IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ROBIN G. THORNTON, on behalf of herself and others similarly situated, and WENDY IRBY, on behalf of herself and others similarly situated,

Plaintiffs,

v.

Case No. 1:20-cv-01040-JB/LF

THE KROGER COMPANY, and PAY AND SAVE, INC.,

Defendants.

DEFENDANT PAY AND SAVE, INC.'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
REGARDING PLAINTIFF IRBY'S MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

Defendant Pay and Save, Inc. submits its proposed Findings of Fact and Conclusions of Law in opposition to Plaintiff Irby's motion for class certification.

* * * * *

THIS MATTER comes before the Court on Plaintiff Irby's Motion for Class Certification as to Defendant Pay and Save, Inc. [Doc. 215] ("Irby Class Cert. Mot.") The Court held a one-day class certification hearing in conjunction with Plaintiff Thornton's Motion for Class Certification as to Defendant the Kroger Company [Doc. 214] on December 5, 2022.

The primary issues are: (i) whether Plaintiff Irby is a member of the four-state class identified in her motion; (ii) whether Plaintiff Irby identified an objectively ascertainable class or whether the individualized inquiries necessary to ascertain the members of the classes defeat class certification; (iii) whether Plaintiff Irby's requested classes satisfy the numerosity requirement of Rule 23(a); (iv) whether Plaintiff Irby's requested classes satisfy the commonality requirement of Rule 23(a) and the predominance requirement of Rule 23(b)(3) when the descriptors "All American Beef" and "Truly Texas" are subject to varying interpretations; (v) whether Plaintiff Irby, the sole proposed classes' representative, satisfies Rule 23(a)'s typicality requirement; (vi) whether Plaintiff Irby put forth a valid method for calculating damages on a classwide basis; and (vii) whether a class action is a superior means of adjudicating the claims asserted by the requested classes.

First, the Court concludes that, as a resident of New Mexico, Plaintiff Irby is not a member of the four-state class (Texas, Colorado, Kansas and Arizona) that she identified in her motion, but is a member of the New Mexico sub-class identified in her class certification motion. The Court denies Plaintiff Irby's request to file an amended complaint for the purpose of either naming an additional class representative or amending the four-state class definition. *Second*,

Plaintiff Irby failed to demonstrate that the proposed classes are readily ascertainable based on objective criteria, using an administratively feasible method that would not require individualized inquiries to identify class members. *Third*, Plaintiff Irby failed to put forward a valid method for calculating damages on a classwide basis. *Fourth*, Plaintiff Irby failed to demonstrate that the size of the alleged classes satisfies the numerosity requirement of Rule 23(a) based on anything other than speculation and assumption. *Fifth*, there is no common contention capable of resolving an issue that is central to the validity of Plaintiff Irby's claims in one stroke, and even if there were for purposes of Rule 23(a), under Rule 23(b)(3), individualized inquiries into the representation that each putative class member saw, how they understood those representations, what purchases they made based on those understandings, and whether, in fact, the products that they purchased were different from the representations on which they relied would predominate over any common questions. *Sixth*, Plaintiff Irby's claims and defenses are not typical of absent class members. *Finally*, the many individualized inquiries outlined above would make class litigation impossible to manage, and thus not a superior means of adjudication. And specifically with regard to the New Mexico sub-class, because the sub-class members cannot recover the full measure of recovery available to them if they pursued their claims individually under the New Mexico Unfair Practices Act, certification of this sub-class is not a superior means to adjudicate these claims.

The Court denies Plaintiff Irby's Motion for Class Certification.

PROPOSED FINDINGS OF FACT

I. Background

A. The Parties

1. Defendant

1. Defendant Pay and Save, Inc. ("Pay and Save") is a Texas corporation with its principal place of business in Littlefield, Texas. (Third Am. Compl. [Doc 97] ¶ 17; Pay and Save Answer [Doc. 211] ¶ 17.)

2. Pay and Save operates 138 stores under a variety of names (*e.g.*, Lowe's Market, Food King, Shop-N-Save, Lowe's Mercado) in five states: New Mexico, Texas, Colorado, Kansas and Arizona. (Third Am. Compl. ¶ 17; Pay and Save Answer ¶ 17; Pay and Save Opp'n to Irby Class Cert. Mot. [Doc. 227] at 3.)

2. Named Plaintiff Irby

3. Plaintiff Wendy Irby is a resident of Otero County, New Mexico. (Third Am. Compl. ¶ 13.) (*See* (Dec. 5, 2022 Hr'g Tr. ("Hr'g. Tr.") [Doc. 255] 257:24 – 258:4.)

4. Plaintiff Irby has been a customer of Pay and Save stores located in Alamogordo and Tularosa, New Mexico and nowhere else. (Hr'g Tr. 257:24 - 258:9; Wendy Irby Dep. ("Irby Dep.") [Doc 215-2] 40:11-22.)

B. COOL Legislation

5. Country of Origin Labeling (COOL) is a labeling law that requires retailers, such as full-line grocery stores, supermarkets and club warehouse stores, to notify their customers with information regarding the source of certain foods. (Third Am. Compl. ¶ 2.) The law initially went into effect in 2002 through passage of the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) (Pub. L. 107-171), the 2002 Supplemental Appropriations Act (2002

Appropriations) (Pub. L. 107-206), and the Food, Conservation and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110-234), all of which amended the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 et seq.) (*Id.*) Covered commodities included muscle cuts of beef and ground beef. (*Id.*)

6. However, as directed by the United States Congress through Public Law 114-113, the Consolidated Appropriations Act of 2016, the USDA issued a final rule in 2016 to remove muscle cut beef and ground beef and pork from COOL requirements. (*Id.* ¶ 4.). The USDA stopped enforcing the COOL requirements for beef effective December 2015. (*Id.*)

7. As of December 2015 and continuing through the present, there is no enforceable federal COOL regulation that requires retailers, such as full-line grocery stores and supermarkets like Pay and Save, to notify their customers with information regarding the source of certain foods, including its geographic origin.

C. The Challenged Conduct

8. In May 2018, Pay and Save began branding some of its beef as "All American" in its non-Texas stores, and "Truly Texas" in its Texas stores. (Pay and Save Opp'n to Irby Class Cert. Mot. at 3.)

9. At the request of Plaintiff Irby's counsel, Pay and Save ceased this marketing program in 2021 and has not branded its beef products as either "All American" or "Truly Texas" since that time. (Irby Class Cert. Mot. at 1, 3.)

10. During the time it conducted this program, Pay and Save relied upon the representations of its beef suppliers that the beef met the USDA definition of "Product of USA." (Pay and Save Opp'n to Irby Class Cert. Mot. at 3.)

11. This marking appears on the delivered boxes that Pay and Save receives from its major supplier, Affiliated Foods, Inc. ("Affiliated"). Headquartered in Amarillo, Texas, Affiliated is a grocers' cooperative provisioning over 700 independent, member-owned stores, including Pay and Save. (*See* Pay and Save Opp'n to Irby Class Cert. Mot. at 3; *id.* Ex. A (photographs showing samples of markings).)

12. The beef suppliers for this branding are United States suppliers, and the beef for this program is limited to those items labeled "Product of US" by the packers pursuant to USDA definitions. (Pay and Save Opp'n to Irby Class Cert. Mot. at 3.)

13. To qualify for a "Truly Texas" brand, the beef is limited to those beef products (1) purchased by Pay and Save from Affiliated; and (2) sourced from JBS Foods Group (Cactus, Texas) and Caviness Beef Packers (Hereford and Amarillo, Texas). The majority of the "All American" brand is also limited to those beef products (1) purchased by Pay and Save primarily from Affiliated; and (2) sourced from JBS Foods Group and Caviness Beef Packers. (*Id.* at 3-4.) Those suppliers guaranteed that the beef products were derived from domestic cattle. (*See* Pay and Save Opp'n to Irby Class Cert. Mot. Ex. B (sample Letters of Guarantee).)

D. Plaintiff Irby's Claims

14. Plaintiff Irby challenges Pay and Save's "All American" and "Truly Texas" logos.

15. Plaintiff Irby contends that these logos are misrepresentations in that they "cause the consumer to believe that the beef is a product of the U.S., prompts consumers to buy beef products with more confidence than they might otherwise have, and to pay more for these products than they otherwise would." (Third Am. Compl. ¶ 8.)

16. Plaintiff Irby further contends that she relied on the advertisements containing the "All American" logo "to mean that the Products being advertised that she eventually purchased

were from cattle produced (meaning born, raised and slaughtered) in the United States." (*Id.* ¶ 14.)

17. Plaintiff Irby does not receive a newspaper. (Irby Dep. 36:14-16.) She also does not receive Pay and Save advertisements in the mail. (*Id.* 35:4-6; Hr'g Tr. 260:12-21.)

18. Instead, Plaintiff Irby testified that she saw these logos online on Wednesdays each week when she checked Pay and Save's website to see what was on sale. (Hr'g Tr. 250:24 - 251:6; *see also* Irby Dep. 34:23 - 35:3.)

19. In addition, Plaintiff Irby testified that she saw those logos on in-store circulars that she picked up when she went to a Pay and Save store and at the meat counter when she was inside a Pay and Save store. (Hr'g Tr. 261:1-25; *see also* Irby Dep. 34:3-22.)

20. In fact, Plaintiff Irby testified that she stopped buying beef at Pay and Save when the store removed a sign over the meat counter inside the store that read "All American Beef." (Irby Dep. 79:21-25; 80:5-10.)

21. In the context of ruling on Defendant Kroger's motion to dismiss, this Court narrowed the scope of Plaintiffs' claims by ruling that "advertising" means "the Defendants' promotion of their products outside of their stores and not inside them. . . ." (Memorandum Op. and Order [Doc. 115] at 247 n.48.) Thus, for purposes of ruling on the present motion, the Court will not consider Plaintiff Irby's testimony related to the logos and signs that she saw inside a Pay and Save store.

22. Plaintiff Irby has another motivation for wanting to know that the beef products she purchases are from cattle born, raised and slaughtered in the United States. After watching a documentary about missing women in Mexico, Plaintiff Irby became concerned that "the cartel" in Mexico was grinding up the bodies of missing women and mixing them in with ground beef

sold in the United States. She refers to this as "cartel meat." (Irby Dep. 46:2 - 47:12; Hr'g Tr. 258:20 - 259:12.)

23. Plaintiff Irby presented no evidence that any other member of the proposed classes share this perception. Dr. Chadelle Robinson – Plaintiff Irby's expert witness – agreed that she had never heard of any other consumer who had this theory and that this theory was "ludicrous." (Hr'g Tr. 150:15-24.)

24. Plaintiff Irby asserts a claim under the New Mexico Unfair Practices Act (on behalf of herself and the New Mexico sub-class), (Third Am. Compl. ¶¶ 52-62); and claims for breach of express warranty (*id.* ¶¶ 63-68), and unfair enrichment (*id.* ¶¶ 69-73), on behalf of all other class members.

25. Plaintiff Irby admits that she has not been harmed monetarily by Pay and Save's use of the "All American Beef" logo. (Irby Dep. 87:16-20.)

E. Plaintiff Irby's Class Certification Motion

26. In her amended complaints, Plaintiff Irby initially sought to represent two classes of individuals defined as follows:

> (1) All consumers in the United States who purchased the Defendants' products during the applicable limitations period, for their personal use, rather than for resale or distribution ("Class").
>
> (2) All 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 ("New Mexico Sub-Class").

(Second Am. Compl. [Doc. 60] ¶ 48; Third Am. Compl. ¶ 48.)

27. On October 17, 2022, Plaintiff Irby filed her Motion for Class Certification. [Doc. 215]. In that Motion, Plaintiff Irby seeks certification of two classes that are different from the classes defined in her amended complaints.

28. Per the class definitions set forth in Plaintiff Irby's Motion for Class Certification, the members of the first class (the "New Mexico Sub-Class") are defined as follows:

> A class consisting of all persons from New Mexico that reviewed the advertisements of Pay and Save's New Mexico stores known as Lowe's, Food King, Fiesta Foods, that they received in a mailer or newspaper or viewed online from May 2018 to the cessation the use of the All American or Truly Texas logos to make the decision to attend a Pay and Save 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.

(Irby Class Cert. Mot. at 7.)

29. Per the class definitions set forth in Plaintiff Irby's Motion for Class Certification, the members of the second class (the "four-state class") are defined as follows:

> A class consisting of all persons from the [*sic*] Texas, Colorado, Kansas and Arizona that reviewed the advertisements of Pay and Save's stores that they received in a mailer or newspaper or viewed online to make the decision to attend a Pay and Save store to purchase beef products which they relied upon to have been produced from cattle born and raised in the USA.

(*Id.*)

30. No individuals are excluded from either of these classes per the definitions set forth in Plaintiff Irby's Motion for Class Certification. (*See Id.*) Excluded from the classes proposed in her amended complaints, however, are "(1) Defendants, any entity or division in which any Defendants' have a controlling interest, and Defendants' legal representatives, officers, directors, assigns, and successors; and (2) the judge to whom this case is assigned and the judge's staff." (Second Am. Compl. ¶ 49; Third Am. Compl. ¶ 49.)

F. The Class Certification Hearing

31. The Court held a one-day hearing on Plaintiff Irby's motion for class certification in conjunction with Plaintiff Thornton's Motion for Class Certification as to Defendant the Kroger Company [Doc. 214] on December 5, 2022.

32. At the hearing, counsel for Plaintiff Thornton and Plaintiff Irby presented an opening statement, followed by an opening statement presented by counsel for Kroger. Plaintiffs Thornton and Irby then called Chadelle Robinson, Ph.D. to testify, followed by the testimony of Plaintiff Thornton. Counsel for Pay and Save then gave an opening statement. Plaintiff Irby testified. Neither Defendant Kroger nor Defendant Pay and Save called any witnesses to testify at the class certification hearing. All counsel agreed on the record to forego closing arguments at the class certification hearing.

