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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

13 MARGARET PICUS, an individual; on behalf)
of herself, and on behalf of all others similarly)
14 situated,)

Plaintiffs,

15 vs.

16 WAL-MART STORES, INC; MENU FOODS)
17 INC.; DEL MONTE CORPORATION;)
SUNSHINE MILLS, INC.; CHEMNUTRA)
18 INC.; and DOES 1 through 100, Inclusive,)
Defendants.)

Case No. CV-S- 00682- PMP-LRL

) **PLAINTIFF'S MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **OPPOSITION TO DEFENDANT DEL**
) **MONTE CORPORATION'S MOTION**
) **TO DISMISS COMPLAINT**

) DATE:
) TIME:
) DEPT:
) JUDGE:
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1 **I. INTRODUCTION**

2 Plaintiffs allege that Defendants have cheated United States consumers and Defendants'
3 competitors alike by lying about the origin of their "Ol' Roy" brand pet food products as "Made in the
4 U.S.A." The laws of the United States, Nevada and the other states uniformly do not allow businesses
5 to cheat to compete for market share by lying about the origin of the sellers' product. Mislabeling as
6 to product origin violates N.R.S. §598.0915 and the consumer protection statutes of every other state.¹

7 Defendant Del Monte Corporation's motion first attacks the sufficiency of the claim for
8 violation of Nevada's consumer fraud laws (N.R.S. §598.0915). That argument is entitled to short
9 shrift because this action is based upon the Defendants' scheme to distribute products as "Made in the
10 USA", when in fact this designation was false. Defendants have admitted that components of the
11 products were made in China. This conduct is a per se violation of N.R.S § 598.0915.

12 Further, this conduct violates federal standards and the laws of the 49 other states. As a result,
13 a nationwide class is appropriate. To the extent that this Court later determines, after a conflict of laws
14 analysis, that Nevada law cannot be applied to the claims of certain members of the Class, the
15 litigation would still be manageable because the conduct violates the laws of the states where
16 Defendants are headquartered and the laws of all other states. In any event, this class manageability
17 issue should not be decided now in a Rule 12 context.

18 Del Monte also challenges the remedies requested in the Complaint. Settled federal law
19 provides that a Rule 12 motion to dismiss cannot be used to challenge the remedies requested in a
20 Complaint, but must instead address an entire claim. Moreover, the alternative remedies requested by
21 Plaintiff are appropriate for the claims pled.

22 Del Monte finally argues that the unjust enrichment claim is legally insufficient. First, Del
23 Monte argues that the prayer for a legal remedy means that an equitable remedy is unavailable as a
24 matter of law. There is no such rule under either federal or Nevada law. In fact, the law is to the
25

26 ¹ Defendants are cheating consumers who think they are buying a product made in America and
27 also cheating their competitors who sell pet food that actually is made in America. This deceptive and
28 unfair conduct is like the conduct condemned by the California Supreme Court in *Stop Youth
Addiction v. Lucky Stores Inc.*, 17 Cal.4th 553, 579, 950 P.2d 1086, 1103 (1998) ("Merchants who
violate the law by selling tobacco products to minors obtain a competitive advantage over their law-
abiding counterparts who do not share in the profits from such illegal sales.")

1 contrary because these claims can be pled in the alternative under F.R.C.P. §8(e). Second, Del Monte
2 argues that factually no benefit was retained. This argument is contrary to the allegations of the
3 Complaint (¶46 and ¶47), and is therefore improper on a motion to dismiss. Moreover, Del Monte's
4 argument relies exclusively on a recall notice expressly limited to specified contaminated lots, and did
5 not provide for any remedy as to the Defendants' falsely labeled products that were not recalled.
6 Defendants have clearly retained benefits from their unlawful conduct as to their mislabeled products
7 that were not recalled.

8 For the reasons set forth hereinbelow, Plaintiff respectfully requests that this Court deny
9 Defendant's motion to dismiss.

10 11 **II. STATEMENT OF FACTS**

12 The instant Class Action Complaint involves a scheme among the Defendants through which
13 "Ol' Roy" brand pet food products were intentionally mislabeled and sold to consumers as "Made in
14 USA," when in fact components of the "Ol' Roy" brand pet food products were made and/or
15 manufactured in China. Specifically, the wheat was processed in China into wheat gluten, and as a
16 result, Defendants were not entitled to label these products as "Made in the U.S.A." as Defendants well
17 know. This action is brought on behalf of all consumers throughout the United States who purchased
18 "Ol' Roy" brand pet food products which falsely represent on the product label to have been "Made
19 in USA" during the applicable Class Period. (Complaint at ¶ 1).

20 Central to the Defendants' marketing of certain of their "Ol' Roy" products is the
21 representation and designation that such products were and are "Made in USA." Defendants package
22 these products with the designation on the label or packaging, in capital and bold lettering, that the
23 products were "MADE IN USA." (Complaint at ¶ 2).

