposed findings of fact and conclusions of law as to Irby's Motion for Class Certification as to Pay and Save.

of the use of the Product of the USA Shield to make the decision to attend a Smith's store to purchase beef products that they relied upon to have been produced exclusively in the USA even though the geographic origin of the production of the beef products included foreign sources;" and (2) "A class consisting of all persons from the United States that reviewed the advertisements of Kroger's stores that they received in a mailer or newspaper to make the decision to attend a Kroger's store to purchase beef products which they relied upon to have been produced from cattle born and raised in the USA." (*Id.* at 8-9.)

17. A hearing on the Motion, along with Irby's motion for class certification as to Pay and Save, was held on December 5, 2022. All parties provided argument. Plaintiffs called Thornton, Irby, and their expert Dr. Chadelle Robinson to testify.

III. Experts

A. Thornton's Experts

1. Brian Sanderoff

18. Plaintiffs contend that they disclosed Brian Sanderoff as an expert on July 5, 2022 when they produced the data underlying a consumer survey that he had conducted, along with a one-page explanation of the survey's research methodology and Mr. Sanderoff's curriculum vitae. (Doc. 218-2, 218-3, 218-4.)[4] Mr. Sanderoff is president of Research & Polling, Inc., which is a "market research, demographic analysis and public opinion polling corporation in New Mexico." (Doc. 218-4.)

[4] After Plaintiffs produced a rebuttal report by Mr. Sanderoff in September 2022, Kroger moved to strike the untimely expert disclosure of Mr. Sanderoff, arguing that Plaintiffs had not actually disclosed Mr. Sanderoff as an expert witness in line with the requirements of Rule 26 as they were required to do so on July 5, 2022. (Doc. 209.) On November 14, 2022, the Court held a hearing on Kroger's motion to strike, at which time it noted that it had some concerns about whether Mr. Sanderoff's July report "was a complete report." (Doc. 262 at 57:13-14.) Nevertheless, the Court determined it would not to exclude Mr. Sanderoff from testifying completely, but held that he would be limited to testimony on his July 2022 "report." (*Id.* at 57:11-13.) In other words, the Court struck Mr. Sanderoff's September 2022 report.

19. Mr. Sanderoff's company conducted a survey in May 2022 among adults who purchase beef in grocery stores in 35 states "selected based on the presence of Kroger and Lowe's grocery stores." (Doc. 218-2.) 1,907 surveys were completed among qualified shoppers. (*Id.*)

20. The survey respondents were asked demographic information about their race, age, household income, gender, and location. (Doc. 218-3 at THORTON/IRBY000075-84.) They were also asked the frequency with which they purchase beef and the grocery stores at which they shop. (*Id.* at THORTON/IRBY000039-48.) Notably, 49% of the respondents answered that they have shopped at stores unassociated with Kroger and Pay and Save in the last year. (Doc. 218-1 at THORTON/IRBY000030.) Respondents were not asked whether they review grocery store advertising circulars or newspaper advertisements, which are at issue here.

21. Respondents were shown an image of Kroger's "USDA Choice Produced in the USA" graphic and asked "[i]f you saw the label above in an advertisement and/or on beef packaging, which of the following would it mean to you?" (Doc. 218-3 at THORTON/IRBY000049.) This graphic was presented to respondents in isolation—not in an advertising circular associated with a particular beef product and price as it would actually be viewed by consumers. Respondents were given only four response options: (1) "The beef is from cattle born and raised in the United States," (2) "The beef was inspected in the United States," (3) "The grade of beef as defined by the USDA (United States Department of Agriculture)," or (4) "Not sure." (*Id.*) Notably, there was no response option for the USDA's own definition of the product of the USA, which is processed in the United States. Nor was there any option for respondents to fill in their own understanding of the graphic. Plaintiffs' marketing expert, Dr. Chadelle Robinson testified at the class certification hearing that an open-ended response option would have provided varied interpretations. (Class Cert. Hr'g Tr., Doc. 255 at 121:13-17.)

22. Respondents were also shown the "USDA Choice Produced in the USA" graphic—again, in isolation—and asked "[i]f you saw this label in an advertisement and/or on beef packaging would you be" (1) "More likely to purchase the beef," (2) "Less likely to purchase the beef," or (3) "Would not make a difference in decision to purchase beef." (Doc. 218-3 at THORTON/IRBY00051.) Respondents were not asked, however, why they would be more or less likely to purchase the beef, much less whether their decision had anything to do with their belief about the origin of the cattle from which the beef was derived.

23. Respondents were also asked to rate the importance on a scale of 1 to 5 of six purchasing attributes associated with beef: (1) price, (2) Beef that is grass fed, (3) Beef from cattle born and raised in the United States, (4) Beef from cattle raised humanely, (5) Beef from cattle raised in an environmentally sound manner, and (6) Beef inspected and graded in the United States. (Doc. 218-3 at THORNTON/IRBY000063-74.) The results showed that price was the most important factor. (*Id.*)

24. Finally, the survey asked respondents "how much would you pay per pound" for beef steak, ground beef, and beef roast that was "produced in the US" and "produced outside the US." (Doc. 218-1 at THORTON/IRBY000033-37.) The survey respondents were not presented with real beef products or market prices; they were simply asked to make up prices for beef produced in the United States versus beef produced outside the Unites States. Additionally, the word "produced" was not defined in the survey question, so it is impossible to tell what respondents thought the term meant.

25. Kroger moved to exclude evidence of Mr. Sanderoff's survey. (Doc. 234.) The Court held a hearing on that motion on January 30, 2023.

2. Dr. Chadelle Robinson

26. Plaintiffs disclosed Dr. Chadelle Robinson and produced her report on July 5, 2022. Dr. Robinson holds a Ph.D. in Marketing and an M.S. in Agricultural Economics. (Doc. 251-1.) She currently serves as an Assistant Professor in the College of Agriculture, Consumer, and Environmental Sciences at New Mexico State University. (*Id.*)

27. Dr. Robinson's reports has three main parts entitled USA Beef Research, U.S. Retail Survey Results, and Financial Implications of Findings. (Robinson Report, Doc. 214-5.)

28. In the USA Beef Research section of her report, Dr. Robinson reviews statistics published by the USDA relating to the United States' beef supply. (*Id.* at THORTON/IRBY00003-5.) She concludes that approximately 6% of the U.S. beef supply comes from imported live cattle and that approximately 11% comes from imported carcasses. (*Id.*) She added then added these percentages to conclude that "[f]rom 2017, the combined import beef product lines contributed 17% to the total U.S. beef supply." (*Id.* at THORNTON/IRBY000005.) This figure includes ground beef, which Kroger has never advertised with the graphic at issue. (3/28/22 Schmitz Decl., Doc. 135-1 at 37, ¶ 5.) In her deposition, Dr. Robinson admitted that she would need to deduct from the 17% total if ground beef was excluded. (Robinson Dep., Doc. 232-1 at 213:15-20.)

29. Dr. Robinson performed no study or analysis of Kroger's beef purchasing practices; she testified at the class certification hearing that the 17% figure is based on the national beef supply. (Class Cert. Hr'g Tr., Doc. 255 at 112:14-16.) Dr. Robinson also admitted that she was not aware of any evidence that any beef that Kroger sold came from cattle born or raised outside of the United States. (*Id.* at 112:17-20.)

30. In the section of her report entitled U.S. Retail Survey Results, Dr. Robinson offers opinions on the importance of Kroger's "USDA Choice Produced in the USA" graphic and the origin of beef to consumers, as well as consumers' willingness to pay for "U.S. beef" based on her review of the raw data from the consumer survey conducted by Mr. Sanderoff.

31. She opines that the graphic "encourage[s] beef purchases with the inclusion of the graphic on the beef item or included within the advertisement and each graphic was highly associated with 'beef from cattle raised in the U.S.'" (Robinson Report, Doc. 214-5 at THORNTON/IRBY000014.) Dr. Robinson reached this opinion solely by reviewing the results of the survey questions asking respondents to assign meaning to the "USDA Choice Produced in the USA" graphic and asking whether respondents would be more or less likely to purchase beef advertised with the graphic. (*Id.* at THORNTON/IRBY000009-11.) Dr. Robinson testified at the class certification hearing that "she cannot say with any degree of certainty why the respondents said they would be more likely to purchase beef based on the graphic." (Class Cert. Hr'g Tr., Doc. 255 at 123:22-124:1.) She conceded the possibility that the respondents were seeking USDA Choice graded beef. (*Id.* at 124:2-4.)

32. Dr. Robinson also opines that "beef from cattle born and raised in the U.S. were identified as important attributes when considering purchasing beef." (Robinson Report, Doc. 214-5 at THORNTON/IRBY000014.) She arrived at this opinion by calculating the mean scores for each of the six beef purchasing attributes respondents were asked to rate by importance; she then compared what appears to be negligible differences in these mean scores. (*Id.* at THORNTON/IRBY000012.) At the class certification hearing, Dr. Robinson admitted that she could not determine statistical significance by comparing minor differences in mean scores. (Class

Cert. Hr'g Tr., Doc. 255, at 126:23-127:5.) She also admitted that such an approach would not meet the requirements for a peer-reviewed publication. (*Id.* at 127:6-13.)

33. Finally, in this section, Dr. Robinson opines that "the price evaluation between beef produced in the U.S. verses [sic] beef produced outside of the U.S. provided additional evidence of the importance beef customers have on purchasing U.S. beef. All three beef categories had a premium price for U.S. beef over imported options." (Robinson Report, Doc. 214-5 at THORNTON/IRBY000014.) This opinion is based on the survey question where respondents were asked to assign prices they would be willing to pay for nondescript beef products produced in the U.S. versus outside of the U.S. (*Id.* at THORNTON/IRBY000013.) Dr. Robinson simply added up all the made-up prices and found the averages for each product category. (Class Cert. Hr'g Tr., Doc. 255 at 128:17-21.)

34. Dr. Robinson conceded at her deposition that her report could not withstand peer review. (Robinson Dep., Doc. 232-1 at 87:20-21, 183:16.) She testified that in her peer reviewed publications she relied upon a survey and then conducted a statistical analysis to determine whether certain variables are of statistical significance (*id.* at 183:21-184:3), but she did not follow this methodology in her report. (*Id.* at 184:4-16.) She also admitted that there was no measure of statistical significance in her report, which meant that it deviates from the approach she takes in her own peer-reviewed work. (Class Cert. Hr'g Tr., Doc. 255 at 106:1-8.)

35. In the section of Dr. Robinson's Report entitled "Financial Implications of Findings," Dr. Robinson opines that Kroger generated $224,232,118.93 in revenue by misrepresenting the origin of the beef it was selling. (Robinson Report, Doc. 214-5 at THORNTONIRBY000017.) She apparently arrived at this figure by basic multiplication: She multiplied Kroger's total gross sales of all USDA Choice beef products for the years 2017-2021

by the percentage of survey respondents who said that they were more likely to purchase beef based on the graphic; she then multiplied these figures by the corresponding annual percentages of imported cattle and beef product for the entire United States to get "sales of imported beef likely purchased." Kroger points out that there are numerous flaws in Dr. Robinson's underlying assumptions: (1) she used Kroger's gross sales instead of net profit; (2) she used sales for the years 2017-2021 when Kroger only used the graphic at issue from October 2018-November 2021; (3) she incorrectly assumes that Kroger advertises every beef product at all times, when actually only a few of the hundreds of beef products were advertised at any given time; (4) she uses imported beef figures for the entire United States (including ground beef) rather than any evidence concerning the beef Kroger actually sold; (5) she has no evidence that Kroger sold a single beef product from cattle born or raised outside the U.S.; and (6) although the survey was not limited to Kroger customers, she assumes that the percentage of survey respondents who said they were more willing to purchase beef with the graphic correlates to the number of Kroger shoppers who purchased beef because they saw the graphic in a circular. (Daubert Hr'g Tr., Doc. 266 at 20:8-21:6.)

36. Dr. Robinson's report appears to contain no analysis or calculation of damages. In fact, Dr. Robinson characterized the Financial Implications and Findings section of her report as merely "some insight" on Kroger revenue from beef sales. (Robinson Dep., Doc. 232-1 at 209:14-18.) She also testified at the class certification hearing that she was not retained to perform a damages analysis (Class Cert. Hr'g Tr., Doc. 255 at 104:22-105:5), she did not prepare a damages analysis (*id.* at 145:13-17), and she did not even come up with a framework for a damages analysis. (*Id.* at 146:7-13.) At the class certification hearing, on direct examination by Plaintiffs' counsel, Dr. Robinson confirmed that she had not provided a damages model, but suggested that she could

provide one based on price differentials in what the survey respondents were willing to pay for beef products produced in and out of the United States. (*Id.* at 89:19-90:3.) As Kroger noted, this testimony conflicts with her earlier deposition testimony in which she was asked if these price differentials could be a way to measure damages and she answered that was "beyond [her] experience." (Robinson Dep., Doc. 232-1 at 204:7-12.)

37. On September 20, 2022, Plaintiffs produced a rebuttal report from Dr. Robinson in which she responded to the critiques of her primary report by Kroger's expert witnesses.[5] (Robinson Rebuttal Report, Doc. 232-2.) In this rebuttal, she explains that once imported cattle are incorporated into the U.S. beef supply it is impossible to trace their origin: "At any stage of the cattle's life these animals are incorporated into the US supply and all traceability of where they were sourced disappears. Details pertaining to the individual animal's history and origin are wiped away." (*Id.* at THORNTON/IRBY000157.)

38. She also offers an opinion on Kroger's state of mind and motivation for creating the logo at issue: "Kroger Company created this unique logo to represent their beef products as a product that was grown and produced in the United States, while knowingly misrepresenting the fact that they truly do not know where the cattle and final beef was produced." (*Id.* at THORNTON/IRBY000155.)[6]

[5] On this date, Plaintiffs also produced an additional report by Dr. Robinson entitled "Survey Report #2 – Retail Hamburger Customer Perceptions." (Doc. 210-2.) This report concerned a second consumer survey "designed to collect responses pertaining to U.S. grocery shopper's interpretation of messaging used by Kroger Co. in relations to hamburger beef." (*Id.* at THORTON/IRBY000167.) This survey was conducted after the Court's July 2022 hearing in which it denied Plaintiffs discovery on ground beef due to lack of evidence that Kroger advertised ground beef with the graphic at issue. Kroger moved to strike Dr. Robinson's new report and evidence of this second consumer survey. (Doc. 210.) At the hearing on Kroger's motion to strike, the Court excluded Dr. Robinson's new report and evidence related to the second consumer survey. (Doc. 262 at 30:4-7, 38:3-5.)

[6] At her deposition, Dr. Robinson agreed, however, that beef from cattle born outside of the United States is "indistinguishable" from beef produced from cattle born in the United States. (Robinson Dep., 232-1, 112:21-113:4; *see also* Class Cert. Hr'g Tr. 115:6-14.)

39. Kroger moved to exclude testimony and opinions of Dr. Robinson on (1) the importance of the "USDA Choice Produced in the USA" graphic and the origin of beef to consumers, (2) consumers' willingness to pay and the price premium for "U.S. beef," (3) Dr. Robinson's "financial implications of findings," (4) Kroger's mental state and purported misrepresentations, and (5) damages. (Doc. 232.) This Court held a hearing on Kroger's motion to exclude the testimony of Dr. Robinson in conjunction with Kroger's motion to exclude the survey evidence on January 30, 2022.

B. Kroger's Experts

40. Kroger disclosed four expert witnesses and produced their reports on August 19, 2022. It is the Court's understanding that Plaintiffs elected not to depose any of Kroger's experts.

1. Dr. Nevil Speer

41. Dr. Speer has been a tenured professor in Western Kentucky University's Department of Agriculture since 2005. (Speer Decl., Doc. 230, Ex. A, ¶ 2.2.) He has "27 years of professional experience and knowledge of the U.S. beef industry" and has written extensively in the area. (*Id.* at ¶¶ 1.4, 2.7.) He currently serves "as Co-Chair of the Animal ID and Information Systems Council at the National Institute of Animal Agriculture." (*Id.* at ¶ 2.6.)

42. In his report, Dr. Speer provides a detailed summary of the "highly complex and dynamic" U.S. beef supply. (*Id.* at ¶ 4.1.) He specifically takes issue with Dr. Robinson's attribution of 17% of the U.S. beef supply to foreign sources (which was not limited to USDA Choice Beef or the kind of muscle cuts at issue in this case), and concludes that "the percentage of total beef supply that could possibly be labeled as USDA Choice and derived from a fed steer or heifer that was NOT born in the U.S. is [a maximum of] 2.05%[.]" (*Id.* at ¶¶ 4.4, 4.5.) He also explains that all USDA-graded beef is inspected by the USDA. (*Id.* at 4.5.I.) Further, the term

"Product of the USA" refers to beef and not cattle; if the animal has been harvested in the United States, it may be sold with a USDA Grade label and accordingly is a "Product of the USA." (*Id.* at ¶ 4.5.I.2.)

43. Dr. Speer also opines on the lack of traceability in the beef industry: "Mandatory traceability does NOT exist today in the U.S. beef industry . . . . Accordingly, as cattle transition through the beef marketing system, animal history is never related from one stage of the supply chain to the next because it's not required. Moreover, once a carcass hits the fabrication floor[,] it's impossible to provide any traceability of any product back to a specific animal." (*Id.* at ¶ 5.1.) Further, "[r]etail stores have no means of knowing origin history of the product they receive[.]" (*Id.* at ¶ 5.3.)

2. Dr. James Dickson

44. Dr. Dickson is a tenured professor in the Department of Animal Science and the Inter-Departmental Program in Microbiology at Iowa State University. (Dickson Decl., Doc. 229, Ex. A at 1.) He was previously employed by "USDA-ARS as a Research Food Technologist and lead scientist of the Meat Safety Assurance Program." (*Id.*)

45. Dr. Dickson provides an overview of beef inspection and regulation in the United States. (*See generally id.*) He explains the equivalency process, which ensures that imported products meet U.S. standards: "[c]ountries wishing to become eligible to export meat, poultry, or egg products to the United States must demonstrate that they have a regulatory food safety inspection system that is equivalent to that of FSIS." (*Id.* at 5.) Based on his experience, "[t]he same inspection standards and processing were applied to all of the meat derived from all the carcasses. The standards of safety of the meat, whether from US or imported cattle, were the same." (*Id.* at 8.) Dr. Dickson opines that: "(1) the equivalency process operates well in practice;

and (2) beef from imported cattle or imported product subject to equivalency is no less safe than any other beef[.]" (*Id.* at 8; *see also* Robinson Dep., Doc. 232-1, 104:16-23 ("A. I do not have evidence that the meat . . . is less safe.").)

46. Dr. Dickson also attests that if imported cattle is slaughtered in the United States or if imported beef products are further processed in the United States, the resultant product may properly be labeled as a "Product of the USA." (Dickson Decl., Doc. 229, Ex. A at 8.)

47. Dr. Dickson confirms that retailers receive no information about the origin of the beef supplied by the supplier other than that it is a "Product of the USA": "[S]uppliers would also include a label on a box-end or product packaging stating the product is a 'Product of the USA.' From a retailer's perspective, this would be the only such information that is available to them upon receipt of the meat. Because the US treaty obligations, there would be no additional country of origin labeling." (*Id.* at 10.)

3. Dr. Richard George

48. Dr. George is a Professor Emeritus in the Department of Food Marketing at Saint Joseph's University. (George Decl., Doc. 231, Ex. A at 1.) He has "40 plus years of experience in the supermarket and food retail industry as a professor, researcher, speaker, and consultant." (*Id.* at 2-4.)

