No. 20-2124

In the

United States Court of Appeals
For the Tenth Circuit

ROBIN THORNTON and MICHAEL LUCERO,
Appellants,

v.

TYSON FOODS, INC., CARGILL MEAT SOLUTIONS, CORP., JBS USA FOOD COMPANY, and NATIONAL BEEF PACKING COMPANY, LLC
Appellees.

On Appeal from the United States District Court for the District of New Mexico
District Case No. 1:20-cv-105 Consolidated with 1:20-cv-106 (Hon. Kea W. Riggs, Judge)

BRIEF OF APPELLEES

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Oral Argument Not Requested

DEFENDANTS'[1] DISCLOSURE STATEMENTS

Defendants established jurisdiction in federal court by removing the case under 28 U.S.C. § 1453 and the jurisdictional provisions of the Class Action Fairness Act ("CAFA"), 28 U.S.C. 1332(d)(2), which requires minimal diversity. *See Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592 (2013). As demonstrated below and in Defendants' Notices of Removal, CAFA's minimal diversity requirements are met here. Pursuant to Appellate Rule of Procedure 26.1, Defendants state as follows:

Defendant-Appellee Tyson Foods, Inc. ("Tyson") is a Delaware corporation with its principal place of business in Springdale, Arkansas. Tyson states that no parent corporation or any publicly held corporation owns 10% or more of the stock of Tyson.

Defendant-Appellee Cargill Meat Solutions Corp. ("CMS") is a Delaware corporation with its principal place of business in Wichita, Kansas. CMS states that it is a wholly owned subsidiary of Cargill, Incorporated. Cargill, Incorporated is a privately held corporation. No publicly held corporation owns 10% or more of Cargill, Incorporated.

[1] Tyson, CMS, JBS, and National Beef are collectively referred to as "Defendants" throughout this brief.

Defendant-Appellee JBS USA Food Company ("JBS") is a Delaware corporation with its principal place of business in Greeley, Colorado. JBS is a wholly owned subsidiary of JBS USA Food Company Holdings ("JBS USA Holdings"). JBS USA Holdings is an indirect wholly owned subsidiary of its ultimate parent JBS S.A., a Brazilian Company that is publicly traded. No other publicly traded company directly or indirectly owns 10% or more of the stock of JBS.

Defendant-Appellee National Beef Packing Company, LLC ("National Beef") is a Delaware limited liability company with its principal place of business in Kansas City, Missouri. *See* U.S.C. § 1332(d)(10) ("For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized"). National Beef's members are:

1. NBM US Holdings, Inc., a Delaware corporation with its principal place of business in São Paulo, Brazil.

2. U.S. Premium Beef, a Delaware limited liability company with its principal place of business in Kansas City, Missouri.

3. NBPCo Holdings, LLC, a South Dakota limited liability company with its principal place of business in Dakota Dunes, South Dakota.

4. TMK Holdings, LLC, a Missouri limited liability company with its principal place of business in Kansas City, Missouri.

National Beef further states that Mafrig Global Foods S.A. is a publicly traded company that indirectly owns 10% or more of the equity interest of National Beef. No other publicly traded company owns 10% or more of National Beef.

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I. STATEMENT OF PRIOR RELATED APPEALS

There are no prior related appeals.

II. JURISDICTIONAL STATEMENT

Plaintiffs' jurisdictional statement is incomplete and inaccurate. Defendants removed the action to federal court pursuant to 28 U.S.C. § 1453 and 28 U.S.C. § 1332(d)(2). Plaintiffs did not dispute jurisdiction on any of those grounds. Plaintiffs did not allege or establish jurisdiction under 28 U.S.C. § 1343. This Court has jurisdiction over the appeal based on 28 U.S.C. § 1291.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. **Preemption.** Did the district court correctly hold that all of Plaintiffs' causes of action challenging Defendants' use of the term "Product of the USA" on their beef product labels are expressly preempted by the Federal Meat Inspection Act, 21 U.S.C. § 678?

2. **Failure to state a claim.** Did the district court correctly hold that Plaintiffs failed to state a claim against Defendants based on advertising that Plaintiffs pleaded was made by third-party retailers, not by Defendants?

3. **Alternative grounds for affirming**. Did the district court correctly hold that each of Plaintiffs' claims failed for alternative grounds?

IV. STATEMENT OF THE CASE

A. Introduction and Procedural History.

This appeal arises from two consolidated class-action Complaints filed by Plaintiffs Robin Thornton and Michael Lucero (collectively, "Plaintiffs") alleging that federally approved beef labels violated various New Mexico statutes and the common law. (*See* Appellant's Appendix ("App.") Vol. I at 032-047, 096-113.)

Both Complaints rested on the same theory—that beef products cannot be labeled as "Product of the USA" unless the cattle used to make the beef products are born, raised, *and* slaughtered entirely in the United States. (*Id.*) Plaintiffs alleged that the cattle used to make some of Defendants' beef products were not born and raised in the United States and hence argued that Defendants could not label them as "Product of the USA." (*Id.*) Under various New Mexico laws, they sought damages, along with an injunction requiring Defendants to remove the "Product of the USA" phrase from their labels and to add statements identifying where the cattle were raised. (App. Vol. I at 050-055, 116-121.)

Plaintiffs' theory foundered on the shoals of preemption. Beef labels are regulated by the United States Department of Agriculture ("USDA") under the Federal Meat Inspection Act ("FMIA"), codified at 21 U.S.C. § 601 *et seq.* Under USDA's regulations, beef products may be labeled "Product of the USA" if they are processed in the United States, even if the cattle were raised elsewhere. Plaintiffs never disputed that Defendants' beef products satisfied USDA's definition. Not only that, but USDA

must preapprove labels before they are used, and all the labels that Plaintiffs challenged were preapproved by USDA. (App. Vol. II at 552-554, 556-558.) The FMIA expressly preempts all state requirements for labels that are "in addition to, or different than" the federal requirements. 21 U.S.C. § 678. Hence, Plaintiffs' attempts to impose different labeling requirements through their New Mexico claims are preempted.

Defendants therefore moved to dismiss the Complaints, arguing preemption as well as alternative grounds. (App. Vol. I at 162-264; App. Vol. II at 376-434.) After briefing was complete, Lucero (but not Thornton) moved to amend his Complaint to add a state antitrust claim predicated on the same theory that Defendants could not label their beef products as "Product of the USA." (App. Vol. II at 435-467.) Defendants argued, among other things, that amendment would be futile because the new claim, like the others, was expressly preempted. (App. Vol. II at 468-525.)

The district court granted Defendants' motions to dismiss, holding that Plaintiffs' claims were preempted by the FMIA and, alternatively, that Plaintiffs had failed to assert any viable claims for relief. (App. Vol. II at 549-568.) Because the district court found that the claims failed, it declined to stay or refer the matter to USDA under the primary jurisdiction doctrine. (App. Vol. II at 561-562, 566.) The district court denied Lucero's motion to amend, holding that amendment would be futile. (App. Vol. II at 566-568.) Ultimately, the district court dismissed both Complaints with prejudice.

Thornton and Lucero appealed. This Court consolidated the appeals.

B. Statement of the Facts.

1. The Parties.

Thornton is a consumer, a "purchaser of beef [p]roducts," who resides in New Mexico. (App. Vol I at 034.)

Lucero is a cattle rancher, a "producer of beef cattle with a multi-generational history of ranching in New Mexico." (App. Vol. I at 100.)

Defendants are producers of beef products. ***Tyson*** is a parent company, headquartered in Springdale, Arkansas. Through its subsidiaries, Tyson sells beef to retailers, wholesalers, and distributors. (App. Vol. I at 034, 100.) ***CMS*** is a wholly owned subsidiary of Cargill, Incorporated. CMS is headquartered in Wichita, Kansas. (App. Vol. I at 035, 100.) ***JBS*** is a Delaware Corporation that owns a number of subsidiary companies. JBS is headquartered in Greeley, Colorado. (App. Vol. I at 035, 100-101.) ***National Beef*** is a Delaware limited liability company with its principal place of business in Kansas City, Missouri. (App. Vol. I at 035, 101.)

2. Plaintiffs' Claims.

i. Thornton's Complaint.

