UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MELVIN WALLACE, SHIRLEY HARDT, LEWIS SIMPSON, WILLIAM COBB, ERICA DAVIS-HOLDER, ROTEM COHEN, JULIAN WAGNER, ROSE WAGNER, ERIN STILWELL, MARIA EUGENIA SAENZ VALIENTE and ADAM BURNHAM, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

CONAGRA FOODS, INC.,

Defendant.

Case No. 12-cv-01354 DWF-TNL

MEMORANDUM IN SUPPORT OF DEFENDANT CONAGRA'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

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INTRODUCTION

Plaintiffs' claims arise from one question: is Hebrew National® beef kosher? ConAgra Foods, Inc.—which owns the brand—proudly answers "yes." Hebrew National® products are, and always will be, made with premium cuts of 100% kosher beef. But this is not a question the Court can resolve in any event. Whether or not something is "kosher" is exclusively a matter of *Jewish religious doctrine*. Under the First Amendment to the United States Constitution, federal courts may not adjudicate disputes that turn on religious teachings, doctrine, and practice. *See Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). Secular courts have no jurisdiction to decide religious questions: "This is precisely the kind of judicial second-guessing of decision-making by religious organizations that the Free Exercise Clause forbids." *Scharon v. St. Luke's Episcopal Presbyterian Hosps*, 929 F.2d 360, 363 (8th Cir. 1991). Because Plaintiffs' claims require the Court to apply Jewish doctrine and practice—and to resolve differing rabbinical interpretations of *kashrut* (the rules for kosher food)—the Complaint must be dismissed for lack of subject matter jurisdiction. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976).

Plaintiffs suggest that statements by ConAgra and others somehow provide an "objective," "neutral," and secular standard for litigating kosher compliance. But there is no secular standard for "kosher." As demonstrated by case law and underscored by the exhibits attached to the Complaint, every purportedly "neutral" definition is inextricably linked to Jewish religious doctrine. *See Ran-Dav's County Kosher, Inc. v. New Jersey*,

608 A.2d 1353, 1363 (N.J. 1992) ("The laws of kashrut are intrinsically religious, whether they are ambiguous or not and whether they are disputed or not."); (Aff. of Rabbi Fyzakov ¶ 6, Cplt. Ex. Q ("The Kosher process involves the coordinated efforts of multiple individuals to assure that the food is, in fact, kosher; the importance of this process cannot be understated, it is more than just sedulous attention to process and detail, it is a matter of religion.").)

Even if the Court avoided ruling on the authoritative standards for "kosher," and asked only whether Hebrew National® beef complies to the "strict" degree expressed in the company's statements, that too is fundamentally a religious question. As Chief Judge Davis concluded in dismissing claims involving related issues, "[a]n examination of the gradations in the rules of *kashrut* [that is, the rules for kosher food] or severity with which the rabbis enforced those rules is precisely the type of religious-based claim the Court is forbidden from entertaining." *Maruani v. AER Servs., Inc.*, No. 06-176, 2006 WL 2666302, at *7 (D. Minn. Sept. 18, 2006). Where rabbis disagree, a Court should not tread.

For these reasons, this Court also lacks subject matter jurisdiction because Plaintiffs have failed to plead facts sufficient to establish Article III standing. Plaintiffs' allegations do not raise a reasonable inference that they *each individually* were injured by alleged violations of *kashrut*. *See Lewis v. Casey*, 518 U.S. 343, 347 (1996). Plaintiffs fail to even allege that any of them keep kosher.

This Court lacks subject matter jurisdiction over Plaintiffs' claims, and the Amended Complaint ("Complaint") should be dismissed in its entirety with prejudice.

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Even if this Court had jurisdiction (and it does not), Plaintiffs' Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief may be granted. Because Plaintiffs seek to impose meat labeling requirements different from or in addition to those promulgated by the U.S. Department of Agriculture, their claims are expressly preempted by the Federal Meat Inspection Act, 21 U.S.C.A. § 678. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 530-31 (1977); *Kuenzig v. Kraft Foods, Inc.*, No. 8:11-CV-838-T-24, 2011 WL 4031141, at *5 (M.D. Fla. Sept. 12, 2011).

Plaintiffs' claims also fail for other reasons:

Count I, for "negligence," is barred on its face by the economic loss doctrine. *See, e.g., Lesiak v. Cent. Valley Ag Co-op., Inc.*, 808 N.W.2d 67, 81 (Neb. 2012).

Count II, brought under Nebraska Uniform Deceptive Trade Practices Act must be dismissed because the only relief to which Plaintiffs could be entitled under the Act is an injunction, but Plaintiffs' allegations preclude injunctive relief. *See Reinbrecht v. Walgreen Co.*, 742 N.W.2d 243, 248 (Neb. Ct. App. 2007).

Count III, brought under Nebraska Consumer Protection Act, fails because that statute broadly exempts conduct (such as food labeling) that is regulated. *See Little v. Gillette*, 354 N.W.2d 147, 152 (Neb. 1984); Neb. Rev. Stat. § 59-1617 (2012). In addition, Nebraska's consumer protection statutes cannot apply to the claims of Plaintiffs (non-Nebraskans who made purchases outside Nebraska) under basic choice-of-law principles. *See In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005).

Count IV, brought under the consumer protection statutes of Plaintiffs' home states, fails to plead basic required elements of these statutes. *See, e.g.*, *Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003); *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 160 (Ill. 2002).

Count VI[1], for breach of contract, should be dismissed because Plaintiffs failed to allege privity and failed to allege reasonable pre-suit notice as required by the Uniform Commercial Code ("U.C.C."). *See, e.g.*, *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011).

For all these reasons, Plaintiffs have failed to state a claim upon which relief may be granted, and the Complaint should be dismissed.

SUMMARY OF ALLEGATIONS

I. Hebrew National® Beef Is Distributed by ConAgra, But Is Certified by an Independent Organization of Rabbis.

In their Complaint, Plaintiffs seek to bring a putative nationwide class action challenging ConAgra's marketing of Hebrew National® beef as kosher. (*See, e.g.*, Cplt. ¶ 109.) The term "kosher" refers to food that is consistent with the body of Jewish religious dietary laws, rules, doctrines, and interpretations known as "*kashrut*," which is also spelled "*kasruth*" and "*kashruth*." (*See id.* ¶ 12.) *See also Commack Self-Serv. Kosher Meats v. Weiss*, ("*Commack I*"), 294 F.3d 415, 418 (2d Cir. 2002); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1344 (4th Cir. 1995).

[1] There is no Count V in the Amended Complaint.

ConAgra does not itself certify the kosher status of Hebrew National® beef. Instead, it is certified as kosher by rabbis affiliated with an independent certification organization, Triangle K. (Cplt. ¶¶ 7, 48-49.) Triangle K is operated by Orthodox Jewish rabbis, including Rabbi Aryeh Ralbag. (*Id.* ¶ 48.) Triangle K confirms its determination that food products are kosher by authorizing the seller's use of the "Triangle K symbol," known as a *hecsher*, which is applied to the food label. (*Id.* ¶¶ 55-56.)

The slaughtering of cattle for Hebrew National® beef also is not performed by ConAgra. The allegations in Plaintiffs' Complaint relate to cattle processed at facilities owned by American Foods Group, LLC ("AFG") in South St. Paul, Minnesota, Green Bay, Wisconsin, and Gibbon, Nebraska, that are slaughtered by employees of AER Services, Inc. ("AER") using kosher methods. (*Id.* ¶¶ 44-46.) The Complaint alleges that ConAgra, "AER, AFG and Triangle K have had an agreement(s) whereby AER would conduct kosher slaughtering and kosher meat processing at AFG facilities, for which Triangle K was retained to provide supervision and kosher certification." (*Id.* ¶ 61.)

II. Plaintiffs Allege that Hebrew National® Beef Is Not Kosher.

Plaintiffs challenge the labeling statement that Hebrew National® food is made with "Premium cuts of 100% Kosher Beef." They do not dispute that Hebrew National® beef is in fact made with premium cuts of 100% beef (*id.* ¶ 89), but contend only that "the meat used in the products failed to strictly comply with the rules for calling meat kosher . . . ." (*Id.* ¶ 109.)

In particular, Plaintiffs allege that Hebrew National® beef should not have been certified as kosher by the rabbis of Triangle K because the slaughter and processing of the beef purportedly violates certain aspects of *kashrut*. The Complaint advances interpretations of *kashrut* on a wide variety of topics including the standards for cleanliness of cow hides; the smoothness and sanitation for the slaughterer's knife blade; the procedures for external inspection of cows; the inspection of cow organs after slaughter; the preparation and storage of kosher beef; the administrative recording of determinations of who can be involved in the slaughter of beef; and the procedures for identifying which beef has been slaughtered in accordance with *kashrut* principles. (*Id.* ¶¶ 90-106.)

Plaintiffs do not allege that *kashrut* violations occurred unbeknownst to the rabbis of Triangle K. Instead, they allege that the unnamed employees "complained to AER and Triangle K that the procedures they witnessed at AFG facilities rendered the meat being processed not kosher." (*Id.* ¶ 63.)

Plaintiffs also do not allege that all Hebrew National® beef sold to consumers is not kosher. Instead, they allege that *kashrut* violations *sometimes* occurred at AER slaughtering facilities. (*See, e.g., id.* ¶ 92 (animals were "*not consistently* inspected;" unclean and unhealthy animals "*have been* selected for slaughter"); ¶ 97 (knives "*often* have nicks and are not properly cleaned and sharpened"); ¶ 100 (inflation and submersion of animal lungs was done "*on rare occasions*"); ¶ 103 (meat "is *not consistently* drained of blood and adequately washed); ¶ 106 (rule requiring tagging of kosher meat has not been "*consistently* followed") (emphasis added in all quotes).) In addition, the Complaint

is vague about *which* facility or facilities were the site of the alleged *kashrut* violations. Plaintiffs specifically allege such violations only at the South St. Paul facility (*id.* ¶ 108), and make no specific allegations about violations at the Green Bay and Gibbon facilities.

III. Plaintiffs Allege Five Claims Against ConAgra.

Plaintiffs are eleven individuals who reside in Minnesota, Arizona, Illinois, New York, Michigan, Florida, California, and Massachusetts. (Cplt. ¶¶ 29-38.) Plaintiffs seek a putative nationwide consumer class and assert the following five causes of action: (1) negligence (Count I); (2) violation of Nebraska Uniform Deceptive Trade Practices Act (Count II); (3) violation of Nebraska Consumer Protection Act (Count III); (4) violation of other states' consumer protection laws (Count IV); and (5) breach of contract (Count VI).

