IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ROBIN G. THORNTON, on behalf of Herself and others similarly situated, and WENDY IRBY, on behalf of Herself and others similarly situated,

Plaintiff,

v. **No. 1:20-CV-1040 JB/LF**

THE KROGER COMPANY, and PAY AND SAVE, INC.,

Defendants.

PLAINTIFF THORNTON'S MOTION FOR CLASS CERTIFICATION & SUPPORTING MEMORANDUM AS TO DEFENDANT KROGER

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Pursuant to Federal Rule 23, Plaintiff Thornton moves the Court for an Order certifying classes as specified below, approving notice to the classes, and designating the undersigned counsel as counsel for the classes certified. The Motion is opposed.

I. Introduction

This is a false advertising case. Between 2018 and 2021, Defendant Kroger advertised choice beef muscle cuts and ground beef weekly in mailed circulars like the one pictured below:

Plaintiff Thornton avers that she received direct mailers with these advertisements of various tasty-looking cooked and uncooked beef products, together with promotional stickers that induced

her to believe that she would find USA produced beef products for purchase in Kroger stores. Thornton relied on these advertisements in making her decision to purchase beef products, including ground beef from Kroger's Smith's stores here in New Mexico. Moreover, when Thornton arrived in the stores, she found beef products with the same promotional stickers affixed to almost all beef products, sometimes outright falsely claiming that the beef was "produced in the US," that gave the false impression that *all* of the beef that she found in the store consistent with Kroger's weekly mailers—was an American produced product, *not* a product of Mexico, Canada, Uruguay, Argentina or Brazil.

Plaintiff has been unequivocal that she relied upon these mailers with the misleading promotional stickers to decide how to spend her grocery dollars purchasing various beef products including ground beef from Kroger. Moreover, Plaintiff has consistently maintained that she would not have purchased any of these beef products, especially the ground beef from Kroger had she know the truth about the origin of some of the meat contained in these various beef products. Plaintiff has not wavered from her assertion that this misrepresentation regarding the geographic origin of the intermingled beef was material to her purchasing decisions.

Given, the Court's recent ruling precluding discovery on Kroger's ground beef, it is especially important to note Kroger has been aware (and their own expert, *see* Report of Dr. Nevel Speer[1], admits) much of the imported beef is intermingled with domestic beef and is processed into ground beef. Kroger has presented no evidence that it was unaware of its suppliers' importation and commingling practices. Indeed, despite its repeated recitation that it relied on guidance from USDA that the suppliers' labeling that foreign beef that was "processed" in the US was permitted to be labeled a product of the USA, Kroger knew that the beef products it was offering for sale to its

[1] Page 6, 4, A.3. – "To that end, nearly all imported beef (product) arrives in the United States as lean trimmings (90% lean) for the purpose of being blended with fed cattle trimmings (50% lean) to make ground beef and/or hamburger. This product does NOT carry any tie to USDA Quality Grades, and it is my understanding that Kroger has never advertised such product with the "USDA CHOICE: Produced in the USA" graphic at issue in this litigation.

consumers was not a true product of this country, as most consumers understood that phrase. In fact, the notion that Kroger had no knowledge of the truth or falsity of that statement or its importance to Plaintiff and class members is belied by Kroger's ESG statements to its investors. Kroger knew that it was important to the public that beef came from environmentally sustainable sources with production practices established and maintained by US producers, and Kroger knew that some percentage of the beef it was selling was produced on foreign soil. Kroger is either being disingenuous about its ignorance about its suppliers' commingling foreign beef with US beef (to the extent it claims such ignorance precludes liability and/or class certification) or it was dishonest with investors in the following statements from its 2021 ESG document[2] regarding how much of its beef is sourced from foreign countries:

Further, Kroger's statement below from that same document stands in stark contrast to its knowing misrepresentations of the geographic origin of their products:

Marketing Practices & Product Labeling	Providing clear, fact-based and transparent nutritional labeling, including information on geographic origin, restaurant-type menu items sold in our stores and our suppliers' products. Working with suppliers to ensure product attributes are truthfully and responsibly communicated to our customers in stores and through advertising, including refraining from marketing products that do not fulfill specific nutritional criteria to children.

[2] https://www.thekrogerco.com/wp-content/uploads/2021/07/Kroger-2021-ESG-Report.pdf

More tellingly, Kroger has continued in its deception even after the initiation of this litigation, pivoting to a statement equating "North American" with the USA stating in its 2022 ESG report[3] that:

- **Beef:** We strive to source deforestation-free fresh beef and beef-based ingredients. In 2021, the regular (non-spot market) procurement into our Meat department and manufacturing plants was predominantly—over 99.9%—harvested in the U.S., with the majority of the remainder coming from Canada or Mexico. Of this remaining beef, over 99.9% was born and raised in North America. Kroger also sources a small volume of specialty Simple Truth® beef products from Uruguay and Australia. Kroger continues to engage our suppliers to gain increased visibility into our beef supply chain.

  In 2022, we are beginning to query relevant co-manufacturing suppliers of *Our Brands* products to identify deforestation risks for beef-based ingredients.

The phrase "harvested in the United States" does not accurately represent to the consumer the geographic origin of the full scope of beef products Kroger is selling (even if it might be consistent with USDA guidance), nor are Mexico or Canada within the United States even if they are in North America. Despite this knowledge, to this day Kroger has continued to maintain this false advertising in stores as depicted below:

[3] https://www.thekrogerco.com/wp-content/uploads/2022/08/Kroger-Co-2022-ESG-Report.pdf

Thus, when Plaintiff and the putative class members bought multiple and various beef products at various times over the course of several years, they relied on the various mailers or promotional stickers (not labels) promoting domestic production which misled them into believing that all of the

beef they were purchasing was a product of the US. It is simply not believable that Kroger had no idea that upwards of 16% or more of the beef in the products that it was selling, between 2018 and the 2022, was not from cattle born and raised in the United States. Kroger's contention that it was wholly reliant on the statements of its suppliers, *see* ECF Doc. Nos. 176, 182, 185 and 197, and had no idea that foreign beef was commingled with domestically born and raised beef is belied by the ESG statements in its own securities filings. Even the ESG statements leave cargo-sized truck holes in Kroger's story—it suggests Kroger uniquely ignored widely-known facts about imports used in forward contracting widely known in the industry (or even the spot market purchases noted conspicuously in the 2022 ESG statement). Kroger's contention that it cannot (and could not at the time) trace specific products sold at its stores to specific lots of foreign beef can only be credited as willful blindness—it is not a basis for denying class certification. *See* Section VI.3.a, *infra*.

