IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 20-2124

ROBIN THORNTON and MICHAEL LUCERO

Plaintiffs-Appellants

v.

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

Defendants-Appellees

On Appeal from the United States District Court
For the District of New Mexico (Hon. Kea W. Riggs)
District Case No. 1:20-CV-105 *Consolidated With* 1:20-CV-106

APPELLANT'S OPENING BRIEF

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Oral Argument Requested

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I. STATEMENT OF PRIOR RELATED APPEALS

There are no prior related appeals.

II. JURISDICTIONAL STATEMENT

The United States District Court for the District of New Mexico had subject matter jurisdiction and personal jurisdiction of the underlying case pursuant to 28 U.S.C. §§ 1331 and 1343.

This Court has jurisdiction over the appeal based on 28 U.S.C. § 1291. The District Court entered its *Memorandum Opinion and Order* and *Judgment* on August 27, 2020 (Aplt App 549-570) granting Appellees motions to dismiss in both of the consolidated matters. Appellant timely noticed this appeal on August 27, 2020.

III. STATEMENT OF THE ISSUES

Does the District Court's decision applying express preemption conflict with the U.S. Supreme Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (plurality opinion), and the unchallenged decision from the District of New Mexico applying *Cipollone* in *Mulford v. Altria Group, Inc.*, 506 F. Supp. 2d 733, 749–50 (D.N.M. 2007)? Further does the District Court's decision ignore the clearly stated purpose of Congress in the Federal Meat Inspection Act contrary to the prescription of the U.S. Supreme Court in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)? Additionally, did the District Court's application of the New Mexico state law safe harbor provision to a guidance

document which is not a regulation conflict with Congress' stated purpose under the Federal Meat Inspection? Furthermore, did the District Court err in dismissing an unjust enrichment claim based on allegations that intentional misrepresentation made to consumers led to billions of dollars in unjustly garnered profits at the expense of Appellant? Finally did the district court abuse its discretion in denying the amendment to address the antitrust claims of Appellant Lucero?

IV. STANDARD OF REVIEW

This Court reviews *de novo* the grant of a motion to dismiss under Rule 12(b)(6). *Ayala v. Joy Mfg. Co.*, 877 F.2d 846, 847 (10th Cir.1989)); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir.1991) ("We review *de novo* a district court's dismissal of a complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim for which relief could be granted."). Whether state law is preempted by federal law is a conclusion of law reviewed *de novo*. *Panhandle E. Pipeline Co. v. Oklahoma ex rel. Comm'rs of Land Office*, 83 F.3d 1219, 1225 (10th Cir.1996). The Tenth Circuit reviews for an abuse of discretion the district court's denial of a motion to file an amended complaint. *Cohen v. Longshore*, 621 F.3d 1311, 1313 (10th Cir. 2010).

V. STATEMENT OF THE CASE

This is a consolidation of two class actions. One was brought primarily under the New Mexico Unfair Practice Act while the other alleged antitrust violations

under the New Mexico Antitrust Act for the fraudulent labeling and false advertising of beef not of domestic origin in order to deceive consumers for profits and to enable anti-competitive market pressures on domestic beef producers. The District Court granted the Motions to Dismiss with prejudice and denied Plaintiff Lucero's proposed amendment as futile. (Aplt App 566-568).

Appellants filed proposed class-action complaints in state court in January of 2020, one brought on behalf of one class and one subclass, comprising consumers who purchased beef products that are deceptively labeled and marketed (Aplt App 032-55) and another for farmers and ranchers harmed by the anti-competitive scheme enabled by the fraudulent labeling. (Aplt App 096-121) Country of Origin Labeling (COOL) is a mandatory U.S. labeling law enforced by the U.S. Department of Agriculture (USDA) requiring retailers to notify their customers with information regarding the source of certain foods, also referred to as covered commodities. The Farm Security and Rural Investment Act of 2002 (2002 Farm Bill), the 2002 supplemental Appropriations Act (2002 Appropriations), and the Food, Conservation and Energy Act of 2008 (2008 Farm Bill) amended the Agricultural Marketing Act of 1946 (Act) to require retailers to notify their customers of the country of origin of covered commodities. However, Appellees seized on the removal of beef and pork from COOL in 2015 to engage in fraudulent mislabeling of non-domestically born, raised or in most cases slaughtered beef. (Aplt App 032-

34, 36-47, 97-100, 101-113). Appellants' complaints alleged violations of the New Mexico Unfair Practices Act, Breach of Express Warranty, and Unjust Enrichment (Aplt App 050-54, 116-119) and in the case of the proposed amended complaint for Appellant Lucero, a violation of the New Mexico Antitrust Act (Aplt App 462-464). Both of the cases were removed to federal court February 5, 2020, and then consolidated on March 11, 2020. Appellees moved for dismissal on several different legal theories, and after briefing the Court ruled in favor of Appellees' motions to dismiss and against Appellant Lucero's Motion to Amend without holding oral argument. (Aplt App 549-568)

VI. SUMMARY OF THE ARGUMENT

The district court's application of guidance preemption to dismiss the cases and to deny the amendment to address Appellant Lucero's antitrust claims results in a reading of 21 U.S.C. § 678 that renders Congress' stated intent, found at 21 U.S.C. § 602, to prevent mislabeling of meat products and anticompetitive behaviors that harm America's farmers and ranchers, a complete nullity.

VII. ARGUMENT

A. The District Court Erred by Construing 21 U.S.C. § 678 so Broadly that it Nullifies the Clearly Stated Congressional Intent of 21 U.S.C. § 602 and Conflicts with the Supreme Court's Holding in *Cipollone* and *Mumford's* Application.

The District Court's application of precedent arising from tobacco litigation erroneously oversimplified complex principles of preemption and federalism.

Appellant demonstrated below that an exception to preemption doctrines applies here. The District Court unduly deferred to agency guidance that directly conflicts with statutorily stated purpose of an Act of Congress. Such analysis, if adopted by this Court, would bless mega corporations acting fraudulently to mislead consumers and destroy industry feasibility. Moreover, it would bless market distorting deceptive behavior that runs counter to the intent of the Congress. Congressional intent is the "touchstone" of preemption analysis.

1. Standards Relating to Preemption

When faced with assertions of express preemption, a court must determine the scope of the preemption that Congress intended. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (stating that "the purpose of Congress is the ultimate touch-stone in every preemption case"). "Congress may indicate preemptive intent through a statute's express language or through its structure and purpose." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). When the text of a preemption clause is susceptible to more than one plausible reading, courts ordinarily "accept the reading that disfavors preemption." *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005). Preemption arguments are analyzed under rule 12(b)(1). *See Cedars-Sinai Med. Center v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007) (applying rule 12(b)(1) when reviewing motion to dismiss asserting preemption defense).

Addressing express preemption requires a court to determine the scope of the preemption. That task entails scrutinizing the preempting words in light of two presumptions. First,

> [i]n all preemption cases, and particularly in those in which Congress has legislated ... in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Medtronic, Inc. v. Lohr, 518 U.S. at 485 (citations omitted) (internal quotation marks omitted). Second, "[t]he purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr*, 518 U.S. at 485 (citations omitted) (internal quotation marks omitted).

> Congress' intent, of course, primarily is discerned from the language of the preemption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Medtronic, Inc. v. Lohr, 518 U.S. at 486(citations omitted)(internal quotation marks omitted).

As an illustration of how the Supreme Court of the United States analyzes a preemptive scheme, in *Bruesewitz v. Wyeth, LLC*, 562 U.S. 223 (2011), the Supreme Court of the United States concluded that the National Childhood Vaccine Injury Act, 42 U.S.C.A. §§ 300aa-11(c)(1), 300aa-13(a)(1)(A), preempted all design-defect

claims that the plaintiffs seeking compensation brought against vaccine manufacturers for injury or death alleged to have resulted from certain vaccine side effects. *See Bruesewitz v. Wyeth*, LLC, 562 U.S. at 230. The Supreme Court observed that Congress passed this act to "stabilize the vaccine market and facilitate compensation." *Bruesewitz v. Wyeth, LLC*, 562 U.S. at 228. This federal statutory scheme provided for "[f]ast, informal adjudication," allowing "[c]laimants who show that a listed injury first manifested itself at the appropriate time are prima facie entitled to compensation." *Bruesewitz v. Wyeth, LLC*, 562 U.S. at 228. Additionally,

> [a] claimant may also recover for unlisted side effects, and for listed side effects that occur at times other than those specified in the Table, but for those the claimant must prove causation. Unlike in tort suits, claimants under the Act are not required to show that the administered vaccine was defectively manufactured, labeled, or designed.

562 U.S. at 228-229 (footnote omitted). The Supreme Court also noted that the statutory scheme had relatively favorable remedy provisions. *See* 562 U.S. at 229. "The quid pro quo for this, designed to stabilize the vaccine market, was the provision of significant tort-liability protections for vaccine manufacturers," such as limiting the availability of punitive damages and expressly eliminating liability for a vaccine's unavoidable, adverse side effects. 562 U.S. at 229. The statutory text at issue in *Bruesewitz v. Wyeth, LLC* read as follows:

> No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the

> vaccine was properly prepared and was accompanied by proper directions and warnings.

562 U.S. at 230 (quoting 42 U.S.C. § 300aa-22(b)(1)). The Supreme Court emphasized the use of the word "unavoidable" in reaching its conclusion that the statute preempted design defect claims resulting from unavoidable side effects. *Bruesewitz v. Wyeth, LLC*, 562 U.S. at 231-232. The Supreme Court also found it persuasive that the statutory text directly mentioned other aspects of product liability law. *See Bruesewitz v. Wyeth, LLC*, 562 U.S. at 232-233.

When Congress legislates in a field traditionally occupied by the states (such as protecting consumers from deceit and fraud,) "[courts] start with the assumption that the historic police powers of the States were not to be superseded by federal law and agency action] unless that was the clear and manifest purpose of Congress." *Pacific Gas & Electric Company v. Energy Resources Comm'n,* 461 U.S. 190,206 (1983) *(quoting Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218,230 (1947)). Put differently. "[p]reemption of state law by federal regulation is not favored 'in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 317 (1987) (*Quoting Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142 (1963)). Preemption "is not lightly to be presumed." *California Federal Savings and Loan Ass'n v. Guerra,* 479 U.S. 272,272 (1987). "[S]tate and local

regulation of health and safety matters can constitutionally coexist with federal regulation [because] the regulation of health and safety matters is primarily and historically a matter of local concern." *Hillsborough County, FL v. Automated Medical Laboratories,* 471 U.S. 716. 719 (1985). This presumption against preemption applies in the instant cases, because preemption here would displace the historic power of the states to protect the health and welfare of their citizens. *See e.g.. Medtronic, Inc. v. Lohr,* 518 U.S. 470, 484-86 (1996).

Further, as in this case. where the allegedly preemptive federal "regulatory" scheme does not itself provide any remedy for injured individuals, preemption would leave them without any state or federal remedy. In such situations. the Supreme Court has ascribed preemptive intent to Congress only in the most compelling circumstances. *See English v. General Electric Co.,* 496 U.S. 72. 87-90 (1990); *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238,251 (1984); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers' Ins. Co.,* 514 U.S. 645. 654 (1995). Because consumer protection law is a field traditionally regulated by the states, very compelling evidence of an intent to preempt is required in this area. *See. e.g., Envtl. Encapsulating Corp. v. City of New York,* 855 F.2d 48, 58 (2n Cir. 1988). Moreover, the Supreme Court has cautioned:

> To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever an agency decides to step into a field, its regulations will be exclusive.

> Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Hillsborough County Fla. v. Automated Med. Labs. Inc., 471 U.S. 707, 717 (1985).

In addition, the "presumption that the traditional police powers of states are not displaced by federal law" is based on "two practical reasons." *Chemical Specialties Manufacturers Association, Inc. v. Allenby.*, 958 F.2d 941, (9th Cir. 1992)(*cert. denied*, 506 U.S. 825(1992)). First, "Congress has the power to make preemption clear in the first instance" by including a specific provision in the statute defining the preemptive reach of any legislation. *Id.* Second, "if the Court erroneously finds preemption, the State can do nothing about it, while if the court errs in the other direction, Congress can correct the problem." *Id.* (citations omitted). *See also* Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies,* 77 Boston Univ. Law Rev. 559,627 (1997). For this reason, the presumption can be overcome only by a showing of clear and manifest Congressional intent, which is the "ultimate touchstone" of any preemption analysis. *Cipollone,* 505 U.S. at 516.