Several exhibits are attached to Plaintiffs' Complaint. Those include website statements and press releases from ConAgra, Triangle K, and AER from various years, including some dated *after* the filing of Plaintiffs' original Complaint. (Cplt. Exs. B-J, M-N.) Plaintiffs also attach affidavits of Rabbis Ralbag, Small, and Fyzakov and AER president Mr. Ben-David that have been submitted in other cases. (*Id.* Exs. O-R; *see also* Ex. P (describing Rabbi Small's service as a Rabbinical authority for a division of Sara Lee Corporation but describing no experience or involvement with Hebrew National® or its independent certification agency).)

ARGUMENT

PART ONE: PLAINTIFFS' CLAIMS SHOULD BE DISMISSED FOR LACK OF JURISDICTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

The burden of establishing the court's subject matter jurisdiction rests on the party asserting jurisdiction. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *see also* Fed. R. Civ. P. 12(b)(1); *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). Here, Plaintiffs cannot establish that this Court has subject matter jurisdiction over their claims for two overarching reasons: (1) the claims for which Plaintiffs seek adjudication are barred by the Establishment and Free Exercise Clauses of the First Amendment; and (2) their allegations are inadequate to establish Article III standing.

I. THE FIRST AMENDMENT BARS PLAINTIFFS' CLAIMS.

The First Amendment's Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. Amend. I. The Supreme Court has defined "Establishment" of religion to include "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of City of N.Y.*, 397 US 664, 668 (1970). Under the test announced by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), government action must have a secular purpose, "its principal or primary effect must be one that neither advances nor inhibits religion," and it must not "foster excessive government entanglement with religion." Court action, including adjudication of a civil lawsuit, is subject to the limitations of the First Amendment. *See Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960); *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S.

367, 369 (1970) (Brennan, J., concurring); *Paul v. Watchtower Bible & Tract Soc. of N.Y.*, 819 F.2d 875, 880 (9th Cir. 1987) (noting that application of state tort laws are government action for First Amendment purposes).

A. Plaintiffs' Claims Are Barred by the Establishment Clause.

The Establishment Clause bars courts from entertaining disputes—such as this one—over the kosher status of food. The purpose of the Establishment Clause is "to prevent, as far as possible, the intrusion of either [government or religion] into the precincts of the other." *Lemon*, 403 U.S. at 614. Because Plaintiffs' claims depend on disproving the representation that Hebrew National® beef is made with "100% Kosher Beef," they are barred by both the entanglement and effect prongs of the *Lemon* test.

1. Adjudication of Plaintiffs' claims requires unconstitutional entanglement with religion.

The entanglement inquiry asks "whether the government is being 'charged with enforcing a set of religious laws' . . . or is making an inquiry into the religious content of the items sold." *See Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 396 (1990). Here, any resolution of Plaintiffs' claims ***necessarily*** will require this Court to enforce *kashrut* and evaluate the religious correctness of kosher determinations made by the rabbis of Triangle K.

a. Whether food is kosher is a religious question.

A determination as to the kosher status of a food is a wholly religious decision. As the Supreme Court of New Jersey succinctly stated, "The laws of kashrut are intrinsically religious, whether they are ambiguous or not and whether they are disputed

or not." *Ran-Dav's*, 608 A.2d at 1363; *see also Kaufmann v. Sheehan*, 707 F.2d 355, 359 (8th Cir. 1983) (stating that binding Supreme Court precedent "prevent[s] this court from deciding what are inherently religious issues").

The Supreme Court of New Jersey is not alone. The Massachusetts Supreme Court declined to entertain a case involving a challenge as to whether foods were kosher because "*the court is not qualified to decide and therefore must refuse to consider an issue which is so exclusively one of religious practice and conscience.*" *United Kosher Butchers Ass'n v. Associated Synagogues of Greater Boston, Inc.*, 211 N.E.2d 332, 334 (Mass. 1965) (emphasis added). Other courts have similarly reached the same conclusion that kosher status is a religious question into which courts cannot inquire. *See Catholic League v. City & County of San Francisco*, 624 F.3d 1043, 1061 (9th Cir. 2010) (Silverman, J., concurring) (describing *kashrut* as a "matter[ ] of religious dogma"); *S.S. & B. Live Poultry Corp. v. Kashruth Ass'n*, 285 N.Y.S. 879, 890 (N.Y. Sup. Ct. 1936) ("In the very nature of things, kashruth must be a monopoly in the hands of those best qualified to administer it. By definition and tradition those persons are the rabbis, and their decree is final.").

b. Courts have recognized that religious authorities disagree over kashrut.

Adjudicating the kosher status of food is particularly problematic because kosher doctrines vary and disagreements regarding *kashrut* exist within Judaism. "[T]here is considerable disagreement over what precepts or tenets truly represent the laws of kashrut. There are differences of opinion concerning the application and interpretation of

the laws of kashrut both within Orthodox Judaism and between Orthodox Judaism and other branches of Judaism." *Ran-Dav's*, 608 A.2d at 1356; *accord Commack I*, 294 F.3d at 426 ("We find it indisputable that there are differences of opinion within Judaism regarding the dietary requirements of kashrut."); *Barghout*, 66 F.3d at 1347 (Luttig, J., concurring) ("The various branches of Judaism define kosher differently, however, and, as one would expect, these differences are significant to adherents of the various sects of the faith. As the district court found, 'Conservative and Orthodox Jews generally agree on the standards of kashrut, [but] they differ in their interpretations of specific provisions.'").

Unlike some religions, Judaism has no central authority for deciding religious doctrine. As one commentator has observed, "There is no widely accepted authority that can determine definitively whether a food product or food preparation practice is kosher." Mark Popovsky, *The Constitutional Complexity of Kosher Food Laws*, 44 Colum. J. L. & Soc. Probs. 75, 79 (2010). This Court lacks subject matter jurisdiction to assume that mantle of authority.

c. Another Court in this district decided that inquiry into kosher determinations violates the Constitution.

Another federal court in Minnesota has already determined that it cannot decide related questions of *kashrut* without violating the First Amendment. In *Maruani*, a kosher butcher ("shochet") brought numerous claims against AER after his employment was terminated. 2006 WL 2666302, at *1. Chief Judge Davis dismissed the plaintiff's claim that he suffered religious discrimination for lack of subject matter jurisdiction

because adjudication of that claim would require inquiry into religious doctrine: "An examination of the gradations in the rules of *kashrut* or severity with which the rabbis enforced those rules is precisely the type of religious-based claim the Court is forbidden from entertaining." *Id.* at *7; *see also id.* ("Examining the potential scope of discovery alone elucidates the Court's concern. Maurani [sic] would be unable to succeed on this claim without subjecting the rabbis to discovery regarding their certifications of other AER employees and the rationale behind those certifications—an inquiry not within the purview of the Court."). The Court also found that the employee who slaughtered the animal was performing a job that "has substantial religious character" noting, "[t]he slaughtering of animals in the Jewish faith is a ritual. The requirements of a *shochet* are determined by rabbis, not by individual employers." *Id.* at *6.

Plaintiffs ask this Court to inquire into particular kosher slaughtering and processing practices approved and authorized by rabbis for the preparation of kosher beef used in Hebrew National® beef. As the court concluded in *Maruani,* this is an issue for rabbinic rulings, not judicial opinions. *See id.* at *7.

d. Other courts have declined to adjudicate kosher decisions.

Other courts that have been asked to adjudicate decisions as to whether food is kosher have declined to do so on First Amendment grounds. Laws requiring identification of kosher certification agencies, however, have been upheld as striking the appropriate balance between consumer protection and religious freedom. The Complaint seeks to obliterate the jurisprudence that has developed regarding this sensitive and important area of constitutional law.

Three courts that recently examined state statutes regulating the kosher status of food held that those statutes were unconstitutional. First, in *Ran-Dav's*, the Supreme Court of New Jersey struck down state consumer protection regulations that governed the preparation, maintenance, and sale of kosher products as violating both federal and state Establishment Clauses. 608 A.2d at 1355. The court noted that "any adjudication by a court" of the disputes that would arise under the kosher rules "inevitably would entail the application and interpretation of Jewish law" which would require the "State to assume a religious role." *Id.* at 1364.

The Fourth Circuit reached the same result in striking down a kosher food consumer fraud municipal ordinance. *Barghout*, 66 F.3d at 1343. In an opinion written by Judge Donald P. Lay, sitting by designation from the Eighth Circuit Court of Appeals, the court held that the ordinance violated the First Amendment because enforcement of the law required city officials to be "dependent upon members of" the Jewish Orthodox "faith to interpret and apply the standard." *Id.*; *see also id.* at 1340-41 (explaining that *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1924), which analyzed a state kosher law against a vagueness challenge, "did not address whether the law was constitutional under the religion clauses of the First Amendment because the Supreme Court had yet to determine that the First Amendment applied to the states").

Finally, in *Commack I*, the Second Circuit affirmed a district court's order holding that New York's statutes prohibiting "fraudulent identification" of food as kosher were unconstitutional. 294 F.3d at 418-19. The Court held that the laws "excessively entangle government and religion because they (1) take sides in a religious matter, effectively

discriminating in favor of the Orthodox Hebrew view of dietary requirements; (2) require the State to take an official position on religious doctrine; and (3) create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria." *Id.* at 426.

By contrast, New York's disclosure laws that were revised after *Commack I*, and which merely require *identification* of the certifiers of kosher foods were upheld as constitutional just two months ago because they did not require courts to wade into religious doctrine. *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210, 212 (2d Cir. 2012) ("*Commack II*"). The Second Circuit noted in *Commack II* that the rules requiring disclosure of certain information about kosher certifiers were permissible because "the term 'kosher' is not defined in the statute, no specific religious processes are detailed as required for kosher labeling, no particular religious viewpoint is referenced, and no particular religion or denomination is given preference." *Id.* at 208.

Plaintiffs' claims seek to turn these decisions on their head. Rather than avoid forcing the Court to evaluate the kosher status of food, Plaintiffs *demand* such an impermissible inquiry. (Cplt. ¶ 109.) And instead of following the rationale behind the disclosure of kosher certifying agencies—which allow consumers to investigate the certifying agencies and make their own determinations as to the identity and qualification of the individuals responsible for the religious interpretations made by those agencies—Plaintiffs attempt to invoke federal power to challenge the substantive religious decisions of ConAgra's certifying agency, Triangle K.