II. Applicable Law

A. Elements of a Claim under the NMUPA

"The UPA is a law that prohibits the economic exploitation of others. The language of the UPA evinces a legislative recognition that, under certain conditions, the market is truly not free, leaving it for courts to determine when the market is not free, and empowering courts to stop and preclude those who prey on the desperation of others from being rewarded with windfall profits." *State ex rel. King v. B&B Inv. Group, Inc*., 2014-NMSC-024, ¶ 34, 329 P.3d 658, 671. The UPA prohibits "unfair or deceptive trade practices," which are defined as:

> 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.

N.M.S.A. 1978 § 57-12-2(D). The UPA applies to both misrepresentations and material omissions. *Salmeron v. Highlands Ford Sales, Inc*., 271 F. Supp. 2d 1314, 1318 (D.N.M. 2003). The UPA provides a non-exhaustive list of unfair or deceptive trade practices, which includes:

> (4) using deceptive representations or designations of geographic origin in connection with goods or services; . . .
>
> (14) using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive;

NMSA 1978 § 57-12-2(D). The UPA also prohibits "unconscionable trade practices," which it defines to mean:

> an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:
> (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or
> (2) results in a gross disparity between the value received by a person and the price paid.

N.M.S.A. 1978 § 57-12-2(E). "Substantive unconscionability is found where the contract terms themselves are illegal, contrary to public policy, or grossly unfair." *B & B Inv. Grp., Inc*., 2014-NMSC-024 at ¶ 32, 329 P.3d at 670. Here, all New Mexico sub-class members have the same claim: that Kroger's advertising of beef products is both unfair and unconscionable. The Unfair Practices Act explicitly provides for class actions. N.M.S.A. 1978 § 57-12-10(E). The New Mexico Supreme Court held in the context of a putative UPA class action that:

> The opportunity to seek class relief is of particular importance to the enforcement of consumer rights because it provides a mechanism for the spreading of costs. The class action device allows claimants with individually small claims the opportunity for relief that would otherwise be economically infeasible because they may collectively share the otherwise prohibitive costs of bringing and maintaining the claim . . . . The opportunity for class relief and its importance to consumer rights is enshrined in the fundamental policy of New Mexico and evidenced by our statutory scheme.

Fiser v. Dell Computer Corp., 2008-NMSC-046, ¶¶ 12-13, 144 N.M. 464, 468, 188 P.3d 1215, 1219.

B. Elements of a Claim for Unjust Enrichment

Plaintiffs counsel respectfully offers that this Court has written on the conflict of laws for multi-state class actions and found that it there is a requirement of some showing of conflict between the different states' law that could be applied to produce different results[4], where as here Plaintiff

[4] Claims for unjust enrichment are distinct from claims sounding in contract or tort law. *See Hydro Conduit Corp. v. Kemble*, 110 N.M. at 178, 793 P.2d at 860 ("We have no disagreement with the scholarly view that restitution for unjust enrichment constitutes an independent basis for recovery in a civil-law action, analytically and historically distinct from the other two principal grounds for such liability, contract and tort."). The *Restatement (First) of Conflict of Laws* § 453 provides: "When a person is alleged to have been unjustly enriched, the law of the place of enrichment determines whether he is under a duty to repay the amount by which he has been enriched." *Restatement (First) of Conflict of Laws* § 453. Although "New Mexico has traditionally followed the Restatement (First)," *1266 *Ferrell v. Allstate Ins. Co.*, 2008–NMSC–042, ¶ 50, the Supreme Court of New Mexico has been willing to follow the *Restatement (Second) of Conflict of Laws* in certain cases, such

respectfully offers that application of New Mexico law is likely to produce identical results. New Mexico has long recognized actions for unjust enrichment, that is, in quantum meruit or assumpsit. *See Tom Growney Equip., Inc. v. Ansley*, 119 N.M. 110, 112, 888 P.2d 992, 994 (Ct. App. 1994). To prevail on such a claim, a party must show that: (1) another has been knowingly benefitted at one's expense; and (2) in a manner such that allowance of the other to retain the benefit would be unjust. *Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA-051, ¶ 11 (citing generally Restatement of the Law of Restitution §§ 1, 40, 41 (1937, as supplemented through 1988)). Damages are measured by restitution arising from the defendant's gain/benefit. *Martin v. Comcast Cablevision Corp. of Cal*., LLC, 2014-NMCA-114, ¶ 11 (citations omitted).

III. Applicable Statutes of Limitation

The statute of limitations under the UPA is four years. N.M.S.A. 1978 § 37-1-4. Kroger has conceded and represented that the false advertisements still at issue as determined by this Court began circulation to the consumers in November of 2018. Therefore, this action commenced in September of 2020 as to the New Mexico subclass is timely.

The unjust enrichment claim is subject to a four-year statute of limitations pursuant to NMSA 1978, §37-1-4 (2015), the "catchall" statute of limitations. Unjust enrichment claims on behalf of the national class regarding the knowing use of the false advertising beginning in November of 2018 are therefore timely.

IV. The Proposed Classes

Plaintiffs seek certification of two classes under Rule 23:

1. A class consisting of all persons from New Mexico that reviewed the advertisements of Kroger's New Mexico stores known as Smith's that they received in a mailer or newspaper from November 2018 to the cessation of the use of the Product of the USA Shield to

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as in multi-state class action cases in which the laws of the states involved actually conflict, because the *Restatement (First) of Conflict of Laws* is "particularly ill-suited for the complexities present in multi-state class actions," *Ferrell v. Allstate Ins. Co.*, 2008–NMSC–042, ¶ 56 (adopting the *Restatement (Second) of Conflict of Laws* for multi-state contract class actions). In *Fowler Brothers, Inc. v. Bounds*, the Court of Appeals of New Mexico explained that courts can "avoid a choice of law question when the laws of the involved states would produce identical results," 2008–NMCA–091, ¶ 9, and agreed with the district court's implicit determination that Arizona and New Mexico law on unjust enrichment did not conflict as applied in the case, *see* 2008–NMCA–091, ¶ 20.