Thornton alleges that she bought beef products "in reliance on the label representations" that they were "Product[s] of the U.S." (App. Vol I at 034.) Thornton did not buy any products directly from a Defendant. (*Id.*) Instead, she shopped at retailers such as Costco, Sam's Club, Smith's Grocery Store, Albertson's Grocery Store, Wal-Mart, Sprouts, and Whole Foods, where she bought beef products with brand

names such as Member's Mark, Kirkland, Smith's, and Kroger. (App. Vol. I at 034, 037-044.) Without alleging that any specific product she purchased was manufactured by a Defendant, Thornton alleged that some or all of the products *must* have come from Defendants because they collectively produce much of the beef ultimately sold to U.S. consumers. (App. Vol. I at 036, 046.)

Thornton alleged that she understood "Product of the USA" to mean that the beef was made from "cattle born, raised, and slaughtered in the United States." (App. Vol. I at 034.) But, she alleged, Defendants' cattle are not all born, raised, *and* slaughtered in the United States. (App. Vol. I at 034, 036.) Based on these allegations, Thornton's Complaint asserted claims for breach of warranty, unjust enrichment, and violation of the New Mexico Unfair Practices Act ("UPA"), codified at N.M. Stat. Ann § 57-12-1 *et seq.* (App. Vol. I at 050-054.) In addition to monetary relief, Thornton sought an injunction requiring Defendants to remove "Product of the USA" from their labels and add statements that "disclose the accurate and complete origination of the Product." (App. Vol. I at 054-055.)

ii. Lucero's Complaint.

Lucero is a New Mexico cattle producer. (App. Vol. I at 100.) He alleged that, if consumers knew that Defendants' beef products were not made from cattle "born, raised and slaughtered" in the United States, they might "purchase a competing product" from Lucero or a similarly situated producer. (App. Vol. I at 098, 112.) This consumer confusion, Lucero alleged, reduces the demand for his cattle and allows

Defendants to pay him less for his "domestically originated cattle for beef." (App. Vol. I at 112, 116-117.) Based on these allegations, Lucero asserted claims for unjust enrichment and violation of the UPA. (App. Vol. I at 116-119.)

Like Thornton, Lucero sought monetary relief and an injunction requiring Defendants to remove "Product of the USA" from their labels and to add statements that "disclose the accurate and complete origination of the Product." (App. Vol. I at 119-120.)

After briefing on Defendants' motion to dismiss was completed, Lucero moved to amend his Complaint to abandon his UPA claim and add an antitrust claim under the New Mexico Antitrust Act, N.M. Stat. Ann. § 57-1-1 *et seq*. (App. Vol. II at 435-436, 462-464.) The factual predicate for the antitrust claim was the same allegation about using "Product of the USA" on labels for beef products. (*Id.*).

3. USDA regulates the use of "Product of the USA" on beef labels under the Federal Meat Inspection Act ("FMIA").

Under federal law, the authority to regulate beef labels is given to USDA, and USDA has exercised that authority to determine when "Product of the USA" may be used. USDA's position, which controls this case, is that "Product of the USA" may be used on all beef that is processed in the United States, regardless of where the cattle were raised.

The controlling statute is the FMIA, which covers meat food products made from "the carcass of any cattle." 21 U.S.C. § 601(j).[2] *See generally Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455-56 (2012) (noting that federal law "regulates a broad range of activities" related to meat processing). Under the FMIA, beef products may not be sold "under any … labeling which is false or misleading, … but … labeling and containers which are not false or misleading and which are approved by the Secretary [of Agriculture] are permitted." 21 U.S.C. § 607(d); *see also* § 601(a) (defining "Secretary"); § 607(e) (authorizing USDA to ban "any … labeling" for meat products it finds "false or misleading in any particular").

USDA exercises its authority over meat-product labels through its Food Safety and Inspection Service ("FSIS"). 9 C.F.R. § 300.2(1); *see also* Nutrition Labeling of Meat and Poultry Products, 58 Fed. Reg. 632 (Jan. 6, 1993); *United Source One, Inc. v. USDA*, 865 F.3d 710, 713-14 (D.C. Cir. 2017) (describing USDA's regulation of meat-product labeling under the FMIA).

FSIS not only regulates what labels may or must say, but it also requires them to be ***preapproved before use***: "No final label may be used on any [meat] product unless the label has been submitted for approval to FSIS Labeling and Program Delivery Staff … and approved by such staff." 9 C.F.R. § 412.1(a).

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[2] Products made from chicken are covered by the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 451 *et seq.*, which has an express label preemption provision identical to that of the FMIA. 21 U.S.C. § 467e. Because of this, courts cite the FMIA and the PPIA preemption cases interchangeably, and this brief does the same.

In its review, FSIS ensures that the labels for meat products do not give "any false indication of origin." 9 C.F.R. § 317.8(a). The current federal rules for "Product of the USA" labeling claims are contained in the "Food Standards and Labeling Policy Book." ("FSIS Labeling Book").[3] Under these rules, the phrase "Product of USA" may be used if the meat product is ***processed*** in the United States, regardless of where the animal was raised:

> **PRODUCT OF USA:**
>
> Labeling may bear the phrase "Product of USA" under one of the following conditions:
>
> 1. If the country to which the product is exported requires this phrase, and the product is processed in the U.S.; or
>
> 2. The product is ***processed*** in the U.S. (i.e., is of domestic origin).

FSIS Labeling Book at 147 (emphasis added).

Regulatory commentary published in the Federal Register states even more clearly FSIS's position that beef can be labeled "Product of the USA" if it is "prepared" in the United States, even if the cattle "originated in other countries":

> **Labeling to Meet Export Requirements**
>
> "Product of the U.S.A." has been applied to products that, at a minimum, have been prepared in the United States. It has never been construed by FSIS to mean that the product is derived only from animals that were born, raised, slaughtered, and prepared in the United States. ***The only***

[3] *See* Food Safety Inspection Service's Food Standards and Labeling Policy Book, available at https://www.fsis.usda.gov/wps/wcm/connect/7c48be3e-e516-4ccf-a2d5-b95a128f04ae/Labeling-Policy-Book.pdf?MOD=AJPERES (last visited February 15, 2021).

> ***requirement for products bearing this labeling statement is that the product has been prepared (i.e., slaughtered, canned, salted, rendered, boned, etc.)***. No further distinction is required. In addition, there is nothing to preclude the use of this label statement in the domestic market, which occurs, to some degree.
>
> ***This term has been used on livestock products that were derived from cattle that originated in other countries and that were slaughtered and prepared in the United States***. Also, the cattle could have been imported, raised in U.S. feed lots, and then slaughtered and prepared in the United States. ***The beef products from these cattle can be labeled as "Products of the USA" for domestic*** and export ***purposes***.

66 Fed. Reg. 41160, at 41160-61 (Aug. 7, 2001) (emphasis added).

The requirements for "Product of the USA" that Plaintiffs are seeking to impose through state law are different from FSIS's requirements. Instead, they reprise requirements that the United States imposed from September 2008 to December 2015[4] but abandoned after they led to international trade disputes and the World Trade Organization ("WTO") approving more than $1 billion in retaliatory tariffs against the United States.

Before September 2008, USDA regulated "Product of the USA" beef labeling in the same way it does now: it allowed this descriptor to be used if the beef was, at a minimum, processed in the United States. FSIS Labeling Book at 147; *see* 66 Fed. Reg. 41160, at 41160-61 (Aug. 7, 2001).

[4] None of Plaintiffs' claims cover this time period.

In the 2002 Farm Bill, however, Congress laid the groundwork for a more restrictive approach to Country-of-Origin Labeling ("COOL"). That bill included provisions requiring meat labels to designate a country of origin and allowing beef to be designated as a product of the United States only if it came "exclusively from an animal that is exclusively born, raised and slaughtered in the United States.…" Farm Security and Rural Investment Act. Pub. L. No. 107-171, §§ 281-82, 116 Stat. 134, 533-35 (2002). The implementation of the 2002 Farm Bill's COOL labeling requirements was delayed until September 2008 through a series of appropriations acts. *See* Joel L. Green, CONG. RSCH. SERV., RS22955, Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling at 2 (Dec. 8, 2015) (hereinafter "Country-of-Origin Labeling") (summarizing history of COOL authorizing legislation). Before they took effect in the 2008 Farm Bill, Congress refined the country-of-origin designation to include four categories: (1) United States country of origin; (2) multiple countries of origin; (3) imported for immediate slaughter; and (4) foreign country of origin. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 11002, 122 Stat. 923, 1351-54 (2008). These COOL requirements took effect in September 2008, and in January 2009 USDA issued a final rule implementing the COOL requirements for all covered commodities, including beef. Country-of-Origin Labeling at 2-3.