If states cannot define and enforce specific kosher standards without violating the Establishment Clause, then surely Plaintiffs cannot invoke the power of this Court to do so. *See Commack I*, 294 F.3d at 418; *Barghout*, 66 F.3d at 1343; *Ran-Dav's*, 608 A.2d at 1356.

e. Plaintiffs seek to override Rabbi Ralbag's determination that Hebrew National® beef is kosher.

The insurmountable entanglement problems with Plaintiffs' claims cannot be overcome by their bald assertion that this Court can determine what is or is not kosher without delving into questions of religious doctrine. (Cplt. ¶ 12.) There is a "danger here that the State will become involved in deciding what is or is not kosher or other questions of Jewish religious law." *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405, 415 (E.D.N.Y. 2011), *aff'd*, *Commack II*, 680 F.3d 194; *see also Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732, 741 (D.N.J. 1999) (declining, for lack of jurisdiction, to hear claims regarding whether a party was divorced "within the meaning of the Orthodox faith" because they would involve "an examination of underlying religious doctrine or practice"); *Lightman v. Flaum*, 736 N.Y.S.2d 300, 306 (N.Y. App. Div. 2001) ("To permit a party to introduce evidence or offer experts to dispute an interpretation or application of religious requirements would place fact-finders in the inappropriate role of deciding whether religious law has been violated.").

Most problematically, Plaintiffs' claims directly contradict the kosher determinations that have been made by Rabbi Ralbag in his independent certification of

Hebrew National® beef. Plaintiffs' claims that Hebrew National® beef is not kosher specifically and necessarily challenge Rabbi Ralbag's interpretation of and adherence to *kashrut* because the Triangle K organization has certified that the very same Hebrew National® beef is kosher. (*See* Cplt. ¶ 7; Cplt. Ex. M (statement from Triangle K after filing of lawsuit that states Triangle K "strongly re-affirm[s] that the Triangle-K Kashrus symbol on Hebrew National products guarantees that the product is 100% strictly Kosher").)[2]

It is difficult to imagine a more blatant First Amendment violation than a court inquiry into whether certain practices resulted in food that was not kosher when those practices occurred under the authorization and supervision of Rabbi Ralbag, are based upon his rabbinic rulings, and resulted in his certification of that food as kosher. *See Ran-Dav's,* 608 A.2d at 1363 (noting that "[i]t is difficult to envision a civil controversy stamped more indelibly with religious doctrine" than resolving "whether the merchant's view of kashrut diverged from the State's definition of Jewish Orthodoxy").

f. This Court cannot cobble together an operative definition of "kosher" that does not depend on kashrut.

Plaintiffs' Complaint also cannot be saved from unconstitutional entanglement by their theory that the Court could apply a working definition of "kosher" to their claims that would not depend on "what constitutes kosher or *kashruth* under Jewish religious law." (Cplt. ¶ 12.) Their suggestion is not only preposterous, it is impossible.

[2] Although Plaintiffs' claims would be unconstitutional regardless, Plaintiffs do not claim that certain alleged violations of *kashrut* occurred unbeknownst to Rabbi Ralbag; they specifically allege that Rabbi Ralbag was aware of the practices that purportedly rendered some of Hebrew National® beef not kosher. (*Id.* ¶ 63.)

Plaintiffs suggest that this Court could craft a comprehensive anthology of kosher standards by looking to sources other than *kashrut*. They invite this Court to cobble together out-of-context statements from websites and from affidavits of rabbis and other people not employed by ConAgra to develop a supposedly "defined" and "detail[ed]" kosher "standard" that would constitute ConAgra's kosher standard but that would not depend on an understanding or interpretation of the laws of *kashrut*. (*Id.*) Plaintiffs' sources for their alleged objective standard include statements made by organizations other than ConAgra, and even include statements made *after* Plaintiffs filed their lawsuit. (Cplt. Exs. M-N.) They also cite affidavits from rabbis in other litigation, including one from Rabbi Ralbag. (*Id.* Exs. O-R.)

On its face, the idea that this Court could take affidavits and website statements to develop an "objective" kosher definition for ConAgra is absurd. Plaintiffs acknowledge that ConAgra does not attempt to determine for itself whether food processed for its products is kosher but instead "contracts with third-party kosher certification agency Triangle K to provide kosher food supervision and certification services." (*Id.* ¶ 55.) Thus, the "standard" ConAgra uses is, in fact, to rely on the involvement and supervision of Triangle K's rabbis. This is not a "neutral" standard that a Court could apply. *See Barghout*, 66 F.3d at 1344 (stating that "secular officials . . . determin[ing] how Orthodox Judaism defines the rules of kashrut" is "clearly not permitted by our Establishment Clause jurisprudence").

Plaintiffs' theory that this Court need not consider any issues of Jewish law fares no better upon inspection of their specific allegations. Plaintiffs allege that "if the meat is

not adequately washed or cooked to any degree during the washing process, the meat cannot be marked as kosher." (Cplt. ¶ 102.) Neither of the post-litigation sources cited in support of that statement, however, discuss what procedures constitute "adequate" washing or says anything whatsoever about what constitutes cooking under the principles of *kashrut*. (*See id.* at n. 18.) The cited AER statement merely describes that meat "is washed in accordance with the kosher supervision guidelines as enforced by the Triangle K." (*Id.* Ex. N. p. 2.) The Triangle K statement explains that meat is washed "*in accordance with the strictest standards of Jewish Law*." (Cplt. Ex. M, ¶ 5 (emphasis added).) Any attempt to define kosher standards leads back—unsurprisingly—to religious doctrine that cannot be adjudicated in a court of law. *See Ad Hoc Committee v. Reiss*, 224 P.3d 1002, 1007 (Ariz. Ct. App. 2010).

The exhibits to the Complaint underscore the futility of any attempt to take *kashrut* out of kosher determinations. For example, the Triangle K website statements specifically warn that their description of kosher is "only an overview" and that "[p]articular questions regarding any foods should be discussed with Rabbi Ralbag or an associate of the Triangle K, rabbinical scholars thoroughly knowledgeable in all the laws of Kashrut." (Cplt. Ex. E p. 2.) The affidavit of Rabbi Fyzakov succinctly summarizes why Plaintiffs' Complaint must be dismissed: "The Kosher process involves the coordinated efforts of multiple individuals to assure that the food is, in fact, kosher; the importance of this process cannot be understated, *it is more than just sedulous attention*

to process and detail, it is a matter of religion."[3] (Aff. of Rabbi Fyzakov ¶ 6, Cplt. Ex. Q (emphasis added).) *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by [the court] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.")

g. Plaintiffs cannot avoid entanglement by asserting that "stringent" kosher standards can be applied by a court.

Plaintiffs' Complaint goes to great lengths to read a "stringent" and "exacting" kosher standard into the statement on Hebrew National® labels that the products are "made with premium cuts of 100% kosher beef." Even if Hebrew National® labels carried such a claim (and they do not), this Court still would lack jurisdiction to decide this suit. *See W. Va. St. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any

[3] The other exhibits to the Complaint further reinforce that kosher determinations are religious inquiries that courts cannot second-guess: (1) It is unclear how this Court could use a seven-page affidavit of Rabbi Ralbag describing the reasons that an AER employee failed to meet the requirement of "*yirei shmayaim meirabim*, or God-fearing in the public's eye" to develop kosher standards to evaluate whether Rabbi Ralbag's certification of Hebrew National® beef was improper. (Aff. of Rabbi Ralbag ¶¶ 11, 13, Cplt. Ex. O.) (2) The press statement from AER explains that "AER employees are involved in *kosher meat processing operations that are governed and regulated by Jewish, religious law*." (Cplt. Ex. N (emphasis added).) (3) Both Rabbi Ralbag and Rabbi Small's affidavits state that "[b]ecause Judaism has no central hierarchical authority to resolve questions of *Halakha*, different individuals and communities may have different answers to such questions." (*Id.* Ex. O. ¶ 12; Ex. P. ¶ 13; *see also id.* Ex. R. ¶ 2 (noting that AER's slaughtering operations are supervised by rabbis "to ensure that they are conducted according to their own rabbinical interpretations of *kashruth*").) *See Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 715 (2012) (Alito, J., concurring); *Milivojevich*, 426 U.S. at 713; *Congregation Beth Yitzchok v. Briskman*, 566 F. Supp. 555, 558 (E.D.N.Y. 1983) (declining to exercise jurisdiction where resolution of the allegations in the complaint would require "determinations of religious tenets").

fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion . . . .").

Plaintiffs' allegation—"On each package, Defendant represents all Hebrew National products sold to be manufactured to the 'stringent' and 'exacting' standard it and its contractors define and adopt"—is, most charitably, a stretch. (*See* Cplt. ¶ 9 (citing to no exhibits).). The pictures of Hebrew National® labels attached to the Plaintiffs' Complaint show clearly that Hebrew National® labels do not contain such a statement. (Cplt. Ex. A.) Plaintiffs cannot go forward with claims that are disproven by their own Complaint. *See Ritchie v. St. Louis Jewish Light*, 630 F.3d 713, 716 (8th Cir. 2011).

Plaintiffs' allegations regarding "stringent" kosher standards also fail to resolve the jurisdictional bar to their claims. Any judicial determination of which kosher interpretations are the most "stringent" suffers the same fundamental First Amendment flaws as an inquiry into whether certain practices render a food kosher: courts cannot adjudicate religious questions. *See Aguilar v. Felton*, 473 U.S. 402, 409-10 (1985), *overruled on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997). Courts also cannot decide among different views within a religion. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981). An attempt to develop a ranking of "stringencies" in *kashrut*, for which there is no definitive or universally accepted source, is beyond the constitutional authority of this Court. *See Thomas*, 450 U.S. at 715 (intrafaith disagreements "are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences"); *Mary*

Elizabeth Blue Hull, 393 U.S. at 451 (civil courts should not "engage in the forbidden process of interpreting and weighing church doctrine").

