UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	ML 13-2438 PSG (PLAx)	Date	June 7, 2017
Title	In re 5-Hour Energy Marketing and Sales Practices Litigation		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): **Order DENYING Plaintiffs' Motion for Class Certification and GRANTING IN PART and DENYING IN PART Defendants' Motions to Exclude Plaintiffs' Experts**

Before the Court is Plaintiffs Marc Adler, Michael Casey, David Ellis, William Forrest, Ilya Podobedov, Cody Soto, and Donna Thompson's motion for class certification, **Dkt. # 159**, and Defendants Innovation Ventures, LLC; Living Essentials, LLC; Manoj Bhargava; and Bio Clinical Development, Inc.'s motions to exclude experts Patrick T. Ronaldson and Colin B. Weir, Dkts. **# 206, 209, 217, 219**. The Court finds the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local R. 7-15. After thoroughly considering the arguments in the papers, the Court DENIES Plaintiffs' motion for class certification, and GRANTS IN PART and DENIES IN PART Defendants' motions to exclude Plaintiffs' experts.

I. Background

A. Procedural Background

On August 4, 2011, Plaintiffs Ilya Podobedov, Jordan Moussouros, and Richard N. James filed this putative class action against Defendants Innovation Ventures, LLC; Living Essentials, LLC; Manoj Bhargava; and Bio Clinical Development, Inc. in the Central District of California. *See Complaint*, *Podobedov v. Living Essentials, LLC*, CV 11-6408 PSG (PLAx) (C.D. Cal.), Dkt. # 1. In June 2013, the Judicial Panel on Multidistrict Litigation centralized a number of cases related to the marketing and sale of 5-hour ENERGY ("5HE") and assigned the matter to this Court for consolidated pretrial proceedings. *See* Dkt. # 1. On January 24, 2017, the Court issued an order granting in part and denying in part Defendants' motion for summary judgment.

Dkt. # 191. Plaintiffs now move for class certification on some of the remaining claims,[1] and Defendants have moved to exclude Plaintiffs' experts, Colin B. Weir and Patrick T. Ronaldson. *See* Dkts. # 159, 206, 209, 217, 219.

B. Factual Background

Plaintiffs are consumers in six states who purchased 5-hour ENERGY ("5HE") products, including 5-hour ENERGY and 5-hour ENERGY Extra Strength,[2] between March 1, 2008 and their entry into this case. *See Plaintiff's Notice of Motion* 1:4–24. They allege that Defendants deceptively and misleadingly marketed 5HE as "five hour energy" or providing "hours of energy" when 5HE provides only a few minutes of energy at most. *See Order Granting in Part and Denying in Part Summary Judgment* 2. Throughout the class period, every label of 5HE displayed the name of the product, "5-hour ENERGY," and a claim that the product provides "hours of energy." *Motion for Class Certification* 1:4–5.

Plaintiffs propose certification of six separate statewide classes:

[1] Some of the surviving causes of action contained claims based on off-label representations and claims that 5HE did not result in a crash. An example of an off-label representation is a claim in a television commercial that 5HE provides, "A powerful blend of B Vitamins for energy," "5-hour ENERGY's blend of vitamins and amino acids gives you hours of smooth energy," and "5-hour ENERGY doesn't jack you up with sugar, caffeine, and herbal stimulants. Instead, it's packed with stuff that's good for you—B-vitamins, amino acids, and enzymes." *See Consolidated First Amended Class Action Complaint* ¶¶ 47–50, 53–55. Plaintiffs' motion for class certification makes no mention of these statements or Plaintiffs' claim under the federal Magnuson-Moss Warranty Act, and Defendants point out the apparent abandonment of these claims in their Opposition. *See Opp.* 5 n.5. Although the Court does not dismiss these claims, as Defendants' urge, the Court does not consider the statements as part of Plaintiffs' class certification order because they are not argued in Plaintiffs' motion.

[2] Plaintiffs have not had an opportunity to revise their motion for class certification since the Court granted in part and denied in part Defendants' motion for summary judgment. Although Plaintiffs' motion for class certification asks the Court to certify a class based on decaffeinated 5HE, the Court dismissed all decaffeinated-related claims in its summary judgment order. *See* Dkt. # 191, at 19. The Court therefore does not address any claims based on decaffeinated 5HE.

All persons who purchased 5HE products, including 5HE and 5HE Extra Strength, on or after March 1, 2008 in California. This class is represented by Plaintiffs Ilya Podobedov[3] and Cody Soto who first filed their Complaint in the Central District of California.

All persons who purchased 5HE products, including 5HE and 5HE Extra Strength, on or after March 1, 2008 in Missouri. This class is represented by Plaintiff William Forrest who first filed in the Eastern District of Missouri.

All persons who purchased 5HE products, including 5HE and 5HE Extra Strength, on or after March 1, 2008 in New Mexico. This class is represented by Plaintiff David Ellis who originally filed in the District of New Mexico.