G. *Daubert* Hearing

33. On November 18, 2022 – before the class certification hearing – Defendant Kroger filed a Motion to Exclude Expert Testimony of Dr. Chadelle Robinson [Doc. 232]. Defendant Pay and Save joined in this motion [Doc. 233].

34. The same day, Defendant Kroger filed a separate Motion to Exclude Survey Evidence [Doc. 234].

35. Neither Plaintiff Irby nor Plaintiff Thornton filed a motion to exclude any of the experts timely disclosed by Defendant Kroger. These include Dr. Stephen F. Hamilton, Dr. James S. Dickson, Dr. Nevil C. Speer, and Dr. Richard J. George.

36. The Court held a hearing on both of Defendant Kroger's motions to exclude on January 30, 2023.

37. The expert testimony and evidence introduced at the class certification hearing related to these motions were the following:

1. Dr. Chadelle Robinson

38. Dr. Robinson is an Assistant Professor of Agricultural Economics and Agricultural Business at New Mexico State University. She holds a Ph.D. in Marketing. (Hr'g Tr. 64:1-2; 95:12-16.)

39. Before this case, Dr. Robinson never had served as an expert witness and never had prepared an expert report. (*Id.* 94:22 - 95:4.)

40. Before she entered academia, Dr. Robinson's primary work experience was in the area of marketing for the produce industry. (*Id.* 50:22 - 51:8; 95:25 - 96:6.)

41. Outside of the present lawsuit, Dr. Robinson has never done any research about consumer demand for beef in the United States. (*Id.* 99:2-5.)

42. Dr. Robinson testified that the reports she submitted in the present litigation would not pass a peer review. (*Id*. 141:25 - 142:7.)

43. In Dr. Robinson's opinion, 17% of the United States' beef supply has been sourced from outside of the United States. (U.S.A. Beef Research ("Robinson Report") [Doc. 215-5] at 5.) That statistic came from the USDA. (Hr'g Tr. 143:17-19.)

44. However, Dr. Robinson presented no evidence that any beef product advertised with the logos that are at issue in the present case was from cattle born or raised outside of the United States. (*Id.* 112:21-25.)

45. Dr. Robinson presented no evidence that any beef product sold in any Pay and Save store actually came from an imported cow or imported beef. (*Id.* 142:13-19; 143:12-16.)

46. Dr. Robinson's report contains no analysis of, and no opinion regarding, the meaning, interpretation or significance of Pay and Save's "Truly Texas" logo.

47. Other than what Dr. Robinson terms as "descriptive statistics" (*id.* 105:10), Dr. Robinson did not perform any statistical analysis to support her opinions, including a regression or conjoint analysis. (*Id.* 105:23 - 106:3; 107:7 - 108:4; 110:1-3; 126:23-25; 128:14-16; 133:12-15; 141:17-22; *see also* Robinson Dep. at 171:19-24; 201:7-9.)

48. Dr. Robinson was not retained to develop a damages model for either putative class in this case. (Hr'g Tr. 105:2-5.)

49. Dr. Robinson has no proposal or plan for how damages could be calculated and assessed for the classes of individuals asserting claims against Pay and Save in this case. (*Id.* 146:7-13.)

2. Survey evidence

50. Dr. Chadelle Robinson's report [Doc. 215-5] purports to rely on a consumer survey conducted by Brian Sanderoff.

51. Plaintiff Thornton did not initially identify Mr. Sanderoff as an expert witness, and did not serve his expert report until September 2022.

52. This Court denied Defendant Kroger's Motion to Strike Untimely Expert Disclosure of Brian Sanderoff and Preclude Expert Testimony [Doc. 209]. At a hearing held on November 14, 2022, the Court ruled that Mr. Sanderoff was not excluded from testifying, but that his testimony would be limited to what was included in his report. (Nov. 14, 2022 Hr'g Tr. [Doc. 262] at 57:11-13.)

53. Neither Plaintiff Thornton nor Plaintiff Irby called Mr. Sanderoff to testify at the class certification hearing.

54. The survey performed by Mr. Sanderoff does not contain any questions regarding the meaning, interpretation or significance of Pay and Save's "Truly Texas" logo.

II. Plaintiff Irby Does Not Satisfy The Implied Conditions Necessary For Class Certification

A. Plaintiff Irby Is Not A Member Of The Four-State Class Identified In Her Class Certification Motion

55. As defined in her Motion for Class Certification, Plaintiff Irby claims to be the sole class representative for the members of the "four-state class" defined as follows:

> A class consisting of all persons from the [*sic*] Texas, Colorado, Kansas and Arizona that reviewed the advertisements of Pay and Save's stores that they received in a mailer or newspaper or viewed online to make the decision to attend a Pay and Save store to purchase beef products which they relied upon to have been produced from cattle born and raised in the USA.

(Irby Class Cert. Mot. at 7.)

56. Plaintiff Irby is a resident of Otero County, New Mexico. (Third Am. Compl. ¶ 13; *see* Decl. of Wendy Irby [Doc. 215-1] ¶ 1.)

57. Plaintiff Irby presented no evidence that she currently is – or ever was during the applicable class period – a resident of Texas, Colorado, Kansas or Arizona; the only states identified in the four-state class defined in her Motion for Class Certification, or that she otherwise is from any of those four states.

58. The Court finds, therefore, that Plaintiff Irby has not carried her burden of establishing that she is a member of four-state class defined in her Motion for Class Certification.

59. As of the date of the hearing on the Class Certification Motions, Plaintiff Irby had not filed a motion to file an amended complaint for the purpose of either naming an additional class representative to represent the four-state class or amending the four-state class definition.

60. The Court denies Plaintiff Irby's request set forth in her Reply in Support of the Class Certification Motion [Doc. 247] at 17 to file an amended complaint for the purpose of either naming an additional class representative or amending the four-state class definition.

B. There Is No Evidence Regarding Any Class Of Persons Who Viewed The "Truly Texas" Logo

61. Plaintiff Irby presented no evidence that she ever saw an advertisement with the "Truly Texas" logo. (Hr'g Tr. 250:1-6.) She offered no testimony about her understanding or impression of the meaning of that logo. She offered no testimony from any Pay and Save customer who ever saw an advertisement with the "Truly Texas" logo. Plaintiff Irby also did not offer any expert opinion with regard to the meaning, interpretation or significance of the "Truly Texas" logo.

62. The Court finds, therefore, that Plaintiff Irby has not carried her burden to establish that persons who viewed the "Truly Texas" logo anytime within the class period properly are members of either class defined in her Motion for Class Certification.

C. There Are No Objective And Administratively Feasible Means Of Identifying Putative Class Members Without Individual Inquiries.

63. Plaintiff Irby made little effort to show that there are objective and administratively feasible means of identifying members of either of the proposed classes. At most, she suggested some form of "minimal self-certification" attesting to their membership in one of the proposed classes. (Irby Class Cert. Mot. at 26; Reply in Support of Class Cert. Mot at 5, 7-8.) Plaintiff Irby proposes "issuing class notice to persons who purchased beef from [Pay and Save], and allowing them to certify under penalty of perjury that they expected their purchase was American beef after reviewing [Pay and Save's] advertising . . . ." (Reply in Support of Class Cert. Mot at 7-8.) However, Plaintiff Irby failed to explain how this method could be used efficiently and reliably to identify putative class members. The Court rejects Plaintiff Irby's proposal.

64. First, to the extent that any submission would be uncorroborated or unverified, such documentation would not provide valid evidence that an individual saw the logo in question, relied on its meaning as to the country of origin of the beef product advertised, purchased that beef product, and that the beef product was not from domestic cattle. Any such submission would be subject to challenge by Pay and Save, and testimony on these issues would be subject to cross-examination.

65. Even if the form of self-certification that might be submitted was verified – whether by declaration, affidavit or other documentation – that mechanism does not provide a method to assure the reliability of such a self-promoting statement, nor does it obviate Pay and Save's opportunity to challenge class membership.

66. Second, Plaintiff Irby has not shown that common evidence demonstrates that potential class members understood the challenged logos in the manner she alleges. To the contrary, the Pay and Save logos at issue – "All American" or "Truly Texas" – are subject to multiple possible interpretations.

67. Plaintiff Irby testified that her impression of "All American" beef was beef "born, raised and slaughtered in the United States." (Irby Dep. 52:7-15; Hr'g Tr. 251:7-10.)

68. But in the survey performed by Brian Sanderoff and relied upon by Plaintiffs' expert Dr. Robinson, the respondents never were asked to define what the phrase "All American" meant to them. (Deposition of Chadelle Robinson ("Robinson Dep.") [Doc. 251-5] 221:13-24; Hr'g Tr. 157:2-5.) Instead, the survey provided four possible interpretations of the "All American Beef" logo, none of which were the same as Plaintiff Irby's understanding.[1] And 15%

[1] (i) The beef is from cattle born and raised in the US; (ii) The grade of beef as defined by the USDA; (iii) The beef was inspected in the US; and (iv) Not sure. (Beef Shield Survey [Doc. 215-3] at 2-3.)

of the survey respondents simply were unsure of what the "All American Beef" label meant at all. (*Id.*) According to Dr. Robinson, these individuals "were unable to really identify the intent of the graphic." (Robinson Report [Doc. 215-5] at 11.) The allegedly misleading Pay and Save logos are thus subject to multiple possible interpretations. (Robinson Dep. 232:6-16 ("[E]very consumer looks at different packaging and different graphics very differently.").)

69. The Court finds that Plaintiff Irby failed to present evidence that the members of the purported class had a clear and uniform understanding of the "All American Beef" logo. As a result, determining how each consumer understood the meaning of the challenged logos can be done only on a person-by-person basis, meaning that individualized inquiries into each putative class member's interpretation are unavoidable simply to determine if they properly are to be deemed members of the proposed classes.

70. Third, Plaintiff Irby has not shown that common evidence demonstrates that the Pay and Save logos' alleged misrepresentation regarding the country of origin for beef products was a material factor in a class member's purchase decision.

71. The survey performed by Brian Sanderoff, Plaintiff Irby's expert witness, reflects that the price of beef – not whether the beef was born and raised in the United States – was a more important factor that consumers considered when purchasing beef products at the grocery store. (Beef Shield Survey at 8.) Dr. Robinson confirmed this conclusion in her testimony. (*See* Hr'g Tr. 74:1-12 ("But consistently, you can identify price is always going to be the top attribute"); *id.* 150:2-4 ("Q. All right. You'll agree with me that price is very important when buying groceries? A. Absolutely.").)

72. Similarly, in his expert report, Dr. Richard J. George stated that "[a]ll of the major studies of which I am aware show that the country of origin of beef products is only of minor, if

any importance when deciding whether to buy beef." (Declaration and Report of Dr. Richard J. George ("George Report") [Doc. 231] at 14.) Dr. Robinson testified at the class certification hearing that she has "no evidence to dispute Dr. George's statement." (Hr'g Tr. 103:20 - 104:4.)

73. The Court finds that Plaintiff Irby failed to present evidence that the alleged misrepresentation regarding the geographic origin of beef products related to the "All American" or "Truly Texas" logos would be material to any individual consumer. As a result, determining the materiality of the supposed misrepresentation would require individualized proof in order to establish class membership.

74. The Court finds, therefore, that determining how each consumer understood the meaning of the challenged logos and the materiality of that meaning for beef purchases at Pay and Save can be done only on an individual basis. This means that individualized inquiries into each putative class member's interpretation of the Pay and Save logos are unavoidable to determine if any individual properly can to be deemed to be a member of the proposed classes.

75. Finally, Plaintiff Irby makes a passing assertion that potential class members could be identified and managed "utilizing [Pay and Save's] advertising and loyalty cards for notice [and] existing database technology. . . ." (Reply in Support of Class Cert. Mot at 28.) There is no evidence to support this statement.

76. Plaintiff Irby did not present any evidence that Pay and Save (unlike Defendant Kroger) has a loyalty card program. To the contrary, the unrefuted representation made to the Court is that Pay and Save has no such program. (Hr'g Tr. 228:23-25 (Schultz).)

77. Plaintiff Irby also failed to present any evidence that Pay and Save has any form of "existing database technology." To the contrary, Pay and Save has no database listing the individuals who received a Pay and Save mailer or a newspaper containing a Pay and Save

advertisement. There are no records showing which individuals viewed a Pay and Save advertisement online. There are no lists showing which customers went to a particular Pay and Save store after reviewing an advertisement. And Pay and Save has no archive identifying specific customers who purchased beef products in any given time-frame. (Hr'g Tr. 233:14 - 234:3 (Schultz); Pay and Save Opp'n to Irby Class Cert. Mot. at 14 & n.3.)

78. The Court finds that Plaintiff Irby failed to propose any method of ascertaining either of the proposed classes with adequate evidentiary support that the method will be successful.

III. Plaintiff Irby Failed To Put Forward A Valid Method For Calculating Damages On A Classwide Basis

79. Plaintiff Irby presented the expert report and testimony of Dr. Chadelle Robinson in an effort to carry her burden of showing that a valid means of calculating damages on a classwide basis.

80. The Court finds that Dr. Robinson failed to present a damages model capable of measuring classwide damages attributable to the harm allegedly resulting from the claimed misrepresentations in this case.

81. As an initial matter, Dr. Robinson conceded that she had no proposal or plan for how damages could be calculated and assessed for the class of individuals in this case. (Robinson Dep. at 214:18-21; *id*. at 227:1-7; 277:8-16. *See* Hr'g Tr. 145:13-17.) In fact, Dr. Robinson testified that she was not retained to develop a damages model for a putative class. (Hr'g Tr. 104:2-5.) Consistent with this admission, Dr. Robinson did not develop a framework for calculating class damages in the future. (*Id.* 146:7-13.)

