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 JB/LF

THE KROGER COMPANY,
ALBERTSONS,

Defendants.

DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE

Defendants The Kroger Co. ("Kroger") and Albertsons LLC ("Albertsons") (collectively, "Defendants") respectfully request that this Court dismiss Plaintiff Robin G. Thornton's ("Plaintiff's" or "Thornton's") claims because (1) they are barred by the doctrine of collateral estoppel, (2) they are preempted by federal law, (3) they are not pled in accordance with the standard of *Twombly* and *Iqbal* and therefore fail to state a claim for which relief may be granted, (4) they fail to state actionable claims under New Mexico law, and (5) they must be stricken pursuant to the Dormant Commerce Clause. In accordance with LR-CV 7.1, it has been determined this Motion is opposed by Plaintiff.

PRELIMINARY STATEMENT

Earlier this year, Thornton filed a class action complaint against the nation's beef packers, alleging that they had improperly labeled their beef as "Products of the USA." In August, Judge Kea W. Riggs dismissed the complaint for a number of reasons, including the fact that any claims

pertaining to such federally-approved labels were expressly preempted by federal law. *See Thornton v. Tyson Foods, Inc.*, No. 1:20-cv-105-KWR-SMV, 2020 U.S. Dist. LEXIS 156059 (D.N.M. Aug. 27, 2020).

One week later, Thornton took her dismissed complaint, replaced the names of the beef packers therein with Kroger and Albertsons, and filed this lawsuit. She asserts that the same advertising on the same labels on the same beef is misleading to the same customers for the same reasons she asserted in her dismissed case. She pursues the same claims and seeks the same remedies. The Supreme Court has repeatedly held that collateral estoppel bars a plaintiff from losing a case and bringing a new one by simply naming new defendants. *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). Because that is precisely what Thornton has done through this action, her claims must be dismissed.

Even if collateral estoppel did not apply, Thornton's claims would still be preempted by the Federal Meat Inspection Act's ("FMIA's") sweeping preemption clause, which expressly preempts state law requirements "in addition to, or different than" federal labeling requirements. 21 U.S.C. § 678. Thornton seeks to hold Kroger and Albertsons liable for using United States Department of Agriculture-("USDA")-approved labels in their advertising by arguing the USDA's definition of domestic beef is wrong. She cannot use her claims here to try to undermine federal law or change federal labeling regulations.

Thornton's claims also fail because she has pled only conclusory and speculative allegations insufficient to state a claim under *Twombly* and *Iqbal*. She does not identify what beef she purchased, much less provide a factual basis for asserting that the beef was imported.

In addition, her claim under the New Mexico Unfair Practices Act ("UPA") also fails because she is not a "competitor" under the statute, and therefore lacks standing to bring a claim, and because the conduct at issue falls within the UPA's safe harbor for conduct approved by federal law. Her breach of warranty claim also fails because she did not give notice to Kroger or Albertsons prior to initiating this lawsuit, even though Judge Riggs told her a week before she filed this case that notice was a mandatory prerequisite to bringing such a claim. Moreover, all of her claims are also barred by the Dormant Commerce Clause, which prohibits her from interfering with interstate and foreign commerce.

Judge Riggs' well-reasoned decision dismissing Thornton's complaint against the beef packers explains in detail why Thornton's claims in that matter were impermissible as a matter of law. The law did not change in the week between the issuance of the decision and Thornton's filing of this lawsuit. Accordingly, Thornton's claims in this matter are likewise impermissible, and this action should be dismissed with prejudice.

BACKGROUND FACTS

I. The Tyson Case

On January 7, 2020, Plaintiff Robin G. Thornton filed a class action complaint in the Second Judicial District Court for the State of New Mexico against the four major beef packers in the United States: Tyson Foods, Inc., Cargill Meat Solutions, Corp., JBS USA Food Company, and National Beef Packing Company, LLC. The defendant meat packers removed the case to the United States District Court for the District of New Mexico, and the case (the "Tyson Case") was assigned to Judge Kea W. Riggs. (*See Thornton v. Tyson Foods, Inc*, et al, Case No. 1:20-cv-00105-KWR-SMV (D.N.M).) (A copy of the complaint in the Tyson Case is attached as Exh. 1).

In her complaint in the Tyson Case, Thornton asserted the beef industry had "been labeling beef that is imported into the U.S. post slaughter as 'Product of the U.S.' or some similar label designed to give the impression that the beef that the consumer is purchasing is from an animal born, raised and slaughtered in the United States," whereas some of the beef they package actually originates from foreign cattle. (*See* Tyson Case, Doc. 1-1, ¶¶ 5-8, 21-42). She included photographs of advertisements of the defendants' beef products that featured a USDA shield, which stated that the beef was "USDA Choice" and that it had been produced in the USA, and she alleged such representations misled consumers about the nature of the beef they were buying. (Id. at ¶¶ 24-25). These are some of them:

(Id. at ¶ 24). Plaintiff asserted claims for Violation of the New Mexico Unfair Practices Act (Count I), Breach of Express Warranty (Count II), and Unjust Enrichment (Count III) against the beef packer defendants. (Id. at ¶¶ 50-71).

The beef packers moved to dismiss Plaintiff's complaint in its entirety on the grounds that representations in the labeling and advertising of the beef complied with federal regulations and

had been approved by the USDA, and as such, the FMIA expressly preempted her claims. (*See* the Tyson Case, Doc. 43, 44, and 51). Judge Riggs agreed that Thornton's claims were preempted by federal law and dismissed her complaint on August 27, 2020. *See Thornton*, 2020 U.S. Dist. LEXIS 156059. With respect to the advertisements pictured above, Judge Riggs explained they were merely pictures of USDA-approved labeling, which the USDA had determined were "not misleading or false," and that it would undermine the purpose of federal preemption to let any claims regarding this advertising proceed. *Id.* at *18-19.

II. This Case

As noted above, one week after dismissal of the Tyson Case, Thornton took the complaint that had been dismissed by Judge Riggs, replaced the meat packer defendants with Kroger and Albertsons, who own and operate grocery stores throughout the United States, and filed it again in the Second Judicial District Court for the State of New Mexico. (*See* Doc. 1 at Exh. 1, Compl.). Although she made a few minor adjustments to the allegations, her complaint against Kroger and Albertsons is nearly word-for-word the same complaint that was dismissed by Judge Riggs. (A comparison of the two complaints is attached as Exh. 2).

Just as she did in the Tyson Case, Thornton alleged that Kroger and Albertsons advertised "beef that is imported into the U.S. post slaughter as 'Product of the U.S.' or some similar label designed to give the impression that the beef that the consumer is purchasing is from an animal born, raised and slaughtered in the United States," whereas some of the beef they sell actually originates from foreign cattle. (Doc. 1 at Exh. 1, Compl., pp. 20-21, 23-30, ¶ 5). In support of this, she included the very same image files of the same advertisements she featured in her complaint in the Tyson Case:

(*Id.* at pp. 25-26, ¶ 22). Plaintiff also brings the same claims against Kroger and Albertsons that she brought against the meat packers in the Tyson Case: Violation of the New Mexico Unfair Practices Act (Count I), Breach of Express Warranty (Count II), and Unjust Enrichment (Count III). (Id. at ¶¶ 48-69).

LEGAL ARGUMENT

I. Plaintiff's Claims Should be Dismissed Pursuant to the Doctrine of Collateral Estoppel.

Plaintiff has filed the same allegations, concerning the same advertisements of the same products with the same labeling, in support of the same claims as she did in the dismissed Tyson Case; she has only switched defendants. The Supreme Court has explained that the doctrine of collateral estoppel was designed to prevent precisely this kind of attempt to relitigate a lost case by switching defendants. In *Blonder-Tongue Labs.*, the Supreme Court wrote:

> In any lawsuit where a defendant . . . is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the

> defendant's time and money are diverted from alternative uses -- productive or otherwise -- to relitigation of a decided issue. And, still assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiff's allocation of resources. **Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.'**

402 U.S. at 329 (quoting *Kerotest Mfg. Co*. v. *C-O-Two Co*., 342 U.S. 180, 185, 72 S. Ct. 219, 96 L. Ed. 200 (1952)) (emphasis added).

In *Parklane Hosiery Co.*, the Supreme Court again made clear that the "[d]efensive use of collateral estoppel **precludes a plaintiff from relitigating identical issues by merely switching adversaries**." 439 U.S. at 329-30 (emphasis added). It added that judicial enforcement of "defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible." *Id.*

As this Court has noted, defensive collateral estoppel requires that four elements be met:

> '(1) the issue previously decided is identical with the one presented in the action in question,
> (2) the prior action has been finally adjudicated on the merits,
> (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and
> (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.'

Mayer v. Bernalillo Cty., No. CIV 18-0666 JB\SCY, 2019 U.S. Dist. LEXIS 3555, at *111 (D.N.M. Jan. 8, 2019) (quoting *United States v. Rogers*, 960 F.2d 1501, 1508 (10th Cir. 1992)); *see also Reeves v. Wimberly*, 1988-NMCA-038, ¶ 12, 107 N.M. 231, 234, 755 P.2d 75, 78 ("Collateral estoppel may now be used to preclude relitigation of an issue if the party against whom it is to be applied was a party or in privity with a party in the earlier suit and had a full and fair opportunity to litigate this issue in that earlier action.").

All four elements are met here. First, the issues in this case are precisely the same as the issues in the Tyson Case. Again, Thornton asserts that the same advertisements for the same beef products, using the same USDA-approved labeling, mislead consumers in the same way, giving rise to the same alleged claims for relief. (*See* pp. 3-6, *supra*). Consideration of Plaintiff's claims here requires the same analysis of the same federal statutes and regulations, and consideration of the same case law regarding federal preemption. (*See* pp. 9-15, *infra).* The only difference in the cases is that Thornton has switched adversaries, which is precisely what the United States Supreme Court held was forbidden by the doctrine of defensive collateral estoppel. *See Parklane*, 439 U.S. at 329-30.

Second, Thornton's claims (and specifically, whether they were preempted by federal law) were "finally adjudicated on the merits" in Judge Riggs' order of dismissal, which terminated the case with prejudice. *Thornton*, 2020 U.S. Dist. LEXIS 156059, at *32. Moreover, Thornton's appeal from this decision does not change the fact that it is a final judgment for purposes of invoking collateral estoppel. *See Casias v. Sw. Med. Assocs*., No. CIV 04-0142 JB/ACT, 2005 U.S. Dist. LEXIS 39006, at *11-12 (D.N.M. Oct. 31, 2005) (wherein this Court explained that "a final judgment is preclusive" for purposes of collateral estoppel and res judicata "even if it is currently being appealed").

Third, "the party against whom the doctrine is invoked," Thornton, is the same plaintiff whose complaint was dismissed in "the prior adjudication." And fourth, when the beef packers moved to dismiss the Tyson Case, Thornton had a full and fair opportunity to litigate the issues in her opposition to their motion. (*See* Tyson Case, Doc. 49). For purposes of collateral estoppel, this is all that is required to bar re-litigation of those issues. *See, e.g., Jaime Sarmiento Espinosa v. Santa Fe Det. Ctr.,* No. CIV 09-0934 JB/LAM, 2009 U.S. Dist. LEXIS 147880, at *6 (D.N.M.

Oct. 28, 2009) (this Court dismissed a case against a defendant under the doctrine of collateral estoppel because the plaintiff's "identical claims" against another defendant had been dismissed in a prior action after a "a full and fair opportunity to litigate his claims" on a motion to dismiss for failure to state a claim); *Arena v. McShane*, 150 F. App'x 165, 167 (3d Cir. 2005) (finding that collateral estoppel barred claims that were litigated at motion to dismiss stage).

In some cases, a collateral estoppel analysis requires close parsing of the claims to see if they are similar or overlap. **This is not a close case.** One week after her complaint in the Tyson Case was dismissed, Thornton cloned that complaint, switched the names of the defendants, and refiled it. This is precisely the kind of behavior defensive collateral estoppel was designed to prevent. For this reason alone, her complaint must be dismissed.

II. Thornton's Claims Must be Dismissed Because They Are Preempted by Federal Law.

Even if collateral estoppel did not bar Thornton's claims here, they still fail for the same reason her claims failed in the Tyson Case—namely, that they are preempted by federal law.

A. Overview of Federal Regulation of Beef Labeling

1. USDA and FSIS Oversight of Labeling

"Federal law 'regulates a broad range of activities' related to meat processing." *Thornton*, 2020 U.S. Dist. LEXIS 156059, at *6 (quoting *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455-456, 132 S. Ct. 965, 181 L. Ed. 2d 950 (2012)). Beef labels "are regulated under the Federal Meat Inspection Act ('FMIA'), codified at 21 U.S.C. § 601, et seq." *Id.* "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.'" *Id.* (quoting § 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')." *Id.* FSIS oversees "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.'" *Id.* (quoting 9 C.F.R. § 317.8(a)). And "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.'" *Id.* at *6-7 (quoting 9 C.F.R. § 412.1(a)). Here, Thornton's complaint contains no allegations that that the labeling depicted in the advertising at issue was not approved by FSIS. (*See generally* Doc. 1 at Exh. 1, Compl.) And in the Tyson Case, she conceded that the labeling at issue had been approved by FSIS. *Thornton,* 2020 U.S. Dist. LEXIS 156059 at *7.

2. Country of Origin Labelling

United States regulations formerly mandated that only beef "exclusively from an animal that is exclusively born, raised, and slaughtered in the United States" was a product of the United States. Pub. L. No. 107-171, §§ 281-82, 116 Stat. 134, 533-35 (2002). In 2008, Canada and Mexico challenged the United States' country-of-origin labeling requirements in the World Trade Organization ("WTO"). *See* Panel Report*, United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶¶ 2.1-2.3, WTO Doc. WT/DS384/R (Nov. 18, 2011).[1] Canada and Mexico claimed the USDA's country-of-origin labeling requirements had the effect of

[1] Available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjPpZmMy9fsAhVbZc0KHZn4DBUQFjABegQIAxAC&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Ftratop_e%2Fdispu_e%2F384_386r_e.pdf&usg=AOvVaw0nt6IFzfipqgTN8HEjB-eQ (last accessed Oct. 28, 2020).

discouraging consumers from purchasing foreign products and raising costs for foreign producers. *E.g.*, *id.* ¶ 7.265. A WTO panel issued a decision accepting Canada and Mexico's claim that designating beef as a "Product of U.S.A." disincentivized purchasers from buying foreign products. *Id.* The WTO Appellate Body affirmed the Panel's ultimate conclusion. *See* Appellate Body Report, *United States—Certain Country Of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384/AB/R (June 29, 2012).[2]

The WTO then ordered the United States to amend its country-of-origin labeling requirements by May 23, 2013. *See* Arbitration Under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 123, WTO Doc. WT/DS384/24 (Dec. 4, 2012).[3] In response, the USDA finalized a new rule, which Canada and Mexico challenged in a second WTO proceeding. *See* Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶¶ 1.6-1.8, WTO Doc. WT/DS384/AB/RW (May 18, 2015).[4] In 2015, the WTO rejected the new May 2013 USDA regulations and authorized $1.01 billion in retaliatory tariffs against the United States. *See* Arbitrator Decision, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.1, WTO Doc. WT/DS384/ARB (Dec. 7, 2015).[5]

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[2] Available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwip9Py0zNfsAhVPG80KHYwrAN4QFjABegQIBBAC&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Ftratop_e%2Fdispu_e%2F384_386abr_e.pdf&usg=AOvVaw2KxUIL58tHoPfFTuK63QcK (last accessed Oct. 28, 2020).