All persons who purchased 5HE products, including 5HE and 5HE Extra Strength, on or after March 1, 2008 in New Jersey. This class is represented by Plaintiff Marc A. Adler who originally filed in the District of New Jersey.

All persons who purchased 5HE products, including 5HE and 5HE Extra Strength, on or after March 1, 2008 in New York. This class is represented by Plaintiff Podobedov who originally filed the New York claims in the Central District of California.

All persons who purchased 5HE products, including 5HE and 5HE Extra Strength, on or after March 1, 2008 in Pennsylvania. This class is represented by Plaintiffs Donna A. Thompson and Michael R. Casey who originally filed in the Western District of Pennsylvania.

Plaintiffs allege claims for violations of state consumer protection laws, breach of express warranty, breach of the implied warranty of merchantability, and intentional misrepresentation and concealment of fact. Specifically, they plead the following claims:

1. **California**: (1) violation of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*; (2) violation of the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (3) violation of the False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 *et seq.*; (4) breach of express warranty; (5) breach of

[3] Plaintiff Podobedov is the lead Plaintiff for both the California and New York classes. Podobedov purchased 5HE in California, Nevada, and New York. *See Podobedov et al. v. Innovation Ventures et al.*, CV 11-6408 PSG (PLAx).

implied warranty of merchantability; and (6) intentional misrepresentation and concealment of fact.

2. **Missouri**: (1) violation of the Missouri Merchandising Practices Act ("MMPA"), Mo. Ann. Stat. §§ 407.020 *et seq.*, and (2) intentional misrepresentation and concealment of fact.

3. **New Jersey**: (1) violation of the New Jersey Fraud in Sales or Advertising of Merchandise Law (the "New Jersey Fraud Statute"), N.J. Stat. Ann. §§ 56:8-1 *et seq.*; (2) violation of the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act (the "New Jersey Warranty Act"), N.J. Stat. Ann. §§ 56:12-14 *et seq.*; (3) breach of express warranty; (4) breach of implied warranty of merchantability; (5) intentional misrepresentation and concealment of fact.

4. **New Mexico**: (1) violation of the New Mexico Unfair Practices Act ("UPA"), N.M. Stat. Ann. §§ 57-12-2 *et seq.*; (2) breach of implied warranty of merchantability; and (3) intentional misrepresentation and concealment of fact.

5. **New York**: (1) violation of the New York Deceptive Trade Practices Act ("DTPA"), N.Y. Gen. Bus. Law §§ 349 *et seq.*, and (2) intentional misrepresentation and concealment of fact.

6. **Pennsylvania**: (1) violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Cons. Stat. §§ 201-2 *et seq.*; and (2) intentional misrepresentation and concealment of fact.

II. Discussion

A. Evidentiary Objections to Plaintiffs' Experts

Before addressing the merits of the certification motion, the Court must consider Defendants' evidentiary objections to Plaintiffs' experts, Patrick T. Ronaldson and Colin B. Weir. The Ninth Circuit has approved of a rigorous application of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993), in evaluating class certification motions. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2001).

Under Federal Rule of Evidence 702 and *Daubert*:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness had applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702; *see also United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002). Before admitting expert testimony, the trial court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592–93. In conducting this preliminary assessment, the trial court is vested with broad discretion. *See, e.g.*, *General Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997).

"The party offering the expert bears the burden of establishing that Rule 702 is satisfied." *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, No. CV 02-2258 JM (AJBx), 2007 WL 935703, at *3 (S.D. Cal. Mar. 7, 2007) (citing *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999)). "In determining whether expert testimony is admissible under Rule 702, the district court must keep in mind [the rule's] broad parameters of reliability, relevancy, and assistance to the trier of fact." *Semantelli v. Trinidad Corp.*, 155 F.3d 1130, 1134 (9th Cir. 1998). On a motion for class certification, it is not necessary that expert testimony resolve factual disputes going to the merits of plaintiffs' claims; instead, the testimony must be relevant in assessing "whether there was a common pattern and practice that could affect the class as a whole." *Ellis*, 657 F.3d at 983.

i. Patrick T. Ronaldson

Patrick T. Ronaldson is Plaintiffs' expert on the physiological effects of 5HE. Ronaldson is currently an assistant professor in the Department of Pharmacology at the University of Arizona College of Medicine. *Smith Decl.*, Ex. 19 (Ronaldson Decl.), Att. A. Ronaldson holds a BS in pharmacology from the University of Toronto, and a Ph.D. in pharmaceutical sciences from the Leslie Dan Faculty of Pharmacy at the University of Toronto. *Ronaldson Decl.*, ¶¶ 4–5. His expertise is in the areas of neuropharmacology, drug delivery, drug transporter biology, pharmacokinetics, drug-drug interactions, and the effect of disease mechanisms on drug efficacy and toxicity. *Id.* ¶ 13.