49. Dr. George provides a detailed explanation on why Dr. Robinson's opinions based on the consumer survey and the consumer survey itself are unreliable. (*Id.* at 5-11). Some of the reasons for the unreliability highlighted by Dr. George include: inadequate response options for the survey question regarding the meaning of the "USDA Choice Produced in the USA" graphic, the survey's failure to ask why consumers would be more or less likely to purchase beef based on the graphic, the survey's presentation of the graphic to respondents in isolation—not as it would

be presented in the market, and Dr. Robinson's failure to perform any statistical analysis in conjunction with her opinion on the importance of certain attributes associated with beef purchasing. (*Id.*)

50. Dr. George also conducted his "own analysis of the role of grocery circulars and advertisements in the grocery shopping process." (*Id.* at 12.) He conducted "primary research (a survey of meat shoppers who use circulars about their use of circulars)" and "secondary research" (a review of other relevant peer-reviewed publications). (*Id.*) Based on his research, he opines that "grocery circulars/ads are declining in use. Even though my survey was drawn from meat shoppers who use circulars, less than half of the survey respondents stated that they 'always' read/review grocery circulars/ads before shopping. Secondary research has found that only 33% of shoppers use them." (*Id.*)

51. He also opines that "the vast majority of shoppers who use grocery circulars/ads, do so to check prices and deals; not to review product claims, such as the country of origin of the products." (*Id.*) Dr. George's survey found that 82% of the respondents gave promotional, i.e., money saving, reasons for the "single most important item found in a grocery circular/ad." (*Id.* at 23.) This was confirmed by his secondary research which found that consumers reviewing grocery store circulars or ads "continue to be focused on price" and "sales/promotions." (*Id.* at 24.)

52. Dr. George also noted that "all of the major studies … show that the country of origin of beef products is only of minor (if any) importance to consumers when deciding whether to buy beef. Certainly, there is no evidence to support the notion that consumers are considering this when reviewing grocery circulars/ads." (*Id.* at 12.)

4. Dr. Stephen Hamilton

53. Dr. Hamilton is a Professor of Economics at California Polytechnic State University, San Luis Obispo ("Cal Poly"). (Hamilton Decl., Doc. 228, ¶ 1.) He chaired the Department of Economics at Cal Poly from 2005-2017. (*Id.*) His "research areas focus on the application of statistical methods and economic theories of industrial organization to wholesale and retail market pricing." (*Id.* at ¶ 2.) He has "published over 60 articles" and "won numerous research awards." (*Id.* at ¶¶ 2-7.) He has also "provided expert reports in over 20 class action cases involving consumer damages for misleading product representations, including testimony on economic damages for consumer fraud and false advertising allegations [on behalf of plaintiffs]." (*Id.* at ¶ 6.)

54. In his report, Dr. Hamilton explains in detail why Dr. Robinson's report and the underlying consumer survey are unreliable and provide no basis to ascertain a class or measure class damages. (*Id.* at ¶¶ 24-25, 72-108.) Among Dr. Hamilton's observations are that the survey itself indicated that consumers do not form "homogeneous beliefs" regarding the meaning of the "USDA Choice Produced in the USA" graphic and the survey failed to identify the consumers' exposure to the graphic through advertising—as opposed to exposure to the label itself—as being the causal factor for the purchasing decision. (*Id.* at ¶¶ 72-81.) He also notes that Dr. Robinson's findings purportedly showing "Kroger revenue generated by misrepresenting beef origin" are neither related to the alleged harm suffered by any putative class members due to Kroger's use of the "USDA Choice Produced in the USA" graphic in advertising nor any benefit Kroger received as a result of use of the graphic. (*Id.* at ¶¶ 89-93.) He also concludes that Dr. Robinson's opinions based on consumers' willingness to pay for beef produced in the United States versus outside the United States are not scientifically valid because they are not derived from a "regression model

that controls for other product characteristics" nor did Dr. Robinson control for standard error in the sample or provide any measure of statistical significance." (*Id.* at ¶¶ 100-102.)

55. Dr. Hamilton also conducts his own econometric analysis using a "two-way fixed effects regression model" to determine whether there are any damages in this case. (*Id.* at ¶¶ 33-68.) According to Dr. Hamilton, "[i]n a class damage framework based on scientifically accepted economic theory, each consumer's damages depend on the difference in market outcomes between the realized prices paid for the products and those that would have been paid in the 'but-for' scenario. Specifically, the data would reveal that damages for consumers who purchased the products at issue would be equal to the difference in market prices (the 'price premium') between the two scenarios." (*Id.* at ¶ 15.) "Absent a carefully framed methodology for determining market prices in the 'but-for' world without the ["USDA Choice: Produced in the USA" graphic], there is no economic basis for Class-wide damages." (*Id.* at ¶ 16.) His regression analysis reveals "that consumers did not pay a price premium because of the ["USDA Choice: Produced in the USA" graphic]" and, in fact, received the products at a substantial discount. (*Id.* at ¶ 43.) Thus, "there is no economic damage at all." (*Id.* at ¶ 106.)

56. Dr. Hamilton also reviewed Thornton's history of beef purchases from Smith's and found that she purchased only one beef product (a chuck roast) during an advertising week. (*Id.* at ¶ 58.) He concluded that she "did not pay a price premium as a result of the ["USDA Choice: Produced in the USA" graphic], but instead received the product at a 29% discount below the average price[.]" (*Id.* at ¶ 63). Dr. Hamilton also found that "[t]he majority of Thornton's purchases (4 out of 5) occurred a month or more after the advertising date, including many Products that were not advertised within the last 6 months or were not advertised at all[,]" (*id.* at ¶

58), indicating that the "USDA Choice: Produced in the USA" graphic in circulars is "unlikely to be a material (causal) factor in her purchases[.]" (*Id.* at ¶ 60.)

IV. Thornton and Class Counsel's Ties to the Cattle Ranching Industry and Prior Relationship.

A. Both Thornton and Class Counsel Have Ties to Cattle Ranching.

57. At her deposition, Thornton testified as to her ties to the cattle ranching industry. Thornton grew up working on her grandfather's cattle ranch, spending summers gathering and branding cattle (Thornton Dep., Doc. 214-2 at 27:17-28:6); she still owns the rights to the cattle brand that was previously held by her grandfather. (*Id.* at 36:2-18.) Thornton also served as Livestock Secretary for the New Mexico State Fair, where she was responsible for all livestock entries. (*Id.* at 28:14-29:2.) In addition, Thornton's cousin currently owns a working cattle ranch. (*Id.* at 37:7-38:7.)

58. The Court takes judicial notice that Mr. Dunn is the founder of Western Agriculture, Resource and Business Advocates, LLP ("WARBA") according to its website. In an interview with the American Agricultural Association, Mr. Dunn has described WARABA as "a law firm that is focused on federal advocacy for farmers and ranchers." *See* https://www.aglaw-assn.org/featured/aala-featured-member-blair-dunn/. He also stated that he "was raised on farms and ranches in Southeast New Mexico," and has known that he would be "involved in advocating for Agriculture since the 4th Grade when" he filed his "first water rights lawsuit against [his] classmates." *Id.*

B. Thornton Had A Prior Relationship with Mr. Dunn.

59. Thornton testified at the class certification hearing that she and proposed class counsel A. Blair Dunn are not "close friends" (Class Cert. Hr'g Tr., Doc. 255 at 179:11-12), but at her deposition, she admitted that her son Andrew is a lawyer who became friends with Mr. Dunn

in law school. (Thornton Dep., Doc 214-2 at 58:2-58:20.) Before serving as a plaintiff in this case, Thornton had interacted with Mr. Dunn at Andrew's birthday, at a political fund-raiser for Mr. Dunn's father, and at her own home. (*Id.* at 58:21-59:24.)

60. According to Thornton, her working relationship with Mr. Dunn began sometime in 2019, shortly after her son Andrew told her that some of the beef sold in the United States was not from cattle born in the United States. (Class Cert. Hr'g Tr., Doc. 255 at 198:24-199:5.) At this time, Andrew did not tell her anything specific as to Kroger or Smith's. (Thornton Dep., Doc. 214-2 at 71:25-72:5.) Thornton testified that she did not research Andrew's allegation; she took his word for it. (Class Cert. Hr'g Tr., Doc. 255 at 199:6-10.)

61. Shortly thereafter, Andrew asked Thornton if she would be interested in serving as a plaintiff in a class action against the United States' largest beef packers, Cargill, National Beef, Tyson, and JBS (the "Beef Packers"). (*Id.* at 200:4-11.) Thornton testified that she understood that Andrew asked her to bring the lawsuit due to her background in cattle and concern with "what we put in our bodies." (*Id.* at 200:12-17.) Andrew suggested to Thornton that she use Mr. Dunn as her attorney to bring the lawsuit against the Beef Packers and she agreed to do so without considering any other attorneys. (*Id.* at 200:18-201:5.)

C. Thornton Served as Mr. Dunn's Plaintiff in An Action Against the Beef Packers Based on the Same Beef Products At Issue Here.

62. On January 7, 2020, Thornton filed a class action complaint against the Beef Packers in the 2nd Judicial District Court of Bernalillo County (the "*Tyson* Case"). (Doc. 235-3.) She alleged that the Beef Packers falsely labeled beef as "Product of the USA" when it originated from cattle born or raised outside of the United States. (*Id.* at ¶ 5.) She also alleged that she relied on the Beef Packers' labels to purchase beef and that she unknowingly purchased this beef at Costco, Sam's Club, Smith's, Albertson's, Wal-Mart, Sprouts, and Whole Foods. (*Id.* at ¶¶ 12,

13, 24.) Thornton claimed that the Beef Packers' false representations caused these retailers to pass along the same "Product of the USA" representations in their advertising (*id.* at ¶¶ 24, 27), and included photographs of Smith's advertising circulars that included the "USDA Choice Produced in the USA" graphic.[7] (*Id.* at ¶ 24.)

63. The Beef Packers removed the case to this Court, where it was consolidated with a substantially similar class action against the Beef Packers filed by Mr. Dunn on behalf of a rancher, Michael Lucero ("Lucero"). *See Thornton v. Tyson Foods, Inc. et al*, Docket No. 1:20-cv-00105 (D.N.M. Feb 05, 2020) ("*Tyson*").

64. Upon motion by the Beef Packers, Judge Riggs dismissed Thornton's and Lucero's claims after finding that they were "preempted under 21 USC § 678 because they seek to impose different or additional labeling requirements than those found under the FMIA." *Thornton v. Tyson Foods, Inc.*, 482 F. Supp. 3d 1147, 1158 (D.N.M. 2020). Thornton filed this action one week later.

65. While Thornton was pursuing this action, she simultaneously appealed the dismissal of her complaint in *Tyson* to the Tenth Circuit, along with Lucero. (Thornton Dep., Doc. 214-2 at 61:1-17.) There, she continued to argue that the Beef Packers were responsible for her unknowing purchase of the same beef that is at issue in this case. (*Id.* at 78:15-22); *Thornton v. Tyson Foods, Inc.*, 28 F.4th 1016, 1020 (10th Cir. 2022). The Tenth Circuit affirmed the dismissal of Thornton's complaint against the Beef Packers on March 11, 2022. *Id.* at 1029. Thornton petitioned for writ of certiorari, which was denied in October 2022. *Thornton v. Tyson Foods, Inc.*, No. 21-1604, 2022 U.S. LEXIS 3890, at *1 (Oct. 3, 2022).

[7] Thornton testified at her deposition that the Beef Packers are deceiving retailers by labeling the beef as "Product of the USA." (Thornton Dep., Doc. 214-2 at 70:10-70:13.)

D. Thornton's Lack of Involvement with this Lawsuit Against Kroger.

66. Based on her deposition testimony, it appears that Thornton has had little involvement with this lawsuit. She did not recognize the name of Wendy Irby, her co-plaintiff in this action. (Thornton Dep., Doc. 214-2 at 17:5-9). She testified that her lawyers do not update her very often, apart from informing her that she would be deposed. (*Id.* at 74:15-22). She does not review the filings. (*Id.* at 74:23-75:2). She does not know the experts her counsel has retained, or what their opinions are. (*Id.* at 75:11-15). She is not familiar with her claims. (*Id.* at 76:10-13). She did not know if a class had been certified in the case, or what would happen if one were certified. (*Id.* at 77:6-24).

67. In an attempt to rehabilitate this testimony, Thornton submitted a declaration in connection with her motion for class certification which she represented that she had now reviewed the Third Amended Complaint and this Court's rulings with her attorney and that she understood that it was her duty to the class to review the actions of her attorneys. (Doc. 214-1.)

V. Thornton's Interpretation of Kroger's "USDA Choice: Produced in the USA" Graphic Contradicts Her Remaining Claims.

68. At her deposition, Thornton testified that it was actually the acronym "USDA" in the phrase "USDA Choice" on the graphic that led her to believe the beef she purchased from Smith's came from cattle born and raised in the United States—not the "Produced in the USA" statement: "Q. And you assume that the phrase 'USDA choice' meant that it came from a cow born, raised and processed in the United States? A. Not the choice part. Beef is choice or prime, but the USDA, yes. Q. So the USDA part is what led you to believe that the cow was born, raised and slaughtered in the United States. A. Yes." (Thornton Dep., Doc. 214-2 at 80:11-81:8; *see also id.* at 49:2-6.) She was under the impression that all USDA graded beef had to be from cattle born and raised in the United States. (*Id.* at 56:15-56:19.)

69. Thornton attempted to walk back this testimony at the class certification hearing, pointing to the phrase, "produced in the USA" and the flag image on the graphic as influencing her belief that the advertised beef products were from cattle born and raised in the United States. (Class Cert. Hr'g Tr., Doc. 255 at 184:25-185:13.) But she admitted that she mentioned none of these factors in her deposition when asked to point out what was misleading about the logo. (*Id.* at 195:19-25; 197:4-9.)

70. At the class certification hearing, Thornton confirmed that the "USDA Choice" shield used by Albertsons in its advertising circulars, which does not contain the phrase "produced in the USA" or the image of a flag, also led her to believe that the advertised beef product was from cattle born and raised in the United States. (*Id.* at 197:24-198:13.)

VI. Thornton's Purported Concerns About Purchasing Beef from Cattle Born and Raised in the USA Are Contradicted by Evidence.

71. At the class certification hearing, Thornton testified that it matters to her that beef she purchases is from cattle born, raised, and harvested in the United States because she "believes the United States has higher standards than other countries."[8] (*Id.* at 186:24-187:4.)

72. Despite Thornton's bald assertions about the importance of beef being from cattle born and raised in the USA, the record evidence suggests that it is really not that important to her. Thornton testified that although she had alleged in the *Tyson* Case that retailers Sam's and Costco deceptively advertised beef from cattle that was not born and raised in the United States, as of the date of the class certification hearing, she continued to buy beef from those retailers. (*Id.* at 208:10-20.)

[8] At her deposition, Thornton admitted that she had not actually researched beef standards in other countries, but she does not "trust outside sources." (Thornton Dep., Doc. 214-2 at 49:19-50:3.)

73. Thornton also buys beef from Whole Foods, but has done no research regarding its sourcing of beef to ensure that the beef she purchases is from cattle born and raised in the United States. (*Id.* at 208:21-209:3.) Incredibly, she testified that she assumed the beef she purchased from Whole Foods is from American cattle due solely to the use of the word "whole" in the name Whole Foods. (*Id.* at 209:4-8.) She also buys beef at grocer Triangle, but the only thing that she did to investigate its origin was to confirm with the butcher that it was a product of the USA; she did not actually confirm where the cattle was born and raised. (*Id.* at 209:12-18.) Thornton also eats beef at restaurants without verifying its origin. (*Id.* at 209:19-25.)

74. But perhaps most telling, is the evidence that Thornton kept purchasing beef from Smith's. Although Thornton averred in her interrogatory responses that she "stopped purchasing beef from Smith's in January of 2020" (Response to Interrogatory 8, Doc. 235-4), Kroger submitted evidence of Thornton's beef purchase history from Smith's (based on her loyalty card) showing that Thornton had purchased beef from Smith's well beyond January 2020 and even after she filed this action against Kroger in September 2020. (Doc. 235-5; *see also* Class Cert. Hr'g Tr., Doc. 255 at 213:3-7.)

75. When confronted with the evidence of her Smith's beef purchase history at her deposition, Thornton suggested that her husband had purchased the beef with her loyalty card. (Thornton Dep., Doc. 214-2 at 113:7-113:8.) However, Thornton could not recall her husband cooking beef in the forty-five years they have been married. (*Id.* at 8:16-8:20, 120:10-121:12.) Perhaps, recognizing the implausibility of her husband purchasing the beef when he does not cook, at the class certification hearing, Thornton testified that she has lost loyalty cards in the past—suggesting that someone used her lost loyalty cards to purchase beef from Smith's. (Class Cert. Hr'g Tr., Doc. 255 at 190:10-15.)

VII. Thornton Presented No Evidence of Damages.

A. Thornton Reviews Advertising Circulars for Sales—Not Product Claims.

76. Despite the fact that her claims rely upon her review of Smith's advertising circulars for product claims—in particular claims about the origin of beef products, Thornton herself admitted several times that she in fact reviews circulars for "good deals." (Class Cert. Hr'g Tr., Doc. 255 at 182:6-14; *see also id.* at 203:11-15.)

77. Thornton's use of the advertising circulars to check deals and prices comports with the research survey conducted by Kroger's expert, Dr. George. When survey respondents were asked why they reviewed grocery store circulars, 92% stated to "check prices, see deals & coupons." (Ex. A to George Decl., Doc. 231 at 23.) When asked about attributes typically featured in grocery circulars, over 82% of respondents gave promotional reasons as their single most important feature in the decision to purchase a particular product or shop at a particular store. (*Id.*)

B. Thornton Herself Cannot Identify Any Advertisement that She Relied Upon to Purchase A Beef Product.

78. Although Thornton claims generally that she relied on Smith's advertisements to purchase beef products, she cannot identify a single advertisement that she actually reviewed to make the decision to purchase a beef product. (Class Cert. Hr'g Tr., Doc. 255 at 204:11-22; Thornton Dep., Doc. 214-2 at 126:16-19.) Likewise, she cannot identify a single beef product that she purchased from Kroger after reviewing an advertisement. (*Id.* at 92:16-93:4.) Kroger points out that Thornton fails to do so even with the benefit of her record of beef purchases from Smith's and every single Kroger circular from the relevant period. (Doc. 235 at 20 n.16.)

79. Kroger's expert, Dr. Hamilton, reviewed an itemized list containing Thornton's history of purchases of beef products from Smith's, dating back to 2016, and compared this list with the dates on which beef products were advertised with the challenged graphic in Thornton's

region. (Hamilton Decl., Doc. 228, ¶ 57.) Based on this review, Dr. Hamilton concluded that there was only one beef product, chuck roast, that Thornton has ever purchased in the week after it was advertised. (*Id.* at ¶ 58.) In other words, there was only one beef product that Thornton could possibly have relied on a Smith's advertisement to purchase. But, Dr. Hamilton opined that "[t]he fact that Plaintiff Thornton purchased Chuck Roast during one of the advertising periods for the Product hardly suggests that she did so in reliance upon the advertisement. Chuck Roast was among the most intensively advertised products in Kroger Division 706 over the period, with advertising occurring in 36 out of 155 weeks (23.2 percent of the time). Even if one were to randomly scramble 5 purchase occasions across dates and UPCs in the beef category of Smith's the odds favor at least one of them striking inside the window of a Challenged Advertising claim purely by happenstance." (*Id.* at ¶ 61.)

C. Thornton Has No Evidence that Kroger Uses the Graphic to Advertise Beef from Cattle Born or Raised Outside of the United States.