[3] Available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds384/*)%20and%20(@Title=%20((arbitration%20under%20article%2021.3)%20and%20((award%20of%20the%20arbitrator)%20or%20(report%20of%20the%20arbitrator))))&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true# (last accessed Oct. 28, 2020).

[4] Available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjTtKK-ztfsAhUlAp0JHQZ4BNAQFjABegQICRAC&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Ftratop_e%2Fdispu_e%2F384_386abrw_e.pdf&usg=AOvVaw058dTZyczHJMOKyc0kqZku (last accessed on Oct. 28, 2020).

[5] Available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwig5_q8z9fsAhUFac0KHeHMBCAQFjABegQIBBAC&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Ftratop_e%2Fdispu_e%2F384_386arb_e.pdf&usg=AOvVaw0iTw49R1Pk2H1u5qIdv_yJ (last accessed Oct. 28, 2020).

In response to this, "Congress made country or origin labeling optional for beef products" starting in 2016. *Thornton*, 2020 U.S. Dist. LEXIS 156059, at *6 (citing Pub. L. No. 114-113, 759, 129 Stat. 2242, 2284-85 (2016)). However, "[t]he 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." *Id.* (citing 21 U.S.C. §607(d) and Food Safety Inspection Service's Food Standards and Labeling Policy Book) (the "FSIS Labeling Book").[6]

The FSIS Labeling Book states that "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)." *Id.* (quoting FSIS Labeling Book at 147). FSIS has explained what beef products may be labeled a "Product of The U.S.A.":

> **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. . . .

Id. at *8-9 (quoting 66 Fed. Reg. 41160, at 41160-61 (Aug. 7, 2001)) (emphasis added). Thus, the **USDA does not require**—as Thornton argues it should in her complaint—that cattle be born, raised, and slaughtered in the United States to qualify as a "Product of U.S.A." (*See, e.g.,* Doc. 1 at Exh. 1, Compl., ¶ 5). To the contrary, the USDA makes it expressly clear that beef **processed** in the United States may bear that label, even if the product is from imported cattle.

[6] Available at https://www.fsis.usda.gov/wps/wcm/connect/ 7c48be3e-e516-4ccf-a2d5-b95a128f04ae/Labeling-PolicyBook.pdf?MOD=AJPERES (last accessed Mar. 9, 2020).

B. Federal Law Preempts Plaintiff's Claims Arising from Beef Labeling.

As the above demonstrates, the beef at issue in Thornton's complaint, i.e. beef derived from imported cattle, was properly deemed a product of the United States under USDA regulations, and the labels describing it as such were USDA-approved through FSIS. *See Thornton*, 2020 U.S. Dist. LEXIS 156059, at *14-15 ("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. . . . Plaintiffs do not disagree."). Under the guise of state law claims, Thornton attempts to overturn that USDA-approval, and rewrite the FSIS guidelines on what constitutes a product of the United States. But as Judge Riggs noted, federal law concerning beef labeling expressly preempts any state law statutes, regulations, or legal claims that conflict with the federal labeling requirements for beef:

> 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).

Id. at *12-13 (emphasis added).

Again, the labels used in the advertising that is the subject of Thornton's complaint against Kroger and Albertsons were approved by the USDA. *Id.* at *14-15. Thornton claims that these

labels are misleading because they represent the beef at issue as a "Product of the USA," even though the beef packer defendants from the Tyson Case may have imported some of the cattle that contributed to those beef products. (Doc. 1 at Exh. 1, Compl., ¶ 23). Because Thornton seeks an order changing the federally-approved labeling of such products (*id.* at pp. 18-29), her claims are (as Judge Riggs found) preempted by the FMIA's preemption clause. *See Thornton*, 2020 U.S. Dist. LEXIS 156059, at*15; *see also Ranchers-Cattlemen Action Legal Fund v. USDA,* No. 2:17-CV-223-RMP, 2018 U.S. Dist. LEXIS 94527, at *18-22 (E.D. Wash. June 5, 2018) (entering summary judgment against challenge to the USDA's implementation of country-of-origin label requirements because those regulations reflected Congress's intent).

Similarly, as Judge Riggs explained, Thornton's claims for damages arising from the approved labeling are barred as well:

> Moreover, **suits that seek damages for USDA approved beef labels on the ground that those labels [are] 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 U.S. Dist. LEXIS 118225, 2013 WL 5530017, at *5 (N.D. Cal. July 25, 2013) (quotation marks omitted); *Webb v. Trader Joe's Co.*, 418 F. Supp. 3d 524, 2019 WL 5578225, at *3-4 (S.D. Cal. 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 U.S. Dist. LEXIS 113534, 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 U.S. Dist. LEXIS 73599, 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 U.S. Dist. LEXIS 43858, 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'.).

Id. at *15-17 (emphasis added). If Thornton's claims were to succeed, they would upend the federal regulatory scheme enacted by Congress and would impair our nation's ability to comply with WTO decisions. Congress expressly preempted such claims precisely so litigants like Thornton could not do this. For this reason, her claims should be dismissed.

C. Plaintiff's Allegations Regarding Labeling Depicted in Advertising Do Not Save Her Claims.

Any attempt by Thornton to distinguish the Tyson Case from this one by arguing that here she is challenging *advertising* that contains or replicates the content of the USDA-approved labels, and not the labels themselves, fails at the outset. Indeed, she challenged this very **same advertising** in the Tyson Case, in addition to the labeling. *See* Thornton, 2020 U.S. Dist. LEXIS 156059, at *19. And Judge Riggs explained that claims based on advertising depicting USDA-approved labels were preempted just like claims based on the labels themselves. *Id.* Other courts have held the same. In *Kuenzig v. Hormel Foods Corp*., 505 F. App'x 937 (11th Cir. 2013), for example, the Eleventh Circuit Court of Appeals upheld the dismissal of state law claims pertaining to advertising that featured FSIS-approved beef labels because the "state law claims would impose requirements 'in addition to, or different than' federal law" governing the labeling. *Id.* at 938. Although Kuenzig argued that it was challenging advertising featuring the labels and not just the

labels themselves, the court explained that "**the label could not become unfair or deceptive simply by virtue of being pictured in an advertisement**." *Id.* at 939 (emphasis added).

Similarly in *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1319 (S.D. Fla. 2017), the plaintiff claimed that the words "Natural" and "No Preservatives" on labels of Hormel beef products were misleading, but the court held that these claims were expressly preempted by PPIA and FMIA because "FSIS has preapproved all of the labels at issue." *Id.* at 1317-18. Plaintiff argued that advertising using this language had not been approved by FSIS, but the court noted that "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." *Id.* at 1317 n.2.

In *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), the court explained that permitting claims to proceed on advertising using USDA-approved labeling would undermine the purpose of federal regulations and federal preemption, as well as confuse consumers about the products they purchase:

> **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 are preempted.** . . . If this Court found misleading Hormel's use in advertising of the same terms that USDA approved in labeling, the finding would conflict with USDA's determination that Hormel's use of the terms to describe the product is not misleading. ALDF does not explain how use of the same term in the same way can be misleading in an advertisement but not in a label. **Federal law regulates labeling so that consumers can use labels as the authoritative source of information about a product's ingredients, and if a producer can accurately use a term in a label, the producer should be able to use the same term in its advertising**. Otherwise, for example, a state could make it illegal for a meat producer to state in its advertising that USDA approved labeling its product as 'natural.'

> **It would be inherently and inevitably confusing to consumers if the description of Hormel's products in its advertisements were materially different from the description in its labels.**

Id. at *32-34 (emphasis added).

The labels depicted in the advertising at issue in this case were approved by the USDA for the purpose of keeping consumers informed about the products they purchase. *See* 9 C.F.R. § 317.8(a). If Thornton were to succeed on her claims, retailers would be forced to digitally alter or blur pictures of beef products in their advertisements to hide such USDA-approved labels. Courts properly dismiss such claims because they would undermine the purpose of the regulatory scheme. This Court should do the same.

D. Thornton Does Not Allege Albertsons' Advertising Represents Anything about the County of Origin of its Beef.

In her complaint, Thornton shows pictures of only Kroger advertising. She does not include any examples of any Albertsons advertising of beef. Indeed, Thornton does not allege that Albertsons advertised its beef as a "Product of the USA" at all, but argues only that this was implied because the advertising she does not include in her complaint features a "'USDA Choice' red white and blue graphic." (Doc. 1 at Exh. 1, Compl., ¶ 24). This fails to state a claim for three reasons.

First, the use of red, white, and blue colors does not represent that a product was made in the USA. *See Milso Indus. Corp. v. Nazzaro*, No. 3:08CV1026(AWT), 2012 U.S. Dist. LEXIS 123999, at *59 (D. Conn. Aug. 30, 2012) ("Although the company name, 'Liberty Casket' and the iconography of the Statue of Liberty and the American flag evoke clear associations with the United States of America, these words and symbols are too general to evoke any specific geographical associations or to support an inference that there is an implied claim of domestic manufacture."); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 256, 36 S. Ct. 269,

60 L. Ed. 629, 1916 Dec. Comm'r Pat. 281 (1916) (holding that use of the words "The American Girl" on shoes is not "a geographical or descriptive term" and "does not signify that the shoes are manufactured in America").

Second, the USDA's official USDA Choice label **is a red, white, and blue graphic**:

[7]

It cannot be misleading to use the USDA's approved label for USDA Choice beef, and any claim otherwise would be preempted for all the reasons described above.

Third, even if this USDA-approved label could somehow be construed to represent that the unidentified beef Thornton purchased was a Product of the USA, Thornton has not pled any facts to suggest that this unidentified beef is not a Product of the USA, as defined by the USDA.

In short, Albertsons may not be liable for using a USDA-approved official label to advertise its beef, and Thornton may not use this lawsuit as an end-run to invalidate the USDA's grading and labeling programs.

[7] *See* USDA's Understanding Food Quality Labels: A Guide to AMS Grade Shields, Value-Added Labels, and Official Seals at 6, available at https://www.ams.usda.gov/sites/default/files/media/AMS%20Product%20Label%20Factsheet.pdf (last accessed Oct. 21, 2020); *see also* USDA Grade Labels Explained, available at https://www.usda.gov/media/blog/2017/06/29/check-label-and-bring-it-table-usda-grade-labels-explained (last accessed Oct. 21, 2020).

III. Thornton Has Failed to State a Plausible Claim for Relief Under the *Twombly* and *Iqbal* Standard for Pleading.

"To survive a motion to dismiss [under Fed. R. Civ. P. 12 (b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that **is plausible on its face**.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)) (emphasis added). A claim is plausible on its face when the facts pleaded "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The plaintiff must make "a 'showing,' rather than a blanket assertion, of entitlement to relief." *Twombly*, 550 U.S. at 555 n.3.

Although Thornton claims to have seen a purportedly misleading beef advertisement for Albertsons, she does not include a copy or picture of the alleged advertisement with her complaint, nor does she state what beef product was advertised, where she saw the advertisement, or how the advertisement was circulated. (*See* Doc. 1 at Exh. 1, Compl., ¶ 24). There is no way for Albertsons to know what advertisement she allegedly saw. And with regard to Kroger, Thornton does excerpt in her complaint two advertisements for beef from Kroger-owned grocer, Smith's, though she does not allege that she purchased either of those beef products. (*See id.*, ¶ 22). In fact, she never identifies any of the beef products she claims to have purchased from Kroger or Albertsons. (*See generally id.*). And perhaps more importantly, she does not allege any factual basis for her claim that those unidentified products contained beef that was imported in whole or part. (*Id.*)

A complaint may not simply tender "**naked assertions** devoid of further factual enhancement." *Justice v. Ocwen Loan Servicing, LLC*, No. 2:13-CV-00165, 2014 U.S. Dist. LEXIS 15800, at *9 (S.D. Ohio Feb. 7, 2014) (emphasis added). "**Conclusory allegations or legal conclusions masquerading as factual allegations**" do no suffice. *Eidson v. Tenn. Dep't. of*

Children's Servs., 510 F.3d 631, 634 (6th Cir. 2007) (emphasis added). Thornton was obligated to plead some factual basis for the assertion that Defendants' beef products contained beef that was "imported."

Indeed, Thornton even suggests she **does not know** if the beef products she purchased were imported, alleging only that it is possible that these unidentified products "**may not**" have been domestic. (Doc. 1 at Exh. 1, Compl., ¶ 23 (emphasis added)). But the "mere possibility of misconduct" is not enough to state a claim under *Twombly* and *Iqbal*. *Iqbal*, 556 U.S. at 679. "[A] complaint that speculates about what **may** have happened, rather than alleging what *did* happen, fails to state a plausible claim." *Gierum v. Glick (In re Glick)*, 568 B.R. 634, 674 n.36 (Bankr. N.D. Ill. 2017) (emphasis added); *Schayes v. Orion Fin. Grp., Inc.*, No. CV-10-02658-PHX-NVW, 2011 U.S. Dist. LEXIS 82402, at *12 (D. Ariz. July 27, 2011) ("[T]he broad sweep of this claim reveals that the Schayes merely speculate that some party may have compensated their lender. Speculation is not enough, *see Twombly*, 550 U.S. at 555, especially naked speculation of this variety."). Because Thornton has failed to state a plausible claim under *Twombly* and *Iqbal*, her claims should be dismissed.

