UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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CLAUDIA NEWTON and BRANDY LEANDRO, on behalf of themselves and others similarly situated,

Plaintiffs,

-against-

R.C. BIGELOW, INC. and DOES 1-10,

Defendants.
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REPORT AND RECOMMENDATION
22-CV-5660 (LDH)(SIL)

STEVEN I. LOCKE, United States Magistrate Judge:

Presently before the Court in this putative consumer class action, on referral from the Honorable LeShann DeArcy Hall for Report and Recommendation, is Plaintiffs Claudia Newton's ("Newton") and Brandy Leandro's ("Leandro," together "Plaintiffs") motion for class certification pursuant to Fed. R. Civ. P. 23. *See* Docket Entry ("DE") [44]. Defendant R.C. Bigelow, Inc. ("Bigelow" or "Defendant") opposes. DE [47-50]. For the reasons set forth herein, the Court respectfully recommends that Plaintiffs' motion be granted in part and denied in part.

I. BACKGROUND

A. Facts[1]

1. Bigelow Tea and Manufacturing Process

Bigelow is the nation's leading specialty tea company with headquarters in Fairfield, Connecticut and domestic manufacturing facilities in Fairfield,

[1] The facts are taken from the parties' pleadings, as well as the submissions, declarations, and exhibits submitted in support of, and in opposition to, Plaintiffs' motion for class certification. *See* DE [18], [23], [44], [46], [47].

Connecticut, Louisville, Kentucky, and Boise, Idaho. *See* First Amended Class Action Complaint ("Am. Compl."), DE [18], ¶ 11; Declaration of Timothy K. Branson in Support of Defendant R.C. Bigelow, Inc.'s Opposition to Plaintiffs' Motion for Class Certification ("Branson Decl."), DE [47-51], Exs. A, C; Answer to First Amended Class Action Complaint ("Ans."), DE [23], ¶ 11. The "vast majority of Bigelow's products are packaged tea bags, not loose tea." *See* Defendant Bigelow's Opposition to Plaintiff's Motion for Class Certification ("Def.'s Opp'n), DE [44-37], at 8; Declaration of John McCraw in Support of Defendant R.C. Bigelow, Inc.'s Opposition to Plaintiffs' Motion for Class Certification ("McCraw Decl."), DE [47-72], ¶ 9. Therefore, the manufacturing process relevant to this action entails both harvesting and processing tea leaves and then preparing them for commercial distribution, including placing the processed tea into bags, placing strings into the tea bags, and placing the tea bags into boxes for sale to consumers. Def.'s Opp'n at 11; McCraw Decl. at ¶ 5. Once the tea leaves have been harvested, processed, and prepared, Bigelow's tea bags are individually wrapped and sold to consumers, often in packages of 18 or 20 bags. McCraw Decl. ¶ 8.

The manufacturing and production process includes an organic aspect and a non-organic aspect. *See* Def.'s Opp'n at 5-15. The organic aspect pertains to growing, harvesting, and processing the tea leaves that end users ultimately consume. *Id*. at 10-11; McCraw Decl. ¶¶ 5, 7. The non-organic aspect pertains to packaging the processed tea leaves for sale to consumers. *Id*. With respect to the organic aspect, none of the tea leaves relevant to this action were grown in the United States. *See*

Declaration of Jason B. Kim in Support of Plaintiffs' Motion for Class Certification ("Kim Decl."), DE [47-2], Ex. 2 at 2. Instead, they primarily came from China, India, and Sri Lanka, where they then underwent further processing. McCraw Decl. ¶¶ 4, 5. Bigelow asserts that "[t]his post-harvest, pre-sale processing is critical as it fundamentally alters and establishes the characteristic of the agricultural product that is purchased and imported by Bigelow." Def.'s Opp'n at 10. Bigelow then receives the tea and other botanicals from abroad and cleans, sorts, and prepares them ahead of blending, packaging, and selling, all of which occurs in the United States. *Id.* at 11.

In addition to the organic aspect of the tea products that consumers will ultimately drink, Bigelow must also transform the "non-organic components into a form that consumers expect and buy." *Id.* This entails bagging the processed tea leaves, boxing them for sale to consumers, and creating and preparing the packaging in which the tea products will ultimately be presented and sold, including preparing "filter paper, string, staple, foil overwrap, and carton." *Id.* Bigelow obtains these non-organic component parts from abroad but assembles them and prepares the final tea product for sale domestically. Kim Decl. Ex. 2 at Nos. 12-15.

2. Labeling and Class Products

Relevant here, Plaintiffs allege that the packaging of certain of Defendant's tea products contains a label that falsely and deceptively states, "Manufactured in the USA 100% American Family Owned" (the "Label"). Am. Compl. ¶¶ 1, 9-10, 13, 31. An image of the Label at issue is below:

Am. Compl. ¶ 15.

The tea products at issue are Bigelow Earl Grey Black Tea Caffeine, Green Tea Caffeine, Constant Comment Black Tea Caffeine, Green Lemon Tea Caffeine, Vanilla Chai Black Tea Caffeine, English Tea Time Black Tea Caffeine, Spiced Chai Black Tea Caffeine, French Vanilla Black Tea Caffeine, Vanilla Caramel Black Tea Caffeine, Bigelow Cozy Chamomile, Lemon Ginger, Lavender Chamomile, Sweet Dreams, and Orange & Spice (collectively, the "Class Products"). *Id.* at ¶ 14. Although Bigelow asserts that it placed the Label on the Class Products at different times, the labeling was the same in each instance, as can be seen in the sampling of images below:

Am. Compl. ¶ 15. An expert for Plaintiffs opines that "[c]onsumers could likely understand the term '100%' to modify the phrase 'Manufactured in the USA' and

'American Family Owned' because visually it is sandwiched between the two clauses, and it is printed in a larger font than the two clauses." *See* Declaration and Expert Report of Cory Carter ("Carter Decl."), [44-35], at ¶ 31.