Ronaldson opines that 5HE does not (1) provide five hours of energy, which Ronaldson defines as "caloric" energy, (2) 5HE's B-vitamins and amino acids are not the basis of the

increased energy and alertness that consumers feel after consuming 5HE, and (3) 5HE results in the same "crash" typically attributed to other caffeine products. *Id.* ¶ 70. Based on information about the number of calories in 5HE and the demographic characteristics of the average 5HE consumer, Ronaldson estimates that 5HE provides no more than 3.4 minutes of caloric energy to the average male consumer and 3.7 minutes of caloric energy to the average female consumer. *Id.* ¶ 27.

Defendants argue that Ronaldson's declaration is unreliable to the extent that Ronaldson claims expertise in how the ordinary consumer would use the term "energy." *Defendants' Motion to Exclude the Expert Opinion Testimony of Patrick T. Ronaldson* 1:11–22 ("Dr. Ronaldson's opinion is what the word 'energy' means *to him* judged 'from the perspective of a pharmacologist.' Dr. Ronaldson does not opine (nor is he qualified to opine) as to how the word 'energy' as used on the Product label is interpreted by the ordinary consumer, either alone or taking the entire label into consideration."); *see also Vazquez Decl.*, Ex. L (Riley Report), at 1, Ex. X (Kennedy Deposition, 51:6-10) (opining that defining energy in terms of caloric value is inconsistent with consumer expectations).

Although the Court finds Ronaldson qualified to testify as an expert on the physiological effect of 5HE, the Court agrees with Defendants that Ronaldson's declaration cannot be used as evidence that there is only one meaning of the term "energy." "Energy" is a commonly understood term, and the trier of fact does not need assistance defining "energy" because it is not a matter that is beyond ordinary competence and experience. *See United States v. Seschillie*, 310 F.3d 1208, 1212 (9th Cir. 2012) ("A district court does not abuse its discretion when it refuses expert testimony where the subject does not need expert 'illumination' and the proponent is otherwise able to elicit testimony about the subject." (quoting *United States v. Ortland*, 109 F.3d 539, 545 (9th Cir. 1997)). The Court is therefore skeptical of the claim that a fact finder needs help defining the term.

Accordingly, the Court STRIKES those portions of Ronaldson's declaration that discuss the meaning of the term "energy" according to a pharmacologist. However, the Court ADMITS Ronaldson's declaration to the extent that Ronaldson opines on the physiological effects of a bottle of 5HE on the average 5HE consumer.

ii. Colin B. Weir

Colin Weir is Plaintiffs' damages expert. Weir is Vice President of Economics and Technology, Inc. ("ETI"), a research and consulting firm specializing in economics, statistics, regulation, and public policy, where he has worked for ten years. *Corrected Smith Decl.*, Dkt. #

180, Ex. 21 (Weir Decl.), Att. A (Statement of Qualifications), at 1. Weir holds an MBA from Northeastern University, and a BA in Business Economics from the College of Wooster. *Id.* Weir has consulted and submitted testimony in a variety of consumer and wholesale products cases, calculating damages related to household appliances, herbal remedies, food products, electronics, and computers. *Id.* at 3–8.

Weir opines that it is possible to determine damages in this case on a class-wide basis by determining the amount of "underfill" in each bottle of 5HE. *Id.* ¶¶ 8, 11-13. Using Ronaldson's calculation that 5HE provides only 3.7 minutes of caloric energy, Weir calculates that the bottles are "underfilled" by approximately 296.3 minutes of caloric energy (300 minutes in five hours minus 3.7 minutes). *Id.* ¶ 12. Defendants attack the reliability of Weir's declaration on multiple grounds, but their principal objection appears to be that Weir's damages model does not comport with Plaintiffs' theory of liability in this case, and so violates the principles set forth in *Comcast v. Behrend*, 133 S. Ct. 1426, 1433 (2013).

Because the issue of whether Weir has put forward a workable model to assess damages on a class-wide basis is closely intertwined with the Rule 23(b) predominance analysis, the Court declines to address the reliability of Weir's methodologies in a *Daubert* motion, and instead accepts Weir's expert report and testimony for the limited purpose of deciding the predominance issue. *See In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 946 (C.D. Cal. 2015) ("As respects Ugone's criticism that the methodology does not satisfy the requirement articulated in *Comcast*—i.e., that damages may be capable of measurement on a classwide basis—this does not affect the *admissibility* of Weir's opinions." (internal citations omitted)); *accord Forth Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 130 (S.D.N.Y. 2014) (whether damages can be assessed "on a class[-]wide basis [is a] question that is properly considered as part of the Rule 23(b) issue of whether questions common to the class predominate over individual issues, not to the validity of [the expert's] methods as a matter of admissibility of his expert testimony under the Federal Rules of Evidence.").

Accordingly, the Court DENIES Defendants' motion to exclude the Weir declaration, and admits Weir's declaration for the narrow purpose of determining whether Plaintiffs have met their class certification burden under Rule 23.