IV. Thornton's Claims Fail for Other Reasons.

Even if Thornton's claims were not preempted by federal law and were pled in accordance with *Twombly* and *Iqbal*, they would still fail for other reasons. For example, Judge Riggs explained to Thornton that she could not bring a claim under the UPA because she was not a "competitor under NMSA 57-12-7," and therefore lacked standing to bring the claim. *Thornton*, 2020 U.S. Dist. LEXIS 156059, at *23. The fact that she filed this claim again a week after being told she did not have standing to assert it borders on sanctionable. Even if she had standing to bring this claim, however, it would fall under the UPA's safe harbor clause pursuant to which

"actions . . . expressly permitted under laws administered by a regulatory body of . . . the United States" are not subject to the act. N.M. Stat. Ann. § 57-12-7 (1999). Because the labeling depicted in the advertisements at issue here was expressly permitted by the USDA (*see* pp. 13-15, *supra*), it cannot be deceptive under the UPA. *See, e.g.*, *Thornton*, 2020 U.S. Dist. LEXIS 156059, at *24-25 (explaining that "the labels were approved by the USDA and FSIS and comply with relevant regulations" and therefore were "expressly permitted under the laws administered by the USDA and fall within the safe harbor clause of NMSA § 57-12-7"); *Phelps*, 244 F. Supp. 3d at 1318-19 (holding that claims of deceptive labeling of USDA-regulated meat were not covered by the Florida's version of the UPA).

Thornton's breach of warranty claim fails because she did not provide Defendants with reasonable notice of any alleged breach of an express warranty prior to bring suit, as required by N.M. Stat. Ann. § 55-2-607(3)(a). "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*., 380 P.3d 1050, 1054 (N.M. 2015). The lack of notice is particularly inexcusable here given that Judge Riggs told her a week before she filed this complaint that such notice was required prior to bringing suit. *See Thornton*, 2020 U.S. Dist. LEXIS 156059, at *27 (noting that Thornton has failed to provide the required notice to bring a claim for breach of warranty, and this was yet another ground for dismissal of her claim). For her to then turn around and file the same claim against different defendants demonstrates a wanton disregard for the requirements of the law.

Finally, Thornton's unjust enrichment claim fails because, as Judge Riggs explained when she dismissed Thornton's unjust enrichment claim in the Tyson Case, "Defendants are complying with USDA regulations and their approved labels are presumptively lawful and not false or misleading," and "[t]here is nothing unjust about using approved USDA labels." *Id.* at *25-26.

V. Plaintiff's Claims Fail Under the Dormant Commerce Clause.

The U.S. Constitution grants Congress the power "[t]o regulate Commerce with foreign nations, and among the several states . . . ." U.S. Const. art. I, § 8, cl. 3. The federal government's power over foreign and interstate commerce is "exclusive and plenary," *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 57 (1933), and its power over foreign commerce is "pre-eminently a matter of national concern," *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 448 (1979); *United States v. Durham*, 902 F.3d 1180, 1204 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 849 (2019) (recognizing that the foreign commerce clause confers "broader authority on Congress" than the interstate commerce clause of the Constitution).

Consistent with this grant of power to the federal government, courts have applied the principle of the "Dormant Commerce Clause" to limit the power of the states to erect barriers to trade. *Hughes v. Oklahoma*, 441 U.S. 322, 326-27 (1979); *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 909 (3d Cir. 1990). This dormant or negative aspect of the Commerce Clause applies to Congress's power over both **foreign** and interstate commerce. *Durham*, 902 F.3d at 1204 ("The dormant Commerce Clause doctrine extends to state regulation that may conflict with Congress's foreign commerce regulatory authority.") (citing *Japan Line*, 441 U.S. at 434).

The United States has already been subject to two adverse WTO rulings on the labeling of the origin of beef. Thornton's claims, if successful, would undo the work of federal trade negotiators and Congressional Representatives, and would potentially subject the country to a third WTO adverse action. Courts must strike down any state actions that would prevent the federal government from "speaking with one voice" on matters of foreign commerce. *Japan Line*, 441 U.S. at 451 ("If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly

prevent this Nation from 'speaking with one voice' in regulating foreign commerce."). If Thornton were to succeed, countries disadvantaged by New Mexico's disparate treatment of its products might retaliate against our nation so "the Nation as a whole would suffer." *Id.* at 450. This Court should strike down Thornton's attempt to take over the United States' trade policy here.

VI. The Court Should Dismiss the Complaint and Do So *With Prejudice*.

The facts that Plaintiff's claims are preempted by federal law and barred by the Commerce Clause are fatal and cannot be fixed by amendment. The Court should, therefore, dismiss the Complaint with prejudice now, just as numerous other courts have done when ruling on similar claims based on USDA-approved labels. *See, e.g.*, *Kuenzig II*, 505 F. App'x at 939 (affirming district court's dismissal of plaintiff's preempted claims with prejudice); *Phelps*, 244 F. Supp. 3d at 1319 (dismissing plaintiff's preempted claims with prejudice "[b]ecause any amendment to the Complaint would be futile").

CONCLUSION

For the foregoing reasons, Kroger and Albertsons respectfully request this Court dismiss Thornton's claims with prejudice.

Respectfully submitted,

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Counsel for Defendants,
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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2020, I filed *Defendants' Motion to Dismiss* 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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/s/ Monica R. Garcia
Monica R. Garcia

Exhibit 1

FILED
2nd JUDICIAL DISTRICT COURT
Bernalillo County
1/7/2020 3:58 PM
James A. Noel
CLERK OF THE COURT
Thomas Wilson

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

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

Plaintiff,

v. **Case No.** D-202-CV-2020-00109

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

Defendants.

CLASS ACTION COMPLAINT

COMES NOW, Plaintiff Robin G. Thornton, by and through undersigned counsel of record Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn, Esq.) on behalf of herself and all others similarly situated, alleges, with personal knowledge as to her own actions, and upon information and belief as to those of others, the following against Defendants (collectively, "Packers" or "Defendants"):

NATURE OF THE ACTION

1. This is a proposed class-action complaint brought on behalf of one class and one subclass (further defined *infra),* comprising consumers who purchased beef products (the "Products," as further defined below) that are deceptively labeled and marketed.

2. Country of Origin Labeling (COOL) is a mandatory U.S. labeling law enforced by the U.S.

5. Since 2015, Defendants have been labeling beef that is imported into the U.S. post slaughter as "Product of the U.S." or some similar label designed to give the impression that the beef that the consumer is purchasing is from an animal born, raised and slaughtered in the United States. Likewise, since 2015 Defendants have imported cattle for immediate slaughter or for finishing in the United States and then labeled the products derived from those animals as "Product of the U.S." Since 2015, imports of beef to the United States are estimated to average $6.2 billion annually.

6. Since 2015, Defendants have breached consumer trust by representing that some of their beef products are a "Product of the U.S." when in fact, the products are not derived from domestically originating cattle.

7. In order to clearly understand the impact that beef imports are having on the market, and their availability to consumers to understand their prevalence, a conversion of live cattle to beef is illustrative. The USDA counts imported live cattle and converts imported beef into a live cattle equivalent. The agency uses a conversion factor of 592 pounds to determine the live cattle equivalent. For example, 1 billion pounds of imported beef is the rough equivalent of 1.7 million live cattle. As of 2019, Defendants as importers now control about 6.9 million cattle in the U.S. market. Only the state of Texas, which controls about 12.6 million cattle exceeds the importers' control. Neither Kansas nor Nebraska, which are the nation's second and third top cattle inventory states, even rival Defendants in domestic cattle inventory.

8. Defendants' misrepresentations about beef that is a "Product of the U.S." prompts consumers to buy beef products with more confidence than they might otherwise have, and to pay more for them than they otherwise would.

9. Plaintiff Thornton, like other reasonable consumers who see Defendants' representations about beef that is a "Product of the U.S.," did not expect the Products to be derived from non-domestic cattle. Plaintiff Thornton, like other reasonable consumers, purchased the Products believing that they were supporting American beef industry by purchasing Products labeled "Product of the U.S."

10. By deceiving consumers about the true origin of the Products, Defendants are able to sell a greater volume of the Products, to produce cheaper products in other Countries, and to take away market share from competitors as well as pay lower prices to domestic producers, thereby increasing their own sales and profits.

11. Because Defendants' labeling and advertising of the beef products are false and misleading to reasonable consumers, Plaintiff Thornton brings this case on behalf of herself and the members of the class and subclass seeking injunctive and monetary relief, as set forth more fully below.

PARTIES

12. Plaintiff Robin Thornton is a resident of Bernalillo County, New Mexico, and a long-time purchaser of beef Products. During the class period (as further defined below), Plaintiff Thornton has purchased beef products from Costco, Sam's Club, Smith's Grocery Store, Albertson's Grocery Store, Wal-Mart, Sprouts, and Whole Foods.

13. When she purchased these Products, Plaintiff Thornton did so in reliance on the label representations. Plaintiff Thornton read the written representations about "Product of the U.S." or similar statements. Plaintiff Thornton understood the representations to mean that the Products she purchased were from cattle born, raised and slaughtered in the United States.

14. Defendant Tyson Foods, Inc. is a Delaware corporation with its principal place of business

in Springdale, Arkansas.

15. Defendant Cargill Meat Solutions Corporation is a Delaware corporation with its principal place of business in Wichita, Kansas.

16. Defendant JBS USA Food Company, is a Delaware corporation with its principal place of business in Greeley, Colorado.

17. Defendant National Beef Packing Company, LLC, is a Delaware corporation with its principal place of business in Kansas City, Missouri.

18. Defendants manufacture and/or cause the manufacture of the Products, and market, distribute, and sell the Products throughout the United States, including in New Mexico.

SUBSTANTIVE ALLEGATIONS

19. In recent years, consumers have grown more concerned about health, sustainability, and animal welfare, leading them to consider how their food is produced. This increased consideration of food production has made consumers more reliant on domestically raised cattle in order to have confidence that the beef they are purchasing meets those concerns, thus a product that is labeled "Product of the U.S." generates a confidence in the consumer that the beef that they are about to purchase is from an American rancher that fulfills their socially conscious and environmentally responsible concerns including concerns that the beef they are about to consume isn't contributing to serious environmental degradation such as what is being experienced in the deforestation of Brazil.

20. Consumers, like Plaintiff Thornton, actively seek products that provide assurances regarding animal welfare, food safety standards, environmentally sound production methods and support for the domestic producers. Consumers (as Defendants know) are willing to pay more for

products marketed in this way than they are willing to pay for competing products that do not provide these assurances, moreover when presented the choice between buying American beef and foreign beef consumers overwhelmingly prefer American beef.

21. Defendants manufacture and market a variety of products from the muscle cuts of beef (the "Products") that are derived both from cattle born and raised in the United States and from imported beef either live or slaughtered elsewhere.

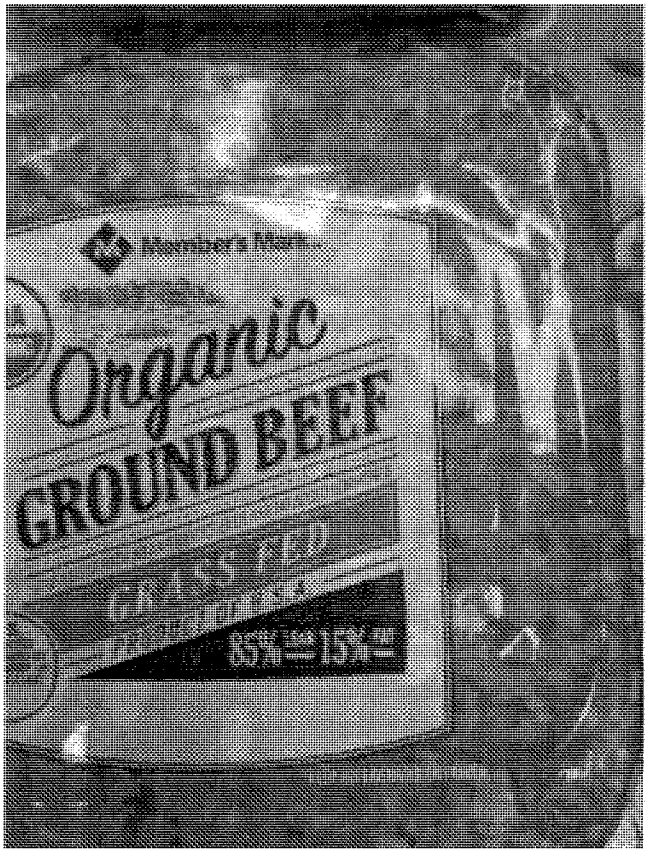
22. Defendants represent to consumers that the Products (all of them, not just Products from cattle born and raised in the USA) are "Products of the USA" even though some of the Products they are selling to consumers were derived from cattle that never drew a breath of American air, much less were born here. The "Product of the U.S." packaging or similar labeling omitting where the Product actually originated from leads consumers to believe that the beef they are purchasing was born and raised on an American ranch or farm.

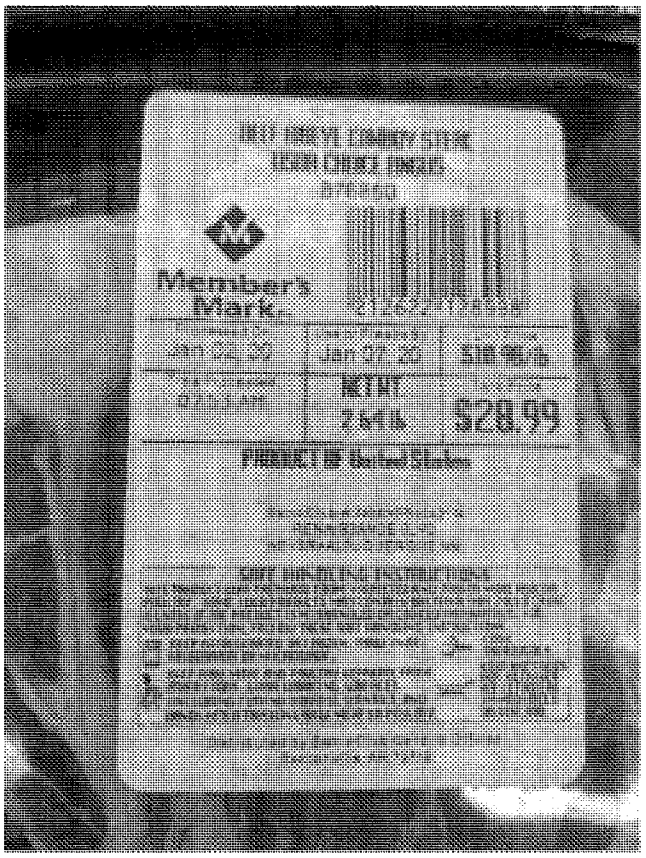
I. The Reality of the Imported Beef or Live Cattle for the Products Renders the Defendants' Advertising False and Deceptive.