Although there is no dispute that the Class Products contained the Label at issue, Defendant asserts that its was added to the packaging of the Class Products "in a disjointed fashion . . . with individual product packaging being approved at different times, printed and shipped at different times, and stocked in retail stores at different times." Def.'s Opp'n at 13. John McCraw, a Special Project Manager for Bigelow, states that the Label was approved for 10 of the 14 Class Products in October 2017, and for one Class Product in each of December 2017, January 2018, August 2018, and November 2019. *See* McCraw Decl. ¶ 12. Thereafter, the Class Products containing the Label were shipped to New York at various points over a two-year period. *Id.* at ¶ 15. Specifically, the Label was approved and shipped to New York for each of the individual Class Products as follows:

Product Name	Approval Date	First Shipped to New York
Earl Grey Black Tea Caffeine	10/17/2017	12/28/2017
Green Tea Caffeine	10/17/2017	1/10/2018
Constant Comment Black Tea Caffeine	10/17/2017	12/15/2017
Green Lemon Tea Caffeine	10/17/2017	12/30/2017
Vanilla Chai Black Tea Caffeine	10/17/2017	1/5/2018
English Tea Time Black Tea Caffeine	10/17/2017	12/20/2017
Spiced Chai Black Tea Caffeine	10/17/2017	1/23/2018
French Vanilla Black Tea Caffeine	10/17/2017	2/6/2018
Vanilla Caramel Black Tea Caffeine	10/17/2017	2/6/2018
Cozy Chamomile	10/17/2017	12/18/2017
Lemon Ginger	8/21/2018	10/18/2018
Lavender Chamomile	1/15/2018	5/18/2018
Sweet Dreams	12/27/2017	2/22/2018
Orange & Spice	11/4/2019	2/5/2020

See McCraw Decl. ¶ 15.

Eventually, Bigelow modified the packaging on the Class Products, replacing the Label at issue in this action with the phrase "Blended and Packaged in the USA 100% American Family Owned" (the "New Label"). *Id.* at ¶ 13. Class Products bearing the New Label first shipped to New York on August 5, 2021 and the latest shipped on November 2, 2022. *Id.* at ¶¶ 12-15.

3. The Named Plaintiffs

Newton resides in Central Islip, New York. Am. Compl. ¶ 9. She purchased Bigelow's Cozy Chamomile and Early Grey teas at retail stores on Long Island, New York in or around June 2022 to July 2022. *Id.*; *see* Declaration of Claudia Newton in Support of Plaintiffs' Motion for Class Certification ("Newton Decl."), DE [47-45], at ¶ 3. Newton purchased Bigelow's tea products both because she liked the taste and because she "thought they were manufactured in the United States." Newton Decl. at ¶ 4. She was willing to pay more based on her belief that they were manufactured in the United States, and her belief was important to her decision purchase the Class Products. *Id.* Newton stopped buying the Class Products when she learned that components were grown, processed, and manufactured in other countries. *Id.* at ¶ 6.

Leandro resides in Binghamton, New York. Am. Compl. ¶ 10. Between approximately March 2022 to May 2022, she purchased the Vanilla Chai Black Tea and Cozy Chamomile varietals of the Class Products. *Id.*; *see* Declaration of Brandy Leandro in Support of Plaintiffs' Motion for Class Certification ("Leandro Decl."), DE [47-46], at ¶ 3. Leandro purchased the Class Products both because she liked the taste and because she "thought they were manufactured in the United States."

Leandro Decl. at ¶ 4. She stated that "[t]his belief was important to [her] decision to purchase these products" and that she was "willing to pay more for them based on [her] belief that they were manufactured in the United States." *Id.* Leandro stopped buying the Class Products when she learned that various components were grown, processed, and manufactured in other countries. *Id.* at ¶ 5.

B. Procedural Background

By way of Complaint dated September 22, 2022, Plaintiffs commenced this action against Bigelow and 10 John Doe Defendants. DE [1]. In their initial Complaint, Plaintiffs asserted causes of action on behalf of themselves and a putative class of consumers for: (1) violations of N.Y. Gen. Bus. Law §§ 349 and 350; (2) breach of express warranty pursuant to N.Y. U.C.C. § 2-313; (3) common law fraud; (4) intentional misrepresentation; and (5) quasi contract/unjust enrichment/restitution. *Id.* On February 16, 2023, Plaintiffs filed their First Amended Class Action Complaint, which is the operative pleading in this action. DE [18]. In the Amended Complaint, Plaintiffs assert claims for: (1) violations of N.Y. Gen. Bus. Law §§ 349 and 350; (2) breach of express warranty pursuant to N.Y. U.C.C. § 2-313; (3) common law fraud; and (4) intentional misrepresentation. *Id.*

On August 20, 2024, Plaintiffs filed the instant motion for class certification in which they seek to certify two classes pursuant to Fed. R. Civ. P. 23: (1) a "Camellia Sinensis Class" and (2) an "Herbal Tea Class." DE [44]. The proposed classes are based on identical labelling but include different tea varietals. The proposed Camellia Sinensis Class includes:

> All natural persons who purchased at least one 18/20 count box of Bigelow Early Grey Black Tea Caffeine, Green Tea Caffeine, Constant Comment Black Tea Caffeine, Green Lemon Tea Caffeine, Vanilla Chai Black Tea Caffeine, English Tea Time Black Tea Caffeine, Spiced Chai Black Tea Caffeine, French Vanilla Black Tea Caffeine, or Vanilla Caramel Black Tea Caffeine, labeled as "Manufactured in the USA 100% American Family Owned" at a retail store in the [S]tate of New York, at any time from September 22, 2019 to May 18, 2022.

See Memorandum of Law in Support of Plaintiffs' Motion for Class Certification ("Pls.' Mem."), DE [44-2], at 9.

The proposed Herbal Tea Class includes:

> All natural persons who purchased at least one 18/20 count box of Bigelow Cozy Chamomile, Lemon Ginger, Lavender Chamomile, Sweet Dreams, or Orange & Spice, labeled as "Manufactured in the USA 100% American Family Owned," at a retail store in the State of New York at any time from September 22, 2019 to May 18, 2022.

Id.

On September 12, 2024, Judge DeArcy Hall referred Plaintiffs' motion for class certification to this Court for a Report and Recommendation as to whether it should be granted. *See* Electronic Order dated September 12, 2024. For the reasons set forth herein, the Court respectfully recommends that Plaintiffs' motion for class certification pursuant to Fed. R. Civ. P. 23 be granted in part and denied in part.