Abraham v. WPX Energy Prod., LLC, 20 F. Supp. 3d 1244, 1265–66 (D.N.M. 2014)

make the decision to attend a Smith's store to purchase beef products that they relied upon to have been produced exclusively in the USA even though the geographic origin of the production of the beef products included foreign sources; and

2. A class consisting of all persons from the United States that reviewed the advertisements of Kroger's stores that they received in a mailer or newspaper to make the decision to attend a Kroger's store to purchase beef products which they relied upon to have been produced from cattle born and raised in the USA;.

V. Plaintiff Thornton

In an effort to mitigate the costs and burden placed on counsel for Plaintiffs and Defendants, as well to conform to the evidence in the case, Thornton is the named Plaintiff responsible for representing both the New Mexico and national classes of Kroger shoppers. Plaintiff Thornton has testified she that reviewed the advertisements containing the USDA Choice Shield with the Stars and Stripes and the statement "Product of the US," understood the advertisements to mean that the beef she purchased was geographically originating and produced exclusively in this country, and relied upon that representation to her detriment to purchase products that she otherwise would not have purchased. *See* Exhibit 2, Thornton Depo, pgs 47,48, 92.

VI. Legal Standards for Class Certification

A. Class Actions Under Fed. R. Civ. P. 23

1. Legal Standard

Under Fed. R. Civ. P. 23, the Court must first determine whether a claim satisfies the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation. The Court should then examine the Rule 23(b) standards and determine whether the claim meets the requirements of at least one of the categories of claims maintainable as a class action. *Carpenter v. Boeing*, 456 F.3d 1183, 1187 (10th Cir. 2006). While the district court is required to conduct a "rigorous analysis" to ensure that plaintiffs have met each of the elements of Rule 23, *Gen. Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 161 (1982), "[r]ule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013). Instead, "[merits] questions may be considered to the

extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites are satisfied." *Id.* at 1195; *Anderson v. City of Albuquerque,* 690 F.2d 796, 799 (10th Cir. 1982).

Certification should be denied only upon a "clear showing" that the Plaintiffs did not meet the Rule 23 requirements. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968) ("[W]e hold . . . rule [23] should be given a liberal rather than a restrictive interpretation, and that [denying certification] is justified only by a clear showing to that effect"). In a close case, certification should be granted. *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968) ("[T]he interests of justice require that in a doubtful case, . . . any error, if there is to be one, should be committed in favor of allowing the class action."). This Court has acknowledged the resolution of doubts in favor of, not against, class certification. *See Daye v. Cmty. Fin. Serv. Ctrs.*, LLC, 313 F.R.D. 147, 159 (D.N.M. 2016) (citing both *Eisen* and *Esplin* approvingly, Browning, J). As demonstrated below, this is not a close case; all requirements of Rule 23 are satisfied and the Court should certify the classes specified herein.

2. Application of Rule 23(a) factors to this case

a. Numerosity

The Tenth Circuit has "no set formula" to determine whether the numerosity requirement is met. *Rex v. Owens*, 585 F.2d 432, 436 (10th Cir. 1978)). However, "[c]ourts generally presume numerosity where a class consists of 40 or more members." *Meyer v. U.S. Tennis Ass'n*, 2013 U.S. Dist. LEXIS 60091, *11 (S.D.N.Y. Apr. 25, 2013) (citation omitted); *Moore v.Napolitano*, 269 F.R.D. 21, 28 (D.D.C. 2010) (citing cases certifying 29-36 member classes); *Rex*, 585 F.2d at 4236 (citing cases holding 37, 262 and 358 met numerosity).

"Satisfaction of the numerosity requirement [also] does not require that joinder is impossible, but only that plaintiff will suffer a strong litigational hardship or inconvenience if joinder is required." *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 384 (D. Colo. 1993) (Kane, J.); *Robidoux v. Celani*, 987 F.2d 931, 935 (2nd Cir. 1993) ("Impracticable does not mean impossible."). This Court has previously found that joinder of "several hundred tenants and

homeowners" would be impracticable, and thus the proposed class met ***rule 23****(a)(1)*'s numerosity requirement. *See Lowery v. City of Albuquerque*, 273 F.R.D. 668, 683 (D.N.M. 2011) (Browning, J.); *see also Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (holding that "100 to 150 members . . . is within the range that generally satisfies the numerosity requirement"). Numerosity is satisfied in this lawsuit.

i. The New Mexico class under the NMUPA includes several thousand residents in the Edgewood market alone where Ms. Thornton commonly shopped that received the mailed false advertisements and purchased beef.

Regarding the New Mexico UPA class, the number of shoppers that received the mailers and were exposed to advertisements using "Produced in the USA" Shield, and subsequently purchased beef from the Smith's store located in Edgewood is likely several thousand New Mexicans ((2020 Population of Edgewood = 6,113) X (46% of Smith's shoppers perceiving the advertisements to mean beef from cattle born and raised in the USA[5]) X (60% of retail shoppers consuming beef[6])). "In determining whether a proposed Class meets the numerosity requirement, "the exact number of potential members need not be shown, and a court may make 'common sense' assumptions to support a finding that joinder would be impracticable." *Anderson Living Tr. v. WPX Energy Prod., LLC*, 306 F.R.D. 312, 380 (D.N.M. 2015) (citation omitted, cleaned up)

ii. The unjust enrichment class includes millions of consumers across 38 states.