The new COOL requirements immediately created tension with the United States' international trade partners, particularly Canada and Mexico. *Id.* at 9-11. After formal consultations between the countries broke down, Canada and Mexico initiated

a dispute before the WTO to determine whether the United States' COOL requirements—particularly as to meat labeling—violated the United States' obligations under the WTO Agreement on Technical Barriers to Trade. *Id.*

In response to Canada's and Mexico's challenge, a WTO panel held that the COOL requirements inappropriately "disincentivized purchasers from buying foreign products." *See* Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶¶ 2.1-2.3, 7.265 WTO Doc, WT/DS384/R (Nov. 18, 2011). The WTO Appellate Body later affirmed the Panel's conclusion. *See* Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384/AB/R (June 29, 2012). The WTO therefore ordered the United States to amend its country-of-origin labeling requirements by May 23, 2013. *See* Arbitration Under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 123, WTO Doc. WT/DS384/24 (Dec. 4, 2012).

In response, USDA issued a revised COOL rule in May 2013. USDA & AMS, Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Fed. Reg. 31367, 31370 (May 24, 2013) (stating the purpose of the revised COOL requirements was to "bring the United States into compliance with its international trade obligations"). The revised rule required labels for beef made from cattle not exclusively born, raised, and slaughtered in the

United States to identify where the cattle was born, raised, and slaughtered—in other words, the same labeling information Plaintiffs now claim is required by New Mexico law. *Id.* at 31368; *see* Country-of-Origin Labeling at 17.

Canada and Mexico challenged the revised COOL rule in a second WTO proceeding. *See* Appellate Body Report, *United States Certain Country of Origin Labelling (COOL) Requirements*, ¶¶ 1.6-1.8, WTO Doc. WT/DS384/AB/RW (May 18, 2015). In 2015, the WTO rejected USDA's May 2013 revised COOL requirements and authorized $1.01 billion in retaliatory tariffs against the United States. *See* Arbitrator Decision, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7, WTO Doc. WT/DS384/ARB (Dec. 7, 2015).

Within weeks, Congress responded by including in a Consolidated Appropriations Act a provision repealing the COOL requirements for beef products and excluding beef from the definition of "covered commodity." Pub. L. No. 114-113, § 759, 129 Stat. 2242, 2284-85 (approved December 18, 2015).[5] Consistent with Congress's direction, USDA reapplied its prior rule that beef may be labeled a "Product of the USA" as long as it is processed in the United States, even if the cattle are raised

[5] *See also* AMS, USDA Amends Country of Original Labeling Requirements, Final Rule Repeals Beef and Pork Requirements (Feb. 29, 2016), available at https://www.ams.usda.gov/press-release/usda-amends-country-origin-labeling-requirements-final-rule-repeals-beef-and-pork (last visited February 15, 2021). Country-of-origin labeling is still required for products that Congress defined as "covered commodities." 7 U.S.C. § 1638(1).

elsewhere. USDA has applied this requirement consistently since Congress repealed the COOL requirements for beef products. FSIS Labeling Book at 147.

4. Defendants' beef products comply with USDA's "Product of the USA" regulations.

Plaintiffs have never disputed that the beef products they challenge satisfy USDA's definition of "Product of the USA" because they were, at a minimum, processed in the United States. (App. Vol. II at 269-328, 329-375.) Plaintiffs also do not dispute that the labels they challenge were preapproved by FSIS. (*Id.*) As the district court observed, Plaintiffs conceded that FSIS approved the labels, including, necessarily, the "Product of the USA" claims. (App. Vol. II at 556-557.)[6] On appeal, Plaintiffs concede that "FSIS permissively allowe[d] and approve[d]" the label statements they challenge. (Appellant Br. at 15.)

V. STANDARD OF REVIEW

Defendants agree with Plaintiffs' statement of the standard of review, subject to the following clarification and additions:

Ordinarily, the Tenth Circuit reviews the denial of a motion to amend a pleading for abuse of discretion. *See Combs v. PriceWaterhouse Coopers LLP*, 382 F.3d 1196, 1205

[6] The district court also could take judicial notice of FSIS's approval of the product labels because they are matters of public record and not subject to any public dispute. *See Fourth Corner Credit Union v. Fed. Reserve Bank of Kansas City*, 861 F.3d 1052, 1064 n.1 (10th Cir. 2017); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009).

(10th Cir. 2004). But when the basis for denial is futility, the Court reviews that issue de novo. *See Watson ex rel. Watson v. Beckel,* 242 F.3d 1237, 1239 (10th Cir. 2001).

On this appeal from an order granting a motion to dismiss, "facts subject to judicial notice may be considered … without converting the motion to dismiss into a motion for summary judgment." *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006). Courts routinely take judicial notice of documents related to government agencies' conduct and information posted on the agencies' websites. *See, e.g.*, *Fourth Corner Credit Union v. Fed. Reserve Bank of Kansas City*, 861 F.3d 1052, 1064 n.1 (10th Cir. 2017) (website of the Board of Governors of the Federal Reserve System); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009) (websites of multiple federal agencies). In cases implicating the FMIA, where meat labels "were, in fact used, the [courts] will presume that the labels received the FSIS's approval." *La Vigne v. Costco Wholesale Corp.*, 284 F. Supp. 3d 496, 505 (S.D.N.Y. 2018); *see also Webb v. Trade Joe's Co.,* 418 F. Supp. 3d 524, 529-30 (S.D. Cal. 2019) (same).

VI. SUMMARY OF THE ARGUMENT

The district court correctly held that all of the claims Plaintiffs asserted, or sought leave to assert, against the labels on Defendants' beef products are preempted by the FMIA. In each of these claims, Plaintiffs attempt to use New Mexico law to establish their own preferred definition of "Product of the USA." But the definition of that phrase is set by USDA as a matter of federal law, and the FMIA expressly preempts all

"***labeling*** … ***requirements in addition to, or different than***, those made under this chapter." 21 U.S.C. § 678 (emphasis added).

The district court also correctly dismissed any claims that Plaintiffs alleged based on advertisements (as opposed to the labels physically attached to the products), because Plaintiffs pleaded that third-party retailers, not Defendants, produced these advertisements.

These two holdings are sufficient to resolve this appeal and affirm the judgment for Defendants. But each claim asserted by Plaintiffs also fails for additional reasons, as set forth in detail below.

VII. ARGUMENT

A. All of Plaintiffs' Claims Against Defendants' Beef Product Labels Are Preempted.

The district court correctly held that all of the claims Plaintiffs asserted against the labels used on Defendants' beef products, as well as the claim that Lucero sought to leave to assert, are preempted by the FMIA, codified at 21 U.S.C. § 601 *et seq*.

1. The FMIA expressly preempts all state-law requirements for beef labels that are different from the federal standards.

The Supremacy Clause of the U.S. Constitution states that federal law "shall be the supreme Law of the Land … any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting U.S. Const. art. VI, cl. 2). Under the Supremacy Clause, "Congress has the

power to enact statutes that preempt state law." *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010).

"[P]reemption is ultimately a question of congressional intent," and "'Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose.'" *Id.* (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008)). As this Court has explained, there are three types of preemption:

> 1) **express preemption**, which occurs when the language of the federal statute reveals an express congressional intent to preempt state law; 2) **field preemption**, which occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a State to supplement it; and 3) **conflict preemption**, which occurs either when compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

US Airways, 627 F.3d at 1324 (quotations omitted (emphasis added)). At issue in this case is **express preemption**.

The FMIA expressly states in relevant part that "[m]arking, labeling, packaging or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia." 21 U.S.C. § 678.

In interpreting an express preemption provision, courts "apply ordinary principles of statutory interpretation, looking initially to the plain language of the federal statute," *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 765 (10th Cir. 2010), which "necessarily contains the best evidence of Congress's pre-emptive intent."

Emerson v. Kansas City S. Ry. Co., 503 F.3d 1126, 1129 (10th Cir. 2007). Interpreting the FMIA's plain language, the Supreme Court has concluded that its "preemption clause sweeps widely [and] prevents a State from imposing any additional or different—even if non-conflicting—requirements." *Harris*, 565 U.S. at 459.

