IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

Plaintiffs,

vs. No. CIV 20-1040 JB/JFR

THE KROGER COMPANY and ALBERTSONS,

Defendants.

ORDER[1]

THIS MATTER comes before the Court on the Defendants' Motion to Dismiss with Prejudice, filed November 13, 2020 (Doc. 14)("Motion to Dismiss"). The Court held a hearing on August 25, 2021. See Clerk's Minutes at 1, filed August 25, 2021 (Doc. 26). The primary issues are: (i) whether collateral estoppel bars the Plaintiff Robin G. Thornton from bringing similar claims to those that the Honorable Kea W. Riggs, United States District Judge for the United States District Court for the District of New Mexico, dismissed with prejudice in the consolidated case, Thornton v. Tyson Foods, Inc., 482 F. Supp. 3d 1147 (D.N.M.)(Riggs, J.)("Tyson Foods"); (ii) whether federal law preempts Thornton's claims under the New Mexico Unfair Practices Act, N.M.S.A. §§ 57-12-1 through 57-12-26 ("UPA"), where the Federal Meat Inspection Act, 21 U.S.C. §§ 601-695 ("FMIA"), regulates meat labeling, and the Food Safety and Inspection Services ("FSIS") division of the United States Department of Agriculture ("USDA") possibly approved some of the labeling that forms the basis of the advertising at issue in this case;

[1]This Order disposes of the Defendants' Motion to Dismiss with Prejudice, filed November 13, 2020 (Doc. 14). The Court will issue a Memorandum Opinion at a later date more fully detailing its rationale for the decision.

(iii) whether Thornton's UPA, breach of express warranty, and unjust enrichment claims are actionable under state law where (a) § 57-12-7 of the UPA exempts "actions or transactions expressly permitted under laws administered by a regulatory body of . . . the United States," and "all actions and transactions forbidden by the regulatory body, and about which the regulatory body remains silent . . ." (b) Thornton did not provide Defendants the Kroger Company and Albertsons notice of the alleged breach of express warranty before filing this case, and (c) the Defendants complied with USDA regulations and their approved labels; (iv) whether the Dormant Commerce Clause bars Thornton's claims; and (v) whether Thornton's Class Action Complaint, filed February 5, 2020 (Doc. 1-1), states a plausible claim for relief under the standards in Bell Atl. Corp. v. Twombly, 550 U.S. 554, 570 (2007)("Twombly") and Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)("Iqbal"). See Motion to Dismiss at 6-23. For the reasons stated below and on the record, the Court concludes that: (i) collateral estoppel does not bar Thornton's claims in this case, because the issues are not identical and because purely legal issues are not subject to collateral estoppel under New Mexico law; (ii) federal law does not preempt Thornton's state law claims, because FIMA does not expressly preempt the UPA, conflict preemption does not bar this case, and field preemption was not briefed or argued by the parties; (iii) Thornton's state law claims do not fail, because (a) the UPA's "safe harbor" provision only prohibits its application to actions or transactions "expressly permitted under laws administered by a regulatory body," and the FMIA does not expressly permit misleading advertising, (b) the notice requirement for a breach of express warranty claim would likely be waived by the New Mexico Supreme Court; (iv) the Dormant Commerce Clause does not bar this claim because the UPA is non-discriminatory and the benefit of prohibiting misleading advertising outweigh any potential burden on interstate commerce; and (v) Thornton states a plausible claim for relief under Iqbal and Twombly, but must amend her

complaint to cure its defects.

I. NEW MEXICO'S LAW OF COLLATERAL ESTOPPEL DOES NOT BAR THORNTON'S CLAIMS BECAUSE THE ISSUES ARE NOT IDENTICAL AND THE ISSUES FULLY LITIGATED ARE PURELY LEGAL.