Although it is not binding on this Court, it bears noting that one Judge in the District of New Mexico synthesized various principals regarding preemption and explained: "The fact that Congress provided an express preemption clause supports a reasonable inference that it did not intend to preempt matters outside the clause, and thus, the task of courts 'is to identify the domain expressly pre-empted' by the

clause." *Mulford v. Altria Group, Inc.*, 506 F. Supp. 2d 733, 749 (D.N.M. 2007) *citing Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001). Moreover, Judge Vazquez has explained in *Mulford* that the derivative express preemption statute in the FCLAA that

> [u]nlike the first theory of fraudulent misrepresentation, the Court ruled that the predicate of the second theory was a state-law duty not to make false statements of material fact or to conceal such facts. *Id.* The Court concluded that claims for false representation "are predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Id.* at 528–29, 112 S.Ct. 2608. The Court also stated that state-law intentional fraud claims do not create diverse and confusing standards because they rely on the single, uniform standard of falsity. *Id.* at 529, 112 S.Ct. 2608.

Mulford v. Altria Group, Inc., 506 F. Supp. 2d 733, 750 (D.N.M. 2007), *citing Cipollone* at 528–29. Judge Vazquez' analysis is compelling. Under these standards, as discussed more fully below, in this case involves intentional misrepresentation of material facts to the consumers, it was error for the District Court to find preemption.

2. Under Applicable Law, the FMIA does not preempt Appellant's Claims.

This case arises from allegations that Appellees have knowingly made affirmative and voluntarily false statements in both labeling and advertising that certain of their beef products are "Products of the US" or similar impressions of actual domestic origin when a significant portion of the beef they sell to retailers who sell to consumers under this false impression is of foreign origin. In *Cipollone,* the Supreme Court examined the preemption provision of the FCLAA, 15 U.S.C. *§*

1334(b), and held that certain state law causes of action were preempted under the Act, while others were not. Importantly, however, the Court explicitly held that "[f]raudulent-misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are **not** preempted by *§* 5(b)." (Emphasis added.) *Id.* at 528. With that case law in mind, the preemption provision of the FMIA being asserted in this matter provides as follows:

> 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[] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

21 U.S.C.A. § 678. (footnote omitted). This preemption provision expressly preserves a state's ability to "exercise concurrent jurisdiction" to prevent adulteration or misbranding. Appellant has alleged misbranding. For example, Appellees are alleged to be lying about the country of origin of their products, intentionally misleading consumers and, contrary to the purposes of the federal

scheme at issue, engaging in unfair competition by asserting that their products are something they are not. By comparison, the FCLAA preemption statute evaluated by the Supreme Court in *Cipollone* states*:*

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. §1334(b). With respect to whether state common law claims are preempted under this provision of the FCLAA, the *Cipollone* Court noted that "the common law is not of a piece," and while some state common law causes of action are preempted by the Labeling Act, others are not. *Id.* at 523. Following *Cipollone*, the Honorable Judge Martha Vazquez in *Mulford* recognized the distinction between state causes of action that fall to a preemption statute and those that remain effective. With respect to the FCLAA, duties related to "smoking and health" were preempted, while causes of action arising from the duty not to deceive were not. Similarly, the FMIA's preemption rule applies to labeling, but reserves a space for the state regulation of misbranding and adulteration. It is facile to contend (as Appellees do) that Appellees may place a label on a package of imported meat that completely misdescribes (i.e., misbrands) the contents within the packaging, yet escape liability by pointing to the fact that the label was federally approved. The applicable federal agency may have approved the label, but that label must describe truthfully what is contained within the package. If the label were slapped on a package of dog meat,

would a preemption argument for UPA violations be preempted because the label was one that met federal approval for beef? The notion seems preposterous, yet the district court's logic would carry through to such a scenario, with the distinction being only one of degree, not substance. If the package does not contain what it says it contains, then there is a misbranding problem and, as stated in the Complaint, an un-preempted violation of the UPA that is actionable under state law.

The district court was plainly wrong in deciding that the state causes of action in this case should be preempted, for two independent reasons. First, of the many cases the district court relied on in favor of preemptive labeling authority, not one involves an agency's approval of a label that is outside of the "substance and scope" of the agency's statutory mandate—such as the importation status of the meat. Notably, though it was ignored by the district court, *Jones v. Rath Packing Co*., 430 U.S. 519, 97 S. Ct. 1305, (1977) addressed the measuring and labeling of the weight of meat, a key concern of the Federal Meat Inspection Act (FMIA) since its inception. On the other hand, the cases cited by Appellees in favor of preemption, including *Ranchers-Cattlemen Action Legal Fund v. United States Dep't of Agric.*, 2018 WL 2708747, (E.D. Wash. June 5, 2018) fail to discuss a voluntary aspect of a label that is outside of the contents of the beef product, its measurement or that it came from a USDA FSIS inspected facility which address food safety and humane handling at the facility. Here, Appellants' stated a cause of action for a voluntarily

addition of a false statement of fact with respect to the labels. Such label for which Appellants sued are precisely the sorts of things the FMIA proscribes. To put it plainly, one of the state law duties Appellant alleges that Appellees violate includes a requirement that Appellees must not misbrand. Such a duty is also expressly included in the FMIA. A UPA lawsuit alleging misbranding and deceptive and false statements about food products therefore is allowable under the FMIA's preemption provision and under case law analyzing the similar provision of the FCLAA. Thus, it cannot be overstated that FSIS does not require Appellees to label their beef products with a country of origin. Rather, FSIS permissively allows and approves a label containing the statement pursuant to a guidance document that directly conflicts with Congress' clearly stated purpose for enacting the FMIA. In this regard, this case is entirely analogous to *Parker v. J.M. Smucker Co.*, 2013 WL 451656 (N.D. Cal. Aug. 23, 2013):

> Defendant ... argu[es] that whatever the basis of Plaintiff's claim, her goal is ultimately to require that bioengineered foods be labeled differently from non-bioengineered foods in a way preempted by federal law. This is not an accurate statement of Plaintiff's argument. Under Plaintiff's theory, Defendant could have simply left "All Natural" off the labels. But because they included the phrase, Plaintiff claims that the labels are misleading. This is not a preempted theory. Defendant may not affirmatively be required to disclose its use of bioengineered ingredients (if any exist at all), but Plaintiff is only alleging that the "All Natural" claim might be untrue and misleading if Defendant in fact does use bioengineered ingredients or processing techniques that render a natural ingredient non-natural. Plaintiff's claim is therefore not preempted on these grounds.

Id. at * 4 (internal citation omitted). Indeed, applying that *Parker* analysis another district court analysis is easily applicable to this case for instance:

> The Court concludes, just as the courts in Parker and Fagan did, that Plaintiffs' state law claims do not establish a "requirement" as contemplated by the express preemption provision of the [FMIA]. As Plaintiffs correctly note, they do not allege that [Defendants] [were] required to identify the [country of origin for] its [beef] . Indeed, under Plaintiffs' theory [Defendants] may choose to say nothing at all regarding the [country of origin] of its products. But [Defendants] cannot say its products are [a product of the U.S] if, as Plaintiffs allege, the representation is not true.

Kao v. Abbott Laboratories Inc., 2017 WL 5257041, at *7 (N.D. Cal. Nov. 13, 2017). Again, while not binding, these decisions demonstrate an appropriate application of preemption principles.

Here, the district court erroneously decided that Appellants' claims fall within the categories of items covered by the FMIA's purposes of food safety and humane handling inside USDA inspected facilities, even though Appellants have not alleged that Appellees should have to include any additional warnings concerning the food safety, the grading of the meat or the way that the animal was handled inside of a FSIS regulated facility. Rather, Appellants have alleged that Appellees voluntarily (without requirement from FSIS) and deceitfully labeled the origin of their beef products in order to compete unfairly in the market, and thereby proximately cause competitive injury to Appellant Lucero and other producers similarly situated, in addition to deceiving consumers like Appellant Thornton. Appellant Lucero alleges

that these unfair, dishonest anti-competitive trade practices done in conspiracy amongst USDA and the Appellees cost him and producers like him in excess of $30 Billion dollars over the period of time since 2016. Likewise here, if Appellees are found liable in this case, they would not necessarily have to change their labeling to add the true country of origin (though that is a part of the injunction relief that Appellant requested). Rather, they could sell beef without a label that outright lies about the Country of Origin of the Beef or gives the impression that the beef is of domestic origin when it is not, but that allows the consumer to purchase according to honest representations and real American beef to compete fairly in the market. Moreover, while Appellees may not have to add the actual country of origin on the label as it is presented to the consumer, they most certainly cannot properly represent to the retailers that it is a product of the United States and by doing so proximately cause retailers to falsely advertise the products in mailings to the consuming public.

The district court ignored the fact that the preemption provision upon which it relied is expressly self-limiting. "The fact that Congress provided an express preemption clause supports a reasonable inference that it did not intend to preempt matters outside the clause." *Mulford v. Altria Grp., Inc*., 506 F. Supp. 2d at 749. Such analysis applies with even more force when the preemption clause carves out areas not covered.

Appellants' claims are analogous to those upheld in *Mulford*. The district court here, however, only superficially reviewed *Mulford* to dismiss it as applying exclusively to the FCLAA to side-step critical component of Judge Vazquez' discussion of express preemption:

> As *Cipollone* instructs, this Court must analyze the substance and theories behind Plaintiffs' claim. Plaintiffs' sole claim is for violation of the UPA, NMSA § 57–12–1 *et seq.* As relevant here, the UPA makes it unlawful to conduct trade or commerce using unfair or deceptive trade practices. NMSA § 57–12–3. The statute defines "unfair or deceptive trade practice" as "any false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale ... of goods ... by any person in the regular course of his trade or commerce, which may, tends to or does deceive or mislead any person...." NMSA § 57–12–2(D).

Mulford v. Altria Group, Inc., 506 F. Supp. 2d 733, 750 (D.N.M. 2007). Here Appellant alleged that Appellees are intentionally making a false or misleading statement on the label of beef products regarding the domestic origin of those products that also proximately causes false advertisements to be mailed to the consuming public which has in turn allowed them to supply the consumer with far cheaper foreign beef while paying the American producer less for their cattle and charging the consumer almost the same price they have always paid. This is consistent with the claims held by the Supreme Court not to be expressly preempted.

Again, it is important to note that the district court did not even reach an analysis of whether Appellees were intentionally mislabeling their beef products. As Judge Vasquez noted in *Mulford*, a party's intent to provide a false representation of

a fact is the crux of factual inquiry a Court must ultimately determine "insofar as [a] claim is based on allegation that Appellees made statements knowing their falsity." *Mulford v. Altria Group, Inc.*, 506 F. Supp. 2d 733, 751 (D.N.M. 2007) *citing Spain v. Brown & Williamson Tobacco Corp*., 363 F.3d 1183, 1201–02 (11th Cir.2004). Moreover, Appellants' Complaints made clear the basis for liability here even though the district court sidestepped the proper analysis of the claims. Applying Judge Vazquez' analysis from *Mulford* to this case in light of the language of the preemption provision at issue should have compelled the district court to reject Appellee's arguments. For example, it would look like the following:

> Plaintiffs' [] Complaint, however, can be fairly read to state an additional theory of false representation of material facts—that the terms "[Products of the US]" and "[labels giving the impression of domestic origin]" are false and misrepresent the facts. **Such a claim arises from a duty not to deceive and is not expressly preempted. This Court is not free to convert that claim into something that it is not.**

Mulford v. Altria Group, Inc., 506 F. Supp. 2d at 752(*emphasis added*). United States Supreme Court precedent compels this result. Certainly, the district should have drawn inferences in favor of Appellant, but moreover, it is clear based upon the admission of Appellees that because they enjoy the collusive benefit of USDA's guidance they have intentionally misrepresented to the consumers the nondomestic origin of much of their beef products to their financial gain.