The FMIA's structure and legislative purpose reinforce the breadth of its preemption. In enacting the FMIA, Congress stated that it intended to establish a uniform, comprehensive regulatory framework governing the production, labeling, and marking of meat products. 21 U.S.C. § 602; *see Harris*, 565 U.S. at 459-60. Within this framework, the FMIA's labeling requirements are intended to establish uniform national standards to "benefit the consumer[s] and to enable [them] to have a correct understanding of and confidence in meat products purchased." *Fed. of Homemakers v. Hardin*, 328 F. Supp. 181, 184 (D.D.C. 1971); *accord* H.R. Rep. No. 1333, 90th Cong., 2d Session (1968) (legislative history of the identical PPIA labeling preemption clause noting that "[b]oth industry and consumers would benefit from greater uniformity of labeling requirements"). Allowing states to establish different standards would undermine this purpose of achieving national uniformity.

Under the FMIA, when FSIS approves a label, its approval has "preemptive effect over state-law claims that would effectively require the label to include different or additional markings." *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1316 (S.D. Fla. 2017) (quotation marks omitted). Thus, "any state law claim based on the contention that the labels are false or misleading is preempted, because such a claim

would require Plaintiff to show that information stated on the labels should have been presented differently (thus, imposing a different and/or additional labeling requirement than those found under the FMIA)." *Kuenzig* v. Kraft Foods, Inc., 2011 WL 4031141, at *7 (M.D. Fla. Sept. 12, 2011) (unpublished), *aff'd per curiam*, 505 Fed. App'x 939; *see Webb*, 418 F. Supp. 3d at 529 (same under the PPIA).

2. All of Plaintiffs' claims against Defendants' labels attempt to define "Product of the USA" differently than USDA does.

Here, all of Plaintiffs' challenges to the labels of Defendants' beef products rest on the theory that beef products may be labeled a "Product of the USA" only if the cattle are born, raised, *and* slaughtered in the United States. (App. Vol. I at 032-034, 050-055, 096-100, 116-121.) USDA disagrees however and has determined that "Product of the USA" may be used if the beef products are processed in the United States, even if they are born and raised elsewhere. Because Plaintiffs' claims attempt to establish a different legal requirement, they are expressly preempted, and the district court correctly dismissed them.

FMIA preemption applies to all state "requirements" that are not "equivalent" or "parallel" to the federal requirements. *Riegel v. Medtronic, Inc.,* 552 U.S. 312, 330 (2008); *see Harris*, 565 U.S. at 467 n.10 (noting that "equivalent" state provisions are allowed). Any state "rule of law that must be obeyed" is a "requirement" for purposes of preemption, regardless of whether it is created by a statute, regulation, or common law. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445 (2005). "Congress may preempt state

common law as well as state statutory law through federal legislation." *Rivera v. Phillip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005); *see Harris*, 565 U.S. at 467 n.10.

The list of cases applying FMIA (or PPIA) preemption to dismiss state-law claims brought against federally approved labels is long and uniform.[7]

Here, all of Plaintiffs' claims attempt to establish requirements for the use of "Product of the USA" on beef labels that are different from or in addition to the federal requirements, whether directly through injunctive relief or indirectly by seeking to

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[7] *See, e.g.*, *Kuenzig v. Hormel Foods Corp.*, 505 Fed. App'x 937, 938-39 (11th Cir. 2013) (unpublished) (plaintiff's claims were preempted by the FMIA and the PPIA where the defendants' labels complied with the federal labeling requirements and were preapproved by FSIS); *Webb*, 418 F. Supp. 3d at 529 ("As [d]efendant has fully complied with the federal requirements under the PPIA and the FSIS has approved the Products' label, the label claims cannot be construed, as a matter of law, as false or misleading"); *Craten v. Foster Poultry Farms Inc.*, 305 F. Supp. 3d 1051, 1060-61 (D. Ariz. 2018) (because failure-to-warn labels had been preapproved by FSIS, the plaintiffs "cannot challenge their adequacy under state tort law theories that would impose upon [defendant] marking or labeling requirements different from or in addition to those preapproved by the federal government"); *La Vigne*, 284 F. Supp. 3d at 507-11 (noting, among other things, that FSIS review "includes a determination of whether a label is false or misleading," so a jury finding for the plaintiffs "would directly conflict with the FSIS's assessment" and "introduce requirements in addition to or different from those imposed by" federal law (cleaned up)); *Phelps*, 244 F. Supp. 3d at 1316-18 ("FSIS's preapproval of a label 'must be given preemptive effect' over state-law claims that would effectively require the label to include different or additional markings." (citation omitted)); *Brower v. Campbell Soup Co.*, 243 F. Supp. 3d 1124, 1128-29 (S.D. Cal. 2017) (dismissing challenge to FSIS-approved labels where the plaintiff's theory would require a jury to "conclude that the labels should disclose more information or employ different language, [which] would introduce requirements in addition to or different from those imposed by the USDA"). *Accord Ranchers-Cattlemen Action Legal Fund v. USDA*, 2018 WL 2708747, at *8 (E.D. Wa. June 6, 2018) (unpublished) (entering summary judgment against challenge to USDA's implementation of country-of-origin labeling requirements because USDA's actions reflected Congress's intent).

impose damages for using the phrase as allowed by federal law. Thornton and Lucero's **UPA claims** are based on the theory that Defendants misled consumers by including "Product of the USA" statements on the federally approved labels and by "omitting information" on the labels "about the actual origination of the beef." (App. Vol. I at 051 (Thornton Compl. ¶¶ 53-55) and 117 (Lucero Compl. ¶¶ 56-58).) Thornton's **breach of warranty claim** alleges that the "Product of the USA" label statements constituted an express warranty "that [the] Products originated exclusively from domestic beef producers." (App. Vol. I at 053 (Thornton Compl. ¶¶ 63-66).) Thornton's **unjust enrichment claim** asserts that Defendants falsely labeled "imported Products" as "Products of the USA" to increase sales and prices. (App. Vol. I at 053-054 (Thornton Compl. ¶¶ 69-71).) And Lucero's unjust enrichment claim alleges that Defendants falsely labeled "imported Products" as "Products of the USA" so they could "increase profits while diminishing amounts paid to Plaintiff Lucero and the Class members for their cattle produced for beef." (App. Vol. I at 119 (Lucero Compl. ¶¶ 66-67).) Put simply, each of Plaintiffs' theories seeks to impose liability on Defendants for using labels that FSIS preapproved and for failing to include information that federal law did not require or authorize them to provide. Each of these theories is therefore preempted. (*See supra* at n.7 (citing cases).)

The district court also correctly concluded that the **antitrust claim** that Plaintiff Lucero sought leave to amend his Complaint to add is preempted, just as his other claims are. As the district court recognized, Lucero's antitrust claim is based on the

same theory as his UPA claim was, namely that Defendants violated New Mexico law by including "Product of USA" claims on their labels and by "omitting information about the actual origination of the beef in the Products." (App. Vol. II at 462-463 (Lucero Proposed Amended Complaint at ¶¶ 57-59); *see also* App. Vol. II at 567 (Order at 19).) Repackaging this same theory as a supposed antitrust claim does not save it from preemption, because courts do not "elevate form over substance" in applying preemption. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). "[W]hether the state law falls within the scope of the federal provision precluding state action" depends on "ordinary principles of statutory interpretation." *Boyz Sanitation Serv., Inc. v. City of Rawlins*, 889 F.3d 1189, 1198 (10th Cir. 2018). Here, as the district court correctly noted, the FMIA does not allow ***any*** state law to be used to impose labeling requirements different from or in addition to those imposed by the FMIA and its regulations.

Applying the FMIA preemption provision according to its express terms is particularly important here, because Plaintiffs are attempting to use New Mexico state law to reimpose labeling requirements that Congress and USDA abandoned after they triggered over $1 billion in international trade sanctions against the United States. (*See supra* at 9-12.) Allowing individual states to disrupt the uniform approach that the United States has taken would risk reigniting an international trade dispute and expose the United States to significant sanctions. This risk is precluded—it is

expressly preempted—by the FMIA, which expresses Congress's decision to set standards for beef labeling at the national level.[8]

Because all of Plaintiffs' causes of action seek to impose beef labeling standards in addition to and different from USDA's and to challenge product labels approved by USDA, those causes of action are expressly preempted by the FMIA.

3. Plaintiffs have no valid argument against FMIA preemption.

Plaintiffs' Appellant Brief includes a scattershot of arguments against FMIA preemption. Each of these arguments fails.