24 Studies show that the "MADE IN USA" is a substantial factor in consumer purchasing
25 decisions. More importantly here, in the context of food products, the designation that the products
26 were "Made in USA" becomes a central and primary consumer concern because of fears about
27 contaminants and the differences in health and safety procedures in foreign countries. (Complaint at
28 ¶ 2).

1 All of the pet food products under the brand name “Ol’ Roy” sold to consumers in Nevada and
2 nationwide were mislabeled in the same way. On each package of “Ol’ Roy” pet food, the label
3 uniformly represents that the product was “MADE IN USA” in capital letters. (Complaint at ¶ 4).
4 Contrary to this representation, “Ol’ Roy” brand pet foods were not “Made in USA” as falsely
5 designated, but instead, were manufactured either in whole or in part, in China. On or after March 16,
6 2007, as a result of the investigation into these products, Defendants disclosed for the first time that
7 the “Ol’ Roy” brand pet food products contained ingredients manufactured in China. (Complaint at
8 ¶ 6).

9 Consumers and users of these products are particularly vulnerable to these deceptive and
10 fraudulent practices. Defendants were in the exclusive possession of information regarding the country
11 of origin for “Ol’ Roy” brand pet food products. The “Made in USA” labeling as to designation of
12 origin is a material factor in many people’s purchasing decisions, as they believe they are buying truly
13 American products and supporting American companies and American jobs. Consumers generally
14 believe that “Made in USA” products are higher quality products than those of other countries which
15 is especially true with regard to food products. Unaware of the falsity of the Defendants’ country-of-
16 origin claims, Plaintiff and the other members of the Class all purchased “Ol’ Roy” brand pet food
17 products that had been fraudulently marketed and mislabeled by Defendants. State and federal laws
18 uniformly outlaw this mislabeling to protect consumers and competitors alike from this type of false
19 advertising and predatory conduct. Defendants’ deception of consumers is ongoing and will victimize
20 consumers every day until the practice is deterred by judicial intervention. (Complaint at ¶ 11).

21 The country-of-origin designation is especially important and material in the context of food
22 products because of oversight one expects by the Food and Drug Administration and local health
23 agencies over food products made in the United States. For example, food products made in foreign
24 countries can be grown or made using banned pesticides and/or chemicals, which one would not expect
25 to find in “Made in USA” labeled food products. Consumers who purchase food products labeled
26 “Made in USA” reasonably believe that they are purchasing products which have been grown and
27 made in accordance with state and federal regulations. These same regulations are not present in
28 foreign countries where unsafe and deleterious chemicals may be used without regulatory oversight.

1 (Complaint at ¶ 12).

2 The Plaintiff Margaret Picus is a resident of Nevada, who purchased her “Ol’ Roy” brand pet
 3 food products on multiple occasions at a Wal-Mart retail store located in Henderson, Nevada during
 4 the Class Period. The Plaintiff purchased “Ol’ Roy” brand pet food products as a consumer for the
 5 household purpose of feeding the product to her pet during the Class Period. (Complaint at ¶ 13).
 6 When the Plaintiff learned of the Defendants’ fraudulent conduct she filed the instant lawsuit on behalf
 7 of herself and all similarly situated consumers nationwide who purchased fraudulently labeled Ol’ Roy
 8 pet food products at Wal-Marts prior to March 16, 2007. (Complaint at ¶ 21). The Complaint alleges
 9 three causes of action based upon the fraudulent designation of Ol’ Roy products as “Made in the
 10 USA”: (1) violations of Nevada’s consumer fraud laws, particularly N.R.S. Sections 41.600 and
 11 598.0915, (2) unjust enrichment, and (3) common law fraud and concealment.

12

13 **III. LEGAL BACKGROUND FOR PLAINTIFF’S CLAIMS**

14 Until the 1930s, the rule of *caveat emptor* prevailed in the marketplace. Deceived consumers
 15 had no claim at common law. Consumers were left to the devices of unscrupulous sellers under the
 16 doctrine of *caveat emptor*.

17 Then in 1938, Congress amended the Federal Trade Commission Act (“FTC Act”), and in
 18 particular, Section 5. “Of particular importance was a 1938 amendment to the act, which expanded
 19 the Federal Trade Commission’s (FTC) preexisting jurisdiction over “unfair methods of competition”
 20 to include “unfair or deceptive acts or practices.” (52 Stat. 111 (1938), amending 15 U.S.C. § 5.)” *Bank*
 21 *of the West v. Superior Court*, 833 P.2d 545, 551; 2 Cal. 4th 1254, 1264 (1992). **“This amendment,**
 22 **which became a model for state regulatory statutes, gave the FTC concurrent jurisdiction over**
 23 **unfair business practices that harmed the public in order to bring confidence and honesty back**
 24 **to the marketplace.” *Id.*²**

25 Despite the broad scope and reach of the FTC Act, Section 5 was not privately actionable.
 26 Therefore, in order to give consumers a private right of action, Congress and the FTC encouraged the
 27