80. Thornton testified that prior to filing this action, and even to the very day of the class certification hearing, she had no evidence that Kroger had sold beef advertised with the "USDA Choice Produced in the USA" graphic that was not from cattle born and raised in the United States. (Class Cert. Hr'g Tr., Doc. 255 at 205:6-14; *see also* Thornton Dep., Doc. 214-2 at 83:18-83:21, 95:20-96:1.) She also testified that she has no evidence that any beef product she purchased from Kroger was from cattle born or raised outside the United States. (Thornton Dep., Doc. 214-2 at 122:9-17.)

81. Thornton's expert, Dr. Robinson, also confirmed that she had no evidence that any beef sold by Kroger came from cattle born and raised outside the United States—let alone any evidence Kroger used the "USDA Choice Produced in the USA" graphic to advertise such a beef product. (Class Cert. Hr'g Tr., Doc. 255 at 112:14-25.)

D. Thornton Has No Evidence that Kroger Charged a Price Premium for Beef Advertised with the Graphic.

82. Thornton testified that she had no evidence that Kroger charges more for the beef that it advertises with the graphic than beef that is not advertised. (Thornton Dep., Doc. 214-2 at 216:3-8.)

83. Kroger submitted evidence that in fact it charges no price premium for the beef products advertised with the graphic. Kroger's expert, Dr. Hamilton, used an econometric analysis to determine "that consumers did not pay a price premium because of the ["USDA Choice: Produced in the USA" graphic]" and, in fact, received the products at a substantial discount. (Hamilton Decl., Doc. 228 at ¶ 43).

84. Dr. Hamilton specifically found that this analysis holds true for Thornton who purchased one beef product (a chuck roast) during an advertising week and "did not pay a price premium as a result of the ["USDA Choice: Produced in the USA" graphic], but instead received the product at a 29% discount below the average price[.]" (*Id.* at ¶ 63) Thornton testified that she was not surprised by Dr. Hamilton's conclusion that beef advertised by Kroger actually cost less to the consumer, because "it's an advertisement" and advertised products typically cost less. (Class Cert. Hr'g Tr., Doc. 255 at 216:9-19.)

E. Thornton Provided No Class Damages Model.

85. Thornton's motion for class certification provided no class damages model for the Court to consider. She has set forth no damages model outside of her motion either. Although Plaintiffs' expert, Dr. Robinson, suggested that she calculated Kroger revenue generated from misrepresenting the origin of beef, she did not identify revenue attributable to the actual beef that was advertised, and she characterized these calculations as merely "some insight" on Kroger revenue from beef sales. (Robinson Dep., Doc. 232-1 at 209:18.) Based on this testimony, as well

as her testimony that she did not prepare a damages analysis nor even come up with a framework for one (*id.* at 145:13-17, 146:7-13), the Court concludes that Dr. Robinson offers no opinion on damages or a damages model. Thus, Thornton has provided no class damages model for consideration.[9]

VIII. Thornton Provided No Evidence of the Number of the Members of the Proposed Classes.

86. Thornton's calculations of the potential members of her proposed classes are completely divorced from any real evidence. For the proposed New Mexico class, she states that there are 6,113 people in her town; speculates that every one of them received and read Kroger circulars and saw the graphic at issue; speculates that 46% of them would have interpreted the graphic to mean that the beef came from cattle born and raised in the United States, based solely on the results of Mr. Sanderoff's consumer survey; speculates that 67% of them bought the advertised beef that week based on that interpretation (again, based on the results of the survey that did not ask respondents why they would be more likely to purchase beef with the graphic); and speculates that all of them received beef from cattle born or raised in other countries. (Doc. 214 at 11.) For her proposed national class, Thornton argues that Kroger sold beef products to 58 million households based on unidentified "discovery materials;" assumes that all of these products were advertised with the graphic at issue (when only a handful were at any given time); states again that 46% of the households would agree with her interpretation of the advertisement; assumes that every shopper relied on that interpretation to purchase the beef; assumes that the beef

[9] The Court gives no credence to the suggestion made by Dr. Robinson at the class certification hearing that she could put together a damages model based on price differentials in what the survey respondents were willing to pay for beef products produced in and outside of the United States. (Class Cert. Hr'g Tr., Doc. 255 at 89:19-90:3.) Even putting aside the fact that these differentials have no connection to any products sold by Kroger—let alone Kroger's advertisements—Dr. Robinson previously testified it was "beyond [her] experience" whether these price differentials could be a way to measure damages. (Robinson Dep., Doc. 232-1 at 204:7-12.)

purchased was not from cattle born and raised in the United States. (*Id.*) Then, without doing any math, Thornton suggests that her proposed national class "is easily in the millions of consumers." (*Id.*)

87. Kroger points out that in discovery it produced every print circular distributed from 2016-2021, as well as data that shows every purchase of USDA Choice beef (the only beef Kroger advertised with the graphic at issue) during the relevant period (when Kroger was using the graphic in advertising). (Doc. 235 at 37.) Thornton could have analyzed these documents to try to identify at least some loyalty card numbers that purchased a beef product during a week in which it was advertised with the graphic at issue, but she elected not to do this.

IX. There is No Objective and Administratively Feasible Way to Identify Class Members.

88. The members of Thornton's proposed classes must meet at least four unique requirements. They must have: (1) reviewed a circular delivered in a mailer or newspaper and seen the "USDA Choice: Produced in the USA" graphic; (2) interpreted the graphic to mean that the beef advertised was from cattle born, raised, and harvested in the United States; (3) relied on that interpretation to purchase the beef; and (4) purchased beef that was not, in fact, born, raised, and harvested in the United States. But Thornton has proposed no administratively feasible means by which to identify these individuals.

89. According to the evidence submitted by Kroger, it is impossible to know which of its customers even received a circular with the advertising at issue. Circulars are not mailed to every Kroger customer or even loyalty card member and neither Kroger nor any third party tracked who received circulars that advertised beef with the "USDA Choice: Produced in the USA" graphic. (11/18/22, Doc. 235-1, Schmitz Decl. ¶¶ 8, 12.) Further, even if Kroger did maintain a database of customers who received circulars with the at issue advertisements, there would be no

way to know whether the customers actually reviewed the circulars—let alone noticed the "USDA Choice Produced in the USA" graphic.

90. Moreover, there is no way to know how a particular individual would interpret the graphic. The survey evidence on which Thornton relies confirms that consumers do not interpret the graphic uniformly. Indeed, only 46% of respondents chose the "born and raised in US" option that Thornton advances. (Doc. 214-3 at 2.) Again, this survey presented limited options for the meaning of the advertisement, none of which reflected the government's own and current definition of "Product of the USA." In other words, even using a survey designed to push respondents towards Thornton's alleged interpretation, most respondents did not agree with her.

91. Thornton also proposed no objective way to determine who actually purchased a beef product in reliance of the interpretation of the "USDA Choice Produced in the USA" graphic that she advocates. Even considering the results of Mr. Sanderoff's consumer survey asking respondents if they would be more or less likely to purchase beef advertised with the graphic (Robinson Report, Doc. 214-5, at THORNTON/IRBY0000010), Dr. Robinson testified that "she cannot say with any degree of certainty why the respondents said they would be more likely to purchase beef based on the graphic." (Class Cert. Hr'g Tr., Doc. 255, at 123:22-124:1.) It is entirely possible that the respondents were seeking USDA Choice graded beef. (*Id.* at 124:2-4.) In fact, the Court notes that 60% of the survey respondents interpreted the graphic to mean the grade of beef as defined by the USDA. (Robinson Report, Doc. 214-5 at THORNTON/IRBY0000010.)

92. Finally, Thornton proposed no way to determine if a particular beef product advertised with the "USDA Choice: Produced in the USA" graphic was from cattle born or raised in another country without reviewing every individual beef purchase and seeking third party

discovery from the beef packers concerning the source of the beef, which Thornton has not done. Moreover, as the Court noted at the hearing on Kroger's motions to exclude expert evidence—and Thornton's counsel conceded—it is likely impossible to determine which beef products were sourced from foreign cattle. (Daubert Hr'g Tr., Doc. 266 at 49:5-50:8.)

93. In short, the only way to answer all of these questions is to ask each potential class member individually, which is just what Thornton proposes. She advocates for allowing potential class members to self-identify by submitting affidavits. (Doc. 246 at 8.) Even setting aside the administrative quagmire that this process would cause, the Court has concerns about its reliability. Indeed, the Court cannot presume that everyone who purchased a product did so in reliance on an advertising circular and after several years—or even months—memories fade and become unreliable. Indeed, even Thornton herself, with the benefit of all Kroger's advertising circulars and a list of her beef purchases, could not identify a single advertisement that she relied on to purchase a beef product or conversely, a single beef product that she purchased after reviewing an advertisement. (Class Cert. Hr'g Tr., Doc. 255 at 204:11-22; Thornton Dep., Doc. 214-2 at 126:16-19, 92:16-93:4.) As Thornton testified, "[W]hen I get home, it's done. I don't care … It's in the past, forget about it." (Class Cert. Hr'g Tr., Doc. 255, at 204:22-205:5.)

PROPOSED CONCLUSIONS OF LAW

I. Dr. Robinson's Challenged Opinions and the Survey Evidence are Excluded.

A. Law Regarding Expert Testimony.

1. **Rule 702**. Federal Rule of Evidence 702 states:

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

2. **The Standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*** "In its gatekeeper role, a court must assess the reasoning and methodology underlying an expert's opinion, and determine whether it is both scientifically valid and relevant to the facts of the case, i.e., whether it is helpful to the trier of fact." *SEC v. Goldstone*, No. CIV 12-0257 JB/LFG, 2016 U.S. Dist. LEXIS 61657, at *108 (D.N.M. May 10, 2016) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594-95). In *Daubert*, the Supreme Court articulated a non-exclusive list of factors that weigh into a district court's first-step reliability determination, including: (i) whether the method has been tested; (ii) whether the method has been published and subject to peer review; (iii) the error rate; (iv) the existence of standards and whether the witness applied them in the present case; and (v) whether the witness' method is generally accepted as reliable in the relevant medical and scientific community. 509 U.S. at 594-95.

3. In *Norris v. Baxter Healthcare Corp.*, the Tenth Circuit set forth the applicable standard:

> Rule 702 requires the district court to ensure that any and all scientific testimony or evidence is not only relevant, but reliable. This obligation involves a two-part inquiry. A district court must first determine if the expert's proffered testimony . . . has a reliable basis in the knowledge and experience of his or her discipline. In making this determination, the district court must decide whether the reasoning or methodology underlying the testimony is scientifically valid. Second, the district court must further inquire into whether proposed testimony is sufficiently relevant to the task at hand.

397 F.3d 878, 883-84 (10th Cir. 2005) (internal citations and quotations omitted).

4. "The second inquiry is related to the first. Under the relevance prong of the *Daubert* analysis, the court must ensure that the proposed expert testimony logically advances a material aspect of the case . . . The evidence must have a valid scientific connection to the disputed facts in the case." *Id.* n. 2. *Id.* at n.2. If the expert's proffered testimony fails on the first prong, the court does not reach the second prong. *Id.* at 884.

5. Further, "[t]he proponent of the expert's opinion testimony bears the burden of establishing that the expert is qualified, that the methodology he or she uses to support his or her opinions is reliable, and that his or her opinion fits the facts of the case and thus will be helpful to the jury." *United States v. Begay*, 497 F. Supp. 3d 1025, 1057 (D.N.M. 2020).

B. The Court Grants Kroger's Motion to Exclude the Challenged Testimony of Dr. Robinson.

7. As discussed above, Plaintiffs' expert, Dr. Robinson, submitted a report consisting of three parts: (1) U.S. Retail Survey Results; (2) U.S. Beef Research; and (3) Financial Implications of Findings. (Robinson Report, Doc. 214-5.) Dr. Robinson also offers a rebuttal report attempting to counter the report authored by Kroger's witnesses in which she offers an opinion as to Kroger's state of mind and motivation for creating the logo at issue. (Rebuttal, Doc. 232-2 at THORNTON/IRBY000155.)

8. Kroger presented four arguments as to why certain of Dr. Robinson's opinions should be excluded: (1) she offers unreliable opinions; (2) her opinions will not assist the trier of fact; (3) Dr. Robinson's opinion on Kroger's mental state is improper; and (4) she has no opinion on damages. (Doc. 263 at 33.) The Court will address each of these in turn.

1. Dr. Robinson's Opinions are Unreliable.

9. Kroger argues that "[m]any of Dr. Robinson's opinions should be excluded as unreliable," including her opinions regarding: (1) the importance of the USDA Choice: Produced in the USA" graphic and the origin of beef to consumers; (2) consumers' willingness to pay for U.S. beef; (3) and the financial implications of findings. (*See* Doc. 232.)

i. The Importance of USDA Choice: Produced in the USA graphic.

10. With regard to Dr. Robinson's opinions on the importance of the graphic and the origin of beef to consumers, Kroger asserts that they are unreliable because they are not supported

by any valid method. Kroger points to the fact that Dr. Robinson repeatedly testified that her report could not be published in a peer-reviewed journal, and deviates from her other work. (*See* Robinson Dep., Doc. 232-1 at 86:2-87:10; 183:16.) She admittedly did nothing more than parrot the results of the survey and perform basic arithmetic by calculating simple mean scores. (Doc. 232 at 14; *see also* Robinson Dep., Doc. 232-1 at 53:16-24 (testifying she has never had "a paper published that [she] authored or coauthored where the only method for determining statistical significance was looking at the mean."). Dr. Robinson also admitted that (1) there is no measure of statistical significance in her report, (Robinson Dep., Doc. 232-1 at 183:10-13; *see also* Class Cert. Hr'g Tr., Doc. 255 at 106:1-3) and (2) that opining on the importance of an attribute in the absence of statistical analysis is contrary to standards in her field. (Robinson Dep., Doc. 232-1 at 185:6-11; *see also* Class Cert. Hr'g Tr., Doc. 255 at 106:4-7.) From Kroger's perspective, Dr. Robinson's failure to engage in any statistical analysis at all renders her report unreliable.[10] (Doc. 259 at 7-9.)

11. Thornton argues that statistical analysis by Dr. Robinson was not necessary. (Doc. 251 at 6, 8.) Thornton posits "Defendants' experts can certainly attempt to explain to a fact finder the purported weaknesses in Dr. Robinson's methodology, but the Court would not be on good grounds to exclude her testimony on such basis." (*Id.* at 6.) But the Court need not accept Dr. Robinson's opinions as reliable simply because she says they are. *Goldstone*, 2016 U.S. Dist. LEXIS 61657, at *113 ("A court is not required to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.").

[10] Kroger also argues that Dr. Robinson's opinions are not based on sufficient facts and data. (Motion, Doc. 232 at 14.) Dr. Robinson suggests that the "USDA Choice Produced in the USA" graphic encourages consumers to purchase beef because they want beef from cattle born and raised in the U.S. based on the results of the consumer survey. Kroger takes issue with the fact that the survey upon which Dr. Robinson's opinions are based did not ask why respondents would be more or less likely to purchase beef with the graphic and that Dr. Robinson admitted she cannot say why respondents said they would be more likely to purchase beef with the graphic. (Class Cert. Hr'g Tr., Doc. 255 at 123:22-124:1.) The Court will consider these issues below in Kroger's motion to exclude the survey.

12. The Court agrees with Kroger that Dr. Robinson's failure to act in accordance with her own standards and to undertake any statistical analysis renders her testimony on the importance of the graphic and the origin of beef unreliable. Trial courts must "make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in their relevant field." *Kumho v. Carmichael*, 526 U.S. 137, 152 (1999). Thus, "[c]ourts have excluded experts' opinions when the experts depart from their own established standards." *Goldstone*, 2016 U.S. Dist. LEXIS 61657 at *114 (citing *Truck Ins. Exch. v. MagneTek, Inc.*, 360 F. 3d 1206, 1213 (10th Cir. 2004) ("The district court noted that [the expert]'s opinion did not meet the standards of fire investigation [the expert] himself professed he adhered to.")); *Magdaleno v. Burlington N. R.R. Co.*, 5 F. Supp. 2d 899, 905 (D. Colo. 1998) ("In sum, [the expert]'s methodology is not consistent with the methodologies described by the authors and experts whom [the expert] identifies as key authorities in his field.")). Similarly, in *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, the court found the plaintiffs' expert's testimony unreliable because the plaintiffs failed to demonstrate that "reliance on non-statistically significant 'trends' [was] accepted in the [expert's] field," and the expert's "own testimony demonstrate[d] that studies without statistical significance are insufficient to support a causation opinion." 174 F. Supp. 3d 911, 926 (D.S.C. 2016); *see also, e.g., In re Zoloft (Sertraline Hydrochloride) Products Liab. Litig.*, 26 F. Supp. 3d 449, 455 (E.D. Pa. 2014) (expert opinion excluded because expert "failed to demonstrate that her reliance on non-statistically significant findings is accepted within her scientific community").

13. The Court finds that Dr. Robinson's opinions on the importance of the graphic and the origin of beef to consumers are unreliable. Dr. Robinson's "failure to undertake any credible statistical, econometric, or rigorous analysis undercuts the reliability of her methods." *Netquote*,

Inc. v. Byrd, No. 07-cv-00630-DME-MEH, 2008 U.S. Dist. LEXIS 109660, at *11 (D. Colo. Oct. 14, 2008); *see also Martincic v. Urban Redevelopment Auth.*, 844 F. Supp. 1073, 1075-76 (W.D. Pa. 1994) (finding the plaintiff's expert "has offered no semblance of statistical analysis that would breathe life into his bare numbers. . . . Plaintiff's attempt at statistical evidence is deficient because it fails to correlate, in any mathematically meaningful way, the defendant's personnel decisions with employee ages.").

14. Further, as this Court has recognized, "[c]ourts have excluded experts' opinions when the experts depart from their own established standards." *Goldstone*, 2016 U.S. Dist. LEXIS 61657 at *114. It is clear that Dr. Robinson's report violates her own standards and would not be accepted in her field. Thus, her opinions on the importance of the USDA Choice: Produced in the USA" graphic to and the origin of beef to consumers are excluded. *See, e.g.*, *Brown v. Burlington N. Santa Fe Ry.*, 765 F.3d 765, 776 (7th Cir. 2014) (proper to exclude results that could not "survive peer review"); *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 563 (S.D.N.Y. 2004) (excluding expert testimony because "Dr. Gale's selectivity in defining the universe of relevant evidence . . . violated his own standard of proper methodology").

ii. Consumers' Willingness to Pay.

15. Kroger argues that Dr. Robinson's opinion on consumers' willingness to pay for United States beef are also unreliable. (Doc. 232 at 19-20.) As described above, survey respondents were asked to make up prices for non-specific beef products, including steak, roast, and ground beef. (Survey, Doc. 218-1 at THORTON/IRBY000033-37.) Using this raw data, Dr. Robinson performed basic arithmetic by calculating the average prices but, again, performed no type of statistical analysis. The parties, and the Court, have been unable to find any federal case law supporting this approach. Indeed, Kroger's experts explain the fallacy of Dr. Robinson's approach: "It is not possible to assess whether the difference in [willingness to pay] for beef

products produced inside vs. outside the US is statistically different from zero. Such unsupported evidence on consumer [willingness to pay] is neither probative for economic damages nor scientifically valid." (Hamilton Rebuttal, Doc. 228 at 42-43; *see also* George Decl., Doc. 231 at 8-9 ("Asking the respondent to insert the prices that they would pay for these products in isolation without including other variables (such as cut or grade of beef) is not a reliable indicator of real-life purchasing conditions. In my professional experience, I have never conducted nor seen a survey conducted in this manner to attempt to discern how much a consumer would pay for products with certain characteristics.")).