First, Plaintiffs argue that the FMIA preemption clause applies only to requirements for mandatory labeling claims (*e.g.*, product name and weight) but not to requirements for voluntary labeling claims (*e.g.*, "Product of the USA"). (Appellant Br. at 14-16, 26-27.) This argument is incorrect. As the district court explained, the plain language of 21 U.S.C. § 678—which provides that "labeling … requirements in addition to, or different than, those made under this chapter may not be imposed by any State"—applies to all USDA labeling requirements, including the requirements for claims that beef producers are given the right to choose whether to make. (App. Vol. II at 560.)

[8] Equally preempted is Plaintiffs' suggestion that the Court could thread the needle by allowing Defendants to label beef a "Product of the USA" only if it comes from cattle that were born, raised, and slaughtered in the United States, but not affirmatively requiring Defendants' labels to disclose the "origins" of *other* beef. (Appellant Br. at 17.) This is no less a requirement "different" from USDA's requirements. Canada and Mexico, however, have stated that this kind of voluntary COOL requirement would "guarantee" trade retaliation "because it would continue to discriminate against imported livestock." Country-of-Origin Labeling at 26.

This is consistent with the Supreme Court's observation that the FMIA preemption clause "sweeps widely," *Harris*, 565 U.S. at 459, as well as the underlying purpose of the FMIA's labeling requirements, which is to ensure consistency in labeling and to prevent the mislabeling or misbranding of meat products. *Hardin*, 328 F. Supp. at 184; *see* 21 U.S.C. § 607(d), (e); 9 C.F.R. § 317.8(a); 9 C.F.R. § 412.1(a); 58 Fed. Reg. 632 (Jan. 6, 1993). *Accord Jones v. Rath Packing Co.,* 430 U.S. 519, 528-32 (1977) (discussing USDA's extensive authority to decide and enforce "standards of accuracy in [meat] labeling" and concluding that California statutes imposing inequivalent labeling requirements "are pre-empted by federal law").

Many cases have therefore applied the FMIA's preemption clause (or the identical clause in the PPIA) to state-law challenges against voluntary labeling claims. *See Kuenzig,* 505 F. App'x 937 ("98% Fat Free" and "50 Calories"); *Phelps*, 244 F. Supp. 3d 1312 ("Natural" and "No Preservatives"); *Brower v. Campbell Soup Co.,* 243 F. Supp. 3d 1124 (S.D. Cal. 2017) ("Healthy"); *Webb*, 418 F. Supp. 3d 524 ("All Natural"); *Trazo v. Nestle USA, Inc.*, 2013 WL 4083218 (N.D. Cal. Aug. 9, 2013) (unpublished) ("Nutrition, Health and Wellness" claims); *Arnold v. Kroger Co.,* 45 N.E.3d 1092 (Ohio App. 2016) ("Humanely Raised"). Plaintiffs do not discuss, much less distinguish, these cases, and the district court correctly relied on them. (App. Vol. II at 557-559.)

The two unpublished federal district court decisions that Plaintiffs cite are inapposite because they involved different federal statutes with different preemption provisions. (Appellant Br. at 15-16 (citing *Parker v. J.M. Smucker*, 2013 WL 4516156, at

*4 (N.D. Cal. Aug. 23, 2013) (unpublished) (FDA preemption under the Federal Food, Drug and Cosmetic Act) and *Kao v. Abbot Laboratories, Inc.*, 2017 WL 5257041, at *4 (N.D. Cal. Nov. 13, 2017) (unpublished) (National Bioengineered Food Disclosure Act).) In both cases, moreover, the challenged statements had not been regulated or approved by the governing federal agency. *See J.M. Smucker*, 2013 WL 4516156, at *4 (noting FDA's "longstanding position not to adopt any regulations governing the term 'natural'"); *Kao*, 2017 WL 5257041, at *6 ("there are currently no NBFDS standards regarding GMO labeling, and thus no preemptive regulation"). Here, in contrast, USDA defined when "Product of the USA" may be used and approved Defendants' labels under that definition.

Second, Plaintiffs are incorrect in arguing that a presumption against preemption must be applied in interpreting § 678. (Appellant Br. at 6, 9-10, 23.) As both this Court and the Supreme Court have held, no such presumption applies to express preemption provisions:

> [W]hen a statute contains an express preemption clause, "we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."

EagleMed LLC v. Cox, 868 F.3d 893, 903 (10th Cir. 2017) (quoting *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016)).

Third, there is no risk of leaving "injured individuals … without ***any*** state or federal remedy" for misleading labeling. (Appellant Br. at 9 (emphasis added).) In

arguing otherwise, Plaintiffs mistake a failure to state a claim on the merits for the absence of a remedy. When the FMIA's deceptive-labeling requirements are violated, state-law remedies are allowed. *See* 21 U.S.C. § 678 (any State … may … exercise concurrent jurisdiction with the Secretary … for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded"). The cases Plaintiffs cite address the inapposite situation where there would be no remedy even if the law is violated. *See, e.g., Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251 (1984); *English v. General Elec. Co.*, 496 U.S. 72, 87-90 (1990). Here, Plaintiffs have no remedy only because they have alleged no violation of federal law.

Fourth, the FMIA's grant of concurrent enforcement jurisdiction to New Mexico does not allow it to create standards different from the federal standards. (Appellant Br. at 12-13, 27.) "[S]tates can [only] impose sanctions for violations of state requirements that are equivalent to the FMIA and the PPIA's requirements." *Kuenzig*, 2011 WL 4031141, at *4 (citing *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 746 (9th Cir. 1994)); *see Bates*, 544 U.S. at 442, 447 (construing similar language in 7 U.S.C. § 136v(b)). Because Plaintiffs are asking for standards that are different from the federal standards, their standards are not equivalent to the federal standards and are preempted. *Cf. id.* at 452-53 (a standard that "diverges from those set out" in the federal requirements is not "equivalent").

Finally, USDA did not lack authority to set the federal standards for when beef products may be labeled "Product of the USA." (Appellant Br. at 13-14, 31.) The FMIA

expressly gives USDA authority to regulate labeling claims about a product's origin, and USDA has exercised that authority for decades. 21 U.S.C. § 678; 9 C.F.R. § 317.8 (prohibiting labels that give "any false indication of origin"); *see also supra* 7-12 (discussing USDA's historical regulation of country of origin labeling through the Agricultural Marketing Services Act and under the FMIA, through FSIS). Plaintiffs cite no legal authority for their contrary view. They also cite no legal authority for their related argument that USDA's definition of "Product of the USA" is so outrageous that it can be ignored. (Appellant Br. 13-14 (imagining a scenario where USDA approved labeling a "package of dog meat" as beef).) Here, moreover, "Product of the USA" could reasonably have a range of meanings, and USDA has chosen among those meanings one that aligns with Congress's direction to apply "Product of the USA" in a way that complies with the United States' international trade obligations. This choice carries preemptive weight under the FMIA.

4. Plaintiffs' arguments based on other preemption statutes do not apply to the FMIA.

Many of Plaintiffs' preemption arguments are taken from cases interpreting the Federal Cigarette Labeling and Advertising Act ("FCLAA"). (*Id.* at 11-14, 18-22.) These cases provide no help in applying the FMIA because the FCLAA's preemption provision is materially different and more limited.

In contrast to the FMIA's broad preemption of ***any*** labeling requirement "in addition to, or different than" those imposed by federal law, 21 U.S.C. § 678, the

FCLAA's preemption clause applies only to advertising that addresses one particular topic: "smoking and health." 15 U.S.C. § 1334(b). In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-29 (1992), the Supreme Court concluded that, in the FCLAA, Congress intended to preempt only state-law regulations of advertising addressing the health consequences of smoking, not advertising addressing other topics. In all the tobacco cases Plaintiffs cite, the question thus was whether the advertisements were about "smoking and health" (and thus preempted) or something else (and thus not preempted).[9] There is no comparable question to be asked under FMIA preemption. If a state law imposes a "requirement" different from what USDA has required, it is preempted under the plain language of § 678.