B. Class Certification

"The class action is an 'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes et al.*, 564 U.S. 338, 348–49 (2011) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). "In order to

justify a departure from that rule, 'a class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members.'" *Id.* (citing *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

In a motion for class certification, the burden is on plaintiffs to make a prima facie showing that class certification is appropriate, *see In re Northern Dist. of Cal. Dalkon Shield IUD Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982), and the Court must conduct a "rigorous analysis" to determine the merit of plaintiffs' arguments, *see Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Plaintiffs must be prepared to "prove" that there are "*in fact*" sufficiently numerous parties or that common questions exist, and frequently this will require some "overlap with the merits of the plaintiff's underlying claim." *See Dukes*, 564 U.S. at 350. Rule 23 does not, however, grant the court license to "engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1194-95 (2013). "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." *See id.* (citing *Dukes*, 564 U.S. at 351 n.6).

Federal Rule of Civil Procedure 23 governs the structure of class certification motions in federal court. Rule 23(a) ensures that the named plaintiffs are "appropriate representatives of the class whose claims they wish to litigate." *See Dukes*, 564 U.S. at 349. Plaintiffs must satisfy all of Rule 23(a)'s four requirements—numerosity, commonality, typicality, and adequacy—and at least one of the requirements of Rule 23(b). *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979–80 (9th Cir. 2011) (describing Rule 23(b) requirements).

In this motion, Plaintiffs move for certification under Rule 23(b)(3). Rule 23(b)(3) requires the Court to find that (1) "questions of law or fact common to class members predominate over any questions affecting only individual class members" and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3). The dual requirements of Rule 23(b)(3) are commonly known as "predominance" and "superiority."

Because Plaintiffs' bid for class certification fails conclusively at the predominance inquiry, the Court focuses its class certification analysis on predominance alone. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Aschem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "Predominance is a qualitative rather than a quantitative concept. It is not determined simply by counting noses: that is, determining whether there are more common issues or more individual issues, regardless of relative importance." *See Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014) (Posner,

J.). It is "far more demanding" than the commonality requirement of Rule 23(a). *See Aschem*, 521 U.S. at 623–24.

Here, the predominance element is not satisfied because individual questions predominate over common questions. Two issues in particular concern the Court. First, Plaintiffs have not carried their burden of showing that reliance and causation are subject to common proof. Plaintiffs offer little evidence of the materiality of the alleged misstatements on the 5HE label, and no evidence that consumers understand the term "energy" in uniformly the same way. Second, Plaintiffs' proposed damages model does not comport with Plaintiffs' theory of liability in this case and so violates predominance under *Comcast*. The Court first discusses reliance and causation, and then turns to the proposed damages model.

i. Reliance and Causation

Reliance and causation are critical components of establishing liability under all of Plaintiffs' causes of action.[4] Thus, to establish predominance under Rule 23(b)(3), courts typically require that plaintiffs demonstrate that reliance and causation are subject to common proof. *See In re ConAgra Foods, Inc.*, 302 F.R.D. at 576.

In the causes of action at issue in this case, reliance and causation are susceptible to common proof only if the state law at issue follows a "reasonable person" standard for assessing the materiality of the misstatement. In such states, a misstatement is material if it is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *See In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 409–10 (S.D.N.Y. 2015); *see also Shein v. Canon U.S.A., Inc.*, No. CV 08-7323 CAS (Ex), 2010 WL 3170788, at *7 (C.D. Cal. Aug. 10, 2010). If a statute uses a reasonable person standard, it is more likely to be subject to common proof because the inquiry into materiality is objective. *See In re Scotts EZ Seed Litig.*, 304 F.R.D. at 409–10; *see also Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 490 (C.D. Cal. 2012) (recognizing that the reasonable consumer test is "ideal for class certification because [it] will not require the court to investigate class members' individual interaction with the product"). "Reasonable consumer" statutes entitle plaintiffs to a class-wide inference of causation if the plaintiffs can show that the

[4] In its Order granting in part and denying in part Defendants' motion for summary judgment, the Court recognized that some states impose a less rigorous standard for proving the element of reliance. *See* Dkt. # 91, at 13–16 (recognizing that some states had adopted a more liberal "exposure" standard). This finding in no way changes the outcome here. In the summary judgment order, the Court was primarily concerned with whether Plaintiffs had presented proof of reliance; here, the Court's only concern is whether reliance is amenable to common proof.

manufacturer's representations were material. *See In re ConAgra Foods, Inc.*, 302 F.R.D. at 571. Similarly, such reasonable consumer laws entitle plaintiffs to a class-wide inference of reliance if plaintiffs show (1) that uniform misrepresentations were made to the class, and (2) that the misrepresentations were material. *Shein*, 2010 WL 3170788, at *7; *see also Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 669 (C.D. Cal. 2009).