16. This Court must "make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in their relevant field." *Kumho*, 526 U.S. at 152. Dr. Robinson has not applied the necessary intellectual rigor to her findings on consumers' willingness to pay for United States beef and, as such, the Court finds her opinions unreliable and excludes them for this reason.

iii. Financial Implications.

17. The Court finds Dr. Robinson's opinion on the "Kroger revenue generated by misrepresenting beef origin" unreliable as well. As discussed above, Kroger details a number of issues with Dr. Robinson's "Financial Implications" opinions. (*See* Doc. 232 at 20-21.) Moreover, Dr. Robinson testified that she has no evidence that Kroger sold a single beef product from cattle born or raised outside the United States. (Class Cert. Hr'g Tr., Doc. 255 at 112:14-20.)

18. Dr. Robinson's opinion on "Financial Implications" amounts to little more than multiplication derived from speculation. *See Marion Healthcare, LLC v. Southern Ill. Healthcare*, No. 3:12-CV-871-MAB, 2020 U.S. Dist. LEXIS 55745, at *19-20 (S.D. Ill. Mar. 31, 2020) (excluding expert's "damages opinion because he relies on speculative assumptions in calculating damages"); *see also FPP, LLC v. Xaxis US*, No. 14 CV 6172-LTS-AJP, 2017 U.S. Dist. LEXIS

225400, at *3-4 (S.D.N.Y. Feb. 13, 2017) (excluding expert's report regarding damages where the report "engages in arithmetic, not expert analysis"). Thus, Dr. Robinson's opinions on "Financial Implications" must be excluded as unreliable as well.

2. Dr. Robinson's Opinions Will Not Assist the Trier of Fact.

19. When the expert's opinions are unreliable, the court need not evaluate whether they will assist the trier of fact. *United States v. Tsosie*, 791 F. Supp. 2d 1099, 1107 (D.N.M. 2011). But if the court does reach the second prong of the analysis, the court must ensure that proposed testimony "logically advances a material aspect of the case"; that is, "[t]he evidence must have a valid scientific connection to the disputed facts in the case." *Goldstone*, 2016 U.S. Dist. LEXIS 61657, at *111.

20. Because the Court finds Dr. Robinson's opinions unreliable, it need not determine whether her opinions will ultimately assist the trier of fact.[11]

3. Dr. Robinson May Offer No Opinion on Damages.

21. The Court finds that Thornton may not use Dr. Robinson's testimony as a basis for identifying damages in this matter for the simple reason she did not offer testimony pertaining to

[11] But, in any event, the Court finds Dr. Robinson's challenged opinions would not assist the trier of fact due to significant gaps between the data and her opinions. For instance, the raw survey data and basic mean values do not suffice for Dr. Robinson to opine on any importance consumers attach to the "USDA Choice: Produced in the USA" graphic and the origin of beef. This finding is further supported by the fact that Dr. Robinson admitted that she cannot say why the survey respondents said they would be more likely to purchase beef with the graphic. (*See* Class Cert. Hr'g Tr., Doc. 255 at 123:22-124:1.) It is clear Dr. Robinson made no legitimate attempt to discern how the origin of cattle affects consumer decisions in comparison to any other attribute of the beef.

Similarly, Dr. Robinson's analysis of willingness to pay for beef produced in the United States is not sufficient for her to opine that consumers would pay more for beef born, raised, and harvested in the United States. A cursory review of the survey reveals that it did not ask the question Dr. Robinson attempts to answer. The survey only asked about beef "produced in the United States" versus "beef produced outside the United States" without defining the word "produced." (Robinson Report, Doc. 214-5 at 13-14.)

Finally, Dr. Robinson's opinion that Kroger "likely" sold over $200 million worth of "imported beef" to consumers "more likely to purchase beef" advertised with the "USDA Choice: Produced in the USA" graphic has no connection to or support from any real evidence. Again, she admits she does not know anything about the origin of the beef Kroger advertised with the shield, and her rudimentary analysis of Kroger's sales was not limited to advertised beef, much less beef from foreign born cattle.

damages. (*See* Daubert Hr'g Tr., Doc. 266 at 62:10-16 ("I don't really see a damages report here. So I think largely, as I prepare the opinion on class certification, I think that in large part the plaintiffs are going into that without any damages testimony. I think she disclaimed doing damages, and what she's doing isn't really a damages calculation for the claims that are being brought.").)

22. Dr. Robinson testified that she was not retained to perform a damages analysis, she did not perform a damages analysis, and she does not know how damages would be distributed to a class. (Class Cert. Hr'g Tr., Doc. 255, at 104:22-105:5; *id.* at 146:7-13; Robinson Dep., Doc. 232-1 at 227:1-7.) Moreover, Dr. Robinson classified her "Financial Implications" section as merely "some insight" on Kroger's revenue from beef sales. (Robinson Dep., Doc. 232-1 at 209:9-18.)

23. On direct examination at the class certification hearing, Dr. Robinson confirmed that she had not provided a damages model, but she suggested that she could provide one based on price differentials in what the survey respondents were willing to pay for beef products produced in and out of the United States. (Class Cert. Hr'g Tr., Doc. 255 at 89:19-90:3.) This testimony conflicts with her earlier deposition testimony in which she was asked if these price differentials could be a way to measure damages and she answered that was "beyond [her] experience." (Robinson Dep., Doc. 232-1 at 204:7-12.)

24. It is clear that Dr. Robinson did not set forth any opinion on damages in her report, and the Court finds that she is excluded from opining on damages. *See* Fed. R. Civ. P. 26(a)(2)(B)(i) (requiring an expert's report to contain "a complete statement of all opinions the witness will express and the basis and reasons for them").

4. Dr. Robinson Offers Improper Opinions on Kroger's Mental State.

25. Kroger challenges statements Dr. Robinson made about its mental state. In her rebuttal report, Dr. Robinson purports to opine on Kroger's mental state and motivation for using the graphic at issue. Dr. Robinson states that the "Kroger Company created the [graphic at issue] to represent their beef products as a product that was grown and produced in the United States, while knowingly misrepresenting the facts that they truly do not know where the cattle and final beef was produced." (Robinson Rebuttal Report, Doc. 232-2 at THORNTON/IRBY000155.) Dr. Robinson, however, has never "spoken to anyone in the marketing department" or "seen any documents from anyone in that marketing department." (Robinson Dep., Doc. 232-1 at 121:6-21.) Kroger argues that such opinions do no more than tell fact finder what result to reach. (Doc. 232 at 23-24.)

26. "Rule 704(b) prohibits an expert from expressly stating the final conclusion or inference as to a defendant's mental state[.]" *Schmidt v. Int'l Playthings LLC*, 536 F. Supp. 3d 856, 895 (D.N.M. 2021) (discussing Rule 704(b) in the civil context). And "[Rules 701, 702, and 403] afford ample assurances against the admission of opinions [under Rule 704] which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day." *Id.*

27. The Court finds Kroger's argument as to Dr. Robinson's opinions regarding its mental state well-taken because Dr. Robinson is merely expressing an inference as to Kroger's mental state. *See Vondrak v. City of Las Cruces*, 2009 U.S. Dist. LEXIS 94628, at *31, 48 (D.N.M. Aug. 25, 2009) (Browning, J.) (excluding testimony from an experienced police officer attempting to show that a police officer reasonably handcuffed the plaintiff because it impermissibly applied the law to the facts). Throughout her rebuttal report, Dr. Robinson accused Kroger of making

knowing misrepresentations and speculated about Kroger's intent in creating the graphic, which constitutes an improper inference as to Kroger's mental state under Rule 704(b).[12]

28. Accordingly, Dr. Robinson's opinions pertaining to Kroger's mental state with respect to the use of the graphic at issue are excluded as well.

C. The Court Grants Kroger's Motion to Exclude Survey Evidence

29. Not only does Kroger seek to exclude the testimony of Dr. Robinson, but it also seeks to exclude the consumer survey upon which she relies. (*See* Motion, Doc. 234.) For the foregoing reasons, the Court agrees that evidence of the survey shall also be excluded.

30. The same standards of reliability and relevance apply to Kroger's motion to exclude survey evidence. *See e.g.*, *Daubert*, 509 U.S. at 592-93; *see also Abraham*, 317 F.R.D. at 263. Generally speaking, "technical and methodological deficiencies in the survey . . . bear on the weight of the evidence, not the survey's admissibility." *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 523 (10th Cir. 1987). When survey deficiencies, however, are "so substantial as to render the survey's conclusions untrustworthy, a court should exclude the survey." *Hodgdon Powder Co. v. Alliant Techsystems, Inc.*, 512 F. Supp. 2d 1178, 1181 (D. Kan. 2007); *see also FTC v. Nudge, LLC*, No. 2:19-cv-867-DBB-DAO, 2022 U.S. Dist. LEXIS 107548, at *15 (D. Utah June 14, 2022) ("Exclusion under Rule 702 is necessary only when a survey's methodological flaws are sufficiently serious and pervasive." (quotation omitted)). "[A] survey's evidentiary value depends on the methodology used and the questions presented to the respondents." *Universal Money Ctrs., Inc. v. AT&T*, 22 F.3d 1527, 1534 n.3 (10th Cir. 1994).

[12] Moreover, Dr. Robinson lacks evidentiary support for her conclusions regarding Kroger's mental state as to the use of the graphic at issue. Thornton asserts that the opinions are based on Dr. Robinson's review of Kroger "market research" from 2018, which is the year that Kroger started using the advertising at issue in this case. (Doc. 251 at 10-11 (citing Doc. 21-5 at 20-21.)) According to Dr. Robinson, however, the 2018 document merely discusses "[g]eneral meat challenges for Kroger stores" and provides [d]etails about customer struggles within the meat case." (Doc. 214-5 at 21.) This document does not support Dr. Robinson's speculation that Kroger started using the graphic to convince customers that they were buying beef born, raised, and harvested in the United States.

31. Courts in the Tenth Circuit evaluate a number of criteria to "assess the validity and reliability of a survey," including whether (1) the survey universe was properly chosen; (2) the sample was representative of that universe; (3) the survey's methodology and execution were in accordance with generally accepted principles; (4) the questions were not leading and suggestive; and (5) the data was accurately gathered and reported. *Water Pik, Inc. v. Med-Systems, Inc.*, Civil Action No. 10-cv-01221-PAB-CBS, 2012 U.S. Dist. LEXIS 81592, at *6 (D. Colo. June 13, 2012).

32. In its motion, Kroger argues the survey evidence should be excluded on four grounds: (1) the survey failed to consider market conditions; (2) the survey is biased and misleading; (3) the survey information is not relevant or useful; and (4) the survey's universe is overly inclusive. (*See* Doc. 234.)

1. The Survey Failed to Consider Market Conditions.

33. "For a survey to provide reliable information, the survey must resemble the manner in which the consumers view the products in the marketplace." *Water Pik, Inc.*, 2012 U.S. Dist. LEXIS 81592, at *20 (citing *Coherent v. Coherent Techs., Inc.*, 935 F.2d 1122, 1126 (10th Cir. 1991)). The survey "must attempt to replicate typical market conditions and simulate how a potential consumer would make a purchasing decision." *Id.* (citing *Beer Nuts, Inc. v. Clover Club Foods Co.*, 711 F.2d 934, 941 (10th Cir. 1983)).

34. The Survey asked respondents (1) what the "USDA Choice Produced in the USA" graphic meant to them and (2) whether they would be more or less likely to purchase beef advertised with the graphic in isolation. (Survey Tables, Doc. 214-4 at THORNTON/IRBY000049-52.) The graphic was not presented in a manner that a consumer would actually view it, such as in an advertising circular (as is in issue here) including pictures of the beef product to which it applied along with pricing information. Indeed, Thornton's case

revolves around consumer perceptions of the graphic in advertising and the survey did nothing to replicate that environment.

35. Dr. Robinson herself admitted that the survey did not consider how consumers would perceive the graphic in real world conditions. (*See* Robinson Dep., Doc. 232-1 at 154:10-16.) Thornton contends that it was proper to submit the graphic in isolation because the survey is "designed to isolate the consumers [sic] perceptions of the portion of the ad that is at issue without confusing them with additional variables." (Doc. 252 at 3.)

36. Thornton is mistaken, however, because the survey lacks effectiveness by portraying the graphic at issue in isolation, which is not how it would be perceived by the putative class members Thornton seeks to represent. The survey question asking respondents to assign prices to generic beef products produced in and outside the United States suffers from the same problem. It fails to account for the many variables that consumers encounter when purchasing beef in a real world scenario.

37. Courts in the Tenth Circuit have made clear that "the survey must resemble the manner in which consumers would view the products in the marketplace." *Water Pik*, 2012 U.S. Dist. LEXIS 81592, at *20. Here, because the survey did not attempt to replicate market conditions, it is not reliable or useful and it is excluded.

2. The Survey is Biased and Misleading.

38. "A survey cannot assist the trier of fact where it poses a leading question in that it suggests its own answer." *In re KIND LLC "Healthy & All Nat." Litig.*, 2022 U.S. Dist. LEXIS 163207 at *31 (S.D.N.Y. Sept. 9, 2022). A leading and suggestive question "weaken[s] the relevance and credibility of the survey evidence to the point that it sheds no light on the critical question in the case." *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 280 (4th Cir. 2002).

39. The survey asks what the "USDA Choice Produced in the USA" graphic means to the consumer, but it only provides four possible choices: (1) the beef is from cattle born and raised in the United States; (2) the beef was inspected in the United States; (3) the grade of beef as defined by the USDA (United States Department of Agriculture); and (4) not sure. (Survey Tables, Doc. 214-4 at 11-12.)

40. But as Kroger notes, the possible choices do not include the USDA's actual definition of the phrase "product of the USA," which defines the term to mean that the beef is processed in the United States. *Thornton v. Tyson Foods, Inc.*, 482 F. Supp. 3d 1147, 1156 (D.N.M. 2020) ("FSIS permits a beef product label to bear the phrase 'Product of the USA' if the product is processed in the United States. The USDA defines the term processed to mean prepared (slaughtered) in the United States.") The survey does not provide any interpretation of the word "produced" other than the one Thornton advances in her claims against Kroger, i.e., the beef is from cattle born and raised in the United States. The other two response options relate to the meaning of the phrase "USDA Choice." The survey also failed to include open-ended response options that would allow the respondents to provide their own interpretation of the graphic because, according to Dr. Robinson, respondents may provide responses other than the four limited ones provided. (Robinson Dep., Doc. 232-1 at 154:25-155:12; *see also* Class Cert. Hr'g Tr., Doc. 255 at 121:13-17.)

41. In *In re KIND "Healthy & All Nat." Litig.*, the court excluded an expert from offering survey evidence where the expert only provided survey respondents with two options for the meaning of the term "All Natural," and these options were either to agree or disagree with the plaintiffs' own definition. 2022 U.S. Dist. LEXIS 163207. The court rejected the plaintiffs' argument that the defendant's challenge should go to the weight and not the admissibility of the

survey evidence because "Plaintiffs cannot side-step this Court's 'task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand,' by claiming that the deficiencies are methodological." *Id.* at *40 (quoting *Daubert*, 509 U.S. at 597). Because the survey is biased and misleading, it will be excluded for this reason as well.

3. The Survey is Not Relevant or Useful.

42. Kroger argues the Survey was not designed to elicit information that could be of any assistance to the trier of fact because Question 4, which asks if consumers would be more or less likely to purchase beef if they "saw this label in an advertisement and/or on beef packaging[,]" "does not answer or shed any light upon any of the issues in the case[.]" (Doc. 234 at 10-11.) Kroger points to the fact that the survey did not ask ***why*** respondents would be willing to pay different prices for beef "produced in the United States" versus beef "produced outside of the United States" to show that the question is unhelpful. Indeed, Kroger argues all this does is "show that some aspect of the shield may make a respondent—who may or may not review circular or newspaper advertisements—more likely to purchase unidentified beef." (*Id.* at 11.)

43. Thornton, on the other, claims that consumers purchase beef advertised with the graphic because they want beef from cattle born, raised, and processed in the United States and that the question helps the trier of fact "determine whether there were consumers that were misled by the ads and damaged by relying on the information that those ads conveyed." (Doc. 252 at 5.)

44. The Court agrees with Kroger. Question 4 simply shows that, for some reason, the graphic at issue may make a consumer more likely to purchase a product, but it does nothing to show what attributes of the graphic are impactful. These survey questions do not shed any light upon any of the issues in the case and, accordingly, cannot assist the trier of fact. *See e.g.*, *Roberts v. Farmers Ins. Co.*, No. 98-5234, 1999 U.S. App. LEXIS 30483, at *6 (10th Cir. Nov. 23, 1999)

(upholding trial court decision that "excluded [a] survey as irrelevant to the question of ambiguity" before the court). Thus, the survey is inadmissible for this reason as well.

4. The Survey Universe is Overly-Inclusive.

45. "A 'universe' is that segment of the population whose perceptions and state of mind are relevant to the issues in the case." *1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-cv-591 CW, 2010 U.S. Dist. LEXIS 132948, at *19 (D. Utah Dec. 15, 2010). "Identification of the proper universe is recognized uniformly as a key element in the development of a survey" because "there may be systematic differences in the responses of members of the population and nonmembers." *Id.* "If the relevant subset cannot be identified . . . an overbroad universe will reduce the value of the survey." *Id.*

46. Kroger argues the survey's universe far exceeds the subset of the population allegedly at issue in the case because none of the respondents were asked whether they review grocery circulars or newspaper advertisements and not all of the respondents surveyed actually even shop at Kroger stores. (*See* Doc. 214-4 at 7-10) (31% of respondents indicated that they do not shop at Kroger).

47. The Court agrees. The breadth of the survey renders the data it purports to convey useless for the purposes of this litigation because it includes respondents that do not rely on circulars or newspaper advertisements, does nothing to gauge whether the respondents have a propensity to do so, and includes respondents that do not shop at Kroger stores. *See Weight Watchers Int'l v. Stouffer Corp.*, 744 F. Supp. 1259, 1272 (S.D.N.Y. 1990) (finding no value to "studies [that] did not limit the universe to consumers who had purchased a diet frozen entrée . . . or who had tried to lose weight through diet as opposed to exercise); *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 452 F. Supp. 2d 772, 782 (W.D. Mich. 2006) ("Courts have not hesitated to

criticize surveys in similar cases where the proponent of the survey failed to employ screening criteria to ensure that the universe was limited to those who were potential purchasers of the defendant's product."); *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1325 (N.D. Ga. 2008) (where allegedly infringing anti-Wal-Mart products were sold exclusively via the internet, survey universe was overbroad because it was not limited to internet purchasers with a possible interest in the anti-Wal-Mart products).

48. Because the survey universe is overly-inclusive, in addition to the reasons set forth above, all evidence of the consumer Survey is excluded.

II. Thornton's Claims are Ineligible for Class Certification.

A. Law Regarding Class Certification

49. The requirements to certify a class are set forth in Federal Rule of Civil Procedure 23. "All classes must satisfy: (1) all of Rule 23(a)'s requirements; and (ii) one of the three sets of requirements under Rule Fed. R. Civ. P. 23(b), where the three sets of requirements correspond to the three categories of classes that a court may certify." *Abraham v. WPX Prod. Prods., LLC*, 317 F.R.D. 169, 218 (D.N.M. 2016) (Browning, J.). This is not a "mere pleading standard. A party seeking class certification must affirmatively demonstrate [her] compliance with the Rule . . . ." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). She "must demonstrate, under a strict burden of proof, that all of the requirements of 23(a) are clearly met." *Tabor v. Hilti, Inc.*, 703 F.2d 1206, 1228 (10th Cir. 2013).