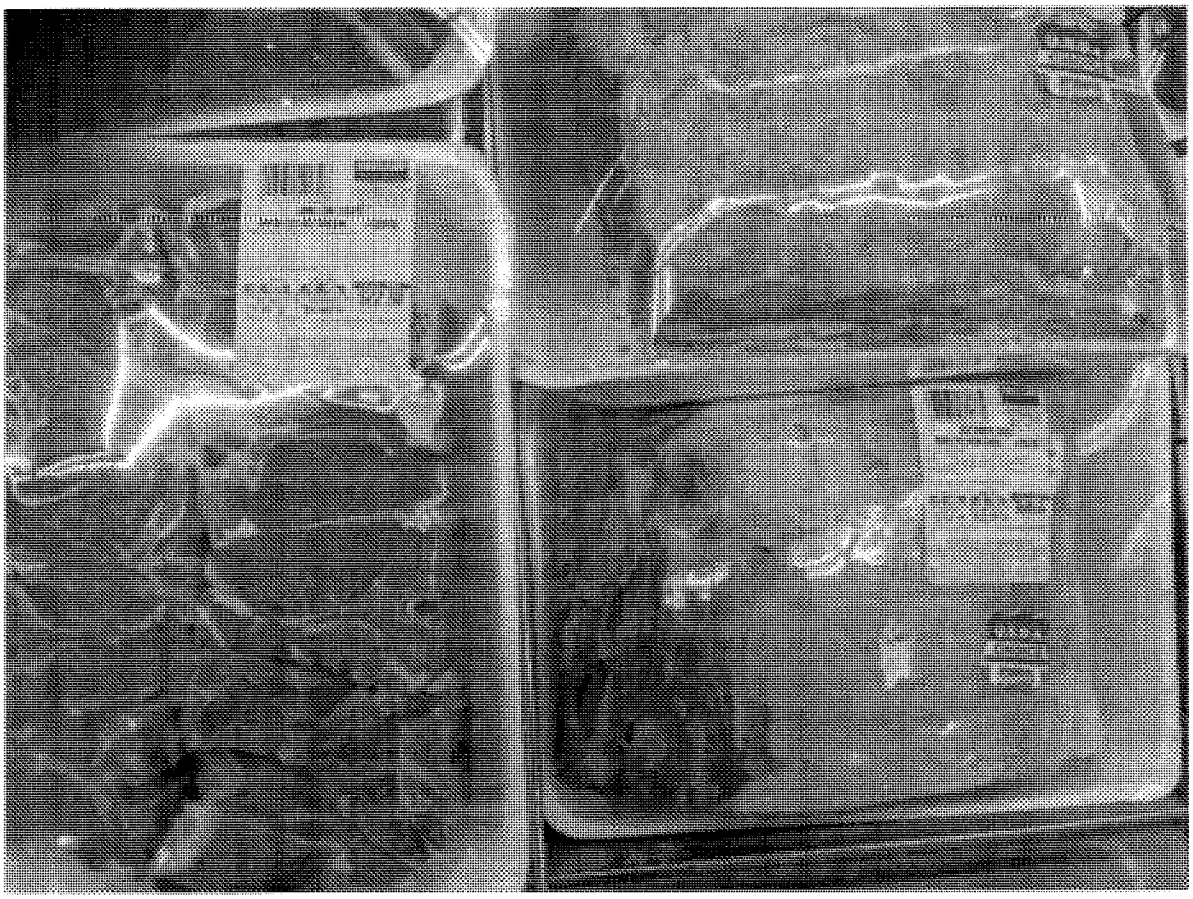
23. In contrast to what Defendants have told consumers, the Products are made from a mixture of domestically born and raised cattle (actual "Product of the U.S.") and imported beef (approximately 3.06 billion pounds on average since 2014) as well as imported live cattle (approximately 1.94 million head on average since 2014). Unbeknownst to consumers who believe they are supporting exclusively American ranchers and farms raised according to that ethos they understand to be associated to the beef industry in this Country, Defendants are misleading them to use their patronage to support unknown, unqualified beef production practices, such as feedlot shipping across the oceans in an environmentally damaging fashion or such as the environmental devastation of deforestation of the Amazon Rain Forest for grazing witnessed in Brazil.

24. The packaging of the Products presenting the Products as "Product of the U.S." or other

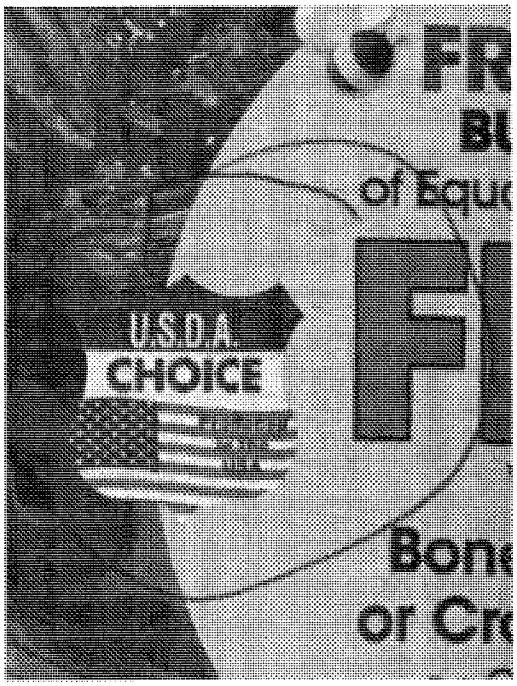
similar representations that are prominent on packaging, result in the representations that are necessarily seen by retail purchasers of the Products. Thus, representations made by Defendants regarding country of origin made to the distributors or to retailers that repackage the meat such as grocers,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