Plaintiffs have shown, and Defendants do not dispute, that the state consumer laws remaining in this case follow a reasonable consumer standard and so a class-wide inference of reliance and causation is available to Plaintiffs. *See, e.g.*, *Cole v. Asurion Corp.*, 267 F.R.D. 322, 328 (C.D. Cal. 2010) ("Class relief is available on [UCL, FAL, and CLRA] claims 'without individualized proof of deception, reliance, and injury.'"); *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1095 (N.D. Cal. 2007); *Allen v. Hyland's Inc.*, 300 F.R.D. 643, 669 (C.D. Cal. 2014) (California express warranty claim); *In re First All. Mortg. Co.*, 471 F.3d 977, 991 (9th Cir. 2006) (California common law fraud); *Glen v. Fairway Indep. Mortg. Corp.*, 265 F.R.D. 474, 480–81 (E.D. Mo. 2010) (MMPA); *Boswell v. Panera Bread Co.*, 311 F.R.D. 515, 531 (E.D. Mo. 2015) (Missouri common law fraud); *Elias v. Ungar's Food Prod., Inc.*, 252 F.R.D. 233, 239, 251 (D.N.J. 2008) (New Jersey Fraud Statute and Breach of Express Warranty); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 513 (D.N.J. 1997) (New Jersey common law fraud); *Guidance Endodontics, LLC v. Dentsply Int'l Inc.*, 749 F. Supp. 2d 1235, 1258 (D.N.M. 2010) (New Mexico UPA); *Daye*, 313 F.R.D. at 169 n.12 (New Mexico common law fraud); *AIG Aviation Ins. v. Avco Corp.*, 709 F. Supp. 2d 1124, 1132 (D.N.M. 2010) (New Mexico breach of express warranty); *Ackerman v. Coca-Cola Co.*, No. CV 09-0395 JG (RMLx), 2010 WL 2925955, at *15 (E.D.N.Y. July 21, 2010) (New York DTPA); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 409–10 (S.D.N.Y. 2015) ("Materiality under Section 349 of the GBL is an objective inquiry; a deceptive act is defined as one likely to mislead a reasonable consumer acting reasonably under the circumstances."); *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1253 (2d Cir. 2002) (New York common law fraud); *Oslan v. Collection Bureau of Hudson Valley*, 206 F.R.D. 109, 112 (E.D. Pa. 2002) (Pennsylvania UTPCPL).

Nonetheless, although Plaintiffs have shown that a class-wide presumption of reliance and causation is *available* for all their claims, they have not shown that they are *entitled* to the presumptions because they have not made a sufficient showing that the statements on the 5HE label were material to the class. *See Jones v. ConAgra Foods, Inc.*, No. C 12-1633 CRB, 2014 WL 2702726, at *15–16 (N.D. Cal. June 13, 2014); *see also In re ConAgra Foods, Inc.*, 302 F.R.D. at 567–68. A misrepresentation is material "if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th at 157. As the Ninth Circuit concluded in *Stearns v. Ticketmaster*, "[i]f the misrepresentation or omission is not material as to

all class members, the issue of reliance [and causation] 'would vary from consumer to consumer' and the class should not be certified." *Jones*, 2014 WL 2702726, at *15–16 (citing *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022–23 (9th Cir. 2011)); *see also In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th at 156–57.

The evidence of materiality of the "five hour energy" statement on the 5HE bottle in this case is limited. Plaintiffs rely heavily on the opinion of 5HE's former marketing director, Carl Sperber, who testified at his deposition that 5HE was named so that it would "educate" consumers in a "few words" about "what the product was" and "what they could expect from it." *Smith Decl.*, Ex. 14 (Sperber Depo.). Sperber's deposition does not convince the Court that materiality is subject to common proof because the deposition addresses only how 5HE perceived its own branding techniques, and not how consumers reacted to the product name or the alleged misstatements on the 5HE label. Although Sperber generally asserts that "front labels" are important to consumers, Sperber provides no information to suggest that the representations on the 5HE label are material to consumers or that the representations factored into the consumers' decision to purchase the product. *Id.* Moreover, although some named Plaintiffs stated that they purchased 5HE because they believed it would provide them with five hours of caloric energy, *see Mot.* 5:1–18, *Reply* 8, Plaintiffs do not provide any consumer surveys that suggest that this belief is common across the class.

In contrast, Defendants' evidence suggests that the representations are not material to most or even a substantial portion of the class. Defendants' expert, Michael J. Riley, conducted a consumer online survey of 5HE consumers. *Vazquez Decl.*, Ex. L (U.S. Consumer Online Survey Report, attached as exhibit to report of Michael Riley). The survey found that only 2.2 percent of 5HE consumers attributed their initial purchase decision to 5HE's "marketing efforts." *Vazquez Decl.*, Ex. L, at 2. Riley also concluded that "marketing efforts" had little effect on subsequent purchases, which were primarily driven by consumer satisfaction or dissatisfaction with the product. *Id.* Moreover, in the survey, consumers listed numerous reasons for making their initial purchase of 5HE, including staying awake or focused; because it was recommended; out of curiosity; as an alternative to energy drinks or coffee; because of its location on the checkout counter; small size and convenience, price, promotions, discounts, free sampling and flavor; because it is sugar free, has zero carbohydrates and four calories; and because of its vitamins and nutrients. *Vazquez Decl.*, Ex. L (Riley Report) at 32 (listing 5HE Consumer Online Survey Report results).