II. LEGAL STANDARD

In evaluating a motion for class certification, Fed. R. Civ. P. 23 requires that "a district court . . . first ascertain whether the claims meet the Rule 23(a) preconditions of numerosity, commonality, typicality, and adequacy." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 201-02 (2d Cir. 2008); *see Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460, 133 S.

Ct. 1184, 1191 (2013) (describing prerequisites to obtaining class certification pursuant to Fed. R. Civ. P. 23(a)). In addition to these requirements, Courts in the Second Circuit have observed that "Rule 23(a) contains an implied requirement of ascertainability." *Hasemann v. Gerber Prods. Co.*, 331 F.R.D. 239, 270 (E.D.N.Y. Mar. 31, 2019); *see In re Petrobras Secs.*, 862 F.3d 250, 260 (2d Cir. 2017) ("This Court has also recognized an implied requirement of ascertainability in Rule 23.") (internal quotation marks omitted).

Once these requirements have been established, a class action may only be maintained if one of the standards set forth in Rule 23(b) is satisfied. *See* Fed. R. Civ. P. 23. Here, Plaintiffs invoke Rule 23(b)(3), which provides for certification where "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." Fed. R. Civ. P. 23(b)(3); *see Perez v. Allstate Ins. Co.*, No. 11-CV-1812(JFB)(AKT), 2014 WL 4635745, at *13 (E.D.N.Y. Sept. 16, 2014) ("Once a court has concluded that Rule 23(a)'s four requirements have been satisfied, it must then proceed to the second step, *i.e.*, determine 'whether the class is maintainable pursuant to one of the subsections of Rule 23(b).") (quoting *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 82 (S.D.N.Y. 2007)). Therefore, at the second step, the court evaluates predominance and superiority. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 117 (2d Cir. 2013) ("To certify a class pursuant to Rule 23(b)(3), a plaintiff must establish: (1) predominance – 'that the questions of law or fact common

to class members predominate over any questions affecting only individual members'; and (2) superiority – 'that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'") (quoting Fed. R. Civ. P. 23(b)(3)).

Rule 23 "does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551 (2011). Instead, "[t]he party seeking class certification must affirmatively demonstrate . . . compliance with the Rule, and a district court may only certify a class if it is satisfied, after a rigorous analysis, that the requirements of Rule 23 are met." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 237-28 (2d Cir. 2012) (internal citations and quotation marks omitted); *see Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010) ("The party seeking class certification bears the burden of establishing by a preponderance of the evidence that each of Rule 23's requirements has been met."). Nevertheless, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc.*, 568 U.S. at 466, 133 S. Ct. at 1194.

III. DISCUSSION

Defendant only opposes class certification based on Fed. R. Civ. P. 23(a)'s implied requirement of ascertainability and predominance under Fed. R. Civ. P. 23(b)(3). *See* Def.'s Opp'n at 16. Bigelow does not dispute numerosity, commonality, typicality, or adequacy under Fed. R. Civ. P. 23(a) or superiority under Fed. R. Civ. P. 23(b)(3). *Id.* Nevertheless, for the sake of completeness, the Court also addresses these factors. Applying the standard enumerated above, and for the reasons set forth

herein, the Court respectfully recommends that Plaintiffs' motion for class certification be granted in part and denied in part as described below.

A. Fed. R. Civ. P. 23(a) Factors

1. Numerosity

The numerosity requirement is satisfied if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). It is well established that "numerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Defendant does not dispute that it sold the Class Products to at least 100 people during the class period. *See* Kim Decl. Ex. 2 at 18-19. Therefore, the Court respectfully recommends that the numerosity requirement be considered satisfied.

2. Commonality

The commonality requirement is satisfied if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This factor "depends upon there being 'a common contention . . . of such a nature that it is capable of class wide 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." *Passman v. Peloton Interactive, Inc.*, 671 F. Supp. 3d 417, 436 (S.D.N.Y. 2023) (quoting *Wal-Mart Stores, Inc.*, 564 U.S. at 350, 131 S. Ct. at 2552); *see Martinez v. Ayken, Inc.*, No. 13-CV-7411(LDW)(AKT), 2016 WL 5107143, at *9 (E.D.N.Y. Feb. 29, 2016) ("Plaintiffs' burden with respect to commonality is simply to identify some unifying thread among the members' claims that warrants class treatment.") (internal quotation and

alterations omitted). Therefore, commonality "requires plaintiffs to demonstrate that the class members have suffered the same injury." *M.G. v. New York City Dep't of Educ.*, 162 F. Supp. 3d 216, 232 (S.D.N.Y. 2016) (internal quotation omitted).

Defendant does not dispute that Fed. R. Civ. P. 23(a)(2) commonality exists. Common questions will include, among other things, whether the Label would be likely to deceive a reasonable consumer and is material. Therefore, and in absence of objection, this is sufficient to establish commonality. *See Ebin v. Kangadis Food, Inc.*, 297 F.R.D. 561, 565 (S.D.N.Y. Feb. 25, 2014) (holding commonality requirement was satisfied where a "common question [was] whether . . . conduct violated New York's General Business Law"). Accordingly, the Court respectfully recommends that that the commonality factor be considered satisfied.

3. Typicality

The typicality requirement is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality ensures that "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Jackson v. Bloomberg, L.P.*, 298 F.R.D. 152, 164 (S.D.N.Y. 2014) (quoting *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)); *see M.G.*, 162 F. Supp. 3d at 232 ("The typicality requirement may be satisfied where injuries derive from a unitary course of conduct by a single system.") (internal quotation omitted). Therefore, "[t]ypicality focuses on 'the fairness of allowing an entire class's claim to rise or fall with the fate of the named representative's claims.'" *Wood v. Mike*

Bloomberg 2020, Inc., No. 20-CV-2489(LTS)(GWG), 2024 WL 3952718, at *7 (S.D.N.Y. Aug. 27, 2024) (quoting *Lopez v. Setauket Car Wash & Detail Ctr.*, 314 F.R.D. 26, 29 (E.D.N.Y. 2016)). The Second Circuit has observed that "[t]he commonality and typicality requirements tend to merge into one another, so that similar considerations animate analysis of Rules 23(a)(2) and (3)." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997).