Recasting religious disputes as ones involving merely the application of a religious institution's own interpretations is a tactic that has been repeatedly tried, and repeatedly rejected. For example, in *Odenthal v. Minn. Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 436 (Minn. 2002), the Minnesota Supreme Court held that a plaintiff could not assert "a cause of action in negligence by reference to neutral standards" by alleging that a pastor exceeded duties described in the church's Minister's Handbook. *See also Houston v. Mile High Adventist Academy*, 846 F. Supp. 1449, 1455 (D. Colo. 1994) (concluding that court could not adjudicate claims to determine whether school provided education in accordance with "religious tenets" where a student enrolled in a Christian school allegedly was exposed to sexually explicit materials and a teacher allowed students to use his home for sexual relations); *Flax v. Reconstructionist Rabbinical College*, 44 Pa. D. & C. 3d 435, 443 (C.P. 1987) (stating that court could not review whether seminary followed provisions in its own handbook or complied with its internal procedures). In essence, Plaintiffs' claims seek to revive the "departure-from-doctrine" approach to religious questions. This ploy was definitively rejected by the Supreme Court more than forty years ago. *See Mary Elizabeth Blue Hull*, 393 U.S. at 450-52.

h. The relief sought in Plaintiffs' Complaint further illustrates entanglement problems.

This Court would face further constitutional difficulties if Plaintiffs' request for relief were granted. Plaintiffs seek an injunction ordering ConAgra to "immediately

cease the unlawful business acts and practices as alleged herein, and to enjoin Defendant from continuing to engage in any such acts and practices in the future." (Cplt. ¶ 145.) This is simply unworkable. How would this Court oversee whether the slaughter of cattle used to make Hebrew National® beef conformed with Plaintiffs' interpretation of *kashrut*? How would this Court determine whether Rabbi Ralbag's decisions as to the processes used to slaughter and prepare beef conform with those of "stringent" or "exacting" kosher standards? Plaintiffs' requested relief casts this Court into the unenviable role of serving as the final arbiter of Jewish religious doctrine. *See, e.g.*, *Commack Self-Service Kosher Meats, Inc. v. Rubin*, 106 F. Supp. 2d 445, 455 (E.D.N.Y. 2000) (declining to exercise jurisdiction to enforce New York state kosher statutes because they "necessarily require state officials to refer to and rely upon religious doctrines"), *aff'd Commack I*, 294 F.3d 415.

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Because of the religious nature of kosher determinations, and because of the disagreements within Judaism as to the interpretation of kosher rules, Plaintiffs' claims must be dismissed as excessive entanglement of government with religion.

2. Adjudication of Plaintiffs' claims would create an unconstitutional effect on religion.

Plaintiffs also cannot establish subject-matter jurisdiction because adjudication of their claims violates the "effects" prong of the *Lemon* test. The effects prong is violated "when the government fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations." *Grand Rapids School Dist. v. Ball*,

473 U.S. 373, 389 (1985), *overruled on other grounds by Agostini*, 521 U.S. 203. Government practices may not "have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin v. Grendel's Den, Inc*., 459 U. S. 116, 125-126 (1982).

Here, a judicial determination of Plaintiffs' claims would constitute both an advancement and an inhibition of religion. *See Ran-Dav's*, 608 A.2d at 1364. Choosing an interpretation of what food constitutes "kosher" beef will necessarily advance one set of Jewish beliefs while inhibiting others. *See Commack I*, 294 F.3d at 430 (stating that "by defining 'kosher' as synonymous with the views of only Orthodox Judaism, the State prohibits members of other branches of Judaism from using the kosher label in accordance with the dictates of their religious beliefs where their dietary requirements differ from those of Orthodox Judaism"). Any determination of the practices of the most "stringent" or "exacting" kosher standards will do the same. *See id.* Rabbi Ralbag has already certified that Hebrew National® beef is kosher; an inquiry by a federal court into the veracity of that certification personally inhibits Rabbi Ralbag's interpretation of *kashrut*. This Court's adjudication of Plaintiffs' claims would "create an impermissible symbolic union of church and state." *Barghout*, 66 F.3d at 1345.

B. Adjudication of Plaintiffs' Complaint Would Violate the Free Exercise Clause.

The allegations in the Complaint are also barred by the Free Exercise Clause of the First Amendment. The First Amendment prohibits civil courts from considering "doctrinal matters, whether the ritual and liturgy or worship or the tenets of faith." *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *see also Watson v. Jones*, 80 U.S. 679, 733 (1871) (holding Courts cannot exercise jurisdiction over any matter that "concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the standard of morals required of them."). This is true because the government cannot "lend its power to one side or the other side in controversies over religious authority or dogma." *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990).

In *Scharon*, the Eighth Circuit held that it could not review personnel decisions by church-affiliated institutions because

> to review such decisions would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made. This is precisely the kind of judicial second-guessing of decision-making by religious organizations that the Free Exercise Clause forbids.

929 F.2d at 363.

Plaintiffs' Complaint fails for the same reason. Plaintiffs seek determinations of the meaning of religious kosher rules and seek to impose their own particular view of *kashrut* rather than the decisions that Rabbi Ralbag has made, both of which are forbidden by the Free Exercise Clause. *See id.*; *see also United States v. Ballard*, 322

U.S. 78, 87-88 (1944) (noting that district court properly withheld from jury "all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents").

C. Plaintiffs' Claims Also Are Not Justiciable Because the Court May Not Second-Guess Rabbi Ralbag's Determination (Based on Religious Texts and Authorities) That Hebrew National® Beef Is Kosher.

While the First Amendment bar is obvious on the face of Plaintiffs' Complaint, it is further underscored by the Affidavit of Rabbi Aryeh Ralbag. (*See* Ex. 1.) This Court need not look further than Plaintiffs' pleading to determine that Plaintiffs cannot establish subject-matter jurisdiction. To the extent, however, that any doubts as to justiciability remain—and in the alternative to its facial challenge—ConAgra submits affidavits in support of its Federal Rule of Civil Procedure 12(b)(1) motion.[4]

Plaintiffs' attacks on the kosher status of Hebrew National® beef cannot be viewed as anything other than a dispute with Rabbi Ralbag's interpretation of *kashrut*. As such, they are nonjusticiable. Rabbi Ralbag has certified Hebrew National® beef is kosher based on his definitive determination that it is kosher under *kashrut*. Rabbi Ralbag is intimately familiar with the manufacturing processes used to make Hebrew National® beef and has confirmed that those processes are consistent with *kashrut*. Finally, even if all of Plaintiffs' allegations were true, Rabbi Ralbag explains that their allegations would not render Hebrew National® beef non-kosher.

[4] Although ConAgra's argument for its 12(b)(6) motion is also contained within this memorandum pursuant to the Court's instructions, ConAgra specifically submits the affidavits solely in support of its jurisdictional challenge to Plaintiffs' Complaint and solely for consideration if the Court cannot determine subject-matter jurisdiction on the face of the Complaint.

1. Triangle K and Rabbi Ralbag have certified Hebrew National® beef as kosher.

Plaintiffs' allegations challenge directly the religious determination of Triangle K that Hebrew National® beef is kosher. (*See* Cplt. ¶ 109.) On behalf of Triangle K, Rabbi Ralbag has certified Hebrew National® beef as kosher and, furthermore, stands firmly by his determination that Hebrew National® beef is kosher. This Court lacks jurisdiction to determine that Rabbi Ralbag is wrong as to Jewish doctrine.

Plaintiffs concede that each package of Hebrew National® beef bears Triangle K's *hecsher*, which certifies its kosher status. (*Id*. at ¶ 7.) Rabbi Ralbag attests that this certification evinces his determination as a religious authority that Hebrew National® beef is kosher under the principles of *kashrut*. (Ex. 1, Ralbag Aff. ¶¶ 1-3; *see also id.* ¶ 8 (noting that Judaism has no central authority for religious doctrine).) Rabbi Ralbag unequivocally stands by his determination. Rabbi Ralbag continues to find that Hebrew National® beef is kosher even if all of Plaintiffs' allegations are true and he does so based on centuries of Jewish religious texts, teachings, and authorities.[5] (Ex. 1, Ralbag Aff. ¶ 5.) It is not for this Court to decide otherwise. *See Jimmy Swaggart Ministries*, 493 U.S. at 396; *Scharon*, 929 F.2d at 363.

2. Even if the allegations in Plaintiffs' Complaint were true (and Rabbi Ralbag denies them), Rabbi Ralbag would continue to believe that the Hebrew National® beef is kosher.

Rabbi Ralbag unequivocally asserts that even if Plaintiffs' allegations in this lawsuit were true, they have not established that Hebrew National® beef is not kosher.

[5] Upon request, ConAgra will provide the textual authorities on which Rabbi Ralbag relies should the Court deem them useful to its subject-matter jurisdiction analysis.

As explained in detail in his Affidavit, ample religious authority demonstrates that the processes used to make Hebrew National® beef are kosher. (*See, e.g.*, Ex. 1, Ralbag Aff. ¶¶ 54-90.) Although Plaintiffs attempt to paint the principles of *kashrut* as agreed-upon laws based on "a few straightforward rules," that is simply not the case. (*Id.* at ¶¶ 40-53.)

Rabbi Ralbag has carefully examined the intricacies of the processes employed to make Hebrew National® beef, including the specific allegations in the Complaint and concluded that the practices employed at the facilities that slaughter Hebrew National® beef conform with *kashrut*. (*Id.* ¶¶ 3-5; *see also* Ex. 2, Ben-David Aff.; Ex. 3, Mehesan Aff.; Ex. 4, Timmons Aff.) Moreover, Rabbi Ralbag's Affidavit demonstrates that under a "fundamental principle of Jewish law"—articulated in a centuries-old Jewish text he cites—where learned rabbis are "actively involved in ensuring that proper procedures are followed, the decision of the certifying agency to certify a product as kosher is conclusive" and alleged deviations cannot "invalidate the kosher status of [such] meat." (Ex. 1, Ralbag Aff. ¶ 89.) Under Jewish law, Rabbi Ralbag's kosher determination is final; this Court cannot disturb it. *Milivojevich*, 426 U.S. at 713.

3. Reliance on "stringent" kosher standards does not establish subject-matter jurisdiction for Plaintiffs' Complaint.

Plaintiffs suggest that this Court can exercise jurisdiction because it could apply the "neutral" standard of "stringent" or "exacting" kosher requirements to their claims. Any question as to whether Rabbi Ralbag's decisions represent "stringent" interpretations of *kashrut* cannot save Plaintiffs from the constitutional bar to adjudicating their claims. In fact, those claims only deepen the First Amendment problems.