As to the unjust enrichment claim asserted on behalf of nationwide consumers that likely received the advertisements from Kroger containing the Product of the USA Shields and purchased beef in reliance on the representation that they were purchasing beef that was produced from cattle born and raised in the USA that number is easily in the millions of consumers ((discovery materials produced by establish for the years 2019-2021, not counting household that only purchased ground beef[7], that Kroger sold beef to an average of 58,296,682 households) X (46% of Kroger's shoppers

[5] *See* Exhibit 4, Research and Polling Data, THORTON/IRBY 000050
[6] https://www.beefitswhatsfordinner.com/retail/sales-data-shopper-insights/ground-beef-at-retail-and-foodservice
[7] This is significant as almost 40% of the retail beef purchased by consumers is ground beef. *See* https://www.statista.com/topics/1447/beef-market/#dossierKeyfigures

perceiving the advertisements to mean beef from cattle born and raised in the USA[8])). This, of course, satisfies numerosity.

b. Commonality

Commonality refers to whether there are "questions of law or fact common to the class." Rule 23(a)(2). The plaintiff class must present a "common contention ... of such a nature that it is capable of class-wide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of one of the claims in one stroke." *Dukes v. Wal-Mart Stores, Inc.*, 564 U.S. 338, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). It is not necessary that class members share every factual and legal predicate. *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988). The common issue or issues must be significant to the litigation. As this Court has observed, in *Dukes*, the Supreme Court "grafted the following requirements onto rule 23(a)(2): (i) that the common question is central to the validity of each claim that the proposed class brings; and (ii) that the common question is capable of a common answer." *Anderson Living Trust v. WPX Energy Prod., LLC*, 306 F.R.D. 312, 381 (D.N.M. 2015) (Browning, J.). A common question of liability can support class certification, **even if** the court must conduct a subsequent individualized inquiry "to determine which class members were actually adversely affected by one or both of the practices and if so what loss he sustained…." *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F. 3d 482, 491 (7th Cir. 2012).

And while Rule 23 requires a showing of common questions, it does *not* require a showing "that those questions will be answered, on the merits, in favor of the class." *Amgen*, 133 S. Ct. at 1191. *Answering* common questions is reserved for the merits stage. *Id.* Where a question of law involves "standardized conduct of the defendants toward members of the proposed class, a common nucleus of operative facts is typically presented, and the commonality requirement . . . is usually met." *Franklin v. City of Chicago*, 102 F.R.D. 944, 949 (N.D.Ill. 1984); *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D.Ill. 1988).

Both the United States Supreme Court and the Tenth Circuit Court of Appeals have recognized that a finding of commonality requires only a single question of law or fact common

[8] *See* Exhibit 4, THORTON/IRBY 000050

to the entire class. *Wal-Mart*, 564 U.S. at 359 ("We quite agree that for purposes for Rule 23(a)(2) even a single common question will do") (brackets and quotations omitted); *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 914 (10th Cir. 2018); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010). There are numerous common questions of fact or law that are central to the NMUPA and unjust enrichment claims in this case and that, importantly, are capable of generating common, class-wide answers through class-wide evidence.

i. Common questions exist on the NMUPA claim.

The following list of common questions exist on the NMUPA claim and are capable of generating class wide answers on material issues in this lawsuit:

1. Whether Defendant Kroger has acted unfairly and deceptively, in violation of the NMUPA, by advertising to consumers that the beef products the sold to New Mexico consumers geographically originates from American Ranchers and Farmers; TAC ¶55; Kroger Answer ¶ 55 (denying allegation);

2. Whether Kroger's advertising was likely to mislead consumers acting reasonably under the circumstances and did mislead consumers acting reasonably under the circumstances. TAC ¶ 55; Kroger Answer ¶ 55 (denying allegation);

3. Whether Kroger's advertisements regarding geographic origin were material to consumers such that they led consumers to believe that the beef products were derived from American ranches and farms with a reputation of humane standards, food safety protections, and environmental responsibility. TAC ¶ 57; Kroger Answer ¶ 57 (denying allegation);

4. Whether Kroger's advertisements led consumers to purchase imported products they would not have otherwise purchased, to purchase more of those products, and/or to pay a higher price for the products than they otherwise would have. TAC ¶ 57; Kroger Answer ¶ 57 (denying allegation);

5. Whether Kroger 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. TAC ¶ 59; Kroger Answer ¶ 59 (denying allegation);

As with *Menocal* and *Daye*, Plaintiffs here have identified no less than five (5) different

common questions across the class that will materially advance the litigation on the NMUPA claim and upon which class wide evidence will generate class wide answers. The central issue of whether advertising regarding geographic origin complies with the NMUPA, a fact that Kroger repeatedly denied, is alone dispositive of a commonality finding under both *Menocal* and *Daye*. This is especially true because the same single (or similar) policies are at issue, just like the same single policies and commonplace payday loans were at issue in *Menocal* and *Daye*, respectively. If the application of the Small Loan Act to the payday loans at issue in *Daye* evidenced commonality, then certainly the question of whether class members were deceived into purchasing beef in violation of the NMUPA presents a common question.

ii. Common questions exist on the unjust enrichment claim.

The following list of common questions, each of which alone is sufficient to establish commonality, exist for consumers across the United States regarding the knowing use of statements of geographic origin for the unjust enrichment claim and are capable of generating class wide answers on relevant and material issues in this lawsuit:

1. Whether as the intended, direct, and proximate result of Kroger's advertising conduct, Kroger has been unjustly enriched through sales of imported beef products at the expense of Plaintiff and the Class members. TAC ¶ 72; Kroger Answer ¶72 (denying claim);

2. Whether under the circumstances, it would be against equity and good conscience to permit Kroger to retain the ill-gotten benefits that they received from Plaintiff and the Class members, in light of the fact that the products they purchased were not what Kroger purported them to be. TAC ¶ 73; Kroger Answer ¶ 73 (denying claim);

3. Whether Kroger knew or should have known that a significant percentage of the beef it was selling to consumers was not from cattle born and raised in the US despite the advertisement stating that it was a product of the USA giving consumers the impression that it was. TAC ¶ 73; Answer ¶ 73(denying claim);

All of these issues are active controversies in this case. All involve disputed facts and/or law that are central to the material issues to be resolved on the two (2) remaining legal claims

asserted in this lawsuit.

Issues 1-3 relate to directly to the material elements of an unjust enrichment claim under New Mexico common law. Because unjust enrichment requires proof that one party has knowingly benefitted at the other's expense in such a manner that to allow the other to retain the benefit would be unjust, Issues 2 & 3 delve into the heart of the material elements of an unjust enrichment claim. *See Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA-051, ¶ 11; *see also Cruse v. St. Vincent Hosp.* 729 F. Supp. 2d 1269, 1276 (D.N.M. 2010) (citing *Credit Institute v. Veterinary Nutrition Corp.*, 133 N.M. 248, 62 P.3d 339, 344 (N.M. Ct. App. 2002), unjust enrichment requirements proof that entity *knowingly* benefitted at the plaintiffs' expense)). Thus, the issue of Defendants' knowledge regarding the benefit they obtained by stating that beef products were from cattle born and raised in the United States is an essential element of the unjust enrichment claim and can be proved on a class-wide basis.