82. Conjoint analysis is a marketing research technique for estimating how consumers value a product's individual attributes, based on consumer surveys in which respondents are

asked to choose between certain combinations of product features. (Robinson Dep. at 40:11-25; Hr'g Tr. 128:6-13.)

83. Dr. Robinson did not perform a conjoint analysis.[2] (Robinson Dep. at 171:19-24; 201:7-9; Hr'g Tr. 128:14-16; 133:12-15; 141:17-22.) As a result, neither Dr. Robinson nor Plaintiff Irby presented a damages model that isolated the damages that putative class members ascribe to the belief that the logos "All American Beef" and "Truly Texas" misrepresent the geographic origin of beef products sold at Pay and Save.

84. At best, Plaintiff Irby presented two possible methods for calculating class damages. Both of them are flawed.

85. Dr. Robinson proposed calculating damages by simply multiplying Pay and Save's annual gross sales by 17% – a figure Dr. Robinson claims is the "Total Annual % of Imported beef in US Beef Supply" – to arrive at a figure labelled "Estimated Value of a % Imported meat sold by Lowe's Markets," and then taking the sum of each year's total during the class period. (Robinson Dep. at 17.) There are two significant problems with this methodology.

86. First, the 17% figure on which Dr. Robinson relies was taken from a USDA study that concluded that "[f]rom 2017, the combined imported beef product lines contributed 17% of

[2] On March 16, 2023 – more than 3 months after the class certification hearing and more than 8 months after the deadline for the parties to disclose expert witness reports – Plaintiff Irby filed a "Notice of Supplemental Information" [Doc. 268]. This Notice included a new and previously undisclosed declaration from Dr. Robinson. [Doc. 268-2]. In this statement, Dr. Robinson stated that she had reviewed a recent survey published by the USDA that utilized "several analysis techniques," including a conjoint analysis, and she provided an opinion that this study "confirms the assumptions and results that I reached in reviewing and analyzing the Sanderoff Survey results. (*Id.*) This belated declaration is untimely under both Fed. R. Civ. P. 26(a) and this Court's Amended Scheduling Order [Doc. 160]. Moreover, the USDA survey does not analyze either the "All American Beef" or "Truly Texas" logos at issue in this litigation. The Court will not consider either the Notice or Dr. Robinson's declaration. *See Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999); *Faure v. Cmty. Health Sys. Prof'l Servs. Corp.*, No. 14-cv-559 KG/KBM, 2017 U.S. Dist. LEXIS 125558, at *24 (D.N.M. Aug. 8, 2017) (striking plaintiff's expert report).

the total U.S. beef supply." (Robinson Dep. at 5.) However, Dr. Robinson has no evidence that Pay and Save sold any portion of that 17% of imported beef. (Robinson Dep. at 219:25 - 220:4; 222:17 - 223:3; Hr'g. Tr. 143:12 - 144:3.) Plaintiff Irby also has no personal knowledge that any beef sold by Pay and Save was not beef raised and slaughtered in the United States. (Irby Dep. 54:6-13; 66:14-22; 73:13-18.) It also appears that the evidence is conflicting as whether it is possible to trace the country of origin of a particular beef product sold in a given is store. (*Compare* Hr'g Tr. 58:4-14; 61:2-12 *with id.* 113:22 - 114:8.) Other than conjecture, therefore, there is no evidence to demonstrate that 17% of the beef products sold by Pay and Save during the class period came from imported beef.

87. Second, Dr. Robinson's calculation – if accepted – provides a full refund of any and all amounts paid by class members for beef she assumes was imported. (Robinson Dep. at 213:22 - 214:5.) In her reply brief, Plaintiff Irby describes this calculation as "a refund model for damages." (Reply in Support of Class Cert. Mot at 27.) Awarding a full refund to class members based solely on this assumed percentage fails to identify or isolate the price premium associated with the alleged misrepresentation. Moreover, providing a full refund of the purchase price allows class members to receive compensation for beef purchases even if they placed no meaning or reliance on the logos at issue.

88. The Court finds that this proposed damages model fails to yield a proper economic model of damages.

89. The other possible damages model proposed by Plaintiff Irby is a "willingness-to-pay" model.

90. In the survey conducted by Brian Sanderoff and relied on by Dr. Robinson, respondents were asked how much they would be willing to pay for several different beef

products "produced in the US" and how much they would be willing to pay for several different beef products "produced outside the US," and then were provided a blank space to enter a dollar value. (Beef Shield Survey at 4-8.) Dr. Robinson then totaled the prices the respondents provided in each category and found the average price. (Robinson Dep. at 201:10-16.) From those numbers, Dr. Robinson concluded that all "beef categories had a premium price for U.S. beef over imported options." (Robinson Dep. at 14.) This methodology is flawed.

91. The survey respondents were asked to provide a price they would be willing to pay for a hypothetical beef product (*e.g.* "beef steak," "ground beef," "beef roast"). (Beef Shield Survey at 4-8.) Respondents were not asked to provide a price associated with any specific beef product, and as a result, there was no control for other product characteristics, such as leanness, freshness, cut of beef, and other material attributes. As a result, there is no way of knowing whether each respondent was providing a price for the same beef product.

92. Moreover, evidence of consumer willingness-to-pay for beef produced in the United States does not mean that, in fact, class members actually paid more for these products in real market transactions (*i.e.*, a price premium). Plaintiff Irby did not present any evidence or expert testimony related to the prices actually paid by consumers for beef products during the class period.

93. And finally, Dr. Robinson candidly admitted that it is "beyond [her] experience" as to whether "willingness to pay is a way to measure damages in the case." (Robinson Dep. at 204:7-12.) She also testified that she "ha[d] no idea" how such damages would be distributed to the class. (*Id.* 214:18 - 215:5; 227:1-7.)

94. The Court finds that Plaintiff Irby's willingness-to-pay damages model fails to provide a valid method for calculating damages on a classwide basis.

PROPOSED CONCLUSIONS OF LAW

I. The Law Regarding Class Certification Under Rule 23

1. Rule 23 states the requirements for certifying a class. "All classes must satisfy: (i) all rule 23(a) requirements; and (ii) one of the three sets of requirements under rule 23(b), where the three sets of requirements correspond to the three categories of classes that a court may certify." *Payne v. Tri-State CareFlight, LLC*, 332 F.R.D. 611, 656 (D.N.M. 2019) (Browning, J.) (citing Fed. R. Civ. P. 23(a)-(b)). Plaintiff "bears the burden of showing that the requirements are met." *Id.* *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (the party seeking class certification must affirmatively demonstrate that the class meets the requirements of Rule 23).

2. "In ruling on a class certification motion, the Court . . . must independently find the relevant facts by a preponderance of the evidence." *Payne*, 332 F.R.D. at 656.; *see also id.* n.15 (the Tenth Circuit has "stat[ed] that district courts should apply a 'strict burden of proof' to class certification issues" (citing *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013))).

3. "[T]he Court must conduct a rigorous analysis of the rule 23 requirements, even if the facts that the Court finds in its analysis bear on the merits of the suit." *Payne*, 332 F.R.D. at 657; *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."). "Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013).

A. The Rule 23(a) Requirements

4. "A party seeking to certify a class is required to show[,] 'under a strict burden of proof, that all the requirements of [Rule] 23(a) are clearly met.'" *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988). 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).

1. Numerosity

5. The numerosity requirement "is concerned with manageability, *i.e.*, the Court's ability to handle the case as a non-class action" and "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 a fact-specific inquiry best left to the district court's discretion." *Zuniga v. Bernalillo Cnty.*, 319 F.R.D. 640, 661 (D.N.M. 2016) (Browning, J.)

2. Commonality

6. The Supreme Court has interpreted Rule 23(a)(2) to require: "(i) [a] common question [that] 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." *Payne*, 332 F.R.D. at 659 (citing *Wal-Mart*, 564 U.S. at 348-52). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 564 U.S. at 349-50 (citation omitted).

Class members' "claims must depend upon a common contention," and "[t]hat common contention . . . must be of such a nature that it 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. The commonality inquiry focuses not on "the raising of common '*questions*' – even in droves – but rather[] [on] the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (first emphasis added; citation omitted). "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (citation omitted). "[T]he common question or questions cannot be incidental. . . ." *Anderson Living Tr.*, 306 F.R.D. at 382.

3. Typicality

7. Typicality "ensures that absent proposed class members are adequately represented by evaluating whether the named plaintiff's interests are sufficiently aligned with the class' interest." *Payne*, 332 F.R.D. at 661 (citations omitted). "The Supreme Court has noted that '[t]he commonality and typicality requirements of Rule 23(a) tend to merge.'" *Id*. (citation omitted). "[I]t is well-established that a proposed class representative is not typical under Rule 23(a)(3) if the representative is subject to a unique defense that is likely to become [ ] a major focus of the litigation." *In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 687 (D. Colo. 2014) (Brimmer, J.) (internal quotation marks & citation omitted). "[A] lead plaintiff's unique defense is detrimental to the class . . . [because] the lead plaintiff might devote time and effort to the defense at the expense of issues that are common and controlling for the class." *Payne*, 332 F.R.D. at 661 (quoting *In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. at 687).

4. Adequacy

8. "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. It ensures that the class' interests will be protected and that the final judgment properly can bind all class members.

B. Rule 23(b) Classes

9. "Once the court concludes that the threshold requirements [under Rule 23(a)] have been met, 'it must then examine whether the class falls within at least one of three categories of suits set forth in Rule 23(b).'" *Id.* at 663 (citation omitted). Plaintiff Irby attempts to satisfy Rule 23(b)(3).

1. Rule 23(b)(3) class

10. Rule 23(b)(3) is "[f]ar and away the most controversial class action category." *Payne*, 332 F.R.D. at 664. That Rule allows a class action to be maintained if:

> the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the putative class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against putative class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). These requirements are discussed below.

a. Predominance

11. "The predominance criterion of rule 23(b)(3) is 'far more demanding' than rule 23(a)(2)'s commonality requirement." *In re Thornburg Mortg., Inc. Sec. Litig.*, 912 F. Supp. 2d 1178, 1225 (D.N.M. 2012) (Browning, J.) (citation omitted). While commonality "requires only that a common question or questions exist[,] [predominance] requires that the common question or questions predominate over the individual ones." *Zuniga*, 319 F.R.D. at 668. Under the Tenth Circuit's approach to predominance, the 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) (citation omitted). That task requires considering the elements of the claims in a case "to 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.* For this reason, the predominance inquiry "will frequently entail some discussion of the claim itself." *Id.*

12. "Affirmative defenses may be considered as one factor in the class certification calculus." *Payne*, 332 F.R.D. at 668; *see also Donaca v. Dish Network, LLC.*, 303 F.R.D. 390, 400 (D. Colo. 2014) (Jackson, J.) (explaining that the necessity of resolving individual issues affecting affirmative defenses is a relevant predominance consideration). "Other recurring issues present serious challenges to predominance," including "the prima facie element of reliance or due diligence in common-law fraud and other cases." *Payne*, 332 F.R.D. at 669-70.

13. The predominance analysis also takes into account questions regarding damages – both "macro damages" (i.e., "total class damages") and "micro damages" (i.e., "individual damages"). *Id.* at 666. This Court has interpreted the Supreme Court's decision in *Comcast* as establishing three points "relevant to the individual determination of damages." *Id*. at 667. First,

"at the class certification stage, the Court cannot ignore" either: (1) "how individual damages, if any are appropriate, are to be decided"; or (2) "the possible complexities of the individual damages determinations in making the predominance calculation." *Id.* at 667-68. Second, the methodology for calculating damages for all class members "needs to be common or, if there are different methodologies for some plaintiffs and class members, the Court must take these differences into account at the class certification stage in the predominance analysis" and determine whether any individual questions regarding damages "predominate over the questions of law or fact common to the class." *Id.* at 668. Third, "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.* Even common methodologies may "create issues for one class member or group of class members that they do not create for other class members or groups," and "[t]he predominance analysis must identify precisely the common issues and uncommon issues that application of the class methodology or methodologies raise, and then determine whether, in the total issue mix, the common issues predominate over the individual ones." *Id.*; *see also Wallace B. Roderick Revocable Living Tr.*, 725 F.3d at 1220 ("Although individualized monetary claims belong in Rule 23(b)(3), predominance may be destroyed if individualized issues will overwhelm those questions common to the class. . . ." (internal quotation marks & citations omitted)).

b. Superiority

14. Rule 23(b)(3) also requires "that a class action would be superior to – not just as good as or more convenient than – all other available procedural mechanisms." *Payne*, 332 F.R.D. at 678 (citations omitted). The "most important factor a court must consider in assessing superiority 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 the particular

the individual issues – and fairly distributing relief among the class members. *Id.* at 682. "The principal concern in a manageability inquiry is individualization." *Id.* Superiority is thus linked to predominance: "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).

II. Plaintiff Irby Does Not Satisfy The Implied Conditions Necessary For Class Certification

A. Plaintiff Irby Is Not A Member Of The Four-State Class Identified In Her Class Certification Motion

15. A class representative must be a member of the class she seeks to represent. *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) ("As this Court has repeatedly held, a class representative must be part of the class. . . ."); *see Harrington v. City of Albuquerque*, 222 F.R.D. 505, 509 (D.N.M. 2004) (Hansen, J.) (recognizing "[e]ssential, but implied, prerequisites . . . that a defined or identifiable class exists and that the class representatives are members of the class.").

16. Plaintiff Irby is the only identified class representative for the members of the "four-state class" "consisting of all persons from the [*sic*] Texas, Colorado, Kansas and Arizona that reviewed the advertisements of Pay and Save's stores that they received in a mailer or newspaper or viewed online to make the decision to attend a Pay and Save store to purchase beef products which they relied upon to have been produced from cattle born and raised in the USA." (Irby Class Cert. Mot. at 7); FOF ¶¶ 29, 55 & 57.