28 ² Emphasis added and internal citations omitted unless otherwise indicated

1 states to enact their own similar statutes to protect consumers. Every state and the District of
 2 Columbia have enacted some law or combination of laws prohibiting acts of unfair competition. **The**
 3 **primary purpose of these statutes was to “extend to the entire consuming public the protection**
 4 **once afforded only to business competitors.”** *Barquis v. Merchs. Collection Assn.*, 496 P.2d 817,
 5 828; 7 Cal. 3d 94, 109 (1972). These state consumer protection laws and the FTC Act have
 6 **concurrent jurisdiction** over unfair and deceptive business practices. *Consumer Justice Center v.*
 7 *Olympian Labs*, 99 Cal. App. 4th 1056, 1058-61 (2002); *Colligan v. Activities Club of New York*, 442
 8 F.2d 686, 693 (2nd Cir. 1971) (“adequate private remedies for consumer protection, which to date have
 9 been left almost exclusively to the states, are readily at hand.”) . **Therefore, the fact that a practice**
 10 **violates federal law does not mean that the same practice cannot be challenged under state law.**
 11 **Instead, state courts look to the “parallel” authority and decisions of the FTC to determine**
 12 **whether a practice is deceptive or unfair under the state laws.** *Cel-Tech Communications v. L.A.*
 13 *Cellular Tel. Co.*, 973 P.2d 527, 543; 20 Cal. 4th 163, 185 (1999).

14 **The concurrent jurisdiction of state and federal law over deceptive trade practices is**
 15 **further evidenced by Nev. Rev. Stat. Ann. § 598.0923 which defines “deceptive trade practices”**
 16 **as including conduct that “[v]iolates a state or federal statute or regulation relating to the sale**
 17 **or lease of goods or services.”** See *George v. Morton*, 2007 U.S. Dist. LEXIS 15980 at * 32 (D. Nev.
 18 March 1, 2007) (denying motion to dismiss claim under Nevada Unfair and Deceptive Trade Practices
 19 Act alleging violation of state and federal regulations in condominium sales).

20 There are four basic types of state consumer protection statutes. Some states, like California,
 21 Florida and Hawaii, enacted “Little FTC Acts” which were patterned after Section 5 of the FTC Act
 22 by generally prohibiting deceptive and unfair business practices. Other states, like Georgia, Tennessee
 23 and Pennsylvania, enacted statutes which prohibited specific listed practices and generally prohibited
 24 any act that is deceptive or unfair to the consumer. Ohio, Kansas and Utah patterned their consumer
 25 protection laws after the Uniform Consumer Sales Practices Act. Finally, Nevada, and twelve other
 26 states, including Delaware, Illinois and Oregon, enacted a version of the Uniform Deceptive Trade
 27 Practices Act which provides for consumer protection by prohibiting specific “deceptive trade
 28 practices.” **Relevant to this case, one of these expressly prohibited practices is the use of**

1 “**deceptive representations or designations of geographic origin.**” Importantly, mislabeling is
2 actionable under all four types of consumer protection laws.

3 This background is important to the consideration of this case because the history of the
4 enactments illustrates that federal standards are useful in determining whether the state statutes are
5 violated and because our system relies on private state enforcement alongside federal agency
6 enforcement. Thus, not only is the conduct in this case properly challenged under state law, state law
7 enforcement is the only source of authority for consumers to seek redress.³

8 9 **IV. ARGUMENT**

10 Del Monte argues that the complaint should be dismissed because (i) the claim for violation
11 of Nevada’s consumer protection laws alleges violations of federal law with respect to the “Made in
12 the USA” designation, (ii) the claim for unjust enrichment fails as a matter of law, (iii) Plaintiff cannot
13 legally plead the laws of states other than Nevada, (iv) the prayer for restitutionary and injunctive relief
14 must be stricken, and (v) the recall notice is a complete defense.

15 **A. The Applicable Pleading Standard**

16 In considering a motion to dismiss, the court accepts the plaintiff’s allegations as true and
17 construes them in the light most favorable to the plaintiff. *No. 84 Employer-Teamster Joint Council*
18 *Pension Trust Fund v. Am. West Holding Corp.*, 320 F.3d 920, 931 (9th Cir. 2003); *Simpson v. AOL*
19 *Time Warner, Inc.*, 452 F.3d 1040, 1046 (9th Cir. 2006); *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th
20 Cir. 2004). The sufficiency of the complaint must be determined considering the allegations in their
21 entirety and viewing all facts in the complaint as a whole. *Id.* There is a strong presumption against
22 dismissing an action for failure to state a claim. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249
23 (9th Cir. 1997). As such, a motion to dismiss for failure to state a claim should be denied unless it
24 “appears beyond doubt that the plaintiff cannot prove any set of facts that would entitle him or her to
25 relief.” *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1229 (9th Cir.
26

27 ³ In *Mangini v. RJ Reynolds Tobacco*, 875 P.2d 73, 78; 7 Cal. 4th 1057, 1065 (1994) the FTC is
28 quoted by the California Supreme Court to the effect that FTC inaction should not be construed as a
determination that a violation has not occurred.

