UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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

Plaintiff,

v. No.

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

Defendants.

NOTICE OF REMOVAL

Defendant JBS USA Food Company ("Defendant") hereby removes this action from the State of New Mexico Second Judicial District Court, County of Bernalillo. Defendant removes pursuant to 28 U.S.C. § 1453 and the jurisdictional provisions of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). Defendant also removes this action pursuant to 28 U.S.C. §§ 1331, 1441(a), and 1367(a).

This Court has original jurisdiction pursuant to CAFA because (1) the proposed Class and New Mexico Sub-Class each have at least 100 putative class members; (2) the proposed Class and New Mexico Sub-Class each assert an aggregate amount in controversy of $5,000,000 or more, exclusive of interest and costs; (3) minimal diversity exists; and (4) no CAFA exceptions apply. *See* 28 U.S.C. § 1332(d). This Court has federal question jurisdiction for removal because the claims raise disputed and substantial federal issues involving federal regulation of the United States and global cattle and beef industries, including United States beef

labeling. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

In this notice of removal, Defendant provides this "short and plain statement of the grounds for removal." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 551 (2014) (quoting 28 U.S.C. § 1446(a)). As the Supreme Court has stated, the short and plain statement of removal does not need to contain evidentiary submissions. *Id.* The notice of removal instead requires only plausible allegations that the requirements for removal are met. *Id*. That requirement is satisfied here.

Nature of the Removed Action And Procedural History

1. Plaintiff commenced this action by filing a Complaint on January 7, 2020, in the Second Judicial District Court for the State of New Mexico, in and for the County of Bernalillo, styled *Robin G. Thornton v. Tyson Foods, Inc., et al.*, Case No. D-202-CV-2020-00109. Pursuant to 28 U.S.C. § 1446(a), and Local Rule 81.1(a), the most recent version of the docket from the state court and true and correct copies of all pleadings and documents filed in that action are attached as Exhibit A.

2. The Complaint asserts claims relating to the cattle and beef markets, focusing in particular on the labeling of beef products. Plaintiff claims imported live cattle and beef are deceptively labeled and marketed. (Compl. ¶¶ 1 & 5.) Plaintiff also alleges the deceptive labeling and marketing has occurred since 2015. (*Id.* ¶ 5.)

3. The Complaint attempts to assert a claim under the New Mexico Unfair Practices Act, NMSA 1978, §§ 57-12-1, *et seq*. ("UPA") on behalf of a "New Mexico Sub-Class."

4. That New Mexico Sub-Class is defined as "[a]ll consumers in New Mexico who purchased the New Mexico Products during the applicable limitations [period], for their personal use, rather than for resale or distribution ('New Mexico Sub-Class')." (Compl. ¶ 46(2).)

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

6. Plaintiff purports to allege a claim under the UPA for the New Mexico Sub-Class stating, among other things, that representations by Defendants "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." (*Id.* ¶ 55.) As a result, Plaintiff alleges she "sustained injury and damages when she saw Defendants' representations about the Products and purchased the Products at the frequency and price she did." (*Id.* ¶ 58.)

7. Plaintiff alleges she and members of the New Mexico Sub-Class 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." (*Id.* ¶ 60.) (citing NMSA § 57-12-10).

8. The Complaint attempts to assert claims for "Breach of Express Warranty" and "Unjust Enrichment" on behalf of a purported "Class." (*Id.* Counts II & III.)

9. That putative "Class" is defined as "[a]ll consumers in the United States who purchased the Defendants' Products during the applicable limitations period, for their personal use, rather than for resale or distribution ('Class')." (*Id.* ¶ 46(1).)

10. Excluded from the Class are "Defendants, any entity or division in which any Defendants have a controlling interest, and Defendants' legal representatives, officers, directors,

assigns, and successors," as well as "the judge to whom this case is assigned and the judge's staff." (*Id.* ¶ 47.)

11. Plaintiff alleges Defendants breached "written express warranties including, but not limited to, warranties that Products originated exclusively from domestic beef producers." (*Id.* ¶¶ 63, 65.)

12. Plaintiff further asserts that as a result of said breach, "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." (*Id.* ¶ 66.)