Defendant does not dispute that Fed. R. Civ. P. 23(a)(3) typicality exists. The named Plaintiffs' claims are typical of the putative class members, including damages incurred because of the allegedly deceptive Label, which appeared on each of the Class Products. *See* Am. Compl. ¶¶ 34, 53, 64, 74. As the named Plaintiffs share an alleged injury with all putative class members, typicality is also satisfied. *See Ebin*, 297 F.R.D. at 565 (holding that typicality was satisfied where "the lead plaintiffs' and other class members' claims [arose] out of the same course of conduct by the defendant" and were therefore "injured in the same manner as other class members"). Accordingly, the Court respectfully recommends that that the typicality requirement be considered satisfied.

4. Adequacy

The adequacy requirement is satisfied if "the representative parties will fairly protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This factor also evaluates "the competency of class counsel and conflicts of interest." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n.13, 102 S. Ct. 2364, 2370 (1982); *see Dziennik v. Sealift, Inc.*, No. 05-CV-4659(DLI)(MDG), 2007 WL 1580080, at *6 (E.D.N.Y. May 29, 2007)

(holding that the adequacy analysis "entails two factors: (1) class counsel must be qualified, experienced and generally able to conduct the litigation; and (2) the interests of the named plaintiffs cannot be antagonistic to those of the remainder of the class") (citing *Marisol A.*, 126 F.3d at 378). "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Martens v. Smith Barney, Inc.,* 181 F.R.D. 243, 259 (S.D.N.Y. 1998).

Defendant does not dispute that Fed. R. Civ. P. 23(a)(4) adequacy is satisfied and the Court identifies no conflict that would render either the named Plaintiffs or their counsel as inadequate or unqualified class representatives. Therefore, the Court respectfully recommends that the adequacy factor be considered satisfied.

5. Ascertainability

Although not specifically enumerated, courts in the Second Circuit read an "implied requirement of ascertainability" into Fed. R. Civ. P. 23(a). *Hasemann*, 331 F.R.D. at 270. The ascertainability requirement mandates "that a class be 'defined using objective criteria that establish a membership with definite boundaries.'" *McKoy v. Trump Corp.*, No. 18 Civ. 9936(LGS), 2023 WL 6842310, at *2 (S.D.N.Y. Oct. 17, 2023) (quoting *In re Petrobras Sec.*, 862 F.3d at 257). The "touchstone of ascertainability is whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015). "The standard for ascertainability is 'not demanding' and is 'designed only to prevent the certification of a class whose membership is truly indeterminable.'" *Ebin*, 297 F.R.D.

at 567 (quoting *Gortat v. Capala Bros., Inc.*, No. 07-CV-3629(ILG), 2010 WL 1423018, at *2 (E.D.N.Y. Apr. 9, 2010)). Therefore, the ascertainability requirement "does not require that every class member be identifiable prior to class certification. Rather, the Court need only be able to ascertain the general boundaries of the proposed class." *Rosario v. Valentine Ave. Disc. Store, Co.*, No. 10-CV-5255(ERK)(LB), 2013 WL 2395288, at *8 (E.D.N.Y. May 31, 2013) (Report and Recommendation), *adopted by* 2013 WL 4647494 (E.D.N.Y. Aug. 29, 2013) (internal quotations and citations omitted).

Defendant argues that members of the proposed classes are not ascertainable because "the 'Manufactured in the USA' verbiage was adopted in an *ad hoc* and disjointed manner, such that there is no objective criteria to definitely identify who purchased a product with the challenged label or not." Def.'s Opp'n at 32. Bigelow further asserts that ascertainability is a "not a matter of retaining receipts to identify purchasers in a reliable manner," but instead is a "matter of reliably identifying ***what version of packaging*** a particular consumer may have purchased at any given time." *Id.* (emphasis in original). Relying on *In re Petrobras Secs.*, 862 F.3d at 266, Plaintiffs counter by arguing that the fact "the [Label] has changed over time has no bearing on the implied ascertainability requirement." *See* Memorandum of Law in Support of Plaintiffs' Reply to Motion for Class Certification ("Pls.' Reply Mem."), DE [44-45], at 10. The Court agrees with Plaintiff, as "[t]he question is not how difficult or practical ascertaining class members will be, but rather whether doing so is 'objectively possible.'" *Singleton v. Fifth Generation, Inc.*, No. 15-CV-474(BKS/TWD),

2017 WL 5001444, at *14 (N.D.N.Y. Sept. 27, 2017) (quoting *In re Petrobras Secs.*, 862 F.3d at 269).

Relevant here, in *Banks v. R.C. Bigelow, Inc.*, No. 20-CV-6208(DDP), 2023 WL 4932894, at *5 (C.D. Cal. July 31, 2023), the Central District of California addressed a similar argument regarding Bigelow's "staggered rollout" of an identical label in a putative consumer class action.[2] In *Banks*, Bigelow argued that there was "tremendous variability in the distribution timeline of products" and that "products bearing the label were then 'haphazardly shipped over a nine-week period.'" *Id.* The Court rejected Bigelow's argument that this variability precluded class certification, observing that, "even accounting for the nine-week delay between Label approval and shipping for some products, the Label was printed on all products identified in the class definition." *Id.* Nevertheless, the Court modified the class period, stating that it "should not begin months before the label was first approved, let alone shipped." *Id.* at *5.

Although the Label on the Class Products in this action was also approved at various times, with the Class Product being shipped to New York at different dates thereafter, this "*ad hoc*" distribution does not preclude a finding of ascertainability. Here, Plaintiffs' proposed classes identify specific Bigelow tea products, each of which contained the same Label for the duration of the class period. Am. Compl. ¶¶ 41; Pls.'

[2] In *Banks*, the Court addressed Bigelow's "staggered rollout" of the relevant label for purposes of Fed. R. Civ. P. 23(b)(3) predominance, and not the Second Circuit's implied requirement of ascertainability. 2023 WL 4932894, at *5. Nevertheless, the analysis in *Banks* is analogous and instructive with respect to the timing of the approval and distribution of the Label, and, in any event, the ascertainability analysis is generally less stringent than the predominance analysis. *See, e.g.*, *Kronenberg v. Allstate Ins. Co.*, No. 18-CV-6899(HG)(TAM), 2024 WL 4126306, at *5, 23 (E.D.N.Y. Aug. 5, 2024) (finding ascertainability was satisfied but predominance was not).