1 2004); *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1156 (9th Cir. 2000). **As a result, under**
 2 **settled Ninth Circuit precedent, a Rule 12(b)(6) dismissal is only proper in extraordinary cases.**
 3 ***United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).**

4 Further, under Federal Rule of Civil Procedure 8(e), a party may plead claims in the alternative,
 5 and therefore, a party may alternatively state claims both for legal and equitable relief. As set forth
 6 in Federal Rule of Civil Procedure 8(e)(2):

7 A party may set forth two or more statements of a claim or defense alternately or
 8 hypothetically, either in one count or defense or in separate counts or defenses. When
 9 two or more statements are made in the alternative and one of them if made
 10 independently would be sufficient, the pleading is not made insufficient by the
 insufficiency of one or more of the alternative statements. **A party may also state as
 many separate claims or defenses as the party has regardless of consistency and
 whether based on legal, equitable, or maritime grounds.**

11 Thus, although a plaintiff may not recover on both theories, “a plaintiff may claim these remedies as
 12 alternatives” *E.H. Boly & Son, Inc. V. Schneider*, 525 F.2d 20, 23 (1975); see also *Hubbard Business*
 13 *Plaza v. Lincoln Liberty Life Ins. Co.*, 596 F.Supp. 344, 347 (D. Nev. 1984) (“It is legally proper for
 14 a pleading to set forth inconsistent theories as bases for the relief sought.”)

15 Finally, as a practical matter, leave to amend is almost always granted by the Court. Fed. R.
 16 Civ. P. § 15(a) expressly states that leave to amend “shall be freely given when justice so requires.”
 17 As a result, where the complaint might state a claim, leave to amend must be granted. *Allen v. Beverly*
 18 *Hills*, 911 F.2d 367, 373 (9th Cir. 1990); *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995); *Silva*
 19 *v. Bieluch*, 351 F.3d 1045, 1048 (11th Cir. 2003).

20 **B. Plaintiff’s Claims Are Legally Sufficient**

21 **1. Plaintiff’s Claim For Violations of Nevada Consumer Fraud Laws Is** 22 **Legally Sufficient**

23 The Complaint alleges a scheme by Defendants whereby certain products were fraudulently and
 24 unlawfully mislabeled as “Made in the USA,” when in fact Defendants knew that the components of
 25 the product were imported from and manufactured in China. Plaintiff alleges that such a scheme
 26 violates the “Nevada consumer fraud laws, particularly NRS Sections 41.600 and 598.0915.”
 27 (Complaint at ¶27). These statutes provide victimized consumers, like the Plaintiff, with a private right
 28

1 of action.⁴

2 Further, there can be no dispute that the conduct alleged in the Complaint violates N.R.S.
3 Section 598.0915 which provides, in relevant part, as follows:

4 **A person engages in a ‘deceptive trade practice’ if, in the course of his business or
5 occupation, he:**

6 **4. Uses deceptive representations or designations of geographic origin in
7 connection with goods or services for sale or lease.**

7 N.R.S. § 598.0915.

8 In this case, the Defendants’ false representation and designation of the products as “Made in
9 the USA”, when in fact they were not “Made in the USA” within the meaning of state and federal law,
10 plainly violates the express prohibition on such conduct. As held by one Court in California ruling on
11 this same issue:

12 **A reasonable consumer of Leatherman's products with the “Made in U.S.A.”**
13 **representation would not expect such foreign manufacturing. (See Fed. Trade**
14 **Com., Enforcement Policy Statement on United States Origin Claims (Enforcement**
15 **Policy) 62 Fed. Reg. 63756, 63768 (Dec. 2, 1997) [“consumers are likely to understand**
16 **an unqualified U.S. origin claim to mean that the advertised product is ‘all or virtually**
all’ made in the United States”].) No reasonable trier of fact could conclude otherwise.
(Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 856 [107 Cal. Rptr. 2d 841, 24
P.3d 493].) Thus, the “Made in U.S.A.” representations were deceptive as a matter
of law.

17 *Colgan v. Letherman Tool Group*, 135 Cal. App. 4th 663, 682-3 (2006).⁵

18 Del Monte, however, objects to Plaintiff’s reference to federal law regarding the issue of what
19 is “Made in the USA.” Such an argument is specious as the Complaint referred to federal law, not to
20 create a right of action, but rather to determine whether a product can be considered “Made in the
21 USA.”

22 The reference to federal law in the Complaint, and in particular, the rules established by the
23 Federal Trade Commission, was to allege the applicable standard for when a product can be called
24

25 ⁴ Nevada Revised Statute Chapter 598 "generally provides for a public cause of action for deceptive
26 trade practices." *Nev. Power Co. v. Eighth Judicial Dist. Court of Nev.*, 120 Nev. 948, 102 P.3d 578,
27 583 n.7 (Nev. 2004). Nevada Revised Statute § 41.600 also provides that a victim of "consumer
fraud" may assert a private cause of action. *Id.* Consumer fraud includes "[a] deceptive trade practice
as defined in NRS 598.0915 to 598.0925, inclusive." *Id.* (quoting Nev. Rev. Stat. 41.600(2)(d)).