Courts have refused to certify a consumer protection class where plaintiffs make such a limited showing of class-wide materiality. In *Jones*, for example, Judge Breyer declined to certify a class of consumers who had purchased Pam cooking spray products, Hunt's tomato

products, and Swiss Miss hot cocoa products, and who alleged that they were deceived by the products' "All Natural" label. 2014 WL 2702726, at *1. The court reasoned that evidence of materiality was lacking because plaintiffs provided only the conclusory declaration of an expert who stated that "reasonable consumers would rely on [the] label to identify products that are natural." *See* 2014 WL 2702726, at *15 ("[The expert] did not explain *how* the challenged statements, together or alone, were a factor in any consumer's purchasing decisions. She did not survey any customers to assess whether the challenged statements were in fact material to their purchases, as opposed to, or in addition to, price, promotions, retail positioning, taste, texture, or brand recognition."). Similarly, in *In re ConAgra Foods*, Judge Morrow declined to certify a class when the evidence of materiality was "in conflict." 302 F.R.D. at 576–77. Judge Morrow faulted plaintiffs for failing to adduce any survey evidence of consumer reactions to the "100% Natural" label or any evidence that consumers understood the "100% Natural" label to indicate that the product would be GMO-free. *Id.*

The same faults permeate the evidence here. Absent a consumer survey or other market research to indicate how consumers reacted to the "five hour energy," or "hours of energy" statements, and how they valued these statements compared to other attributes of the product and the energy supplement market generally, Plaintiffs have not offered sufficient evidence of materiality across the class. *See Pierce-Nunes v. Toshiba Am. Information Sys., Inc.*, No. CV 14-7242 DMG (KSx), 2016 WL 5920345, at *9 (C.D. Cal. June 23, 2016) (finding no common proof of materiality where defendants introduced evidence that consumers purchased TVs for a variety of factors, including their own research, the influence of sales people, comparison shopping, or recommendations from family, friends, or co-workers).

Predominance also fails for lack of a common definition for the term "energy." Where plaintiffs fail to establish a controlling definition for a key term in an alleged misstatement, courts have found that materiality is not susceptible to common proof. *See Pierce-Nunes*, 2016 WL 5920345, at *7 (finding predominance not satisfied where plaintiffs could not establish a common meaning for the term "LED TV"); *Pelayo v. Nestle USA, Inc.*, No. 13-5213 JFW (AJWx), 2013 WL 5764644, at *4–5 (C.D. Cal. Oct. 25, 2013) (discussing lack of common understanding of the term "all natural" that is shared by reasonable consumers); *Jones*, 2014 WL 2702726, at *15 ("[E]ven if the challenged statements were facially uniform, consumers' *understanding* of those representations would not be."); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 508 (S.D. Cal. 2013) (denying class certification where plaintiffs failed to show that "all natural" had any kind of uniform definition among the class). In these cases, some plaintiffs have even shown a specific rate of acceptance of the proposed definition of a disputed term in the consumer marketplace. *See In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1112–13 (C.D. Cal. 2015) (presuming materiality where "37.1 percent and 41.5 percent of

respondents who viewed the advertisement believed it conveyed an overall safety message"); *Oshana v. Coca-Cola Co.*, 2005 WL 1661999, at *9 (N.D. Ill. July 13, 2005) (presumption of materiality applied where 24 percent of consumers "would behave differently" without the misrepresentation).

Here, the meaning of the term "energy" is disputed, and Plaintiffs have offered no evidence of a common definition of "energy" among a substantial number of consumers. Plaintiffs argue that "energy" means "caloric energy," and they offer the declaration of their expert, a leading pharmacologist, who attests that energy is scientifically understood to mean caloric energy. *See Smith Decl.*, Ex. 19 (Ronaldson Decl.), ¶ 19. Plaintiffs also point out that the U.S. Food and Drug Administration defines "energy" as caloric energy for dietary supplements. *See Reply* 8. Even with these proffered definitions, however, Plaintiffs still offer no evidence that the majority of consumers, or even a substantial group of consumers, define "energy" as caloric energy or believe that "energy" means only one thing. *See Vazquez Decl.*, Ex. Y.