17. Plaintiff Irby is a resident of Otero County, New Mexico. FOF ¶¶ 3 & 56. She presented no evidence that she currently is – or ever was during the applicable class period – a resident of Texas, Colorado, Kansas or Arizona; the only states identified in the four-state class defined in her Motion for Class Certification, or that she otherwise is from any of those four states. FOF ¶¶ 57-58.

18. Because Plaintiff Irby is not a resident of any of the states identified in her four-state class, she cannot serve as the lone class representative for that class.

19. Under Fed. R. Civ. P. 23(d), this Court is granted considerable discretion to make appropriate orders to govern the conduct of class actions. The Rule expressly authorizes the Court to issue orders that "determine the course of proceedings," Rule 23(d)(1)(A), and "deal with . . . procedural matters." Rule 23(d)(1)(E). This provision is broadly construed. *See* Fed. R. Civ. P. 23 advisory committee's note (the purpose of Rule 23(d) is to provide the district court with the means for facilitating "the fair and efficient conduct of the action.").

20. As of the date of the hearing on the Class Certification Motions, Plaintiff Irby had not filed a motion to file an amended complaint for the purpose of either naming an additional class representative to represent the four-state class or amending the four-state class definition. Counsel for Plaintiff Irby also did not make an oral motion for such relief at the class certification hearing. FOF ¶ 59.

21. Given the absence of an express motion, the Court exercises its discretion and authority under Rule 23(d) and denies Plaintiff Irby's request in her Reply in Support of the Class Certification Motion at 17 to file an amended complaint for the purpose of either naming an additional class representative or amending the four-state class definition.

22. The Court denies Plaintiff Irby's motion to certify the "four-state" class as defined in her Motion for Class Certification.

B. There Is No Evidence Regarding Any Class Of Persons Who Viewed The "Truly Texas" Logo

23. "Rule 23 does not set forth a mere pleading standard." *Wal-Mart,* 564 U.S. at 350. Instead, a party seeking class certification must affirmatively demonstrate that all of the requirements for a class action have been met and that the action should be certified as a class action. *Payne*, 332 F.R.D. at 656 (plaintiff "bears the burden of showing that the requirements are met.").

24. "In ruling on a class certification motion, the Court need not accept either party's representations, but must independently find the relevant facts by a preponderance of the evidence." *Payne,* 332 F.R.D. at 656. *See Gariety v. Grant Thomas, LLP*, 368 F.3d 356, 365-67 (4th Cir. 2004) (district court's reliance on truth of plaintiff's allegations for purposes of class certification failed to comply with Rule 23 and did not constitute required rigorous analysis of whether plaintiffs demonstrated that the requirements of Rule 23(b)(3) were met).

25. Plaintiff Irby is the only identified class representative for the members of the New Mexico sub-class "consisting of all persons from New Mexico that reviewed the advertisements of Pay and Save's New Mexico stores . . . from May 2018 to the cessation of the use of the All American or Truly Texas logos to make the decision to attend a Pay and Save store to purchase beef products . . . ." (Irby Class Cert. Mot. at 7); FOF ¶ 28.

26. Plaintiff Irby presented no evidence that she ever saw an advertisement with the "Truly Texas" logo. She offered no testimony from any person from New Mexico who ever saw a Pay and Save advertisement containing the "Truly Texas" logo. She offered no testimony about her understanding or impression of the meaning of that logo. Plaintiff Irby also did not

offer any expert opinion with regard to the meaning, interpretation or significance of the "Truly Texas" logo. FOF ¶¶ 46 & 61.

27. There is no evidence on the record that there is any class of "persons from New Mexico that reviewed the advertisements of Pay and Save's New Mexico stores . . . from May 2018 to the cessation of the use of . . . [the] Truly Texas logo[ ] to make the decision to attend a Pay and Save store to purchase beef products. . . ." FOF ¶ 61. "It is axiomatic that in order for a class action to be certified, a class must exist." 5 Daniel R. Coquillette, *et al.*, *Moore's Federal Practice*, § 23.21[1] (3d ed.)

28. The Court finds that Plaintiff Irby has not carried her burden to establish by a preponderance of the evidence that persons who viewed the "Truly Texas" logo anytime within the class period "to make the decision to attend a Pay and Save store to purchase beef products" properly are members of any class defined in her Motion for Class Certification.

29. The Court denies Plaintiff Irby's motion to certify that portion of the "four-state" class as defined in her Motion for Class Certification as to those persons from Texas, Colorado, Kansas and Arizona who reviewed the advertisements of Pay and Save's stores from May 2018 to the cessation of the use of the "Truly Texas" logo to make the decision to attend a Pay and save store to purchase beef products.

30. The Court denies Plaintiff Irby's motion to certify the New Mexico sub-class as to those persons from New Mexico who reviewed the advertisements of Pay and Save's New Mexico stores from May 2018 to the cessation of the use of the "Truly Texas" logo to make the decision to attend a Pay and Save store to purchase beef products.

C. Plaintiff Irby Failed To Identify An Objectively Ascertainable Class

31. Rule 23(c) directs the Court to "define the class and the class claims, issues or defenses." Fed. R. Civ. P. 23(c)(1)(B). This requirement has led many courts and commentators to recognize that, in addition to the explicit conditions that must be satisfied, Rule 23 also contains an implicit condition that is essential to class certification: "a class must exist. Although the text of Rule 23 is silent on the matter, a class must not only exist, the class must be susceptible of precise definition." 5 Daniel R. Coquillette, *et al.*, *Moore's Federal Practice*, § 23.21[1] (3d ed.); *see EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) ("We have repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'"). *See also* 1 William B. Rubenstein, *et al.*, *Newberg on Class Actions*, §§ 3.1-3.3 (5th ed.) (collecting cases).

32. "An identifiable class exists if its members can be ascertained by reference to objective criteria. The order defining the class should avoid subjective standards (e.g. plaintiff's state of mind). . . ." *Manual for Complex Litigation (Fourth)* § 21.222 (2004). Where the identification of putative class members requires individualized fact finding or mini-trials for each putative class member, class certification is inappropriate. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 307-12 (3rd Cir. 2013) (a plaintiff cannot demonstrate ascertainability if individualized fact-finding or mini-trials will be required to prove class membership).

33. That the class be ascertainable is critical because the outcome is *res judicata* as to all unnamed class members. *Marcus v. BMW of N. Am.*, 687 F.3d 583, 593 (3rd Cir. 2012). Ascertainability also serves a key function in Rule 23(b)(3) class actions by determining who is entitled to receive notice. *Id.*; *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 396 (S.D.N.Y.

2008). Thus, the class definition must be sufficiently definite so that it is administratively feasible for the Court to determine whether a particular individual is a class member.

34. As noted above, Plaintiff Irby has proposed two separate classes: a four-state class (consisting of persons from Texas, Colorado, Kansas and Arizona), FOF ¶¶ 29 & 55, and a New Mexico sub-class (consisting of persons from New Mexico). FOF ¶ 28. Plaintiff Irby has failed to propose any method for ascertaining the members of either of these proposed classes by reference to objective criteria.

35. This Court has explained that "Plaintiffs 'may not merely propose a method of ascertaining the class without any evidentiary support that the method will be successful.'" *Abraham v. WPX Prod. Prods., LLC*, 317 F.R.D. 169, 258 (D.N.M. 2016) (Browning, J.) (quoting *Carrera*, 727 F.3d at 306); *see Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015 WL 3623005 at *10 (E.D. Pa. June 10, 2015) (Goldberg, J.) ("Plaintiffs must, *at the time of class certification*, present a methodology to identify class members, and prove by a preponderance of the evidence that such a methodology will be effective and will not require extensive individualized inquiry and mini-trials.").

36. This Court finds that Plaintiff Irby failed to propose a method of identifying class members, much less demonstrated with evidentiary support that any method "will be successful." *See* FOF ¶¶ 63-78.

37. Pay and Save represented to the Court that it does not maintain any available database that can identify the "persons" described in either the class or sub class: *i.e.*, persons who reviewed a given advertisement and then made a specific purchase of a product in reliance on a subjective belief about the meaning of that advertisement. FOF ¶ 77. Pay and Save represented that it has no data-base listing the individuals who received a Pay and Save mailer or

a newspaper containing a Pay and Save advertisement. *Id.* There are no records showing which individuals viewed a Pay and Save advertisement online. *Id.* There are no lists showing which customers went to a particular Pay and Save store after reviewing an advertisement. *Id.* And Pay and Save has no archive identifying specific customers who purchased beef products in any given time-frame. *Id.*

38. Plaintiff Irby did not contest these representations. She also did not present any evidence or testimony to the contrary.[3]

39. In the absence of such records, Plaintiff Irby failed to demonstrate by a preponderance of the evidence that the "persons" who would comprise the purported classes as defined in the class certification motion can be identified with any degree of evidentiary certainty. As a result, the most fundamental elements of the class members' claims – that they saw an advertisement, relied on the logo contained in that circular and purchased a product for which they are now seeking damages – would have to be proved individually, focusing on evidence from each separate claimant.

40. A defendant in a purported class action has the "right to have each element of each claim asserted against it by each class member *specifically* proven." *Abraham*, 317 F.R.D. at 245 (citation omitted). This principle is consistent with the Supreme Court's ruling in *Wal-Mart* that there can be no "trial by formula"; the same elements of each class member's claim must be proved in a class action as would be required in an individual claim. *Wal-Mart*, 564 U.S. at 36. Absent classwide evidence setting forth the identity of which consumer saw what advertisement and then purchased a product in reliance on that circular, the individualized

[3] In her reply in support of the class certification motion, Plaintiff Irby made reference to Pay and Save's "loyalty card" program. FOF ¶ 75. Plaintiff Irby did not present any evidence to support this assertion. FOF ¶¶ 75-76. Instead, the unrefuted representation made to the Court is that Pay and Save has no such program. FOF ¶ 77.

inquiries needed to prove class membership inevitably would overwhelm any common issues claimed to exist in this case. *See Zuniga*, 319 F.R.D. at 683 ("Techniques that merely presume away substantive elements that a plaintiff normally has to prove, or that would impair a defendant's due-process rights . . . are impermissible.")

41. Plaintiff Irby's suggestion that "minimal self-certification" properly could substitute for full proof of class membership, FOF ¶ 63, is an insufficient means to identify an objectively ascertainable class. Certification is improper where class membership is determined by "a method that would amount to no more than ascertaining by potential class members' say so." *Marcus*, 687 F.3d at 594. *See City Select Auto Sales, Inc. v. BMW Bank of N. Am.*, 867 F.3d 424, 441 (3rd Cir. 2017) (affidavits from potential class members, without more, would not constitute "reliable and administratively feasible" means of determining class membership"). Affidavits "do[] not address a core concern of ascertainability: that a defendant must be able to challenge class membership." *Carrera*, 727 F.3d at 309; *see also Marcus*, 687 F.3d at 594 ("Forcing [defendant] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications."). Nor would they satisfy *Wal-Mart*'s requirement that class members' claims satisfy the same standards of proof that an individual's claim would be required to satisfy. 564 U.S. at 367.

42. Reliance on affidavits submitted at the claims administration stage also would be inconsistent with the Supreme Court's instruction that the requirements of Rule 23 must be "rigorous[ly] analy[zed]" before – not after – a class a class is certified. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citation omitted). Pursuant to *Wal-Mart*, each and every class member must prove that they saw Pay and Save's challenged logos and acted on their interpretation of those logos to purchase beef products, and Pay and Save may challenge each

such showing. Anything less would amount to the "trial by formula" that "the Supreme Court has expressly disavowed." *Abraham*, 317 F.R.D. at 244 (citing *Wal-Mart*, 564 U.S. at 367).

43. Because the class and sub-class members cannot be identified "without extensive and individualized factfinding or 'mini-trials'" that would overwhelm common issues, "a class action is inappropriate." *Abraham*, 317 F.R.D. at 254 (citation omitted). *See also EQT Prod. Co.*, 764 F.3d at 358 ("[I]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate.").

44. The members of Plaintiff Irby's proposed four-state class and New Mexico sub-class are persons who reviewed Pay and Save advertisements and relied on the presence of the "All American" or "Truly Texas" logos in deciding whether to purchase beef products. FOF ¶¶ 28-29. The Court finds that Plaintiff Irby failed to present adequate evidentiary support that her proposed method of ascertaining the members of either class will be successful.

45. Separate and apart from the lack of a reliable and administratively feasible mechanism for determining whether putative class members fall within either of the class definitions, the proposed classes are not ascertainable. The logos at issue – "All American Beef" and "Truly Texas" – are subject to multiple possible interpretations that differ from Plaintiff Irby's subjective impression. *See* FOF ¶¶ 66-69. Because Plaintiff Irby "fail[s] to show that [the representation] has any kind of uniform definition among class members," individualized inquiries into each putative class member's interpretation are unavoidable. *Astiana v. Kashi Co.*, 291 F.R.D. 493, 508 (S.D. Cal. 2013) (Huff, J.); *see also Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726 at *17 (N.D. Cal. June 13, 2014) (Breyer, J.) ("[E]ven if the challenged statements were *facially* uniform, consumers' *understanding* of those representations would not be.").

46. Finally, for the first time in her reply brief in support of her class certification motion, Plaintiff Irby raises one additional issue related to the ascertainability of her proposed classes. Plaintiff Irby contends that because Pay and Save supposedly deleted or failed to keep essential documents relating to whether it actually sold beef from foreign sources, the Court should infer that a class of consumers exists as a sanction for Pay and Save's failure to keep essential records necessary to identify class members. (Reply in Support of Class Cert. Mot at 11-17.) The Court declines both to make such an inference and to impose this type of sanction.

47. As an initial matter, arguments raised for the first time in reply are often considered waived and need not be considered by the Court. *See F.D.I.C. v. Noel*, 177 F.3d 911, 915-16 (10th Cir. 1999) (district court properly refused to consider an argument raised for the first time in reply in support of pending motion).