New Mexico law of collateral estoppel is applied here. The claim-preclusive effect of a federal court sitting in diversity is determined by the law of the State in which the federal diversity court sits. See Semtek International, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506-08 (2001). The Court determines that the consolidated cases in Tyson Foods were before the federal district court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)("CAFA"), which is an expanded form of diversity jurisdiction[2] requiring only minimal diversity between parties to a class action, and aggregated claims exceeding $5,000,000.00. See 28 U.S.C. § 1332(d)(2). Because neither of the plaintiffs in Tyson Foods raised federal law claims or stated federal law issues in their complaints, they do not satisfy the well-pleaded complaint rule, nor do they meet its two exceptions. See Parker v. WI Waterstone, LLC, 790 F. App'x 926, 929 (10th Cir. 2019)(unpublished)[3]; Devon Energy Prod. Co., L.P., v. Mosaic Potash Carlsbad, Inc., 693 F.3d

[2]See Parson v. Johnson & Johnson, 749 F.3d 879, 889 (10th Cir. 2014)("CAFA's stated purposes are to 'assure fair and prompt recoveries for class members with legitimate claims;' to 'restore the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction;' and to 'benefit society by encouraging innovation and lowering consumer prices.'" (quoting CAFA, § 2, Pub. L. No. 109-2, 119 Stat. at 5 (2005)).

[3] Parker v. WI Waterstone, LLC, 790 F. App'x 926, 929 (10th Cir. 2019) is an unpublished opinion, but the Court can rely on an unpublished Tenth Circuit opinion to the extent its reasoned analysis is persuasive in the case before it. See 10th Cir. R. 32.1(A)("Unpublished opinions are not precedential, but may be cited for their persuasive value."). The Tenth Circuit has stated:

> In this circuit, unpublished orders are not binding precedent, . . . and . . . citation to unpublished opinions is not favored . . . . However, if an unpublished opinion . . . has persuasive value with respect to a material issue in a case and would assist the court in its disposition, we allow a citation to that decision.

1195, 1203-05 (10th Cir. 2012); Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005); Notice of Removal, filed February 5, 2020 (Doc. 1-1, 1:20-CV-00105 KMR-SMV); Notice of Removal, filed February 5, 2020 (Doc. 1-1, 1:20-CV-00106 KMR-SMV). Because of this omission, and for the reasons stated on the record, see Transcript of Hearing[4] at 30:12-19 (August 25, 2021)("Tr."), the Court applies New Mexico's law of collateral estoppel to determine Tyson Foods' preclusive effect.

The Court further determines that New Mexico collateral estoppel law does not bar Thornton's claims in this case. For collateral estoppel to apply under New Mexico law,

> [F]our elements must be met: "(1) the parties in the current action were the same or in privity with the parties in the prior action, (2) the subject matter of the two actions is different, (3) the ultimate fact or issue was actually litigated, and (4) the issue was necessarily determined."

Mayer v. Bernalillo Cty., No. CIV 18-0666 JB\SCY, 2019 U.S. Dist. LEXIS 3555, at *59-61 (D.N.M. Jan. 8, 2019)(Browning, J.)(quoting Ullrich v. Blanchard, 2007-NMCA-145, ¶ 19, 142 N.M. 835, 171 P.3d 774, 778). At issue here is the test's third prong, whether the ultimate fact or issue The Kroger Company and Albertsons raise in this case actually was litigated in Tyson Foods. Under New Mexico law, there must be "an identity of factual issue in the two cases." O'Brien v. Behles, 2020-NMCA-032, ¶ 51, 464 P.3d 1097, 1116-17. See also Torres v. Village of Capitan, 1978-NMSC-065, ¶ 16, 92 N.M. 64, 68, 582 P.2d 1277, 1281. The issues in this case are not identical to those litigated in Tyson Foods: here, the issue is whether The Kroger Company and

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United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005). The Court concludes that Parker v. WI Waterstone, LLC, 790 F. App'x 926, and all other unpublished cases cited herein have persuasive value with respect to a material issue, and will assist the Court in its disposition of this Order.