Moreover, the district courts holding that Appellants' affirmative fraud claims are expressly preempted ignores the unambiguous holding in *Cipollone*,

subsequently reaffirmed in *Lorillard,* under which the Court must first determine whether the legal duty at issue is generally applicable or whether it specifically targets the industry and is based in this instance on food safety and humane handling of cattle for beef for human consumption. See *Cipollone*, 505 U.S. 524-529. Claims arising out of duties associated with the latter are preempted, while claims arising out of the former (upon which Appellant's claims are based) are not.

The Supreme Court has been emphatic that express preemption does not encompass the more general duty not to deceive or make fraudulent statements. Looking to the legislative history of the FCLAA, the Court in *Cipollone* noted that traditional police powers, such as the "regulation of deceptive advertising," were not to be displaced by the enactment of the preemption provision: "Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." *Id.* at 529 and n.26. Here, Congress has offered zero indication that it wishes to insulate Appellees and their cohorts from longstanding rules governing fraud. The district court essentially resurrected the argument articulated by Justice Scalia in his dissent in *Cipollone,* which was rejected:

> Justice SCALIA contends that, ... as a matter of consistency. we should construe fraudulent misrepresentation claims *not* as based on a general duty not to deceive but rather as "based on smoking and health." ... ,[T]o analyze fraud claims at the lowest level of generality (as Justice SCALIA would have us do) would conflict both with the background presumption against preemption and with legislative history that plainly expresses an intent to preserve the "police regulations" of the States.

Cipollone, 505 U.S. at 529. n. 27. The position staked out by Appellees and accepted by the district court is therefore not the law—it is instead a version of what Justice Scalia propounded in dissent in *Cipollone*. Appellees would define down the UPA claim by characterizing the duty in the narrowest terms (which would happen to fall under the preemption provision), instead of in accordance with the true duty at issue.

The overwhelming weight of the authorities interpreting *Cipollone* and *Lorillard* acknowledge that affirmative fraud claims are not preempted. *See Johnson v. Brown & Williamson Tobacco Corp.,* 122 F.Supp.2d 194, 203 (D.Mass. 2000)(no preemption of claims based on "intentional misrepresentations and false statements" in "advertising and promotional material.") *Penniston v. Brown & Williamson Tobacco Corp.*, No. 99-CV-10628. 2000 WL 1585609 at *5 (D.Mass. June 15, 2000) ("fraudulent misrepresentation claims based on false statements of material facts" not preempted); *In re Simon II Litigation,* 211 F.R.D. 86, 141-143 (E.D.N.Y. 2002) *(Lorillard* reaffirmed *Cipollone* by emphasizing that "generally applicable obligations and laws were not preempted" and particularly "state laws prohibiting fraud" which are based on "'the duty not to deceive."); *Spain v. Brown & Williamson Tobacco Corp., 363* F.3d 1183, 1101-1202 (11th Cir. 2004)(claim that "manufacturers misrepresented and fraudulently stated ...material facts about smoking and health ...not preempted, even to the, extent it arose in relation to advertising and promotion ...because such claims arc predicated . . on a duty ... not

to deceive.")(internal quotations and citations omitted); *Hill v. R.J. Reynolds Tobacco Co.,* 44 F.Supp.2d 837 (W.D. Ky. 1999) ("'claims based on deception" such as "affirmative fraud ... remain undisturbed by *Cipollone.'"): Appavo v. Philip Morris Inc.,* No. 122469/97, 1998 WL 440036 at •4 (N.Y. Sup. Ct. July 24, l998)("claims based on affirmative representations of fact, whether the alleged misrepresentations appear in advertisements or elsewhere, will escape preemption so long as they are based on a general duty not *to* deceive.'"). Recent New Mexico state appellate court jurisprudence continues to support this notion applying it to motor carries stating that

> Plaintiffs' negligence claim is directed specifically at the manner in which Tavenner's carried out the service of loading and transporting Plaintiffs' property. Although Plaintiffs' negligence claim relates to the transportation of property, the claim does not target or affect the regulation of motor carriers in general. In such instances, courts have declined to find preemption under the FAAAA, concluding that the relation or effect on a motor carrier's rates, routes, or services to be too tenuous to be preempted.

Schmidt v. Tavenner's Towing & Recovery, LLC, 2019-NMCA-050, ¶ 16, 448 P.3d 605, 611. Consistent with the discussion in *Schmidt*, here, liability would not have an impact on meat labeling (at least on labelling that adheres to the Congressional purpose of the FMIA,) nor would it alter or conflict with the federal scheme at issue. Instead, entities such as Appellees simply would be held liable for lying about the nature and origin of their products.

Meat inspection and labeling (not to mention anti-trust regulation) are traditional state concerns. Meat inspection only came under federal regulation in 1907, and the preemption sections of the FMIA did not go into effect until December 15, 1967, with the Wholesome Meat Act of 1967. Regarding food labeling specifically, the Third Circuit pointed out in *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, (3d Cir. 2009) that food and beverage labeling "have traditionally fallen within the province of state regulation." *Id.* at 334. Additionally, the court noted, "if there be any subject over which it would seem the states ought to have plenary control . . . it is the protection of the people against fraud and deception in the sale of food products." *Id.* at 334-335.

Applying the presumption against preemption of state laws in areas of traditional state concern, it becomes clear that the FMIA's labeling preemption does not apply to voluntary country of origin statements on labels. Even if the "substance and scope" of the FMIA includes misbranding (though expressly not to preemptive effect), (1) neither the substance nor the scope of the FMIA reaches where animals originated from before they are on a slaughterhouse's premises or processing facility; and (2) the labeling preemption clause of the FMIA was not intended by Congress to impact agriculture marketing and import/export concerns, which was already covered by the preemption statute that was passed in the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621 et seq. Additionally, the purpose of the

statute as a whole, the statutory framework, the language, and the way in which the regulatory scheme was designed to work all point clearly and definitively against preemption of state causes of action based on a duplicitous country of origin label.

Based on statutory framework language alone, "[a] reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law," *Lohr* at 485, points conclusively against labeling preemption, and certainly against labeling preemption for voluntary descriptions on labels that deal with the origination of the cattle for the beef products. On the latter point, the Supreme Court summed up the FMIA in recent years, noting at least five times that the FMIA applies to activities on slaughterhouse grounds and by slaughterhouses (i.e., not the country of origin of the cattle in the slaughterhouse or the boxes of beef arriving at a USDA inspected processing facility). *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 466, 132 S. Ct. 965, 974, 181 L. Ed. 2d 950 (2012).

The second and independent reason state claims against fraudulent origination labels on meat are not preempted is that they require exactly the same thing as is required by federal law— veracity. The FMIA prohibits "any act . . . which is intended to cause or has the effect of causing [meat] to be adulterated or misbranded." 21 U.S.C.A. § 610(d). The Act provides examples of "misbranded," with the first example defining it as "false or misleading in any particular." *Id*. at § 601(n)(1). Thus, any consumer action that is based on a "false or misleading" label

would dovetail with the Act. There is FMIA jurisprudence that supports the presumption against preemption in this regard. In *Mario's Butcher Shop & Food Center., Inc. v. Armour & Co.*, the North Federal District Court of Illinois held that state consumer fraud and deceptive practices actions could be brought by the Appellant if he based them on violations of FMIA's labeling requirements. *Id.*, 574 F. Supp. 653, 656 (N.D. Ill. 1983). In that case, a butcher sued three meat companies for consumer fraud and deceptive practices under state law, claiming that they had lied on the labels of their meat containers, stamping the containers "10 pounds" when in fact they contained less. *Id* at 654. The meat companies claimed federal preemption under the FMIA. *Id.* The court ruled that as long as the butcher's state law claims were based on a violation of the FMIA's requirements regarding weight declarations, his causes of action could continue, since they would not require anything in addition to or different from federal law. *Id* at 656 Likewise here, since the FMIA prohibits "false and misleading" labels, state causes of action based on voluntary duplicitous origination claims would be allowed. *See e.g. Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330, 128 S. Ct. 999, 1011, 169 L. Ed. 2d 892 (2008) ("State requirements are pre-empted... only to the extent that they are 'different from, or in addition to' the requirements imposed by federal law.") And while *Mario's* is forty years old, more recent Supreme Court precedent in the non-FMIA realm supports the analysis. In *Bates v. Dow Agrosciences LLC*, Dow argued that the Federal

Insecticide, Fungicide, & Rodenticide Act (FIFRA) preempted state law claims for damages. The Court looked at the preemption clause of the FIFRA, which—just like the FMIA's preemption clause—preempted state law "in addition to or different from" FIFRA requirements. 544 U.S. 431 at 431. The Court ruled that "a state-law labeling requirement is not pre-empted . . . if it is equivalent to, and fully consistent with, FIFRA." *Id.* at 447. And to be clear, it is only the *requirements* (not voluntary marketing statements about where the beef came from) that must be the same—the precise words do not. The *Bates* court explained: "To survive preemption, the state-law requirement need not be phrased in the identical language as its corresponding FIFRA requirement; indeed, it would be surprising if a common-law requirement used the same phraseology." *Id.* at 454. *I.e.* a state law requirement not to lie to the consumers about where the beef they are purchasing comes from need not require that anything is even said about origin at all.

In explaining why state law would be retained where it aligned with federal law, the Supreme Court stressed that an overreach attempting to vacate state law that is not in conflict with federal law would not offer "any plausible alternative interpretation of 'in addition to or different from' that would give that phrase meaning." *Id*. at448. The Court discussed Dow's argument to the contrary, in terms that would apply perfectly to any attempt to challenge state law claims based on false humane labels. It noted that they appear to favor reading ["in addition to or different

from"] out of the statute, which would leave the following: "Such State shall not impose or continue in effect any requirements for labeling or packaging." This amputated version would no doubt have clearly and succinctly commanded the preemption of *all* state requirements concerning labeling. That Congress added [the phrase "in addition to or different from"] is evidence of its intent to draw a distinction between state labeling requirements that are preempted and those that are not. *Id*. at 448-49 (emphasis in original). The Court also noted that allowing state causes of action for violation of federal law will in no way hinder federal action. Indeed, doing so "would seem to aid, rather than hinder" federal law. *Id*. at 450-51. That is especially true here, where meat inspection is a duty shared by states and the federal government, and where the FMIA explicitly anticipates and welcomes state action in the area. Specifically, states are encouraged to "exercise concurrent jurisdiction with the Secretary over articles required to be inspected . . . for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded." 21 U.S.C. § 678.

Finally, even if Appellant's state-law causes of action based on a fraudulent label were to fail on preemption grounds, claims based on use of "Product of the US" will stand. In *National Broiler Council*, the Ninth Circuit held that although California was preempted from requiring a label that violated the U.S. Department of Agriculture (USDA) regulations regarding what constituted "fresh," California

could continue to enforce its ban on advertising—so that chickens labeled as "fresh" could not be advertised that way unless they were not frozen. *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 747 (9th Cir. 1994). That Court noted that "California stores can still be required by state law to tell the truth in advertising and to display frozen chickens for what they are—'frozen'—even though the labels on the chickens themselves are required by federal law to say 'fresh.'" *Id*. at 749.

3. The District Court Abused Its Discretion to Decide the Advertising Claims After Recognizing that there was an Indispensable Third Party

Without question, with regard to the false advertising claims, the district court first determined that "Plaintiffs' advertisement argument fails because (1) Plaintiffs pled that third-parties and not the Defendants themselves produced the false advertisements." (Aplt App 559-560) This is unequivocally a determination that there is an indispensable party that is not present and that should have stopped the Court's analysis of the false advertising claims at that point. Instead, after recognizing that that there was a party not present necessary for the resolution of that claim, the district court did not perform the required "two-part analysis." *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407 (10th Cir. 1996). Therefore, in proceeding on to determine the merits of the claim after failing to consider the factors related to absence of an indispensable party, the district court abused its discretion. *See Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1289

(10th Cir. 2003). This portion of the District Courts decision should be vacated as an abuse of discretion.