28 ⁵ The Court in *Colgan* expressly referred to the FTC standard to determine whether the designation
of “Made in USA” was deceptive.

1 "Made in USA." The product must be "all or virtually all" made in the U.S. Under this standard, "All
2 or virtually all" means that "all significant parts and processing that go into the product must be of U.S.
3 origin. That is, the product should contain no — or negligible — foreign content."

4 Thus, Plaintiff's citation to the federal standard to determine whether Defendants' conduct is
5 a deceptive trade practice with respect to the designation of a geographic origin was entirely proper.
6 **The citation to federal authority in the Complaint was not intended, nor did it, invoke federal law**
7 **as a private right of action. Plaintiff's private right of action is based upon N.R.S. Sections 41.600**
8 **and 598.0915. Del Monte's argument on this point is misplaced as the federal standard will be**
9 **the test to determine when the products could lawfully be designated as "Made in the USA"**
10 **under N.R.S. Section 598.0915.**

11 2. Plaintiff's Claim for Unjust Enrichment Is Also Legally Sufficient

12 Del Monte incorrectly asserts that Plaintiff's claim for unjust enrichment fails for two reasons.
13 First, Del Monte argues that Plaintiff cannot allege an equitable claim because "an adequate remedy
14 exists at law." (Motion at p.7). Second, Del Monte contends that the Court should factually find, as
15 a matter of undisputed fact, that "no benefit was retained by the Defendant."

16 Del Monte's first argument is that Plaintiff cannot allege an equitable claim because Plaintiff
17 has alleged a legal claim. This argument is entitled to short shrift. Settled Nevada and Federal
18 authority permit a party to plead legal and equitable claims in the alternative. *E.H. Boly & Son, Inc.*
19 *v. Schneider*, 525 F.2d 20, 23 n.3 (9th Cir. 1975); see also *Hubbard Business Plaza, supra*, 596
20 F.Supp. at 347. In *George, supra*, 2007 U.S. Dist. LEXIS 15980, this Court very recently held that
21 a complaint could properly alleged both a legal cause of action for breach of contract and an equitable
22 cause of action for unjust enrichment. *Id.* at * 21.

23 In Nevada, unjust enrichment is "the unjust retention of a benefit to the loss of another. . . ."
24 *Coury v. Robison*, 115 Nev. 84, 976 P.2d 518, 521 (Nev. 1999) (quoting *Nev. Indus. Dev. v. Benedetti*,
25 103 Nev. 360, 741 P.2d 802, 804 n.2 (Nev. 1987)). A benefit "denotes any form of advantage."
26 Restatement of Restitution § 1 cmt. b (1937); Restatement (Second) of Torts § 886B cmt. c (1979).
27 In this case, the Complaint sufficiently alleges the elements of a claim for unjust enrichment. *Stewart*
28 *Title of Nevada v. Haenisch*, 2006 U.S. Dist. Lexis 90513, at *19 (D. Nev. 2006). Unjust enrichment

1 applies here because “money paid through misapprehension of facts belongs, in equity and good
2 conscience, to the person who paid it.” *Nevada Indus. Dev. v. Benedetti*, 103 Nev. 360, 363, fn.2
3 (1987).

4 **Under Federal Rule of Civil Procedure 8(e) a party may plead in the alternative and**
5 **therefore Plaintiff may state a claim both for breach of contract and unjust enrichment.** The
6 liberal policy reflected in Rule 8(e)(2) instructs courts not to construe a pleading “as an admission
7 against another alternative or inconsistent pleading in the same case.” *McCalden v. Cal. Library Ass’n*,
8 955 F.2d 1214, 1219 (9th Cir. 1990) (quoting *Molsbergen v. United States*, 757 F.2d 1016, 1019 (9th
9 Cir. 1985)). Thus, although a plaintiff may not recover on both theories, “a plaintiff may claim these
10 remedies as alternatives, leaving the ultimate election for the court.” *E.H. Boly & Son, Inc., supra*. 525
11 F.2d at 23 n.3; *see also Hubbard Bus. Plaza, supra*, 596 F. Supp. at 347 (stating a “claimant is entitled
12 to introduce his evidence in support of all his claims for relief; if he doesn't make an election among
13 them, the trier of fact decides which, if any, to sustain.”). **As a result, there is nothing improper**
14 **about pleading a legal and an equitable claim in the same Complaint, and Del Monte’s argument**
15 **that the pleading of a legal claim in the Complaint is an admission that defeats the equitable**
16 **claim is refuted by the express language of Rule 8(e).**

17 Del Monte’s second argument regarding the unjust enrichment claim is that the recall notice
18 issued by Defendants with regard to certain contaminated lots offered a refund of “all voluntarily
19 recalled products.” Based on this evidence, Del Monte argues that the Court should factually find that
20 Del Monte did not retain any “benefit.” This argument is fatally flawed for multiple reasons. First,
21 the recall notice is not attached to the complaint. Second Del Monte’s argument is totally inapposite.
22 The recall of “specific product codes” of products due to contamination is not coextensive with the
23 claim now asserted as to all “Ol’ Roy” pet food products sold before March 16, 2007. **The recall**
24 **notice only offered refunds for certain contaminated lots and is in no way equivalent to the**
25 **recovery sought in this case for all mislabeled products.** The Class in this case is much broader
26 and substantively different from those affected by the recall notice. Moreover, the claim alleged here
27 is for all mislabeled “Ol’ Roy” products sold during the Class period, not just for a specific lot that was
28 contaminated. Plaintiff and the Class Members bought far more pet food that had been fraudulently

1 mislabeled by Defendants than the narrow subset of the lot of contaminated pet food subject to the
2 recall.

