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-1040

THE KROGER COMPANY,
ALBERTSONS,

Defendants

JOINT NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1331, 1332, 1441, 1446, and 1453, Defendants The Kroger Co. ("Kroger") and Albertson's LLC ("Albertson's") (collectively, "Defendants") hereby remove this action from the State of New Mexico Second Judicial District Court, County of Bernalillo to the United States District Court for the District of New Mexico.

This Court has original jurisdiction pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), because (1) the proposed class has at least 100 putative class members, (2) the proposed class asserts an aggregate amount in controversy of $5,000,000 or more, exclusive of interest and costs, and (3) minimal diversity exists. *See* 28 U.S.C. § 1332(d). This Court also has original jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because (1) there is complete diversity between the named parties, and (2) the amount in controversy exceeds the sum of $75,000, exclusive of interests and costs. This Court also has federal question jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiff Robin G. Thornton's ("Plaintiff's") claims are preempted by federal law.

Background

1. Plaintiff commenced this action by filing a Complaint on September 3, 2020, in the Second Judicial District Court for the State of New Mexico, in and for the County of Bernalillo, styled *Robin G. Thornton v. The Kroger Company, et al*., Case No. D-202-CV-2020-05018. Pursuant to 28 U.S.C. § 1446(a), and Local Rule 81.1(a), the most recent version of the docket from the state court and true and correct copies of all pleadings and documents filed in that action are attached as Exhibit 1.

2. Kroger was served with a Summons and copy of the Complaint on September 8, 2020. Albertson's was served with a Summons and copy of the Complaint on September 8, 2020.

3. Plaintiff's Complaint asserts claims regarding Defendants advertising of beef products. (*See, e.g.,* Compl., ¶ 5.) Defendants own and operate grocery stores throughout the United States. (*Id.*, ¶¶ 14-16.) Plaintiff alleges that Defendants deceptively advertise imported beef or beef derived from imported cattle as products of the United States. (*Id.*, ¶¶ 5-6, 19-21.) Plaintiff also alleges the deceptive advertising has occurred since 2015. (*Id*. ¶ 5.)

4. Plaintiff brings this action as a class action on behalf of a putative class, which is defined as "[a]ll consumers in the United States who purchased the Defendants' Products during the applicable limitations period for their personal use, rather than for resale or distribution ('Class')." (*Id.*, ¶ 44.) She also seeks to represent a sub-class, defined as "[a]ll consumers in New Mexico who purchased the New Mexico Products during the applicable limitations [sic], for their personal use, rather than for resale or distribution ('New Mexico Sub-Class')." (*Id.*)

5. Plaintiff brings three claims against Defendants: (1) violation of the New Mexico Unfair Practices Act, NMSA 1978, §§ 57-12-1, *et seq.* ("UPA") on behalf of herself and the New

Mexico Sub-Class, (2) breach of express warranty on behalf of herself and the Class, and (3) unjust enrichment on behalf of herself and the Class. (*Id.*, ¶¶ 48-69.)

6. In her Prayer for Relief, Plaintiff seeks, (1) an order certifying the Class and New Mexico Sub-Class, (2) a declaration that Defendants are "financially responsible" for notifying the Class and New Mexico Sub-Class members of the pendency of this suit, (3) an order declaring that Defendants' conduct violates the UPA, (4) an injunction requiring "proper, complete, and accurate advertising of the Products," (5) an injunction "requiring that Defendants remove and refrain from making representations on advertising that beef that is not born, raised and slaughtered in the US is not exclusively a product of the US and requiring that any Products from cattle that are not born, raised and slaughtered in the US be advertised in a way to disclose the accurate and complete origination of the Product," (6) actual damages for the New Mexico Sub-Class pursuant to the UPA, (7) exemplary damages of three times the actual damages for Plaintiff pursuant to the UPA, (8) restitution for members of the Class "to recover Defendants' ill-gotten benefits," (9) damages for members of the Class arising from Defendants' breach of warranty, (10) an order finding in favor of Plaintiff, the Class, and the New Mexico Sub-Class on all counts, (11) prejudgment interest, (12) "[a]n order of restitution and all other forms of equitable monetary relief," (13) unspecified "injunctive relief," and (14) attorneys' fees, expenses, and costs. (*Id.*, Prayer for Relief, pp. 18-19.)