50. "Further, the district court has an independent obligation to conduct a rigorous analysis before concluding that Rule 23's requirements have been satisfied." *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1217 (10th Cir. 2013). Doubts are not resolved in favor of certifying a class. *Id.* at 1218. This rigorous analysis is not altered even if the

analysis bears on the merits of the suit. *Payne v. Tri-State CareFlight, LLC*, 332 F.R.D. 611, 657 (D.N.M. 2019) (Browning, J.); *see also Wal-Mart*, 564 U.S. at 351 ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.").

51. "Before the Court analyzes whether the proposed class meets Rule 23's requirements, the Court must identify the class[es]" that Thornton seeks to certify. *Abraham*, 317 F.R.D. at 254. An "'essential prerequisite' to a Rule 23(b)(3) class action is that the 'class must be currently and readily ascertainable based on objective criteria." *Id.* (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012)). "If a class cannot be ascertained in an economical and 'administratively feasible' manner, significant benefits of a class action are lost." *Id.* at 258 (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013)). As with the other statutorily-listed requirements, a plaintiff bears the burden of proving the ascertainability element is "clearly met." *Id.* at 220, 254.

1. Rule 23(a) Requirements

52. The four Rule 23(a) requirements are that

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

Fed. R. Civ. P. 23(a). A plaintiff bears the burden of proving each element. *DG v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010).

53. **Numerosity**. The numerosity requirement "is concerned with [1] manageability, *i.e.*, the Court's ability to handle the case as a non-class action . . . [and] [2] protecting absent

plaintiffs from the dangers that inhere in class litigation's foregoing of meaningful, face-to-face attorney-client representation." *Anderson Living Tr. v. WPX Energy Prod., LLC*, 306 F.R.D. 312, 436 (D.N.M. 2015) (Browning, J.). Numerosity is not presumed in the Tenth Circuit. *Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006). A plaintiff "must offer some evidence of established, ascertainable numbers constituting the class." *Holmes v. Farmers Grp., Inc.*, No. 19-0387 JHR/SCY, 2021 U.S. Dist. LEXIS 164596, at *6-7 (D.N.M. Aug. 31, 2021). "[T]he numerosity determination may not be based on . . . speculation, and unsubstantiated assertions and speculative beliefs are insufficient to demonstrate numerosity." *Id.* at *7; *see also Woodard v. Fid. Nat'l Title Ins. Co.*, No. CIV 06-1170 RB/WDS, 2008 U.S. Dist. LEXIS 108411, at *4 (D.N.M. Dec. 8, 2008) (stating "numerosity determination may not be based on mere speculation"); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 357 (3d Cir. 2013) ("Mere speculation as to the number of class members—even if such speculation is a bet worth making—cannot support a finding of numerosity.").

54. **Commonality**. Prior to the Supreme Court's decision in *Wal-Mart*, "[t]he commonality requirement was widely perceived to lack teeth." *Zuniga v. Bernalillo Cty.*, 319 F.R.D. 640, 663 (D.N.M. 2016) (Browning, J.) (citing *Wal-Mart*, 564 U.S. at 349). *Wal-Mart* made clear that the commonality requirement requires a district court to find "(i) that the common question is central to the validity of each claim that the proposed class brings; and (ii) that the common question is capable of a common answer." *Id.* A complaint's mere recitation of questions that happen to be shared by class members is "not sufficient to obtain class certification." *Wal-Mart*, 564 U.S. at 349. Instead, there must be a common contention that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is

central to the validity of each of the claims in one stroke." *Id.* at 350. "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.*

55. **Typicality**. The typicality requirement "tend[s] to merge" with commonality, and "ensures that absent proposed class members are adequately represented by evaluating whether the named plaintiff's interests are sufficiently aligned with the class' interest." *Abraham*, 317 F.R.D. at 222-23.

56. **Adequacy**. "The requirement of fair and adequate representation is perhaps the most important of the criteria for class certification set forth in Rule 23(a)." *Zuniga*, 319 F.R.D. at 665. "The adequacy requirement protects the interests of unnamed proposed class members—who are bound by any judgment in the action." *Payne*, 332 F.R.D. at 662; *see also Zuniga*, 219 F.R.D. at 691 ("Due process requires that the Court stringently apply [this] requirement because putative class members are bound by the judgment (unless they opt out), even though they may not actually be aware of the proceedings."). The Tenth Circuit has set forth two questions relevant to the adequacy inquiry: "(i) whether the named plaintiffs and their counsel have any conflicts with other class members and (ii) will the named plaintiffs and their counsel vigorously prosecute the action on behalf of the class." *Id.* at 665.

2. Rule 23(b)(3) Requirements

57. Rule 23(b)(3) is "[f]ar and away the most controversial class action category." *Payne*, 332 F.R.D. at 664. A plaintiff seeking to certify a damages class under Rule 23(b)(3) must prove that (1) "questions common to the class predominate over those that are individualized"; and (2) "a class action would be superior to—not merely just as good or more convenient than—all other available procedural mechanisms." *Abraham*, 317 F.R.D. at 237.

58. **Predominance**. While similar to Rule 23(a)'s commonality requirement, Rule 23(b)(3)'s predominance requirement is "far more demanding." *Monreal v. Potter*, 367 F.3d 1224, 1237 (10th Cir. 2004). Commonality "requires only that a common question or questions exist[], [while predominance] requires that the common question or questions predominate over the individual ones." *Zuniga*, 319 F.R.D. at 668. In the Tenth Circuit, a district court "must *characterize* the issues in the case as common or not, and then *weigh* which issues predominate." *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014) (emphasis in original). "[C]onsidering whether questions of law or fact common to class members predominate begins, of course, with the elements underlying the cause of action." *Anderson*, 306 F.R.D. at 443. A court must consider "(1) which of those elements are susceptible to generalized proof, and (2) whether those that are so susceptible predominate over those that are not." *Id.* "Where the right to recover for each class member would 'turn . . . on facts particular to each individual plaintiff,' class treatment makes little sense." *Zuniga*, 319 F.R.D. at 676.

59. **Superiority**. Rule 23(b)(3) 's superiority requirement "sets a high bar." *Zuniga*, 319 F.R.D. at 679. Under this requirement, "[a] class action must be better than, and not merely as good as, other methods of adjudication." *Porcell v. Lincoln Wood Prods.*, 713 F. Supp. 2d 1305, 1325 (D.N.M. 2010) (Browning, J.). In analyzing superiority, a court looks to the four factors set forth in Rule 23(b)(3)(A)-(D), the "most important" of which "is the extent to which the court will be able to manage the class action." *Anderson*, 306 F.R.D. at 407, 411. "[T]he principal concern in a manageability inquiry is individualization." *Id.* at 417. Superiority is linked to the predominance requirement as well: "the more common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims," but "the less common the issues, the less desirable a class action will be as a vehicle for resolving

them." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1184 (11th Cir. 2010).

B. The Court Denies Thornton's Motion for Class Certification.

60. The Court will deny Thornton's Motion. In order for the proposed classes to be certified, Thornton must demonstrate (1) the classes are ascertainable, (2) all four requirements of Rule 23(a) are satisfied, and (3) the predominance and superiority requirements of Rule 23(b)(3) are satisfied. Kroger contends Thornton has failed to carry her burden on any of these requirements, and the Court agrees.

1. The Classes Thornton Proposes in Her Motion Are Unascertainable.

61. "Before the Court analyzes whether the proposed class meets Rule 23's requirements, the Court must identify the class[es]" Thornton seeks to certify. *Abraham*, 317 F.R.D. at 254. "A class cannot be certified unless a court can readily identify the class members in reference to objective criteria." *Id.* If a class definition introduces "subjective criterion into what should be an objective evaluation," the proposed class is improper. *Id.* Further, "[i]f class members are impossible to identify without extensive and individualized fact-findings or mini-trials, then a class action is inappropriate." *Id.*

62. As discussed above, Thornton proposes two classes in her Motion: a New Mexico NMUPA class and a nationwide unjust enrichment class. (Doc. 214 at 8-9.) Kroger asserts the proposed classes are unascertainable because the definitions require the putative members to satisfy four unique requirements: the members must have "(1) reviewed a circular delivered in a mailer or newspaper and seen the 'USDA Choice: Produced in the USA' graphic; (2) interpreted the graphic to mean that the beef advertised was from cattle born, raised, and harvested in the USA; (3) relied on that interpretation to purchase the beef; and (4) purchased beef that was not, in

fact, born, raised, and harvested in the USA." (Doc. 235 at 18-19.) The Court finds that the proposed class definitions set forth in Thornton's Motion do indeed require members to satisfy these requirements and, as explained below, these requirements prevent the classes from being ascertainable.

63. In *Abraham*, the class could not be certified because the class membership was not ascertainable. The plaintiffs sought to certify the following class:

> all present and former owners of royalties and overriding royalties that burden oil-and-gas leases and wells in the San Juan Basin of Colorado and New Mexico, where those leases and wells are now or were formerly held by the Defendants or their corporate affiliates, successors, or predecessors, and where the oil or natural gas produced from the leases was delivered to the Ignacio processing Plant in La Plata County, Colorado, the Kutz Plant in San Juan County, New Mexico, or the Lybrook Plant in Rio Arriba County, New Mexico, for processing.

317 F.R.D. at 184. The Court found the plaintiffs failed to present an ascertainable class because determining where the gas flowed for processing constituted "an individual and time-consuming inquiry" and "would require more information" than plaintiffs had presented. *Id.* at 258. The Court further indicated that a plaintiff "may not merely propose a method of ascertaining the class without any evidentiary support that the method will be successful." *Id.*

64. Similarly, Thornton's proposed classes cannot be ascertained in an administratively feasible manner. First, the Court cannot determine which consumers received and reviewed a circular delivered in a mailer or newspaper and saw the "USDA Choice: Produced in the USA" graphic. Thornton presents no evidence regarding how these consumers can be identified. Circulars are not mailed to every Kroger customer or even loyalty card members, and neither Kroger nor any third party tracks who received circulars that advertised beef with the "USDA Choice: Produced in the USA" graphic. (11/18/22 Schmitz Decl., Doc. 235-1.) Moreover, the Court cannot assume that if a consumer received a circular, they proceeded to review the circular

and the "USDA Choice: Produced in the USA" graphic. *See Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1248 (11th Cir. 2002) (stating a court cannot "assum[e] that consumers will be exposed to every advertisement in a campaign"). Moreover, the evidence before the Court reflects that such an assumption in this matter would be particularly inappropriate. According to Kroger's expert, Dr. George's survey of meat shoppers, less than half of the respondents indicated they always review circulars before going shopping. (George Decl., Doc. 231, Ex. A at 12-14.) Dr. George's findings are similar to those presented in a recent peer-reviewed study, which found that only 33% of meat shoppers look at paper circulars prior to going shopping. (*Id.* at 20.) Dr. George's survey also demonstrates that when consumers do look at circulars, the overwhelming majority do so to check prices and look for deals—not product claims. (*Id.* at 15-18, 23-24.) Thornton herself admitted she reviews circulars for "good deals." (Class Cert. Hr'g Tr., Doc. 255 at 182:6-14; *see also id.* at 203:11-15.) Given this evidence, it is clear that identifying which individuals actually received, reviewed, and relied on a circular containing the graphic would be a time-consuming endeavor.

65. Second, even if the Court assumed that Kroger customers saw the "USDA Choice: Produced in the USA" graphic, no objective method exists to determine how consumers interpreted the graphic. Thornton has not presented evidence demonstrating that there is a uniform understanding of the graphic such that putative class members can be readily identified "in reference to objective criteria," *Abraham*, 317 F.R.D. at 254, such as an objective and reliable consumer understanding survey. Even if the Court had not excluded the consumer survey that Thornton commissioned, the Court's conclusion would not change. The consumer survey confirmed that Thornton's interpretation of the graphic is not uniform among consumers, as only 46% of respondents—given limited and biased response options—agreed with Thornton's

interpretation of the graphic.[13] The Court would therefore have to ask each putative class member how they interpret the graphic to ascertain the classes that Thornton proposes, which is undoubtedly an unfeasible task and not sufficient to satisfy the ascertainability requirement. *See Thorogood v. Sears*, 547 F.3d 742, 747 (7th Cir. 2008) (Posner, J.) ("Each class member who wants to pursue relief against Sears will have to testify to what he understands to be the meaning of a label or advertisement" because there is no uniform understanding).

66. Third, there is no objective way to determine which consumers relied on the interpretation of the "USDA Choice: Produced in the USA" graphic that Thornton advocates to purchase a beef product. Thornton asserts that she has "common, circumstantial evidence establishing Kroger obtained an unjust benefit" via its allegedly false advertising, and therefore the Court should infer that the putative class members relied on the graphic. (Doc. 246 at 8-10.) She draws the Court's attention to the Tenth Circuit's decision in *Menocal v. GEO Grp., Inc.*, which held that "plaintiffs may prove class-wide causation based on inference from common circumstantial evidence." 882 F.3d 905, 918 (10th Cir. 2018). As an initial matter, the *Menocal* decision addressed class-wide causation in the context of whether Rule 23(b)(3)'s predominance requirement was satisfied, not whether a plaintiff can satisfy the ascertainability requirement. *Id.* at 918-20. Even if such a class-wide inference applied to analyzing whether a proposed class is

[13] On March 16, 2023, Thornton filed a Notice of Supplemental Information, which includes as an attachment a November 30, 2022 survey commissioned by the United States Department of Agriculture, Food Safety and Inspection Service to "better understand how consumers understand the 'Product of the USA' labeling claim as it relates to the origin of FSIS-regulated products." (Doc. 268-3 at ES-1.) The Court declines to consider this information. For one, the Court deems it inappropriate to take judicial notice of the survey, particularly because at this stage and given how the survey has been presented, the Court cannot properly assess the reliability of the survey. *See Meridian Project Sys. v. Hardin Constr. Co.*, No. S-04-2728 FCD DAD, 2005 U.S. Dist. LEXIS 23727, at *17 (E.D. Cal. Oct. 14, 2005) ("[A] survey is not the proper subject for judicial notice because its results are reasonably subject to dispute."); *see also Morales v. Kraft Foods Grp.*, No. LA VC14-04387 JAK (PJWx), 2016 U.S. Dist. LEXIS 204427, at *22-25 (C.D. Cal. Dec. 2, 2016). Moreover, the Notice appears to be an attempt to shore up the shortcomings of Dr. Robinson's opinion and testimony by seeking to present expert testimony in circumvention of Rule 26. The Court also finds that this survey is not relevant because it addresses "Product of the USA" labeling, and Thornton's claims go to the "USDA Choice: Produced in the USA" graphic used in advertising. Thus, Thornton's claims concern advertising, not labeling, as well as "Produced in the USA" versus "Product of the USA."

ascertainable, the Court finds that such an inference is inappropriate in this case. In *Menocal*, a class-wide inference was appropriate because the proposed class of detainees were all forced to work under a uniform work policy the detainees alleged to be unlawful. *Id.* at 910-911, 919-20. The detainees' claims thus did not "involve significant individualized or idiosyncratic elements." *Id.* at 921 (quoting *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1092 (10th Cir. 2014)). Here, in contrast, customers purchase beef products for a variety of reasons, with the top attribute being price. (George Decl., Doc. 231, Ex. A at 23.) As such, again, the Court would need to conduct individual inquiries to establish whether a consumer purchased a beef product because they interpreted the "USDA Choice: Produced in the USA" graphic to mean the beef was from cattle born, raised, and harvested in the United States, and they were seeking to purchase this type of beef. Courts have denied class certification in similar circumstances. *See Meta v. Target Corp.*, No. 4:14 CV 832, 2016 U.S. Dist. LEXIS 128196, at *9 (N.D. Ohio Sep. 19, 2016) (denying certification where "[t]here are many reasons consumers may have chosen to purchase the wipes at issue in this case, some of which may have had nothing to do with whether or not they were flushable"); *Weiner v. Snapple Bev. Corp.*, No. 07 Civ. 8742 (DLC), 2010 U.S. Dist. LEXIS 79647, at *37 (S.D.N.Y. Aug. 3, 2010) (denying certification where "consumers may have purchased Snapple beverages for many reasons other than the 'All Natural' label").

67. Fourth, and compounding the above issues, Thornton has presented no evidence from which it can be determined which beef products, if any, advertised with the "USDA Choice: Produced in the USA" graphic were from cattle born, raised, or harvested in another country. Thornton testified that she has no personal knowledge of Kroger selling beef products that were from cattle not born, raised, and harvested in the United States. (Thornton Dep., Doc. 214-2, at 71:25-72:5, 95:20-96:1.) And at the Daubert hearing, Thornton's counsel conceded that it is

impossible to "identify . . . [an] exact piece of beef" that Kroger sold to a customer that can be traced to foreign cattle.[14] (Daubert Hr'g Tr., Doc. 266 at 49:5-50:8.) Instead, Thornton contends she need not present such evidence because the Beef Packers "have made that impossible by destroying any traceability," and Kroger ratified this conduct by allegedly continuing to purchase and sell beef after Kroger knew the origin was relevant to potential litigation. (Doc. 246 at 11, 16.) The Court finds no merit to this argument. As an initial matter, Thornton states later in her Motion that she can obtain records from the Beef Packers showing how many beef products Kroger sold that were allegedly from cattle not born, raised, or harvested in the United States, (*id.* at 14), so it is difficult for the Court to discern how Thornton contends any spoliation-related argument would apply. If Thornton can obtain such information, she should have sought to subpoena it from the Beef Packers such that she could satisfy her burden of establishing ascertainability at this stage. But, as the Court stated at the Daubert hearing, the Court questions whether it is even possible to obtain records identifying (1) any beef products Kroger received from the Beef Packers that contained foreign beef, and (2) which Kroger customers received any such beef products that were advertised with the "USDA Choice: Produced in the USA" graphic. (Daubert Hr'g Tr., Doc. 266 at 49:4-50:8.)

68. Even if these records do not exist, the Court is not persuaded by Thornton's cited authority, which appears to stand for the proposition that "inadequate record keeping" is not a

[14] Her admission that she cannot identify which beef (if any) came from foreign born cattle is enough to warrant denial of class certification. In *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 U.S. Dist. LEXIS 1640, at *9 (N.D. Cal. Jan. 7, 2014), the plaintiff sought to represent a class of consumers "who bought Ben & Jerry's labeled 'all natural' which contained alkalized cocoa processed with a synthetic ingredient." *Id.* The court noted that the plaintiff "has provided no evidence as to which ice cream contained the allegedly 'synthetic ingredient'" or that "a means exists for identifying the alkali in every class member's ice cream purchases." *Id.* The court noted that the defendant uses "cocoa that is sourced from as many as 15 different suppliers," only one of which was alleged by Plaintiff to have supplied an alkalized cocoa." *Id.* The court held that "[b]ecause plaintiff has not shown that a method exists for determining who, among the many California purchasers of Ben & Jerry's, fits within the proposed class, the class is not ascertainable."

grounds on which to deny class certification. *See Rhodes v. Nat'l Collection Sys.*, 317 F.R.D. 579, 583 (D. Colo. 2016). Moreover, unlike in *Rhodes*, there is no evidence Kroger engaged in any actions even arguably approaching spoliation. Instead, the evidence demonstrates that the only information Kroger receives from the Beef Packers is the grade of the beef and the designation of "product of the USA." (Docs. 176, 182, 185, 197.)