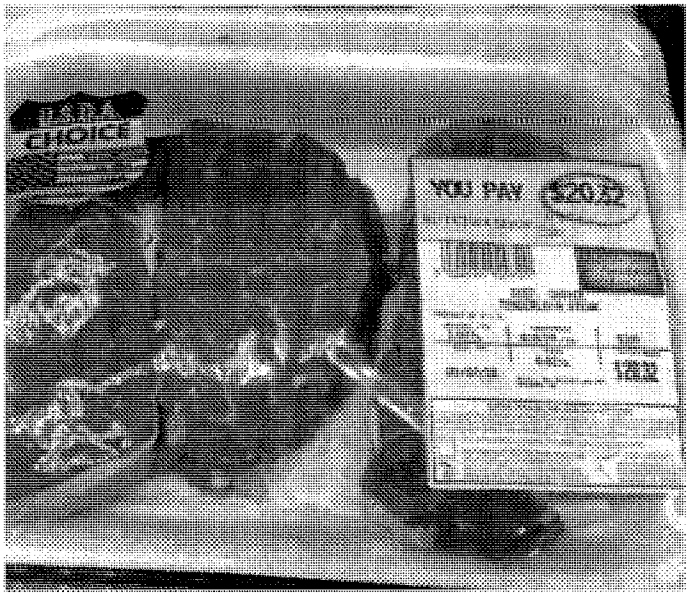

Smith's
FRESH DEAL
BUY 1, GET 1
FREE

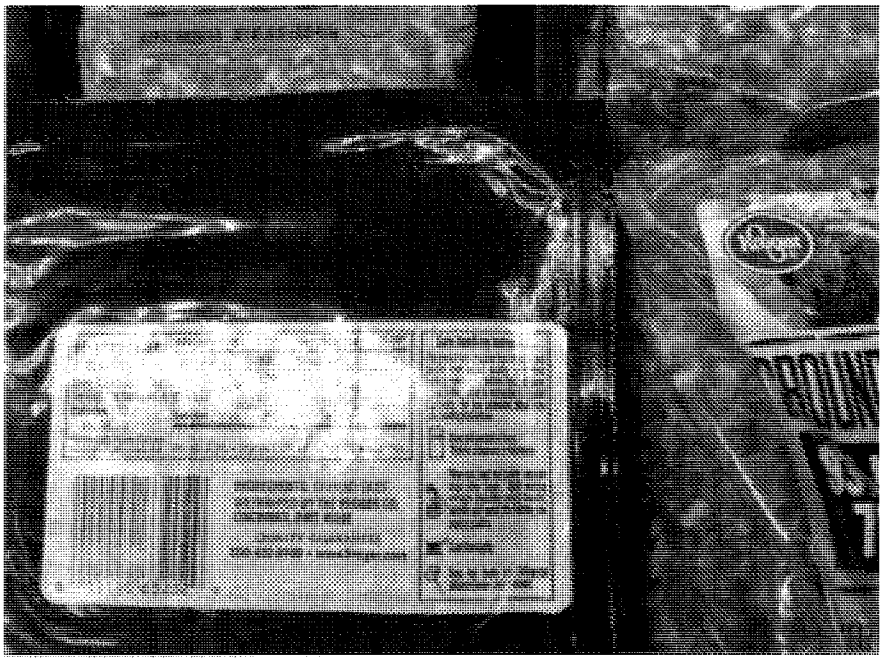

USDA
CHOICE

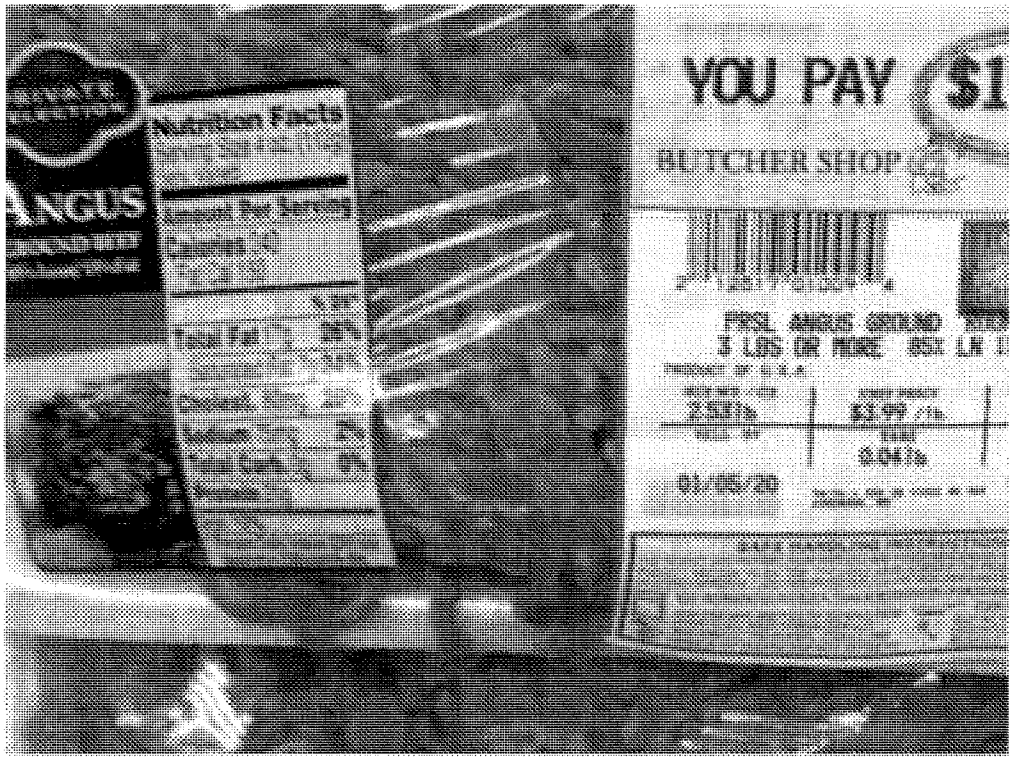

/LB
Fresh Atlantic Salmon Fillets
$6.99
$2.49
$7.99

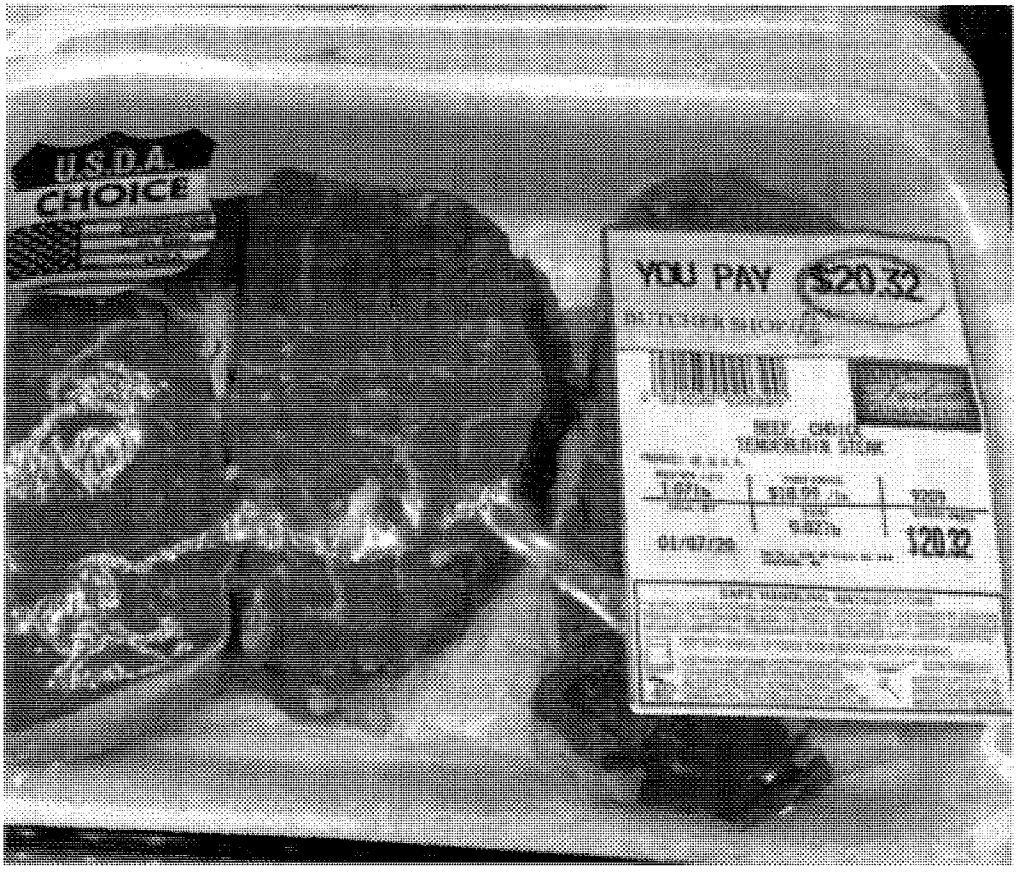

USDA CHOICE
Ribeye Steak
Bone-In,
Super Value Pack
$7.99 /LB


TASTY CHOICE
SAVE $1.00 OR MORE ON THIS PACKAGE

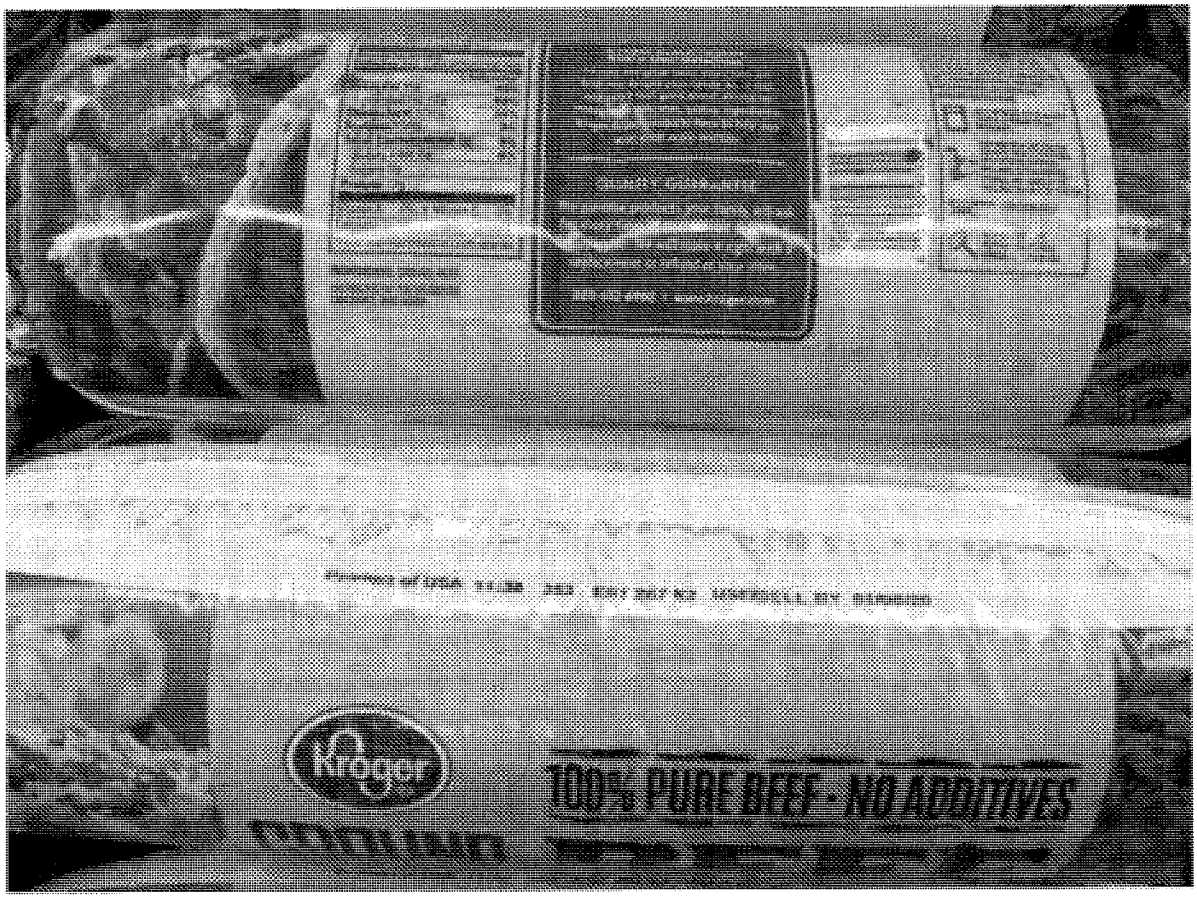

TASTY CHOICE
YOU PAY $20.22

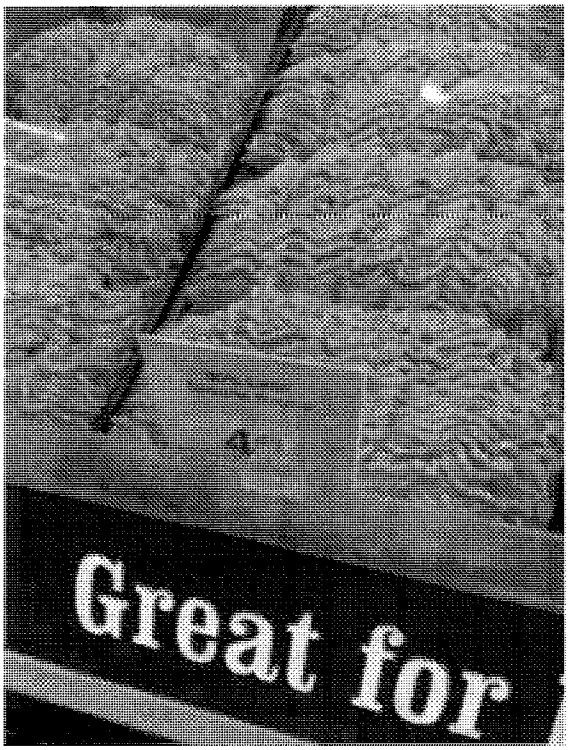



Nutrition Facts
ANGUS
YOU PAY ($1
BUTCHER SHOP

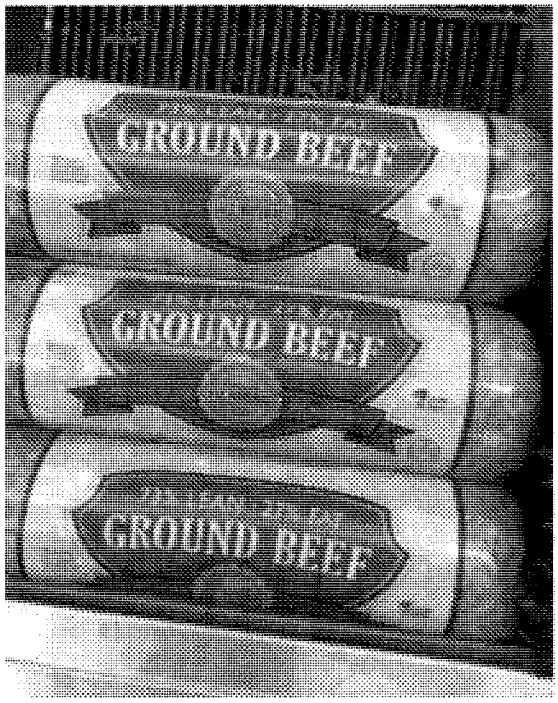

CHOICE
YOU PAY $20.32
120.32


Organic
GROUND
BEEF


100% PURE BEEF · NO ADDITIVES


Great for


12.49


GROUND BEEF
GROUND BEEF
GROUND BEEF

25. The packaging, with its "Product of United States" or "USDA Choice" with no accurate representation of country of origin, prominently directs purchasers to assume that the Products are actually derived from domestically born and raised cattle when in fact that may not be true at all.

26. In the instance of the Costco packaging, the absence of the country of origin taken together, with "USDA Choice" or other grading label, are intended to, and do, portray to consumers that they are purchasing a "Product of the United States" which is contrasted to lamb which is required

to have accurate country of origin labeling.

27. Contrary to the representations made by Defendants and passed on to retailers who make the representations to the consumers, much of the beef in the Products is not actually a product of the United States.

II. Defendants' Have Deceived Consumers and Are Aware That Their Representations Are False.

28. America's ranchers and farmers have spent decades cultivating a reputation as an environmentally and socially conscious beef industry. Since 2015, when USDA went silent on COOL for beef and pork, Defendants have been able to benefit from that reputation, and from the consumer trust it engenders, without necessarily operating the way that American farmers and ranchers are reputed to do and then misused that consumer trust to pay domestic producers 40% less on average per year since 2015 less for their born and raised American beef that they sell alongside foreign beef to the consumer under the same labeling.

29. Reasonable consumers rely on manufacturers, their reputation, and the information provided in manufacturers' marketing in making purchase decisions, especially in purchasing food.

30. Reasonable consumers lack the information and scientific knowledge necessary to ascertain the true source, quality, and nature of the beef products they purchase.

31. Reasonable consumers must, and do, rely on Defendants to report honestly where the products originate.

32. Reasonable consumers are misled and deceived by Defendants' labeling as to where the Products originate from and what that means for how the Product was produced.

33. Defendants made these false, misleading, and deceptive representations, and omitted the

true information that would counter them, knowing that consumers would rely upon the representations and omissions in purchasing the Products.

34. In making the false, misleading, and deceptive representations and omissions at issue, Defendants knew and intended for consumers to purchase the Products believing them to be products of the United States when consumers might otherwise purchase a competing product that was actually born, raised and slaughtered in the United States.

35. In making the false, misleading, and deceptive representations and omissions at issue, Defendants also knew and intended that consumers would purchase foreign beef believing that they were purchasing something that represented a humane, environmentally sound and/or socially responsible, production furthering Defendants' private interest of increasing their profits through the sale of what would otherwise be cheaper valued products to the consumer and decreasing the sales of products that are truthfully marketed by its competitors.

36. Upon information and belief, Defendants have profited enormously to the detriment of consumers and domestic producers from its falsely marketed products. It is understood that on average per year since 2015, imports for Defendants represents close to $6.2 Billion annually.

37. Defendants' conduct in representing the Products as being products of the United States deceived and/or is likely to deceive the public.

38. To this day, Defendants continue to conceal and suppress the true origination of the Products.

39. Defendants' concealment tolls the applicable statute of limitations.

40. Upon information and belief, Defendants have failed to remedy the problems with their marketing, thus causing future harm to consumers, as well as real, immediate, and continuing

harm.

41. Plaintiff Thornton and other members of the Class and Subclass will continue to suffer injury if Defendants' deceptive conduct is not enjoined. Plaintiff Thornton would like to continue purchasing the Products in the future. But as a result of Defendants wrongful acts, Plaintiff Thornton and other reasonable consumers can no longer rely on the truth and accuracy of the origination of Defendants' Products. Absent an injunctive order, Plaintiff Thornton and other reasonable consumers are prevented from making a meaningful and informed choice, and are otherwise at continued risk of real and immediate threat of repeated injury, including purchasing deceptively labeled and packaged Products sold at prices above their true market value.

42. Defendants have failed to provide adequate relief to members of the Class as of the date of filing this Complaint.

JURISDICTION AND VENUE

43. This Court has subject matter jurisdiction under the New Mexico Constitution and the Unfair Practices Act, NMSA 1978 57-12-1 *et seq.*

44. This Court has personal jurisdiction over the parties in this case. Defendants conduct business in New Mexico and avails themselves of the laws of this State to market, promote, distribute, and sell the Defendants' Products to consumers throughout New Mexico.

45. Venue is proper in this District because substantial acts in furtherance of the alleged improper conduct, including the dissemination of false and misleading information regarding the nature, quality, and/or ingredients of the Products, occurred within this District; Plaintiff Thornton resides in and purchased the Products in this District; and Plaintiff Thornton brings this action under the laws of New Mexico.

CLASS ALLEGATIONS

46. Plaintiff Thornton brings this action as a class action pursuant to NMRA Rule 1-023. Plaintiff seeks to represent the following Class and Sub-Class.

(1) All 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").

(2) All consumers in New Mexico who purchased the New Mexico Products during the applicable limitations, for their personal use, rather than for resale or distribution ("New Mexico Sub-Class").

47. Excluded from the Class and New Mexico Sub-Class are (1) Defendants, any entity or division in which any Defendants' have a controlling interest, and Defendants' legal representatives, officers, directors, assigns, and successors; and (2) the judge to whom this case is assigned and the judge's staff.

48. The requirements of Federal Rule of Civil Procedure 23 are satisfied:

A. Numerosity: The members of the Class and the New Mexico Sub-Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is currently unknown to Plaintiff Thornton, based on Defendants' volume of sales, Plaintiff Thornton estimates that each will number greater than 40, if not more.

B. Commonality: There are questions of law and fact that are common to the Class members and that predominate over individual questions, and therefore, the requirements of Rule 23(b)(3) are met. The common questions of law and fact include the following:

i. Whether Defendants materially misrepresented, either through express or implied representations, that the muscle cut of beef in the Products originated exclusively from the United States;

ii. Whether Defendants misrepresented and/or failed to disclose material facts concerning the Products;

iii. Whether Defendants' labeling, marketing, and sale of the Products as products of the United States constitutes unfair, deceptive, fraudulent, or unlawful conduct;

iv. Whether Defendants warrantied the Products to contain originating exclusively from the United States;

iv. Whether Defendants procured and have retained ill-gotten gains from members of the Class;

v. Whether Defendants' conduct injured consumers and, if so, the extent of the injury;

vi. Whether Plaintiff Thornton and the Class or New Mexico Sub-Class members are entitled to injunctive relief; and

viii. The appropriate remedies for Defendants' conduct.

C. Typicality: Plaintiff Thornton's claims are typical of the claims of the Class and New Mexico Sub-Class because Plaintiff Thornton suffered the same injury-i.e., Plaintiff Thornton purchased the Products based on Defendants' misleading representations and omissions about the origination of those cattle for the Products.

D. Adequacy: Plaintiff Thornton will fairly and adequately represent and

protect the interests of the members of the Class and the New Mexico Sub-Class. Plaintiff Thornton does not have any interests that are adverse to those of the Class members or New Mexico Sub-Class members. Plaintiff Thornton has retained competent counsel experienced in class action litigation and intends to prosecute this action vigorously.

E. Superiority: A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions would engender. Since the damages suffered by individual Class members are relatively small, the expense and burden of individual litigation make it virtually impossible for the Class members to seek redress for the wrongful conduct alleged.

49. The prerequisites for maintaining a class action for injunctive or equitable relief under NMRA 1-023 are met because Defendants have acted or refused to act on grounds generally applicable to the Class and to the New Mexico Sub-Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Violation of the New Mexico Unfair Practices Act
(On Behalf of Plaintiff and the New Mexico Subclass)

50. Plaintiff Thornton repeats the allegations in all the foregoing paragraphs as if fully set forth herein.

51. Plaintiff Thornton brings this claim on her own behalf and on behalf of the New Mexico Subclass.

52. The Unfair Practices Act (N.M.S.A. §§ 57-12-1 *et seq.* ("UPA")) declares unlawful all "[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce." N.M.S.A. § 57-12-1. The UPA is to be liberally construed to protect the public and encourage fair and honest competition.

53. Defendants have acted unfairly and deceptively, in violation of the UPA, by misrepresenting to consumers that the muscle cuts of beef in the Products exclusively originates from American Ranchers and Farmers. This representation was likely to mislead consumers acting reasonably under the circumstances and did mislead consumers acting reasonably under the circumstances.

54. Having made these representations, Defendants have acted unfairly and deceptively, in violation of the UPA, by omitting information about the actual origination of the beef in the Products, a great amount of which originates from imports of beef and imported foreign cattle. This omission was likely to mislead consumers acting reasonably under the circumstances and did mislead consumers acting reasonably under the circumstances.

55. Defendants' representations and omissions were material to consumers. Defendants' representations and omissions led consumers to believe that the Products were derived from American ranches and farms with a reputation of humane standards, food safety protections, and environmental responsibility. Defendants' representations and omissions led consumers to purchase imported Products, to purchase more of those Products, and/or to pay a higher price for the Products than they otherwise would have.