As demonstrated by his Affidavit, Rabbi Ralbag is a devoted religious scholar who takes questions of Jewish religious doctrine, including *kashrut*, with the utmost seriousness and gravity. (*See, e.g.*, Ex. 1, Ralbag Aff. ¶¶ 6-7.) He describes himself as a "stringent, observant and G-d-fearing Jew" and notes that he is considered "ultra-Orthodox" in "common parlance." (*Id.* ¶ 7.) Rabbi Ralbag has devoted his life to the principles of Judaism and is a leading member of the country's oldest organization of Orthodox Rabbis. (*Id*. ¶¶ 6-7.) The mission of the Triangle K organization is to promote the principles of *kashrut* and to increase the amount of kosher food that is available to the public. (*Id.* ¶ 39.)

Plaintiffs' invocation of "stringent" and "exacting" kosher standards implies a unanimity of opinion amongst Orthodox religious scholars. (*See* Cplt. ¶¶ 38-39.) But Rabbi Ralbag explains that there would not be unanimous agreement amongst Jewish religious authorities as to whether beef was kosher based on any of Plaintiffs' claims. (*See* Ex. 1, Ralbag Aff. ¶¶ 38, 89-90; *see also id.* ¶ 36 (explaining that there are 1,100 kosher-certifying organizations world wide).) *See also Barghout*, 600 A.2d at 326 (noting that there are "about 50 different symbols" of kosher certifying agencies); *Korn v. Rabbinical Council*, 195 Cal. Rptr. 910, 914 (Cal. Ct. App. 1983) (unpublished). To the contrary, the allegations here involve the most granular of details of the religious rituals involved in the slaughtering and preparing of beef—details about which Jewish authorities have disagreed and debated for millennium. (Ex. 1, Ralbag Aff. ¶ 40.) For this Court to find that the practices used to make Hebrew National® beef violate *kashrut* would require the Court to find that Rabbi Ralbag—and the textual and Rabbinic

authorities upon which he bases his religious determinations—are wrong. In other words, the Court would have to inject itself into fundamental questions of Jewish religious doctrine and practices. *See Catholic Bishop*, 440 U.S. at 502; *see also Founding Church of Scientology of Washington, D. C. v. United States*, 409 F.2d 1146, 1164 (D.C. Cir. 1969) (per curiam) (noting that jury verdict was improper because it could have rested on religious literature that was not "labeling" within the meaning of the Food, Drug, and Cosmetic Act).

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Even if this Court decides that it cannot determine whether Plaintiffs have established subject-matter jurisdiction on the face of the Complaint, Rabbi Ralbag's Affidavit confirms that Plaintiffs' claims are nonjusticiable under the First Amendment.

II. PLAINTIFFS ALSO LACK ARTICLE III STANDING.

Plaintiffs' Complaint suffers from another fatal jurisdictional flaw: their allegations fail to establish that they have standing to bring the claims for which they seek relief. Plaintiffs have not alleged that they suffered any concrete and particularized injury as a result of their allegations that Hebrew National® beef is not kosher under Plaintiffs' interpretation of Jewish religious doctrine. Indeed, Plaintiffs have failed to allege that the particular Hebrew National® beef packages that they actually purchased were not kosher—nor, as they admit, can they ever make such an allegation. Because Plaintiffs fail to establish that they suffered an injury-in-fact sufficient to confer Article III standing, their claims must be dismissed.

The constitutional standing doctrine "contains three necessary elements: '[T]he plaintiff must have suffered an injury in fact,' 'there must be a causal connection between the injury and the conduct complained of,' and 'it must be likely ... that the injury will be redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs bear the burden of establishing these elements for jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

To establish an injury in fact, Plaintiffs must demonstrate "an invasion of a legally protected interest which is . . . concrete and particularized." *Lujan*, 504 U.S. at 560. The Constitution "requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972); *see also Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320 (5th Cir. 2002) (stating that Plaintiffs must establish that the defendant "violated a legal duty owed to them"). To demonstrate standing, "*named plaintiffs who represent a class must allege* and show *that they personally have been injured*, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Lewis*, 518 U.S. at 347 (emphasis added); *see also In re Zurn Pex Prods. Liability Litig.*, 644 F.3d 604, 616 (8th Cir. 2011) (noting that a court lacks jurisdiction over claims of people "who lack the ability to bring a suit themselves").

A. Plaintiffs Lack Standing Because They Have Not Alleged That They Keep Kosher.

Plaintiffs Complaint should be dismissed for their failure to demonstrate that each named plaintiff has suffered an "injury" based on the alleged non-kosher status of Hebrew National® beef.

Plaintiffs have not demonstrated that they have standing to sue because none of them allege that they keep kosher—that is, that they actually adhere to Jewish dietary restrictions. Thus, it is entirely possible that Plaintiffs are part of the large number of people who purchase kosher food for non-religious reasons and who could not claim to be injured if the food did not conform with some interpretations of *kashrut*. (*See* Cplt. ¶ 70 (noting that people purchase kosher food for reasons including "great taste").) Without alleging that the conformity of food to *kashrut* matters to them as individuals for religious reasons, Plaintiffs have not demonstrated that they "personally have been injured," and thus have not demonstrated that they have standing to bring this suit. *See Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (noting that plaintiffs in alleged class action who alleged fraudulent business practices that were not uniformly applied to all customers lacked standing to pursue their claims); *see also Lewis*, 518 U.S. at 347; *Lujan*, 504 U.S. at 560.

B. Plaintiffs Lack Standing Because They Have Not Alleged That The Products They Themselves Purchased Were Not Kosher.

As the Eighth Circuit recently reiterated, Plaintiffs must allege that the products they themselves purchased were defective. It is not enough to allege a defect in the manufacturing process that might or might not have affected the Plaintiffs' purchases.

See Zurn Pex, 644 F.3d at 616 (holding that it "is not enough for a plaintiff to allege that a product line contains a defect or that a product is at risk for manifesting this defect; rather, the Plaintiffs must allege that their product actually exhibited the alleged defect." (*quoting O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009) (internal quotation marks omitted))).

Here, the Complaint does not specifically allege that the ***particular*** Hebrew National® beef package that any named plaintiff purchased and consumed was not kosher. Instead, Plaintiffs' claims are based on allegations of intermittent *kashrut* violations at unspecified slaughtering facilities that they claim rendered some Hebrew National® beef packages not kosher. (Cplt. ¶¶ 91-92, 97, 100, 103.) Even if all of the allegations in the Complaint were true—and they are not—Plaintiffs have not alleged that all Hebrew National® beef is not kosher or that the particular packages of beef they purchased were not kosher. Plaintiffs' conclusory, vague statements of law are insufficient to save their Complaint from this fatal flaw. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007); *Ritchie*, 630 F.3d at 716.

Indeed, Plaintiffs' own Complaint precludes them from alleging that the specific beef they purchased was not kosher because Plaintiffs allege that it is "impossible for any reasonable consumer to detect" the kosher status of food. (Cplt. ¶ 1.) By their own allegations, Plaintiffs have no idea whether the products they bought were kosher or were not kosher under their purported interpretations of *kashrut*. *See Rivera*, 283 F.3d at 316-17. Plaintiffs here have not alleged that there was anything defective about the particular product each named plaintiff purchased and, as such, cannot establish standing. *See id.* at

319; *see also Hughes v. Chattem, Inc.*, 818 F. Supp. 2d 1112, 1119 (S.D. Ind. Aug. 31, 2011); *Collins v. Safeway Stores, Inc.*, 231 Cal. Rptr. 638, 643 (Cal. Ct. App. 1986) (deciding that plaintiffs who alleged that only some of the eggs at issue were contaminated lacked the ability to "prove loss or harm" in class action). For these reasons, Plaintiffs have not met their burden to demonstrate that they have standing to bring their claims and their suit should therefore be dismissed.

PART TWO: PLAINTIFFS' CLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

When ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the district court must assume that the factual allegations in the Complaint are true. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). But if the court concludes that the Complaint fails to contain "enough facts to state a claim to relief that is plausible on its face," then it must be dismissed. *Twombly*, 550 U.S. at 570. Similarly, if a claim fails to allege one of the elements necessary to recovery on a legal theory, that claim must be dismissed. *Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 355 (8th Cir. 2011).

I. PLAINTIFFS' CLAIMS ARE ALL PREEMPTED BY THE FEDERAL MEAT INSPECTION ACT.

If this Court was not barred from exercising jurisdiction by the First Amendment, and if Plaintiffs had not failed to establish standing under Article III, Plaintiffs' claims would then be preempted by federal law.

Congress has expressly preempted any state claims that impose labeling requirements that are "***in addition to***, ***or different than***" those set forth in the Federal

Meat Inspection Act ("FMIA") and the regulations promulgated under that act. 21 U.S.C.A. § 678 (West 2012) (emphasis added). In *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-31 (1977), the Supreme Court stated that the "explicit pre-emption provision" in Section 678 of the FMIA "dictate[d] the result" of a case involving a state meat labeling requirement and held that the state statute was preempted. Courts consistently have concluded that consumer fraud claims challenging the labeling of meat products – as plaintiffs do here in their attack on the "100% kosher beef" language on Hebrew National® labels – are preempted by the Federal Meat Inspection Act. *See Kuenzig v. Kraft Foods, Inc.*, No. 8:11-CV-838-T-24, 2011 WL 4031141, *5 (M.D. Fla. Sept. 12, 2011); *Meaunrit v. ConAgra Foods Inc.*, No. C 09-02220, 2010 WL 2867393, at *7 (N.D. Cal. July 20, 2010); *see also Armour & Co. v. Ball*, 468 F.2d 76, 84 (6th Cir. 1972); *Animal Legal Def. Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F. Supp. 278, 286 (D. Mass 1986); *Kircos v. Holiday Food Ctr.*, 477 N.W.2d 130, 132-33 (Mich. Ct. App. 1991); *Meat Trade Inst., Inc. v. McLaughlin*, 326 N.Y.S.2d 683, 684-85 (N.Y. App. Div. 1971).

Earlier this year, the Supreme Court explained that Section 678 of the FMIA "sweeps widely" in creating broad preemption. *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970 (2012). The Court explained section 678 "prevents a State from imposing any additional or different—***even if non-conflicting***—requirements" in a case involving slaughterhouse activities. *Id.* (emphasis added). Even if the federal regulations do not address a particular issue, such an argument is "irrelevant, because the FMIA's preemption clause covers not just conflicting, but also different or additional state

requirements." *Id.* at 971. Thus, in *Harris*, the preemption clause precluded the State of California from "impos[ing] new rules, beyond any the [Department of Agriculture's Food Safety and Inspection Service ("FSIS")] has chosen to adopt . . . ." *Id.*

Here, Plaintiffs' claims seek to impose specific kosher labeling criteria that are in addition to and different than the meat labeling criteria set forth in the FMIA and USDA regulations.[6] Thus, Plaintiffs' claims are preempted by federal law. *See id.*; *Jones*, 430 U.S. at 530-31; *see also Kuenzig*, 2011 WL 4031141 at *6-7 (explaining that federal regulations require that beef labels be pre-approved by the FSIS and that use of the labels is evidence that they passed the FSIS preapproval process such that they "are presumptively lawful and not false or misleading").