B. Because the District Court's Holding on Preemption is Wrong, its Determination Regarding Primary Jurisdiction Doctrine is Flawed

Because of the district court's incorrect determination regarding preemption, it declined to exercise jurisdiction to stay or refer the matter to the USDA under the primary jurisdiction doctrine. Nevertheless, the Court announced an incorrect analysis that is addressed here out of an abundance of caution. As this Circuit has explained:

> Even where a court has subject matter jurisdiction over a claim, courts have discretion to refer an issue or issues to an administrative agency. Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1376 (10th Cir.1989). The doctrine of primary jurisdiction is "specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *Reiter v. Cooper*, 507 U.S. 258, 268, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993).

TON Servs., Inc. v. Qwest Corp., 493 F.3d 1225, 1238 (10th Cir. 2007). The purpose of the doctrine is to "allow agencies to render opinions on issues underlying and related to the cause of action." *Crystal Clear Commc'ns, Inc. v. Sw. Bell Tel. Co*., 415 F.3d 1171, 1179 (10th Cir.2005). In the present case "[t]he district court is not required to defer factual issues to an agency under the doctrine of primary jurisdiction if those factual issues are of the sort that the court routinely considers" and that is exactly what faces the here. *TON Services, Inc. v. Qwest Corp.*, 493 F.3d

1225, 1241 (10th Cir. 2007). Critically, none of the four cited factors[1] would have counseled the district court in favor of deference to the agency's expertise here.

Factor 1. While Appellees are engaged in beef processing subject to USDA FSIS's expertise on its regulations and technical requirements, this case does not require expertise on beef processing or whether or not the technical claims on a label are correct. This is a case about an admitted outright lie presented to the consumers regarding the origins of beef products sold to and through retailers. The district court is more than capable of determining the honesty of statements of fact about products made to the public. Moreover, this "doctrine is not designed to secure expert advice from agencies every time a court is presented with an issue conceivably within the agency's ambit. Instead, it is to be used only if a claim requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency, and if protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) (internal quotation marks and citation omitted). Perhaps even more importantly, Country of Origin labeling has been traditionally administered by USDA Agricultural Marketing Service ("AMS") under the Agricultural Marketing Act ("AMA"), 7 U.S.C. § 1621

[1] *See Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1349-50 (D.N.M. 1995)

et seq., enacted in 1946, not by USDA FSIS under the FMIA. That is of course, until Congress removed beef and pork from the regulation of AMS by amending the AMA in the 2016 Consolidated Appropriations Act, Pub. L. No. 114-113, 129 Stat. 2242 (2015); 7 U.S.C. §§ 1638, 1638a. So, a legitimate question exists as to whether or not USDA has any jurisdiction much less technical authority over Country of Origin labeling for beef and pork products. Nothing in the reality surrounding country of origin labeling for beef suggests that this Court should defer to any agency.

Factor 2. Appellees are subject to both a duty not to deceive and a statutory prohibition against misbranding meat. Again, admitting they are intentionally misrepresenting their beef products to consumer, they make the odd claim that requiring that they not misbrand their products would subject them to a differing standard than the FMIA's prohibition against misbranding. This argument has been discussed and rebutted above.

Factor 3. For the third factor, the district court ignored that Congress has taken away Country of Origin Labeling regulation from USDA by removing beef and pork from the AMA's jurisdiction. Of course, the issue has not languished because the USDA's jurisdiction is limited to issuing guidance on voluntary labeling and even that guidance cannot properly be read to allow the agency to ratify fraudulent

representations of fact to consumers.[2]

Factor 4. Finally, the district court presumptively lumped two parts of the injunctive relief requested by Appellants into one. Rather, Appellants asked that Defendants be required to honestly label where the beef comes from (requiring an affirmative action). Appellants further requested that Defendants be prohibited from lying that their products are from somewhere they are not. The requested relief components are not, however, co-dependent on each other. In the final analysis, there was no sound basis for deferring to agency expertise here.

C. Appellee's Labeling Practices Are Not Permissible Under 21 U.S.C. 602 and Guidance That is Merely Permissibly Passive Cannot Satisfy the UPA's Safe Harbor Requirements

For largely the same reasons that Appellants' claims are not expressly preempted by the FSIS actions relative to meat inspection, the claims are also not subject to the "expressly permitted" exemption found in section 57-12-7 of the New Mexico UPA. Specifically, section 57-12-7 provides:

> 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.

For a particular practice to fall within this "safe harbor" exemption, the New

[2] USDA itself has acknowledged that the voluntary use that USDA has failed prohibit of "Product of USA" is misleading to the consumers. https://thecounter.org/country-of-origin-label-cool-american-beef-usda-grassfed/

Mexico courts have held that the conduct in question must actually be permitted by the regulatory body in question. Specifically, in *Stratton v. Gurley Motor Company.* 105 N.M. 803 (1987), the Court of Appeals upheld a UPA claim brought by the State Attorney General against a car dealer for accepting rebates from an insurer to which the car dealer directed customers without disclosing the rebates. The defendant car dealer argued that the UPA claim was excluded under section 57-12-7 because the Insurance Holding Company Act regulated the objectionable conduct - i.e., the alleged illegal rebates. The State court held that because the rebates were not explicitly permitted by a regulatory body or statute, the claim was not excluded by section 57-12-7. In so holding, the New Mexico Court cogently enunciated that it is not enough that there is merely some oversight and involvement by a regulatory body, but that the illegal conduct in question must actually be permitted by the regulatory body:

We construe the language "permitted under laws administered by a regulatory body" in Section 57-12-7 to require more than the mere existence of a regulatory body in order for the exemption to apply ... **In effect, this means the regulatory body must render permission to engage in the business of the transaction through licensing, registration or some similar manifestation of "permitting" the business activity.** (emphasis added) *Id.* at 807. Accordingly, it is not enough that there is a regulatory body that can regulate, it is required that the conduct in

question actually be "permitted" by the regulatory body or passively allow a label to voluntarily contain an intentionally misleading description of the origin of the product. As described above, in the instant case, the fraudulent use of the term "Product of the US" and "other labels intended to mislead the consumer that the product is of domestic origin" were not permitted by the FSIS because FSIS cannot expressly permit misbranding without running afoul of the FMIA.

Similarly, in *Ashlock v. Sunwest Bank of Roswell. N.A.*, 107 N.M. 100 *(1988)(overruled on other grounds),* the New Mexico Supreme Court held that the UPA safe harbor was inapplicable to a bank which was sued by a customer/account-holder for interest that was wrongfully not paid by the bank. In *Ashlock*, the bank argued that because it was regulated by federal law and federal law existed pertaining to unfair and deceptive practices, the illegal conduct alleged was exempt under the UPA. The New Mexico Supreme Court disagreed, holding that the exemption did not apply because there was no regulation or statute which directly conflicted with the UPA. In pertinent part, the *Ashlock* Court held as follows"[O]ur attention has not been directed to any federal statute or regulation that would evidence the intention of Congress or the federal regulatory branch to regulate, to any extent, the: bank's failure to deliver goods or services as promised.

Id. at 103."[3] *See also Campos v. Arookshank,* 120 F.Supp.2d 1271, 1275 n. 3, 1277-1278 (D.N.M.2000)(explaining that the phrase "actions or transactions expressly permitted," is to be given narrow reading and that "'the specific activity," including the manner in which it was done, must be expressly permitted to fall within the exception); *Shields v. Lella. Inc.*, 888 F.Supp. 894, 897 (N.D.Ill.1995)(concluding that defendant's use of model disclosure forms published by Federal Reserve did not insulate defendant from UPA claim just because alleged misrepresentations occurred within an otherwise sanctioned activity.)

Likewise, in the instant case, the FMIA does not conflict with the UPA because the FMIA specifically prohibits mislabeling or misbranding (i.e. misrepresenting a material fact in the label or advertisement), and the guidance of the FSIS cited by Defendants cannot be interpreted in a manner inapposite of the FMIA prohibition on misbranding that expressly permits the conduct alleged to violate the UPA. The district court should have applied Judge Parker's test from *Campos* employed by Judge Vasquez in *Mulford* that,

> In order to determine whether the [FSIS]'s actions in overseeing and regulating [meat inspection] compel the application of the UPA exemption in this case, this Court must determine (1) if [Defendants'] activities generally are subject to regulation by the [FSIS], and (2) whether the specific activity which would otherwise constitute a

[3] The *Ashlock* Court also noted that "[t]he mere existence of federal legislation in an area of law also addressed by state legislation, without more, is not enough to show preemption." *Id.* at 102. (Citations omitted.)

> violation of the UPA, here, the use of the terms "[Product of the US]" and "[other label representations that give the impression that the beef product is of domestic origin]" in [beef product labeling and] advertising, is in fact "expressly permitted under laws administered [] by" the [FSIS]. *See Azar*, 2003–NMCA–062, ¶ 68, 133 N.M. at 689, 68 P.3d at 929; *Stratton*, 105 N.M. at 807, 737 P.2d at 1184; *Campos*, 120 F.Supp.2d at 1276.

Mulford v. Altria Group, Inc., 506 F. Supp. 2d 733, 759–60 (D.N.M. 2007). While it is clear the first part of the test is met and Defendants' activities are generally regulated by FSIS under the FMIA, it is equally clear that misdescribing meat products is unequivocally prohibited by the FMIA and it is inconceivable that FSIS would expressly permit the intentional misbranding of the domestic origin of foreign beef to mislead the consumers and harm American producers in competition to sell their beef.

D. The District Court Analysis of the Unjust Enrichment Claim was Flawed

The district court understated the role of equity in New Mexico jurisprudence with regard to unjust enrichment and overstated the contractual relationship of Appellants and the retailers that sold the beef products in reliance upon the knowingly false labeling. Appellants' claim for unjust enrichment was appropriate if Appellants' lack privity with Appellees and applies if it turns out that they do not have a remedy under the New Mexico UPA. A straightforward application of the standards and reasoning from the cases cited by the district court should have led the district court to a different conclusion. As Judge Browning laid out:

> "New Mexico has long recognized actions for unjust enrichment...." *Ontiveros Insulation Co. v. Sanchez*, 2000–NMCA–051, ¶ 11, (citing *Tom Growney Equip., Inc. v. Ansley*, 1994–NMCA–159, 119 N.M. 110, 112, 888 P.2d 992, 994). To prevail on an unjust enrichment claim, "one must show that: (1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust." *Ontiveros Insulation Co. v. Sanchez*, 2000–NMCA–051, ¶ 11.

Abraham v. WPX Energy Prod., LLC, 20 F. Supp. 3d 1244, 1266 (D.N.M. 2014). Thus, as Judge Browning points out in another decision, an "unjust-enrichment claim can[] be an alternative theory, under federal law, if it is premised on the same factual predicates. *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Products Liab. Litig.*, 288 F. Supp. 3d 1087, 1257 (D.N.M. 2017). Moreover, the allegations of the instant matter invoke improper and deceitful conduct of Appellees as non-contracting parties with Appellants, which is an important distinction in the Tenth Circuit, as explained in the following terms:

> DCP also cites this court to *Abraham v. WPX Energy Prod., LLC*, 20 F. Supp. 3d 1244 (D. N.M. 2014). Although the facts in that case more closely resemble the facts alleged here, the court is not persuaded that it counsels a different outcome. First, as an opinion from the District of New Mexico, the holding in *Abraham*, while illuminating, is not binding on this court. Second, the facts in *Abraham* do not suggest any improper or deceitful conduct on the part of the non-contracting parties. Thus, the court concludes that *Abraham* is more akin to *DCB Constr.* and *Cross Country Land Servs.*, and distinguishable from the facts alleged here.

Phelps Oil & Gas, LLC v. Noble Energy, Inc., 2016 WL 9735739, at *4 (D. Colo. Aug. 1, 2016), *report and recommendation adopted, Phelps Oil & Gas, LLC v.*

Noble Energy, Inc., 2016 WL 9735740 (D. Colo. Sept. 28, 2016)

Finally, the argument that Appellants do not allege that labels from Appellees which intentionally misrepresent that the beef products they sell to retailers and wholesalers (who in turn continuing the mislabeling and then falsely advertise in reliance on that false information) is of domestic origin under the consumers understanding of those terms is not deceptive is implausible. That is the noticeably clear and explicit claim made through the entire complaint giving rise to each cause of action alleged. These claims are plausible, and Appellees are on notice under *Iqbal* and *Twombly*. The District Court was in error in this regard.