3 Finally this argument also fails as a procedurally flawed dispute as to the merits of Plaintiff's
4 factual allegations (Complaint at ¶46 and ¶47), which cannot be resolved through a motion to dismiss.
5 This argument attacks the factual allegations of the complaint which must for purposes of the Motion
6 to Dismiss be viewed as true.

7 As the Complaint plainly alleges at paragraphs 46 and 47:

8 Defendants have benefitted and been enriched by the above-alleged conduct.
9 Defendants sold the Ol' Roy brand pet food products with the false designation that the
10 Ol' Roy brand pet food products were "Made in USA" and thereby unjustly reaped
11 benefits and profits from consumers and the Class as a result of these representations.
12 Defendants received and continues to receive sale benefits and profits at the expense
13 of Plaintiff and the Class using such deceptive representation and designations.

14 (Complaint at ¶ 46).

15 Defendants used there aforementioned representations to induce Plaintiff and the other
16 members of the Class to purchase the Ol' Roy brand pet food products. Accordingly,
17 Defendants received benefits which they have unjustly retained at the expense of
18 Plaintiff and the Class members. Defendants have knowledge of this benefit,
19 voluntarily accepted such benefit, and retained the benefit.

20 (Complaint at ¶ 47).

21 **3. Plaintiff May Appropriately Seek Out-of-Pocket Damages, Restitution and/or
22 Injunctive Relief**

23 Plaintiff's complaint alleges three counts. Under these three claims, Plaintiff prays for relief
24 in the form of both monetary relief (damages and/or restitution) and injunctive relief. Del Monte does
25 not dispute that both restitution and injunctive relief are available remedies for Plaintiff's equitable
26 claim (unjust enrichment) and the common law fraud claim. As a result, there can be no basis for Del
27 Monte's request that the Court "finds that Plaintiff is not entitled to the remedies of restitutionary
28 disgorgement or injunctive relief." (Def's Proposed Order at p.2). In fact, Del Monte's failure to
address the remedies available for the unjust enrichment and fraud claims renders Del Monte's
argument on this point without merit.

Del Monte next argues that the prayer for restitution and injunctive relief should be stricken
from the complaint because these remedies are not available under the first claim (deceptive trade

1 practices). First, the fact that certain remedies prayed for by Plaintiff may only be available under one
2 claim, but not the other, does not provide a basis to hold that the remedies are altogether unavailable.
3 Contrary to Del Monte's unsupported assertion, unjust enrichment may be alleged in an action which
4 also seeks remedies at law.

5 More importantly, Del Monte's argument that the monetary relief requested cannot be
6 recovered as damages is plainly wrong. **Nevada law specifically provides that out-of-pocket**
7 **amounts paid for a deceptively marketed product are the measure of damages for a**
8 **misrepresentation.** *Goodrich & Pennington Mort. Fund Inc. v. J.R. Woolard*, 120 Nev. 777, 782
9 (2004). Finally, under the claim for Deceptive Trade Practices, Plaintiff alleged:

10 "Plaintiffs were injured by the many violations of the Nevada Consumer Fraud Act,
11 and parallel sister state statutes, and Plaintiffs have thereby been damaged in an amount
12 to be proven at trial. As a direct and proximate result of the acts and practices alleged
13 above, members of the general public who purchased the subject Ol' Roy brand pet
14 food products from Defendants, including the Plaintiff, lost monies in a sum currently
15 unknown but subject to proof at the time of trial.

16 (Complaint at ¶ 36). As a result, Plaintiff prayed for an award of "damages and/or restitution in an
17 amount to be proven at trial." (Prayer at ¶ 2).

18 As to the request for injunctive relief, Del Monte points to no authority which could remove
19 this case from the ordinary situation under N.R.S. § 31.010 which governs when an injunction may
20 be granted. The granting of an injunction under Nevada law is not based upon the claim pled, but
21 rather on the requirements of N.R.S. § 31.010. Here, if the conduct of Defendants is held to be
22 deceptive and fraudulent, there can be no dispute that an injunction is well within the discretion of the
23 Court under N.R.S. § 31.010.

24 Moreover, a prayer for an improper remedy is not grounds for a motion to dismiss under Rule
25 12. As held in *Massey v. Banning Unified School District*, 256 F.Supp. 2d 1090, 1092 (C.D. Cal.
26 2003), **a motion to dismiss "will not be granted merely because [a] plaintiff requests a remedy**
27 **to which he or she is not entitled."** Here, Del Monte's motion to dismiss, challenging the remedy
28 and not the claim, does not comply with Rule 12. "It need not appear that plaintiff can obtain the
specific relief demanded as long as the court can ascertain from the face of the complaint that some
relief can be granted." *Massey, supra*, 256 F.Supp. 2d at 1092, citing *Doe v. United States*, 243 U.S.

