

**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.

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

COMES NOW, Plaintiff Robin Thornton, by and through undersigned counsel of record Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn, Esq.) and The Law Offices of Marshall J. Ray (Marshall J. Ray, Esq.) and respectfully request a Preliminary Injunction as requested in the Amended Complaint, ECF Doc. No. 20 and as her grounds state:

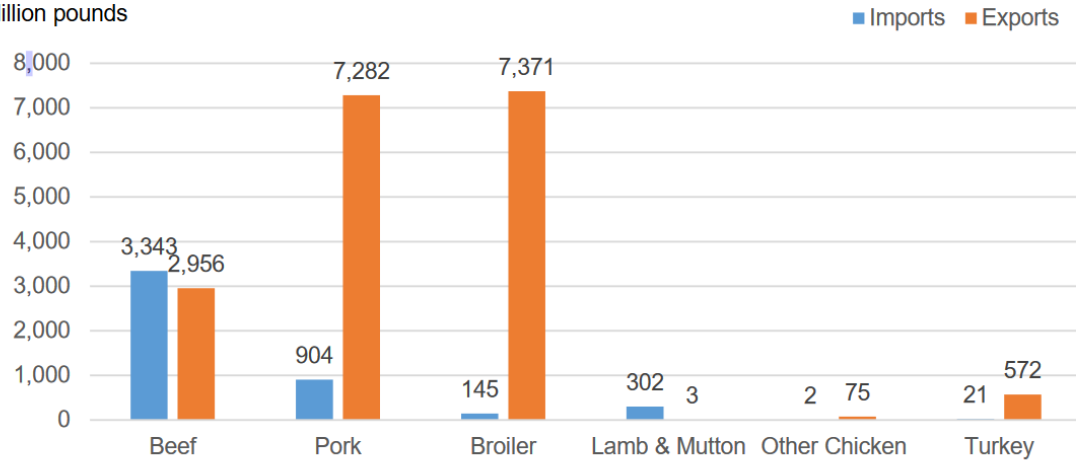
INTRODUCTION

Among the troubling things that occurred in 2020, imports of beef (not counting a substantial increase in imported live feeder cattle) nearly tied an all-time high with 3.343 billion pounds:¹

¹ <https://www.statista.com/statistics/194702/us-total-beef-and-veal-imports-and-exports-since-2001/>

U.S. red meats and poultry trade in 2020

Million pounds



Source: USDA, Economic Research Service calculations using data from U.S. Department of Commerce, Bureau of the Census.

Using an equivalency for live cattle to convert that to the total pounds of imported beef that reached the consumer in 2020, the total exposure to consumer of foreign beef that did not originate in any real sense in this country was 4.4 billion pounds.² These staggering figures are significant to the instant case given that much of this beef comes from countries such as Mexico, Brazil, Argentina, Nicaragua, and Uruguay:³

U.S. beef imports: Volume, January-February 2020 and 2021

Country	Imports			Import share	
	2019	2020	Change	2019	2020
Volume					
	Million pounds	Million pounds	Million pounds	Percent	Percent
Top 5 largest foreign markets (per year-to-date 2021 export volumes)					
Canada	119	128	9	25.0	30.3
Mexico	98	88	-10	20.6	20.8
New Zealand	66	71	5	13.8	16.8
Australia	112	52	-60	23.6	12.3
Brazil	16	29	13	3.4	6.8
World	475	423	-52	100	100
Additional foreign markets of note					
Nicaragua	35	23	-12	7.3	5.4
Uruguay	13	21	7	2.8	4.9
Argentina	3	6	3	0.6	1.4

Note: Largest markets are based on 2021 export volumes.

Source: USDA, Economic Research Service using data from the U.S. Department of Commerce, Bureau of the Census.