It is arguable under *Abraham v. WPX Energy Prod., LLC*, 20 F. Supp. 3d 1244, (D.N.M. 2014) based upon the facts of that case, that no Plaintiff could ever bring an unjust enrichment claim against a defendant that was a third party to an express contract. such a premise would serve to destroy the centuries old equitable policies that form the substantive law in New Mexico. Thus, applying *Abraham* to the context of a third party's deceitful, predatory and anti-competitive activity, as the district court did below, resulted in an absurd reading of the precedents and ignored the New Mexico jurisprudence that case is based upon. In *Abraham* Judge Browning's ruling is based in large part on the New Mexico Court of Appeal's decision holding that, for a claim for unjust enrichment to prevail that, "one must show that: (1) another has been knowingly benefitted at one's expense (2) in a

manner such that allowance of the other to retain the benefit would be unjust." *Ontiveros Insulation Co., Inc. v. Sanchez*, 2000-NMCA-051, 129 N.M. 200, 203, 3 P.3d 695, 698.

Here, as clearly alleged, Appellant is not in privity with Appellees, though Appellees are (1) knowingly engaged in a deceitful and anti-competitive practice that is manipulating the market to cause American producers like one of the Appellant Lucero to receive far less compensation for their cattle, (2) has been retaining those additional profits (allegedly more than $30 Billion) and (3) has been deceiving consumers like Appellant Thornton to pay more for beef to the tune of billions of dollars than they ordinarily would have for imported products, for which allowing these companies to retain those proceeds would be unjust. It is true that the New Mexico Court of Appeals has recognized that under New Mexico law

> [] suits against [third parties to a contract] are generally not favored. *See id.* at 176, 793 P.2d at 858; *see also George M. Morris Constr. Co. v. Four Seasons Motor Inn, Inc.*, 90 N.M. 654, 656–57, 567 P.2d 965, 967–68 (1977) (disapproving of subcontractor's personal action against property owner upon facts presented). *But see United States ex rel. Sunworks Div. of Sun Collector Corp. v. Insurance Co. of N. Am.*, 695 F.2d 455, 458 (10th Cir.1982) (recognizing subcontractor's right, under New Mexico law, to claim unjust enrichment against property owner in present context). Remedy is instead viewed as best sought from the underlying general contractor. This general disfavor, however, is not required by anything intrinsic to the subcontractor-property owner relationship, but rather is a reflection of the jurisprudence of equity. Simply, equity does not take the place of remedies at law, it augments them; in this regard, an action in contract would be preferred to one in quasi-contract.

Ontiveros Insulation Co., Inc. v. Sanchez, 2000-NMCA-051, 129 N.M. 200, 204, 3 P.3d 695, 699. The reticence that Judge Browning demonstrated in *Abraham* contradicts the context and circumstances of this particular case and the district court erred in failing to follow the New Mexico Supreme Court's guidance for a case such as this based upon deceitful conduct to evaluate this case on the basis of

> (" 'Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. *They are obligations created by law for reasons of justice*.' " (Emphasis added.) (quoting Restatement Law of Contracts § 5 cmt. a (1932)). Accordingly, rather than shying from application of equitable principles in the present case, we inquire more closely as to the particular equities of this specific matter.

Ontiveros Insulation Co., Inc. v. Sanchez, 3 P.3d 695, 699. This availability of a claim of unjust enrichment is more in keeping with the Tenth Circuit's guidance based upon cases involving deceitful and anti-competitive trade practices.

E. Breach of Warranty Should Have Been Dismissed Without Prejudice

While Appellant concedes that the district court correctly analyzed and applied *Badilla v. Wal-Mart Stores E., Inc.*, 2017-NMCA-021, 389 P.3d 1050, the lower court failed to provide any analysis for why a lack of pre-suit notice required a dismissal *with* prejudice rather than *without.* In fact, the dismissal of this claim under the typical analysis requires that the dismissal should be *without prejudice.* For instance,

> Unlike the circumstances in *Bosh v. Cherokee County Gov. Bldg. Auth.*, 305 P.3d 994 (Okla.2103), which held that a claim under the

> Oklahoma Constitution cannot be barred by the OGTCA, requiring plaintiff to comply with the pre-suit notice provisions of the OGTCA would not immunize the defendants from liability, it would simply require plaintiff to pursue administrative exhaustion prior to pursuing this particular claim. Because plaintiff has not alleged compliance with the pre-suit notice requirement, its state law claims are dismissed without prejudice.

Estate of Tamico Norton v. Avalon Corr. Services, Inc., 2014 WL 5089074, at *3 (N.D. Okla. Oct. 2, 2014). Or

> When faced with situations in which a plaintiff fails to plead compliance with the CGIA, Colorado courts have taken two courses of actions. First, if the plaintiff fails to plead compliance and cannot cure this defect, Colorado courts dismiss the claims with prejudice. *See, e.g., Jones*, 622 P.2d at 94.[8] If the plaintiff fails to plead compliance but later proves compliance at trial prior to the raising of an objection to the sufficiency of the complaint, Colorado courts, pursuant to Colo. R. Civ. P. 15(b),[9] treat the CGIA notice issues "as if they had been raised in the complaint." *Morgan v. Board of Water Works of Pueblo*, 837 P.2d 300, 302 (Colo.Ct.App.1992).
>
> Here, unlike in *Jones*, it is not clear from the record whether Doctors Brazina and Nadler can cure their deficient pleading by amendment. Also, unlike *Morgan*, Doctors Brazina and Nadler have not proved compliance with the CGIA at trial. Given these circumstances, we find that a Colorado court would dismiss their claims without prejudice. … Doctors Brazina and Nadler's Counts XIII, XVI and XVIII should be dismissed without prejudice.

Aspen Orthopaedics & Sports Med., LLC v. Aspen Valley Hosp. Dist., 353 F.3d 832, 842 (10th Cir. 2003). Thus, the district court's dismissal of this claim should have been without prejudice.

F. Appellant Lucero's Anti-Trust Claim is not Preempted and Appellant Lucero Pled Market Manipulation and Collusion by Appellees Who Used the Power they Obtained by Fraudulent Misrepresentation to Facilitate the Anti-Competitive Behavior.

The district court erred in failing to take judicial notice that these four Appellees, representing over 80% of the market, are an oligopoly that is collectively sophisticated and well-funded, complete with an army of lobbyists that acted in concerted fashion to repeal mandatory Country of Origin Labeling (m-COOL or COOL) for beef and pork in 2015. Moreover, having succeeded in removing a statutory impediment to their selected vehicle for market manipulation, mislabeling beef, this oligopoly has profited greatly by breaching their duty not to deceive the customers, and using the power derived from that deception to further consolidate their power in vertical integration by driving the producers of beef like Appellant Lucero out of business by reducing the prices paid for cattle therein and impermissibly restraining trade.

Of equal concern was the district court's refusal to acknowledge the pled concerted effort by this oligopoly to restrain trade in favor of their enormous profits. It is well documented in public records that these companies, acting through their trade organization, were the major proponents of the removal of beef from COOL, thus, opening the resulting backdoor for their fraudulent labeling. And, having opened the door, they have used the lack of any real regulatory oversight to deceptively label their products which "result in sundry losses to livestock producers," 21 U.S.C.A. § 602, in direct contravention of the clear stated intent of Congress under the Federal Meat Inspection Act (FMIA) that they say now shields

them in preemption. Appellee arguments for preemption of state law anti-competition enforcement adopted by the district court undermine the cooperation between USDA and the States that Congress explicitly intended and authorized, codifying:

> The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and **compete unfairly** with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and **that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce**, to effectively regulate such commerce, and to protect the health and welfare of consumers.

21 U.S.C.A. § 602 (emphasis added). The district court's refusal to consider Appellees' alliance to collude to keep the ability to lie to the consumers and depress the market for domestically originating beef thereby restraining trade was in error as evidence of that collusion clearly existed. (Aplt App 532, 539-541)[4].

Here, not only do Appellees consistently breach their duty not to deceive consumers by intentionally mislabeling meat (the regulation of food is traditionally an area of state concern and remains a cooperative area of state inspection and

[4] North American Meat Institute (NAMI) enjoys all four Defendants as part of its membership, as does the Meat Importers Council of America (MICA) *See* https://members.meatinstitute.org/apps/#ProdResultByOrg/1 and http://www.micausa.org/mica-members/ .

enforcement under the FMIA), but they are colluding to use that fraudulent practice to burden commerce by manipulating prices paid to domestic producers which "result in sundry losses," 21 U.S.C.A. § 602, and in burgeoning profits to these oligopolistic Defendants.

Far from being preempted as described, state regulation of anti-trust matters has traditionally been protected and upheld by the Supreme Court. In the present case, similarly, Congress drew the FMIA with a meticulous regard for state and federal actions being coextensive. The district court instead agreed that the preemption clause of the FMIA expresses Congressional intent to allow these meat packers to escape state regulation of their fraudulently labeling beef to deceive consumers and to escape the State's regulation of the use of that deception to compete unfairly in the market place, thereby restraining trade and harming the New Mexico cattle producers along with the rest of the domestic producers across the Country. And while no Tenth Circuit decision applying the FMIA to state law anti-competition claims can be located, there is persuasive authority analyzing this point. Notably, the District Court for the Northern District of California applied California's Unfair Competition Law to the FMIA in the false labeling context and found that:

> First, as an initial matter, consumer protection laws such as the UCL and FAL are within the historic police powers resting with the states and are therefore subject to the presumption against preemption. *See In re Farm Raised Salmon Cases*, 42 Cal.4th 1077, 1088, 72 Cal.Rptr.3d

> 112, 175 P.3d 1170 (2008). Consequently, they cannot be superseded by federal law or action unless it is the "clear and manifest purpose of Congress." Such purpose is not evident here. Neither the PPIA nor FMIA demonstrates express or implicit congressional intent to limit legislation like the UCL and FAL. In fact, the state and federal laws at issue here are complementary. The UCL and FAL prohibit "unfair competition" including "misleading advertising" and "false advertising." *See* Cal. Bus. & Prof. Code §§ 17200, 17500. Allowing plaintiffs to proceed with their *advertising* claims in no way undermines the PPIA's objectives of ensuring that poultry products are "wholesome, not adulterated, and properly marked, labeled, and packaged." *See* 21 U.S.C. § 451. *Cf.Ass'n des Éleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140, 1153 (9th Cir. 2017) (finding state law addressing cruel feeding practice was not preempted by PPIA). Nor does it *1014 hinder the FMIA's nearly identical objectives of assuring the quality and proper labeling of "meat and meat food products." *See* 21 U.S.C. § 602; *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 334 (5th Cir. 2007) ("[T]he FMIA contains a narrow inspection and labeling preemption clause, and Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.")

Organic Consumers Ass'n v. Sanderson Farms, Inc., 284 F. Supp. 3d 1005, 1013–14 (N.D. Cal. 2018). Similarly, here Plaintiff has invoked the common law duty not to deceive rather than a pure labeling issue as Appellees erroneously led this district court to conclude. Plaintiffs' claims are therefore not preempted.

Moreover, the Supreme Court has cautioned:

> To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever an agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Hillsborough County Fla. v. Automated Med. Labs. Inc., 471 U.S. 707, 717 (1985).