Reply Mem. at 6 n.5; McCraw Decl. ¶ 12-15. Moreover, to ensure "that every Product bore the [Label]," Plaintiffs proactively propose a modified class period of February 5, 2020 through August 5, 2021. Pls.' Reply Mem. at 6 n.5. Respectively, these dates reflect the latest date on which Class Products bearing the Label were shipped to New York and the earliest date on which Class Products bearing the New Label were shipped to New York. McCraw Decl. ¶ 15. This is an appropriate limitation of the proposed class that overcomes Defendant's concern regarding "reliably identifying ***what version of packaging*** a particular consumer may have purchased at any given time." Def.'s Opp'n at 32 (emphasis in original); *see Banks*, 2023 WL 4932894, at *5; *Allegra v. Luxottica Retail N. Am.*, 341 F.R.D. 373, 404 (E.D.N.Y. 2022) (observing that the fact that "determining the members of the proposed classes may have been burdensome does not undermine any of [the] relevant conclusions the Court needs to reach with respect to ascertainability").

Moreover, to the extent Defendants dispute the ability to ascertain which consumers purchased which Class Product at which time, courts have observed that consumers are not expected to retain receipts, and that "sworn affidavits and other forms of proof may suffice to ascertain class membership." *Singleton*, 2017 WL 5001444, at *14; *see Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 553 (E.D.N.Y. 2017) ("Because it is unlikely that consumers will retain receipts, plaintiff may rely on affidavits for those without a receipt."); *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 317 F.R.D. 374, 399 (S.D.N.Y. 2016) ("[T]he Court concludes that the implied ascertainability requirement of Rule 23 can, at minimum, be met on the

basis of sworn statements indicating class members purchased the products at issue in the necessary state during the necessary limitations period."); *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29, 66 (E.D.N.Y. 2015) (holding that a class was ascertainable even in the absence of retention of receipts).

With the Class Products being specifically identified, the class period being appropriately narrowed, and the ability of putative class members to self-identify to the extent necessary, members of the proposed classes are sufficiently ascertainable. *See Belfiore*, 311 F.R.D. at 66 (holding that a class was ascertainable where both a specific product and a specific class period were identified); *Ebin*, 279 F.R.D. at 567 (holding that a class was ascertainable through self-identification where the allegedly false label was uniform across the products). Accordingly, Plaintiffs have established the relatively minimal ascertainability standard. *Ebin*, 297 F.R.D. at 567. Therefore, the Court respectfully recommends that each of the factors of Fed. R. Civ. P. 23(a), as well as its implied standard of ascertainability, be deemed satisfied.

B. Fed. R. Civ. P. 23(b)(3) Factors

In addition to the requirements of Fed. R. Civ. P. 23(a), plaintiffs seeking class certification under Fed. R. Civ. P. 23(b)(3) must establish both that "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." Fed. R. Civ. P. 23(b)(3). Therefore, courts evaluate both "predominance" and "superiority." *See, e.g.*, *Ebin*,

297 F.R.D. at 567. Defendant disputes predominance, but not superiority. Def.'s Opp'n at 17-27. For the sake of completeness, the Court again addresses both factors.

1. Predominance

Rule 23(b)(3) predominance "requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen*, 568 U.S. at 459, 133 S. Ct. at 1191. "Predominance is satisfied 'if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.'" *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (citations omitted); *see Moore v. PaineWebber, Inc.,* 306 F.3d 1247, 1252 (2d Cir. 2002) ("Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof."). The predominance inquiry is a stricter version of the Rule 23(a) commonality requirement and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 2249 (1997).

In evaluating predominance under Rule 23(b), "a Court must consider the elements of each cause of action, and determine whether those elements can be satisfied by common, class-wide proof." *Oscar v. BMW of N. Am., LLC*, 274 F.R.D. 498, 509 (S.D.N.Y. 2011) (quoting *In re Currency Conversion Fee Antitrust Litig.*, 230

F.R.D. 303, 309 (S.D.N.Y. 2004)). "[A] class can be certified under Rule 23(b)(3) even if damages require individualized determination." *Hasemann*, 331 F.R.D. at 275; *see Vaccariello v. XM Satellite Radio, Inc.*, 295 F.R.D. 62, 73 (S.D.N.Y. 2013) ("[N]either the existence of individual defenses nor difficulties in calculating damages in and of themselves defeat the predominance requirement.").

Plaintiffs assert claims for: (1) violation of N.Y. Gen. Bus. Law §§ 349 and 350; (2) breach of express warranty under N.Y. U.C.C. § 2-313; (3) common law fraud under New York law; and (4) intentional misrepresentation. Am. Compl. ¶¶ 46-92. Although Plaintiffs address the causes of action individually, *see* Pls.' Mem. at 14-21, Defendant does not, and instead argues whether the Label was material and whether damages can be established on a class-wide basis. Def.'s Opp'n at 19-31. The Court considers predominance with respect to each cause of action in turn.

i. N.Y. Gen. Bus. Law §§ 349 and 350

N.Y. Gen. Bus. Law § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York]." N.Y. Gen. Bus. Law § 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in [New York]." Therefore, to prevail "under either section, 'a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.'" *Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015) (quoting *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941, 944 N.Y.S.2d 452, 452 (2012)). Neither Section 349

nor Section 350 includes a reliance requirement. *See Polvay v. FCTI, Inc.*, 713 F. Supp. 3d 1, 6 (S.D.N.Y. 2024) ("Sections 349 and 350 of the New York GBL do not independently require proof of reliance as an essential element of a claim . . . ."). [3] As there is no plausible dispute that the labeling on the Class Products involves "consumer-oriented conduct," the Court considers whether generalized, class-wide proof will suffice to establish materiality and damages. N.Y. Gen. Bus. Law §§ 349, 350.