Even if this Court could exercise jurisdiction here (and it cannot), Plaintiffs claims would fall before the strong preemptive language of the FMIA.

[6] The USDA has issued guidance that does not attempt to define "kosher" but does require that products labeled as "kosher" be prepared under supervision from third-party certification agencies. *See* USDA, Ask FSIS, http://askfsis.custhelp.com/app/answers/detail/a_id/375/kw/kosher (last visited July 23, 2012) (stating that FSIS does not monitor kosher production and the "acceptability of the ritual used is the responsibility of the religious organization"); USDA, Fact Sheet: Meat and Poultry Labeling Terms, www.fsis.usda.gov/Factsheets/Meat_&_Poultry_Labeling_Terms/index.asp#10 (last visited July 23, 2012) (stating that kosher label "may be used only on the labels of meat and poultry products prepared under rabbinical supervision"); USDA, Food Standards and Labeling Policy Book 86 (August 2005), *available at* www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf (stating that "[u]se of the term[] 'Kosher' on labeling requires certifications by an appropriate third party authority"). Here, there is no allegation that ConAgra has ever violated the USDA's guidance on kosher labeling. Indeed, Plaintiffs concede that Hebrew National® beef is prepared under supervision from Triangle K, a third-party certification authority. (Cplt. ¶ 55.)

II. PLAINTIFFS' NEGLIGENCE CLAIM (COUNT I) IS BARRED BY THE ECONOMIC LOSS DOCTRINE.

Count I is a negligence claim. (Cplt. p. 55.) Plaintiffs do not assert which state's negligence law applies. A choice-of-law analysis is unnecessary, however, because this claim is barred by the economic-loss doctrine under Nebraska law (which Plaintiffs seek to apply in the context of their statutory consumer protection claims), and the laws of every state in which Plaintiffs reside.

Plaintiffs allege only economic losses from ConAgra's purported negligence. (Cplt. ¶ 144.) The economic-loss doctrine, which bars recovery for economic losses under a negligence theory, has been adopted by most jurisdictions, *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 n.2 (Fla. 1993), including in Minnesota, Arizona, Illinois, New York, Michigan, Florida, California, and Massachusetts—where the Plaintiffs reside.[7] Nebraska has also adopted the economic-

[7] ***Minnesota***: Minn. Stat. § 604.101, subd. 3 (2012) ("A buyer may not bring a product defect tort claim against a seller for compensatory damages unless a defect in the goods sold or leased caused harm to the buyer's tangible personal property other than the goods or to the buyer's real property."); ***Arizona***: *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 694 P.2d 198, 210 (Ariz. 1984) ("If the only loss is non-accidental and to the product itself, or is of a consequential nature, the remedies available under the UCC will govern and strict liability and other tort theories will not be available."), *abrogated on other grounds by Phelps v. Firebird Raceway, Inc.*, 111 P.3d 1003 (Ariz. 2005); ***Illinois***: *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 451 (Ill. 1982) ("When the defect is one of a qualitative nature and the harm relates to the consumer's expectation that a product is of a particular quality so that it is fit for ordinary use, contract, rather than tort, law provides the appropriate set of rules for recovery."); ***New York***: *King County, Wash. v. IKB Deutsche Industriebank AG, IKB*, ___ F. Supp. 2d ___, ___, No. 09 Civ. 8387, 2012 WL 1592193, at *8 (S.D.N.Y. May 4, 2012) ("Under New York's 'economic loss' rule, a plaintiff cannot recover in tort for purely economic losses caused by a defendant's negligence."); *Carpenter v. Plattsburgh Wholesale Homes, Inc.*, 83 A.D.3d 1175, 1176 (N.Y. App.

loss doctrine. *Lesiak*, 808 N.W.2d at 81. Because the economic-loss doctrine bars a negligence claim, Count I should be dismissed.

III. PLAINTIFFS' CLAIMS UNDER NEBRASKA CONSUMER PROTECTION LAWS (COUNTS II AND III) MUST BE DISMISSED BECAUSE THEY CANNOT BE APPLIED IN THIS CASE.

Plaintiffs assert claims under Nebraska's consumer protection laws, even though (i) none of them reside in Nebraska and (ii) none of them allege that they purchased Hebrew National® beef in Nebraska. They cannot do so. Plaintiffs are not entitled to relief under Nebraska's deceptive practices statute. And Nebraska's consumer protection statute broadly exempts the alleged misconduct. Moreover, Minnesota's choice-of-law rules preclude application of Nebraska law to Plaintiffs' claims.

A. Plaintiffs Cannot Maintain a Claim for Injunctive Relief Under the Nebraska Uniform Deceptive Trade Practices Act (UDTPA), Which Is the Only Relief Available.

In Count II, Plaintiffs attempt to assert a claim under the Nebraska Uniform Deceptive Trade Practices Act ("UDTPA"). (Cplt. p. 60.) This claim fails because the

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Div. 2011) (affirming district court's dismissal of negligence claim that is barred by economic loss doctrine); ***Michigan***: *Neibarger v. Universal Coops., Inc.*, 486 N.W.2d 612, 619 (Mich. 1992) (discussing history of and reaffirming economic-loss rule under state law); ***Florida***: *Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 538-41 (Fla. 2004) (same); ***California:*** *Robinson Helicopter Co., Inc. v. Dana Corp.*, 102 P.3d 268, 272 (Cal. 2004) ("The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise"); ***Massachusetts:*** *Aldrich v. ADD Inc.*, 770 N.E.2d 447, 454 (Mass. 2002) ("[P]urely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage." (quotation omitted)).

only remedy for which Plaintiffs—as individual consumers—could receive under the UDTPA is an injunction, but their allegations preclude any such relief.

There is no private right of action for damages under Nebraska's UDTPA. The statute provides only injunctive relief and only for persons "likely to be damaged" by deceptive trade practices. Neb. Rev. Stat. § 87-303(a) (2012). Plaintiffs, however, cannot establish the forward-looking requirement imposed by the UDTPA because Plaintiffs, having now learned the alleged "truth" behind the Hebrew National® label, cannot be harmed by the label in the future.

The Nebraska Court of Appeals reached this precise result in *Reinbrecht*, 742 at 247. The Court held that the terms of the statute precluded plaintiff from receiving damages under the UDTPA. *Id.* Plaintiff was also precluded from receiving injunctive relief for his claims that he was charged too much for postage stamps he purchased at Walgreens. He could not "present evidence sufficient to support an inference of future harm to him." *Id.* at 248. Because plaintiff "now knows the truth regarding the price of the postage stamps sold by Walgreens" he could not "suffer future damages" as required by the statute. *Id.*

The same is true here. Plaintiffs allege that certain practices rendered some Hebrew National® beef to be not "strictly 100% kosher." (Cplt. ¶ 158.) Plaintiffs' allegations establish that they cannot support an inference of future harm now that they "know" the alleged "truth" regarding Hebrew National® beef so they cannot state a claim

under Nebraska's UDTPA.[8] *See id.* In short, they have not alleged that they themselves will be harmed in the future if ConAgra's marketing is not enjoined.

B. Plaintiffs Fail to State a Claim Under the Nebraska Consumer Protection Act.

In Count III, Plaintiffs attempt to assert a claim under the Nebraska Consumer Protection Act ("NCPA"). (Cplt. p. 62.) As a threshold matter, it is unclear how Plaintiffs—none of whom are from Nebraska—could bring claims under the NCPA, in light of the Supreme Court of Nebraska's explanation that the Act is intended "to protect Nebraska consumers." *Arthur v. Microsoft Corp.*, 676 N.W.2d 29, 37 (Neb. 2004).

Moreover, the Nebraska Consumer Protection Act does "not apply to actions or transactions otherwise permitted, prohibited, or regulated under laws administered by . . . any . . . regulatory body or officer acting under statutory authority of this state or the United States." Neb. Rev. Stat. § 59-1617 (2012). This exemption is broadly applied to conduct regulated by state or federal agencies. *See Wrede v. Exchange Bank of Gibbon*, 531 N.W.2d 523, 529 (Neb. 1995) (citing cases). In *Little*, 354 N.W.2d at 152, the Supreme Court of Nebraska held that misrepresentations made by a bank and a realtor, though actionable as fraudulent misrepresentations under tort law, were not actionable under the Consumer Protection Act because both the bank and the realtor are "regulated." *See also Wrede*, 531 N.W.2d at 529 ("[W]hile particular conduct is not immunized from

[8] Plaintiffs' claims under the UDTPA fail for an additional reason: The UDTPA does not apply to "[c]onduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency," Neb. Rev. Stat. § 87-304(a)(1) (2010), so the regulated nature of food precludes their claims. *See also supra,* Part II, (I).

the operation of the Consumer Protection Act merely because the actor comes within the jurisdiction of some regulatory body, immunity does arise if the conduct itself is also regulated"); *Hydroflo Corp. v. First Nat'l Bank of Omaha*, 349 N.W.2d 615, 622 (Neb. 1984) ("[S]ince the requirements for opening corporate accounts are governed by banking standards indirectly approved by the Department of Banking and Finance, the practice of opening accounts is excluded from the terms of the Consumer Protection Act").

As described above, ConAgra's labeling of its food products is regulated by the United States Department of Agriculture (USDA). The Federal Meat Inspection Act empowers the USDA to protect the public health and welfare of consumers by ensuring that "meat and meat food products . . . are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C.A. § 602 (West 2012). The USDA deems a food "misbranded" if its labeling "is false or misleading in any particular." 21 U.S.C.A. § 601(n)(1) (West 2012). The USDA has promulgated extensive regulations about the proper labeling of food. *See, e.g.*, 9 C.F.R. § 317.309 (2012) (regulations regarding nutrition label content); 9 C.F.R. § 317.313 (2012) (regulations regarding nutrition content claims); 9 C.F.R. § 317.380 (2012) (limits on claims regarding reducing or maintaining body weight). Moreover, no meat label can be used until it is *preapproved* by the USDA. 9 C.F.R. § 317.4 (2012). "If a label submitted for review is determined to be false or misleading, the FSIS can prohibit the use of the label." *Kuenzig v. Kraft Foods, Inc.*, No. 2011 WL 4031141, at *5. Because the USDA regulates meat labeling,

ConAgra cannot be sued under the NCPA for the labels on its Hebrew National® beef. *See Little*, 354 N.W.2d at 152.