Issues 2 & 3 also relate to the key elements of an unjust enrichment claim—whether a significant percentage of the beef sold by Kroger was from cattle that were not born and raised in the USA, and whether Kroger knew that was the case—and are susceptible to class-wide proof.

All of the issues identified above are central to the unjust enrichment claims, remain unresolved and the answers to these questions would "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. The commonality requirement is satisfied.

c. Typicality

Typicality is intertwined with commonality and both are often addressed together. *See Dukes*, 131 S. Ct. at 2551 n.5. "Typicality requires only that 'the claims of the class representative and class members are based on the same legal or remedial theory.'" *Menocal*, 882 F.3d at 917 (10th Cir. 2018) (quoting *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1216 (10th Cir. 2014)). "It is axiomatic that [w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the

typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Meyer,* 2013 U.S. Dist. LEXIS 60091, at *25 (internal citation omitted). "Differing fact situations of class members do not defeat typicality [if] the claims of the class representative and class members are based on the same legal or remedial theory." *Adamson,* 855 F.2d at 675. Like commonality, typicality exists where all class members are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances. *DG ex rel. Stricklin v. Devaughn,* 594 F.3d 1188, 1198-99 (10th Cir. 2010); *see also Floyd v. City of New York*, 283 F.R.D. 153, 176 (S.D.N.Y. May 16, 2012) ("Because the named plaintiffs' claims arise from the same policy or practice and the same general set of facts as do the claims of the putative class members, the typicality prong is satisfied"). The typicality burden "is not an onerous one." *Paxton v. Union Nat. Bank,* 688 F.2d 552, 561 (8th Cir. 1982), *cert. denied,* 460 U.S. 1083 (1983).

i. Typicality exists on the NMUPA claim.

Plaintiff Thornton and all members of the putative NM subclass have the exact same false advertising claim: they saw advertisements that portrayed that the beef products they would find for purchase at Kroger's New Mexico stores was from cattle born and raised in the United States. The designated class representative is a New Mexico shopper that saw the same ads and arrived at the same conclusion relying on that advertisement in her decision to purchase beef from Kroger's stores. All putative class members are individuals who received the advertisements in their mailbox or in their newspaper and purchased beef in reliance on the representations contained in those advertisements. The designated class representative shares these claims with the members of the class and all were injured in the same way. Typicality is satisfied.

ii. Typicality exists on the unjust enrichment claim.

As to the unjust enrichment claim, all consumers share the same claim—they received advertisements in the mail that misrepresented a substantial portion of the production origin of beef products for sale by Kroger and a substantial portion of those consumers relied on those advertisements to purchase products they either would not have purchased otherwise or would not have paid as much for. Kroger knew that all of its beef products (but especially its ground beef) were of commingled origin, and employed deception to unjustly benefit. As class representative,

Thornton was also deceived and thus shares the same claim and suffered the same type of injury. Typicality is satisfied.

d. Adequacy of Representation

Adequacy of representation requires that the named representative provide fair and adequate protection for class members' interests. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n. 5 (1996). Adequacy is generally measured by two important inquiries: (i) whether the named plaintiffs and their counsel have any conflicts with other class members; and (ii) whether the named plaintiffs and their counsel will vigorously prosecute the action on behalf of the class. *See Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002). "In considering this second question, the attorney's experience and competence may inform the court's analysis." *See Bustillos v. Bd. of County Comm'rs*, 310 F.R.D. 631, at 652 (D.N.M. 2015) (citing *Lopez v. City of Santa Fe*, 206 F.R.D. 285, 289-90 (D.N.M. March 13, 2002)).

Plaintiff is not aware of any actual or substantially inherent conflicts that would render her an inadequate representative. *See* 7A C. Wright, A. Miller & M. Kane, Fed. Prac. & Proc. § 1768 at 389-93 (3d ed. 2005) ("only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status…."); 1 A. Conte & H. Newberg, Newberg on Class Actions § 3:26 at 433-34 ("Though a plaintiff cannot be an adequate representative if he or she has a conflict of interest with class members, not every potential disagreement between a class representative and the class members will stand in the way of a class suit."). She was a consumer that was deceived by advertisements she received in the mail or her newspaper into purchasing beef products from the Defendant because she thought the products including the ground beef that was advertised was produced from cattle born and raised in the United States. *See E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977) ("class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members") (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S. Ct. 2925, 41 L.

Ed. 2d 706 (1974)). Ms. Thornton's interests are fully aligned with the putative class members and she is conflict free. *See Morris v. Affinity Health Plan, Inc*., 859 F. Supp. 2d 611, 616 (S.D.N.Y. 2012) (adequacy met when "there is no evidence that Plaintiffs' and the Class Members' interests are at odds."). They all seek to recompense for the deception that caused them to make purchases that but for the deception they would not have made.

Second, the unequivocal deposition testimony of Ms. Thornton was that she received the ads in her mail or newspaper and based upon the USDA Choice Shield stating "Produced in the USA" (that she later observed on the packaging on almost all beef products in the store) believed that the products contained on those pages, including ground beef, was produced from cattle born and raised in the United States, to the spend her grocery dollars to purchase beef from the Defendant's stores.[9] Significantly, the evidence thus far supports that a significant percentage of Kroger shoppers (47%) also believed that use of the advertising shield meant that beef was from cattle born and raised in the United States,[10] and, thus Ms. Thornton's interests align and she suffered the same injury as the putative class members under the same incorrect beliefs. *See E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977) (quoting *Schlesinger*, 418 U.S. at 216).

The second prong is almost entirely established by the fact that Counsel is collectively thoroughly experienced in, the beef industry including USDA processing regulation and litigation, agriculture litigation and in class actions. As attested to by the Declarations of A. Blair Dunn, Marshall J. Ray and Ethan M. Preston, Exhibits 9, 10 and 11, counsel have the necessary skills, background and experience to adequately represent the proposed classes in this lawsuit. *See Bustillos*, 310 F.R.D. at 652. They have litigated this case vigorously since its inception, as evidenced by the detailed pleadings outlined in the Court's Docket Sheet, their engagement in the motion

[9] *See* Exhibit 2, Depo pg 92
[10] *See* Exhibit 3 and 4, THORTNON/IRBY 000050

practice and multiple hearings that have been held thus far, and the discovery efforts made to date. They will continue to do so for, and on behalf of, the named Plaintiff Thornton, as well as the putative class members. Additionally, the Court should appoint these three lawyers as class counsel under Fed. R. Civ. P. 23(g).