13. Plaintiff alleges "Defendants have been unjustly enriched through sales of imported Products at the expense of Plaintiff Thornton and the Class members." (*Id.* ¶ 70.) Plaintiff further alleges Defendants' imports during the period since 2015 "represent close to $6.2 Billion annually." (*Id.* ¶ 36.)

14. Plaintiff further asserts that:

> 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.

(*Id.* ¶ 71.)

15. Plaintiff's prayer for relief asks for the following:

> 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 his 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 [sic] 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.

(*Id.* at 24-25 (Prayer for Relief).)

Venue

16. Plaintiff filed this Action in the State of New Mexico Second Judicial District Court, County of Bernalillo, which is located in the District of New Mexico. Venue is proper in the United States District Court for the District of New Mexico under 28 U.S.C. §§ 111, 1391, and 1441(a).

17. Contemporaneously with filing this Notice of Removal in this Court, Defendant JBS USA Food Company will serve written notice of the filing on Plaintiffs' counsel of record and have a copy of this Notice of Removal filed with the Clerk of the State of New Mexico Second Judicial District Court, County of Bernalillo, under 28 U.S.C. § 1446(d).

Timeliness of Removal

18. This Notice of Removal is timely filed pursuant to 28 U.S.C. § 1446(b). The Action was filed on January 7, 2020, and Defendant JBS USA Food Company was served on January 10, 2020. This Notice of Removal is timely filed within thirty days of the receipt of a copy of the Complaint and service of process, from which it was ascertained that the case is one which is removable, pursuant to 28 U.S.C. § 1446(b). *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354-56 (1999) (thirty day period for removal does not begin to run until defendant is served with complaint). This Notice of Removal also is filed within one year of the commencement of this action and is thus timely pursuant to 28 U.S.C. § 1446(c).

19. All Defendants have been served. The other Defendants named in the present action were served on January 10, 2020 or later. "If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal." 28 U.S.C. § 1446(b)(2)(C).

Basis For Removal

I. All of The Requirements For Removal Under CAFA Are Satisfied.

A. The Present Action is a Class Action.

20. This Action falls within CAFA's definition of "class action." That definition states that a "class action" is "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be

brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). Plaintiff captioned the Complaint as a "Class Action Complaint" and specifically and expressly seeks certification of a Class and New Mexico Sub-Class. This Action thus is a "class action" as defined by CAFA.

B. There is Sufficient Diversity of Citizenship.

21. There is at least minimal diversity of citizenship as required by CAFA.

22. As set forth in the Complaint, Plaintiff alleges that she is a resident of New Mexico (Compl. ¶ 12), and on information and belief, she is a citizen of New Mexico. Plaintiff further alleges that the New Mexico Sub-Class includes all consumers in New Mexico who purchased the New Mexico Products during the applicable limitations period, for their personal use, rather than for resale or distribution. (*Id.* ¶ 46(2).) The proposed National Class and proposed New-Mexico Sub-Class each includes at least one New Mexico citizen. (*See id*. ¶¶ 46(1) & (2).)

23. Defendants are incorporated in states other than New Mexico and have their principal places of business in states other than New Mexico. (*Id.* ¶¶ 14-17.) Defendants thus are not citizens of New Mexico. *See* 28 U.S.C. § 1332(c)(1); *see also Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1245 (10th Cir. 2009); *De La Rose v. Reliable, Inc.*, 113 F. Supp. 3d 1135, 1157-58 (D.N.M. 2015).

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

25. There is the requisite diversity of citizenship required by CAFA. 28 U.S.C. § 1332(d)(2).

C. The Proposed Class and New Mexico Subclass Have At Least 100 Members.

26. This case meets CAFA's requirement that the proposed class contain at least 100 members. *See* 28 U.S.C. § 1332(d)(5)(B).

27. Plaintiff purports to bring claims on behalf of a proposed national Class of "[a]ll consumers in the United States who purchased the Defendants' Products during the applicable limitations period, for their personal use, rather than for resale or distribution ('Class')." (Compl. ¶ 46(1).).