48. Moreover, like Plaintiff Irby's belated request to amend her complaint for the purpose of either naming an additional class representative to represent the four-state class or amending the four-state class definition, *see* FOF ¶¶ 59-60; COL ¶¶ 20-21, as of the date of the hearing on her class certification motion, Plaintiff Irby failed to file a motion seeking sanctions for an alleged spoliation of evidence. Given the absence of an express motion, the Court exercises its inherent discretion and authority and denies Plaintiff Irby's request in her Reply in Support of the Class Certification Motion to consider imposing a sanction for an alleged spoliation of evidence.

49. Finally, "[a] spoliation sanction is proper where (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence." *Burlington Northern and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007). If an aggrieved party seeks an

adverse inference to remedy the spoliation, the party must also prove bad faith. *Turner v. Public Serv. Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009). Here, other than the argument of counsel set forth in the reply brief, Plaintiff Irby presented no evidence to establish that Pay and Save in any way destroyed or spoliated any evidence of any kind during any time in which it knew or should have known that the present litigation was imminent. There also is no evidence of bad faith.

50. The Court rules that Plaintiff Irby failed to establish by a preponderance of the evidence that an inference of ascertainability is warranted. Plaintiff Irby also failed to demonstrate by a preponderance of the evidence that Pay and Save should be sanctioned for the alleged spoliation of evidence.

51. The Court further finds that Plaintiff Irby failed to establish by a preponderance of the evidence that the members of either the four-state class or the New Mexico sub-class she proposed in her class certification motion can be ascertained without extensive and individualized fact-finding or mini-trials. On this basis, the Court denies Plaintiff Irby's motion to certify either class.

III. Plaintiff Irby Failed To Satisfy The Threshold Requirements Of Rule 23(a).

52. Pay and Save disputes that Plaintiff Irby carried her burden of demonstrating that she satisfied the requirements set forth in Rule 23(a). *Wallace B. Roderick Revocable Living Tr.*, 725 F.3d at 1217-18 (party seeking class certification must affirmatively demonstrate compliance with Rule 23).

A. Numerosity: Plaintiff Irby Did Not Adequately Establish The Number Of Members In The Purported Classes

53. Numerosity "is not just a question of numbers." *Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1215 (10th Cir. 2014). But at the very least, a plaintiff

seeking class certification "must offer 'some evidence of established, ascertainable numbers constituting the class.'" *Id.* (quoting *Rex v. Owens ex rel. Okla.,* 585 F.2d 432, 436 (10th Cir.1978)). Mere speculation as to the size of the class is insufficient to establish numerosity. *See Marcus*, 687 F.3d at 595-97 (trial court must make factual determination based on preponderance of evidence and may not rely on conclusory allegations or mere speculation); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267-68 (11th Cir. 2009) (trial court abused discretion when its decision on numerosity was based on "sheer speculation" and not evidence in the record).

54. Even though a plaintiff need not show the precise number of class members, *Zuniga*, 319 F.R.D. at 661-62, "[n]evertheless, a plaintiff still bears the burden of making *some* showing, affording the district court the means to make a supported factual finding, that the class actually certified meets the numerosity requirement." *Vega*, 564 F.3d at 1267.

1. New Mexico Sub-Class

55. Plaintiff Irby asserts that the proposed New Mexico sub-class "is likely several thousand New Mexicans." (Irby Class Cert. Mot. at 9.) To reach that estimate, Plaintiff Irby multiplies the following generic numbers:

- The 2020 population of Alamogordo (31,635);
- The estimated percentage of Lowe's shoppers who perceived the advertisements to mean beef from cattle born and raised in the USA (55%);
- The estimated percentage of retail shoppers consuming beef (60%); and
- An estimate of the number of grocery store shoppers in Alamogordo who patronize Lowe's (20%).

(*Id.*) Although not expressly stated in her class certification motion, this formula produces an estimated class of more than 2,000 individuals. These factors and this calculation fail to establish that the New Mexico sub-class "is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a).

56. Plaintiff Irby's mathematical calculations are not supported by any evidence in the record. There is no record evidence to demonstrate – or even estimate – the number of New Mexicans who viewed a Pay and Save advertisement appearing either in a mailer or newspaper or online. There also is no evidence showing the number of consumers who, after viewing those advertisements, chose to purchase beef products at any Pay and Save store, let alone those consumers who made that decision in reliance on their interpretation of the advertisements that they viewed. And it is uncontested that Pay and Save has no such records. *See* FOF ¶ 77. In the absence of these numbers supported by a factual record, the Court can only guess at the size of the New Mexico sub-class, "and guessing is not a component of a rigorous analysis." *Holmes v. Farmers Grp., Inc.*, 2021 WL 3879073 at *3 (D.N.M. Aug. 31, 2021) (Ritter, J.).

57. There also is no factual showing that any of the beef products purchased by consumers at any Pay and Save store included beef from foreign sources. Plaintiff Irby admits that she has no such evidence; she is only assuming that this might be the case. FOF ¶ 86. And Irby's expert Dr. Robinson concedes that she has no evidence that any beef product sold in any Pay and Save store actually came from imported beef. FOF ¶¶ 44-45. In short, Irby has no factual basis to demonstrate the size of the proposed sub-class based on any of the defined characteristics of that class.

58. Plaintiff Irby's attempt to calculate the size of the proposed New Mexico sub-class without the aid of any evidence or expert opinion relating to the characteristics of that class

is nothing more than sheer speculation. This is inadequate to establish the element of numerosity required under Rule 23(a). *See Marcus*, 687 F.3d at 585-96 (reversing district court's finding of numerosity "[g]iven the complete lack of evidence specific to BMWs purchased or leased in New Jersey with Bridgestone RFTs that have gone flat and been replaced").

59. The Court finds that Plaintiff Irby did not establish by a preponderance of the evidence that the New Mexico sub-class is so numerous that joinder of all members is impracticable. The Court denies Plaintiff Irby's motion to certify the New Mexico sub-class.

2. Four-State Class

60. Plaintiff Irby asserts that the proposed four-state class "is easily in the millions of consumers." (Irby Class Cert. Mot. at 10.) To support that assertion, Plaintiff Irby multiplies the following generic numbers:

- "Pay and Save sold millions of pounds of beef to states with an average population of 10.25 million";
- The estimated percentage of Lowe's shoppers who perceived the advertisements to mean beef from cattle born and raised in the USA (55%);
- An estimate of Lowe's market share in Texas, Colorado, Kansas and Arizona (10%); and
- The number of states in the class (4)

(*Id.*)

61. As with the New Mexico sub-class, Plaintiff Irby's mathematical calculations related to the four-state class have no evidentiary support and do not relate to the defined characteristics of the class. There is no record evidence to demonstrate – or even estimate – the number of consumers in any of the four states who viewed a Pay and Save advertisement

appearing either in a mailer or newspaper or online. The percentage figure on which Plaintiff Irby relies (55%) is taken from a question in Brian Sanderoff's survey that asked "If you saw the label (All American Beef) in an advertisement and/or on beef packaging, which of the following would it mean to you?" (Irby Class Cert. Mot. at 10 n.6 (citing Thornton/Irby000054).) There is no showing, however, that the survey respondents were residents of only the states included in the four-state class. There also is no evidence showing the number of consumers in those four states who, after viewing those advertisements, chose to purchase beef products at any Pay and Save store, let alone those consumers who made that decision in reliance on their interpretation of the advertisements that they viewed. And there is no evidence or expert testimony to establish Pay and Save's share of the market in any location.

62. The party seeking certification may not rely on conclusory allegations or on mere speculation regarding the size of the class. *See Woodard v. Fidelity Nat. Title Ins. Co.*, 2008 WL 5737364 at *8 (D.N.M. Dec. 8, 2008) (Brack, J.) ("Unsubstantiated assertions and speculative beliefs . . . are insufficient to demonstrate numerosity under the 'strict burden of proof required for class certification."). *See also Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 486 (3rd Cir. 2018) (rejecting counsel's request for the court to use "common sense" to infer a sufficient number of class members when plaintiff failed to present evidence "to determine – rather than speculate about – the portion of those disabled individuals who have actually patronized a relevant Steak 'n Shake restaurant, let alone the portion who have experienced or will experience an ADA violation at one of those restaurants.")

63. The Court finds that Plaintiff Irby did not establish by a preponderance of the evidence that the four-state class is so numerous that joinder of all members is impracticable. The Court denies Plaintiff Irby's motion to certify the four-state class.

B. Commonality: There Are No Common Questions That Will Resolve A Central Issue In One Stroke

64. "After *Wal-Mart*, a common question must be '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,' or to use the more popular phraseology, it must be prone 'to generate [a] common *answer*[] apt to drive the resolution of the litigation.'" *Abraham*, 317 F.R.D. at 260 (quoting *Wal-Mart*, 564 U.S. at 350).

65. Plaintiff Irby's claims do not "depend upon a common contention" that "is capable of classwide resolution." Instead, Plaintiff Irby's claims hinge on individualized issues – namely, whether potentially millions of consumers saw certain logos in circulars and online advertisements, and how each of those consumers understood and responded to them. No putative class member's claim can be resolved without answering those questions, and the answers turn on each consumer's individual circumstances.

66. None of the "common questions" Plaintiff Irby identifies (Irby Class Cert. Mot. at 11-13), is "central to the validity of each claim that the proposed class brings" and "capable of a common answer." *Payne*, 332 F.R.D. at 659 (citing *Wal-Mart*, 564 U.S. at 348-52); *see also Abraham*, 317 F.R.D. at 260 ("[i]ncidental" questions do not satisfy *Wal-Mart*).

67. Questions One through Four of the "common" questions Plaintiff Irby identifies relate to her Unfair Practices Act claim and all center on whether the Pay and Save advertisements misled consumers into perceiving that the beef products sold at its stores had a certain geographic origin and paying a premium for those products. (Irby Class Cert. Mot. at 11-12.) Those are not common questions "capable of a common answer"; they can be resolved only individually, by assessing which logo each putative class member actually saw over time, how they understood them, what other considerations they relied upon in buying beef products at Pay

and Save, and whether they in fact paid a premium. *Payne*, 332 F.R.D. at 659 (citing *Wal-Mart*, 564 U.S. at 348-52). It is the perception – not the veracity – that matters, and those questions of interpretation can be resolved only through individualized facts.

68. For example, Plaintiff Irby testified that her impression of "All American beef" was beef "born, raised and slaughtered in the United States." FOF ¶ 67. Yet she provided no evidence that any other member of either purported class interpreted that logo in the same manner. And the consumer survey performed by Brian Sanderoff and on which Dr. Robinson relied presented no less than four alternative interpretations of that same logo. FOF ¶ 68.

69. Similarly, Plaintiff Irby's "common" questions related to unjust enrichment (Irby Class Cert. Mot. at 12-13), each require fact-intensive answers. All three of the proposed questions rely on the premise that Pay and Save, in fact, sold beef that was not born, not raised, and/or not slaughtered in the United States. But rather than accept that unsupported conclusion, the Court will need to confirm whether a particular advertised beef product, in fact, consisted of imported beef or was produced from cows born outside of the United States in order to generate any semblance of a common answer. But the evidence is conflicting as whether it is possible to trace the country of origin of a particular beef product sold in a given store. FOF ¶ 86.

70. The very nature of Plaintiff Irby's claim for unjust enrichment demands fact-intensive inquiries: whether a particular consumer paid a premium for a given beef or meat product and whether that amount conferred a benefit directly on Pay and Save. *See Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA-051, ¶ 11, 3 P.3d 695 (stating elements of unjust enrichment under New Mexico law). Such claims inherently require "individualized inquiries concerning the reasons each class member purchased [the product] . . . in order to determine whether [the defendant's] retention of the purported price premium would be 'unjust' or

otherwise inequitable." *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 995 (C.D. Cal. 2015) (Morrow, J.) For that reason, courts have held that "common questions will rarely, if ever, predominate an unjust enrichment claim. . . ." *Vega*, 564 F.3d at 1274.

71. Because Plaintiff Irby's claims will turn on individualized inquiries into the representations that each consumer saw and how each consumer understood and acted upon the relevant representation, the Court concludes that they do not present a "common contention" capable of "generat[ing] common answers apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (citation omitted).

72. The Court therefore concludes that Plaintiff Irby failed to carry her burden of satisfying Rule 23(a)(2)'s commonality requirement.

C. Typicality: Plaintiff Irby's Claims Are Not Typical Of Absent Class Members' Claims

73. Plaintiff Irby also failed to carry her burden of satisfying Rule 23(a)(3)'s typicality requirement

74. First, Plaintiff Irby's proposed classes fail the typicality requirement "for the same reason that [they] do[] not satisfy the commonality requirement." *Payne*, 332 F.R.D. at 697. Because each purported class member's claim turns on the unique circumstances with respect to whether that person saw the "All American Beef" or "Truly Texas" logo, how that person construed it, and whether that person then purchased a beef product at Pay and Save based on that understanding, Plaintiff Irby is not typical of absent class members. *See Zuniga*, 319 F.R.D. at 690-91 (no typicality where each person's claim "turn[s] on individual actions of a supervisor").

75. Second, Plaintiff Irby fails the typicality requirement because her claims are "subject to one or more unique defenses that likely will be central to the litigation." *Payne*, 332 F.R.D. at 697 (citation omitted).

76. The first unique defense specific to Plaintiff Irby deals with the reason she no longer buys beef products at Pay and Save. Plaintiff Irby testified that she stopped buying beef at Pay and Save when the store in Alamogordo removed a sign over the meat counter inside the store that read "All American Beef." FOF ¶ 20. But neither the four-state class nor the New Mexico sub-class involves persons who saw advertisements inside a Pay and Save store. Both classes are defined in terms of consumers who reviewed a Pay and Save advertisement "that they received in a mailer or newspaper or viewed online." FOF ¶¶ 28-29. This definition is consistent with the Court's earlier pronouncement that in the context of the present lawsuit, "advertising" means "the Defendants' promotion of their products outside of their stores and not inside them. . . ." (Memorandum Op. and Order [Doc. 115] at 247 n.48.)