In addition to the commitments of Counsel, Ms. Thornton has affirmed that she is prepared to represent the interests of the class appropriately as attested by her Declaration, *see* Exhibit 1 and her honest participation in her deposition. *See* Exhibit 2, Depo pg 71, ln 13-17. This should satisfy the Court that she is ready, willing and able to serve as an adequate class representative for the proposed classes. Defendants may further try to counter that Ms. Thornton is not adequate to serve as a class representative because she is not sufficiently familiar with the detailed legal framework applicable to their claims in this case. The attached deposition testimony and/or declarations of Ms. Thornton establishes that they she has a working understanding of the need to pursue justice regarding the deception as well as willingness to advocate for the need for justice for the putative class members ahead of their own interests or pecuniary gain. Adequacy does not require that class representatives have a sophisticated understanding of the law. "The threshold of knowledge required to qualify a class representative is low" and "it is enough that the representative understand the gravamen of the claim." *Moeller v. Taco Bell Corp*., 220 F.R.D. 604, 611 (N.D. Cal. February 23, 2004) (citing *In re Worlds of Wonder Securities Litig*., 1990 U.S. Dist. LEXIS 8511, 1990 WL 61951 at *3 (N.D. Cal. Mar. 23, 1990)). Indeed, that is one of the reasons that the qualifications of class counsel are examined as part of the adequacy analysis because the focus is less on the knowledge of unsophisticated plaintiffs and more on the skill of plaintiffs' counsel. *See, e.g., Klein v. A.G. Becker Paribas, Inc.*, 109 F.R.D. 646, 51 (S.D.N.Y. March 19, 1986); *Weinberger v. Jackson*, 102 F.R.D. 839, 845 (N.D. Cal. August 6, 1984). As one court explained:

> The court would be naive to apply a rule that lay persons purporting to represent a class[,] cannot rely heavily on their attorneys for guidance, advice, and financial assistance. Lay persons rely on attorneys for such purposes in individual actions, and there appears to be no strong policy reason to preclude them from doing so in class

> actions. Just as a plaintiff, otherwise adequate, with inadequate counsel might be deemed to be an inadequate representative, an unsophisticated plaintiff with competent counsel may be deemed to be an adequate representative.

Harman v. Lyphomed, Inc., 122 F.R.D. 522; 1988 U.S. Dist. LEXIS 11579, at *16-17 (N.D. Ill. Oct. 12, 1988) (quoting *Ross v. Bank South, N.A.*, (CCH) Fed. Sec. L. Rep. para. 92,526, p. 93,149, 93,150 (N.D. Ala. 1986)). As another court explained, "[p]articularly where members of the class are laypersons without any necessary business or legal experience and the claims are small, detailed knowledge of the claim is inappropriate, approaching irrelevance." *Schwab v. Philip Morris USA*, Inc., 449 F. Supp. 2d 992, 1109 (E.D.N.Y. 2006). This Court should not impose an untenable standard of adequacy that requires laypersons to be lawyers.

As it stands, the deposition testimony and declarations from Ms. Thornton establishes that she is a sophisticated individual who possesses the requisite knowledge, skill and/or experience to satisfy the due process requirements of fair and adequate representation under Rule 23(a)(4) for both proposed classes. More importantly, Ms. Thornton has demonstrated that she is dedicated to researching and learning about facts underlying her claims. *See* Exhibit 2, Depopgs 47, 51, 96 and 97. She understands her duties and responsibilities and the claims asserted in the lawsuit. *See* Exhibit 1, *Declaration.* She is ready, willing and able to serve in that capacity. Coupled with the experience of counsel, adequacy is met.

3. The Requirements of Rule 23(b)(3) are Met

a. Common Questions of Law or Fact Predominate

Plaintiffs seek certification pursuant to Rule 23(b)(3), which requires a showing that common issues predominate and that a class action is superior to other available methods of resolving the controversy. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Not all of the claims to be resolved need be common to the class, but "the predominance prong asks whether the common, aggregation-enabling issues in the case are more prevalent or important than the non- common, aggregation-defeating, individual issues." *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014) (quotations omitted); *see also Daye*, 313 F.R.D. at 168 (court should first

"characterize the issues in the case as common or not, and then *weigh* which issues predominate").

"[T]he fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification." *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013). Even with that inquiry, the Court can still "preserve the class action model in the face of individualized damages" should it express any concerns. *Id.* In this instance, Kroger may try to argue that it is impossible to ascertain which class members relied upon the advertisements and whether those consumers actually intersected with the purchase of foreign produced beef products. But this effort to uses intermingling of products and knowing obfuscation (in essence bad faith willful blindness) of the actually facts enjoys no support in the law, quite to the contrary Courts have held that to make a determination of bad faith, the court must find that the spoliating party "intended to impair the ability of the potential defendant to defend itself." *Schmid v. Milwaukee Elec. Tool Corp*., 13 F.3d 76, 80 (3d Cir.1994). The "fundamental element of bad faith spoliation is advantage-seeking behavior by the party with superior access to information necessary for the proper administration of justice." *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1326 (Fed. Cir. 2011)

A class defendant "may not attempt to 'avoid a class suit merely because [its] own actions have made the class more difficult to identify or locate.'" *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1306-07 (9th Cir. 1990) (quoting *Appleton Electric Co. v. Advance-United Expressways*, 494 F.2d 126, 135 (7th Cir. 1974); punctuation omitted). Courts have rejected defendants' efforts to thwart class certification by claiming their records did not permit them to identify class members:

> Should a debt collection company as large and as sophisticated as Transworld be able to avoid class action liability by mere identifying of inadequate record-keeping, the Congressional purpose behind the [FDCPA] would indeed be thwarted. Given the number of claims that have been pursued against Transworld and the number of classes that have been certified, defendant's claim that their records are not up to the task of differentiating the debts it collects rings hollow.