1 App. D.C. 354, 753 F.3d 1092, 1104 (D.C. Cir. 1985).

2 **4. Plaintiff can Legally Plead the Violation of the Consumer Protection Laws of**
3 **Defendants' Home States as Well as Nevada To Establish the Absence of any True**
4 **Conflict of Law and the Manageability of the Nationwide Class**

5 After careful analysis of the state consumer protection laws, Plaintiff determined that there
6 is no true conflict of laws between the various states with respect to Defendants' liability for
7 fraudulently mislabeling and selling the products as "Made in the USA." As a result, Nevada law can
8 properly be applied to the claims of the absent class members.

9 Nevertheless, anticipating Defendants' argument that alleged difference in the laws of the
10 various fifty states could arguably present manageability concerns in a nationwide action, Plaintiff
11 performed a detailed analysis of the laws of the various states to show that there is no conflict of state
12 laws on this issue and therefore no manageability problem. **All states follow federal law on this**
13 **issue.** Moreover, Plaintiff's complaint specifically alleged how the domicile state law for each
14 defendant was identical to Nevada, and therefore presents no conflict of law issue:

15 **The laws of every other state are identical to and/or substantively similar to**
16 **Nevada consumer fraud laws in that federal law and the laws of every state**
17 **prohibit the use of deceptive representations regarding the geographic origin of**
18 **products, and every state similarly authorizes an action by consumers for such**
19 **conduct.** In addition, the laws of the state of Delaware, and in particular 6 Del. C. §
20 2532(a)(4) is identical to that of Nevada N.R.S. §598.0915.

21 (Complaint at ¶ 27).

22 **This conduct violates Nevada law, and the law of every other state, including but**
23 **not limited to California (Cal. Civil Code §1770(a)(4)), Arkansas (Ark. Stat. Ann.**
24 **§4-88-107(a)(1)), Alabama (Code of Ala. §8-19-5(4)), and Delaware (6 Del. C.**
25 **§2532), all of which laws are identical in prohibiting deceptive representations or**
26 **designations of geographic origin in the marketing and sales of goods.**

27 (Complaint at ¶ 30).

28 As a result, Plaintiff further alleged:

To the extent that the Nevada Consumer Fraud Act may be found not to protect the
residents of other states, the consumer fraud acts of the Defendants' forum state could
be applied to all members of the Class.

(Complaint at ¶ 35).

In the event this Court concludes at some later stage of proceedings that Nevada law does not
apply to the claims of out-of-state consumers, the case will remain manageable because the law of

1 the Defendants' forum state can be applied to the claims of all of the absent class members. For
2 example, Plaintiff's alleges that all of the fraudulently labeled products were distributed from Arkansas
3 and purchased by consumers from an Arkansas company (Walmart). As a result, Arkansas law could
4 be found to have a nexus to all of the claims in this case. The same is true with respect to California
5 (Del Monte), Alabama (Sunshine Mills), Nevada (Chemnutra), and Delaware (Wal-Mart, Menu Foods,
6 Sunshine Mills, Del Monte and Chemnutra). All these states follow the federal standard for labeling
7 products as "Made in the U.S.A." and find mislabeling actionable by private citizens as a deceptive
8 trade practice.

9 Del Monte's reliance on *Philips Petroleum v. Shutts*, 472 U.S. 797 (1985) is misplaced.
10 In *Shutts*, the United States Supreme Court held that a state court may constitutionally exercise
11 jurisdiction over the claims of nonresident plaintiffs and defendants in a nationwide class action case
12 and apply the law of the forum state if 1) the named plaintiff adequately represents the absent class
13 members' interests; 2) the members of the class are given adequate notice and the opportunity to opt
14 out; and 3) the forum state has "a significant contact or significant aggregation of contacts, creating
15 state interests, such that choice of law is neither arbitrary nor fundamentally unfair." 472 U.S. at 811-
16 822. **Here, Nevada and the states in which Defendants are headquartered all have a significant**
17 **aggregation of contacts such that application of their law in this action would be "neither**
18 **arbitrary nor fundamentally unfair" under *Shutts*.**

19 Moreover, choice of law analysis for a nationwide class action and a determination of its
20 potential impact on the manageability of a class action are premature at the pleadings stage. *Rios v.*
21 *State Farm Fire & Cas. Co.*, 469 F. Supp. 2d 727, 742 (D. Iowa 2007) **(On a motion for judgement**
22 **on the pleadings "it is premature to determine the manageability of the proposed class action**
23 **lawsuit given that it is unclear which, and how many, varying state laws will be implicated.")**.