77. With regard to her claim brought under the New Mexico Unfair Practices Act, Plaintiff Irby states that the class members saw "advertisements in their mailbox or in their newspaper or viewed them online" (Irby Class Cert. Mot. at 15), "that portrayed that the beef products they would find for purchase at Pay and Save's New Mexico stores was from cattle born and raised in the United States." (*Id.* at 14-15.) The class members "then purchase[d] beef in reliance on the representations contained in those advertisements." (*Id.* at 15.) In contrast, Plaintiff Irby testified that she relied on the presence of signage inside a Pay and Save store proclaiming "All American Beef." FOF ¶ 20. Similarly, with regard to her claim for unjust enrichment, Plaintiff Irby contends that all class members "received advertisements in the mail, via their newspaper or online that misrepresented a substantial portion of the production origin of

beef products for sale by Pay and Save and a substantial portion of those consumers relied on those advertisements to purchase products they either would not have purchased otherwise or would not have paid as much for." (Irby Class Cert. Mot. at 15.) But Plaintiff Irby relied on the presence of signage inside a Pay and Save store proclaiming "All American Beef." FOF ¶ 20.

78. For both of these legal theories, therefore, Plaintiff Irby fails the typicality requirement because her claims are "subject to one or more unique defenses that likely will be central to the litigation." *Payne*, 332 F.R.D. at 697 (citation omitted). "[A] lead plaintiff's unique defense is detrimental to the class … [because] the lead plaintiff 'might devote time and effort to the defense at the expense of issues that are common and controlling for the class.'" *Id.* at 661 (citation omitted; alterations in original).

79. The second unique defense specific to Plaintiff Irby focuses on why she believes the "All American Beef" logo is potentially misleading. If the beef products she purchases do not specify whether the cattle were born, raised and slaughtered in the United States, Plaintiff Irby is concerned that "the cartel" in Mexico may be grinding up the bodies of missing women and mixing them in with ground beef sold in the United States. She refers to this as "cartel meat." FOF ¶ 22. Plaintiff Irby presented no evidence that any other member of the proposed classes shares this perception, and Dr. Chadelle Robinson agreed that she had never heard of any other consumer who had this "ludicrous" theory. FOF ¶ 23.

80. The lack of commonality, coupled with Plaintiff Irby's unique motivation for pursuing her legal claims, significantly undercuts her assertion that her interests are sufficiently aligned with the interests of the class.

81. The Court finds that Plaintiff Irby failed to carry her burden of satisfying Rule 23(a)(3)'s typicality requirement.

D. Adequacy: Plaintiff Irby Is Not An Adequate Class Representative

82. "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 (internal quotation marks & citation omitted). "The 'requirement of adequacy of representation must be stringently applied because members of the class may be bound by the outcome of class litigation even though they may be unaware of the proceedings." *Albertson's, Inc. v. Amalgamated Sugar Co*., 503 F.2d 459, 463-64 (10th Cir. 1974).

83. Plaintiff Irby is not an adequate class representative of the four-state class she seeks to represent for the simple reason that she is not a member of that class. FOF ¶¶ 3 & 56-57. She resides in New Mexico, and New Mexico is not within that four-state class. It is black-letter law that "[a] class action may not be maintained by a putative representative who is not a member of the class." *Monarch Asphalt Sales Co. v. Wilshire Oil Co.*, 511 F.2d 1073, 1077 (10th Cir. 1975). *See also Hayes v. Wal-Mart Stores, Inc.,* 725 F.3d 349, 360 (3d Cir. 2013) ("It is axiomatic that the lead plaintiff must fit the class definition.").

84. Plaintiff Irby also is not an adequate class representative for the New Mexico sub-class. The New Mexico sub-class seeks recovery under the New Mexico Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26. Under that Act, Plaintiff Irby can "recover actual damages or the sum of one hundred dollars ($100), whichever is greater," and she may collect treble damages if she establishes that the deceptive act was willful. NMSA 1978, § 57-12-10(B). The members of the New Mexico sub-class, however, have a more restricted range of potential relief. They can recover only "such actual damages as were suffered by each member of the class as a result of the unlawful method, act or practice." NMSA 1978, § 57-12-10(E). *See Bhasker v. Kemper Cas. Ins. Co.*, 361 F. Supp. 3d 1045, 1139 (D.N.M. 2019) (Browning, J.) ("In a class

action under the [Unfair Practices Act], statutory damages are available only to the named plaintiff whereas class members can recover only their actual damages.")

85. This stark contrast in what Plaintiff Irby may recover, as compared to the recovery available to members of the class she seeks to represent, shows that her interests are antagonistic with those of the class. This conclusion is further borne out by the fact that Plaintiff Irby has not suffered any actual damages. Plaintiff Irby alleges that Pay and Save misled her with advertisements inducing her to purchase beef products that she understood were from cattle born, raised and slaughtered in the United States. (Third Am Compl. ¶ 14.) But Plaintiff Irby has conceded that she has no evidence that any beef product she ever purchased at Pay and Save was anything other than beef from the United States. FOF ¶ 86. Moreover, Plaintiff Irby admits that she has not been harmed monetarily by the manner in which Pay and Save advertised its beef products. FOF ¶ 25.

86. Plaintiff Irby presented no evidence supporting her claim that she ever purchased a beef product at Pay and Save that came from an imported cow or imported beef, FOF ¶¶ 44-45, 86, and she has no evidence that she as suffered any monetary harm. FOF ¶ 25. In the absence of this evidence, if Plaintiff Irby prevails on the merits of her Unfair Practices Act claim, she can recover only the statutory award of $100. NMSA 1978 § 57-12-10(B). Assuming that Plaintiff Irby's individual claim is typical of the claims of the New Mexico sub-class she seeks to represent, those class members similarly will not be able to establish any actual damages. But under the Act, they will not be entitled to recover anything. NMSA 1978, § 57-12-10(E). This situation – where the sole named class representative can recover damages but the members of the class cannot – creates a clear dichotomy in the interests of the class as compared to Plaintiff Irby's personal interests, thus rendering her an inadequate class representative. *See Gardner v.*

Equifax Info. Servs., LLC, 2007 WL 2261688 (D. Minn. Aug. 6, 2007) (Montgomery, J.) (named plaintiffs were inadequate class representatives by attempting to forego claim for actual damages and proceed only with their claims for statutory damages).

87. The Court concludes that Plaintiff Irby failed to carry her burden of satisfying Rule 23(a)(4)'s adequacy requirement.

88. For all of the reasons set forth in the foregoing Conclusions of Law, COL ¶¶ 52-87, the Court rules that Plaintiff Irby did not satisfy the explicit requirements necessary for a class action to proceed as set forth in Rule 23(a).

IV. Plaintiff Irby Failed To Satisfy The Requirements Of Rule 23(b)(3)

89. Even if Plaintiff Irby was able to satisfy Rule 23(a)'s mandatory requirements, the Court concludes that she failed to satisfy Rule 23(b)(3)'s requirements that the questions of law or fact common to the class predominate over any questions affecting only individual members and that a class action is a superior means for resolving their claims.

90. The Court concludes that Plaintiff Irby failed to satisfy the requirements of Rule 23(b)(3) for three reasons. *First*, Plaintiff Irby fails to demonstrate an ascertainable class. *Second*, common issues do not predominate – they are overwhelmed by the individualized inquiries essential to every aspect of Plaintiff Irby's claims. These include determining – from individual proof – (i) whether each consumer actually purchased beef products; (ii) whether the consumer saw one of the two logos at issue in a circular or online before making a purchase; (iii) whether the consumer understood non-specific words like "All American Beef" or "Truly Texas" as conveying a message about the meat's country of origin (and if so, what message); and (iv) whether the consumer relied on a misperception about the geographic origin of the meat in deciding to purchase beef products. Damages also must be determined individually, as Plaintiff

Irby failed to put forward a classwide damages model that measures the damages attributable to the misrepresentations she alleges. *Third*, a class action overwhelmed by these individualized inquiries is not a superior means of resolving anything.

A. Plaintiff Irby Failed To Demonstrate An Ascertainable Class

91. As explained above, COL ¶¶ 31-51, Plaintiff Irby's effort to secure class certification fails from the outset given that the proposed classes are not ascertainable. This same element – ascertainability – also is an "'essential' prerequisite to a rule 23(b)(3) class action.'" *Abraham*, 317 F.R.D. at 258 (quoting *Marcus*, 687 F.3d at 593). "If a class cannot be ascertained in an economical and administratively feasible manner" based on objective criteria, then certification under Rule 23(b)(3) cannot be accomplished. *Id.* (citing cases). And in particular, "where nothing in company databases shows or could show whether individuals should be included in the proposed class, the class definition fails." *Id.* (citing cases).

92. Here, just as in *Abraham*, "no existing database can identify the proposed class." *Id.* And as in *Abraham*, the only means for the Court to identify which persons satisfy the criteria for membership in either the four-state class or New Mexico sub-class "is an individual and time-consuming inquiry." *Id.* Plaintiff Irby failed to propose any method for ascertaining the classes she proposes and submitted no evidentiary support for any such inquiry. "Accordingly, [Plaintiff Irby] ha[s] not shown that the proposed class is ascertainable." *Id*.

93. Plaintiff Irby claims that Pay and Save has this information but is choosing not to make it available. (Irby Class Cert. Mot. at 20-21.) However, Plaintiff Irby failed to present any evidence to support this assertion. In similar circumstances, other courts held that a class representative failed to prove an ascertainable class. *See, e.g., In re Tropicana Orange Juice Mktg. & Sales Practices Litig.*, 2018 WL 497071, at *11 (D.N.J. Jan. 22, 2018) (Martini, J.)

("[R]etailer data is the critical component in determining whether putative class members can be ascertained and that data is not in the record."); *Ault v. J.M. Smucker Co.*, 310 F.R.D. 59, 64-65 (S.D.N.Y. 2015) (Crotty, J.) (ascertainability not established where plaintiff relied on "mere assertion that records exist to identify many class members"); *In re Wellbutrin XL Antitrust Litig.*, 308 F.R.D. 134, 150 (E.D. Pa. 2015) (McLaughlin, J.) (ascertainability not established where plaintiffs relied on "assurances . . . that there are extensive purchase records" but did not introduce "any evidence showing that such records are obtainable or can be used in an administratively feasible fashion to ascertain class members").

94. Plaintiff Irby has the burden of showing that the proposed class is ascertainable. She "may not merely propose a method of ascertaining the class without any evidentiary support that the method will be successful." *Abraham*, 317 F.R.D. at 258 (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013)).

95. The ascertainability requirement protects the administrative feasibility of the proceedings "by insisting on the easy identification of class members," protects absent class members "by facilitating the 'best notice practicable' under rule 23(c)(2) in a rule 23(b)(3) action," and protects defendants "by ensuring that those persons who will be bound by the final judgment are clearly identifiable." *Id.* (citations omitted).

96. Courts have taken different views on how the need for an ascertainable and administratively feasible class factors into the Rule 23 analysis. *See Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 471-72 (6th Cir. 2017) (summarizing the different approaches). At a minimum, the Court concludes that the need for individualized inquiries to determine class membership is relevant for (i) determining whether common questions "predominate of any questions affecting only individual class members" (Rule

23(b)(3)); and (ii) assessing "the likely difficulties in managing a class action." Rule 23(b)(3)(D).

97. The potential need for individualized inquiries into class membership is particularly relevant to Rule 23(b)(3)'s predominance requirement. In *Wal-Mart*, the Supreme Court established that there can be no "trial by formula": the same elements of each class member's claim must be proven in a class action as would be required in an individual case. 564 U.S. at 367. A class action defendant has a due process "right to have each element of each claim asserted against it by each class member specifically proven." *Abraham*, 317 F.R.D. at 245 (emphasis in original (citing *Wal-Mart*, 564 U.S. at 367).

98. For a claim involving a purchase of a product, "a plaintiff would have to prove at trial he purchased" the product, and the defendant has the right to challenge that proof. *Carrera*, 727 F.3d at 307. Under *Wal-Mart*, the aggregation of many individual claims into a single action does not eliminate these requirements: "[a] defendant in a class action has a due process right to raise individual challenges and defenses" and "a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Id.*; *see also Wal-Mart*, 564 U.S. at 367 ("[A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.") Because "[t]echniques that merely presume away substantive elements that a plaintiff normally has to prove, or that would impair a defendant's due-process rights . . . are impermissible," the Court must assess whether there is a ready and objective means of proving each claimant's class membership. *Abraham*, 317 F.R.D. at 244.

99. When "class members are impossible to identify without extensive and individualized factfinding or 'mini-trials,'" a class action often will be "inappropriate." *Id.* at 254 (quoting *Marcus*, 687 F.3d at 593). Such mini-trials are in tension with Rule 23(b)(3)'s

requirement that common issues predominate over individualized ones. If such individualized inquiries stand to overwhelm any common issues in the litigation, then the predominance requirement cannot be satisfied.

100. For these reasons, the Court concludes that Plaintiff Irby failed to demonstrate an ascertainable class, and thus the Court will not certify any class under Rule 23(b)(3).

B. Predominance: Individualized Questions Predominate Over Questions Common To The Class

101. "Predominance regularly presents the greatest obstacle to class certification, especially in fraud cases." *CGC Holding Co. v. Broad and Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014)). In this case, that obstacle is insurmountable.