In addition, as discussed above, the "presumption that the traditional police powers of states are not displaced by federal law" is based on "two practical reasons." *Chemical Specialties Manufacturers Association, Inc. v. Allenby.*, 958 F.2d 941, (9th Cir. 1992)(*cert. denied*, 506 U.S. 825(1992)). Congress knows how to expressly preempt a field if it wishes to do so. Furthermore, when a court holds that a federal law is preemptive, the state is left without a remedy, whereas Congress can always correct a federal-court decision not to find preemption. Afterall, Congress can amend the statute in question. Thus, Appellees combination to cloak their fraud under the auspices of continued FSIS guidance in order drive down the prices to American cattle producers so the Defendants can exercise greater market power and enjoy larger profits actionable under state law. There is no good reason to read complete preemption into the statutory and regulatory scheme at issue here. Here, Appellant Lucero sought to amend his complaint to address the following allegations:

> The packaging of the Products presenting the Products as "Product of the U.S." or other similar representations that are prominent on packaging, result in the representations that are necessarily seen by retail purchasers of the Products. **Thus, representations made by Defendants regarding country of origin made to the distributors or to retailers that repackage the meat such as grocers, Costco or Sam's Club results in misleading and false representations being made to the consumer.**

(Aplt App 436-438, 440-467). Thus, Appellants specifically alleged that Appellees make the fraudulent representations to wholesalers and retailers who carry the

intentional misrepresentations to the consumers in both labeling and mailed advertisements in reliance on Appellees so that Appellees can manipulate the market to increase their profits and decrease the amounts paid to producers like Appellant Lucero. Appellant Lucero's proposed *Amended* Complaint, thus, gave fair notice of the plausible claim as required by the standards set out in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009) and *Bell Atlantic Corp. v. Twombly;* 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). That the Appellees tacitly admitted that they are intentionally mislabeling beef because FSIS has not acted to prohibit such misbranding is enough to trigger liability for their manipulation of the market in the anti-trust context regardless if the fraudulent label does not incur liability due to preemption.

Appellant Lucero sought to allege that a New Mexico Antitrust Act claim was present and the Appellees have combined to intentionally mislabel foreign beef as domestic in order to depress the price of the domestically originating beef from Appellant Lucero and America's cattle producers. The scheme amongst the Appellees, that have control over 80% of the market between the four of them (four companies controlling over 80% of the market both horizontally and vertically is the textbook definition of an oligopoly), is to have lobbied to have mandatory Country of Origin Labeling requirements removed by Congress through their combined efforts under NAMI's lobbyists. *See* https://nationalaglawcenter.org/house-votes-

to-repeal-cool/.[5] The Appellees then imported beef at prices that are less than a third of what they were paying American producers for their cattle before the repeal of beef from COOL at the end of 2015 and fraudulently labeled the beef as a "Product of the U.S." The fraudulently labeled and advertised product is then sold to the unsuspecting consumer at prices commensurate with what beef that is actually domestically produced would fetch. The Big 4 Oligopoly are then able to use their market power to drive down the price they pay to their American suppliers in the production chain to the levels of what they pay for imported beef. The Appellees have combined to restrain trade by fraudulently concealing foreign origin of their products and are using that fraud to further consolidate their vertical power, having already horizontally consolidated their power into their four companies. This is not merely plausibly alleged by Appellant Lucero, rather it is exactly the type of conduct that the New Mexico Legislature sought to address in adopting the New Mexico Antitrust Act.

The fact that the FMIA interweaves injury to the consumer with injury to livestock producers is illuminating and completely avoided by the district court. In both essence and in effect, the Appellees here have taken the very actions that Congress sought to prohibit and done the very two things they should not do. They

[5] "The 2002 and 2008 farm bills mandated Country of origin labeling (COOL), and meat processors have been lobbying for the law to be changed ever since."

have conspired through their industry organizations (North AMI and MICA) to harm the consumer by intentionally misrepresenting facts to the consumer to manipulate prices. They used their market power, achieved through the import of both live cattle and beef of less desirability to the American consumer, along with the vertical and horizontal oligopolistic power to pay the American cattle producer like Appellant Lucero less. Appellant Lucero, as the rancher supplying cattle for beef to a market dominated by these Appellees, is undeniably a "person threatened with injury or injured in his business or property, directly or indirectly, by" this restraint of trade by Appellees and as such is well suited to enforce this violation against Defendants. NMSA 1978 § 57-1-3.

VIII. CONCLUSION

The Court should reverse the decision of the district court.

ORAL ARGUMENT STATEMENT

Pursuant to 10th Cir. L. R. 28.2(C)(f), Appellants request oral argument in this matter. Such argument is necessary because the issues involve important questions of law. Appellants respectfully suggest that the Court may benefit from the interactive conversation that oral argument would provide on these issues.

Respectfully submitted this 30th day of November 2020.

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CERTIFICATE OF COMPLAINCE

Undersigned counsel certifies that Appellants' Opening Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,779 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii). This opening 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 2010 in 14-point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing via the appellate CM/ECF system on November 30, 2020 causing all parties of record to be served electronically.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.

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

2) Required hard copies will be filed with the court upon acceptance; and

3) The digital submission has been scanned for viruses with the most recent version of Avast Premier version 11.1.2245 and, according to this program, is free of viruses.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

Plaintiff,

v. No. 1:20-cv-105-KWR-SMV

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

Defendants.

CONSOLIDATED WITH:

MICHAEL LUCERO, *on behalf of himself and others similarly situated,*

Plaintiff,

v. No. 1:20-cv-106-KWR-SMV

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

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendants' Motion to Dismiss Plaintiff Lucero's Complaint, filed on March 9, 2020 **(Doc. 45, 1:20-cv-106),** Defendants' Motion to Dismiss Plaintiff Thornton's Complaint, **(Doc. 43, 1:20-cv-105)**, and Plaintiff Lucero's Motion to File Second Amended Complaint, filed on May 12, 2020 **(Doc. 55).** Having reviewed the pleadings

and arguments, the Court finds Defendants' arguments well-taken, therefore the Motions to Dismiss are **GRANTED** and the Motion to Amend is **DENIED** as futile.

BACKGROUND

Plaintiffs Robin Thornton and Michael Lucero filed substantially similar putative class actions and their cases were consolidated for pretrial matters. Defendants produce and sell beef products to retailers. Both Plaintiffs assert that Defendants are misleading retailers and consumers by labeling their beef "Product of the USA", when in fact the cattle are raised in foreign countries, imported into the United States live, then slaughtered and processed in the United States. Plaintiff Thornton asserts a putative class of consumers who were deceived into paying higher prices for American beef when it was allegedly foreign beef. Plaintiff Lucero asserts a putative class of American Ranchers who receive less for their American cattle because of the influx of imported cattle sold as product of the USA.

A. Procedural History

Plaintiff Michael Lucero is a "long time producer of beef cattle with a multi-general history of ranching in New Mexico." 20-cv-106, Doc. 1-1 ¶ 14. Plaintiff Lucero brings a class and subclass of all ranchers and Farmers in the United States (or New Mexico) who produced beef cattle for the commercial sale that were born, raised, and slaughtered in the United States. 20-cv-106, Doc. 1-1, 58 of 67, ¶49.

Plaintiff Thornton is a consumer who bought Defendants' beef from various retail stores. She brings a putative class action of retail consumers allegedly deceived by Defendants' county or origin label. Aside from the different classes, the two complaints appear to be substantially similar.

Plaintiff Thornton filed a complaint alleging violation of the New Mexico Unfair Practices Act pursuant to NMSA § 57-12-1; (2) breach of express warranty; and (3) unjust enrichment. Plaintiff Lucero's complaint alleges (1) violation of the NM UPA and (2) unjust enrichment.

On March 11, 2020, the cases were consolidated for all pre-trial purposes, and the parties agreed the cases would be tried separately before the undersigned. **Doc. 47.**

After briefing on the motions to dismiss were complete, Plaintiff Lucero filed a motion to amend complaint to replace his New Mexico Unfair Practices Act Claim with a violation of the New Mexico Antitrust Act. Defendants opposed the motion as futile.

B. Federal Meat Inspection Act and beef labeling.

Federal law "regulates a broad range of activities" related to meat processing. *Nat'l Meat Ass'n v. Harris,* 565 U.S. 452, 455-456 (2012). Labels on beef products are regulated under the Federal Meat Inspection Act ("FMIA"), codified at 21 U.S.C. § 601, *et seq.* Meat 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 are permitted." § 607(d). The FMIA allows the USDA to ban labeling for meat products that it finds to be false or misleading. § 607(e).

The USDA regulates beef labels through its Food Safety and Inspection Service ("FSIS"). FSIS administers a label approval program which ensures that no meat products "bear any false or misleading marking, label, or other labeling and [that] no statement, word, picture, design or device which conveys any false impression or gives any false indication of origin or quality or is otherwise false or misleading shall appear in any marking or other labeling." 9 C.F.R. § 317.8(a).

FSIS has provided by regulation that "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,

accompanied by FSIS form 7234-1, Application for Approval of Labels, Marking, and Devices, and approved by such staff." 9 C.F.R. § 412.1(a). Here, it is undisputed that the label at issue has been approved by FSIS and found to not be misleading or false.

Defendants recite the history of "country of origin labels" thoroughly in their briefs. *See* **Doc. 46, 1:20-cv-00106, at 19-23.** In 2016, Congress made country or origin labeling optional for beef products. Pub. L. No. 114-113, 759, 129 Stat. 2242, 2284-85 (2016). The USDA treats country of origin labels as optional. The USDA continues to approve beef labels; if a producer wants to label its beef with a country of origin, it must comply with FSIS's approved standard before doing so. 21 U.S.C. §607(d); *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-PolicyBook.pdf?MOD=AJPERES (last visited March 9, 2020). The FSIS approval process is required by federal law and beef products could not be sold unless the seller complied with that process. *See Kuenzig v. Kraft Foods, Inc.*, 2011 WL 4031141, at *7 n.8 (M.D. Fla. Sept. 12, 2011) ("The regulations relating to the FMIA and the PPIA are clear that Defendants' labels were required to be submitted to the FSIS for approval prior to their use, and given that the labels were, in fact used, the Court will presume that the labels received the FSIS's approval."), *aff'd*, 505 F. App'x 937 (11th Cir. 2013).

C. Beef Labels at issue were approved by USDA.

As noted above, before a label may be used, it must be approved by the USDA. It appears to be undisputed that the labels at issue here were approved. Moreover, the label at issue is consistent with USDA regulations.

According to the FSIS labelling book "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. "Processed" means as follows:

> **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 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 "Product of the U.S.A." for domestic and export purposes.
> **Labeling of Imported Beef Products**
> Under Section 20 of the FMIA (21 U.S.C. § 620), imported beef products are to be treated as "domestic" product upon entry into the United States.

66 Fed. Reg. 41160, at 41160-61 (Aug. 7, 2001) (emphasis added). Therefore, the regulations are clear that cattle born and raised in a foreign country but slaughtered in the United States may use the "Product of the USA" label.

LEGAL STANDARD

In reviewing a Fed. R. Civ. P. 12(b)(6) motion to dismiss, "a court must accept as true all well-pleaded facts, as distinguished from conclusory allegations, and those facts must be viewed in the light most favorable to the non-moving party." *Moss v. Kopp*, 559 F.3d 1155, 1159 (10th Cir. 2010). "To withstand a motion to dismiss, a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. In ruling on a motion to

dismiss, "a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011). Mere "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555.

The Court may consider materials that are part of the public record or materials that are embraced by the pleadings and there is no dispute as to their authenticity. *Peterson v. Saperstein*, 267 F. App'x 751, 754 (10th Cir. 2008); *Hodgson v. Farmington City*, 675 F. App'x 838, 840-41 (10th Cir. 2017) ("The district court correctly noted that facts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment."). Here, at Defendants' request the Court takes judicial notice of the relevant USDA regulations and the undisputed fact that the beef labels have been approved by the USDA. Plaintiffs did not object.

DISCUSSION

I. Federal Preemption.

Defendants argue that Plaintiffs' claims challenging federally approved beef labels are expressly preempted by federal law and should be dismissed. The FMIA is clear that labeling requirements in addition to or different than those under the FMIA or approved by the USDA are preempted. 21 U.S.C. § 678. Plaintiffs seek to effectively alter or change USDA approved labels which are allegedly misleading. Therefore, the Court agrees with the Defendants and holds that Plaintiffs' state law claims are preempted under 21 U.S.C. § 678.

A. Preemption law.

"Congress has the power to pre-empt state law under Article VI of the Constitution, which provides that 'the Laws of the United States shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.' " *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1128–29 (10th Cir. 2007), *quoting in part* U.S. Const. art. VI. Because of the supremacy of federal law, "state law that conflicts with federal law is without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). 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." *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir.1998), *quoted in US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010).