56. Although it is not necessary for Plaintiff Thornton to prove that Defendants intended to act unfairly or deceptively, on information and belief, Defendants did so intend, and did knowingly capitalize on the reputation of domestic beef producers to make material representations and omissions to consumers in New Mexico and across the nation.

57. Defendants acted with malice, ill will, or wanton conduct in deceiving New Mexico consumers about how their purchasing dollars are being spent, and whether they are supporting domestic producers, or unwittingly spending in support of foreign beef operations associated with environmental degradation. Defendants acted with malice, ill will, or wanton conduct in deceiving New Mexico consumers who wish to support environmentally responsible socially conscious New Mexico and USA-based businesses.

58. Pursuant to NMSA § 57-12-10, a person who sustains injury or damages as a result of practices prohibited by UPA may sue for equitable relief and to recover damages or return of consideration. Plaintiff Thornton sustained injury and damages when she saw Defendants' representations about the Products and purchased the Products at the frequency and price she did.

59. Plaintiff Thornton brings this claim for violation of the UPA on her own behalf, and on behalf of other New Mexico consumers who saw the Products labeled as products of the United States and purchased the Products. Plaintiff Thornton is a "person"' pursuant to NMSA § 57-12-2.

60. Plaintiff Thornton and members of the New Mexico Subclass are entitled to:

a. equitable relief;

b. actual damages or the sum of one hundred dollars ($100), whichever is greater;

c. exemplary damages up to three times actual damages or three hundred dollars ($300), whichever is greater; and

d. attorneys' fees and costs.

NMSA § 57-12-10.

COUNT II
Breach of Express Warranty (On Behalf of Plaintiff and the Class)

61. Plaintiff Thornton repeats the allegations in all the foregoing paragraphs as if fully set forth herein.

62. Plaintiff Thornton brings this claim on her own behalf and on behalf of the Class.

63. Defendants provided Plaintiff Thornton and members of the Class with written express warranties including, but not limited to, warranties that Products originated exclusively from domestic beef producers.

64. Plaintiff Thornton and members of the Class purchased the Products believing them to conform to the express warranties.

65. Defendants breached these warranties.

66. As a proximate result of the breach of warranties by Defendants, Plaintiff Thornton and the members of the Class did not receive goods as warranted and did not receive the benefit of the bargain. They have been injured and have suffered damages in an amount to be proven at trial.

COUNT III
Unjust Enrichment
(On Behalf of Plaintiff and the Class)

67. Plaintiff Thornton repeats the allegations in all the foregoing paragraphs as if fully set forth herein.

68. Plaintiff Thornton brings this claim on her own behalf and on behalf of the Class.

69. To the extent required by law, this cause of action is pleaded in the alternative to Plaintiff Thornton's contract-based claims.

70. As the intended, direct, and proximate result of Defendants' conduct, Defendants have been unjustly enriched through sales of imported Products at the expense of Plaintiff Thornton and the Class members.

71. Under the circumstances, it would be against equity and good conscience to permit Defendants to retain the ill-gotten benefits that they received from Plaintiff Thornton and the Class members, in light of the fact that the products they purchased were not what Defendants purported them to be.

PRAYER FOR RELIEF

Plaintiff Thornton, on her own behalf and on behalf of the Class and the New Mexico Subclass, prays for the following relief:

A. An order certifying the Class and New Mexico Subclass under Rule 23 of the New Mexico Rules of Civil Procedure and naming Plaintiff Thornton as Class and New Mexico Subclass Representative and her attorneys as Class Counsel;

B. A declaration that Defendants are financially responsible for notifying Class and New Mexico Subclass members of the pendency of this suit;

C. An order declaring that Defendants' conduct violates the New Mexico UPA;

D. An order providing appropriate equitable relief in the form of an injunction against Defendants' unlawful and deceptive acts and practices, and requiring proper, complete, and accurate representation, packaging, and labeling of the Products;

E. An order providing appropriate equitable relief in the form of an injunction against Defendants' unlawful and deceptive acts and practices, and requiring that Defendants remove and refrain from making representations on the Products' packaging 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 labeled in a way to disclose the accurate and complete origination of the Product;

F. Actual damages for members of the New Mexico Subclass pursuant to NMSA § 57-12-10;

G. Exemplary damages of 3 times the actual damages for members of the New Mexico Subclass pursuant to NMSA § 57-12-10;

H. Restitution for members of the Class to recover Defendants' ill-gotten benefits;

I. Damages for members of the Class arising from Defendants' breach of warranty;

J. An order finding in favor of Plaintiff Thornton and the Class and New Mexico Subclass on all counts asserted herein;

K. Prejudgment interest on all amounts awarded;

L. An order of restitution and all other forms of equitable monetary relief;

M. Injunctive relief as the Court may deem appropriate; and

N. An order awarding Plaintiff Thornton, the Class and New Mexico Subclass their attorneys' fees and expenses and costs of suit.

Respectfully submitted,

WESTERN AGRICULTURE, RESOURCE AND BUSINESS ADVOCATES, LLP

/s/ A. Blair Dunn
A. Blair Dunn, Esq.
400 Gold Ave SW, Suite 1000
Albuquerque, NM 87102
(505) 750-3060
abdunn@ablairdunn-esq.com

Exhibit 2

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

D-202-CV-2020-00109

STATE OF NEW MEXICO

COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

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

Plaintiff,

v. Case No. D-202-CV-2020-05018

TYSON FOODS, INC,
CARGILL MEAT SOLUTIONS, CORP.,

JBS USA FOODTHE KROGER COMPANY,
ALBERTSONS,
NATIONAL BEEF PACKING COMPANY, LLC

Defendants.

CLASS ACTION COMPLAINT

COMES NOW, Plaintiff Robin G. Thornton, by and through undersigned counsel of record Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn, Esq. and Jared R. Vander Dussen, Esq.) and the Law Offices of Marshall Ray (Marshall J. Ray, Esq.) on behalf of herself and all others similarly situated, alleges, with personal knowledge as to her own actions, and upon information and belief as to those of others, the following against Defendants (collectively, "PackersGrocers" or "Defendants"):

NATURE OF THE ACTION

1. This is a proposed class-action complaint brought on behalf of one class and one subclass (further defined *infra),* comprising consumers who purchased beef products (the "Products," as further defined below) that are deceptively ~~labeled and~~ marketed and advertised.

2. Country of Origin Labeling (COOL) is a mandatory U.S. labeling law enforced by the U.S. Department of Agriculture (USDA) that requires retailers 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. Covered commodities include muscle cuts of beef (including veal), lamb, chicken, goat, and pork; ground beef, ground lamb, ground chicken, ground goat, and ground pork; wild and farm-raised fish and shellfish; perishable agricultural commodities; macadamia nuts; pecans; ginseng; and peanuts. Specifically, this applied to regulations promulgated by USDA that prohibited beef imported post-slaughter or products derived from animals imported for immediate slaughter were required to be labeled with the originating country and could not be held out exclusively as "Product of the U.S."

3. COOL is not a food safety program. It is a consumer labeling and marketing law regulated by the USDA's Agricultural Marketing Service.

4. As directed by the United States Congress through Public Law 114-113, the Consolidated Appropriations Act of 2016, the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) issued a final rule in 2016 that amends the Country of Origin Labeling (COOL) regulations by removing the requirements for muscle cuts of beef and pork, and ground beef and pork. The Consolidated Appropriations Act of 2016 repealed these COOL requirements and immediately after the legislation was passed, USDA stopped enforcing the COOL requirements for beef and pork effective Dec. 18, 2015. USDA is thus considered to be silent as to COOL regulations regarding beef and pork post 2015.

5. Since 2015, Defendants have been ~~labeling~~advertising beef that is imported into the U.S. post

slaughter as "Product of the U.S." or some similar label designed to give the impression that the beef that the consumer is purchasing is from an animal born, raised and slaughtered in the United States. Likewise, since 2015 Defendants have sold beef from imported cattle for immediate slaughter or for finishing in the United States and ~~then labeled~~advertised the products derived from those animals as "Product of the U.S." Since 2015, imports of beef to the United States are estimated to average $6.2 billion annually.

6. Since 2015, Defendants have breached consumer trust by ~~representing~~advertising that some of their beef products are a "Product of the U.S." when in fact, the products are not derived from domestically originating cattle.

7. In order to clearly understand the impact that beef imports are having on the market, and their availability to consumers to understand their prevalence, a conversion of live cattle to beef is illustrative. The USDA counts imported live cattle and converts imported beef into a live cattle equivalent. The agency uses a conversion factor of 592 pounds to determine the live cattle equivalent. For example, 1 billion pounds of imported beef is the rough equivalent of 1.7 million live cattle. As of 2019, ~~Defendants~~the Big 4 Packers (Tyson, Cargil, JBS USA and National Beef) as importers now control about 6.9 million cattle in the U.S. market. Only the state of Texas, which controls about 12.6 million cattle exceeds the importers' control. Neither Kansas nor Nebraska, which are the nation's second and third top cattle inventory states, even rival Defendants in domestic cattle inventory.

8. Defendants' misrepresentations in advertising that they mail or cause to be delivered to consumers about beef that is a "Product of the U.S." or is advertised in such a way to cause the consumer to believed that the beef is a product of the U.S. prompts consumers to buy beef products

with more confidence than they might otherwise have, and to pay more for them than they otherwise would.

9. Plaintiff Thornton, like other reasonable consumers who see Defendants' representations in advertisement outside of the stores about beef that is a "Product of the U.S.," did not expect the Products to be derived from non-domestic cattle. Plaintiff Thornton, like other reasonable consumers, purchased the Products believing that they were supporting American beef industry by purchasing Products labeled "Product of the U.S."

10. By deceiving consumers about the true origin of the Products, Defendants are able to sell a greater volume of the Products, to produce cheaper products in other Countries, and to take away market share from competitors as well as pay lower prices to domestic producers, thereby increasing their own sales and profits.

11. Because Defendants' labeling and advertising of the beef products are false and misleading to reasonable consumers, Plaintiff Thornton brings this case on behalf of herself and the members of the class and subclass seeking injunctive and monetary relief, as set forth more fully below. PARTIES

12. Plaintiff Robin Thornton is a resident of Bernalillo County, New Mexico, and a long-time purchaser of beef Products. During the class period (as further defined below), Plaintiff Thornton has purchased beef products in New Mexico from Costco, Sam's Club, Smith's Grocery Store, Albertson's Grocery Store, Wal-Mart, Sprouts, and Whole Foods and Albertsons grocery stores.

13. When she purchased these Products, Plaintiff Thornton did so in reliance on the ~~label representations~~advertisements she received in the mail or in her newspapers. Plaintiff Thornton read the ~~written representations~~advertisements about "Product of the U.S." or similar statements~~. Plaintiff Thornton understood the representations~~ on red white and blue flag like images to mean that the Products ~~she~~being advertised that she eventually purchased were from cattle born, raised and slaughtered in the United States.

~~14. Defendant Tyson Foods, Inc. is a Delaware corporation with its principal place of business 4~~

~~in Springdale, Arkansas.~~

14. ~~15.~~ Defendant ~~Cargill Meat Solutions Corporation is a Delaware corporation~~The Kroger Company. is a Ohio LLC with its principal place of business in ~~Wichita, Kansas~~Cincinnati, Ohio that in New Mexico operates Smith's stores and City Market stores.

~~16. Defendant JB S USA Food Company, is a Delaware corporation with its principal place of business in Greeley, Colorado.~~

15. ~~17.~~ Defendant ~~National Beef Packing Company, LLC,~~Albertsons is a Delaware ~~corporation~~LLC with its principal place of business in ~~Kansas City, Missouri~~Boise, Idaho, that in New Mexico operates Albertsons, Albertsons Market, Safeway and Market Street.

16. ~~18.~~ Defendants ~~manufacture and/or cause the manufacture of the Products, and market, distribute,~~market or advertise and sell the Products throughout most of the United States, including in New Mexico.

SUBSTANTIVE ALLEGATIONS

17. ~~19.~~ In recent years, consumers have grown more concerned about health, sustainability, and animal welfare, leading them to consider how their food is produced. This increased consideration of food production has made consumers more reliant on domestically raised cattle in order to have confidence that the beef they are purchasing meets those concerns, thus a product that is labeled "Product of the U.S." generates a confidence in the consumer that the beef that they are about to purchase is from an American rancher that fulfills their socially conscious and environmentally responsible concerns including concerns that the beef they are about to consume isn't contributing to serious environmental degradation such as what is being experienced in the deforestation of Brazil. In fact Defendant The Kroger Company recognizes this and markets to consumers that they are concerned about the sustainability. See Exhibit A and http://sustainability.kroger.com/; Exhibit B and https://www.albertsonscompanies.com/our-values/sustainability.html

18. ~~20.~~ Consumers, like Plaintiff Thornton, actively seek products that provide assurances regarding animal welfare, food safety standards, environmentally sound production methods and support for the domestic producers. Consumers (as Defendants know) are willing to pay more for

 products marketed in this way than they are willing to pay for competing products that do not provide these assurances, moreover when presented the choice between buying American beef and

foreign beef consumers overwhelmingly prefer American beef.

19. ~~21.~~ Defendants ~~manufacture and market~~advertise a variety of products from the muscle cuts of beef and ground beef (the "Products") that are derived both from cattle born and raised in the United States and from imported beef either live or slaughtered elsewhere.

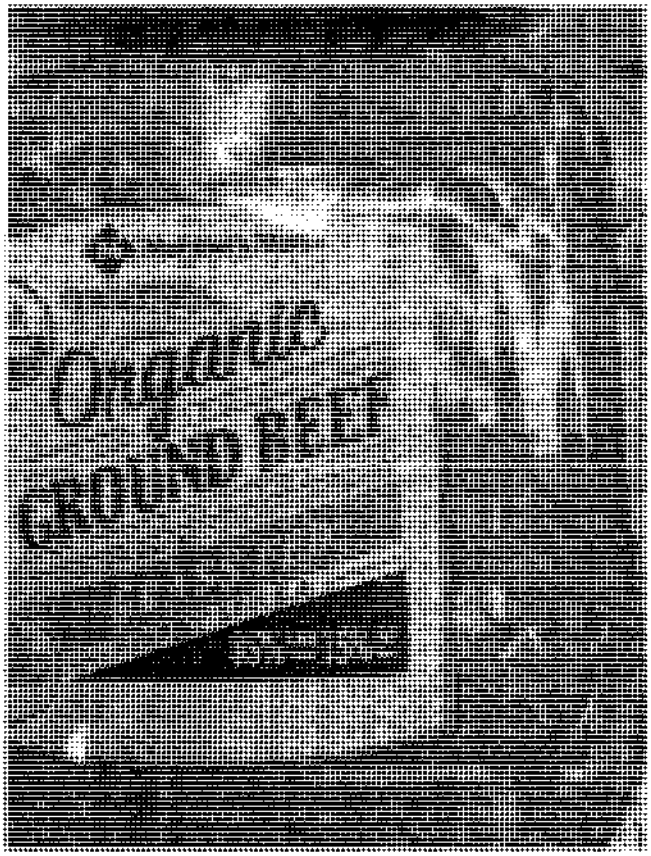
20. ~~22.~~ Defendants represent to consumers that the Products (all of them, not just Products from cattle born and raised in the USA) are "Products of the USA" even though some of the Products they are selling to consumers were derived from cattle that never drew a breath of American air, much less were born here. The "Product of the U.S." packaging or similar ~~labeling~~advertising omitting the truth of where the Product actually originated from leads consumers to believe that the beef they are purchasing was born and raised on an American ranch or farm.