² <https://www.thefencepost.com/news/imports-of-cattle-and-beef-hit-historical-high-in-2020/>

³ <https://www.ers.usda.gov/webdocs/outlooks/100951/ldp-m-322.pdf?v=1202.3>

The significance to consumers who purchased beef that is advertised by Defendants in a way to explicitly or implicitly give the impression that it originated in this country cannot be overstated for several reason. Even this year these numbers of imported beef remain high with a sharp increase in imports from Brazil.⁴ First, of the total beef consumed in the United States in 2020 approximately 16% did not originate in this country. This means that Kroger and Albertsons, who were the two largest supermarket chains in the United States in 2020, and in 2017 were the 2nd and 3rd largest grocery retailers respectively, have beyond any colorable doubt sold some of that foreign originating beef to their customers over the last 5 years. Those sales must have occurred under a sticker that misrepresented to the consumer that the beef actually originated in this country, subject to our food safety regulatory enforcement, disease traceability standards, environmental protection regulation as well as enforcement,⁵ our humane handling requirements as well as enforcement⁶ and United States' labor protection laws.⁷⁸ Defendants do not and cannot deny that they were knowingly selling this foreign originating beef, as they have argued to this Court that they were entitled to preemption for that action despite statutory language to the contrary-- an argument which did not gain purchase with this Court. Yet, Defendants here ask this Court to turn a blind eye to this continued false advertising, the equivalent of which United States Tenth Circuit Judge the Honorable Carlos Lucero recently criticized Appellees in the related case of Plaintiff's in a recent oral argument, stating "so what do you want me to do with that counsel? Sit on it and keep it warm?"⁹

⁴ <https://www.bloomberg.com/news/articles/2021-11-08/u-s-beef-craze-gives-brazil-s-meatpackers-relief-amid-china-ban>

⁵ <https://www.bloomberg.com/news/features/2020-12-17/saving-the-amazon-starts-with-cleaning-up-the-beef-industry>

⁶ <https://traslsmuros.com/en/slaughterhouses-investigation-mexico>

⁷ <https://www.reuters.com/article/us-brazil-trafficking-cattle-idUSKBN29A2EW>

⁸ <https://www.nrdc.org/experts/jessica-carey-webb/jbs-profits-rose-while-workers-communities-paid-price>

⁹ <https://www.ca10.uscourts.gov/sites/ca10/files/oralarguments/20-2124.mp3>

Following this Court's Order (ECF Doc. No. 28) on September 30, 2021, that neither federal preemption nor collateral estoppel apply in this case, Defendants have continued the practice of labeling beef, 16% of which is potentially not actually a product originating in this Country. For instance, during the week leading up to Halloween, Smith's a subsidiary of Defendant Kroger advertised:





Meanwhile, Albertson's halted its use of the red, white and blue label alleged by Plaintiff to give the false impression that the beef is of domestic origin advertising instead:



Subsequently, however, both Defendants resumed advertising under the unrequired¹⁰ and misleading red, white and blue promotional sticker this week:

Kroger:



¹⁰ No USDA or FDA regulation requires that that retailers advertise or label the grade of beef or to tell the consumer that it was USDA inspected.

Albertsons:



Importantly, counsel for Defendants conceded this week via email that just this week Kroger had voluntarily ceased the use of the phrase “Produced in the USA” in response to this lawsuit, but replaced that promotional sticker with just the red, white and blue USDA promotional sticker. Important for the Court at this juncture is the allegation from the Amended Complaint that Plaintiff was misled by the USDA red white and blue sticker, now utilized by both Defendants, into believing that the beef she was purchasing based upon those advertisements was a product originating in this Country, which begs an ultimate factual question to be decided by trier of fact as to whether the Defendants knowingly and intentionally placed those promotional stickers on the beef in order to achieve a belief in the consumer that it was from this Country and whether it did in fact mislead the consumers as alleged by Plaintiff. At this juncture, Defendants have demonstrated that they will continue to use these promotional stickers absent an order enjoining them from this Court and Plaintiff has demonstrated in her allegations that even just those red, white and blue stickers mislead consumers as to the true origination of beef products sold by Defendants inducing them through those advertisements to purchase beef from Defendants.