C. In the Alternative, Minnesota's Choice-of-Law Rules Preclude Application of Nebraska Law.

Even if Plaintiffs could otherwise state claims under Nebraska law (and as explained above, they cannot), Minnesota's choice-of-law rules preclude application of Nebraska law.

When there is a question of what state's law should apply to an action, a district court sitting in diversity must apply the choice-of-law rules of the state in which it sits. *Prudential Ins. Co. of Am. v. Kamrath*, 475 F.3d 920, 924 (8th Cir. 2007). Under Minnesota choice-of-law rules, the court must engage in a three-step inquiry to determine whether a particular state's law should apply. *See Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 469-70 (Minn. 1994). This three-step inquiry requires the court to determine (1) whether a conflict will be created by choosing the proposed law; and if so, (2) whether the proposed law can be constitutionally applied. *Id.* at 469. If the proposed law may be constitutionally applied, then the court must decide (3) whether the "five choice influencing factors" set forth in *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973), weigh in favor of applying the proposed law. *Id.* at 470.

1. An Actual Conflict Exists Between Nebraska's Consumer Protection Laws and Other States' Consumer Protection Laws.

The first step in Minnesota's choice-of-law inquiry is to consider "whether the choice of one state's law over another creates an actual conflict." *Id*. at 469. The Eighth Circuit, applying Minnesota law, has already observed that the consumer protection laws

of the fifty states "vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules." *St. Jude Med.*, 425 F.3d at 1120 (quoting *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002)). Courts have noted that UDTPA varies considerably from the "uniform" laws enacted by other states. *See, e.g.*, *HK Sys. Inc. v. Eaton Corp.*, No. 02-C-1103, 2007 WL 3012993, at *2 n.1 (E.D. Wisc. 2007) (observing that the Nebraska Uniform Deceptive Trade Practices Act "differs considerably from the uniform law" on which it is based). Thus, under *St. Jude Medical*, Nebraska's consumer protection laws cannot be applied to all Plaintiffs' claims.

In addition, even a cursory glance at the consumer fraud laws demonstrates material differences between the Minnesota and Nebraska statutes. The definitions of unlawful conduct vary between the applicable statutes of Minnesota and Nebraska. *Compare* Neb. Rev. Stat. §§ 59-1602 to 1606 (2012) *with* Minn. Stat. § 325F.69 subd. 1 (2012). The available damages also differ. *Compare* Neb. Rev. Stat. § 59-1609 (2012) *with* Minn. Stat. § 8.31 subd. 3a (2012).

2. Plaintiffs' allegations are insufficient to demonstrate that the Constitution would allow Nebraska law to be applied to their claims.

The Court's next step "is to determine if the law of both states may be constitutionally applied to the case." *Burks v. Abbott Labs.*, 639 F. Supp. 2d 1006, 1012 (D. Minn. 2009) (citing *Jepson*, 513 N.W.2d at 469). Here, the allegations in the Complaint are insufficient to establish "significant contact or significant aggregation of contacts" between Nebraska and each Plaintiffs' claims that create state interests, "such

that choice of its law is neither arbitrary nor fundamentally unfair." *Jepson*, 513 N.W.2d at 469 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)); *see also St. Jude Medical, Inc.*, 425 F.3d at 1120. Because Plaintiffs' claims can be dismissed under the third prong of Minnesota's choice-of-law analysis, at this time the Court need not "conduct an analysis of [each] plaintiff's particular situation and the state laws that potentially apply" to determine whether application of Nebraska law is constitutional and may be applied to each putative class member. *See Cruz v. Lawson Software, Inc.*, No. CIV 08-5900, 2010 WL 890038, at *8 (D. Minn. Jan. 5, 2010).

3. Minnesota's "choice influencing factors" weigh against applying Nebraska law.

Assuming, *arguendo*, that Nebraska law could govern the claims of non-Nebraska consumers who purchased products outside Nebraska, Plaintiffs' claims fail under the next required step of Minnesota's choice-of-law analysis. The "choice-influencing" factors preclude application of Nebraska law to all of Plaintiffs' claims in this case. *See Jepson*, 513 N.W.2d at 470.

a. Predictability of result

The first factor, predictability of results, "represents the ideal that litigation on the same facts, regardless of where the litigation occurs should be decided the same to avoid forum shopping." *Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 604 N.W.2d 91, 94 (Minn. 2000). The predictability of results factor is most relevant when parties have expectations about the applicable law, such as in "consensual transactions." *Milkovich v. Saari*, 203 N.W.2d 408, 412 (Minn. 1973).

Predictability precludes applying Nebraska law to Plaintiffs' claims. Here, although Plaintiffs attempt to apply one state's laws to all consumers nationwide does not raise a concern for forum shopping, the requirement that litigation "on the same facts . . . should be decided the same" precludes application of Nebraska law. *See id.* The predictability factor supports the notion that the state in which each alleged consumer purchased Hebrew National® beef governs their claims. *See Foster v. St. Jude Med., Inc.*, 229 F.R.D. 599, 605 (D. Minn. 2005) (citing Eighth Circuit and Minnesota authority in support of decision that the law of the state where the allegedly defective device was implanted would govern plaintiffs' claims). This is especially so because Plaintiffs' claims rest on the "consensual transaction" of a purchase of Hebrew National® beef. *See Milkovich*, 203 N.W.2d at 412.

This case raises particular issues under Minnesota's choice-of-law analysis because plaintiffs' claims involve activities that occurred in Minnesota. For example, plaintiff Melvin Wallace alleges that he resides in Dakota County, Minnesota. (Cplt. ¶ 29.) Plaintiffs also allege that at least one of the facilities from which ConAgra obtains beef is in South St. Paul, Minnesota. (*Id.* ¶ 46.) In fact, Plaintiffs allege that "many of the [alleged] violations at issue occurred in th[e] district [of Minnesota]." (*Id.* ¶ 24.)

None of the named Plaintiffs alleges that he or she is a resident of Nebraska, and none allege purchasing any Hebrew National® beef in Nebraska. Thus, allowing Plaintiffs to proceed with their claims under Nebraska law would thwart the predictability principle enforced by Minnesota's choice-of-law rules. *See Nodak*, 604 N.W.2d at 94.

b. Maintenance of interstate and international order

Under the maintaining-interstate-order factor, the court is "primarily concerned with whether the application of [one state's] law would manifest disrespect for [other states'] sovereignty or impede the interstate movement of people and goods." *Jepson*, 513 N.W.2d at 471. In examining this factor, a court looks at the contacts the state has with the issues being litigated. *Myers v. Government Employees Ins. Co.*, 225 N.W.2d 238, 242 (Minn. 1974). The court's goal should be "to maintain a coherent legal system in which the courts of different states strive to sustain, rather than subvert, each other's interests in areas where their own interests are less strong." *Jepson*, 513 N.W.2d at 471.

States have expressed a strong interest in protecting the consumers that reside in their state and that purchase products in their state. *See Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 592 (9th Cir. 2012) ("The automobile sales at issue in this case took place within 44 different jurisdictions, and each state has a strong interest in applying its own consumer protection laws to those transactions."); *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 263 F.R.D. 205, 211 n. 12 (E.D. Pa. 2009) ("Given the fact that the alleged injury occurred in each of the fifty states, and given each state's strong interest in protecting its own consumers (but a far weaker interest in protecting consumers from other states), . . . it is clear (and in the context of this Motion, the parties do not dispute) that the law of a particular state will govern any overcharge injury arising in that state." (citations omitted)); *McCord v. Minnesota Mut. Life Ins. Co.*, 138 F. Supp. 2d 1180, 1187-88 (D. Minn. 2001) (following Minnesota choice-of-law rules, and applying Louisiana law because the policy at issue was sold in

Louisiana, the alleged torts occurred in Louisiana, and plaintiffs' alleged damages were incurred in Louisiana, noting that Louisiana has an interest in protecting consumers residing in its state); *see also Northwest Airlines, Inc. v. Astraea Aviation Servs., Inc*., 111 F.3d 1386, 1394 (8th Cir. 1997) (applying Minnesota law to slander, defamation, and libel claims for statements published in Texas newspaper where statements were first made and published in Minnesota where plaintiff was from Minnesota and defendant was from Texas). The goal of maintaining interstate order is best achieved by rejecting Plaintiffs' novel invitation to apply Nebraska law to consumers who do not live in or make purchases in Nebraska.

c. Simplification of the judicial task, advancement of the forum's governmental interest, and application of the better rule of law.

The remaining factors either are neutral or militate against applying Nebraska law.

Simplification of the judicial task. The Minnesota Supreme Court has explained that "simplification of the judicial task[] has not been given much weight in [its] precedent. *Nodak*, 604 N.W.2d at 91.

Advancement of the forum's governmental interest. The fourth factor considers "which choice of law most advances a significant interest of the forum." *Jepson*, 513 N.W.2d at 472. Minnesota's interests are not advanced in any way by applying Nebraska law. Instead, Minnesota courts have recognized that Minnesota's interests are "advanced by application of Minnesota law." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 455 (Minn. Ct. App. 2001). In this case, Minnesota's interests are advanced by applying Minnesota's consumer protection laws based on allegations regarding a

purchase by a Minnesota consumer that involve, at least in part, conduct that occurred in Minnesota. (*See* Cplt. ¶¶ 29, 46.) This factor plainly weighs against application of Nebraska law to Plaintiffs' claims.

Application of the better rule of law. Minnesota courts have "not placed any emphasis on this factor" in more than 20 years. *Nodak*, 604 N.W.2d at 96.

In sum, Minnesota's choice-of-law factors overwhelmingly weigh against application of Nebraska law to Plaintiffs' claims. *See, e.g., Horvath v. LG Elecs. Mobilecomm U.S.A., Inc.*, No. 3:11–CV–01576, 2012 WL 2861160, at *3 (S.D. Cal. Feb. 13, 2012) (granting 12(b)(6) motion to dismiss claims of non-California residents brought under California state law).