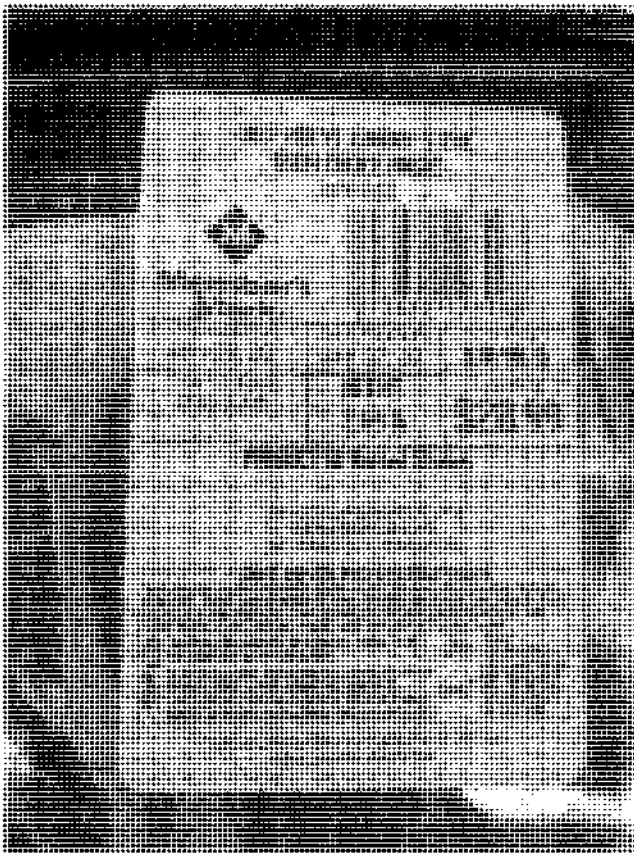
I. The Reality of the Imported Beef or Live Cattle for the Products Renders the Defendants' Advertising False and Deceptive.

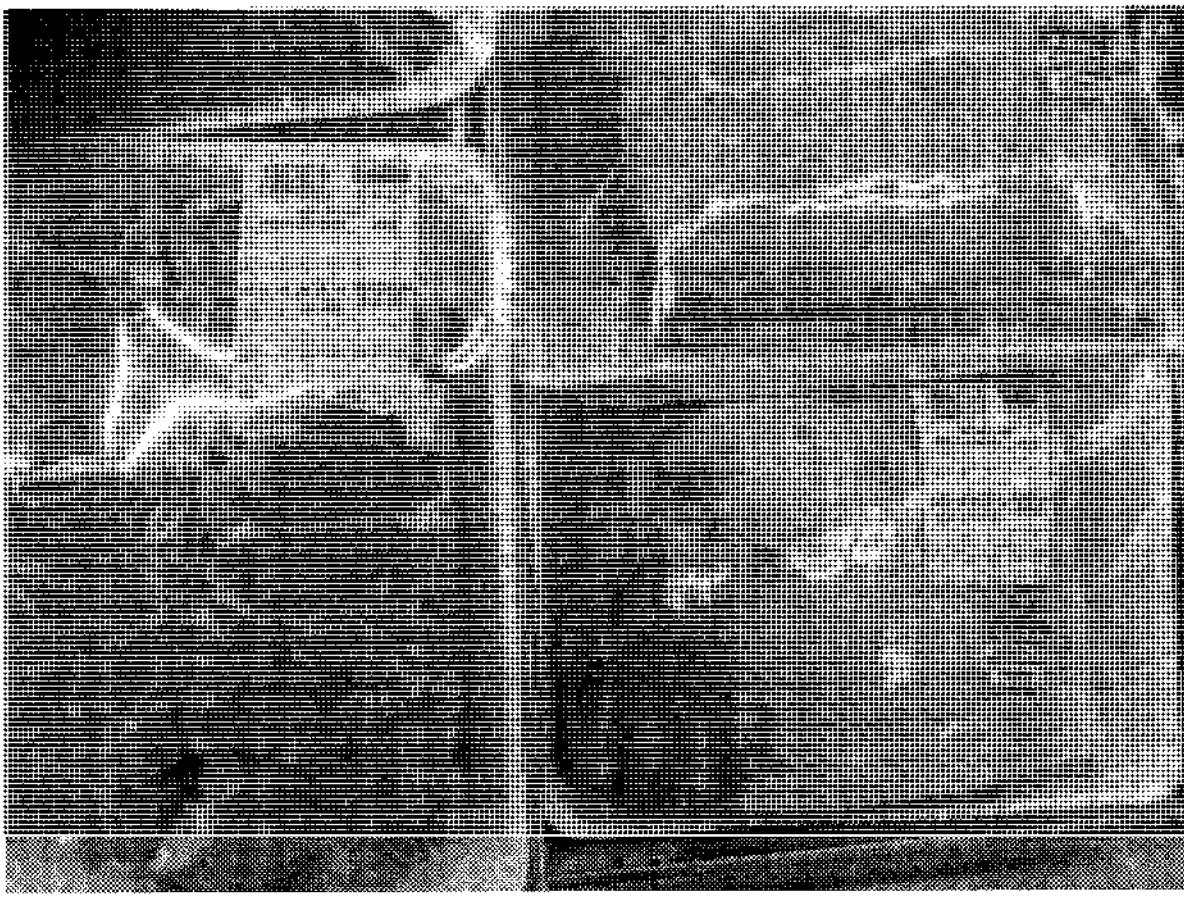
21. ~~23.~~ In contrast to what Defendants have told consumers, the Products are made from a mixture of domestically born and raised cattle (actual "Product of the U.S.") and imported beef (approximately 3.06 billion pounds on average since 2014) as well as imported live cattle (approximately 1.94 million head on average since 2014). Unbeknownst to consumers who believe they are supporting exclusively American ranchers and farms raised according to that ethos they understand to be associated to the beef industry in this Country, Defendants are misleading them to use their patronage to support unknown, unqualified beef production practices, such as feedlot shipping across the oceans in an environmentally damaging fashion or such as the environmental devastation of deforestation of the Amazon Rain Forest for grazing witnessed in Brazil.

22. ~~24.~~ The ~~packaging~~advertising delivered to consumers in their homes and businesses of the Products ~~presenting~~representing the Products as "Product of the U.S." or other similar representations that are prominent on the advertising materials, result in the representations that are necessarily seen by

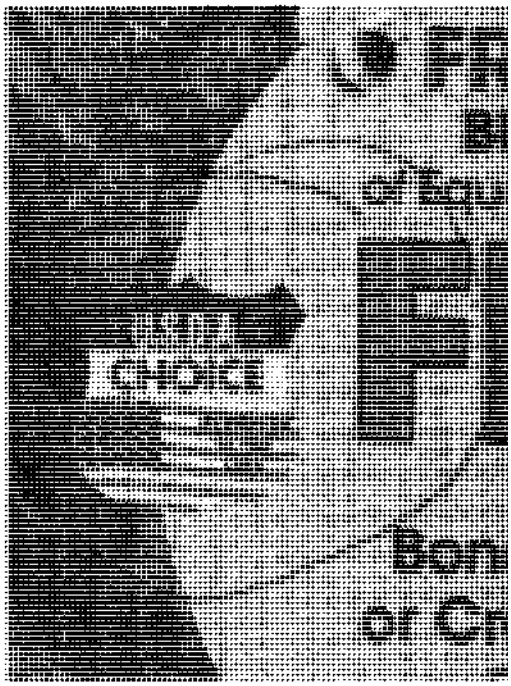
similar representations that are prominent on packaging, result in the representations that are necessarily seen by retail purchasers of the Products. Thus, representations made by Defendants regarding country of origin made to the distributors or to retailers that repackage the meat such as grocers,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





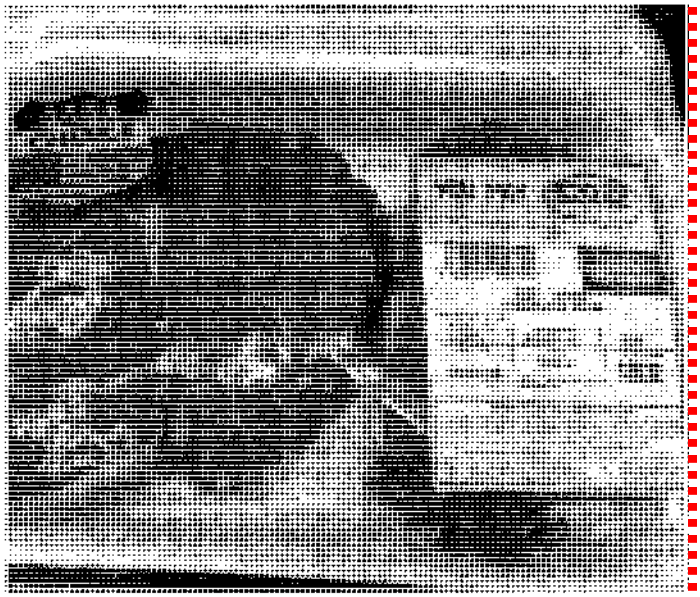


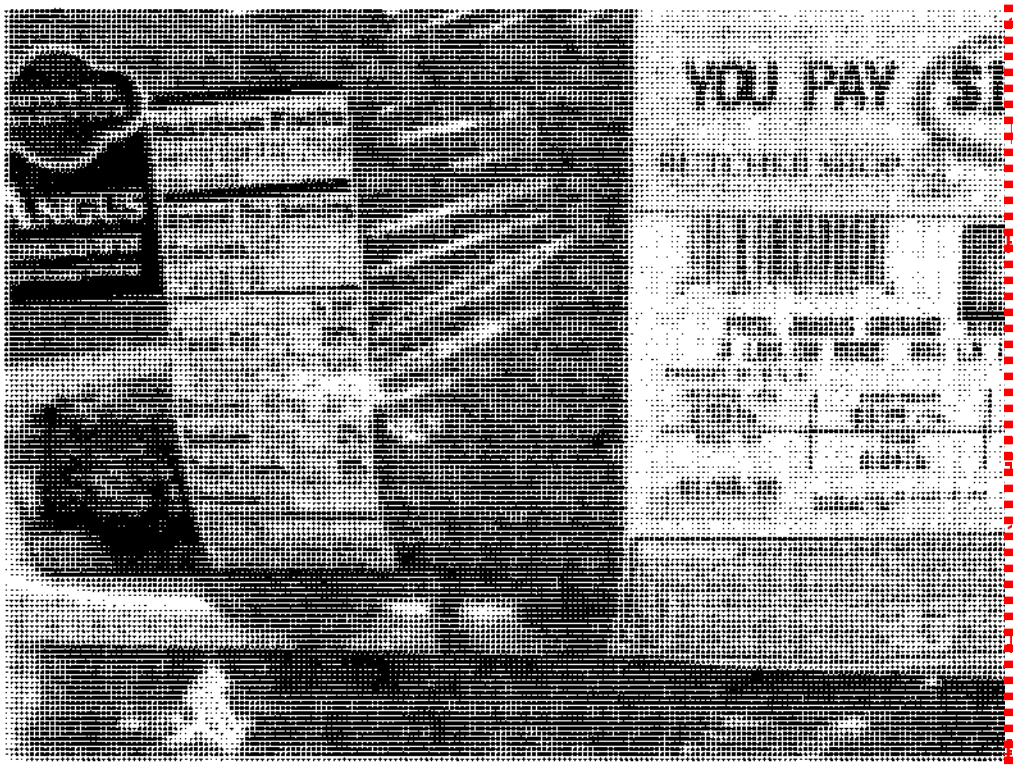

Smith's

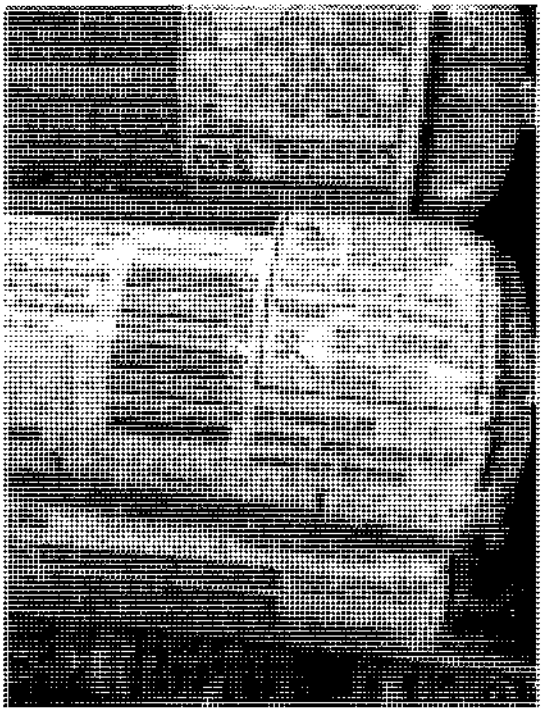

choice


CHOICE
Ribeye Steak
Boneless
Super Value Pack
$7.99 /LB


1.00




YOU PAY



retail purchasers of the Products. Thus, representations made by Defendants regarding country of origin results in mis

leading and false representations being made to the consumer.

25. The packaging, with its "Product of United States" or "USDA Choice" with no accurate representation of country of origin, prominently directs purchasers to assume that the Products are actually derived from domestically born and raised cattle when in fact that may not be true at all.

26. In the instance of the Costco packaging, the absence of the country of origin taken together, with "USDA Choice" or other grading label, are intended to, and do, portray to consumers that they are purchasing a "Product of the United States" which is contrasted to lamb which is required

14

~~to have accurate country of origin labeling~~

23. The advertising, with its "Product of United States" or "USDA Choice" with no accurate representation of country of origin, prominently directs purchasers to assume that the Products are actually derived from domestically born and raised cattle when in fact that may not be true at all.

24. In the instance of the Albertsons' advertising, the absence of the country of origin taken together, with "USDA Choice" red white and blue graphic, are intended to, and do, portray to consumers that they are purchasing a "Product of the United States."