[9] *See Mulford v. Altria Group, Inc.,* 506 F. Supp. 2d 733, 751-54 (D.N.M. 2007) (tobacco manufacturer's affirmative advertising claims that its cigarettes were "light" and had "lowered tar and nicotine" were not claims related to "smoking and health"); *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1201-02 (11th Cir. 2004) (statements involving the alleged addition of carcinogens to cigarettes were not related to smoking and health); *Johnson v. Brown & Williamson Tobacco Corp.*, 122 F. Supp. 2d 194, 203-04 (D. Mass. 2000) (similar); *In re Simon II Litig.* 211 F.R.D. 86, 141-43 (E.D.N.Y. 2002) (similar), vacated and remanded on other grounds by *In re Simon II Litig.*, 407 F.3d 125 (2d Cir. 2005); *Hill v. R.J. Reynolds Tobacco Co.*, 44 F. Supp. 2d 837, 839-40 (W.D. Ky. 1999) (similar); *Appavoo v. Phillip Morris Inc.,* 1998 WL 440036, at *3-4 (N.Y. Sup. Ct. July 24, 1998) (unpublished) (similar); *see also Penniston v. Brown & Williamson Tobacco Corp.*, 2000 WL 1585609, at *5-6 (D. Mass. June 15, 2000) (unpublished) (granting motion to dismiss for failure to plead fraud claim with particularity and declining to address FCLAA preemption argument).

B. Plaintiffs' Allegations About Advertising Conducted by Third Parties Does Not State a Claim Against Defendants.

In their opening brief, Plaintiffs argued in passing that, even if their labeling claims are preempted, they should still be allowed to challenge advertisements containing pictures of labels reflecting "Product of the USA." (Appellant Br. at 27-28.)

It appears that Plaintiffs may moot this issue on appeal by agreeing that they did not bring a claim against advertisements. That is the position they appeared to take in opposing the motion for leave to file an amicus brief, where they stated they "agree[d] with the proposed Amici with regard [sic] the thrust of their brief that the district court erred in reaching the false advertising claim." (Appellants' Resp. at 2 (Dec. 8, 2020).) Plaintiffs should address this in their reply.

Regardless of whether Plaintiffs concede the issue, this Court should affirm the dismissal of Plaintiffs' challenges to advertisements because they did not allege sufficient facts to state a claim against Defendants. *See Chouteau v. Enid Mem'l Hosp.*, 992 F.2d 1106, 1109 n.3 (10th Cir. 1993) (declining to address issue on appeal when "the four corners of the complaint" did not lay out the necessary allegations to raise the issue). Apart from a handful of uses of the word "advertising" that appear in context to refer to labels (*see* App. Vol. I at 032, 034, 036 (Thornton Compl. ¶¶ 1, 11 and Heading I) and App. Vol. I at 096, 100, 102 (Lucero Compl. ¶¶ 1, 13 and Heading I)), the Complaints each contain a single paragraph pasting images of labels and advertising—and these images show that the advertising was made by third-party

retailers, not by Defendants (App. Vol. I at 037-044, 102-110 (Thornton Compl. ¶ 24; Lucero Compl. ¶ 26).) The attribution of the advertising to third-party retailers is driven home by a final paragraph referring to "retailers who make the representations to the consumers." (App. Vol. I at 045, 111 (Thornton Compl. ¶ 27; Lucero Compl. ¶ 30).)

Because of these allegations, the district court correctly held that Plaintiffs did not allege that the advertisements were made by Defendants and therefore dismissed the claim against Defendants. (App. Vol. II at 559.)

On appeal, Plaintiffs never claim that Defendants made the challenged advertisements. Instead, their sole argument is that the district court *sua sponte* determined that the retailers were indispensable third parties and "abused its discretion" by "failing to consider the factors related to absence of an indispensable party." (Appellant Br. at 28-29.) This is incorrect because the district court did not dismiss the advertising claims for failure to join an indispensable third party; it dismissed them for failure to state a claim against Defendants. (App. Vol. II at 559-560.) No matter who was joined to the lawsuit, Plaintiffs still would not state a claim against Defendants because they did not allege that the advertisements were theirs. This case did not present a situation where "an absent party is necessary" for resolution of Plaintiffs' claims against Defendants. *Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999). Nor did

Plaintiffs' failure to join the third-party retailers in this suit preclude them from suing the retailers separately, which Plaintiff Thornton has now done.[10]

Because the district court did not dismiss the advertising claim for failure to join an indispensable party, it was not required to perform the "two-part analysis" Plaintiffs mention in their briefing. (Appellant Br. at 28-29 (citing *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407 (10th Cir. 1996) and *Davis ex rel. Davis v. United States*, 343 F.3d 1289 (10th Cir. 2003).)

Plaintiffs offer no tenable argument that the district court acted improperly in deciding that their Complaints failed to state a cause of action against Defendants for advertising. The district court's holding should be affirmed.

C. In the Alternative, All of Plaintiffs' Claims Fail for Additional Reasons.

If this Court agrees that (1) the FMIA preempts all of Plaintiffs' claims against the *labels* on the beef products, and (2) Plaintiffs did not state a claim against Defendants for other entities' *advertising*, those two holdings are sufficient to affirm the judgment for Defendants, and the Court need not address any other arguments.

In addition, however, all of Plaintiffs' claims fail for other reasons.

[10] On September 3, 2020, two weeks after filing this appeal, Plaintiff Thornton filed a state court lawsuit against two retailers alleging violations of the UPA, breach of express warranty, and unjust enrichment based on the retailers' advertising of beef as being a "Product of the USA." *See generally Thornton v. the Kroger Co. & Albertson's*, Case No. 1:20-cv-01040-JB-LF, U.S. District Court for the District of New Mexico, Docket 1 (Notice of Removal).

1. Defendants' federally approved labels fall within the safe-harbor provision of the New Mexico Unfair Practices Act.

Lucero conceded in the district court that his New Mexico "UPA claims as a competitor are not actionable under [the UPA]," and he abandoned those claims in his motion to amend his Complaint. (App. Vol. II at 362-363, 436.) Thornton did not abandon her UPA claim, but it fails because Defendants' labels were approved by USDA and thus fall within the UPA's regulatory safe harbor.[11]

The plain language of the safe-harbor provision limits the UPA's reach:

> Nothing in the Unfair Practices Act shall apply to **actions or transactions expressly permitted under laws administered by a regulatory body of New Mexico or the United States**, but all actions or transactions forbidden by the regulatory body, and about which the regulatory body remains silent, are subject to the Unfair Practices Act.

N.M. Stat. Ann. § 57-12-7 (1999) (emphasis added).

Courts in New Mexico apply a two-part test to determine whether the safe harbor applies, asking whether (1) the conduct at issue is "subject to regulation by an appropriate state or federal agency," and (2) the specific challenged action "is in fact permitted by the applicable law or regulation." *See, e.g.*, *Mulford v. Altria Grp., Inc.*, 506 F. Supp. 2d 733, 757-58 (D.N.M. 2007) (citation omitted).

Here, the district court correctly concluded that both parts of the test are met. First, the labeling of meat products is subject to regulation by USDA and FSIS. (App. Vol. II at 563.) Second, the "Product of the USA" claims that Plaintiffs challenge were

[11] The safe harbor would also bar Lucero's UPA claims if they were not abandoned.

specifically permitted by USDA's regulations and FSIS's approval of Defendants' labels. (*Id.*) Hence, the regulatory safe harbor applies, and Plaintiffs' UPA claim fails as a matter of law.

The district court's analysis directly follows the approach this Court took in *Coll v. First American Title Insurance Co.*, 642 F.3d 876 (10th Cir. 2011). There, the plaintiff alleged that insurers had engaged in price-fixing in violation of several laws, including the New Mexico UPA. *Id.* at 883. This Court affirmed dismissal of the UPA clams because the insurers had filed their rates with the superintendent of insurance, and the superintendent had approved them. *Id.* at 900. The safe harbor therefore applied, just as it does here.

Neither case that Plaintiffs cite addressed a challenge to conduct specifically authorized by a regulator. At issue in *Stratton v. Gurley Motor Co.*, 737 P.2d 1180 (N.M. Ct. App. 1987), was a car dealership's practice of accepting rebates from automobile insurers without disclosing them to vehicle purchasers. *Id.* at 1182. The court found that the alleged regulator did not exercise even a "modicum of oversight" concerning that practice. *Id.* at 1184. The facts in *Ashlock v. Sunwest Bank of Roswell, N.A.*, 753 P.2d 346 (N.M. 1988), are even further afield. There, the parties did not cite "any federal statute or regulation" showing any "intention of Congress or the federal regulatory

branch to regulate" the challenged conduct "to any extent." *Id.* at 349.[12] Unlike in *Stratton* and *Ashlock*, here the very conduct Plaintiffs challenge was approved by the regulator. The safe-harbor provision applies.

2. Thornton's warranty claim fails for lack of pre-suit notice and lack of privity.

On appeal, Thornton concedes that her breach of warranty claim was properly dismissed but argues that the dismissal should have been without prejudice. (Appellant Br. 40.) That is incorrect because a dismissal with prejudice "is appropriate" when "granting leave to amend would be futile," *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006), and here, amending would be futile for three reasons.