In response, Defendants argue that consumers define "energy" more broadly to encompass subjective feelings of energy and an increased ability to perform tasks. *Vazquez Decl.*, Ex. O (Kennedy Report, at 6–13). Defendants point to the definition of energy in a "psychological sense," which includes "alertness, arousal, or fatigue," and energy as in "mental energy" or "the ability and motivation to perform mental tasks," such as vigilance and sustained attention. *Id.*, Ex. P (Kennedy Report, at 8–9). Defendants point out that people do not typically associate the term "energy" with the feeling you get after a high-calorie meal, *Opp.* 4:14–16, and they argue that Plaintiffs' definition of energy is excessively narrow, given that each bottle of 5HE explicitly stated that it contained only four calories and it would thus be unreasonable for a consumer to believe that "energy" meant only "caloric energy."

At this point, the Court need not resolve the dispute among the parties about the appropriate definition of the term "energy." It is enough to say that Plaintiffs have offered no evidence that any one definition of energy prevails among all consumers. Without a common definition or common understanding of the term, the Court cannot conclude that materiality is susceptible to common proof.

In sum, the Court concludes that individual issues predominate over common issues. The element of predominance is not satisfied because Plaintiffs have not shown that they are entitled to a class-wide presumption of materiality, and thus, cannot establish reliance or causation with common proof. Without a market survey documenting consumer preferences, Plaintiffs have not shown that the "five hour energy" representation is material to consumers as compared to other

factors, including the positioning of the product at the retail location, the product's value as an alternative to coffee, and the relatively small size of the bottle. Plaintiffs also have not shown that there is a prevalent definition of "energy" in the market. Without such evidence, Plaintiffs cannot show an entitlement to a class-wide presumption of materiality.

Although Plaintiffs' motion to certify a class under Rule 23(b)(3) fails on these grounds alone, there are additional predominance problems with Plaintiffs' proposed damages model that the Court turns to now.

ii. Damages

To satisfy Rule 23(b)(3), plaintiffs must show that "damages are capable of measurement on a classwide basis." *Comcast*, 133 S. Ct. at 1433. Under *Comcast*, Plaintiffs must additionally show that their proposed damages models match their theory of liability in the case. *Id.* ("[A] model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. 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)."). The Ninth Circuit rule that damage calculations do not defeat certification does not relieve Plaintiffs of the requirement of putting forth a damages model that ties the theory of liability to damages. *See Lindell v. Synthes USA*, No. 11-2053, 2014 WL 841738, at *14 (E.D. Cal. Mar. 4, 2014) ("So long as the damages can be determined and attributed to a plaintiff's theory of liability, damage calculations for individual class members do not defeat class certification.").

Plaintiffs offer two methods for calculating damages. First, Plaintiffs propose a statutory damages model for the New York and Pennsylvania classes based on the statutory amounts available under New York and Pennsylvania's consumer protection laws. *See Reply* 10:3–15 & 10 n.9; *Weir Decl.*, ¶ 28. Defendants do not take issue with this statutory damages model, and for this reason, it is not discussed further here. *See id.* The second damages model proposes to calculate damages in California, Missouri, New Jersey, and New Mexico based on Colin Weir's theory that 5HE is "underfilled" with caloric energy. Because this second damages model is divorced from Plaintiffs' theory of liability, the Court concludes that this second damages model does not satisfy *Comcast* and is further reason why Plaintiffs' motion to certify the California, Missouri, New Jersey, and New Mexico classes fail predominance.

Weir's underfilled theory calculates damages in two steps. First, Plaintiffs' expert, Ronaldson, estimates the amount of caloric energy in 5HE and concludes that 5HE's four calories provide as much as 3.7 minutes of caloric energy. *See Weir Decl.*, ¶¶ 8, 11. With this

estimate, Weir divides the 3.7 minute estimate of actual caloric energy by the five hours of allegedly promised caloric energy. *Id.* ¶ 12. From these calculations, Plaintiffs estimate that each bottle of 5HE is only 1.3 percent filled (3.7 minutes divided by 300 minutes) or 98.7 percent underfilled. *Id.* To account for the "value" received from the other ingredients in 5HE, such as caffeine, folic acid, B6, and sucralose, Weir adjusts the "underfilled" amount by the cost of these other ingredients. *Id.* ¶ 29. Weir, for example, estimates that the cost of 200 mgs of caffeine in each bottle of 5HE is $0.00269. *Weir Decl.*, Tbl. 2. Based on these calculations, Weir estimates that damages in this case will total $1.436 billion. *Id.* ¶ 27.

The proper measure of damages in a consumer class action case is typically restitution. *See, e.g.*, *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 694 (2006). Restitutionary relief is an equitable remedy, and its purpose is "to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003); *see also Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 177 (2000). "The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received." *Colgan*, 135 Cal. App. 4th at 700. Restitution is "determined by taking the difference between the market price actually paid by consumers and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices." *Brazil v. Dole Packaged Foods, LLC*, No. CV 12-1831, 2014 WL 2466559, at *15 (N.D. Cal. May 13, 2014); *see also In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d at 1118 ("The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received." (citing *Werdebaugh v. Blue Diamond Growers*, 2014 WL 2191901, at *2 (N.D. Cal. May 23, 2014) (calculating damages as the price paid less the value received), class decertified, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014))). This measure typically requires some understanding of the value of the goods as received by the consumer. *See In re ConAgra Foods*, 300 F.R.D. at 578–79.