25 ⁶ After review of the applicable state laws, the trial court, on remand, held that there was no conflict
26 of laws between Kansas, the forum state, and other state laws implicated in the case. On appeal, the
27 Kansas Supreme Court reviewed the laws of each of the eleven states involved in the case to
28 determine the appropriate interest rate at issue. *Shutts v. Phillips Petroleum Corp.*, 240 Kan. 764, 732
P.2d 1286, 1292-1314 (Kan. 1987). Here also, there is no true conflict between the law of the forum
state, in this case Nevada, and the other state laws implicated in this case.

1 In fact many courts have held that choice of law issues are even premature at the class certification
2 stage. *Singer v. AT&T Corp.*, 185 F.R.D. 681, 691 (S. D. Fla. 1998) (“It is well-established that
3 consideration of choice of law issues at the class certification stage is generally premature”); *Kirschner*
4 *Medical Corp. Sec. Litig.*, 139 F.R.D. 74, 84 (D. Md. 1991); *In re Lilco Sec. Litig.*, 111 F.R.D. 663,
5 670-71 (E.D.N.Y. 1986); *Gunter v. Ridgewood Energy Corp.*, 164 F.R.D. 391, 399 (D.N.J. 1996).

6 **5. Del Monte’s Reliance on the Recall Notice is Improper on a Motion to Strike**
7 **and Provides no Defense to the Claims in this Action**

8 Del Monte finally argues as a matter of disputed fact that they have retained no benefit from
9 their alleged wrongdoing because they have recalled the product and paid refunds. This argument
10 fails for multiple reasons. First, Defendant’s purported recall has nothing to do with the claims of the
11 Class. Defendant’s recall notice directed consumers to return certain contaminated lots to receive
12 a refund of the purchase price because certain of the mislabeled lots were contaminated. The package
13 where the product was not only mislabeled but also contaminated and injurious was but one of
14 Plaintiff’s many mislabeled products purchased by Plaintiff from Defendants. **The Class in this case**
15 **as represented by Plaintiff is far broader than the few consumers affected by adulteration of a**
16 **few lots and the benefit retained is not confined to the adulterated lots.**⁷ Here the Class is
17 composed of all consumers who during the Class Period purchased products from Defendants that
18 were falsely and fraudulently mislabeled as “Made in the U.S.A.”

19 Second, references in the argument to extrinsic evidence on a disputed issue of fact is simply
20 never proper on a motion to dismiss under Rule 12. *Arpin v. Santa Clara Valley Transp. Agency*, 261
21 F.3d 912, 925 (9th Cir. 2001). The evidence is not a matter which is subject to judicial notice.⁸ Fed.
22 R. Evid. §201. The evidence is undeniable hearsay as to the disputed issue of whether the benefit was
23

24 _____
25 ⁷ The issue of any defensive setoff due to a refund which may have been paid to certain consumers
is a matter for claims administration, and is not a basis to dismiss claims.

26 ⁸ None of the authorities cited by Del Monte support the consideration of this document. In every
27 one of the authorities cited, the document considered by the Court was a **contract or agreement**
28 referenced in the pleadings upon which the claim was based, not a disputed issue of fact concerning
the defendant’s conduct. Here, the recall is not “central” to Plaintiff’s claim, rather, what is central
is Defendants’ misrepresentation concerning the geographic origin of the products, which fraud was
admitted in the recall.

1 retained by Defendants. Fed. R. Evid. § 801 and § 802. The evidence is being used to contest the
2 allegations of the pleading, which are assumed to be correct on a motion to dismiss.

3 Third, the Complaint, at paragraphs 46 and 47, plainly alleges that Defendants retained the
4 improper benefit. This important factual issue cannot be resolved by reference to a single hearsay
5 piece of evidence during a motion to dismiss. *Simpson, supra*, 452 F.3d at 1046.

6 Fourth, in decisions which have considered the issue, the sufficiency of the refund program was
7 found to be a factual issue which could not be decided in a motion to dismiss. See e.g. *Kagan v.*
8 *Gibraltar Sav. & Loan Assoc.*, 35 Cal. 3d 582, 591-2; 676 P.2d 1060, 1064 (1984). The evidence was
9 not attached to the complaint and reference to a recall of certain lots wherein the product was admitted
10 to be of Chinese origin does not allow the Court to consider the document as evidence that the
11 Defendant did not retain a benefit from the misrepresentation of geographic origin, which was not part
12 of the recall. *BJC Health System v. Columbia Cas. Co.*, 348 F.3d 685, 687 (8th Cir. 2003).

13 Finally, Plaintiff strongly disputes the document as evidence that no benefit was retained by
14 the Defendant from the misrepresentation of geographic origin, and as such, the Court may not
15 consider the document as evidence on this disputed factual issue. *Marder v. Lopez*, 450 F.3d 445, 448
16 (9th Cir. 2006); *Erickson v. Horing*, 2000 U.S. Dist. Lexis 22432, *30 (D. Minn 2000).

17
18 **V. CONCLUSION**

19 For all of the reasons discussed herein, Plaintiff respectfully submits that Del Monte’s motion
20 should be denied.

21
22 Dated: July 5, 2007

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24
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