First, as demonstrated above, Thornton's warranty claim is preempted.

Second, Thornton never alleged that she gave the pre-suit notice required under New Mexico law or sought leave to amend to allege that she had. (*See* App. Vol. II at 565 ("Plaintiff Thornton did not plead or argue in her response that she filed a pre-suit notice.").) Thornton had at least three opportunities to allege pre-suit notice: (1) in her Complaint; (2) in her opposition to Defendants' motion to dismiss; and (3) through an amended pleading as a matter of course within twenty-one days of receiving

[12] Plaintiffs also cite *Campos v. Brooksbank,* 120 F. Supp. 2d 1271 (D.N.M. 2000) in passing. *Campos* stands for the unremarkable proposition that merely engaging in the practice of law, which is "regulated and licensed by" the state supreme court, is insufficient to fall within the UPA safe harbor. *Id.* at 1277-78.

Defendants' motion to dismiss under Rule 15(a)(1)(B). The district court thus reasonably concluded that Thornton was unable to remedy her pleading deficiency.

Third, Thornton was not in privity with Defendants, and although New Mexico, has removed the privity requirement for warranty claims based on negligence, *see Steinberg v. Coda Roberson Const. Co.*, 440 P.2d 798, 800 (N.M. 1968), it has neither removed that requirement for warranty claims based on contract nor indicated that it will remove it, *see Bellman v. NXP Semiconductors USA, Inc.*, 248 F. Supp. 3d 1081, 1150 (D.N.M. 2017). In the absence of clear guidance from the New Mexico Supreme Court, this Court should not remove the privity requirement on its own. *Amparan v. Lake Powell Car Rental Cos.*, 882 F.3d 943, 947-48 (10th Cir. 2018). As a result, because Plaintiff Thornton did not buy anything from Defendants (App. Vol. I at 034), her warranty claim against them fails for lack of privity. Defendant raised this argument below and the parties fully briefed it. (App. Vol. I at 202-203; App. Vol. II at 307-308, 397-399.) This Court may therefore affirm the district court judgment based "for any reason supported by the record." *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1032-33 (10th Cir. 2018), *as revised* (Apr. 13, 2018) (quotation marks omitted).

3. Plaintiffs' unjust enrichment claims fail because using federally approved labels is not unjust.

Plaintiffs' unjust enrichment claims fail for independent reasons beyond preemption.

As the district court correctly recognized, "[t]here is nothing unjust about using USDA approved labels." (App. Vol. II at 564.) Plaintiffs' unjust enrichment claims therefore fail to meet the required element of proving that Defendants knowingly benefitted at Plaintiffs' expense "in a manner such that allowance of the other [side] to retain the benefit would be unjust." *Ontiveros Insulation Co. v. Sanchez*, 3 P.3d 695, 698 (N.M. Ct. App. 2000).

Plaintiffs fall back on the broad principle that allows pleading in the alternative. (*See, e.g.*, Appellant Br. 37 (citing *In re Santa Fe Natural Tobacco Co. Mktg. & Sales Practices & Products Liab. Litig.*, 288 F. Supp. 3d 1087, 1257 (D.N.M. 2017).) But this is not a pleading-in-the-alternative scenario, because there is no alternative where Plaintiffs succeed on any claims against Defendants, including unjust enrichment. They fail to state a claim on any set of facts alleged in their Complaints.

4. Lucero's antitrust claim fails for lack of antitrust standing.

After Plaintiff Lucero recognized that he had no claim under the New Mexico UPA, he filed a motion to amend his complaint to assert a claim under the New Mexico Antitrust Act ("ATA"). (App. Vol. II at 435-467.) The district court denied the motion for futility because the ATA claim would be preempted. (App. Vol. II at 566.) As demonstrated above, that was correct. In addition, the district court held that Plaintiff Lucero did not suffer a cognizable antitrust injury. (App. Vol. II at 567-568.) This is also correct, and it is an additional reason to affirm.

At the outset, Lucero does not address the district court's ruling on antitrust injury in his opening brief. "The failure to raise an issue in an opening brief waives that issue." *United States v. Abdenbi*, 361 F.3d 1282, 1289 (10th Cir. 2004). For this reason alone, the denial of leave to assert the ATA claim must stand.

In addition, the district court's analysis was correct. "'An antitrust injury is an injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" (App. Vol. II at 568 (quoting *Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249, 1267 (10th Cir. 2006).) Injuries arising out of government-approved conduct—like Defendants' beef-labeling practices—cannot form the basis of any cognizable antitrust injury. *In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785, 791 (8th Cir. 2006). Plaintiff Lucero thus has not suffered any antitrust injury.[13]

5. Plaintiffs' advertising claims are conflict preempted.

If Plaintiffs had alleged that Defendants made the advertisements they challenge, rather than third parties, their claim still would have failed under conflict preemption.

[13] Defendants preserved several other arguments as to why Plaintiff Lucero's proposed ATA claim was futile, including (1) primary jurisdiction counsels deference to USDA; (2) the dormant foreign commerce clause prohibits the ATA claim; (3) Lucero is not an efficient enforcer of the ATA; and (4) Lucero did not allege any conspiracy in restraint of trade or monopolization under New Mexico law. (App. Vol. II at 487-494.) This Court may affirm on any of these bases as well. *Spring Creek Expl. & Prod. Co.*, 887 F.3d at 1032-33.

Under conflict preemption, state law must give way when it "'stands as an obstacle to the accomplishment of and execution of the full purposes and objectives of Congress.'" *Arizona*, 567 U.S. at 406 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

As the district court observed, the advertisements Plaintiffs challenge "appear to merely be a picture of the USDA approved label reflecting 'Product of the USA.'" (App. Vol. II at 559.) Plaintiffs never argue otherwise.

Although Plaintiffs never clearly explain why their advertising claims supposedly are not preempted, they seem to be arguing that FMIA preemption never extends to advertising, because advertising is not labeling. That argument is surely too broad. Conflict preemption bars state laws that are an "obstacle to the accomplishment and execution of the full purposes of Congress." *Hines*, 312 U.S. at 67. "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purposes and intended effects." *Crosby*, 530 U.S. at 373. Here, the FMIA's preemption clause furthers Congress's goal of creating uniform meat-labeling standards so that consumers can have a consistent understanding of what labeling terms mean. (*See supra* 7-12; *see also* H.R.Rep. No. 1333, 90th Cong., 2d Session (1968) (legislative history of the preemption clause noting "[b]oth industry and consumers would benefit from … greater uniformity of labeling requirements").)

Plaintiffs concede that Defendants' beef qualifies as "Products of USA" under USDA's definition and that FSIS concluded that it was accurate and not misleading to label that beef as "Product of the USA." (Appellant Br. at 15; App. Vol. II at 556-557, Order at 8-9 (listing Plaintiffs' factual concessions).) Plaintiffs' theory depends on the fiction that the same term means something different in advertisements than it does on USDA-approved labels, even if presented identically.

Numerous courts have held that this type of theory is preempted because it would undermine Congress's intent to create uniform standards for describing meat products.[14] *See, e.g., Kuenzig*, 505 Fed. App'x at 939 ("Because Kuenzig had not shown [that] Hormel's label was unfair or deceptive on its own, the label could not have become unfair or deceptive simply by virtue of being pictured in an advertisement"); *Phelps*, 244 F. Supp. 3d at 1316 n.2; (similar); *accord Organic Consumers Ass'n v. Sanderson Farms, Inc.*, 284 F. Supp. 3d 1005, 1014 (N.D. Cal. 2018); *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 549 F. Supp. 2d 708, 720 (D. Md. 2008).

That is the correct result here as well. Plaintiffs cannot prevail on their advertising claims without proving that USDA's "Product of the USA" standard is wrong, and that would conflict with and frustrate USDA's efforts to promote uniform labeling.

[14] The FTC also recognizes the importance of harmonizing its advertising enforcement program with USDA's labeling regulations and accords significant deference to USDA's labeling standards in determining whether advertisements are false and misleading. *See FTC Enforcement Policy Statement on Food Advertising* (1994), *available at* https://www.ftc.gov/public-statements/1994/05/enforcement-policy-statement-food-advertising.

Plaintiffs' advertising claims are thus preempted. *Kuenzig*, 505 Fed. App'x at 939; *Phelps*, 244 F. Supp. 3d at 1316 n.2.