Defendants primarily argue that the claims in this case are expressly preempted under 21 U.S.C. § 678. Express pre-emption occurs when Congress "define[s] explicitly the extent to which its enactments pre-empt state law." *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1128–29 (10th Cir. 2007). Where there is an express preemption clause, the Court must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Id.* at 1129.

Congress enacted the Federal Meat Inspection Act ("FMIA") in part to ensure that meat products are properly labeled. 21 USC § 602. Meat cannot be sold if the product has labeling that

is false or misleading. § 607(d). The FMIA contains an express preemption clause, 21 USC § 678. 21 U.S.C. § 678 provides that "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." (emphasis added). The United States Supreme Court noted that "[t]he FMIA's preemption clause sweeps widely…[t]he clause prevents a State from imposing any additional or different—even if non-conflicting—requirements." *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 459, 132 S. Ct. 965, 970, 181 L. Ed. 2d 950 (2012). "This includes claims raised under state common law or statutory law." *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir.2005) ("Under the Supremacy Clause of the United States Constitution, Congress may preempt state common law as well as state statutory law through federal legislation."); *see also Dist. 22 United Mine Workers of Am. v. Utah*, 229 F.3d 982, 987 (10th Cir.2000) (same).

B. FMIA Expressly preempts this state law action.

Here, the core of Plaintiffs' various causes of action is that Defendants are misleading consumers by representing that their foreign-born beef is a product of the United States. They seek injunctive relief directing Defendants to change or modify the country of origin labels, or damages for the allegedly misleading labels.

Defendants argued, and Plaintiffs do not dispute, as follows:

- The FMIA grant the USDA exclusive authority to regulate the labels and packing of beef products, which the USDA exercises through its Food Safety Inspection service (FSIS). **20cv106, Doc. 46 at 5-6;**
- The FSIS administers a comprehensive label approval program ensuring that meat products do not bear any false or misleading labeling and do not give any false impression as to a product's origin or quality. **9 CFR 317.8(a), 412.1(a); 20 CV 106 Doc. 46 at 6.**
- A beef product label cannot be used until FSIS has approved it, including by determining that the label contains no false or misleading words or pictures. ***Id.***
- FSIS permits a beef product label to bear the phrase "Product of the USA" if the product is processed in the United States. The USDA defines the term processed to mean prepared (slaughtered) in the United States. The USDA does not require

that cattle must be born and raised in the United States for the beef processed from them to quality as a Product of the USA. *See* 66 Fed. Reg. 41160, at 41160-61 (Aug. 7, 2001).

- FSIS necessarily approved the product labels. The FSIS approval process is required by federal law and the products could not be sold unless the seller complied with the process. *Kuenzig v. Kraft Foods, Inc.*, 2011 WL 4031141, at & n.8 (M.D. Fla. Sept. 12, 2011) ("The regulations relating to the FMIA… are clear that Defendants' labels were required to be submitted to the FSIS for approval prior to their use, and given that the labels were, in fact used, the Court will presume that the labels received the FSIS's approval."), *aff'd* 505 F. App'x 937 (11th Cir. 2013). Plaintiffs do not disagree.
- The Court may take judicial notice of FSIS's approval of product labels because they are matters of public record and not subject to any dispute. *See, e.g., Shalikar v. Asahi Beer U.S.A. Inc.*, 2017 WL 9362139, at *2 (C.D. Cal. Oct. 15, 2017) (considering agency approvals of food or beverage labels).

Here, Plaintiffs seek (1) an injunction to change the "misleading labels"; (2) an injunction prohibiting Defendants from using the Product of USA label on their foreign-born beef; and (3) damages for the misleading labels. *See* 20-cv-106, **doc. 1-1, p. 64 of 67.** Clearly, Plaintiffs seek injunctive relief that creates labeling requirements "in addition to, or different than" the USDA's standards. This injunctive relief is preempted under the plain language of 21 U.S.C. § 678.

Moreover, suits that seek damages for USDA approved beef labels on the ground that those labels misleading are also preempted under 21 U.S.C. § 678, as those claims would effectively require labeling different than the USDA approved labels. "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." *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, at *5 (N.D. Cal. July 25, 2013) (quotation marks omitted); *Webb v. Trader Joe's Co.*, Case No.: 19-CV-1587-CAB-WVG, 2019 WL 5578225, at *3- 4 (S.D. Cal. Oct. 29, 2019) (noting that plaintiff's state law claims "would effectively impose" an additional labeling requirement and "undermine federal agency authority"); *Craten v. Foster Poultry Farms Inc*., 305 F. Supp. 3d 1051, 1060-61 (D. Ariz. 2018) (concluding that a failure-to-warn claim challenging a label that had been preapproved by the FSIS was preempted by the PPIA); *La Vigne v. Costco*

Wholesale Corp., 284 F. Supp. 3d 496, 507-11 (S.D.N.Y. 2018) (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 or different from those imposed by" federal law (internal citations omitted)); *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1316-18 (S.D. Fla. 2017) ("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) (finding plaintiff's claims preempted where the FSIS previously found no fault with the labels at issue); *Trazo v. Nestle USA, Inc.*, 2013 WL 4083218, at *7-8 (N.D. Cal. Aug. 9, 2013) (concluding that "allowing a jury to weigh in on preapproved USDA labels would surely conflict with the federal regulatory scheme" as a negative "jury verdict would improperly 'trump' the USDA's authority"), *reconsidered on other grounds*, 113 F. Supp. 3d 1047 (N.D. Cal. 2015); *Meaunrit v. ConAgra Foods Inc.*, 2010 WL 2867393, at *6-7 (N.D. Cal. July 20, 2010) (citing cases rejecting state-law challenges to federally approved labels); *Meaunrit v. Pinnacle Foods Grp.*, 2010 WL 1838715, at *7 (N.D. Cal. May 5, 2010) ("To allow a jury to pass judgment on Defendant's labels, notwithstanding the USDA's approval, would disrupt the federal regulatory scheme.").

Therefore, all of Plaintiffs' claims are preempted under 21 USC § 678 because they seek to impose different or additional labeling requirements than those found under the FMIA. *See, e.g., Kuenzig v. Kraft Foods, Inc.*, No. 8:11-CV-838-T-24 TGW, 2011 WL 4031141, at *6-7 (M.D. Fla. Sept. 12, 2011) ("any state law claim based on the contention that the labels are false or misleading [was] preempted, because such a claim would require Plaintiff to show that the 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 and the PPIA).", *aff'd* 505 F. App'x 937 (11th Cir. 2013); *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1316–17 (S.D. Fla. 2017) ("By attempting to challenge the FSIS-approved [labels] as false, misleading, or deceptive, each of Plaintiff's claims improperly seeks to impose additional or different requirements on Defendant's labeling than those required by USDA.").

C. Plaintiffs' remaining arguments against preemption are unavailing.

Plaintiffs spend much of their argument analyzing *different* preemption clauses under different acts. For example, Plaintiffs refer to case law interpreting the Federal Cigarette Labeling and Advertising Act (the "FCLAA"). The Court finds these cases inapposite. That preemption clause applies to tobacco advertising about "smoking and health" but not to other advertising. Here, as the United States Supreme Court noted, the preemption clause under 21 USC § 678 sweeps widely, prohibiting states from requiring labels "in addition to, or different than" those approved by the USDA. §678. As noted above, the Court must look to the specific language of the preemption clause at issue. Therefore, the Court finds that the case law on the preemption clause under the FCLAA is irrelevant to the specific language of the FMIA's preemption clause under section § 678.

Plaintiffs argue that even if the claims based on the labels are preempted, they may proceed on the basis that Defendants' advertising is misleading customers. Plaintiffs' advertisement argument fails because (1) Plaintiffs pled that third-parties and not the Defendants themselves produced the false advertisements; (2) the advertisements appear to merely be a picture of the USDA approved label reflecting "Product of the USA" or "USDA approved"; (3) the USDA concluded those labels are not misleading or false; and (4) allowing this claim would undermine Congress's intent to create uniform standards for describing meat products under conflict

preemption. *Kuenzig v. Hormel Foods Corp.*, 505 F. App'x 937, 939 (11th Cir. 2013) (labels which complied with federal regulations and passed FSIS approval were presumptively lawful and not false or misleading. Therefore, the labels "could not become unfair or deceptive simply by virtue of being depicted in an advertisement."); *Phelps*, 244 F. Supp. 3d at 1317 n.2 ("PPIA and FMIA do not preempt all FDUTPA claims alleging false or misleading *non-label* advertising. However, the only advertising content to which Plaintiff objects in the Complaint is use of the terms "Natural" and "No Preservatives," which are claims approved by FSIS for use in describing the Products. Therefore, Plaintiff's FDUTPA claims based on advertising and marketing are preempted."). To the extent Plaintiffs request leave to amend their complaint as to their advertisement claims, they do not explain what facts they would assert to establish a plausible claim.

Plaintiffs argue that the preemption clause applies only to mandatory label requirements, not optional label requirements such as the country of origin. This argument is not reflected anywhere in 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…."

Plaintiffs argue that 21 U.S.C. § 678 grants New Mexico concurrent jurisdiction over beef labeling. Congress provided that states may, consistent with the requirements set forth under the FMIA, exercise concurrent jurisdiction with the USDA to prevent the distribution of meat products that have labeling that is false or misleading. *See* § 678 (state may not impose labeling requirement in addition to or different than those made under this chapter "but any State… may consistent with the requirements under this chapter exercise concurrent jurisdiction with the Secretary… for the purpose of preventing distribution for human food purposes of any such articles which are…misbranded."); *see also* 21 U.S.C. § 601(n)(1). However, that clause must be read in

conjunction with language in § 678 which provides that no state may impose labeling requirements "in addition to, or different than" those issued under the FMIA. "The states' concurrent jurisdiction has been interpreted to mean that states can impose sanctions for violations of state requirements that are equivalent to the FMIA and the PPIA's requirements." *Kuenzig v. Kraft Foods, Inc.*, No. 8:11-CV-838-T-24 TGW, 2011 WL 4031141, at *4 (M.D. Fla. Sept. 12, 2011), citing *National Broiler Counsel v. Voss*, 44 F.3d 740, 746 (9th Cir.1994); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442, 447, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005) (construing similar language in 7 U.S.C. § 136v(b)); *see also Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1317 (S.D. Fla. 2017) (rejecting concurrent jurisdiction argument as to FMIA). Here, Plaintiffs do not seek to impose equivalent requirements as those imposed by the USDA or to enforce the USDA's labeling requirements. Rather, they seek to impose different labeling requirements by asking this Court to declare USDA approved labels misleading. Plaintiffs' interpretation of 21 USC § 678 would render the express preemption clause a nullity.

Plaintiffs alternatively argue that even if the USDA approved the labels at issue, their decision to approve the labels was wrong and therefore their decision has no effect. Plaintiffs offered no support for this argument, and the Court disagrees. As explained above and in Plaintiffs' motion, the USDA has authority to regulate country-of-origin labeling. 20 cv 106, **Doc. 46 at 5-12.** Moreover, Defendants explained in detail that the USDA exercised its authority to approve labels and determine whether they are misleading. ***Id.;*** 21 USC 607(d), (e); *see also Background section, supra*. Even if the USDA made the wrong decision in determining that the labels were not misleading, it is unclear how that changes the preemption analysis.

II. Court declines to exercise discretion under primary jurisdiction doctrine.

Defendants argue that the Court should dismiss the claims under the primary jurisdiction doctrine. "Even where a court has subject matter jurisdiction over a claim, courts have discretion to refer an issue or issues to an administrative agency. The doctrine of primary jurisdiction is specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1238 (10th Cir. 2007) (internal quotation marks and citations omitted).

"A district court's decision to invoke the primary jurisdiction doctrine "require[s] it to consider whether the issues of fact in the case: (1) are not within the conventional experience of judges; (2) require the exercise of administrative discretion; or (3) require uniformity and consistency in the regulation of the business entrusted to the particular agency. Additionally, when the regulatory agency has actions pending before it which may influence the instant litigation, invocation of the doctrine may be appropriate." *Id.* at 1239.