[4]The Court's citations to the draft transcript of the hearing refers to the court reporter's original, unedited version. Any final transcript may contain slightly different page and/or line numbers.

Albertsons, which operate grocery stores, have violated the UPA and breached state law through deceptive advertising, see Defendants' Joint Notice of Removal at 33-36, filed October 8, 2020 (Doc. 1)("Complaint"), whereas in Tyson Foods, the main issue litigated was whether the defendant meat packers had violated the UPA and state law through their use of FSIS-approved labeling. While the Court concedes that the claims are similar, the distinction between labeling and advertising renders the claims not identical, and therefore, the Defendants' collateral estoppel argument fails.

Additionally, New Mexico collateral estoppel law does not apply to pure questions of law. See Torres v. Village of Capitan, 1978-NMSC-065, ¶ 18, 92 N.M. 64, 68, 582 P.2d 1277, 1281. At issue in Judge Riggs' opinion in Tyson Foods is not whether the food labels misled consumers, which is a factual issue, but whether federal law preempts Thornton's claims. Because the issues fully litigated in Tyson Foods are pure questions of law, New Mexico collateral estoppel does not bar Thornton from bringing this claim.

Finally, under New Mexico law, the application of collateral estoppel is within the trial court's discretion. See Mayer v. Bernalillo Cty., No. CIV 18-0666 JB\SCY, 2019 U.S. Dist. LEXIS 3555 at *60-61 (Browning, J.)(citing Hartnett v. Papa John's Pizza USA, Inc., 828 F. Supp. 2d 1278, 1286 (Browning, J.); Shovelin v. Cent. N.M. Elec. Coop., Inc., 1993-NMSC-015, ¶ 14, 115 N.M. 293,299, 850 P.2d 996, 1002). Collateral estoppel "should be applied only where the judge determines that its application would not be fundamentally unfair." Mayer v. Bernalillo Cty., 2019 U.S. Dist. LEXIS 3555 at *61. The Court exercises its discretion and concludes that barring Thornton's claims would be fundamentally unfair for the reasons stated above.

II. FEDERAL LAW DOES NOT PREEMPT THORNTON'S FALSE ADVERTISING CLAIMS, BECAUSE FMIA DOES NOT EXPRESSLY PREEMPT STATE ADVERTISING LAWS, AND THERE IS NO CONFLICT PREEMPTION ISSUE WHERE THE LABELS IN QUESTION ARE NOT MANDATORY UNDER

FEDERAL LAW.

The Court concludes that federal law does not expressly preempt Thornton's claims. For preemption to be express, a federal statute must demonstrate an "express congressional intent to preempt state law." Cerveny v. Aventis, Inc., 855 F.3d 1091, 1097-98 (10th Cir. 2017)(quoting Mount Olivet Cemetery Ass'n v. Salt Lake City, 164 F.3d 480, 486 (10th Cir. 1998)). FMIA provides:

> Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act 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 title I of this Act.

21 U.S.C. § 678 (2018). Further, FMIA states that, in terms of imported livestock, "[a]ll such imported articles shall, upon entry into the United States, be deemed and treated as domestic articles subject to the other provisions of this Act." 21 U.S.C. § 620.

However, Congress removed the requirement that beef and pork products be labeled with their country of origin in 2016. See 7 U.S.C. §§ 1638, 1638a; Pub. L. No. 114-113, 759, 129 Stat. 2242, 2284-85 (2016). See also Removal of Mandatory Country of Origin Labeling Requirements for Beef and Pork Muscle Cuts, Ground Beef, and Ground Pork, 81 F.R. 10,755, 10,755 (March 2, 2016)(removing 7 C.F.R. § 65.155). As a result, beef need not be labeled with country-of-origin information, and so labeling beef with a sticker that reads, "Produced in the U.S.A.," "Product of the U.S.A.," or "Produce of the U.S.A." is optional, and not mandatory, according to federal law.