IV. PLAINTIFFS' CLAIMS UNDER OTHER STATES' CONSUMER PROTECTION LAWS (COUNT IV) FAILED TO PLEAD NECESSARY ELEMENTS UNDER THOSE LAWS.

Perhaps recognizing that they are unlikely to be able to maintain their claims under Nebraska law, Plaintiffs alternatively attempt to assert claims under the consumer protection laws of their home states. But Plaintiffs failed to plead their fraud claims with specificity as required by Rule 9(b). In addition, they fail to allege facts that would entitle them to relief under particular state laws.

A. Plaintiffs' Count-IV claims must be dismissed for failure to plead plaintiff-specific allegations of violations of the various state laws.

The mandate of Rule 9(b) to plead with specificity "applies to claims of false advertising, deceptive trade practices, unlawful trade practices, and consumer fraud," just as it does to all other allegations of fraud. *Select Comfort Corp. v. Sleep Better Store*,

LLC, 796 F. Supp. 2d 981, 983 (D. Minn. 2011). Plaintiffs must identify "who, what, where, when, and how" of their fraud-based claims. *See Costner*, 317 F.3d at 888.

Plaintiffs failed to allege the particulars of the alleged fraud in their complaint. Not one of the Plaintiffs allege *where* or *when* the supposedly fraudulent statements were made to them – that is, when they purchased Hebrew National® beef. *See Toshiba Am. HD DVD Mktg. & Sales Pracs. Litig.*, No. 08-939, 2009 WL 2940081, at *13 (D.N.J. Sept. 11, 2009) (determining that plaintiffs' failure to allege specifics including "where" and "when" they allegedly purchased HD DVD players failed Rule 9(b)'s pleading requirements). Nor do Plaintiffs allege how much they paid for the Hebrew National® beef they purchased or how much other "comparable" beef cost at the time. *See id.* None of the Plaintiffs allege that they ever read the website language concerning the "stringent" or "exacting" standard, or when or where they did so. (*See* Cplt. ¶ 67.)

Plaintiffs' failure to allege the "who, what, where, when, and how" of their fraud-based claims necessitates their dismissal. *See Costner*, 317 F.3d at 888; *Russo v. NCS Pearson, Inc.*, 462 F. Supp. 2d 981, 1003 (D. Minn. 2006).

B. Plaintiffs' Request for an Injunction Is Precluded by Their Own Allegations.

To the extent that Plaintiffs seek an injunction under certain states' consumer-protection statutes, their claims fail because Plaintiffs have not shown and cannot show they are likely to be deceived in the future. *See, e.g.*, Minn. Stat. § 325D.45, subd. 1 (2012) (requiring potential for future injury); *Hayna v. Arby's, Inc.*, 425 N.E.2d 1174, 1186 (Ill. App. Ct. 1981) (affirming dismissal of claim under Illinois Deceptive Trade

Practices Act, 815 ILCS 510/2, observing that Arby's practices of allegedly misrepresenting its roast beef are not likely to harm plaintiff in the future where: "[plaintiff] does not and cannot credibly contend that [Arby's] advertising practices would likely mislead her into resuming the purchase of [its] sandwiches on the mistaken assumption that [it] ha[s] ceased using the simulated roast beef substitute"); *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 951 (S.D. Cal. 2007) (an injunction would not redress plaintiff's injury where she is now aware of linens' thread count).

V. PLAINTIFFS' BREACH-OF-CONTRACT CLAIMS (COUNT VI) MUST BE DISMISSED BECAUSE PLAINTIFFS LACK PRIVITY AND FAILED TO ALLEGE ADEQUATE PRESUIT NOTICE.

Plaintiffs allege "breach of contract" in Count VI of their Amended Complaint. (*See* Cplt. p. 67.) Plaintiffs have not alleged which states' contract laws they are proceeding under but a choice-of-law analysis is not necessary for this claim. In Nebraska, and in every state in which plaintiffs reside, Plaintiffs cannot go forward with their contract claims because they have not—and cannot—allege privity between themselves and ConAgra.[9]

[9] ***Arizona*****:** *Hayden Bus. Ctr. v. Pegasus Dev.*, 105 P.3d 157, 160 (Ariz. Ct. App. 2005), *abrogated on other grounds, Lofts at Fillmore Condo. Ass'n v. Reliance Commercial Constr., Inc.*, 190 P.3d 733, 736 (Ariz. 2008); ***California*****:** *Superior Gunite v. Mitzel*, 12 Cal. Rptr. 3d 423, 424 (Cal. Ct. App. 2004); ***Florida*****:** *Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37, 39 (Fla.1988); ***Illinois*****:** *Mellander v. Kileen*, 407 N.E.2d 1137, 1138 (Ill. App. Ct. 1980); ***Massachusetts*****:** *Monahan v. Town of Methuen*, 558 N.E.2d 951, 957 (Mass. 1990); ***Michigan*****:** *Nat'l Sand, Inc. v. Nagel Constr., Inc.*, 451 N.W.2d 618, 620 (Mich. Ct. App. 1990); ***Minnesota*****:** *Three Putt, LLC v. City of Minnetonka*, No. A08-1436, 2009 WL 1515572, at *5 (Minn. Ct. App. June 2, 2009) (citing *N. Nat'l Bank v. N. Minn. Nat'l Bank*, 70 N.W.2d 118, 123 (Minn. 1955)); ***Nebraska*****:** *Lawyers Title Ins. Corp. v. Hoffman*, 513 N.W.2d 521, 525 (Neb. 1994); ***New York*****:** *Jesmer v. Retail Magic, Inc.*, 863 N.Y.S.2d 737, 737 (App. Div. 2008).

Plaintiffs' breach-of-contract claim also fails for lack of required presuit notice under the Uniform Commercial Code (UCC)—which has been adopted in all of the states in which Plaintiffs reside. Under Nebraska's enactment of the U.C.C., and under the U.C.C. enactments of every state in which Plaintiffs reside, Plaintiffs were required to provide pre-suit notice of the alleged breach or be barred from any remedy. They have failed to allege sufficiently their compliance with the notice requirement.

The U.C.C.'s notice requirement is not a mere formality. It is firmly rooted in public policy, serves important commercial goals, and promotes the orderly flow of commerce. *See E. Air Lines, Inc. v. McDonnell Douglas, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 972 (5th Cir. 1976). For that reason, failure to provide proper notice is a complete bar to *any* recovery under every state's laws in which plaintiffs reside. *See* Neb. Rev. Stat. § 2-607(3)(a) (2012) (requiring buyer to give notice "or be *barred* from *any* remedy" (emphasis added)); Cal. Com. Code § 2607(3)(A) (2012) (same); N.Y. U.C.C. Law § 2-607(3)(a) (2012) (same); Minn. Stat. § 336.2-607(3)(a) (2012) (same); 810 ILCS 5/2-607(3)(a) (2012) (same); Mass. Gen. Laws ch. 106, § 2-607(3)(a) (2012) (same); Mich. Comp. Laws § 440.2607(3)(a) (2012) (same); Fla. Stat. § 672.607(3)(a) (2012) (same); Ariz. Rev. Stat. § 47-2607(C)(1) (2012) (same). Where the buyer fails to plead reasonable notice, the complaint must be dismissed. *See Alvarez*, 656 F.3d at 932 (affirming district court's dismissal of state-law breach of contract and warranty claims based on plaintiff's failure to plead notice); *see also Whitwell v. Wal-Mart Stores, Inc.*, No. CIV 09-513-GPM, 2009 WL 4894575, at *6 (S.D. Ill. Dec. 11, 2009) (dismissing claims under Rule 12(b)(6) for failure to allege pre-suit notice).

Plaintiffs have not alleged when they purchased Hebrew National® beef nor when they allegedly provided notice (except for two Plaintiffs). Plaintiffs allege only that "[t]o the extent required, the Plaintiffs have provided Defendant pre-filing notice under each of the above listed [consumer protection] statutes and/or limited their claims." (Cplt. ¶ 174.) This vague, boilerplate allegation is insufficiently specific to raise a plausible inference that Plaintiffs provided the notice of breach within a reasonable amount of time as required by the U.C.C. *See Alvarez*, 656 F.3d at 932.

The Complaint alleges that California plaintiffs Stillwill and Saenz Valiente provided notice under the California Consumer Legal Remedies Act, and Massachusetts plaintiff Burnham provided notice under the Massachusetts Consumer Protection Act. (*See* Cplt. ¶ 174; Exs. K-L.) But their letters do not satisfy the notice requirement under the U.C.C. First, the letter from Burnham was sent simultaneously to commencing suit (on May 18, 2012). As a matter of law, this is not reasonable notice under the U.C.C. *Alvarez,* 656 F.3d at 932. Second, the letter from Stillwill and Saenz Valiente was received by ConAgra on April 30, 2012, only eighteen days earlier. Even if this eighteen days constituted "reasonable" pre-suit notice (and ConAgra denies that it did), both letters also fail to show these plaintiffs' compliance with the requirements for notice under the U.C.C. Plaintiffs do not allege – and the letters do not contain – any facts regarding when Burnham, Stillwill, or Saenz Valiente purchased Hebrew National® beef. *See Adler v. U.S. for Use & Ben. of Gen. Tire & Rubber Co.*, 270 F.2d 715, 719 (8th Cir. 1959). Thus, there is no basis for this Court to assess whether they provided notice in a reasonable amount of time. Such a failure is fatal to their claims.

In sum, Plaintiffs cannot recover under breach of contract under the U.C.C. without first providing reasonable notice to the allegedly breaching party, and they have failed to allege such notice with the requisite specificity. For this reason, Count VI should be dismissed.[10]

CONCLUSION

For the reasons stated above, the Complaint should be dismissed in its entirety.

Dated: July 26, 2012

Respectfully submitted,

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[10] Count VI should also be dismissed for the same reasons Plaintiffs lack standing: Plaintiffs have not alleged that any of the individual products they purchased breached any purported contract. *Zurn Pex*, 644 F.3d at 616 (noting that "it 'is not enough' for a plaintiff 'to allege that a product line contains a defect or that a product is at risk for manifesting this defect; rather, *the plaintiffs must allege that their product actually exhibited the alleged defect.*'" (emphasis added; quoting *O'Neil v. Simplicity, Inc.*, F.3d 501, 503 (8th Cir. 2009))). According to Plaintiffs' allegations, "it is impossible for any reasonable consumer to detect" whether a product is kosher. (*See* Cplt. ¶ 1.)