25. ~~27.~~ Contrary to the representations made by Defendants ~~and passed on to retailers who make the representations to the consumers~~, much of the beef in the Products is not actually a product of the United States.

~~II~~H. Defendants' Have Deceived Consumers and Are Aware That Their Representations Are False.

26. ~~28.~~ America's ranchers and farmers have spent decades cultivating a reputation as an environmentally and socially conscious beef industry. Since 2015, when USDA went silent on COOL for beef and pork, Defendants have been able to benefit from that reputation, and from the consumer trust it engenders~~, without necessarily operating the way that American farmers and ranchers are reputed to do and then misused that consumer trust to pay domestic producers 40% less on average per year since 2015 less for their born and raised American beef that they sell alongside~~ to sell foreign beef to ~~the consumer under~~consumers for the same ~~labeling~~price as domestically produced beef.

27. ~~29.~~ Reasonable consumers rely on ~~manufacturers~~grocers, their reputation, and the information provided in ~~manufacturers~~grocers' marketing in making purchase decisions, especially in purchasing food.

28. ~~30.~~ Reasonable consumers lack the information and scientific knowledge necessary to ascertain the true source, quality, and nature of the beef products they purchase.

29. ~~31.~~ Reasonable consumers must, and do, rely on Defendants to ~~report~~advertise honestly where the products originate.

30. ~~32.~~ Reasonable consumers are misled and deceived by Defendants' ~~labeling~~advertising that they receive in the mail or in their newspapers as to where the Products originate from and what that

means for how the Product was produced.

31. ~~33.~~ Defendants made these false, misleading, and deceptive representations, and omitted the

 true information that would counter them, knowing that consumers would rely upon the representations and omissions in purchasing the Products.

32. ~~34.~~ In making the false, misleading, and deceptive representations and omissions at issue, Defendants knew and intended for consumers to purchase the Products believing them to be products of the United States when consumers might otherwise purchase a competing product that was actually born, raised and slaughtered in the United States.

33. ~~35.~~ In making the false, misleading, and deceptive representations and omissions at issue, Defendants also knew and intended that consumers would purchase foreign beef believing that they were purchasing something that represented a humane, environmentally sound and/or socially responsible, production furthering Defendants' private interest of increasing their profits through the sale of what would otherwise be cheaper valued products to the consumer and decreasing the sales of products that are truthfully marketed by its competitors.

34. ~~36.~~ Upon information and belief, Defendants have profited enormously to the detriment of consumers and domestic producers from its falsely marketed products. ~~It~~For example, it is understood that on average per year since 2015, imports for the Big 4 Packers that supply Defendants with the beef they sell to consumers represents close to $6.2 Billion annually.

35. ~~37.~~ Defendants' conduct in representing the Products as being products of the United States deceived and/or is likely to deceive the public.

36. ~~38.~~ To this day, Defendants continue to conceal and suppress the true origination of the Products in their advertisements.

37. 39. Defendants' concealment tolls the applicable statute of limitations.

38. 40. Upon information and belief, Defendants have failed to remedy the problems with their marketing, thus causing future halmharm to consumers, as well as real, immediate, and continuing

 harm.

39. 41. Plaintiff Thornton and other members of the Class and Subclass will continue to suffer injury if Defendants' deceptive conduct is not enjoined. Plaintiff Thornton would like to continue purchasing the Products in the future. But as a result of Defendants wrongful acts, Plaintiff Thornton and other reasonable consumers can no longer rely on the truth and accuracy of the origination of Defendants' Products. Absent an injunctive order, Plaintiff Thornton and other reasonable consumers are prevented from making a meaningful and informed choice, and are otherwise at continued risk of real and immediate threat of repeated injury, including purchasing deceptively labeled and packagedadvertised Products sold at prices above their true market value.

40. 42. Defendants have failed to provide adequate relief to members of the Class as of the date of filing this Complaint.

JURISDICTION AND VENUE

41. 43. This Court has subject matter jurisdiction under the New Mexico Constitution and the Unfair• Practices Act, NMSA 1978 57-12-1 *et seq.*

42. 44. This Court has personal jurisdiction over the parties in this case. Defendants conduct business in New Mexico and availsavail themselves of the laws of this State to market, promote, distribute, and sell the Defendants' Products to consumers throughout New Mexico.

43. 45. Venue is proper in this District because substantial acts in furtherance of the alleged improper conduct, including the dissemination of false and misleading information regarding the

nature, quality, and/or ingredients of the Products, occurred within this District; Plaintiff Thornton resides in and purchased the Products in this District; and Plaintiff Thornton brings this action under the laws of New Mexico.

CLASS ALLEGATIONS

~~46.~~44. Plaintiff Thornton brings this action as a class action pursuant to NMRA Rule 1-023. Plaintiff seeks to represent the following Class and Sub-Class.

(1) All 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").

(2) All consumers in New Mexico who purchased the New Mexico Products during the applicable limitations, for their personal use, rather than for resale or distribution ("New Mexico Sub-Class").

~~47.~~45. Excluded from the Class and New Mexico Sub-Class are (1) Defendants, any entity or division in which any Defendants' have a controlling interest, and Defendants' legal representatives, officers, directors, assigns, and successors; and (2) the judge to whom this case is assigned and the judge's staff.

~~48.~~46. The requirements of Federal Rule of Civil Procedure 23 are satisfied:

A. Numerosity: The members of the Class and the New Mexico Sub-Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is currently unknown to Plaintiff Thornton, based on Defendants' volume of sales, Plaintiff Thornton estimates that each will number greater than 40, if not more.

B. Commonality: There are questions of law and fact that are common to

the Class members and that predominate over individual questions, and therefore, the requirements of Rule 23(b)(3) are met. The common questions of law and fact include the following:

i. Whether Defendants materially misrepresented, either through express or implied representations, that the muscle cut of beef in the Products originated exclusively from the United States;

ii. Whether Defendants misrepresented and/or failed to disclose material facts concerning the Products;

iii. Whether Defendants' labeling, marketing, and sale of the Products as products of the United States constitutes unfair, deceptive, fraudulent, or unlawful conduct;

iv. Whether Defendants warrantied the Products to contain originating exclusively from the United States;

iv. Whether Defendants procured and have retained ill-gotten gains from members of the Class;

v. Whether Defendants' conduct injured consumers and, if so, the extent of the injury;

vi. Whether Plaintiff Thornton and the Class or New Mexico Sub-Class members are entitled to injunctive relief; and

viii. The appropriate remedies for Defendants' conduct.

~~C.~~ C. Typicality: Plaintiff Thornton's claims are typical of the claims of the Class and New Mexico Sub-Class because Plaintiff Thornton suffered the same injury-

i.e., Plaintiff Thornton purchased the Products based on Defendants' misleading representations and omissions about the origination of those cattle for the Products.

D. Adequacy: Plaintiff Thornton will fairly and adequately represent and

~~19~~

~~Case 1:20-cv-00105-JHR-SMV Document 1-1 Filed 02/05/20 Page 21 of 44~~ protect the interests of the members of the Class and the New Mexico Sub-Class. Plaintiff Thornton does not have any interests that are adverse to those of the Class members or New Mexico Sub-Class members. Plaintiff Thornton has retained competent counsel experienced in class action litigation and intends to prosecute this action vigorously.

E. ~~F.~~ Superiority: A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions would engender. Since the damages suffered by individual Class members are relatively small, the expense and burden of individual litigation make it virtually impossible for the Class members to seek redress for the wrongful conduct alleged.

~~49.~~47. The prerequisites for maintaining a class action for injunctive or equitable relief under NMRA 1-023 are met because Defendants have acted or refused to act on grounds generally applicable to the Class and to the New Mexico Sub-Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

CAUSES **OF** ACTION

FIRST CAUSE OF ACTION
Violation of the New Mexico Unfair Practices Act
(On Behalf of Plaintiff and the New Mexico Subclass)

48. ~~50.~~ Plaintiff Thornton repeats the allegations in all the foregoing paragraphs as if fully set forth herein.

49. ~~51.~~ Plaintiff Thornton brings this claim on her own behalf and on behalf of the New Mexico Subclass.

50. ~~52.~~ The Unfair Practices Act (N.M.S.A. §§ 57-12-1 *et seq.* ("UPA")) declares unlawful all "[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce." N.M.S.A. § 57-12-1. The UPA is to be liberally construed to protect the public and encourage fair and honest competition.

51. ~~53.~~ Defendants have acted unfairly and deceptively, in violation of the UPA, by ~~misrepresenting~~fraudulently advertising to consumers that the muscle cuts of beef in the Products exclusively originates from American Ranchers and Farmers. This representation was likely to mislead consumers acting reasonably under the circumstances and did mislead consumers acting reasonably under the circumstances.

52. ~~54.~~ Having made these representations, Defendants have acted unfairly and deceptively, in violation of the UPA, by omitting ~~infoiliation~~information about the actual origination of the beef in the Products, a great amount of which originates from imports of beef and imported foreign cattle. This omission was likely to mislead consumers acting reasonably under the circumstances and did mislead consumers acting reasonably under the circumstances.

53. ~~55.~~ Defendants' representations and omissions were material to consumers. Defendants'

representations and omissions led consumers to believe that the Products were derived from American ranches and farms with a reputation of humane standards, food safety protections, and environmental responsibility. Defendants' representations and omissions led consumers to purchase imported Products, to purchase more of those Products, and/or to pay a higher price for the Products than they otherwise would have.

54. ~~56.~~ Although it is not necessary for Plaintiff Thornton to prove that Defendants intended to act unfairly or deceptively, on information and belief, Defendants did so intend, and did knowingly capitalize on the reputation of domestic beef producers to make material representations and omissions to consumers in New Mexico and across the nation.

55. ~~57.~~ Defendants acted with malice, ill will, or wanton conduct in deceiving New Mexico consumers about how their purchasing dollars are being spent, and whether they are supporting domestic producers, or unwittingly spending in support of foreign beef operations associated with environmental degradation. Defendants acted with malice, ill will, or wanton conduct in deceiving New Mexico consumers who wish to support environmentally responsible socially conscious New Mexico and USA-based businesses.

56. ~~58.~~ Pursuant to NMSA § 57-12-10, a person who sustains injury or damages as a result of practices prohibited by UPA may sue for equitable relief and to recover damages or return of consideration. Plaintiff Thornton sustained injury and damages when she saw Defendants' representations about the Products and purchased the Products at the frequency and price she did.

57. ~~59.~~ Plaintiff Thornton brings this claim for violation of the UPA on her own behalf, and on behalf of other New Mexico consumers who saw the Products labeled as products of the United States and purchased the Products. Plaintiff Thornton is a "person"' pursuant to NMSA § 57-12-2.

~~60.~~

58. Plaintiff Thornton *and* members of the New Mexico Subclass are entitled to:

a. equitable relief;

b. actual damages or the sum of one hundred dollars ($100), whichever is greater;

c. exemplary damages for Plaintiff Thornton only as to herself up to three times actual damages or three hundred dollars ($300), whichever is greater; and

d. ~~d.~~ attorneys' fees and costs.

NMSA § 57-12-10.

COUNT II
Breach of Express Warranty (On Behalf of Plaintiff and the Class)

~~61.~~ 59. Plaintiff Thornton repeats the allegations in all the foregoing paragraphs as if fully set forth herein.

~~62.~~ 60. Plaintiff Thornton brings this claim on her own behalf and on behalf of the Class.

~~63.~~ 61. Defendants provided Plaintiff Thornton and members of the Class with written express warranties including, but not limited to, warranties that Products originated exclusively from domestic beef producers.

~~64.~~ 62. Plaintiff Thornton and members of the Class purchased the Products believing them to conform to the express warranties made in advertisements.

~~65.~~ 63. Defendants breached these warranties.

~~66.~~ 64. As a proximate result of the breach of warranties by Defendants, Plaintiff Thornton and the members of the Class did not receive goods as warranted and did not receive the benefit of the bargain. They have been injured and have suffered damages in an amount to be proven at trial.

COUNT ~~III~~III
Unjust Enrichment
(On Behalf of Plaintiff and the Class)

~~67.~~ 65. Plaintiff Thornton repeats the allegations in all the foregoing paragraphs as if fully set forth

herein.

66. ~~68.~~ Plaintiff Thornton brings this claim on her own behalf and on behalf of the Class.

67. ~~69.~~ To the extent required by law, this cause of action is pleaded in the alternative to Plaintiff Thornton's contract-based claims.

68. ~~70.~~ As the intended, direct, and proximate result of Defendants' conduct, Defendants have been unjustly enriched through sales of imported Products at the expense of Plaintiff Thornton and the Class members.

69. ~~71.~~ Under the circumstances, it would be against equity and good conscience to permit Defendants to retain the ill-gotten benefits that they received from Plaintiff Thornton and the Class members, in light of the fact that the products they purchased were not what Defendants purported them to be.

PRAYER FOR RELIEF

Plaintiff Thornton, on her own behalf and on behalf of the Class and the New Mexico Subclass, prays for the following relief:

A. An order certifying the Class and New Mexico Subclass under Rule 23 of the New Mexico Rules of Civil Procedure and naming Plaintiff Thornton as Class and New Mexico Subclass Representative and her attorneys as Class Counsel;

B. A declaration that Defendants are financially responsible for notifying Class and New Mexico Subclass members of the pendency of this suit;

C. An order declaring that Defendants' conduct violates the New Mexico UPA;

D. An order providing appropriate equitable relief in the form of an injunction against Defendants' unlawful and deceptive acts and practices, and requiring proper, complete, and

accurate ~~representation, packaging, and labeling~~advertising of the Products;

E. An order providing appropriate equitable relief in the form of an injunction against Defendants' unlawful and deceptive acts and practices, and requiring that Defendants remove and refrain from making representations on ~~the Products' packaging~~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 ~~labeled~~advertised in a way to disclose the accurate and complete origination of the Product;

F. Actual damages for members of the New Mexico Subclass pursuant to NMSA § 57-12-10;

G. Exemplary damages of 3 times the actual damages for ~~members of the New Mexico Subclass~~Plaintiff Thornton pursuant ~~to~~ NMSA § 57-12-10;

H. Restitution for members of the Class to recover Defendants' ill-gotten benefits;

I. Damages for members of the Class arising from Defendants' breach of warranty;

J. An order finding in favor of Plaintiff Thornton and the Class and New Mexico Subclass on all counts asserted herein;

K. Prejudgment interest on all amounts awarded;

L. An order of restitution and all other forms of equitable monetary relief;

M. Injunctive relief as the Court may deem appropriate; and

N. An order awarding Plaintiff Thornton, the Class and New Mexico Subclass their attorneys' fees and expenses and costs of suit.

Respectfully submitted,

~~WESTERN AGRICULTURE,~~ RESOURCE AND BUSINESS ADVOCATES, LLP

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