> While it is true that Federal Meat Inspection Act (FMIA), 21 USCS §§ 601 et seq., prohibits states from imposing marking, labeling, packaging, or ingredient requirements in addition to, or different than, those mandated under FMIA, 21 USCS § 678, nothing in the text of FMIA indicates intent to preempt state unfair-trade-practices laws in general . . .

United States v. Stanko, 491 F.3d 408, 418 (8th Cir. 2007). The Kroger Company and Albertsons' reliance on National Meat Association v. Harris, 565 U.S. 452 (2012)("Harris") for its preemption

argument is inapposite, because, in that case, the State law at issue regulated the operation of slaughterhouses and not misleading advertising under a state Unfair Practices Act. See Harris, 552 U.S. at 468. While the Supreme Court held that FMIA contains an express preemption provision "prevent[ing] a State from imposing any additional or different -- even if non-conflicting -- requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations," it does not sweep so widely as to preempt State laws that do not "regulate the same thing, at the same time, in the same place." Harris, 552 U.S. at 459-60, 468. The Defendants cite an unpublished decision of the D.C. Superior Court in support of their argument that FMIA preempts claims based on USDA-approved labeling, see Motion to Dismiss at 16-17 (citing Animal Legal Def. Fund v. Hormel Foods Corp., No. 2016 CA 004744 B, 2019 D.C. Super. LEXIS 7, *32-34 (D.C. Sup. Apr. 8, 2019)), but the District of Columbia Court of Appeals recently reversed and remanded that case, finding that the FMIA does not preempt the UPA. See Animal Legal Def. Fund v. Hormel Foods Corp., No. 19-CV-0397, 2021 D.C. App. LEXIS 254 at *33-36 (Sep. 2, 2021)("We see nothing in the FMIA or PPIA suggesting Congress meant to limit states' (or the District's) traditional powers to regulate advertising.").

Neither proposed federal regulations nor agency policy documents help the Defendants here. The 2001 proposed rule cited in Judge Riggs' opinion states:

> For many years, "Product of the U.S.A." has been applied to product that is exported to other countries to meet those countries' country-of-origin labelling requirements (9 CFR 327.14; FSIS Policy Memo 080 (April 16, 1985)). Products that meet all FSIS requirements for domestic products also ***may*** be distributed in U.S. commerce with such labeling. No further documentation is required. "Product of the U.S.A." has been applied to products, that, at a minimum, have been prepared in the United States.

Product Labeling: Defining United States Cattle and United States Fresh Beef Products, 66 Fed. Reg. 41,160, 41,160 (proposed August 7, 2001)(emphasis added). That proposed rule

subsequently was withdrawn in 2003. See Product Labeling: Defining United States Cattle and United States Fresh Beef Products, 68 Fed. Reg. 11,008, 11,008 (withdrawn March 7, 2003). The Defendants also cite a 2005 FSIS guidance manual, which states:

> Labeling ***may*** bear the phrase "Product of U.S.A." 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).

Food Safety Inspection Service, Food Standards and Labeling Policy Book at 147 (August 2005)(emphasis added), available at https://www.fsis.usda.gov/guidelines/2005-0003. See also Motion to Dismiss at 12.

The Court concludes that neither proposed rules nor policy guidance rise to the level of federal law for the purpose of express preemption, and, because the labeling of beef products with a country of origin is not mandatory, there are no grounds for conflict preemption. The Court also notes the disfavored status of field preemption in the wake of the Supreme Court's decisions in Wyeth v. Levine, 555 U.S. 555 (2009), and Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894 (2019), and the parties neither briefed nor argued the issue of field preemption at the hearing. The Defendants agree with Judge Riggs that the FSIS "necessarily approved" the labels at issue in Tyson Foods, Motion to Dismiss at 13 (quoting Tyson Foods, 482 F. Supp. 3d at 1157 (citing Kuenzig v. Kraft Foods, Inc., 2011 U.S. Dist. LEXIS 102746 at *19 (M.D. Fla. Sept. 12, 2011)(Bucklew, J.)). The "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." Tyson Foods, 482 F. Supp. 3d at 1157 (citing Kuenzig

v. Kraft Foods, Inc., 2011 U.S. Dist. LEXIS 102746 at *19-20 (M.D. Fla. Sept. 12, 2011)(Bucklew, J.)).