Venue

7. Plaintiff filed this action in the State of New Mexico Second Judicial District Court, County of Bernalillo, which is located in the District of New Mexico. Venue is proper in the United States District Court for the District of New Mexico pursuant to 28 U.S.C. § 1441(a) because it encompasses the county in which the state court action is pending.

Notice to Plaintiff

8. Concurrently with the filing of this Notice of Removal in this Court, Defendant will serve written notice of removal on Plaintiff's counsel and file a copy of this Notice of Removal with the Clerk of the State of New Mexico Second Judicial District Court, County of Bernalillo, as required by 28 U.S.C. § 1446(d).

Timely Removal

9. This Notice of Removal is timely filed pursuant to 28 U.S.C. § 1446(b)(1) because it is being filed within thirty days of September 8, 2020, the date on which Defendants received the Complaint through service of Summons and a copy of the Complaint. This Notice of Removal also is filed within one year of the commencement of this action on September 3, 2020, and is thus also timely pursuant to 28 U.S.C. § 1446(c)(1).

Grounds for Removal

I. This Court Has Jurisdiction Pursuant to CAFA.

A. The Present Action is a Class Action.

10. Under CAFA, "'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action[.]" 28 U.S.C. § 1332(d)(1)(B). The Complaint is captioned as a "Class Action Complaint," seeks certification of the Class and New Mexico Sub-Class, and expressly states that "Plaintiff Thornton bring this action pursuant to NMRA Rule 1-023." (Compl., pp. 1, 18, ¶ 44.) NMRA Rule 1-023 authorizes an action to be brought by one or more representative parties as a class action. Therefore, this Action is a "class action" as defined by CAFA.

B. There is Sufficient Diversity of Citizenship.

11. CAFA's minimal diversity requirement is satisfied when "[a]ny member of a class of plaintiffs is a citizen of a State different from any defendant[.]" 28 U.S.C. § 1332(d)(2). There is at least minimal diversity of citizenship here because both Defendants are citizens of different states than Plaintiff.

12. Plaintiff alleges that she is a resident of New Mexico (Compl., ¶ 12), and on information and belief, she is a citizen of New Mexico.

13. Kroger is a corporation that was incorporated in Ohio and has its principal place of business in Cincinnati, Ohio.[1] Kroger is therefore a citizen of Ohio. *See* 28 U.S.C. § 1332(c)(1).

14. Albertson's is limited liability limited liability company, organized in Delaware, with its principal place of business in Boise, Idaho. (Compl., ¶ 15.) Therefore, under CAFA, it is a citizen of Delaware and Idaho. *See* 28 U.S.C. § 1332(d)(10).

15. None of the members of Albertson's is a citizen or resident of the State of New Mexico. Accordingly, Albertson's is not a citizen of New Mexico.

16. No change of citizenship has occurred since commencement of the state court action.

17. Accordingly, the requisite diversity of citizenship exists for federal jurisdiction under CAFA. 28 U.S.C. § 1332(d)(2)(A).

C. The Putative Class Has At Least 100 Members.

18. The putative Class exceeds CAFA's requirement of at least 100 members. *See* 28 U.S.C. § 1332(d)(5)(B).

[1] *See, e.g.,* Amendment to the Amended Articles of Incorporation of the Kroger Co., dated June 25, 2015, available at https://www.sec.gov/Archives/edgar/data/56873/000110465915048764/a15-10878_1ex3d1.htm (last accessed Oct. 1, 2020). Plaintiff mistakenly pleaded that Kroger is an Ohio limited liability company (Compl., ¶ 14), but it is in fact an Ohio corporation. (*Id.*)

19. Plaintiff purports to bring claims on behalf of a proposed national Class of "[a]ll consumers in the United States who purchased the Defendants' Products during the applicable limitations period, for their personal use, rather than for resale or distribution." (Compl. ¶ 44(1).)

20. According to United States Department of Agriculture ("USDA") data, 27.3 billion pounds of beef products were consumed in the United States in 2019, and the USDA estimates that consumption from 2019 to the present is not lower than that number.[2] Also according to USDA estimates, the amount of beef consumed in the United States per capita in 2019 was approximately 58 pounds, and the USDA estimates that per capita beef consumption since that time is not significantly lower than in 2019.[3]

21. Plaintiff herself alleges that 3.06 billion pounds of beef and 1.94 million head of cattle have been imported on average since 2014. (Compl., ¶ 21.)