28. According to USDA data, 26.8 billion pounds of beef products were consumed in the United States in 2018, and the USDA estimates that consumption from 2018 to the present is not lower than that number.[1] Also according to USDA estimates, the amount of beef consumed in the United States per capita in 2018 was over 50 pounds, and the USDA estimates that per capita beef consumption since that time is not lower than in 2018.[2]

29. Plaintiff alleges that Defendants have imported an average of 3.06 billion pounds of beef on average since 2014 and also have imported 1.94 million head of cattle on average since 2014. (Compl. ¶ 23.) Using Plaintiffs' number for imported beef and the USDA's number for total United States beef consumption, Plaintiff thus alleges that approximately 11.4% of the United States beef market consists of imported beef (3.06 billion pounds allegedly imported divided by 26.8 billion pounds consumed = 11.4%). Adding the 1.94 million head of cattle allegedly imported annually increases that percentage even further.

[1] *See* USDA *World Agricultural Supply and Demand Estimates*, Jan. 10, 2020 at 32 https://www.usda.gov/oce/commodity/wasde/wasde0120.pdf (last accessed Feb. 4, 2020); *see also* National Cattlemen's Beef Association, *Industry Statistics*, https://www.ncba.org/beefindustrystatistics.aspx (last accessed Feb. 4, 2020).

[2] *See* USDA *World Agricultural Supply and Demand Estimates*, *supra* n.1, at 32.

30. The number of persons falling in the proposed National Class exceeds 100 persons using either total national beef consumption figures or Plaintiffs' figures for imported beef. Far more than 100 persons are required to consume 26.8 billion pounds of beef per year (annual total consumption) and far more than 100 persons are required to consume 3.06 billion pounds of beef per year (claimed annual imports by Defendants).

31. Plaintiff also purports to bring claims on behalf of a New Mexico Sub-Class consisting of "[a]ll consumers in New Mexico who purchased the New Mexico Products during the applicable limitations [period], for their personal use, rather than for resale or distribution ('New Mexico Sub-Class')." (Compl. ¶ 46(2).)

32. The number of persons in that New Mexico Sub-Class also exceeds 100 persons. According to the most recent census data, the population of New Mexico is 2.059 million.[3] Even assuming, for example, that only 1% of the entire New Mexico population is a consumer of the beef for personal consumption, then the purported New Mexico Sub-Class would be 20,950 persons. Even taking 11.14% of that number to correspond to the ratio of imported beef to total beef—based on Plaintiff's allegations—results in 2,392 persons. Either way, the purported New Mexico Sub-Class in this action exceeds the required 100 persons.

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

33. CAFA creates original jurisdiction in the United States district courts "of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs" that satisfies the other CAFA requirements. 28 U.S.C. § 1332(d). The claims of the individual putative class members are aggregated for purposes of calculating that amount-in-controversy. *See* 28 U.S.C. § 1332(d)(6).

[3] United States Census, *Quick Facts*, https://www.census.gov/quickfacts/fact/table/NM,US/PST045219 (last accessed Feb. 4, 2020).

34. The Tenth Circuit has explained that the amount in controversy is "not the amount the plaintiff will recover," but instead "an estimate of the amount that will be put at issue in the course of the litigation." *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1245 (10th Cir. 2012) (quoting *McPhail v. Deere & Co.*, 529 F.3d 947, 956 (10th Cir. 2008)). As the Tenth Circuit further stated, "the question at this stage in the proceedings isn't what damages the plaintiff will *likely* prove but what a factfinder *might* conceivably lawfully award." *Hammond v. Stamps.com*, 844 F.3d 909, 912 (10th Cir. 2016). Even when it is "highly improbable that the Plaintiffs will recover the amounts Defendants have put into controversy, this does not meet the legally impossible standard." *Id*. (quoting *Raskas v. Johnson & Johnson*, 719 F.3d 884, 888 (8th Cir. 2013)).

1. Claimed Compensatory Damages Under The UPA.

35. Plaintiff claims "actual damages" under the UPA on behalf of herself and the putative New Mexico Sub-Class. (Compl. ¶ 57-58.)

36. Plaintiff further alleges that she and the New Mexico Sub-Class are entitled to "actual damages or the sum of one hundred dollars ($100), whichever is greater." (*Id.* ¶ 60(b).)