Although the plaintiffs in Tyson Foods did not dispute this fact, the Court notes as part of its preemption analysis that it is not clear that the FSIS approved the individual product labels that form the basis of the advertisements in Thornton's Complaint. While it is true that the FSIS operates a label approval program under 9 C.F.R. § 412.1, "generically approved labels" are exempt from this approval process under 9 C.F.R. § 412.2(b), and "[l]abels that bear claims and statements that are defined in FSIS's regulations or the Food Standards and Labeling Policy Book . . . are also deemed to be generically approved by the Agency without being submitted for evaluation and approval." 9 C.F.R. § 412.2. Because the Food Standards and Labeling Policy Book approves the label "Product of U.S.A." for food processed in the United States, this and possibly similar labels may not be subject to the FSIS approval process.

On the other hand, FSIS regulations affirmatively provide that:

> No product or any of its wrappers, packaging, or other containers shall bear any false or misleading marking, label, or other labeling and no statement, word, picture, design, or device which conveys any false impression or gives any false indication of origin . . . shall appear in any marking or other labeling.

9 C.F.R. § 317.8. Due to the uncertainty surrounding the approval process for the labels at issue in Tyson Foods, and which form the basis for the Plaintiff's advertising claim in this case, the Court will not assume that the labels in question have been approved by the FSIS in any manner other than the guidance offered in FSIS' Food Standards and Labeling Policy Book. Because Congress has spoken since 2005 on the issue by repealing the country-of-origin labeling requirements for beef and pork in 2016, the Court concludes that labeling beef "Product of the U.S.A." is permissive, and therefore, State regulation of the conduct at issue here is not preempted by federal law.

III. THE COURT DENIES THE DEFENDANTS' MOTION TO DISMISS THORNTON'S STATE LAW CLAIMS.

The Defendants argue that the Court should dismiss Thornton's state law claims under the UPA's safe harbor provision, that Thornton's express warranty claims are barred for lack of notice, and that her unjust enrichment claims should fail because, by following FSIS guidance, the Defendants did not behave unjustly. See Motion to Dismiss at 20-22. First, the Court concludes that the UPA's safe harbor provision, N.M.S.A. § 57-12-7, does not bar Thornton's claims, because federal law does not expressly permit the advertising at issue here. Second, the Court determines that Thornton's express warranty claims are not barred, because the Supreme Court of New Mexico would waive their notice requirement. Finally, the Court concludes that Thornton's unjust enrichment claims do not fail for the same reasons that the UPA's safe harbor provision does not bar her claims.

A. THE COURT DENIES THE DEFENDANTS' MOTION TO DISMISS THORNTON'S UPA CLAIMS.

The Court concludes that the UPA's safe harbor provision does not bar Thornton's UPA claims. The safe harbor provision of the UPA provides:

> Nothing in the Unfair Practices Act [Chapter 57, Article 12 NMSA 1978] 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.S.A. § 57-12-7. In Quynh Truong v. Allstate Ins. Co., 2010-NMSC-009, 147 N.M. 583, 227 P.3d 73 ("Quynh Truong"), the Supreme Court of New Mexico interpreted the UPA's safe harbor provision, noting the need to balance the State's interest in upholding the "general protections of the UPA" with its interest in giving deference to the "expertise of the relevant regulatory body," and not penalizing "regulated entities who have conformed their conduct to the express directives

of their governing regulatory body." Quynh Truong, 2010-NMSC-009, ¶¶ 31-32, 147 N.M. at 592, 227 P.3d at 82. The Court notes that, unlike some other jurisdictions, New Mexico's safe harbor provision does not include rules and regulations that a regulatory body promulgates as authority for expressly permitted actions. See, e.g., Tenn. Code Ann. § 47-18-111 ("(a) This part does not apply to: (1) Acts or transactions required or specifically authorized under the laws administered by, ***or rules and regulations promulgated by***, any regulatory bodies or officers acting under the authority of this state or of the United States[.]")(emphasis added).