22. Kroger is the largest grocery chain in the country. Given the volume of beef sold each year, it is not surprising that the number of consumers who have purchased Kroger's beef products at Kroger-owned or operated stores across the United States exponentially exceeds 100. (*See* Declaration of William Zimmerman ("Zimmerman Decl.") (attached hereto as Exhibit 2), ¶ 6).) Albertson's is the second-largest chain and would be no different.

D. The Amount in Controversy is Over $5,000,000.

23. CAFA confers jurisdiction to the United States district courts over class actions "in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs[.]" 28 U.S.C. § 1332(d)(2). To determine whether the matter in controversy exceeds

[2] *See* USDA World Agricultural Supply and Demand Estimates, September 11, 2020 at 32, available at https://www.usda.gov/oce/commodity/wasde/wasde0920.pdf (last accessed Sept. 30, 2020).
[3] *See id*.

CAFA's $5,000,000 threshold, "the claims of the individual class members shall be aggregated[.]" 28 U.S.C. § 1332(d)(6).

24. The Tenth Circuit has explained that the amount in controversy is "not the amount the plaintiff will recover," but instead "an estimate of the amount that will be put at issue in the course of the litigation." *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1245 (10th Cir. 2012). Moreover, "the question at this stage in the proceedings isn't what damages the plaintiff will *likely* prove but what a factfinder *might* conceivably lawfully award." *Hammond v. Stamps.com*, 844 F.3d 909, 912 (10th Cir. 2016) (emphases in original).

25. A notice of removal "need only include a '***plausible allegation*** that the amount in controversy exceeds the jurisdictional threshold.'" *Buscema v. Wal-Mart Stores East LP*, No. 19-CV-01089-MV-KK, 2020 U.S. Dist. LEXIS 68412, at *14 (D.N.M. Apr. 16, 2020) (emphasis added). As set forth below, the amount in controversy in this action far exceeds $5,000,000.[4]

26. For her claim for breach of warranty, Plaintiff alleges that she and the members of the national Class have been damaged because they "did not receive goods as warranted and did not receive the benefit of the bargain." (Compl., ¶ 64.) She claims that as such, "they have suffered damages in an amount to be proven at trial. (*Id.*)

27. Additionally, for her claim for unjust enrichment, on behalf of herself and the national Class, Plaintiff requests restitution of alleged "ill-gotten benefits." (Compl., ¶ 69.) She further alleges that the amount of the unjust enrichment is the sale of imported Products. (*Id.*, ¶ 68.)

[4] Defendants provide the following calculations only to demonstrate that the amount in controversy exceeds $5,000,000. Defendants make no admission of liability or damages with respect to any aspect of this case, nor do Defendants waive their right to ultimately contest the proper amount of damages due, if any, should Plaintiff prevail with any of her claims.

28. Her claims on behalf of the Class place at issue all sales by Kroger or Albertson's—nationwide—of beef products that contain what Plaintiff claims to be imported beef products.

29. Kroger's annual sales for beef products at its stores nationwide totals well in excess of $5,000,000. (Zimmerman Decl., ¶ 7.) And this figure is for only ***one year***. It must be multiplied by five as Plaintiff alleges the Defendants' deceptive advertising has occurred since 2015. (Compl., ¶ 5). Albertson's, which Plaintiff alleges also sells beef products nationwide, would be no different. (*See Id*., ¶ 16.)

30. Even assuming that only a small portion of the Defendants' total sales for beef products resulted from the sale of what Plaintiff alleges to be deceptively marketed beef, it is more than plausible that this amount totals $5,000,000. Indeed, Plaintiff alleges "Defendants have ***profited enormously*** … from [their] falsely marketed products." (*Id.*, ¶ 34) (emphasis added).) She also states that beef imported by the packers that supply Defendants totals $6.2 billion in sales annually. (*Id*. ¶ 34.)