37. Here, Plaintiffs' allegations of "actual damages" on behalf of herself and the putative New Mexico Sub-Class create an amount-in-controversy that exceeds $5 million. Plaintiff offers two ways to calculate damages and seeks the greater of the two. (*Id.* ¶ 60(b).) The first (the alleged "actual damages") alone exceeds the CAFA amount-in-controversy threshold. For example, Plaintiff purports to allege actual damages that include the full purchase cost of all beef products in New Mexico since 2015 that included imported cattle or beef. (*Id.* ¶ 55.) Specifically in that regard, Plaintiff alleges that the claimed 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." (*Id.* (emphasis added)).

Plaintiff further alleges she "sustained injury and damages when she saw Defendants' representations about the Products and purchased the Products at the frequency and price she did." (*Id*. ¶ 57.) She purports to assert claims on behalf of "other New Mexico consumers who saw the Products labeled as products of the United States and purchased the Products." (*Id.* ¶ 59.)

38. Those amounts exceed the requirement that the amount-in-controversy exceed $5 million, exclusive of interest and costs. For example, using New Mexico's population of approximately 2.059 million, per capita beef consumption of approximately 57 pounds, and an estimated retail price for all retail beef of $4.82 per pound,[4] the total amount-in-controversy for the New Mexico-Subclass just from its claim for actual damages exceeds the $5 million jurisdictional requirement. Even assuming that just 1% of the New Mexico population (*i.e.*, 20,590 people) consumed 57 pounds of allegedly mislabeled beef, at an average price of $4.82 per pound, the amount in controversy is $5,656,896 or over $5.65 million for just one year. For the claimed period of four or five years, the total amount-in-controversy is between $22.6 million and $28.2 million, well in excess of CAFA's amount-in-controversy requirement.

39. Alternatively, Plaintiff seeks $100 per putative New Mexico Sub-Class member. Again, as previously noted, as of the most recent census, there were over 2 million residents in New Mexico. It is plausible that at least 2.5% (or approximately 50,000) of those 2 million residents fall within the proposed New Mexico Sub-Class. Even using that conservative assumption, the $100 claim by itself satisfies the $5 million amount-in-controversy requirement.

2. Claimed Treble Damages for the New Mexico Sub-Class.

40. Plaintiff seeks an award of treble damages pursuant to the UPA. (*See* Compl., Prayer for Relief at 24-25.) Specifically, Plaintiff claims "exemplary damages up to three times actual damages or three hundred dollars ($300), whichever is greater." (*Id*. ¶ 60(c).)

[4] *See* National Cattlemen's Beef Association, *Industry Statistics*, *supra* n.1.

41. A claim of treble damages should be considered in the calculations of amount in controversy. *See*, *e.g.*, *Woodmen of the World Life Ins. Soc'y v. Manganaro*, 342 F.3d 1213, 1217-18 (10th Cir. 2003); *see also Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1248 (10th Cir. 2012); *Barreras v. Travelers Home & Marine Ins. Co.,* No. 12-CV-0354 RB/RHS, 2012 WL 12870348, at *3 (D.N.M. Oct. 17, 2012).

42. Absent class members cannot recover treble damages under the UPA and are limited to "actual damages." *See* NMSA 1978, § 57-12-10(E). *See also*, *e.g.*, *Pedroza v. Lomas Auto Mall, Inc.*, 663 F. Supp. 2d 1123, 1133 (D.N.M. 2009). But Plaintiff here places the treble damage amounts in controversy through her allegations. (*See*, *e.g.*, Compl., Prayer for Relief at 24-25.)

43. Accepting the claims as set forth in Plaintiff's complaint, the claim for treble damages for the New-Mexico Sub-Class places an additional amount-in-controversy three times the claimed actual damage above. Once again looking to just 1% of the New Mexico population, which is an exceedingly conservative estimate, the potential amount in controversy added by the claim for treble damages is over $17 million per year, and at least $67.8 million for the claimed period since 2015.

3. Claimed Damages for Breach of Express Warranty

44. On behalf of the claimed national Class, Plaintiff claims consumers have been damaged because they "did not receive goods as warranted and did not receive the benefit of the bargain." (Compl. ¶ 66.) Plaintiff alleges that she and the members of the claimed national Class "have been injured and have suffered damages in an amount to be proven at trial." (*Id*.) Using the estimated national beef sales numbers of approximately 26.8 billion pounds of beef consumed and an estimated retail price for all retail beef of $4.82 per pound (from the NCBA estimates for 2018, cited above), and Plaintiffs' numbers alleging imported beef by Defendants

on average per year (3.06 billion pounds of imported beef, equaling 11.14% of total consumption) the amount-in-controversy easily exceeds $5 million; indeed, it is approximately $14.7 billion per year.