ARGUMENT

Unless the Court enters the Preliminary Injunction, Defendants have demonstrated that they will continue to intentionally mislead lead consumers regarding the origin of the beef that they advertising to induce consumers to purchase those products. Moreover, Defendants demonstrated this after the Court ruled against them with respect to preemption in their first motion to dismiss, putting the consumers at risk of the irreparable harm of unknowingly contracting fatal food borne illnesses from other countries with lesser or different food safety practices, contributing to the grotesquely inhumane slaughter practices of countries like Mexico with poor enforcement,

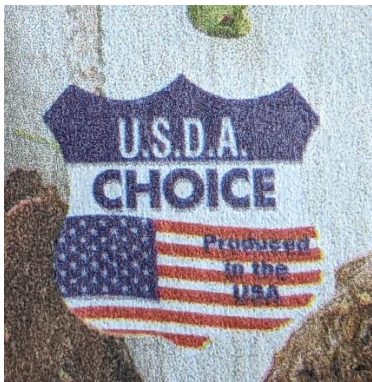
environmental degradation of the Brazilian rainforests or potentially supporting with their misinformed purchase decisions to slave-like labor practices. Moreover, they will never be able to take back those purchase decisions and the damage is likely permanent. It is hard to fathom, that consumers would agree to making purchase decisions that unalterably ruin lives by committing them to slave labor practices in order to sell them beef solely for the profit of mega corporations.

I. Standards for Issuance of a Preliminary Injunction

A movant may obtain a preliminary injunction if: (1) the movant will be irreparably injured by denial of the relief; (2) the movant's injury outweighs any damage the injunction may cause the opposing party; (3) granting the preliminary relief would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits. *Keirnan v. Utah Transit Auth.*, 339 F.3d 1217, 1220 (10th Cir. 2003) (citation omitted). For the reasons that follow, the standards for granting a temporary and preliminary injunction have been met in this case.

II. Plaintiffs are Likely to Succeed on the Merits.

Defendants cannot deny that this is not an honest statement about where a significant portion of the beef products they sell originate:



Nor can Defendants deny that a great number of consumers just like Plaintiff purchased these

foreign beef products that had been purposefully intermingled with American beef in order to obscure its origin, believing that they were supporting American ranchers and farmers and would not have purchased the products advertised or any of the beef products sold by Defendants if they understood that they would be using their purchasing dollars to production practices in foreign countries that include severe environmental degradation or slave-like labor. Nor, absent reliance on the false advertising of Defendants would Plaintiff and putative class members have exposed their health to increased risk of contracting fatal diseases from countries like Brazil or Argentina that have utterly failed to stop the aforementioned environmental destruction and humanitarian violations, and cannot reliably be expect to operate honestly in terms of reporting or enforcing the food safety standards that increase the risk of contracting fatal diseases such as Bovine Spongiform Encephalopathy or Creutzfeldt-Jakob Disease. In fact, this year even China (among other countries) halted imports from Brazil after two cases of BSE were discovered.¹¹ *See* Declaration of Plaintiff Robin Thornton, Exhibit 1. Plaintiff is, thus, able to establish a likelihood of success on the merits of her UPA claim because she can easily establish for the record before the Court that Defendant has engaged in an unfair or deceptive trade practice as defined by the as:

D. “unfair or deceptive trade practice” means an act specifically declared unlawful pursuant to the Unfair Practices Act, **a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods** or services or in the extension of credit or in the collection of debts by a person in the regular course of the person's trade or commerce, that may, tends to or does deceive or mislead any person and includes:

- (1) representing goods or services as those of another when the goods or services are not the goods or services of another;
- (2) causing confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services;**
- (3) causing confusion or misunderstanding as to affiliation, connection or association with or certification by another;
- (4) using deceptive representations or designations of geographic origin in**