31. Even setting aside Defendants' actual sales of beef products, CAFA's $5,000,000 amount-in-controversy requirement can be satisfied by Plaintiff's alternative demand for $100 on behalf of herself and the New Mexico Sub-Class. (Compl., ¶ 58b.) The United States Census Bureau estimates New Mexico's population at over 2 million.[5] It is plausible that at least 2.5% (or approximately 50,000) of those 2 million residents fall within the proposed New Mexico Sub-Class. Even using that conservative assumption, the $100 claim by itself satisfies the $5 million amount-in-controversy requirement.

32. Finally, Plaintiff has claimed attorneys' fees. (Compl., p. 19.) Where attorneys' fees are part of the potential and claimed recovery under a statute, they properly are considered as

[5] *See* https://www.census.gov/quickfacts/fact/table/NM/PST045219 (last accessed Sept. 30, 2020).

part of the amount-in-controversy. *See Barreras v. Travelers Home & Marine Ins. Co.,* No. 12-CV-0354 RB/RHS, 2012 U.S. Dist. LEXIS 200819, at *3 (D.N.M. Oct. 17, 2012); *see also Woodmen of the World Life Ins. Soc'y v. Manganaro*, 342 F.3d 1213, 1218 (10th Cir. 2003).

33. This Court has awarded attorneys' fees of approximately 18 to 20 percent of the class recovery. *See, e.g., In re Thornburg Mortg., Inc. Sec. Litig.,* 912 F. Supp. 2d 1178, 1249 (D.N.M. 2012); *Robles v. Brake Masters Sys., Inc.,* No. CIV 10-0135 JB/WPL, 2011 U.S. Dist. LEXIS 14432, at *54 (D.N.M. Jan. 31, 2011); *In re Horizon/CMS Healthcare Corp. Sec. Litig*., 3 F. Supp. 2d 1208, 1212 (D.N.M. 1998).

34. Plaintiff's request for attorney's fees, therefore further increases the amount in controversy by approximately 18 to 20% beyond the rest of the amount in controversy.

E. The Exceptions To CAFA Do Not Apply Here.

35. A district court is required to decline to exercise jurisdiction under CAFA if certain explicit conditions are present. *See* 28 U.S.C. § 1332(d)(4). Those conditions are not present here. Neither Defendants are citizens of New Mexico, as stated above. *See* 28 U.S.C. § 1332(d)(4)(A)(i) (local controversy exception applies only if at least one defendant is a citizen of the state in which the action was originally filed); § 1332(d)(4)(B) (home-state controversy exception also applies only if at least one defendant is a citizen of the state in which the action was filed); 28 U.S.C. § 1332(d)(3) (discretionary exception applies only if primary defendants are citizens of the state in which the action was filed).

36. Accordingly, this Court has jurisdiction over this matter pursuant to CAFA.

II. This Court Has Jurisdiction Pursuant to 28 U.S.C. § 1332(a).

37. Original jurisdiction is also present pursuant to the diversity statute, 28 U.S.C. § 1332(a)(1), which applies where there is complete diversity between the named parties and the amount in controversy exceeds $75,000.

38. For purposes of determining if complete diversity exists, unnamed class members shall not be considered. *See Devlin v. Scardelletti,* 536 U.S. 1, 10, 122 S. Ct. 2005 (2002) ("The rule that nonnamed class members cannot defeat complete diversity is likewise justified by the goals of class action litigation.").

39. The named parties here are completely diverse. On information and belief, Plaintiff is a citizen of New Mexico. (*See* Compl., ¶ 12.) As an Ohio corporation with its principal place of business in Cincinnati, Ohio, Kroger is a citizen of Ohio.[6] Albertson's is a limited liability company; its sole member is Albertsons Companies, Inc., a corporation incorporated in Delaware with its principal place of business in Boise, Idaho.[7] For purposes of establishing diversity jurisdiction pursuant to 28 U.S.C. § 1332(a), Albertson's is a citizen of Delaware and Idaho. *See Spring Creek Exploration & Prod. Co., LLC v. Hess Bakken Invs. II, LLC*, 887 F.3d 1003, 1014 (10th Cir. 2018) ("For diversity purposes, a limited liability company 'takes the citizenship of all its members.'").

40. As set forth above, the amount in controversy for this matter exceeds $5,000,000, which is exponentially greater than 28 U.S.C. § 1332(a)(1)'s $75,000 requirement.

41. Moreover, Kroger and Albertson's have filed this Notice jointly and as such all Defendants have consented to removal of this action as required by 28 U.S.C. § 1446(b)(2)(a).