Macarz v. Transworld Sys., Inc., 193 F.R.D. 46, 57-58 (D. Conn. 2000). *Cf. Shurland v. Bacci Cafe & Pizzeria on Ogden, Inc.*, 271 F.R.D. 139, 145-46 (N.D. Ill. 2010) (whether "record-keeping violated any regulatory standard" or not, determination of "whether a class action is appropriate cannot be a function of [class defendant's] record-keeping practices").

Unquestionably, the Defendant has superior access to the information that is kept in the normal course of business by its suppliers of beef so that if necessary for food safety issue there is traceability in the event of recall. Where a defendants' documentation policies are "instituted in order to limit damaging evidence available to potential plaintiffs, it may be proper to give an instruction" that the missing evidence is unfavorable to the defendant. *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988). *See also Micron Tech., Inc. v. Rambus Inc.*, 917 F. Supp. 2d 300, 315-19 (D. Del. 2013) (selective preservation of documents constituted "litigation misconduct"). The suppliers could easily trace the source of these beef products for Kroger, in fact, for a time they did, until Congress changed the requirement for truth in labeling for the packers in late 2015. There is even case law relevant to these long-standing practices of commingling cattle or beef products which states:

> Plaintiffs' second statutory challenge is their assertion that the AMS exceeded its statutory authority when it issued a Final Rule that prohibits the longstanding practice of commingling. (Compl. ¶ 84; *see also* Pl. Br. at 25 (arguing that "the Final Rule's bar on commingling extends beyond the limited authority Congress granted the AMS to regulate product labels by instead dictating how meat is processed and packaged in the first instance").) As noted in Section II.B above, commingling involves processing animals from different countries of origin together during a single production day and labeling the resulting muscle cuts commodity with all of the various countries where the animals originated. Plaintiffs maintain that the COOL statute expressly authorizes commingling (Pl. Reply at 17), and also that the AMS, which is an agency that regulates labeling and advertisements, went far beyond its mission when it promulgated a rule that brings commingling to an end and thereby forces regulated entities to "restructure the[ir] production, distribution, and packaging systems" (Compl. ¶ 83; *see also* Pl. Br. at 30–32). For the following reasons, this argument lacks merit, and is therefore unlikely to succeed.

Am. Meat Inst. v. U.S. Dept. of Agric., 968 F. Supp. 2d 38, 59–60 (D.D.C. 2013), *aff'd, Am. Meat Inst. v. U.S. Dept. of Agric.*, 746 F.3d 1065 (D.C. Cir. 2014), *reh'g en banc granted, opinion vacated, Am. Meat Inst. v. U.S. Dept. of Agric.*, 35 ITRD 2763 (D.C. Cir. 2014), and *judgment reinstated Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18 (D.C. Cir. 2014). Quite plainly, the Defendant cannot to avoid liability by claiming ignorance of a long-standing practice to commingle foreign beef and domestic beef and defeat claims by hiding behind a willful refusal to ascertain the truth of the

statements it is making in its advertisements to consumers.

i. The NMUPA Claim that Kroger Engage in Unfair and Unconscionable Practice to Misrepresent the Geographic Origin of a Significant Percentage of the Beef Products Sold in Its New Mexico Stores.

Liability on geographic production misrepresentation claim can be proved entirely by common evidence. This will consist of evidence showing that the amount of imported beef and cattle for slaughter renders it a statistical impossibility that Kroger did not sell some significant percentage muscle cuts of beef or ground beef that were not from cattle born, raised or even harvested in the United States. *See* EX 5, Dr. Robinson First Report. Importantly, a significant portion, between 39.6% and 49% in 2021[11][12], of the beef consumed in American is ground. That, of course, means that the significant portions of the consumers, specifically in New Mexico but also across the Country, that were mislead to believe[13][14][15] that the ground beef they were consuming was also from cattle born and raised in the USA, like Ms. Thornton, have been victim of unfair and unconscionable practices by Defendant in violation of the NMUPA.

Defendant has maintained as a defense that it did not misrepresent or deceptively advertise that ground beef had it is geographic origin in the United States, but such a notion is inconsistent with the recent holding of the New Mexico Court of Appeals that:

> Even if we assume that, by virtue of the trademark licensing agreement between Applica and Black & Decker, Defendants' use of the Black & Decker trademark on the Coffeemaker could not alone constitute active misrepresentation as to the source or manufacturer of the Coffeemaker, Defendants have not adequately addressed the district court's reliance on Section 57-12-2(D)(14), which provides that "using ... ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive" can constitute an unfair or deceptive trade practice. In other words, even if we assume Defendants' use of the Black & Decker trademark by itself did not actively misrepresent the Coffeemaker's source or manufacturer, Defendants do not address the ambiguity created by Defendants' use of the Black & Decker trademark together with the absence of any disclosure on the Coffeemaker, or in Wal-Mart's coffeemaker display section, which might indicate to a reasonable consumer either (1) the relationship between Black & Decker and Applica; or (2) that the Coffeemaker was in fact an Applica, rather than Black & Decker, product.

[11] *See* https://www.statista.com/topics/1447/beef-market/#dossierKeyfigures
[12] *See* https://www.beefitswhatsfordinner.com/retail/sales-data-shopper-insights/ground-beef-at-retail-and-foodservice
[13] *See* Exhibit 6, Second Survey
[14] *See* Exhibit 7, Dr. Robinson Second Report
[15] *See* Thornton Deposition, pgs 91-92.

Puma v. Wal-Mart Stores E., LP, 2022 WL 3221810, at *6 (N.M. Ct. App. Aug. 9, 2022). Much like the use of ambiguity by the Puma defendants, here, the Defendant has used the juxtaposition of the produced in the USA logo in proximity to advertising of cooked ground beef to create an ambiguity that deceives consumers as to a material fact in violation of Section 57-12-2(D)(14).

While Defendant has alleged several affirmative defenses from Fed. R. Civ. P. 8, seemingly out of an abundance of caution, those also do not defeat predominance. *See Smilowv. Sw. Bell Mobile Sys., Inc*., 323 F.3d 32, 39 (1st Cir. 2003) ("Courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members").