In this case, Plaintiffs' "underfilled" model is not an adequate measure of restitution because the model does not accurately account for the value that consumers receive from 5HE, even excluding the limited value of the "caloric energy." *See Opp.* 13:26–14:5. As Defendants point out in their papers, 5HE's caffeine content alone may be sufficient to justify much of the price of 5HE, given that consumers typically pay several dollars for a cup of coffee with similar caffeine content. *Defendants' Mot. to Exclude Weir* 2:27–3:4. Yet, Plaintiffs do not account for the value of the caffeine, vitamins, and minerals in 5HE, or even the relative convenience of the small 5HE bottle compared to other energy supplements. Plaintiffs only account for the cost of 5HE's ingredients to the manufacturer. Defendants are correct that the "cost" of the ingredients

is not the same as the value of the ingredients to the consumer, and so this measure is not an adequate proxy consumer value or restitution. *See Hughes v. The Ester C Co.*, 317 F.R.D. 333, 355–56 (E.D.N.Y. 2016).

Plaintiffs also fail to distinguish the Ninth Circuit cases that have struck down damages models in similar circumstances for failing to account for other factors that may drive consumer preferences. *See*, *e.g.*, *Brazil*, 2014 WL 2466559, at *15–16 (finding damages model insufficient under *Comcast* because it "does not take into account 'any factors that may cause consumers to prefer [the product] . . . such as brand loyalty or quality differences'"); *Algarin*, 300 F.R.D. at 460 (finding damages model insufficient for failure to account for price differences attributable to "higher quality ingredients," "selection of 'flavors,'" and research and development costs). Plaintiffs' argument that they do not need to provide a "complex price-premium damages model" is neither here nor there because, regardless of whether Plaintiffs' provide a price-premium model or not, they still must be able to account for consumer preferences and the relative value that consumers ascribe to different aspects of the product. *See Reply* 11:16–23.

The showing that Plaintiffs must make is well illustrated in Judge Morrow's companion opinions in *In re ConAgra Foods*. *See* 302 F.R.D. 537 (2014); 90 Supp. 3d 919 (2015). There, the court did not approve of plaintiffs' damages model until plaintiffs proved that they could isolate the specific "price premium" for the term "100% Natural," as plaintiffs defined it to mean "non-GMOs." *See* 90 F. Supp. 3d at 1023. To prevail, plaintiffs had to show that consumers paid a "price premium" for an oil that was free of non-GMOs versus an oil that had GMOs. *Id.* The court ultimately approved a damages model that combined hedonic regression and conjoint analysis, and was informed by consumer surveys that established the "relative value" of certain of the product features. *Id.* at 1025. Plaintiffs' damages model here falls short of that approved in *ConAgra Foods*. Even if Plaintiffs' are correct that caloric energy is the dominant definition of "energy," Plaintiffs must account for the value of other features of 5HE if they are to isolate the specific premium paid for five hours of caloric energy. Without consumer surveys ascribing a relative value to each of 5HE's features, it is hard to see how Plaintiffs will do this here.

Judge Walter's recent approval of the underfilled theory in *Martin v. Monsanto Co.*, EDCV 16-2168 JFW (SPx), Dkt. # 51, does not convince the Court that such a theory is appropriate here, given *Martin*'s distinguishable facts and theory of liability. In *Martin*, plaintiffs alleged that Monsanto sold RoundUp Concentrates that did not make the number of gallons of solution promised when following the instructions on the back label. *Id.* at 10. There, the underfilled theory was appropriate because plaintiffs alleged that Monsanto sold them less RoundUp than they promised. *See id.* at 9–11. Here, Plaintiffs' theory is distinguishable

because Plaintiffs do not allege that they received less 5HE than expected; rather, they allege that 5HE did not perform as expected, or that the ingredients were deficient. When the performance of a product is at issue, the calculation of value is not as simple as when the product is underfilled because, with a performance issue, the plaintiff must account not only for how the product actually performed but also whether the consumer valued other aspects of the product. In contrast, when the issue is only how much of the product the consumer received, few would contest that the consumer received no value from the product that they did not get. In this way, Plaintiffs' attempt to analogize to *Martin* is overly simplistic and ultimately unconvincing.

In sum, the Court is not convinced that the damages model proposed in this case adequately matches Plaintiffs' theory of liability. The Court finds the deficit in Plaintiffs' damages model an additional ground for denying class certification, at least as it applies to the proposed classes in California, Missouri, New Jersey, and New Mexico, where statutory damages are not available.

III. Conclusion

Plaintiffs have failed to demonstrate that common issues predominate over individual inquiries, and so class certification is not appropriate under Rule 23(b)(3).

IT IS SO ORDERED.