Plaintiffs do not meaningfully dispute any of this. Instead, Plaintiffs cite to *Voss* for the proposition that the FMIA can never preempt state regulation of advertising for meat products. (Appellant Br. at 27-28). *Voss* says no such thing. *Voss* involved a challenge to a California statute imposing restrictions around when the term "fresh" could be used on labels and advertisements for poultry. 44 F.3d at 742-43. The plaintiffs in that case asserted two arguments: (1) the FMIA expressly preempted the statute's labeling requirements because they were different from USDA's labeling requirements; and (2) the entire statute was therefore invalid because its advertising requirements were not severable from its preempted labeling requirements. *Id.*

The Ninth Circuit agreed that the California statute's labeling requirements were expressly preempted by the FMIA. *Id.* at 746-47. However, after applying California rules of statutory interpretation, the Ninth Circuit concluded that the statute's advertising requirements were severable and thus could not be invalidated under the theory the plaintiff asserted. *Id.* at 748-49. The Ninth Circuit did not, however, address whether or under what circumstances the statute's advertising requirements could be conflict preempted. Therefore, at most, *Voss* supports the district court's determination that Plaintiffs' labeling claims are expressly preempted and is silent on the issue of whether Plaintiffs' advertising claims are conflict preempted.

Plaintiffs also argue in passing that the Court should presume that Congress did

not intend for the FMIA preemption clause to reach advertising because the preemption clause only refers to "marking, labeling, packaging or ingredient requirements." (Appellant Br. at 12.) Plaintiffs misstate the law. "[T]he existence of an 'express preemption provisio[n] does ***not*** bar the ordinary working of conflict preemption principles' or impose a 'special burden' that would make it more difficult to establish the preemption of laws falling outside the clause." *Arizona*, 567 U.S. at 406 (emphasis in original) (quoting *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 869-72 (2000).) The relevant point remains the same—if states can ban the use of federally approved label terms in ads for beef products, this would stand as an obstacle to accomplishing Congress's purposes of making the regulated label language the accepted source for consumer information.

The *amici* point out that some courts have declined to find that false advertising claims were conflict preempted by the FMIA or the PPIA where there were allegations that "language that is technically and scientifically accurate on a label [was] manipulated in an advertisement to create message that is false and misleading." (Amici Br. at 19-20 (citing cases).) The cases *amici* cite agree, however, that a state cannot prohibit an ad using the same term, with the same meaning, as FSIS approved for use on the label "without contradicting or interfering with USDA authority." *Organic Consumers*, 284 F. Supp. 3d at 1014; *accord Sanderson Farms*, 549 F. Supp. 2d at 720. The on-point cases say that such restrictions are conflict preempted. *Kuenzig*, 505 Fed. App'x at 939; *Phelps*, 244 F. Supp. 3d at 1316 n.2. So too here.

Thus, if the Court reaches the district court's conflict preemption ruling, that ruling should be affirmed.

6. The district court correctly did not invoke primary jurisdiction because Plaintiffs' claims fail on the merits.

Because the district court dismissed Plaintiffs' claims on the merits, it correctly exercised its discretion not to stay the case or refer it to USDA under the doctrine of primary jurisdiction. (App. Vol. II at 562.) Whether to stay or refer a case to an agency is a discretionary decision, and the district courts are charged with making that decision in the first instance. *See Reiter v. Cooper*, 507 U.S. 258, 268–69 (1993); *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1239 (10th Cir. 2007). This Court reviews that decision only for abuse of discretion. *Id.* Where, as here, the plaintiffs' claims fail on the merits, it is correct to dismiss the claims rather than refer them to the agency. *Id.* at 1238 (doctrine of primary jurisdiction is only "'applicable to claims properly cognizable in court'") (quoting *Reiter*, 507 U.S. at 268). Thus, this Court should affirm the decision of the district court.[15]

ORAL ARGUMENT STATEMENT

Pursuant to 10th Cir. L. R. 28.2(C)(2), Defendants state that they do not believe oral argument is required to affirm the district court and therefore do not request it. If

[15] If this Court were to find that the merits arguments are not dispositive, the proper course would be to remand for the district court to consider primary jurisdiction in the first instance.

the Court grants Plaintiffs' request for oral argument, however, Defendants request that they be given argument time equal to that of Plaintiffs.

CONCLUSION

The judgment for Defendants should be affirmed.

Dated: February 16, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that Appellee's Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 10,601 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Appellee's Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2008 in 14-point Garamond.

February 16, 2021 */s/ Aaron D. Van Oort*

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021, I electronically filed the foregoing document via the Appellate CM/ECF system, causing all parties of record to be served electronically.

/s/ Aaron D. Van Oort

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the Tenth Circuit ECF User's Manual, Section II.J, I hereby certify, with respect to the foregoing document, that:

1) All required privacy redactions have been made per 10th Cir. R. 25.5;

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3) The digital submission has been scanned for viruses with the most recent version of Crowd Strike Windows Sensor 6.14.12806.0 and, according to this program, is free of viruses.

/s/ Aaron D. Van Oort

STATUTORY ADDENDUM

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§ 678. Non-Federal jurisdiction of federally regulated matters; prohibition of additional or different requirements for establishments with inspection services and as to marking, labeling, packaging, and ingredients; recordkeeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement[1] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

(Mar. 4, 1907, ch. 2907, title IV, § 408, as added Pub. L. 90–201, § 16, Dec. 15, 1967, 81 Stat. 600.)

§ 679. Application of Federal Food, Drug, and Cosmetic Act

(a) Authorities under food, drug, and cosmetic provisions unaffected

Notwithstanding any other provisions of law, including section 1002(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 392(a)), the provisions of this chapter shall not derogate from any authority conferred by the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.] prior to December 15, 1967.

(b) Enforcement proceedings; detainer authority of representatives of Secretary of Health and Human Services

The detainer authority conferred by section 672 of this title shall apply to any authorized representative of the Secretary of Health and Human Services for purposes of the enforcement of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.] with respect to any carcass, part thereof, meat, or meat food product of cattle, sheep, swine, goats, or equines that is outside any premises at which inspection is being maintained under this chapter, and for such purposes the first reference to the Secretary in section 672 of this title shall be deemed to refer to the Secretary of Health and Human Services.

(Mar. 4, 1907, ch. 2907, title IV, § 409, as added Pub. L. 90–201, § 16, Dec. 15, 1967, 81 Stat. 600; amended Pub. L. 96–88, title V, § 509(b), Oct. 17, 1979, 93 Stat. 695; Pub. L. 111–31, div. A, title I, § 103(*o*), June 22, 2009, 123 Stat. 1838.)

REFERENCES IN TEXT

The Federal Food, Drug, and Cosmetic Act, referred to in subsec. (b), is act June 25, 1938, ch. 675, 52 Stat. 1040, as amended, which is classified generally to chapter 9 (§ 301 et seq.) of this title. For complete classification of this Act to the Code, see section 301 of this title and Tables.

AMENDMENTS

2009—Subsec. (a). Pub. L. 111–31 substituted ''section 1002(b)'' for ''section 902(b)''.

CHANGE OF NAME

''Secretary of Health and Human Services'' substituted for ''Secretary of Health, Education, and Welfare'' in subsec. (b) pursuant to section 509(b) of Pub. L. 96–88, which is classified to section 3508(b) of Title 20, Education.

§ 679a. Safe Meat and Poultry Inspection Panel

(a) Establishment

There is established in the Department of Agriculture a permanent advisory panel to be known as the ''Safe Meat and Poultry Inspection Panel'' (referred to in this section as the ''panel'').

(b) Duties

(1) Review and evaluation

The panel shall review and evaluate, as the panel considers necessary, the adequacy, necessity, safety, cost-effectiveness, and scientific merit of—

(A) inspection procedures of, and work rules and worker relations involving Federal employees employed in, plants inspected under this chapter;

(B) informal petitions or proposals for changes in inspection procedures, processes, and techniques of plants inspected under this chapter;

(C) formal changes in meat inspection regulations promulgated under this chapter, whether in notice, proposed, or final form; and

(D) such other matters as may be referred to the panel by the Secretary regarding the quality or effectiveness of a safe and cost-effective meat inspection system under this chapter.

(2) Reports

(A) In general

The panel shall submit to the Secretary a report on the results of each review and evaluation carried out under paragraph (1), including such recommendations as the panel considers appropriate.

[1] So in original. Probably should be ''requirements''.