Moreover, under the New Mexico UPA class actions are specifically provided for as explained that "[i]n any class action filed under this section, the court may award damages to the named plaintiffs as provided in Subsection B of this section and may award members of the class such actual damages as were suffered by each member of the class as a result of the unlawful method, act or practice." NMSA 1978 § 57-12-10. The case at bar is especially appropriate for class action treatment, because there are no individual questions relating to liability. All of Kroger's beef products in some form or at some point bore the false advertising or benefitted by proximity to the used of the deceptive logo with regard to geographic origin in violation of the UPA. There are no individual inquiries necessary to resolve this case or which pose the kind of problems that are barriers to class certification. The legal issues concerning the violations of New Mexico law predominate over any other possible issues.

ii. The Unjust Enrichment Claim.

As previously noted, the elements of an unjust enrichment claim are that (1) one party has knowingly benefitted at the other's expense (2) in a manner that to allow the other to retain the benefit would be unjust. *Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA-051, ¶ 11, 129 N.M. 200, 3 P.3d 695. Plaintiff contends that Defendant Kroger was unjustly enriched by knowingly

using deceptive advertising about the geographic origin of beef products in mailers or in newspaper inserts that consumers also encountered on packaging once they arrived at the stores to purchase beef.

Liability on the unjust enrichment claim can be proved by evidence that Kroger knew or should have known that beef that they were advertising was not of the geographic origin that consumers perceived from the use of a logo that stated that it was a product of the USA. These contentions can be established with class-wide proof and will predominate the lawsuit. This evidence will suffice to establish whether or not Defendants knowingly benefitted at the expense of the national class members. The final element, that the manner in which Defendant obtained the benefit would result in allowing them to retain the benefit unjustly, is a legal issue that applies to the entire class without exception. Plaintiff contends that the terms of the NMUPA do not permit Defendant to utilize advertising that falsely states the geographic origin of the beef sold. In *Menocal*, the defendant argued that individual damages on the unjust enrichment claim would result in individual issues predominating over common issues. The Tenth Circuit quickly rejected this contention, commenting that "the district court reasonably found that 'individual damages in this case should be easily calculable using a simple formula' based on number of hours worked, type of work performed, and fair market value of such work." 882 F.3d at 927 (citation omitted). Here, the calculation will be even simpler.

The only other issue is punitive damages on the unjust enrichment claim. Punitive damages are based on the reprehensibility of Defendant's overall conduct in relation to the class. *See* UJI-Civ. 13-1817. The conduct upon which the punitive damages claim will be based is conduct that is common to the class. Therefore, punitive damages will not inject any individual issue into the case. Even so, the Court, if necessary, can shelve the issue of punitive damages for now as part of a trial plan and adjudicate the other issues.

b. A class action is a superior method of adjudicating this dispute

The second prong of Rule 23(b)(3) requires the Court to determine whether a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. Rule 23(b)(3). The Rule directs the Court to consider the following non-exclusive factors:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

Id. "Class actions are the superior method when they serve the purpose of efficient resolution of the claims or liabilities of many individuals in a single action, as well as the elimination of repetitious litigation and possibly inconsistent adjudications." *Aliota v. Gruenberg,* 237 F.R.D. 8, 13 (D.D.C. 2006). The "strong commonality" between the class members, and the fact that they were all aggrieved by a uniform practice, is "precisely the type of situation for which the class action device is suited." *Stinson v. City of New York,* 282 F.R.D. 360, 383 (S.D.N.Y. 2012) (citation omitted).

The four superiority factors in Rule 23(b)(3)(A-D) all favor certification in this matter. First, given the common questions on liability and the class members' ability to opt-out of the monetary relief portion of the case or to pursue claims in a remedial phase, "class members have a diminished interest in individually controlling the common portions of this action." *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 540 (N.D.Cal. 2012). Also, in cases such as this one, the size of individual claims are typically relatively modest, suggesting that class members are unlikely to want to pursue claims in separate proceedings. To evade the burden of damages proceedings based on the fact that class members may not have the knowledge or wherewithal to pursue separate suits "would be to annihilate the most basic principles of justice." *Kerner v. City & Cty. of Denver*, 2012 U.S. Dist. LEXIS 187114, *35 (D. Colo. Nov. 30, 2012), *adopted,* 2013 U.S. Dist. LEXIS 41280. Second, there are no competing cases pending in this or any other forum. Third, concentrating this lawsuit in this Court is not undesirable. The proposed classed consists only of New Mexico consumers and consumers from across the nations subject to the same deceptive advertising, making this the most logical federal forum.

Manageability does not present a significant issue, and this Court has successfully handled

any number of class action cases in this district involving large classes. Class-wide adjudication is far more manageable than the alternative individual proceedings on all issues, provides for uniformity of decisions and prevents inconsistent verdicts. *See Moore v. Napolitano*, 926 F. Supp. 2d 21, 34 (D.D.C. 2010); *Easterling v. Conn. Dep't of Corrections*, 278 F.R.D. 41, 50-51 (D. Conn. November 22, 2011). As one Circuit Court has cautioned, "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored, and should be the exception rather than the rule." *In re Visa Check/MasterMoney Antitrust Litig*., 280 F.3d 124, 140 (2nd Cir. 2001) (internal citations omitted). These same principles hold true and highlight the superior nature of proceeding on a class-wide basis. Handling the claims in this case on a class-wide basis is clearly superior to the alternative. In terms of judicial efficiency, litigation of these claims on a class basis is obviously far superior to the possibility of a number of separate lawsuits. The UPA and unjust enrichment classes should be certified.

VII. Conclusion

This case is ideally suited for class treatment. Liability issues are largely, if not completely, common. Notice of the class can be accomplished through the same means that false advertising was distributed and with minimal self-certification the Court can obtain a particularized class of consumers that relied on the advertisements for their decision to purchase beef from the Defendant. The Court should therefore certify a class under the NMUPA consisting of all New Mexico consumers and the Court should also certify an unjust enrichment class consisting of all persons deceived by the false advertising to rely upon a belief that beef, including ground beef, there were purchasing was from cattle born and raised in the USA.

The Court should also order that a Notice in the form attached as **EXHBIT 8** be distributed with or in the Defendant's circulars to all class members to whom the circulars have been typically distributed via mail or newspaper and that undersigned counsel, be designated as class counsel, along with any other relief warranted under Rule 23.

Respectfully submitted:

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Attorneys for Plaintiffs Thornton and Irby, on their own behalf, and behalf of all others similarly situated

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing via CM/ECF on October 17, 2022 causing all parties of record to be served via electronic means.

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