45. The $5 million amount-in-controversy requirement is met even if very conservative assumptions are used. For example, assuming that the amount in controversy from claimed breach of warranty damages is only 10% of the $14.7 billion per year calculated in Paragraph 44, that places in controversy $1.47 billion per year. Assuming that the amount in controversy from claimed breach of warranty damages is only 1% of the $14.7 billion per year calculated in Paragraph 44, that places in controversy $147 million per year. Assuming that the amount in controversy from claimed breach of warranty damages is only 1/10th of 1% of the $14.7 billion per year calculated in Paragraph 44, that placed in controversy $14.7 million per year. And Plaintiff places those amounts at issue for every year since 2015. (*See id.* ¶ 5).

4. Claimed Restitution Sought by the Claimed National Class.

46. On behalf of the claimed national Class, Plaintiff requests restitution of claimed "ill-gotten benefits." (Compl. ¶ 71.)

47. Plaintiff alleges that the amount of the unjust enrichment is the sale of imported Products. (*Id.* ¶ 70.) Specifically, Plaintiff alleges that "[a]s 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." (*Id.* (emphasis added)). Plaintiff further places the entire amount of imports at issue by alleging that "[i]n 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)." (*Id.* ¶ 23).

48. Plaintiff alleges that the amount of those products imported by Defendants is close to $6.2 billion annually. (*Id.* ¶ 36.)

49. Plaintiff alleges ill-gotten gains supposedly have occurred since 2015, thus meaning that the $6.2 billion alleged annual number is multiplied by four or five years for purposes of the amount-in-controversy.

50. The $5 million amount-in-controversy requirement is met even if very conservative assumptions are used. For example, assuming that the restitution claim only applies to 10% of the alleged $6.2 billion in annual imported product, that places in controversy $620 million per year. Assuming that the restitution claim only applies to 1% of the alleged $6.2 billion in annual imported product, that places in controversy $62 million per year. Assuming that the restitution claim only applies to 1/10th of 1% of the alleged $6.2 billion in annual imported product, that placed in controversy $6.2 million per year. And Plaintiff places those amounts at issue for every year since 2015. (*See id.* ¶ 5).

5. Claimed Attorneys' Fees.

51. Where attorneys' fees are part of the potential and claimed recovery under a statute, they properly are considered as part of the amount-in-controversy. *See Martinez-Wechsler v. Safeco Ins. Co. of Am.,* No. CIV 12-0738 KBM/ACT, 2012 WL 12892762, at *2 (D.N.M. Sept. 13, 2012); *see also Woodmen,* 342 F.3d at 1218; *Barreras*, 2012 WL 12870348, at *3.

52. Certain decisions from the United States District Court for the District of New Mexico have awarded attorneys' fees of approximately 18 to 20 percent of the class recovery. *See, e.g., In re Thornburg Mortg., Inc. Sec. Litig.*, 912 F. Supp. 2d 1178, 1249 (D.N.M. 2012); *Robles v. Brake Masters Sys., Inc.*, No. CIV 10-0135 JB/WPL, 2011 WL 9717448, at *19 (D.N.M. Jan. 31, 2011); *In re Horizon/CMS Healthcare Corp. Sec. Litig.*, 3 F. Supp. 2d 1208, 1212 (D.N.M. 1998).

53. Plaintiff's request for attorney's fees (Compl., Prayer for Relief at 24-25), therefore further increases the amount in controversy by approximately 18 to 20% beyond the rest of the amount in controversy.