69. Thornton contends that the above four issues do not preclude a finding of ascertainability because the Court can utilize a procedure that does not require significant judicial resources to identify class members; namely, the putative class members can be identified by "issuing class notices to persons who purchased beef from Kroger, and allowing them to certify under penalty of perjury that they expected their purchase was American beef after reviewing Kroger's advertising." (Doc. 246 at 8.) Such a process, however, would impede Kroger's rights as it would present "serious due process implications." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012). Indeed, this process would deny Kroger the meaningful opportunity to confront and cross-examine these individuals. As the Third Circuit stated in *Marcus*, "[w]e caution, however, against approving a method that would amount to no more than ascertaining by potential class members' say so. For example, simply having potential class members submit affidavits that their Bridgestone RFTs have gone flat and been replaced may not be proper or just." *Id.* (internal quotations omitted).

70. The Court is not persuaded by Thornton's cited authority. In *Mullins v. Direct Digital, LLC*, the Seventh Circuit indicated that a district court may allow class members to identify themselves by such means at the class certification stage, but that Circuit applies a relaxed standard of ascertainability. 795 F.3d 654, 668-69 (7th Cir. 2015).[15] This Court has never applied

[15] Thornton further cites *Wesley v. Snap Fin., LLC*, 341 F.R.D. 72, 77 n.41 (D. Utah 2022), for the proposition that "[s]implified proof of claims procedures [with] affidavits or documentary evidence [] can be used in the disputed

that standard, and instead applies a standard akin to that utilized by the Third Circuit. *See Abraham*, 317 F.R.D. at 254 (citing and quoting *Marcus*, 687 F.3d at 593). Further, permitting Thornton's proposed method of ascertaining the putative classes raises particularly heightened due process concerns in this instance where Thornton herself cannot identify a single Kroger circular she reviewed to make the decision to purchase a beef product from Kroger, or a single beef product she purchased from Kroger after she reviewed a circular. (Thornton Dep., Doc. 214-2, at 92:16-93:4, 126:12-19.) Use of affidavits would not resolve the problem of which customers (if any) actually purchased a beef product from Kroger that was from cattle born, raised, or harvested outside the United States which, as the Court discussed above, is a serious concern, because the affiants have no knowledge of whether the beef products they purchased were from foreign cattle. In sum, the Court rejects Thornton's proposed self-identification method as inconsistent with this Court's application of the ascertainability requirement and contrary to Kroger's due process rights.

71. The Court cannot identify an administratively feasible alternative to Thornton's proposed class definitions as set forth in the Motion. Even considering the class definitions Thornton proposed in the Third Amended Complaint, which Thornton abandoned in the Motion for Class Certification, no ascertainable classes exist. These classes consist of: (1) "[a]ll consumers in the United States who purchased . . . [Kroger's] Products during the applicable limitations period, for their personal use, rather than for resale or distribution," and (2) "[a]ll consumers in New Mexico who purchased the New Mexico Products during the applicable limitations [period], for their personal use, rather than for resale or distribution." (Doc. 97 at 12.)

claims context, by affording the defendants a fair opportunity to validate or contest individual claims in a reasonable manner under the circumstances." (Doc. 246 at 8.) This quoted language, however, is from the plaintiff's briefing not from the court's holding. Moreover, the court had already preliminarily certified the class, and the plaintiff's proposed proof of claims procedure was therefore directed at sorting bona fide class members from potential class members. *Wesley*, 341 F.R.D. at 77.

72. Courts have denied class certification in similar instances where a proposed class is overbroad and includes "a great number of members who could not have been harmed by the defendant's allegedly unlawful conduct." *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 824-25 (7th Cir. 2012); *see also Friedman v. Dollar Thrifty Auto Grp.*, 304 F.R.D. 601, 606 (D. Colo. 2015) (same) (citing *Messner*, 669 F.3d at 824);*Oshana v. Coca-Cola, Co.*, 472 F.3d 506, 509-10, 514 (7th Cir. 2006) (affirming denial of class certification where proposed class "could include millions who were not deceived").

73. In *In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.*, the plaintiffs alleged that the defendant falsely advertised Craftsman tools as being "Made in the USA" because "many, if not most, Craftsman tools [were] foreign-made or contain[ed] significant foreign components." 2007 U.S. Dist. LEXIS 89349, at *2-4 (N.D. Ill. Dec. 4, 2007). They sought to certify a class of "[a]ll persons and entities throughout the United States who purchased on[e] or more Craftsman tool[s] which were not all or virtually all 'Made in the USA.'" *Id.* at *10. In finding the putative class "impermissibly overbroad, unidentifiable, and unmanageable," the court indicated the class would necessarily include a large number of consumers who were not deceived:

> The instant putative class would include people who (1) bought Craftsman tools but never saw any Craftsman advertising; (2) bought Craftsman tools but never saw advertising representing that the tools were made in the United States; and (3) bought Craftsman tools with the knowledge that those tools were not made in the United States.

Id. at *12-15.

74. The class definitions included in the Third Amended Complaint suffer from the same flaws. These definitions include every Kroger customer who purchased a beef product advertised in a print circular with the "USDA Choice: Produced in the USA" graphic over a three-

year period.[16] Thornton has not presented any evidence that any of the beef products Kroger advertises in print circulars with this graphic are from cattle born, raised, or harvested outside the United States—let alone, that the majority are—and therefore these class definitions necessarily include customers that suffered no injury whatsoever. *See Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 U.S. Dist. LEXIS 1640, at *10-14 (N.D. Cal. Jan. 7, 2014) (finding class not sufficiently ascertainable where plaintiff "provided no evidence as to which ice cream contained the allegedly 'synthetic ingredient'" and had "not shown that a means exists for identifying the alkali in every class member's ice cream purchases").

75. Further, the classes would include customers (1) that never received or reviewed circulars in the mail; (2) that interpreted the graphic in a manner contrary to Thornton's interpretation; and (3) who either did not care if the beef product they purchased was from cattle not born, raised, or harvested in the United States, or potentially preferred such beef. As such, these class definitions are insufficient to establish ascertainability. *See Pueblo of Zuni v. United States*, 243 F.R.D. 436, 443 (D.N.M. 2007) (finding class definition that was "broad enough to include those tribes which do not allege any injury caused by the Government" was improper because "[o]nly those tribes which sustained injuries [could be] properly included in a class definition.") (alterations added); *see also Assoc. v. Ag. of N.M. Gary King*, No. CIV 09-00467-MV-WPL, 2010 U.S. Dist. LEXIS 163797, at *13-14 (D.N.M. Mr. 31, 2010) (finding class definition overbroad because it included "individuals who [did] not allege injury") (alteration added).

[16] Thornton does not explain what data or records she intends to rely on to identify the class members. If she did intend to rely on Kroger's loyalty card data, which does not cover every beef purchase or identify the purchasers with certainty, these proposed classes would include roughly eight to nine million loyalty card numbers. (Welch Decl., Doc. 235-2, at ¶¶ 5, 6.)

76. For these reasons, Thornton has failed to satisfy her burden of establishing an ascertainable class. Thornton's proposed classes do not permit the Court to "readily identify the class members in reference to objective criteria." *Abraham*, 317 F.R.D. at 254. Just as in *Abraham*, ascertaining the putative class members would require the Court to engage in "an individual and time-consuming inquiry" and "would require more information" than Thornton has presented. *Id.* at 258. Even if the Court engaged in such a tedious process, the Court notes that these efforts would likely prove fruitless. For one, issues would undoubtedly arise regarding whether customers could recall what advertisements they relied upon. *See Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 689 (S.D. Fla. 2014) (denying certification of class suing defendant for mislabeling product as "All Natural" in violation of Florida's deceptive advertising law because potential class members were unlikely to remember if they bought a product with such a label). And if memory did not pose such a roadblock, customers nevertheless would not be able to prove the geographic origin of the of the beef products they purchased from Kroger.

2. Thornton Has Failed to Satisfy the Rule 23(a) Requirements.

77. Kroger contends that Thornton has not met her burden of establishing the four requirements under Rule 23(a). For the reasons set forth below, the Court agrees.

i. Thornton Has Not Shown the Numerosity Requirement is Satisfied.

78. Rule 23(a)(1) provides for class certification where "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Courts in the Tenth Circuit do not presume numerosity, *Trevizo*, 455 F.3d at 1162, and a plaintiff "must offer some evidence of established, ascertainable numbers constituting the class." *Holmes*, 2021 U.S. Dist. LEXIS 164596, at *6-7.

79. Thornton contends that the proposed New Mexico class "is likely several thousand New Mexicans," and the proposed nationwide class "is easily in the millions of consumers." (Doc. 214 at 15-16.) To arrive at these broad estimates, Thornton performed quasi-calculations. As to the New Mexico class, Thornton states that 6,133 individuals live in her town, 46% of these individuals would have perceived the graphic to mean the advertised beef was from cattle born and raised in the United States, and 60% of those individuals would have purchased beef from Kroger. (*Id.* at 15.) As to the proposed nationwide class, Thornton states that, based on unidentified discovery materials, from 2019 to 2021 Kroger sold beef to an average of 58,296,682 households, and 46% of these households would agree with her interpretation of the graphic. (*Id.* at 15-16.) These calculations, however, rely upon Mr. Sanderoff's survey, which the Court has already excluded.

80. Kroger takes the position that Thornton offers only speculation as to numerosity, which is insufficient to satisfy her burden as the moving party. (Doc. 235 at 28-29.)

81. In *Hayes*, the plaintiff claimed that Sam's Club improperly sold him a service plan that did not actually cover the "as-is" clearance item he purchased, and he sought to certify a class of others customers with an allegedly similar issue. 725 F.3d at 352-53. He sought to satisfy numerosity by showing records of 3,500 transactions at Sam's Club that included both charges for as-is product price overrides and service plan charges. *Id.* at 357-58. The court noted that this number of potential class members was over-inclusive because not every as-is item was excluded by the service plans, and that plaintiff had failed to satisfy his burden to provide evidence regarding how many within this pool might have been sold a non-operable plan. *Id.*

82. Similarly, in *Woodard*, the plaintiff moved to certify a class of persons who paid a title insurance premium that exceeded the permitted rate in the state. 2008 U.S. Dist. LEXIS

108411, at *2-3. The Court noted that a plaintiff in a "similar class action" had "persuasively established numerosity by conducting a sample review of files from the relevant title insurance agents and demonstrating, through statistical analysis and testimonial evidence, that at least several thousand individuals had been overcharged for title insurance." *Id.* at 27-28. Woodard, by contrast, did no such work. The Court found that his "failure to do the due diligence necessary to provide similar evidentiary support for his numerosity claim not only precludes certifying the proposed class on numerosity grounds, but also calls into question whether [Woodard] and his counsel would expend the effort necessary to prosecute this action vigorously on behalf of the class." *Id.*

83. Thornton has likewise failed to prove numerosity, or even demonstrate a diligent attempt to do so. Thornton is correct that "[i]n determining whether a proposed class meets the numerosity requirement, the exact number of potential members need not be shown, and a court may make common sense assumptions to support a finding that joinder would be impracticable." *Payne*, 332 F.R.D. at 658 (internal quotations omitted). Yet, the broad estimates Thornton purports to rely on to establish numerosity is not the type of "evidence of established, ascertainable numbers constituting the class." *Holmes*, 2021 U.S. Dist. LEXIS 164596, at *6-7. Rather, these are simply general assertions based on assumptions and speculations that find no support in the record. This is the exact type of speculation that this Court and others have rejected. *See, e.g.*, *Holmes*, 2021 U.S. Dist. LEXIS 164596, at *7; *Woodard*, 2008 U.S. Dist. LEXIS 108411, at *4. Thornton provides no way for this Court to determine the number of customers in her proposed classes. "In the absence of a "method to derive the number of actual class members, . . . the Court [can] only guess, and guessing is not a component of a rigorous analysis." *Holmes*, 2021 U.S. Dist. LEXIS

164596, at *7. The Court thus finds that, similar to *Woodard*, Thornton has failed to demonstrate numerosity.[17]

ii. Common Questions of Law or Fact Do Not Exist.

84. Thornton must prove that "there are questions of law or fact common to the class" to satisfy the commonality requirement of Rule 23(a)(2). Fed. R. Civ. P. 23(a)(2). "The commonality requirement was widely perceived to lack teeth before the Supreme Court's decision in *Wal-Mart*, which grafted the following requirements onto Rule 23(a)(2): (i) that the common question is central to the validity of each claim that the proposed class brings; and (ii) that the common question is capable of a common answer." *Zuniga v. Bernalillo Cty.*, 319 F.R.D. 640, 663 (D.N.M. 2016) (Browning, J.) (citing *Wal-Mart*, 564 U.S. at 349 (2011)). A complaint's mere recital of questions that happen to be shared by class members is "not sufficient to obtain class certification." *Wal-Mart*, 564 U.S. at 349. There must be a common contention that "is capable of classwide resolution— which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. Thornton has failed to demonstrate commonality for the two claims she asserts.

85. Thornton contends there are five common questions on her NMUPA claim capable of generating class-wide answers: (1) whether Kroger acted unfairly and deceptively by allegedly advertising to consumers that the beef sold to New Mexico consumers geographically originates from American ranchers and farmers; (2) whether Kroger's advertising was likely to mislead consumers acting reasonably under the circumstances and did in fact mislead such consumers; (3) whether Kroger's advertisements regarding geographic origin were material to consumers, such

[17] Given that Thornton herself continues to buy meat from retailers that she alleges sell her imported beef, she has not identified even one consumer that was misled by any Kroger advertising in any material way. Nor has she demonstrated that any Kroger customer (including herself) purchased advertised beef that was derived from foreign born cattle. The Court cannot simply assume that such customers exist.

that the advertisements led consumers to believe the advertised beef was derived from American ranches and farms; (4) whether Kroger's advertisements led consumers to purchase imported beef that they would not have otherwise purchased, to purchase more of those products, and/or pay a higher price for the products than they otherwise would have; and (5) whether Kroger acted with malice, ill will, or wanton conduct in allegedly deceiving New Mexico consumers about how their purchasing dollars are being spent, and whether consumers are supporting domestic producers or instead foreign beef operations. (Doc. 214 at 17.)

86. The Court cannot resolve any of these questions on behalf of the proposed New Mexico class in one fell stroke, as Kroger persuasively argues. Each requires the Court to determine how Kroger customers interpret the "USDA Choice: Produced in the USA" graphic. Thornton has not presented any evidence that consumers have a uniform understanding of the graphic,[18] such that the Court could resolve this question in the manner that *Wal-Mart* requires. Thornton's own testimony further demonstrates that this is an individual question, as she testified that it was the acronym "USDA" in the phrase "USDA Choice" that led her to believe that the beef she purchased from Kroger came from cattle born, raised, and harvested in the USA.[19] (Thornton Dep., Doc. 214-2, at 81:6-8.) In a similar situation, the court in *Vizcarra v. Unilever United States* found commonality lacking where the plaintiff failed to present common evidence showing that consumers understood a product's packaging as representing certain aspects the plaintiff alleged—namely, that the ice cream at issue would be flavored exclusively with vanilla from the vanilla

[18] *See Thornton v. Kroger Co.*, No. CIV 20-1040 JB/JFR, 2022 U.S. Dist. LEXIS 29699, at *316-17 (D.N.M. Feb. 17, 2022) ("Here, the Court concludes that the phrase "Produced in the USA" is ambiguous as applied to beef products, because it is subject to more than one interpretation. . . . . Some consumers, like Thornton, may believe it means that the beef is derived from cattle who were born, raised, slaughtered, and processed in the United States. . . . Others may understand it to mean that the beef derives from cattle not born in the United States, but imported before slaughter. Still others may believe that it means that the carcasses were merely processed or prepared in the United States." (internal citations omitted)).

[19] The Court previously ruled that the "USDA" aspect of the graphic Thornton relied on is not misleading as a matter of law. (Doc. 115 at 237-38.)

plant. 339 F.R.D. 520, 547-48 (N.D. Cal. 2021); *see also Bd. of Educ. of Albuquerque Pub. Schs. V. Szolnoki-Brainard*, 339 F.R.D. 650, 659 (D.N.M. 2021) (noting the need to conduct "individualized fact finding for each putative class member" prevented a finding of commonality).

87. Even if the interpretation of the "USDA Choice: Produced in the USA" graphic did pose a common question, commonality would still not be satisfied for the New Mexico class. The answer to this question would be merely incidental to whether any proposed class member actually purchased beef advertised with the graphic that was from cattle born, raised, or harvested outside of the United States and, if so, whether that beef was of lesser value to that particular class member. "[I]ncidental issues," such as this, is not capable of producing a common answer. *Payne*, 332 F.R.D. at 693.

88. Further, in order to determine whether Kroger is liable under the NMUPA, the Court would have to examine every beef purchase because the putative New Mexico class members must prove "causation" as an element of their NMUPA claim. *Mulford v. Altria Group, Inc.*, 242 F.R.D. 615, 625 (D.N.M. 2007). These putative class members have to show that the "product was not what it was represented to be and, instead, was a product of lesser economic value." *Id.* at 626. Again, Thornton has presented no evidence that the Court can use to resolve this question in one stroke on behalf of the putative class. Thus, answering this question would "require the Court to proceed proposed class member by proposed class member" and, as such, no common issues on the NMUPA claim exist. *Payne*, 332 F.R.D. at 690; *see also Daye v. Cmty. Fin. Servs. Ctr., LLC*, 313 F.R.D. 147, 176 (D.N.M. 2016) (Browning, J.) (finding that "[i]f . . . [the Court] has to examine each loan document to determine liability, . . . [the Court] would agree with [defendant] that commonality would not exist"). Thornton in fact conceded that if the Court has to examine each beef purchase, under *Daye* commonality does not exist. (Doc. 246 at 20.)

89. As to her unjust enrichment claim, Thornton asserts three common questions exist: (1) whether as the intended, direct, and proximate result of Kroger's advertising conduct, Kroger has been unjustly enriched through the alleged sales of imported beef at the expense of Thornton and the proposed class members; (2) whether under the circumstances it would be against equity to permit Kroger to retain the alleged ill-gotten benefits it received from Thornton and the proposed class members given that the beef they purchased was allegedly not what Kroger purported the beef to be; and (3) whether Kroger knew or should have known that a significant percentage of the beef it was selling to consumers was not from cattle born and raised in the United States despite Kroger's advertisement allegedly stating the beef was from cattle born and raised in the USA. (Doc. 214 at 18.)

90. For reasons similar to the NMUPA claim, Thornton has failed to prove commonality for the unjust enrichment claim. All of Thornton's proposed common questions for the unjust enrichment claim require the Court to answer the same questions discussed above, which it cannot do consistent with *Wal-Mart*. For example, if a Kroger customer expected to obtain beef from cattle born, raised, and harvested in the United States based on the graphic at issue and, in fact, received that beef, there can be no unjust enrichment.[20] *See, e.g., Monus v. Colo. Baseball 1993*, No. 95-1099, 1996 U.S. App. LEXIS 32995, at *48-49 (10th Cir. Dec. 17, 1996) ("Having received the benefit of the bargain he agreed to, plaintiff has made no showing that there are inequitable circumstances justifying his claim."); *Romero v. Bank of the Sw.*, 2003-NMCA-124, 135 N.M. 1, 9, 83 P.3d 288, 296 ("Unjust enrichment exists only when one party knowingly benefits at another's expense and allowing that party to retain the benefit would be unjust.").

[20] Even Thornton's expert, Dr. Robinson, conceded that the vast majority of all beef purchased by consumers in the United States is from domestic born cattle. (*See* Robinson Dep., Doc. 232-1, 125:24-126:2 ("A. Seventeen percent of . . . the U.S. meat supply is from imported carcasses and/or live animals."))

Therefore, as with the NMUPA claim, the Court would have to examine every beef purchase to determine liability, which precludes a finding of commonality as to the unjust enrichment claim.

91. As such, Thornton has failed to establish Rule 23(a)'s commonality requirement.

iii. The Typicality Requirement is Not Satisfied.