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[6] *See, e.g.,* Amendment to the Amended Articles of Incorporation of the Kroger Co., dated June 25, 2015, https://www.sec.gov/Archives/edgar/data/56873/000110465915048764/a15-10878_1ex3d1.

[7] *See, e.g.* Form 8-K of Albertson's Company, Inc., dated September 14, 2020, available at https://sec.report/Document/0001193125-20-245806/ (last accessed Oct. 7, 2020).

42. Accordingly, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1).

III. This Court Has Federal Question Jurisdiction Pursuant to 28 U.S.C. § 1331.

43. Under 28 U.S.C. § 1331, United States district courts have original jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States."

44. "[F]ederal courts may exercise federal question jurisdiction over complaints that, although not presenting federal questions on their face, nonetheless present state law claims that are *preempted* by federal law." *Garley v. Sandia Corp.*, 236 F.3d 1200, 1207 (10th Cir. 2001) (emphasis in original). Additionally, the Supreme Court has held that "[t]he artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim." *Rivet v. Regions Bank*, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 912 (1998). Because Plaintiffs' claims are preempted by the Federal Meat Inspection Act ("FMIA"), this Court has jurisdiction pursuant to 28 U.S.C. § 1331.

45. The FMIA regulates labels on beef products. *See* 21 U.S.C. § 601, *et seq.* It prohibits labels, which are "false and misleading" and permits labeling that is specifically approved by the Secretary of Agriculture or his delegate. 21 U.S.C. § 607(d). The USDA, through its Food Safety and Inspection Service ("FSIS"), regulates beef labels pursuant to the FMIA. *See Thornton v. Tyson Foods, Inc.*, Nos. 1:20-cv-105-KWR-SMV, 1:20-cv-106-KWR-SMV, 2020 U.S. Dist. LEXIS 156059, at *6 (D.N.M. Aug. 27, 2020). Beef labels indicating a country of origin must comply with FSIS-approved standards. *Id.* at *7 (citing 21 U.S.C. § 607(d)). FSIS permits a beef product label to indicate that it is a product of the United States if it is "processed in the

U.S.",[8] in other words, if it "has been prepared (i.e., slaughtered, canned, salted, rendered, boned, etc.)" in the United States. 66 Fed. Reg. 41160, at 41160-61 (Aug. 7, 2001).

46. The FMIA contains an express preemption clause, which provides, "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." 21 U.S.C. § 678. The Supreme Court has found the "FMIA's preemption clause sweeps widely … The 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, 181 L.Ed. 2d 950 (2012). "This includes claims raised under state common law or statutory law." *Thornton*, 2020 U.S. Dist. LEXIS 156059, at *13 (citing *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005)).

47. Earlier this year, this Court found that this Plaintiff's claims based on USDA-approved beef labels that bore the phrase "Product of the USA" were preempted by the FMIA. *Id.* at *16 ("[A]ll of Plaintiffs' claims are preempted under 21 U.S.C. § 678 because they seek to impose different or additional labeling requirements than those found under the FMIA.").

48. Now Plaintiff brings the same claims based on the depiction of USDA-approved labels in Defendants' advertising. (Compl., ¶ 22.) But these claims are also preempted by the FMIA. *See, Thornton*, 2020 U.S. Dist. LEXIS 156059, at *18-19*; Animal Legal Def. Fund v. Hormel Foods Corp.*, No. 2016 CA 004744 B, 2019 D.C. Super. LEXIS 7, at *33 (D.C. Sup. Apr. 8, 2019) ("To the extent that a meat producer uses ***in advertising the same terms with the same disclaimers that USDA has approved in labeling, state-law challenges to the advertising claims***

[8]*See* Food Safety Inspection Service's Food Standards and Labeling Policy Book, available at https://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/guidelines/2005-0003 (last accessed Oct. 2, 2020).

are preempted.") (emphasis added); *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1317 n.2 (S.D. Fla. Mar. 27, 2017) ("[T]he 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.").

49. Because Plaintiffs' claims are preempted by federal law, this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

WHEREFORE, Defendants remove the above-styled action to this Court.

Respectfully submitted,

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I HEREBY CERTIFY that on the 8th day of October 2020, I filed the foregoing electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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