With respect to materiality, although the formatting of the Label leaves room for interpretation as to whether the "100%" applies to "Manufactured in the USA," which appears above it, or "American Family Owned," which appears below it, Plaintiffs' expert, Cory Carter, opines that "[c]onsumers could likely understand the term '100%' to modify [both] . . . because visually it is sandwiched between the two clauses, and it is printed in larger font than the two clauses." Carter Decl. ¶ 31. As a result, Carter states "that the phrase 'Manufactured in the USA' standing alone . . . is deceptive." *Id.* at ¶ 32. He further explains that "if the '100%' modifies 'Manufactured in the USA,' this would accentuate a consumer's belief that the Product, and each of its ingredients and components, is made in the USA." *Id.* Carter further asserts, which Bigelow does not dispute, that "Companies often want to highlight that they are an American company and/or that the goods they sell are

[3] Although certain Courts have held that N.Y. Gen. Bus. Law § 350 includes a reliance requirement, the New York Court of Appeals has explicitly held that no such requirement exists. *Koch*, 18 N.Y.3d at 941, 944 N.Y.S.2d at 453 ("To the extent that the Appellate Division order imposed a reliance requirement on General Business Law §§ 349 and 350 claims, it was error. Justifiable reliance by the plaintiff is not an element of the statutory claim."). In any event, Defendant concedes that neither N.Y. Gen. Bus. Law § 349 nor § 350 require a showing of reliance. *See* Def.'s Opp'n at 17.

American made." *Id.* at ¶ 22. Accordingly, and described further below, there is little dispute that the Label is material to consumers.

Consistent with Carter's opinion, Plaintiffs' additional expert, J. Michael Dennis, Ph.D., evaluated a sampling of 1354 individuals regarding their understanding of the Label. *See* Rebuttal Declaration and Expert Report of J. Michael Dennis, Ph.D. ("Dennis Decl.), DE [44-58], at ¶¶ 83-84. Of this sampling, 71.2% "understood the [Label] to mean that the tea was processed, blended, and packaged in the USA." *Id.* at ¶ 93. Based on this, Dennis concludes that the Label "deceives reasonable consumers into believing the [Class] Products are made or manufactured in the USA." *Id.* at ¶ 92.

The Court agrees that, given the formatting of the Label and placement of "100%," it is reasonable that a consumer would believe that it would apply to the phrase "Manufactured in the USA" and is therefore deceptive based upon the actual manner in which the Class Products are grown, produced, packaged, and sold. To that end, Courts in the Second Circuit routinely find that predominance exits based upon false or deceptive labeling in putative consumer class actions arising under N.Y. Gen. Bus. Law §§ 349 and 350. *See, e.g.*, *Hasemann*, 331 F.R.D. at 274 (observing that N.Y. Gen. Bus. Law §§ 349 and 350 do not contain reliance requirements and that "class members will be able to use generalized proof to make out their claims"); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 409 (S.D.N.Y. 2015) ("Plaintiffs' GBL claims thus depend on generalized evidence. Class-wide evidence will be used to establish whether [the defendant's] labeling of EZ Seed was false, and if so, whether

it was likely to mislead a reasonable consumer acting reasonably under the circumstances."); *Ebin*, 297 F.R.D. at 568 (finding class issues predominated where "[t]he same generalized evidence [would] be used to establish whether [the] label is false, and if so, whether it was likely to mislead a reasonable consumer acting under the circumstances"). Accordingly, the materiality element of Plaintiffs' N.Y. Gen. Bus. Law claims may be established by generalized proof.

Likewise, damages for violations of N.Y. Gen. Bus. Law §§ 349 and 350 may be established by generalized proof on a class wide basis. To this end, "[i]njury is adequately alleged under GBL 349 or 350 by a claim that a plaintiff paid a premium for a product based on defendants' inaccurate representations." *Ackerman v. Coca-Cola Co.*, No. 09-CV-395(DLI)(RML), 2013 WL 7044866, at *20 (E.D.N.Y. July 18, 2013); *Sharpe v. A&W Concentrate Co.*, No. 19-CV-768(BMC), 2021 WL 3721392, at *6 (E.D.N.Y. July 23, 2021) ("Under the GBL, plaintiffs suffer an injury when they pay a "premium" because of a product's misleading claim."). Under a "price-premium theory, the plaintiff is injured by purchasing products in a market where costs are artificially inflated by defendant's false or misleading representations." *Passman*, 671 F. Supp. 3d at 453.

Here, Plaintiffs have submitted expert evidence from Colin Weir, a Vice President at Economics and Technology, Inc., who conducts economic, statistical, and regulatory research and analysis, demonstrating that consumers are willing to pay a premium because of the Label. *See* Declaration of Colin B. Weir ("Weir Decl."), DE

[47-49], at ¶¶ 70-73.[4] After describing his methodology at length, Weir ultimately concludes that Class Products bearing the Label would sell for 11.38% more than if they did not have the Label. *Id.* at ¶ 71. Weir further opines that the findings of his survey are "projectable to all Class Members and class purchases of the Bigelow Teas for the proposed class period . . . ." *Id.* at ¶ 73. The *Banks* Court held that this specific expert testimony was sufficient to establish that damages were capable of being measured on a class-wide basis. 2023 WL 4932894, at *5-6. Moreover, and contrary to the position of Defendant's expert, Bruce A. Strombom, Ph.D., DE [44-54], that damages are unable to be reliably calculated on a class-wide basis, courts in the Second Circuit have held that generalized proof of damages, similar to that at issue here, is sufficient for purposes of class certification in consumer class actions. *See, e.g.*, *Ackerman*, 2013 WL 7044866, at *20; *Sharpe*, 2021 WL 3721392, at *6.

As generalized proof will suffice to determine both materiality and damages, the Court respectfully recommends the predominance requirement be deemed satisfied with respect to Plaintiffs' claims arising under N.Y. Gen. Bus. Law §§ 349 and 350.

ii. Breach of Express Warranty Under N.Y. U.C.C. § 2-313

Under New York law, "[a]n express warranty is an 'affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain.'" *Lin v. Canada Goose US, Inc.*, 640 F. Supp. 3d 349, 362

[4] Although Weir's expert opinion generally addresses damages, it also further supports a finding of materiality, as it demonstrates that consumers are willing to pay more for a product that they believe is manufactured in the United States. Weir Decl. ¶¶ 62-72.