E. The Exceptions To CAFA Do Not Apply.

54. CAFA applies to actions "commenced" on or after its effective date of February 18, 2005.

55. A district court is required to decline to exercise jurisdiction under CAFA if certain explicit conditions are present. *See* 28 U.S.C. § 1332(d)(4). Those exceptions do not apply to the present case. As indicated above, Plaintiff alleges facts establishing that all Defendants are citizens of States other than New Mexico. (Compl. ¶¶ 14-17). *See* 28 U.S.C. § 1332(d)(4)(A)(i)(II) (local controversy exception applies only if at least one defendant is a citizen of the State in which the action was filed); § 1332(d)(4)(B) (home-state controversy exception also applies only if at least one defendant is a citizen of the State in which the action was filed); 28 U.S.C. § 1332(d)(3) (discretionary exception applies only if primary defendants are citizens of the State in which the action was filed). No other exceptions in 28 U.S.C. § 1332(d) apply.

II. Removal Also Is Proper Under Federal Question Jurisdiction.

56. Under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-14 (2005), a state law claim can give rise to federal question jurisdiction as long as it appears from the complaint that the right to relief depends upon the construction or application of federal law.

57. Specifically, a claim purportedly arising under state law may be removed to federal court pursuant to federal question jurisdiction when "the federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258

(2013). "Where all four of these requirements are met . . . jurisdiction is proper because there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts." *Id.* (quoting *Grable*, 545 U.S. at 313-14).

58. All four of those requirements for removal under federal question jurisdiction are met in the present case.

59. As to the first requirement, Plaintiff's Complaint explicitly refers to federal legislation regarding beef labeling and federal regulation involving beef labeling. (Compl. ¶¶ 2-5.) Also as to that first requirement, Plaintiff's Complaint attempts to base claims upon labels that refer to the grade issued by the USDA for the beef in question, such as "USDA Choice." (*Id.* ¶ 27.) Plaintiff's allegations place those federal interests – including reference to USDA grading information – at stake.

60. The second requirement also is met, because Defendants dispute that Plaintiff's claims are consistent with federal law. To the contrary, Plaintiff's claims are inconsistent with, and preempted by, federal law including the Federal Meat Inspection Act, ("FMIA"), 21 U.S.C. § 601 *et seq*. The FMIA contains specific provisions governing meat inspection and labeling, including that the United States Department of Agriculture ("USDA) shall review and approve meat labels. *See* 21 U.S.C. §§ 601-607. The FMIA further contains specific provisions regarding imported meat products. *See* 21 U.S.C. § 620. The FMIA also expressly preempts state-law requirements "in addition to, or different than" those imposed by the FMIA regarding the "premises, facilities, and operations" of facilities that the USDA inspects under the FMIA. 21 U.S.C. § 678. And it specifically expressly preempts requirements "in addition to, or different than" those under the FMIA regarding "[m]arking, labeling, packaging, or ingredient

requirements." *Id*. For purposes of preemption, the term "requirements" includes obligations claimed to be imposed by common law and by state statute. *See, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445-46 (2005).

61. The third requirement also is met because the dispute is substantial. Here, it could be outcome-determinative and lead to dismissal.

62. The fourth requirement for federal question removal jurisdiction also is met. Federal jurisdiction does not disturb the balance between federal and state interests. It instead promotes that balance. That is because of the strong federal interest in uniformly regulating labeling of meat products and in regulating global trade. In fact, the USDA actions that Plaintiff references in the Complaint already have been the subject of a federal court summary judgment ruling in favor of the USDA. *See Ranchers-Cattlemen Action Legal Fund v. United States Department of Agriculture*, No. 2:17-CV-223-RMP, 2018 WL 2708747 (E.D. Wash. June 5, 2018). In that decision, the Court held that the USDA's "implementation of both the 1989 Foreign Products Rule and the 2016 COOL Requirement Removal Rule directly reflects statutory language enacted by Congress." *Id.* at *8. The Court further stated that the USDA's regulations "follow Congress's clear intent." *Id.* at *9.

III. All Defendants Consent To Removal.

63. All Defendants are not required to consent to removal under CAFA. *See* 28 U.S.C. § 1453(b).

64. Nevertheless, all Defendants have consented to this removal and join in this filing and the remaining Defendants timely will file separate consents with this Court.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: *"Electronically Filed" /s/ Andrew G. Schultz* .
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CERTIFICATE OF SERVICE

We hereby certify that a true copy of the foregoing was sent by electronic mail and first-class mail to the following counsel:

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this **5th** day of February, 2020.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: */s/ Andrew G. Schultz* .
Andrew G. Schultz