In interpreting the safe harbor provision, "the Supreme Court of New Mexico has held that 'expressly' means 'directly and distinctly stated or expressed *rather than implied or left to inference*.'" In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prods. Liab. Litig., 288 F. Supp. 3d 1087, 1249 (D.N.M. 2017)(Browning, J.)(quoting Truong v. Allstate Ins. Co., 2010-NMSC-009, ¶ 38, 147 N.M. at 593, 227 P.3d at 83 (emphasis in Truong v. Allstate Ins. Co.)). Furthermore, for the safe harbor provision to apply,

> "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. Until the party complies with the requisite licensing or registration procedure, the regulatory body cannot be deemed to have authorized, or implicitly permitted, any transactions in the area subject to regulation."

Campos v. Brooksbank, 120 F. Supp. 2d 1271, 1275-76 (D.N.M. 2000)(Parker, J.)(quoting State ex rel. Stratton v. Gurley Motor Co., 1987-NMCA-063, ¶ 21, 105 N.M. 803, 807, 737 P.2d 1180, 1184).

Guided by the rationale and analysis of the Supreme Court of New Mexico and the Court of Appeals of New Mexico, the Court determines that FSIS' Food Standards and Labeling Policy Book neither rises to the level of "laws administered by a regulatory body of . . . the United States" under the safe harbor provision, nor does it give "express permission" to advertise beef in the

manner that Thornton alleges to be misleading. N.M.S.A. § 57-12-7; see Complaint ¶ 22, at 6-7; id. ¶ 23-24, at 9. The Food Standards and Labeling Policy Book is a generic guide to all food labelling, and states in its preface that "[t]he Policy Book is intended to be guidance to help manufacturers and prepare product labels that are truthful and not misleading. Compliance with the requirements set forth in this publication does not, in itself, guarantee an authorization." Food Safety Inspection Service, Food Standards and Labeling Policy Book at 2 (August 2005), available at https://www.fsis.usda.gov/guidelines/2005-0003. The Court also concludes that descriptions of FSIS policy in an Advanced Notice of Proposed Rulemaking do not rise to the level of "laws administered by a regulatory body of . . . the United States," N.M.S.A. § 57-12-7, and neither do they constitute express permission, because the proposed rule described existing policy in general terms, and the proposed rule has since been withdrawn:

> Products that meet all FSIS requirements for domestic products also may be distributed in U.S. commerce with such labelling. No further documentation is required. "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.

Product Labeling: Defining United States Cattle and United States Fresh Beef Products, 66 Fed. Reg. 41,160, 41,160-41,161 (proposed August 7, 2001); Product Labeling: Defining United States Cattle and United States Fresh Beef Products, 68 Fed. Reg. 11,008, 11,008 (withdrawn March 7, 2003).

The "actions or transactions" at issue in Thornton's Complaint are the use of "'Product of the U.S.,' or similar representations," and the "'USDA Choice' red[,] white and blue graphic" by Defendants in their advertising materials. Complaint ¶ 22, at 6-7; id. ¶¶ 23-24, at 9. The Court

notes that the images Thornton provides in her complaint show labels that include the words, "***Produced*** in the U.S.A." See Complaint at 7-8 (emphasis added). Even if FSIS guidance gives permission to label an imported food product processed in the United States, "Product of the U.S.A.," such guidance does not explicitly give permission for any added or similar words, pictures, or symbols, nor for their use in advertising those products. The Court concludes that the UPA's safe harbor provision does not prohibit Thornton's claims. The Court therefore will deny the Defendants' Motion to Dismiss Thornton's UPA claims.