1. Because putative class members differ in the representations they saw and how they understood those representations, individualized inquiries will predominate over common questions

102. The Court earlier concluded that Plaintiff Irby failed to satisfy the "commonality" requirement set forth in Rule 23(a). COL ¶¶ 64-72. Rule 23(b)(3) also addresses commonality, but "is 'far more demanding' than rule 23(a)(2)'s commonality requirement." *In re Thornburg Mortg., Inc. Sec. Litig.*, 912 F. Supp. 2d 1178, 1225 (D.N.M. 2012) (Browning, J.) (quoting *Amchem Prod., Inc. v Windsor*, 521 U.S. 591, 624 (1997)). "To satisfy Rule 23(b)(3), a plaintiff must 'show that common questions subject to generalized, classwide proof *predominate* over individual questions.'" *Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 789 (10th Cir. 2019) (quoting *CGC Holding Co.*, 773 F.3d at 1087)). "A question is common when 'the same evidence will suffice for each member to make a prima facie showing'"; conversely, "[a] question is individual when 'the members of a proposed class will need to present evidence that varies from member to member.'" *Bhasker*, 361 F. Supp. 3d at 1097 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)).

103. Here, the only common evidence is that Pay and Save used one of two logos in its circulars and online advertisements to describe its beef products as "All American" or "Truly Texas." In contrast, the individualized evidence includes: (i) the possible meanings and interpretations given to these two logos by consumers; (ii) the level of reliance placed on those interpretations by consumers with regard to their purchase of meat products; (iii) the reasonableness of that reliance given other information known or available to those consumers; (iv) the actual beef products purchased by those consumers in reliance on their interpretations of the two logos; and (v) whether any of the beef products purchased by these consumers, in fact, came from imported cattle or imported beef. There can be little question but that, "[w]eighing the individualized evidence against the common evidence, the Court will spend the majority of its time hearing individualized evidence and adjudicating individual questions." *Abraham*, 317 F.R.D. at 271. And in that circumstance, class certification is improper given that Plaintiff Irby's claims do not "depend upon a common contention" that "is capable of classwide resolution" – that is, one whose "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350 (citation omitted).

104. Two examples confirm this conclusion. First, Plaintiff Irby failed to show by a preponderance of the evidence that all class members share a common understanding of the meaning of the "All American Beef" logo. Plaintiff Irby testified that her impression of "All American" beef was beef "born, raised and slaughtered in the United States." FOF ¶¶ 16 & 67. In the survey relied upon by Plaintiff Irby's expert Dr. Robinson, the respondents were not asked to define what the phrase "All American" meant to them. FOF ¶ 68. Instead, the survey provided four possible interpretations of that logo, none of which were the same as Plaintiff Irby's understanding. *Id.* The allegedly misleading logo is thus subject to multiple possible

interpretations. This means that, to the extent the logos may have been misleading at all, not all consumers will have been deceived in the manner that Plaintiff Irby alleges. *See Weiner v. Snapple Bev. Corp.*, 2010 WL 3119452, at *11 (S.D.N.Y. Aug. 5, 2010) (Cote, J.) ("Individualized inquiries would be required to determine, for instance, . . . whether class members [ ] believed [high-fructose corn syrup] to be natural [and so consistent with an 'All Natural' representation] . . . ."). Representations that are subject to a wide array of interpretations preclude a finding that that common issues related to those interpretations "predominate" for purposes of Rule 23(b)(3). *See, e.g., Vizcarra v. Unilever United States*, 339 F.R.D. 530, 548 (N.D. Cal. 2021) (finding "no common evidence showing that consumers understood the Vanilla Representations . . . as representing that the ice cream at issue would be flavored exclusively with vanilla from the vanilla plant"); *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 695 (S.D. Fla. 2014) (Bloom, J.) (common issues did not predominate where "Plaintiff has not demonstrated that an objectively reasonable consumer would agree with her interpretation of 'all natural.'"); *Thurston v. Bear Naked, Inc.*, 2013 WL 5664985, at *8 (S.D. Cal. July 30, 2013) (Huff, J.) ("Plaintiffs fail to sufficiently show that 'natural' has any kind of uniform definition among class members"); *In re 5-Hour Energy Mktg. & Sales Practices Litig.*, 2017 WL 2559615, at *8 (C.D. Cal. June 7, 2017) (Gutierrez, J.) ("Predominance also fails for lack of a common definition for the term 'energy.'"); *Townsend v. Monster Bev. Corp.*, 303 F. Supp. 3d 1010, 1045 (C.D. Cal. 2018) (Phillips, J.) (denying certification on predominance grounds where "Plaintiffs do not establish that the Hydrates statement has a common meaning.").

105. The other example showing the significant individual evidence at issue focuses on whether beef products purchased by class members actually came from imported cattle or imported beef. Plaintiff Irby admits that she has no such evidence, FOF ¶ 86, and her expert Dr.

Robinson concedes that she has no evidence that any beef product sold in any Pay and Save store actually came from an imported cow or imported beef. FOF ¶¶ 44-45. The Court thus would need to inquire of each class member to determine whether they can establish this essential element of their claim for relief.

106. The Court concludes that the individualized inquiries involving the class members' claims preclude Plaintiff Irby from establishing that common questions predominate, as required by Rule 23(b)(3).

2. Because Plaintiff Irby's unjust enrichment claim requires proof that each class member, in fact, was misled into purchasing beef products at Pay and Save, those individualized inquiries will predominate over common questions.

107. Plaintiff Irby asserts claims for unjust enrichment for both purported classes. (Third Am. Compl. ¶¶ 69-73.)

108. "The threshold question . . . is whether each claim sought to be certified . . . requires a showing of reliance and/or causation, and if so, whether such elements may be established on a classwide basis." *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 982 (C.D. Cal. 2015) (Morrow, J.)

109. In a case predicated on alleged misrepresentations to consumers, such claims inherently require "individualized inquiries concerning the reasons each class member purchased [the product] . . . in order to determine whether [the defendant's] retention of the purported price premium would be 'unjust' or otherwise inequitable." *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d at 995. For this reason, "common questions will rarely, if ever, predominate an unjust enrichment claim. . . ." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009).

110. The very nature of Plaintiff Irby's claim for unjust enrichment demands fact-intensive inquiries: whether a particular consumer paid a premium for a given beef product and

whether that amount conferred a benefit directly on Pay and Save. *See Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA-051, ¶ 11, 3 P.3d 695 (stating elements of unjust enrichment under New Mexico law). Such claims inherently require "individualized inquiries concerning the reasons each class member purchased [the product] . . . in order to determine whether [the defendant's] retention of the purported price premium would be 'unjust' or otherwise inequitable." *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d at 995.

111. Plaintiff Irby contends that common questions predominate when an unjust enrichment claims rests on the misconduct of the defendants. (Irby Class Cert. Mot. at 23-24.) The Court previously rejected a similar contention in *Payne v. Tri-State CareFlight, LLC*, 332 F.R.D. 611(D.N.M. 2019) (Browning, J.).

112. In *Payne*, this Court partially denied and partially granted a request for certification of an unjust enrichment class. The plaintiffs in *Payne* contended that the defendants did not have a contract requiring pilots to work 14-hour days, and that the duty day, for purposes of calculating pilots' daily compensation, was in fact 12-hours. *Id.* at 703. To the extent that the plaintiffs claimed, based on "the Defendants' representations and the pilots' beliefs," that the duty day was really 12-hours and that the defendants had thus been under-paying the pilots, the Court found that this theory would require "individualized inquiries" into the pilots' "beliefs on the hours in the duty day" and the defendants' "representations about the duty day to some pilots." *Id.* at 696. The Court held that these individualized inquiries defeated Rule 23(b)(3) predominance. *Id.* at 703-04. By contrast, the Court held that common issues did predominate as to the theory that the defendants could not insist there was a 14-hour duty day when they had pilots regularly work only 12-hour days. *Id.* at 703. The difference was that this latter theory depended on the defendants' "uniform pay and scheduling policy for the pilots," such that

resolution of the issue would "generate a common answer on the issue of this scheme's legality [and] whether the Defendants were unjustly enriched." *Id.* at 696, 703.

113. The Court concludes that Plaintiff Irby's unjust enrichment claim is akin to the *Payne* pilots' claim that the duty day was in fact 12-hours. Just as that theory required individualized inquiries into the pilots' "beliefs on the hours in the duty day," *id.* at 696, resolving Plaintiff Irby's unjust enrichment claim necessitates inquiries into each class member's beliefs regarding the meaning of the logo and their reasons for buying beef products at Pay and Save. *See also Sloane v. Rehoboth McKinley Christian Health Care Servs., Inc.*, 2014-NMCA-048, ¶ 33, 423 P.3d 18 (purported class action involving uncompensated breaks; common issues did not predominate because plaintiffs failed to put forth any classwide method for proving that "staffing issues caused each purported class member to work through meal breaks uncompensated").

114. The Court concludes that Plaintiff Irby's unjust enrichment claims under New Mexico law will require individualized proof and cannot be certified under Rule 23(b)(3).

3. Because Plaintiff Irby failed to put forth a valid method for calculating damages on a classwide basis in a manner that aligns with her theories of liability - as required by *Comcast* - individualized inquiries into damages predominate over common questions.

115. "[R]ecent Supreme Court case law makes clear that damages determinations, whether they related to classwide damages or individual damages, can defeat predominance." *Daye v. Community Fin. Servs. Ctr.*, 313 F.R.D 147, 169 (D.N.M. 2016) (Browning, J.). Without any reliable method for establishing classwide damages, individual issues relating to determining classwide damages defeated predominance. *Comcast*, 569 U.S. at 34 (plaintiffs' "model falls far short of establishing that damages are capable of measurement on a classwide

basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance").

116. The Court concludes that, for several reasons, Plaintiff Irby failed to put forward a valid means of calculating classwide damages. This failure independently forecloses certification under Rule 23(b)(3).

117. As an initial matter, Dr. Chadelle Robinson – Plaintiff Irby's only economic expert witness – was not retained to develop a damages model for a putative class in this case and has no proposal for how damages could be calculated and assessed for the class of individuals asserting claims against Pay and Save. FOF ¶¶ 48-49 & 81-83. The absence of a damages model is fatal to Plaintiff Irby's class certification motion. *See Siino v. Foresters Life Ins. & Annuity Co.*, 340 F.R.D. 157, 164 (N.D. Cal. 2022) ("[A]lthough the existence of individualized damages and any attendant difficulty calculating them cannot defeat certification, the absence of a methodology for calculating damages on a classwide basis can."); *In re Con-Agra Foods*, 302 F.R.D. 537, 552 (C.D. Cal. 2014) (Morrow, J.) ("Weir does not provide a damages model that lacks certain variables or functionality. Rather he provides no damages model at all. Although the methodologies he describes may very well be capable of calculating damages in this action, Weir has made no showing that this is the case. He does not identify any variable he intends to build into models, nor does he identify any data presently in his possession to which the models can be applied"); *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930 at *6 (C.D. Ca. Dec. 18, 2014) (Wilson, J.) ("Dr. Hay has yet to design the survey and method he will use in his conjoint analysis . . . Thus, Plaintiffs have done worse than not even advancing a reliable method of calculating classwide damages – they have advanced 'no damages model at all.'") (citation omitted).

118. Next, neither of the possible methods for calculating classwide damages that Dr. Robinson endorses – a full refund model or a willingness to pay model – comport with Plaintiff Irby's liability theories. This failure also precludes certification under Rule 23(b)(3).

119. The Supreme Court in *Comcast* emphasized that a classwide damages model needs to be specific to the alleged wrong: "[A] model purporting to serve as evidence of damages in this class action must measure only those damages attributable to [the operative] theory [of liability]." 569 U.S. at 35 (emphasis added). "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)," and "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* at 34-35. The Court thus emphasized the need for "a 'rigorous analysis' to determine whether" the model "supporting a 'plaintiff's damages case [is] consistent with its liability case." *Id.* (citation omitted).

120. To present a valid model for calculating damages for a claim of unjust enrichment, Plaintiff Irby "must be able to isolate the price premium associated with misleading consumers in [the] particular fashion" underlying their specific theories of liability. *In re ConAgra Foods*, 302 F.R.D. at 579. Plaintiff Irby has not done so. As a result, she "cannot show Rule 23(b)(3) predominance" because "[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class." *Comcast*, 569 U.S. at 34; *see Coffin v. Magellan HRSC, Inc.*, No. CIV 20-0144 JB/GJF, 2021 U.S. Dist. LEXIS 117954, at *70-71 (D.N.M. June 24, 2021) (Browning, J.) (quoting *Comcast*, 569 U.S. at 34).

121. Plaintiff Irby's economic expert, Dr. Robinson, did not perform either a regression or conjoint analysis. FOF ¶¶ 47, 83.

122. By merely asserting that all class members receive a full refund of the amounts paid for imported beef or for beef from imported cows, Plaintiff Irby's proposed damages model suffers from the exact flaw identified in *Comcast*: it "does not even attempt" to "measure only those damages attributable to" Plaintiff's operative theories of liability. *Id.* The "full refund" model makes no effort to quantify the difference in value between domestic beef Plaintiff Irby claims consumers were promised and the value of imported beef (or beef from imported cows) Plaintiff Irby alleges they were sold. A damages model that fails to make this distinction cannot support class certification.

123. The Court finds that a model that simply proposes providing a full refund of any and all amounts paid by class members for beef products regardless of the value obtained by the consumer is not a plausible model for damages under *Comcast*. *See In re POM Wonderful LLC*, 2014 WL 1225184 at *5 (C.D. Cal. Mar. 24, 2014) (Pregerson, J.) (rejecting plaintiffs' proposed damages model because it did not "answer the critical question why [a] price difference existed" between the defendant's product and competitor products but "instead assumed that 100% of that price difference was attributable to [the defendant's] alleged misrepresentations.").

124. Similarly, with regard to Plaintiff Irby's Unfair Practices Act claim, this "full refund" damages model is overly broad in that it would permit monetary recovery by all persons who purchased beef products at Pay and Save regardless of whether they were deceived by logos appearing in an advertisement or whether the product they purchased did not come from imported cattle or beef. Those persons would not have "suffer[ed] any loss of money," and thus would not have incurred any actual damages. Without actual damages, those persons would not be entitled to any recovery under the Unfair Practices Act. *See* NMSA 1978, § 57-12-10(E).