92. The typicality requirement, which "tend[s] to merge" with commonality, "ensures that absent proposed class members are adequately represented by evaluating whether the named plaintiff's interests are sufficiently aligned with the class' interest." *Abraham*, 317 F.R.D. at 222. "Typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." *Payne*, 332 F.R.D. at 661 (quoting *Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 622 (D. Kan. 2008)).

93. Thornton argues the typicality requirement is satisfied as to the NMUPA claim because all members of the putative class share the same false advertising claim and suffered the same injury; that is, the putative class members, similar to Thornton, saw and reviewed Kroger's circulars, interpreted the graphic to mean the beef was born and raised in the United States, and relied on the circular and that interpretation to purchase beef from Kroger. (Doc. 214 at 20.)

94. Similarly, Thornton asserts all consumers share the same unjust enrichment claim, as they received circulars that allegedly misrepresented a substantial portion of the origin of beef sold by Kroger, relied on those circulars to purchase beef they would not have otherwise purchased or would have purchased at a lower price, and that Kroger knew of this misrepresentation. (*Id.*)

95. The Court finds that Thornton's claims are not typical of the classes she seeks to represent. As discussed above, both the NMUPA and unjust enrichment claims necessarily turn on each Kroger customer's experience. This includes whether the customers looked at print circulars and why they do so, how customers interpreted the "USDA Choice: Produced in the

USDA" graphic and if they saw it in the circular, and whether the customers purchased beef advertised with the graphic that was not actually from cattle born, raised, and harvested in the United States. Thornton has presented no evidence reflecting that her alleged experience is typical of the putative classes' experience. Specifically Thornton's interpretation of the graphic appears to be unique given that she believed the advertised beef was from cattle born, raised, and harvested in the United States because of the acronym "USDA" in the phrase "USDA Choice"—not the statement "Produced in the USA"[21] (Thornton Dep., Doc. 214-2, at 81:6-8.) Members of Thornton's proposed classes must have also necessarily relied on a Kroger advertisement to purchase imported beef, and Thornton has not been able to identify a single advertisement she relied on or a single beef product she purchased from Kroger that was from foreign cattle. (*Id.* at 83:18-83:21, 93:2-93:4, 122:9-17.)

96. Typicality is also lacking as to the NMUPA claim because, as Kroger correctly argues, Thornton has no actual damages. Aside from not being able to recall a single beef product she purchased in reliance on the graphic at issue, she has not provided any evidence that any beef products she purchased were from cattle born, raised, or harvested outside the United States.[22] (*Id.* at 83:18-83:21, 93:2-93:4.) Thornton's conclusory assertion that a jury could find she purchased

[21] Thornton attached a declaration to her Motion for Class Certification in which she states that she was deceived about the geographic origin of Kroger's beef products because of "the Stars and Bars and the Product of the US or Produced in the USA language" in the graphic. (Thornton Decl., Doc. 214-1 at 1.) At the class certification hearing, Thornton admitted that she did not provide this purported reasons for being allegedly deceived when questioned during her deposition. (Class Cert. Hr'g Tr., Doc. 255 at 192:24-196:17.) In the Tenth Circuit, a district court may disregard a declaration contradicting a deponent's prior deposition testimony after considering whether "(1) the affiant was cross-examined during h[er] earlier testimony; (2) the affiant had access to the pertinent evidence at the time of h[er] earlier testimony or whether the affidavit was based on newly discovered evidence; and (3) the earlier testimony reflects confusion which the affidavit attempts to explain." *Lesher v. Hedges*, No. 20-1237 JCH/KRS, 2022 U.S. Dist. LEXIS 188891, at *4 n.2 (D.N.M. Oct. 17, 2022). The Court finds that this statement in the declaration contradicts Thornton's prior deposition testimony, and further finds that the circumstances do not warrant the Court to consider this statement in the declaration.

[22] Thornton notes that although she could not identify any specific beef product she purchased, Kroger identified a beef product she purchased in the week after it had been advertised in a circular. (Doc. 246 at 23; *see also* Hamilton Decl., Doc. 228 at ¶ 58.) Nevertheless, this does not change the fact that Thornton has not presented any evidence that any of the beef products she purchased were from cattle born, raised, or harvested outside the United States.

some beef that contained commingled beef has no merit and is inconsistent with her obligations as the party seeking class certification. (Doc. 246 at 22.) Further, Thornton received a consumable beef product in exchange for her money (Thornton Dep., Doc. 214-2, at 80:4-80:6, 91:22-91:24), and she did not pay a price premium for the beef due to the "USDA Choice: Produced in the USA" graphic (Hamilton Decl., Doc. 228 at ¶¶ 58-63.) In fact, she purchased the beef at a substantial discount. In the absence of actual damages, (*id.*), Thornton could theoretically pursue statutory damages in her individual capacity under the NMUPA, but putative New Mexico class members she seeks to represent cannot. *Bhasker v. Kemper Cas. Ins. Co.*, 361 F. Supp. 3d 1045, 1139 (D.N.M. 2019) (Browning, J.). Thus, her NMUPA claim is not typical of the class she seeks to represent. *See, e.g., Hill v. Aspen Contracting*, No. 1:20-cv-00149-SWS-MLC, 2021 U.S. Dist. LEXIS 124719, at *18 (D.N.M. Feb. 19, 2021); *Brooks v. Northwest Corp.*, 2004-NMCA-134, ¶ 45, 136 N.M. 599, 103 P.3d 39.

97. The Court thus finds that Thornton has failed to establish Rule 23(a)'s typicality requirement.

iv. The Adequacy Requirement is Not Satisfied.

98. "The requirement of fair and adequate representation is perhaps the most important of the criteria for class certification set forth in Rule 23(a)." *Zuniga*, 319 F.R.D. at 665. "Due process requires that the Court stringently apply [this] requirement because putative class members are bound by the judgment (unless they opt out), even though they may not actually be aware of the proceedings." *Id.* at 691. "The Tenth Circuit has identified two questions relevant to the adequacy of representation inquiry: (i) whether the named plaintiffs and their counsel have any conflicts with other class members and (ii) will the named plaintiffs and their counsel vigorously prosecute the action on behalf of the class." *Id.* at 665.

99. Thornton states she has no conflicts that render her an inadequate representative and her interest align with those of the putative classes, as she was a consumer allegedly deceived by Kroger's circulars to purchase beef she alleges was advertised as being from cattle born, raised, and harvested in the United States. (Doc. 214 at 21-22.) She further states her deposition testimony and declarations demonstrate she is sufficiently familiar with this matter and her claims such that she is an appropriate class representative. (*Id.* at 23.)

100. For several reasons, the Court finds that Thornton is an inadequate representative for the putative classes she seeks to certify. First, and perhaps most significantly, she is not a member of the classes she seeks to represent. As the Court explained in finding that Thornton has failed to demonstrate ascertainability, the putative classes she seeks to certify, by definition, requires class members to meet at least four prerequisites. Thornton's deposition testimony reveals she herself cannot meet any of these requirements. Although she stated she generally reviewed Kroger's circulars after she received them, (Thornton Dep., Doc. 214-2, at 44:25-45:8), she could not identify a single Kroger circular she reviewed to make the decision to purchase a beef product from Kroger. (*Id.* at 126:12-19.) She also could not identify a single beef product she purchased from Kroger after reviewing a circular.[23] (*Id.* at 92:16-93:4.) And she testified that she has no evidence that any beef product she purchased from Kroger was from cattle that was not born, raised, and harvested in the United States. (*Id.* at 122:9-17; Class Cert. Hr'g Tr., Doc. 255, at 205:6-14.)

[23] Kroger's expert, Dr. Hamilton, was able to determine after reviewing Thornton's purchase history that a single beef product was purchased in the week after it was advertised in a circular. (Hamilton Decl., Doc. 228 at ¶ 58.) A single purchase identified after reviewing the entirety of Thornton's purchase history, however, hardly suggests that she did so in reliance upon a circular. (*Id.* at ¶ 61.) Moreover, the beef product Thornton purchased "was among the most intensively advertised products," (*id.* at ¶¶ 60-61), which tends to indicate it was a mere coincidence that she purchased the beef product during a week in which it was advertised.

101. Second, the Court is not convinced that Thornton will vigorously prosecute this action on behalf of the putative classes. To be sure, she has indicated that she is prepared to adequately represent the interest of the putative classes. (Thornton Decl., Doc. 214-1.) But the proposed New Mexico class "can recover only their actual damages." *Bhasker*, 361 F. Supp. 3d at 1139. Yet, Thornton has not pursued or identified any such proof of actual damages on behalf of this proposed class. She has not set forth any evidence that a putative class member purchased a beef product from Kroger advertised with the "USDA Choice: Produced in the USA" graphic that was from cattle not born, raised, or harvested in the United States. Under the NMUPA, to establish a claim for actual damages a plaintiff must show that the "product was not what it was represented to be and, instead, was a product of lesser economic value." *Mulford*, 242 F.R.D. at 626. Even if she had presented evidence establishing Kroger sold such a beef product, she has provided no method to determine the economic value of these beef products, let alone any evidence that those beef products are of a lesser economic value. The record instead reflects that customers place minor, if any, importance on the geographic origin of beef. (George Decl., Doc. 231, at 12, 16-20.) While Thornton could potentially recover statutory damages under the NMUPA even though there is an absence of evidence regarding any actual damages, these circumstances indicate that her interests are not aligned with the New Mexico class. *See Hill*, 2021 U.S. Dist. LEXIS 124719, at *18 (denying class certification where named plaintiff sought statutory damages under the NMUPA because this "remedial theory is not sufficiently aligned with the class' interest" in recovering their actual damages).

102. Third, Thornton's actions cause the Court some concern. She testified at the class certification hearing that it matters to her if the beef she purchases is born, raised, and harvested in the United States. (Class Cert. Hr'g Tr., Doc. 255 at 186:24-187:1.) She also previously stated

that she ceased purchasing beef from Smith's in 2020. (Response to Interrogatory 8, Doc. 235-4.) Her purchase history, however, indicates that she continued to purchase beef from Smith's more than two months after she filed this instant suit, and more than ten months after she filed a class action complaint against the beef packers in *Tyson* alleging conduct similar to what she now alleges against Kroger. (Doc. 235-5.) Further, although she alleged in the *Tyson* case that Sam's and Costco deceptively advertise their beef products as being from cattle born, raised, and harvested in the United States, at the class certification hearing she admitted she has continued purchasing beef products from these retailers. (Class Cert. Hr'g Tr., Doc. 255 at 208:10-20.) Thus, although Thornton purports to represent consumers who deeply care about the geographic origin of the beef products they purchase, her own conduct seemingly indicates she does not share these same beliefs.

103. A court can consider a proposed class representative's credibility in determining whether they are an adequate representative under Rule 23(a)(4). *See Sunbird Air Servs., Inc. v. Beech Aircraft Corp.*, No. 89-2181-V, 1992 U.S. Dist. LEXIS 12669, at *13 (D. Kan. July 15, 1992) ("[I]f the representative displays a lack of credibility regarding the allegations being made . . . then the court may conclude that Rule 23(a)(4) is not satisfied.") (quoting Wright, et al., Fed. Prac. and Proc. § 1766 (2d ed. 1986)); *see also Fishon v. Peloton Interactive, Inc.*, No. 19-cv-11711 (LJL), 2022 U.S. Dist. LEXIS 10502, at *32 (S.D.N.Y. Jan. 19, 2022) ("If there are 'serious concerns' about a named plaintiff's credibility and these concerns bear on an issue critical to a cause of action in the litigation, a district court may deny class certification on the basis that the plaintiff is not an adequate class representative.") (quoting *Savino v. Computer Credit*, 164 F.3d 81, 87 (2d Cir. 1998)). The central issues in this litigation is whether customers believed that the beef products advertised with the "USDA Choice: Produced in the USDA" graphic were from

cattle born, raised, and harvested in the United States, purchased beef products from Kroger for that reason, and in fact received that product. Thornton's credibility concerns go to the heart of these issues.

104. The Court further notes Thornton's relationship with one of proposed class counsel, A. Blair Dunn, presents a potential conflict. As the Court previously noted, Thornton's son is a friend of Mr. Dunn, and prior to initiation of this suit Thornton had interacted with Mr. Dunn several times socially. (Thornton Dep., Doc. 214-2, at 58:2-20, 58:21-59:24.) Thornton, at the behest of her son, also engaged Mr. Dunn as counsel in the *Tyson* matter without considering other attorneys. (*Id.* at 200:18-201:5.) Similarly, she did not consider engaging an attorney besides Mr. Dunn to represent her and the putative classes in this matter. (*Id.* at 73:10-13.) Courts have indicated that a proposed class representative's relationship with proposed class counsel "casts doubt on [a plaintiff's] ability to place the interests of the class above that of [counsel]." *Maeda v. Kennedy Endeavors, Inc.*, No. 18-00459 JAO-WRP, 2021 U.S. Dist. LEXIS 117433, at *32 (D. Haw. June 23, 2021) (quoting *Lindon v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003)). In light of Thornton's prior relationship with Mr. Dunn, the Court finds that Thornton is not an adequate class representative.[24] The Court further also notes that while Thornton purports to represent classes of consumers of beef products and has asserted claims from the perspective of a "reasonable consumer," (*see* Third Am. Compl., Doc. 97, ¶¶ 31-34), Thornton herself has long-

[24] Thornton's apparent lack of involvement in this suit also causes the Court concern, particularly given that her decision to serve as a class representative was at the behest of her son and her prior relationship to Mr. Dunn. At her deposition, she testified that she does not review the filings in this matter, she was unfamiliar with her retained experts or their opinions, and she did not even recognize the name of her co-plaintiff, Wendy Irby. (Thornton Dep., Doc. 214-2 at 17:5-9, 74:23-75:2, 75:11-15.) She was not familiar with her claims, and did not know whether class certification had been granted or how the case would proceed if a class was certified. (*Id.* at 76:10-13, 77:6-24.) Although she subsequently submitted a declaration stating she had now reviewed the Third Amended Complaint and the Court's rulings with her counsel, and understands her duties as a named-plaintiff in this matter, (Thornton Decl., Doc. 214-1), this declaration does not assuage the Court's concerns given her seeming indifference to this matter for the past two years and the circumstances surrounding the decision to retain Mr. Dunn and file this case.

standing ties to the cattle ranching industry. (Thornton Dep., Doc. 214-2, at 27:17-28:6, 28:14-29:2, 36:2-18, 37:7-28:7.) These connections appear to place Thornton outside the realm of a typical consumer—the purported class members she seeks to represent—whose experience with cattle would theoretically be limited to merely purchasing beef products from a retail store.[25]

105. For these reasons, the Court finds Thornton has failed to satisfy the typicality requirement.

3. Thornton Has Failed to Satisfy the Requirements of Rule 23(b)(3).

106. As Thornton is only seeking to certify damages classes under Rule 23(b)(3), she must prove that (1) "questions common to the class predominate over those that are individualized"; and (2) "a class action would be superior to—not merely just as good as or more convenient than—all other available procedural mechanisms." *Abraham*, 317 F.R.D. at 237. While bearing a similarity to Rule 23(a)'s commonality requirement, Rule 23(b)(3)'s predominance requirement is "far more demanding." *Monreal v. Potter*, 367 F.3d 1224, 1237 (10th Cir. 2004). While Rule 23(a) "requires only that a common question or questions exist," Rule 23(b)(3) "requires that the common question or questions predominate over the individual

[25] Kroger argues that a conflict exists between the proposed class counsel, at least with regard to Mr. Dunn, and the proposed classes. (Doc. 235 at 39.) In this action, proposed counsel seeks to represent classes of consumers regarding Kroger's alleged advertising of beef products as being from cattle born, raised, and harvested in the United States, when these products were instead from cattle born, raised, and harvested outside the United States. Mr. Dunn's interests, however, are not aligned with those of the proposed classes. The Court takes judicial notice that Mr. Dunn's firm, WARBA, is a "law firm that is focused on federal advocacy for farmers and ranchers." *See* https://www.aglaw-assn.org/featured/aala-featured-member-blair-dunn/; *see also Austin v. Select Portfolio Servicing*, No. CIV 16-0017 MV/KBM, 2016 U.S. Dist. LEXIS 117489, at *6 n.3 (D.N.M. July 25, 2016) (noting a court "may take judicial notice of a website's contents, assuming its authenticity has not been challenged, and it is capable of accurate and ready determination."). WARBA's mission is reflected by Mr. Dunn litigating the *Tyson* Case against the Beef Packers on behalf of a cattle rancher, as well as Thornton, attempting to change the USDA's "Product of the USA" definition. *See Thornton v. Tyson Foods, Inc. et al.*, Docket No. 1:20-cv-00105 (D.N.M. Feb. 5, 2020). It is difficult for the Court to fathom how a firm with a mission such as WARBA's could be aligned with the proposed classes in this matter, let alone not directly at odds with one another. A special interest law firm established to advocate for cattle ranchers is not the appropriate choice for counsel of proposed consumer classes where, as here, the claims at issue involved beef products. *See Lowery v. City of Albuquerque*, No. 09-0457 JB/WDS, 2012 U.S. Dist. LEXIS 14204, at *62 (D.N.M. Jan. 24, 2012) ("[A] conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status") (Browning, J.).

ones." *Abraham v. WPX Energy Prod., LLC*, 322 F.R.D. 592, 622 (D.N.M. 2017) (Browning, J.); *see also CGC Holding*, 773 F.3d at 1087 ("[T]he predominance prong 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'") (quoting William B. Rubenstein et al., *Newberg on Class Actions* § 4:49, at 195-96 (5th ed. 2012)). As set forth below, Thornton has not proven that common questions predominate for either proposed class, or that a class action is superior in this instance.

i. Common Issues Do Not Predominate For Either the NMUPA Claim or Unjust Enrichment Claim.

107. "[C]onsidering whether questions of law or fact common to class members predominate begins, of course, with the elements underlying the cause of action." *Id.* at 397. A court considers "(1) which of those elements are susceptible to generalized proof, and (2) whether those that are so susceptible predominate over those that are not." *Id.* "Where the right to recover for each class member would 'turn . . . on facts particular to each individual plaintiff,' class treatment makes little sense." *Zuniga*, 319 F.R.D. at 676.

a. Common Issues Do Not Predominate as to the NMUPA Claim.

108. As relevant here, under the NMUPA, class members can only recover actual damages and must prove "causation, loss, and damages." *Mulford*, 242 F.R.D. at 625. That is, there must be a "causal nexus between the defendant's deceptive conduct and the plaintiff's loss." *Porcell v. Lincoln Wood Prods.*, 713 F. Supp. 2d 1305, 1320 (D.N.M. 2010). At a minimum, this requires a showing that "the product was not what it was represented to be and, instead, was a product of lesser economic value." *Mulford*, 242 F.R.D. at 626; *but see Porcell*, 713 F. Supp. 2d at 1320-21. The Court must therefore determine whether causation, loss, and damages may be proven with class-wide evidence.

109. Thornton posits common issues predominate as to the NMUPA claim due to Kroger's alleged use of the "USDA Choice: Produced in the USDA" graphic to "create an ambiguity that deceives consumers" as to the geographic origin of the advertised beef products. (Doc. 214 at 23-24.)