¹¹ <https://www.abc.net.au/news/rural/2021-09-15/indonesia-russia-saudis-join-china-ban-brazil-beef-mad-cow/100463062>

connection with goods or services;

NMSA 1978 § 57-12-2 (emphasis added). The fact that Defendants have continued to make misleading if not outright false statement about the geographic origin of the good they are selling after this Court declined giving them the defense of preemption only serves to solidify that the Defendants have knowingly engaged in this misrepresentation. Thus, likelihood of success on this claim is all but certain, and the questions are of degree and extent, not whether or not they has been a violation. Likewise, the UPA does not require that Plaintiff satisfy the usual high bar for an injunction stating:

A. A person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person is not required. Relief granted for the copying of an article shall be limited as to the prevention of confusion or misunderstanding as to source.

NMSA 1978 § 57-12-10. It is abundantly clear that Plaintiff has likely already been damaged and that allowing the Defendants to continue to use any promotional stickers that cause confusion or mislead the putative class member consumers as to the origin of the products they are consuming will not just damage them but will cause irreparable injury as discussed below.

III. The Putative Class Member Consumers Will Suffer Additional Irreparable Injury if Injunctive Relief Is Denied

It is hard to imagine a more irreparable harm that a consumer might experience as a result of a misrepresentation as to the origin of a good they have purchase, than to have unwittingly used their hard money to support the production of beef in countries that will not stop severe environmental degradation or slave-like labor practices. Or to have their health put at a risk, even a negligible risk of contracting a debilitating and fatal disease from eating beef from one of the countries that is unable or unwilling to curb unsafe practices, yet expected to self-police in a

manner to protect human health from Mad Cow Disease (BSE) or Creutzfeldt-Jakob. Thus, under the Tenth Circuit Court of Appeals' jurisprudence, irreparable injury has occurred and will continue to occur until an injunction issues.

IV. The Balance of Harms Favors Issuance of Injunctive Relief

Plaintiff has established both likelihood of success on the merits as well as a clear irreparable injury beyond what is required for an injunction under the UPA. In addition, the balance of harms tips decidedly in favor of Plaintiff. Defendants have demonstrated just in the picture included in this brief, that the inclusion of a red, white and blue promotional sticker is neither regulatorily required, nor necessary for them to market their products as they commonly omit if advertisements of beef products. It certainly is not required by USDA to appear on a label in the stores. Defendants will not be harmed by denying them the ability to deceive the consumers on the beef of foreign origin that they sell co-mingled with American beef during the pendency of this action.

Because the Defendants will not suffer more than irrational unsubstantiated speculative harm if an injunction is granted, and the Plaintiffs will suffer certain harm in the absence of injunctive relief, the balance of hardships favors the Plaintiff.

V. An Injunction Is in the Public Interest

Finally, Plaintiff establishes that issuance of a preliminary injunction is in the public interest to prevent harm to consumer from unfair or deceptive practices. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 302, 96 S. Ct. 1978, 1986, 48 L. Ed. 2d 643 (1976). Thus, an injunction is in the public interest and this Court should grant it.

SPECIFICS OF TEMPORARY RESTRAINING ORDER REQUESTED

Plaintiffs requests the Court grant a Preliminary Injunction that prohibits the Defendants from using any sort of promotional sticker in advertisements or on packages of beef that tends to

lead to the consumer to believe that they are purchasing a product that originated in this Country as cattle born and raised in the United States unless they can certify with certainty that such is a true and accurate statement.

Conclusion

For all the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction should be granted.

Respectfully submitted,

WESTERN AGRICULTURE, RESOURCE
AND BUSINESS ADVOCATES, LLP

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**CERTIFICATE OF
SERVICE**

I HEREBY CERTIFY that on November 10, 2021, a true and correct copy of the foregoing was filed electronically pursuant to the CM/ECF procedure for the District of New Mexico, and caused counsel of record to be served by electronic means.

/s/ A. Blair Dunn