(S.D.N.Y. 2022) (quoting N.Y. U.C.C. § 2-313(1)(a)). Therefore, to prevail on a claim for breach of express warranty, a plaintiff must establish "(1) the existence of a material statement amounting to a warranty, (2) the buyer's reliance on this warranty as a basis for the contract with the immediate seller, (3) breach of the warranty, and (4) injury to the buyer caused by the breach." *In re Scotts EZ Seed Litig.*, 304 F.R.D. at 410 (quoting *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F. Supp. 3d 467, 482 (S.D.N.Y. 2014)); *Promuto v. Waste Mgmt., Inc.*, 44 F. Supp. 2d 628, 642 (S.D.N.Y. 1999) (holding that a breach of express warranty claim requires the existence of a contract containing an express warranty regarding a material fact, which was a part of the basis of the bargain, and which the defendant breached); *Warren W. Fane, Inc. v. Tri-State Diesel, Inc.*, No. 12-CV-1903(TJM), 2014 WL 1806773, at *7 (N.D.N.Y. May 7, 2014) ("To prevail on an express warranty claim, a Plaintiff must show that there was an affirmation of fact or promise by the seller, the natural tendency of which [was] to induce the buyer to purchase and that the warranty was relied upon.") (internal quotation omitted). Relevant here, "[a] cause of action to recover damages for breach of an express warranty requires proof of reliance." *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *11 (S.D.N.Y. Aug. 5, 2010).

Unlike a claim for common law fraud, a "buyer may enforce an express warranty even if it had reason to know that the warranted facts were untrue." *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 186 (2d Cir. 2007). Nevertheless, an individual's reliance on the seller's representation is a fact

intensive, individualized inquiry that is generally not appropriate for class certification. *Price v. L'Oreal USA, Inc.*, No. 17 Civ. 614(LGS), 2018 WL 3869896, at *7 (S.D.N.Y. Aug. 15, 2018) (holding that class certification was inappropriate for claims of breach of express warranty under New York law); *see In re Amla Litig.*, 282 F. Supp. 3d 751, 764 (S.D.N.Y. 2017) (denying class certification where "reliance on the challenged express warranties [was] not self-evident").

Here, Plaintiffs assert a "basis of the bargain" theory in that they allege that they would have not purchased the Class Products but for the Label. Am. Compl. ¶¶ 10, 53, 64, 73; Newton Decl. ¶¶ 4-5; Leandro Decl. ¶ 4. Although Newton and Leandro stated in their declarations that they relied on the Label in purchasing the relevant Class Products, *see* Newton Decl. ¶¶ 4-5, Leandro Decl. ¶ 4, the reliance element of a breach of express warranty claim requires an individualized inquiry that is not susceptible to generalized proof, and therefore generally not appropriate for class certification. *See, e.g., Weiner*, 2010 WL 3119452, at *11 (declining to certify a class claiming a violation of New York's express warranty law because plaintiffs' "reliance on Snapple's 'All–Natural' label [could not] be the subject of generalized proof"); *In re Scotts EZ Seed Litig.*, 304 F.R.D. at 411 (denying class certification for breach of express warranty "because each buyer's knowledge of the truth or falsity of [the defendant's] advertising claims require evaluation"); *Klein v. Robert's Am. Gourmet Food, Inc.,* 28 A.D.3d 63, 72, 808 N.Y.S.2d 766 (2d Dep't 2006) (reversing lower court's decision that common questions predominated with respect to reliance in a New York express warranty claim).

Because the reliance aspect of a breach of express warranty claim requires individualized proof, the Court respectfully recommends that Plaintiffs' motion for class certification be denied with respect to that claim.

iii. Common Law Fraud

A claim for common law fraud requires that the plaintiff establish "(1) a misrepresentation or omission of material fact; (2) which the defendant knew to be false; (3) which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff." *Ge Dandong v. Pinnacle Performance Ltd.*, No. 10 Civ. 8086(JMF), 2013 WL 5658790, at *8 (S.D.N.Y. Oct. 17, 2013) (quoting *Wynn v. AC Rochester*, 273 F.3d 153, 156 (2d Cir. 2001)). Class certification for common law fraud claims is generally disfavored. *Crab House of Douglaston Inc. v. Newsday, Inc.*, No. 04-CV-558(DRH)(WDW), 2013 WL 1338894, at *12 (E.D.N.Y. Mar. 29, 2013) (declining to certify a class where reliance was "too individualized to be the subject of generalized proof"). As claims for common law fraud require a showing of reliance on the allegedly fraudulent representation, Courts have observed that common law fraud requires a higher level of evidence than N.Y. Gen. Bus. Law § 349. *Daniel v. Mondelez Int'l, Inc.*, 287 F. Supp. 3d 177, 193 n.16 (E.D.N.Y. 2018).

Although Newton and Leandro may have relied upon the Label when they decided to purchase the Class Products, the reliance requirement, again, is an individualized inquiry. *See Tropical Sails Corp. v. Yext, Inc.*, No. 14 Civ. 7582(JFK), 2017 WL 1048086, at *13 (E.D.N.Y. Mar. 17, 2017) (holding that "class certification

would be inappropriate for [the plaintiff's] common law fraud claim" because the plaintiff could not "show reliance—a core element of common law fraud in any jurisdiction—by common proof"). As a claim for common law fraud necessarily involves individualized proof regarding reliance, common questions of law and fact do not predominate. *Crab House of Douglaston*, 2013 WL 1338894, at *12 (holding that "individual issues predominate[d] with respect to establishing liability on plaintiffs' common law fraud claim"); *In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 371 (Bankr. S.D.N.Y. 1997) ("A class action is generally not appropriate to resolve claims based upon common law fraud because each class member must prove his or her own reliance."). Accordingly, the Court respectfully recommends that Plaintiffs' motion for class certification be denied with respect to their claim for common law fraud.

iv. Intentional Misrepresentation

To establish a cause of action for intentional misrepresentation, "a plaintiff must allege 'a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely on it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Greene v. Gerber Prods Co.*, 262 F. Supp. 3d 38, 80 (E.D.N.Y. 2017) (quoting *Mandarin Trading Ltd. v. Wildstein*, 16 N.Y.3d 173, 178, 919 N.Y.S.2d 465, 468 (2011)). As with claims for breach of express warranty and common law fraud, to prevail on a claim for intentional misrepresentation, "a plaintiff must allege that it reasonably relied on the representation or omission at issue.