125. The Court earlier detailed the deficiencies with Dr. Robinson's willingness to pay model. FOF ¶¶ 89-93. Beyond those technical defects, this template bears no relation to the measure of permissible damages under either of Plaintiff Irby's claims for damages.

126. For an unjust enrichment claim, "the measure of restitution is the defendant's gain or benefit." *Miller v. Bank of America*, 2015-NMSC-022, ¶ 22, 352 P.3d 1162 (quoting *Cent. Sec. & Alarm Co. v. Mehler*, 1996-NMCA-060, ¶¶ 12, 17-18, 918 P.2d 1340). A willingness to pay model does not assess this measure of damages. For a claim under the New Mexico Unfair Practices Act, class members must demonstrate actual damages. NMSA 1978, § 57-12-10(E). And a willingness to pay model does not provide competent proof of such harm. *Cf. In re Gen. Motors LLC Ignition Switch Litig.*, 407 F. Supp. 3d. 212. 235-36 (S.D.N.Y. 2019) (Furman, J.) (a damages model measuring only willingness to pay "does not measure the market value" and so "does not provide competent proof of Plaintiffs' damages").

127. The Court finds that Plaintiff Irby's possible damages models runs afoul of *Comcast* in that they do not "measure only those damages attributable" to her theories of wrongdoing. 569 U.S. at 35.

C. Superiority: A Class Action Is Not Superior To Other Available Methods For Fairly And Efficiently Adjudicating Plaintiff Irby's Claims.

128. Plaintiff Irby bears the burden of establishing "that a class action would be superior to – not merely just as good as or more convenient than – all other available procedural mechanisms." *Payne*, 332 F.R.D. at 678. The "most important factor a court must consider in assessing superiority 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." *Abraham*, 317 F.R.D. at 242.

129. The Court finds that, for a number of reasons, Plaintiff Irby has not satisfied Rule 23(B)(3)'s superiority requirement.

130. First, Plaintiff Irby contends that the superiority requirement is satisfied because the value of an individual claim is minimal, "suggesting that class members are unlikely to want to pursue claims in separate proceedings." (Irby Class Cert. Mot. at 25; Reply in Support of Class Cert. Mot. at 28 n.12.) These claims are commonly known as "negative value" claims. *See Anderson Living Tr.*, 306 F.R.D. at 407 (describing "so-called negative value claims – claims in which the cost of litigation exceeds the likely recovery, rendering them economically non-viable without aggregation."). The Supreme Court provided its strongest recognition, endorsement and expansion of the concept of the negative value suit in *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997), by noting that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." This Court has reached the same conclusion. *Anderson Living Tr.*, 306 F.R.D. at 452 (finding a class action to be superior to individual suits because the class members' claims have negative value).

131. But although the fact that a case involves negative value claims weighs in favor of superiority, this finding alone cannot justify certification where the other requirements necessary for certification are not satisfied. To the contrary, under "Supreme Court and Tenth Circuit precedent . . . when faced with class certification, district courts must rigorously enforce rule 23's commonality and predominance requirements – separate and apart from the more plaintiff-friendly superiority test." *Anderson Living Tr.*, 306 F.R.D. at 461 (denying class certification);

see also Flecha v. Medicredit, Inc., 946 F.3d 762, 770 (5th Cir. 2020) ("Proof of a negative value suit may be necessary to prove superiority – but it is not sufficient to warrant class certification.")

132. Second, Plaintiff Irby's emphasis on the unlikelihood of consumers pursuing their claims individually (Irby Class Cert. Mot. at 25; Reply in Support of Class Cert. Mot. at 28), rests on the implicit premise that a class action would result in absent class members obtaining relief that they otherwise would not have pursued individually. That proposition is without basis in the present case given that there is no objective and efficient method for even identifying class members. If class members cannot be readily identified, then they cannot be directly notified of their opportunity to make claims or share in a portion of any settlement or judgment. The many individualized inquiries outlined above, FOF ¶¶ 69 & 73-74, make class litigation impossible to manage. The Court would be required to determine which individuals actually belong in either of the proposed classes, what information each putative class member received, whether they were misled by that information into purchasing beef products at Pay and Save, and what injury each putative class member sustained as a result of Pay and Save's supposed misconduct. These individualized questions would render the litigation utterly unmanageable, in violation of the "most important" aspect of the superiority analysis. *Payne*, 332 F.R.D. at 682.

133. Third, a class action is not superior with regard to the purported New Mexico sub-class's asserted damage claims under the New Mexico Unfair Practices Act.

134. Plaintiff Irby identified a sub-class of "persons from New Mexico" seeking damages under the New Mexico Unfair Practices Act. (Irby Class Cert. Mot. at 7.) Because the members of this sub-class cannot recover the full measure of recovery available to them if they

pursued their claims individually, certification of this sub-class is not a superior means to adjudicate these claims.

135. Under the Unfair Practices Act, individual plaintiffs (including Plaintiff Irby as the named class representative) may recover the greater of their actual damages or statutory damages of $100, and may collect treble damages if they establish that the deceptive act was willful. NMSA 1978, § 57-12-10(B) & (E). Absent class members, in contrast, are limited to recovering their actual damages, and cannot collect statutory or treble damages. NMSA 1978, § 57-12-10(E)).

136. This incongruity in recovery led the New Mexico Court of Appeals in *Brooks v. Norwest Corp.*, 2004-NMCA-134, 103 P.3d 3, to affirm the denial of certification of class under the Unfair Practices Act. The court explained that because of the discrepancy in available remedies, the Act "appears to be less fair to those members who pursue their remedy as a class action." *Id.* ¶ 45. In *Mulford v. Altria Group, Inc.*, 242 F.R.D. 615, 631 (D.N.M. 2007) (Vazquez, J.), this Court came to the same conclusion in denying the plaintiffs' class certification motion: the UPA "appears to be less fair to individual plaintiffs to pursue their remedy as a class action." The same is true here.

137. Plaintiff Irby seeks to avoid this conclusion by asserting that individual claims are too small to justify individual actions and thus require amalgamation through a class action. (Irby Class Cert. Mot. at 25; Reply in Support of Class Cert. Mot. at 27-28.) This argument previously has been considered and rejected. In *Brooks*, the court found it "entirely feasible" for plaintiffs to bring claims individually under the Unfair Practices Act because the statute "awards attorney fees and costs to a successful litigant," and individual plaintiffs could recover statutory and treble damages. *Brooks,* 2004-NMCA-134, ¶ 45. This Court in *Mulford* came to the same

conclusion. 242 F.R.D. at 631 ("Plaintiffs' argument concerning the prohibitive cost of bringing individual suits is wholly undermined by the fact that the [Act] awards attorney fees and costs to a successful litigant."). *See also Jones v. General Motors Corp.*, 1998-NMCA-020, ¶ 25, 953 P.2d 1104 (Act encourages consumers to initiate, and attorneys to handle, claims where recoverable amounts are small).

138. The Court concludes that *Brooks* and *Mulford* correctly held that a class action is not a superior means of adjudicating damages claims under the New Mexico Unfair Practices Act. The Court denies Rule 23(b)(3) certification with respect to the New Mexico sub-class's claim under that statute.

139. Finally, the Court determines that Plaintiff Irby failed to establish superiority of a class action based on factors set forth in Rule 23(b)(3)(A)-(D). Those enumerated factors are relevant, but not exhaustive. *See* Fed. R. Civ. P. 23 advisory committee's notes ("Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings."); *Amchem Prods., Inc.,* 521 U.S. at 615-16 ("Rule 23(b)(3) includes a non-exhaustive list of factors pertinent to a court's 'close look' at the predominance and superiority criteria.").

140. The first factor, "the class members' interests in individually controlling the prosecution . . . of separate actions," mirrors the monetary value of the individual cases. Rule 23(b)(3)(A). The presence of large individual damage claims supports an interest of the class members in separate litigation. *See, e.g., Commander Prop. Corp. v. Beech Aircraft Corp.*, 164 F.R.D. 529, 542 (D. Kan. 1995) (O'Connor, J.) (airplane purchasers had sufficient economic interest to pursue separate claims against manufacturer).

141. The second enumerated factor, "the extent and nature of any litigation concerning the controversy already begun by . . . class members" focuses on class members' conduct, and is

closely linked to the first factor as a means to assess the interest of putative class members in controlling their own litigation. Rule 23(b)(3)(B). "If few class members have filed individual suits, a court is likely to conclude that the members do not possess strong interests in controlling their own, separate litigation." 5 Daniel R. Coquillette, *et al.*, *Moore's Federal Practice*, § 23.46[2][b][ii] (3d ed.). "However, the lack of a large numbers of parallel, individual suits may weigh against superiority of class action as well, because the lack of other suits serves as an indicator of the lack of any 'judicial crisis' mandating class treatment in order to preserve judicial resources." *Id.* § 23.46[2][c].

142. The third Rule 23(b)(3) factor is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Rule 23(b)(3)(C). The analysis here "can be split into two prongs: (i) whether aggregation is desirable; and (ii) whether the particular court at issue is a desirable forum to adjudicate the aggregated dispute." *Anderson Living Tr.*, 306 F.R.D. at 411. These elements focus primarily on geographical considerations. *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 92-93 (2d Cir. 2015) ("The overwhelming weight of authority suggests that the forum requirement is one that centers on geography, rather than a comparative analysis of the benefits available under either federal or state law.").

143. The fourth factor a court must consider in assessing superiority is the extent to which the court will be able to manage the class action, if certified. Rule 23(b)(3)(D). The manageability factor "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 164 (1974). This factor "is, by far, the most critical concern in determining whether a class action is a superior means of adjudication." William B. Rubenstein, *Newberg on Class*

Actions § 4:72 (5th ed.). As a general rule, if the predominance requirement is not met, then the Court should decline to certify the class on manageability grounds alone. *See Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1184 (11th Cir.2010).

144. Addressing the four Rule 23(b)(3) factors, the first three favor class certification. The Court concludes first that "the class members' interests in individually controlling the prosecution or defense of separate actions" would not be served by denying class certification, because the class members may not be able economically to maintain their own suits. This factor thus cuts in favor of certification. Second, considering "the extent and nature of any litigation concerning the controversy already begun by or against class members" also cuts in favor of certification, because the Court is unaware that any class members have commenced individual litigation. Rule 23(b)(3)(B). Third, it is "desirab[le] . . . [to] concentrate] the litigation of the claims in th[is] particular forum," because (i) it is geographically convenient for the parties, witnesses, and lawyers; and (ii) the Court has worked on this case extensively and become familiar with the factual and legal issues involved. Rule 23(b)(3)(C).

145. However, careful consideration of the fourth factor shows that the many individualized inquiries outlined above make class litigation impossible to manage. Rule 23(b)(3)(D). Plaintiff Irby failed to demonstrate that the proposed classes are readily ascertainable based on objective criteria, using an administratively feasible method that would not require individualized inquiries to identify class members. Plaintiff Irby further failed to demonstrate a workable manner for determining what information each putative class member received, whether they were misled by that information into purchasing beef products at Pay and Save, and what injury each putative class member sustained as a result of Pay and Save's

supposed misconduct. Finally, Plaintiff Irby presented no model for calculating classwide damages, resulting in this Court needing to determine and resolve individual damage claims. The Court concludes that these individualized questions render the litigation utterly unmanageable, in violation of the "most important" aspect of the superiority analysis. *Payne*, 332 F.R.D. at 682. *See Danvers Motor Co., Inc. v. Ford Motor Co.*, 543 F.3d 141, 149 (3rd Cir. 2008) (manageability factor counseled against class treatment when multitude of individualized issues "would entail complicated mini-litigations within class action itself.").

146. It is important to note that the denial of class certification does not foreclose judicial relief to the members of the purported class. To the contrary, as noted by both this Court and the New Mexico Court of Appeals, it is "entirely feasible" for plaintiffs to bring claims individually under the Unfair Practices Act because the statute "awards attorney fees and costs to a successful litigant," and individual plaintiffs could recover statutory and treble damages. *Brooks,* 2004-NMCA-134, ¶ 45; *see Mulford*, 242 F.R.D. at 631 ("Plaintiffs' argument concerning the prohibitive cost of bringing individual suits is wholly undermined by the fact that the [Act] awards attorney fees and costs to a successful litigant."). And the fact that Plaintiff Irby has not identified a single lawsuit filed in any court anywhere in the country asserting the same allegations against Pay and Save is a strong indicator that denying class certification will not subject the courts to an avalanche of individual lawsuits. *See Zinser v. Accuflix Research Institute, Inc.*, 253 F.3d 1180, 1191 (9th Cir. 2001) (existence of relatively few individual suits – nine suits despite thousands of allegedly defective implanted pacemakers – weighed against class certification because it suggested that individual litigation was adequate to deal with a problem of that scope).

147. Accordingly, for all of the above reasons, the Court concludes that Plaintiff Irby failed to demonstrate that the proposed classes satisfy the superiority requirement of Rule 23(b)(3), and class certification is denied based on the lack of that showing.

CONCLUSION

IT IS ORDERED that Plaintiff Irby's Motion for Class Certification [Doc. 215] is denied.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: */s/ Andrew G. Schultz* .
Andrew G. Schultz
Melanie B. Stambaugh
P.O. Box 1888
Albuquerque, NM 87103
Telephone: (505) 765-5900
Facsimile: (505) 768-7395
E-mail: aschultz@rodey.com
mstambaugh@rodey.com

-and-

MULLIN HOARD & BROWN, LLP
Hugh N. Lyle
1500 Broadway, Suite 700
Lubbock, TX 79401
Telephone: (806) 765-7491
Facsimile: (806) 765-0553
E-mail: hlyle@mhba.com

Attorneys for Defendant Pay and Save, Inc.