110. In *Mulford*, the Court found that causation and loss could not be established on a class-wide basis. The Court found that the plaintiffs needed to show that the cigarette brand at issue "did not deliver the promised lower tar and nicotine, and, therefore, class members received a product of lesser economic value" to succeed on the NMUPA claim. 242 F.R.D. at 626. While the cigarettes contained less nicotine and tar, some evidence indicated some smokers changed their smoking behavior after switching to the cigarettes by "compensating" to achieve the level of nicotine they were previously accustomed to—some compensated completely, some compensated incompletely, and some none at all. *Id.* The plaintiffs presented no evidence to support their position that no smokers received less nicotine and tar, and the defendant had produced evidence showing less than 50% of smokers compensated. *Id.* Due to the "individualized nature of tar and nicotine delivery," the Court found that each class member had to prove they actually received something other than "lower tar and nicotine." *Id.* at 628-29.

111. Kroger contends that this case is analogous to *Mulford* in that, like the plaintiff there were unable to show that the cigarettes failed to deliver less nicotine and tar, Thornton cannot demonstrate through generalized proof that she or any other Kroger customer purchased a beef product advertised with the "USDA Choice: Produced in the USA" graphic that was not from cattle born, raised, and harvested in the United States. (Doc. 235 at 41.) The Court finds Kroger's argument persuasive. As the Court has already determined, Thornton has not set forth any evidence that she, or any putative class member, purchased a beef product from Kroger that did not

geographically originate from the United States. Even after conducting discovery in this matter, Thornton has not pointed to a single beef product she purchased that was from foreign cattle. (Thornton Dep., Doc. 214-2 at 83:18-21, 122:9-21.) The only "common evidence" Thornton has presented is that Kroger sold beef products advertised with the graphic to consumers, but this alone does not constitute a question that is relevant to whether Kroger violated the NMUPA. *See Smith-Brown v. Ulta Beauty*, 335 F.R.D. 521, 533, 534 (N.D. Ill. 2020) ("common evidence suggesting at most that Ulta 'sometimes' sold used products is not enough to predominate over the individual questions of whether Ulta actually did sell used products to the particular plaintiffs and class members and under what conditions."); *Saey v. CompUSA, Inc.*, 174 F.R.D. 448, 451-52 (E.D. Mo. 1997) (not certifying class for similar reasons). Given a lack of common evidence, individual issues necessarily predominate as to whether the putative class members purchased advertised beef products from cattle that were not born, raised, or harvested in the United States.

112. Individual issues also predominate as to other aspects of this case. It cannot be determined on a class-wide basis whether the putative class members even saw Kroger's advertisements containing the "USDA Choice: Produced in the USDA" graphic, as Thornton has not submitted evidence that this is the case. Kroger's expert report, on the other hand, indicates that a given customer is unlikely to have reviewed circulars prior to purchasing grocery products from a retailer. (George Decl., Doc. 231, Ex. A at 12.) While the traditional form of "reliance" may not be required under the NMUPA, there must still be exposure to the allegedly unfair practice, and the individual issues of exposure would predominate here. *Mulford*, 242 F.R.D. at 621; *see also Pierce-Nunes v. Toshiva Am. Info. Sys.*, No. 14-7242-DMG (KSx), 2016 U.S. Dist. LEXIS 149847, at *23 (C.D. Cal. June 23, 2016) ("[W]here exposure to the alleged misleading advertising and leveling varies, courts have found that individual issues predominate because

consumers' understanding of the alleged misrepresentation would not be uniform."). There is also no evidence before the Court suggesting that the putative class members, or customers in general, ascribe a "lesser economic value" to beef products produced from cattle that are born, raised, or harvested outside the United States.[26] This also represents a subjective and individualized issue that is not susceptible to class-wide proof. *See Martinez v. Welk Grp., Inc.*, No. 09cv2883 AJB, 2012 U.S. Dist. LEXIS 98433, at *19 (S.D. Cal. July 13, 2012) (denying class certification when plaintiff claimed that his "points have lost value" was "subjective and individualized—they have diminished in value *to him*, based on his personal views and circumstances," but that does not mean they were of lesser value to others) (emphasis in original).

113. Lastly, as Kroger correctly notes, "[t]he UPA . . . imposes a duty to disclose material facts reasonably necessary to prevent any statements from being misleading. The existence of a duty is dependent on the materiality of the facts." (Doc. 235 at 43 (*quoting Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 15, 135 N.M. 265, 269, 87 P.3d 545, 549)). Even though materiality is not an "objective standard," a plaintiff nevertheless needs "to point to some type of common proof," particularly where "there are numerous reasons a customer might buy [a product.]" *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 U.S. Dist. LEXIS 81292, at *60 (N.D. Cal. June 13, 2014). For example, in *Jones*, the plaintiff alleged that the label claim

[26] Even if the Court considered Dr. Robinson's opinion regarding Mr. Sanderoff's survey, the survey does not support a finding that consumers would be willing to pay higher prices for Kroger's beef products advertised with the "USDA Choice: Produced in the USA" graphic that were from cattle born, raised, and harvested in the United States. The survey asked respondents "how much would you pay per pound" for beef steak, ground beef, and beef roast that was "produced in the US" and "produced outside the US." (Doc. 218-1 at THORTON/IRBY000033-37.) Critically, however, the survey respondents were not presented with real beef products or market prices; they were simply asked to make up prices for beef produced in the United States versus beef produced outside the Unites States. Additionally, the word "produced" was not defined in the survey question, so it is impossible to tell what respondents thought the term meant. Given these deficiencies, the survey does support Thornton's contention that consumers were willing to pay a higher price for the specific beef products at issue in this case. And regardless of what consumers would be willing to spend, the actual evidence shows that Kroger priced beef lower when it was advertised, not higher. Thus, even if there had been reliable evidence that customers would have been willing to pay more for this advertised beef, they did not in fact pay more.

"100% natural" on cans of Hunt's tomatoes was misleading and sought to certify a class of consumers who purchased the products. *Id.* at *4. The court found that the plaintiff failed to prove that common issues will predominate over individual ones in regard to materiality because "there are numerous reasons a customer might buy Hunt's tomatoes, and there is a lack of evidence demonstrating the impact of the challenged label statements." *Id.* at *60. "While the Court ha[d] no trouble believ[ing] that the 100% label claim was material to some customers," there was no evidence to demonstrate that it was "necessarily material to reasonable consumers." *Id.* at *59-60 (internal quotation omitted).

114. While Thornton contends the "USDA Choice: Produced in the USA" graphic was personally important to her,[27] the Court lacks any evidence that the graphic was "necessarily material" to Kroger's customers. *Id.* And Kroger has submitted evidence reflecting that customers purchase beef products for a variety of reasons, with savings being the most prominent. (George Decl., Doc. 231, Ex. A at 16-24.) The Court is persuaded by the reasoning in *Jones*, and finds it applies with similar import here. Individualized issues predominate regarding whether the graphic is material to Kroger's customers.

115. Given that the Court has concluded common issues do not predominate as to the NMUPA claim, certification of this class would be improper under Rule 23(b)(3).

b. Common Issues Do Not Predominate as to the Unjust Enrichment Claim.

116. Under New Mexico law, to prevail on a claim of unjust enrichment a party must demonstrate "(1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust." *Ontiveros Insulation Co. v. Sanchez*,

[27] The Court reiterates the dubious nature of this contention given that the evidence reflects Thornton continued purchasing beef products from retailers without inquiring about the geographic origin of these products even after she filed this instant action.

2000-NMCA-051, ¶ 11, P.3d 695, 698, 129 N.M. 200, 203. Thornton argues that the unjust enrichment claim can be proved by class-wide evidence that Kroger knew or should have known that beef that [it] w[as] advertising was not of the geographic origin that consumers perceived from the use of a logo that states that it was a product of the USA." (Doc. 214 at 25.)

1) Individual Issues Predominate Given That the Unjust Enrichment Laws of Multiple States Apply.

117. Thornton seeks to certify an unjust enrichment class covering the thirty-five states in which Kroger operates. (Doc. 214 at 9.) As Kroger correctly notes, "[i]n a proposed multi-state class action, choice of law analysis is interwoven with the certifying court's Rule 23(b)(3) predominance determination." *Porcell*, 713 F. Supp. 2d at 1311. Thornton bears the burden of "provid[ing] an extensive analysis of state law variations [in unjust enrichment claims] to reveal whether" the predominance requirement is met. *Spence v. Glock, GEX.m.b.H*, 227 F.3d 308, 310-11 (5th Cir. 2000).

118. In moving for class certification, Thornton provided no, let alone an "extensive," analysis of whether the unjust enrichment laws of the thirty-five states are sufficiently similar such that common legal issues will predominate. Instead, Thornton attempts to appease the Court by asserting a conclusory statement that the "Court has written on the conflict of laws for multi-state class actions" and she "respectfully offers that application of New Mexico law is likely to produce identical results." (Doc. 214 at 7-8.) Kroger has identified at least three purported conflicts between New Mexico's unjust-enrichment law and the thirty-four other states at issue,[28] (Doc. 235 at 46-47), and Thornton does not attempt to substantively rebut these arguments or analyze the

[28] Kroger indicates that some states do not allow unjust-enrichment claims if the plaintiff has an adequate remedy at law, the elements necessary to establish unjust enrichment vary materially among certain states, and states differ on the weight afforded to either the plaintiff's or the defendant's conduct. (Doc. 235 at 46-47.) The Court need not determine, however, the merits of Kroger's arguments given that Thornton has failed to carry her burden.

state laws at issue (Doc. 246 at 30-31)). The Court will hold Thornton to her burden of proof and, for this reason, the Court cannot find that common issues predominate as to the putative unjust enrichment class. *See Anderson Living Tr.*, 306 F.R.D. at 449 ("[T]he potential forty different legal standards governing the various claims creates too many individualized standards for the Court to find that common issues predominate."); *see also Woodard*, 2008 U.S. Dist. LEXIS 108411, at *17-18 ("T]he different showings required by putative class members from different jurisdictions to prove unjust enrichment would undermine Plaintiff's ability to present generalized proof for all putative class members' unjust enrichment claims.").

2) Even if the Court Applied Only New Mexico Law, Individual Issues Would Predominate.

119. Assuming, without deciding, that only New Mexico law applies to the putative class's unjust enrichment claim, individual issues would still predominate.

120. The Court's prior reasoning in *Payne* is instructive. There, the defendant contracted with pilots for a daily rate of compensation that accounted for fourteen-hour duty days, although the pilots generally worked twelve-hour shifts. *Payne*, 332 F.R.D. at 619. Plaintiffs asserted an unjust enrichment claim, alleging they were not compensated for time worked beyond twelve hours in their shifts. *Id.* at 622. The Court found that if the plaintiffs contended that "the duty day was in fact twelve hours pursuant to the Defendants' representations and the pilots' beliefs," and thus the plaintiffs had been underpaid, such a theory did not satisfy the predominance requirement. *Id.* at 696, 703. The Court would have to "resort to individualized inquiries," given that the evidence suggested each pilot might have different beliefs on the hours in the duty day. *Id.* at 696.

121. Kroger asserts similar individualized considerations are present in this case. The Court agrees. To establish the first element, there must be a showing that Kroger knowingly advertised and sold a beef product that was not born, raised, and harvested in the United States.

Yet, whether any beef product came from a foreign source cannot be determined with common proof, meaning the Court would have to result to individualized inquiries with respect to each purchase.

122. As to the second element, Thornton must show that purchasers of the beef products Kroger advertised with the "USDA Choice: Produced in the USA" graphic did not receive what they expected, and instead received something of lesser value. *See Bruton v. Gerber Prods. Co.*, No. 12-CV-02412-LHK, 2018 U.S. Dist. LEXIS 30814, at *21-23 (N.D. Cal. Feb. 13, 2018). This, in turn, requires showing that customers interpreted the graphic to mean that the advertised beef products were from cattle that was not born, raised, and harvested in the United States, and that such beef products were of a lesser value. Such an inquiry into customers' subjective beliefs presents the quintessential sort of individualized determination that defeats predominance. *See In re Dial Mktg. & Sales Practices Litig.*, 312 F.R.D. 36, 60, 62-68, 70, 74 (D.N.H. 2015) (finding unjust enrichment claims were not subject to common proof "[g]iven the necessity for individualized inquiries into motivations and purchasing decisions," and thus predominance requirement was not satisfied).

123. Regarding the issue of damages, Thornton draws the Court's attention to *Menocal*, in which the Tenth Circuit noted that "individual damages in this case should be easily calculable using a simple formula based on number of hours worked, type of work performed, and fair market value of such work." 882 F.3d at 937 (internal quotations omitted). She then asserts that "[h]ere, the calculation will be even simpler," without any further elaboration. (Doc. 214 at 25.) The Court is not persuaded by this unadorned statement, and finds that individual issues as to damages will predominate. The alleged damages depend on the circumstances of each individual purchase, including whether the beef product purchased was from cattle not born, raised, or harvested in the

United States, and how each consumer interpreted the "UDSA Choice: Produced in the USA" graphic. Further, to be entitled to a disgorgement remedy, Thornton must show "a causal link between the illegal activity and the" damages "sought to be disgorged." *Peters Corp. v. N.M. Banquet Inv'rs Corp.*, 2008-NMSC-039, ¶ 32, 144 N.M. 434, 444, 188. P.3d 1185, 1194. Making such a showing would also require the Court to examine the circumstances surrounding each individual purchase.

124. The Court therefore finds that even if New Mexico's unjust-enrichment law solely applied, Thornton has failed to demonstrate common issues would predominate.[29]

c. Thornton Has Failed to Present a Damages Model.

125. A court can only certify a Rule 23(b)(3) class is there is evidence demonstrating that "damages are capable of measurement on a classwide basis." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). While a proposed class can have individual damages calculations, "the Court cannot ignore the possible complexities of the individual damages determinations in making the predominance requirement." *Payne*, 332 F.R.D. at 667-68. The damages methodology for all putative class members needs to be common, and if differing methodologies are used for some class members, the court must take this into account at the class certification stage. *Id.* at 668. Finally, "even if the methodology is common to the class, the Court must decide whether it will operate in a consistent way for each individual class member." *Id.*

126. Thornton's Motion is entirely silent about how any damages model could assess class-wide damages. In her reply brief, she contends Kroger sold the beef products advertised with

[29] In the Reply in Support the Motion for Class Certification, Thornton again reiterates that Kroger is "responsible for making [the information regarding the geographic origin of its beef products] impossible for the consumers to obtain," and thus "a more unjust scenario is hard to fathom." (Doc. 246 at 31.) No such evidence of Thornton's alleged "spoliation" theory is before the Court, nor is there any evidence even arguably indicating such is the case. The Court, again, expressly rejects this argument.

the "USDA Choice: Produced in the USA" at a higher price that it would have been if the beef products that were allegedly from cattle not born, raised, or harvested in the United States had been labeled as foreign beef, and therefore a price differential exists. (Doc. 246 at 10-11, 32.)

127. When a proposed class action concerns allegedly misleading advertising, a plaintiff can show class-wide damages by presenting evidence that the misleading claim resulted in members paying a higher price than they would for comparable product without the claim. However, there is no evidence before the Court suggesting there was any price premium associated with the beef products advertised with the "USDA Choice: Produced in the USDA" graphic, as Thornton argues. The only record evidence indicates that no such premium existed. Kroger's expert, Dr. Hamilton, conducted a "two-way fixed effects regression model" to determine whether any damages exist in this case, which reveals that "consumers did not pay a price premium because of the ["USDA Choice: Produced in the USA" graphic], and, in fact, received the products at a substantial discount." (Hamilton Decl., Doc. 228 at ¶¶ 33-68, 106.)

128. In *Astiana*, the court noted that the plaintiff "ha[d] not offered any expert testimony demonstrating that the market price of Ben & Jerry's ice cream with the 'all natural' designation was higher than the market price of Ben & Jerry's without the 'all natural" designation," or "more importantly . . . . any expert testimony demonstrating a gap between the market price of Ben & Jerry's 'all natural' ice cream and the price it purportedly should have sold for if it had not been labeled 'all natural.'" 2014 U.S. Dist. LEXIS 1640, at *38. The court concluded that "her failure to offer a damages model that is capable of measurement across the entire class for purposes of Rule 23(b)(3) bars her effort to obtain certification of the class." *Id*. at *40.

129. Given the failure to produce evidence demonstrating any damages in this matter are "capable of measurement on a classwide basis," *Comcast*, 569 U.S. at 34, Thornton has not

satisfied her burden of demonstrating common issues predominate. Without presenting such a model, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.*

2. Thornton Has Failed to Demonstrate a Class Action Would be Superior to Individual Actions.

130. In determining whether a class action is superior to, and not merely as good as, other methods of adjudication, the Court considers the factors set forth in Rule Fed. R. Civ. P. 23(b)(3)(A)-(D). *Abraham*, 317 F.R.D. at 238. The "most important" of these factors "is the extent to which the court will be able to manage the class action, if certified, through pre-trial litigation and trial, accurately adjudicating the class' claims—in particular the individual issues—and fairly distributing relief among the class members." *Id.* at 242.

131. Thornton argues that all four factors are satisfied here, and manageability does not present a significant issue. (Doc. 214 at 26-27.) Kroger has taken the position there is no way for the Court to feasibly manage this action given the presence of numerous individual issues, which the Court has already outlined above. (Doc. 235 at 54.)

132. The Court agrees with Kroger, and finds that the manageability factor is dispositive and this action is not superior to alternative methods of adjudication. As the Court has already found, there are a significant number of individual issues that the Court would have to determine if the putative classes were certified, such as whether each consumer received and reviewed a circular containing the "USDA Choice: Produced in the USA" graphic; how each consumer interpreted the graphic; whether each consumer relied on the graphic to purchase a beef product from Kroger because they believed the products were from cattle born, raised, and harvested in the United States; whether any beef products Kroger advertised with the graphic and sold to customers was in fact foreign beef; and whether each customer suffered damages.

133. Further, Kroger credibly argues that is feasible for the plaintiffs in the putative New Mexico class could bring their claims individually under the NMUPA. (Doc. 235 at 54-55); *see also Mulford*, 242 F.R.D. at 631 ("[I]t appears entirely feasible for Plaintiffs to bring their claims individually under the UPA."). As the reasoning in *Mulford* demonstrates, Thornton's argument that individual actions would be costly, (Doc. 246 at 32), "is wholly undermined by the fact that the UPA awards attorney fees and costs to a successful litigant." 242 F.R.D. at 631. Additionally, individual actions would present no concern over the lack of evidence of causation and damages because statutory damages are available for an individual NMUPA claim. *See Bhasker*, 361 F. Supp. 3d at 1139. As the Court has previously noted, "[w]hen individual actions are practical, they are preferred." *Anderson*, 306 F.R.D. at 407. Such is the case here. It was Thornton's burden to establish that this putative class action is superior to other methods of adjudication, and the Court finds that she has failed to do so.

III. CONCLUSION

134. **IT IS THEREFORE ORDERED** that Kroger's Motion to Exclude the Expert Testimony of Dr. Robinson (Doc. 232) and Motion to Exclude Survey Evidence (Doc. 234) are hereby **GRANTED**, and Thornton's Motion for Class Certification (Doc. 214) is hereby **DENIED**.

Respectfully Submitted,

/s/ *Nathaniel Lampley, Jr.*

BUTT THORNTON & BAEHR PC

Monica R. Garcia
P.O. Box 3170
Albuquerque, New Mexico 87190
Telephone: (505) 884-0777
mrgarcia@btblaw.com

and

VORYS, SATER, SEYMOUR AND PEASE LLP

Nathaniel Lampley, Jr.
Victor A. Walton, Jr.
Jeffrey A. Miller
Jessica K Baverman
Wesley R. Abrams
All admitted pro hac vice
301 E. Fourth Street
Suite 3500, Great American Tower
Cincinnati, OH 45202
Telephone: (513) 723-4616
nlampley@vorys.com
vawalton@vorys.com
jamiller@vorys.com
jkbaverman@vorys.com
wrabrams@vorys.com

Counsel for Defendant The Kroger Company