Elkind v. Revlon Consumer Prods. Corp., No. 14-CV-2484(JS)(AKT), 2017 WL 9480894, at *15 (E.D.N.Y. Mar. 9, 2017) (quoting *B & M Linen, Corp. v. Kannegiesser, USA, Corp.*, 679 F. Supp. 2d 474, 480 (S.D.N.Y. 2010)). Accordingly, class certification is generally inappropriate for claims of intentional misrepresentation. *See, e.g.*, *Marotto v. Kellog Co.*, 415 F. Supp. 3d 476, 481 (S.D.N.Y. 2019) (holding that individual issues predominated with respect to claim for intentional misrepresentation and denying motion to certify class action).

As described above with respect to Plaintiffs' claims for breach of express warranty and common law fraud, the reliance requirement applicable to a claim for intentional misrepresentation precludes class certification here, as individualized proof will be required to prevail. *See Greene*, 262 F. Supp. 3d at 80; *Marotto*, 415 F. Supp. 3d at 481. Accordingly, the Court respectfully recommends that Plaintiffs' motion for class certification be denied with respect to their claim for intentional misrepresentation.

2. Superiority

Finally, Fed. R. Civ. P. 23(b)(3) requires that proceeding as a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In evaluating superiority, Courts consider:

(a) the 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 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.

Id.

Bigelow does not dispute that a class action is the superior method of prosecuting this action and the Court agrees. Both Newton and Leandro acknowledge that their individual interests are "relatively small" and that they would be disadvantaged if this matter did not proceed as a class action. *See* Newton Decl. ¶ 8; Leandro Decl. ¶ 7. To that end, and without opposition from Defendant, each class member's claim is presumably too small to warrant bringing an individual lawsuit against Bigelow and "the only rational way to proceed is to concentrate the class's claims in a single action, rather than have numerous separate trials on the same issue." *Jermyn v. Best Buy Stores, L.P.*, 256 F.R.D. 418, 436 (S.D.N.Y. 2009); *see Rivera v. Harvest Bakery Inc.*, 312 F.R.D. 254, 277 (E.D.N.Y. 2016) (finding that the superiority requirement was satisfied where "the potential recovery for each individual class member [was] relatively small"); *Kurtz*, 321 F.R.D. at 553 (holding that a class action proceeding was superior in consumer fraud claims). Accordingly, the Court respectfully recommends that the superiority requirement of Fed. R. Civ. P. 23(b)(3) be deemed satisfied.

C. ***Banks v. R.C. Bigelow* Decision**

The Court considers the holding in *Banks v. R.C. Bigelow, Inc.*, 2023 WL 4932894 (C.D. Cal. July 31, 2023) instructive in certain aspects, as it involved the same Label, the same parties and law firms, and the same expert witnesses. In *Banks*, the Court granted class certification for the plaintiffs' causes of action for: (1) violation of the California Consumer Legal Remedies Act ("CLRA"), (2) common law

fraud and intentional misrepresentation, (3) negligent misrepresentation, and (4) breach of express warranty. As described above, *Banks* is particularly helpful in evaluating whether Plaintiffs' proposed classes in this action are ascertainable.

With respect to the predominance analysis in *Banks*, the Court notes that neither the CLRA nor breach of express warranty under California law contain reliance requirements. *Lessin v. Ford Motor Co.*, No. 19-CV-1082(AJB)(AHG), 2024 WL 4713898, at *35 (S.D. Cal. Nov. 7, 2024) ("[A] California class suing under the state's CLRA need not show individualized reliance if it can establish the materiality of [the defendant's] omission to a reasonable customer."); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 985 (C.D. Cal. Feb. 23, 2015) ("[B]reach of express warranty arises in the context of contract formation in which reliance plays no role."). Insofar as the remaining causes of action addressed in *Banks* require reliance under California law, for the reasons discussed above, the Court respectfully disagrees that this element has been established under New York law. Accordingly, although *Banks* is instructive with respect to ascertainability related to the *ad hoc* rollout of the Label, the Court does not rely on *Banks* with respect to a finding of reliance.

IV. CONCLUSION

For the reasons set forth herein, the Court respectfully recommends that Plaintiffs' motion for class certification be granted in part and denied in part. The Court respectfully recommends that the motion for class certification be granted with respect to Plaintiffs' claims arising under N.Y. Gen. Bus. Law §§ 349 and 350 and

denied with respect to Plaintiffs' claims for breach of express warranty, common law fraud, and intentional misrepresentation.

Furthermore, based upon the recommended modification of the class period, the Court recommends that the Camellia Sinensis Class be amended to include:

> All natural persons who purchased at least one 18/20 count box of Bigelow Early Grey Black Tea Caffeine, Green Tea Caffeine, Constant Comment Black Tea Caffeine, Green Lemon Tea Caffeine, Vanilla Chai Black Tea Caffeine, English Tea Time Black Tea Caffeine, Spiced Chai Black Tea Caffeine, French Vanilla Black Tea Caffeine, or Vanilla Caramel Black Tea Caffeine, labeled as "Manufactured in the USA 100% American Family Owned" at a retail store in the State of New York, at any time from February 20, 2020 to August 5, 2021.

The Court further recommends that the proposed Herbal Tea Class be amended to include:

> All natural persons who purchased at least one 18/20 count box of Bigelow Cozy Chamomile, Lemon Ginger, Lavender Chamomile, Sweet Dreams, or Orange & Spice, labeled as "Manufactured in the USA 100% American Family Owned," at a retail store in the State of New York at any time from February 20, 2020 to August 5, 2021.

V. OBJECTIONS

A copy of this Report and Recommendation is being served on all parties by electronic filing on the date below. Any objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen days. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; Fed. R. Civ. P. 6(a) and 6(d). Failure to file objections within this period waives the right to appeal the District Court's Order. *See Ferrer v. Woliver*, No. 05-CV-3696, 2008 WL 4951035, at *2 (2d Cir. Nov. 20, 2008); *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York
February 14, 2025

/s/ Steven I. Locke
STEVEN I. LOCKE
United States Magistrate Judge