The Court finds Defendants' arguments persuasive. *See* **Doc. 46 at 36 to 38 of 52.** However, the primary jurisdiction doctrine requires the court to stay the matter, refer the matter to the agency or dismiss this matter without prejudice. *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1239 (10th Cir. 2007). Because the Court is dismissing the matter with prejudice on other grounds, the Court declines to exercise its discretion to stay or refer this matter to the USDA.

III. New Mexico Unfair Practices Act claim fails as a matter of law.

Alternatively, even if Plaintiffs' New Mexico UPA claims were not preempted, they fail as a matter of law as explained below.

A. Plaintiff Lucero lacks standing under the UPA as a competitor.

Plaintiff Lucero admits that he cannot assert a UPA claim as a competitor under NMSA 57-12-7. **Doc. 50 at 34 of 47.** Therefore, the Court dismisses Plaintiff Lucero's UPA claim.

B. Plaintiffs' UPA claims otherwise fail under statutory safe harbor.

The UPA contains a safe harbor clause precluding UPA liability for conduct that is permissible under federal law. Because Defendant's labeling practices are permissible under federal law, specifically under the FMIA and regulations, Defendants' conduct cannot constitute an unfair practice.

Section 57-12-7 of the New Mexico Unfair Practices Act provides:

> 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. "For the UPA exemption to apply, more than the mere existence of a regulatory body is required. At a minimum, the regulatory body must actually administer the regulatory laws with respect to the party claiming the exemption, thereby exercising at least the modicum of oversight that the exempting language indicates is required. Thus, the party claiming the exemption must have obtained permission from the regulatory body to engage in the business of the transaction, thereby subjecting that party to the regulatory body's oversight." *Zamora v. Wells Fargo Home Mortg., a Div. of Wells Fargo Bank, N.A.*, No. CV 12-0048 RB/LFG, 2012 WL 12895364, at *7 (D.N.M. Sept. 18, 2012) (internal quotation marks and citations omitted), *citing State ex rel. Stratton v. Gurley Motor Co.*, 737 P.2d 1180, 1184 (N.M. Ct. App. 1987).

Here, as explained in detail above, the labels were approved by the USDA and FSIS and comply with relevant regulations. Therefore, the labels are expressly permitted under the laws administered by the USDA and fall within the safe harbor clause of NMSA § 57-12-7. *Kuenzig*, 2011 WL 4031141, at *7 (citations omitted) ("labels that have received FSIS preapproval "are presumptively lawful and not false or misleading." "If the FSIS had determined that the labels were false or misleading, Defendant['s] labels would not have been approved, and the FSIS would

have prohibited Defendant[ ] from using the labels."); *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1318–19 (S.D. Fla. 2017) ("Defendant cannot be liable under the FDUTPA because the challenged labels were approved by FSIS and therefore fall within the safe harbor provision.")

Therefore, both Plaintiffs' UPA claims are dismissed with prejudice.

IV. Unjust Enrichment Claims fail.

Alternatively, Plaintiffs' unjust enrichment claims fail as a matter of law, even if they are not preempted. An unjust enrichment claim under New Mexico law requires that "(1) another has been knowingly benefitted at one's expense (2) in a manner such that allowed of the other side to retain the benefit would be unjust." *Ontiveros Insulation Co. v. Sanchez*, 3 P.3d 695, 699 (N.M. Ct. App. 2000).

As explained above, Defendants are complying with USDA regulations and their approved labels are presumptively lawful and not false or misleading. There is nothing unjust about using approved USDA labels. *Kuenzig*, 2011 WL 4031141, at *7 (citations omitted); *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1318–19 (S.D. Fla. 2017).

Moreover, Plaintiff Thornton bought the offending beef from retailers. Plaintiff Thornton does not explain why she does not have a breach of contract claim with the retailers. Generally, an unjust enrichment claim does not sound when they could pursue her claims in contract. *Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA-051, 129 N.M. 200, 203–04, 3 P.3d 695, 698–99.

Plaintiff Lucero's unjust enrichment claim should also be dismissed because his claims are governed by contracts either with the Defendants or third parties. *See* **20-cv-106, Doc. 46 at 42-43 of 52.** New Mexico law disfavors "an unjust enrichment claim against a third party when the that claim involves the same subject as a contract, unless there is something preventing the

plaintiffs from pursuing the contract claims." *Abraham v. WPX Energy Prod., LLC*, 20 F. Supp. 3d 1244, 1276 (D.N.M. 2014).

V. Plaintiff Thornton's Breach of Warranty Claim fails as a matter of law.

Even if Plaintiff Thornton's breach of warranty claim was not preempted, it would fail as a matter of law. *See, e.g., Kuenzig v. Kraft Foods, Inc.*, No. 8:11-CV-838-T-24 TGW, 2011 WL 4031141, at *7 (M.D. Fla. Sept. 12, 2011) (Plaintiff's breach of express warranty claims that contradict the FSIS's nutrition labeling regulations are preempted.").

Plaintiff Thornton did not plead or argue in her response that she filed a pre-suit notice. Plaintiff must give notice within a reasonable time under NMSA § 55-2-607. "A buyer wishing to sue a seller for a breach of warranty must within a reasonable time after he discovers or should have discovered any breach[,] notify the seller of breach or be barred from any remedy[.] Section 55–2–607(3)(a). On its face, Section 55–2–607 facially operates to bar Plaintiff, as the "buyer" of the boots, from "any remedy" if he failed to abide by its provisions. The failure to allege sufficient notice may be a fatal defect in a complaint alleging breach of warranty." *Badilla v. Wal-Mart Stores E., Inc.*, 2017-NMCA-021, ¶ 10, 389 P.3d 1050, 1054 (internal quotation marks omitted). Defendants argue that the complaint may constitute sufficient notice. However, the New Mexico Court of Appeals concluded that failure to give pre-suit notice was unreasonable under the circumstances of that case. *Id.* Here, Defendants did not allege or argue they gave pre-suit notice or argue whether notice was reasonable under the circumstances.

Here, Plaintiff Thornton failed to plead that she gave notice, and Plaintiff does not suggest she could correct this in an amended complaint. Moreover, she did not plead or argue in her response that the notice under the circumstances was reasonable. Rather, the Court concludes that any lack of pre-suit notice was unreasonable because she had capable and experienced counsel.

Moreover, failure to provide pre-suit notice deprived Defendants of the opportunity to respond to Plaintiff's concerns and explore settlement. *Badilla v. Wal-Mart Stores E., Inc.*, 2017-NMCA-021, ¶ 21, 389 P.3d 1050, 1057 ("Factors to be considered in determining reasonableness of notice include the obviousness of the defect, the perishable nature of the goods, and possible prejudice to the seller from the delay.").

VI. Defendants' remaining arguments for dismissal.

Defendants assert several other grounds for dismissal. For example, Defendants also argue that Plaintiffs' claims should be dismissed because they violate the dormant commerce clause. Generally, the Court avoid unnecessarily reaching constitutional issues when a case fails on other grounds. Therefore, the Court declines to address this argument.

VII. Plaintiff Lucero's Motion to Amend Complaint.

Plaintiff Lucero seeks to amend his complaint to replace his UPA claim with a claim for violation of the New Mexico Antitrust Act (NMSA § 57-1-3). Plaintiff Lucero appeared to acknowledge that his New Mexico UPA claim in his first amended complaint fails because, as a competitor of Defendants, he lacks standing. **Doc. 55 at 2.** Defendants argue that amendment here is futile. The Court agrees. The ATA claim fails because it is also preempted, for the same reasons as above.

Plaintiff Lucero argues that his ATA claim is not preempted by federal antitrust law. However, Plaintiff merely repackages his UPA allegations here. Plaintiff Lucero's ATA claim still alleges that Defendants mislabeled their beef. Plaintiff Lucero would require Defendants to modify their labeling practices and would therefore impose requirements that are "in addition to or different than" the USDA's standard. For example, Plaintiff Lucero's proposed Second Amended complaint **(20-cv-105, Doc. 55-1)** alleges as follows:

- Defendants deceptively label and market their beef as product of the USA, when the cattle were in fact born and raised in other countries. ¶¶2, 25, 27.
- Defendants' misrepresentations about the country of origin of their beef prompts consumers to buy their beef products and pay more to Defendants. ¶ 9.
- By deceiving customers about the origin of their products, Defendants are able to sell a greater volume of products. ¶11.
- Contrary to representations made by Defendants, their products are not actually a product of the United States. Defendants made this misleading or deceptive representations knowing that consumers would rely on the representations. ¶¶ 31, 37.
- "Defendants have acted unfairly and deceptively in a scheme to fraudulently label their Beef Products, so that they may compete in a predatory and anti-competitive manner in violation of the ATA, by misrepresenting to consumers that the muscle cuts of beef in the Products originates exclusively from American ranchers and farmers like Plaintiff Lucero and other similarly situated in order to capitalize on the reputation of those domestic producers and cause underpayment for their cattle to Plaintiff and the class members." ¶ 57.
- As a remedy, Plaintiff Lucero requests that the Court issue an injunction requiring Defendants to remove the deceptive or inaccurate labeling and affirmatively label their beef as a foreign product. **Doc. 55-1 at p. 26 and 27.**

The alleged violation of the ATA is the alleged mislabeling or misbranding of foreign cattle as product of the USA, which causes consumers to buy the misbranded beef. Plaintiff's claim is still based on the same theory as above that the USDA approved labels are misleading. Therefore, Plaintiff Lucero's ATA claim is still preempted under the FMIA for the same reasons as stated above.

B. Alternative grounds for dismissal of ATA claim.

Alternatively, Defendants argue that Plaintiff (1) failed to allege an antitrust injury caused by allegedly anticompetitive behavior. Plaintiff appears to only briefly address these arguments. The Court agrees with Defendants.

New Mexico law follows federal antitrust law to construe its provisions. *Nass-Romero v. Visa U.S.A., Inc.*, 279 P.3d 772, 777 (N.M. Ct. App. 2012). An antitrust plaintiff has standing to bring a lawsuit when it alleges facts showing that it has suffered an antitrust injury *Abraham v. Intermountain Health Care, Inc.*, 461 F.3d 1249, 1267-68 (10th Cir. 2006).

"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." *Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249, 1267 (10th Cir. 2006). Here, Plaintiff's alleged injury – receiving less for their beef as a result of Defendants' USDA approved product labeling– is not an injury resulting from anticompetitive behavior. Rather, the injury resulted from Defendants complying with USDA regulations. A plaintiff does not suffer an antitrust injury when the injury results from governmental regulatory framework authorizing Defendants' conduct. *In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785, 791 (8th Cir. 2006) (injury was caused by the federal statutory and regulatory scheme adopted by the United States government, not by the conduct of the defendants.").

CONCLUSION

For the reasons stated above, all of Plaintiffs' claims are preempted. Alternatively, they also fail to state a claim as a matter of law. Plaintiff Lucero's motion to amend is denied as futile.

IT IS THEREFORE ORDERED that Defendants' Motions to Dismiss **(20-cv-105, Doc. 43; 20-cv-106, Doc. 45)** are **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff Lucero's Motion to Amend Complaint **(20-cv-105, Doc. 55)** is **DENIED.**

IT IS FINALLY ORDERED that the consolidated cases are **DISMISSED WITH PREJUDICE.**

Separate judgments dismissing both cases will be entered.

KEA W. RIGGS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

Plaintiff,

v. No. 1:20-cv-105-KWR-SMV

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

Defendants.

CONSOLIDATED WITH:

MICHAEL LUCERO, *on behalf of himself and others similarly situated,*

Plaintiff,

v. No. 1:20-cv-106-KWR-SMV

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

Defendants.

JUDGMENT

Pursuant to Fed. R. Civ. P. 58, and consistent with the Memorandum Opinion and Order filed contemporaneously herewith, the Court issues its separate judgment finally disposing of this civil case.

IT IS ORDERED, ADJUDGED, AND DECREED that this civil action is **DISMISSED WITH PREJUDICE.**

KEA W. RIGGS
UNITED STATES DISTRICT JUDGE