B. THORNTON'S LACK OF NOTICE TO DEFENDANTS ON HER EXPRESS WARRANTY CLAIMS DOES NOT BAR HER CLAIMS.

The Defendants argue that because Thornton did not give them notice of an alleged breach of express warranty before her lawsuit, the Court must dismiss her breach of express warranty claims. See Motion to Dismiss at 21 (citing N.M.S.A. § 55-2-607(3)(a)). Thornton suggests that her Complaint serves the purpose of providing notice to the Defendants for her breach of express warranty claim. See Plaintiff's Response at 27-28. The Court agrees with Thornton that the Supreme Court of New Mexico likely would follow other jurisdictions' example in waiving the notice requirement. See Complaint at 27-28 (citing In Re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Products Liab. Litig., 288 F. Supp. 3d at 1271-72. The Court therefore will deny the Defendants' Motion to Dismiss Thornton's breach of express warranty claims.

C. THE COURT DENIES THE DEFENDANTS' MOTION TO DISMISS THORNTON'S UNJUST ENRICHMENT CLAIMS.

The Defendants argue that they "are complying with USDA regulations and their approved labels are presumptively lawful and not false or misleading." Motion to Dismiss at 21 (quoting Tyson Foods, 482 F. Supp. 3d at 161). Because the Court finds that neither federal law nor the UPA's safe harbor provision expressly preempt or block Thornton's claims, however, it sees no

reason to bar Thornton's unjust enrichment claims. The Court therefore denies the Defendants' Motion to Dismiss Thornton's unjust enrichment claims.

IV. THORNTON'S CLAIMS DO NOT FAIL UNDER THE DORMANT COMMERCE CLAUSE.

Thornton's UPA claims do not fail under the Dormant Commerce Clause, because the UPA is not designed to foster a State's economic protectionism, nor is it discriminatory. See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 101 (1994). Because Congress withdrew its country-of-origin requirements for beef, and because labeling meat prepared in the United States as "Product of the U.S." is permissive and not mandatory, it is possible for the Defendants to comply with both FSIS policy and the UPA without affecting international trade agreements. It could comply, for example, by removing misleading stickers and any wording or symbols which suggest a country of origin for beef products. See Animal Legal Def. Fund v. Hormel Foods Corp., No. 19-CV-0397 at *38-39. Even if Thornton succeeds on the merits and forces the Defendants to change their advertising in New Mexico, thus burdening interstate commerce to some degree, the benefit of prohibiting misleading advertising outweighs any potential burden on interstate commerce. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

V. THORNTON'S COMPLAINT STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED, BECAUSE SHE PLEADS PLAUSIBLE FACTS, BUT THE COURT ORDERS THORNTON TO SUBMIT AN AMENDED COMPLAINT.

The Court concludes that Thornton has stated sufficient facts to show that the Defendants' advertisements are misleading, and concludes that Thornton has asserted a plausible claim for relief under State law. See Twombly, 550 U.S. at 555-56; Iqbal, 556 U.S. at 678. The Court cannot tell, however, from the Complaint which advertisements belong to which Defendants, how the advertisements were circulated or where they were seen, and when the products were purchased, and by whom. Furthermore, the Defendants assert that none of the advertisements Thornton provides in her Complaint are from Albertsons. See MTD at 19. The Court therefore orders Thornton to file an Amended Complaint that includes clear, high resolution pictures which are labeled or indexed with information identifying which Defendant circulated each advertisement, where, and when, and whether Thornton or other putative class members purchased that meat, and on what date.

IT IS ORDERED that (i) the Defendants' Motion to Dismiss With Prejudice, filed November 13, 2021 (Doc. 14), is denied; and (ii) the Plaintiff Robin Thornton shall submit an Amended Complaint curing the defects in her original complaint, as described in this Order.

UNITED STATES DISTRICT JUDGE

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