

UNITED STATE 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 all others similarly situated,

Plaintiffs,

vs.

CONAGRA FOODS, INC d/b/a Hebrew
National, a Delaware corporation.

Defendant.

Case No. 12-cv-01354-DWF-TNL

**PLAINTIFFS' MEMORANDUM
OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISIDICIION**

(Jury Trial Demanded)

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I. INTRODUCTION

This lawsuit challenges Defendant ConAgra Foods Inc.’s deceptive and misleading representations regarding its Hebrew National beef products. ConAgra states that it adheres to the most exacting and rigorous kosher standard “as defined by the most stringent Jews who follow Orthodox Jewish Law”—when in fact it does not. The fraudulent mislabeling of kosher food has been a significant problem in the United States for years. Compounding the problem is the fact that it is impossible for any reasonable consumer to detect. As explained in the *New York Times*:

“Kosher food is one of the products sold that is fraught with the potential for consumer fraud,” said W. Cary Edwards, the state’s Attorney General. “This is because it is essentially a ‘blind’ item; that is, buyers must rely on the integrity of the seller and/ or the protection of the government to prevent deception.... “In most cases, he said, “you can’t tell by looking whether foods have been prepared and maintained so that they meet kosher requirements”¹

ConAgra moves to dismiss Plaintiffs’ First Amended Complaint (“FAC”), arguing that Plaintiffs’ claims are barred by the First Amendment because “any resolution of Plaintiff’s claims necessarily will require this Court to enforce kashrut and evaluate the religious correctness of kosher determinations made by the rabbis of Triangle K.” Def. Br. at 9 (Doc. 16). ConAgra bases its arguments primarily on the affidavit of Rabbi Ralbag of Triangle K, ConAgra’s kosher certifier, claiming that: (1) kosher rules are not a series objective rules that can be evaluated for compliance, and (2) because there is

¹ New York Times, *State Cracks Down on Kosher Cheats*, Jan. 3, 1988, FAC Ex. C. All references to “FAC Ex.” are to the exhibits attached to the First Amended Complaint (Doc. 1). All references to “Ex.” are to the exhibits attached to the Affidavit of Hart Robinovitch filed concurrently herewith.

disagreement amongst different sects of Orthodox Jews as to certain kosher standards, there really is no definition of “kosher as defined by the most stringent Jews who follow Orthodox Jewish Law.” Remarkably, Ralbag’s affidavit sharply conflicts with the prior testimony and statements Ralbag has proffered to other courts, where he has urged that in fact a secular court could readily determine whether a product was kosher according to Orthodox standards because “there is no debate about the meaning of the word ‘kosher’ among different “sects” of Jews.”² As further explained:

Since the term “kosher” relates to objectively ascertainable qualities of the product being sold -- *i.e.*, its ingredients and how it has been processed -- this is not a case involving a term that has no objective meaning and has only theological significance. This case does not concern descriptive terms pertaining to religion that are amorphous and are definable only in religious terms. The word “kosher” has a well-established objective meaning when applied to the content and preparation of food. Nor is this a case in which enforcing consumer expectations will routinely catapult the state into interpretations of religious doctrine.³

Indeed, Ralbag endorsed the position that any “attempts to paint these dietary standards as a confusing swirl of freakish mysticism and bizarre spirituality, open to an infinite number of conflicting interpretations... is *untrue*.”⁴

The Court may reject ConAgra’s First Amendment arguments for two reasons.

First, Ralbag’s Affidavit provides the Court a means to decide this matter using neutral

² Opening Brief of Intervenors Union of Orthodox Rabbis a/k/a/ Agudath Harabonim in *Commack Self Service Kosher Meats, Inc. v. Weiss*, 2001 WL 34106424, at *16 (2nd Cir. 2001)(Ex. 1). Rabbi Ralbag is and was one of the Union of Orthodox Rabbis that sought to have New York’s kosher laws upheld as constitutional.

³ 2001 WL 34106424, at *18.

⁴ Brief of Amicus Curiae in *Barghout v. Bureau of Kosher Meat and Food Control*, 1994 WL 16049942, at 10-11 (4th Cir 1994)(Ex. 2).

principles of law, without addressing any ecclesiastical questions. Clear and direct contradictions exist between Ralbag's affidavit her and averments asserted in other litigation. These credibility issues, which should be resolved using neutral evidentiary and procedural rules mean that this Court may disregard the affidavit and rely on Ralbag's prior representations that in fact a clear standard exists for what is considered kosher by Orthodox authorities. Determining compliance therewith rests on a straightforward, objective, factual inquiry that can again be answered using neutral principles of civil law.

Second, and perhaps more importantly, if this Court finds that Ralbag's recent affidavit is credible, *or* that determining its credibility would implicate ecclesiastical questions (which it would not), the Court could nonetheless apply the affidavit to the facts in this case. Ralbag's affidavit demonstrates that contrary to what ConAgra has steadfastly represented to consumers—that all Hebrew National products rigorously adhere to kosher standards “*as defined by the most stringent Jews who follow Orthodox Jewish Law*” and that there are “strict guidelines kosher manufacturers *must* follow”—no such stringent definition really exists at all. *See* Ralbag Aff. ¶¶34, 37-38, 49; Def. Br. at 10-11. If that is true, ConAgra is profiting by promoting a product at higher prices based on representations that its products strictly adhere to a particularly defined standard that it now says *does not exist*.

In summary, ConAgra's self-serving suggestion that the claim in this case raises ecclesiastical questions proves too much. Either (1) Ralbag's position in prior cases demonstrates that there is a clear standard for what the strict Orthodox definition of

kosher is and the only question in this case is whether that standard was followed in fact; or, (2) there is no agreement as to what the strict Orthodox definition of kosher is; in which case ConAgra has essentially conceded its case given the fact that it has profited from the perception of rigorous adherence to a illusory standard that it suddenly reveals. Thus, despite ConAgra's contention, this Court is neither tasked with resolving religious disputes nor establishing any religious doctrine or kosher rules. This Court is simply asked to determine if ConAgra's representations about the products it sold were misleading to consumers. The substance or theological correctness of kosher standards is not being challenged and this Court need not resolve any ecclesiastical or doctrinal questions. Rather, the Court only needs to determine whether ConAgra, *in fact*, followed its own stated standard—or fraudulently marketed an amorphous standard as an objective one in order to charge a premium for its product.

For years, Hebrew National presented itself to the public as “answering” to a “Higher Authority.” ConAgra—a billion dollar food conglomerate—now seeks to codify that famous slogan into a rule of law, preventing mainstream consumers of kosher products from being able to redress their injuries in civil court. Critically, the claims here are not against any religious entity holding any religious beliefs. The claims here are only presented against ConAgra, a secular, Fortune 500 company, for representing that the products it sold adhered to a standard with which it failed to comply. As Plaintiffs demonstrate, the First Amendment neither divests this Court of jurisdiction, nor prevents it from hearing the merits of this dispute.

ConAgra's remaining attempts to defeat Plaintiffs' claims are unavailing. Plaintiffs have standing to bring their consumer fraud, breach of contract, and negligence claims to this Court. Those claims are not preempted. Nebraska law applies to this dispute, and under those laws—or any state's law—this case can and should go forward on the merits.

II. BACKGROUND FACTS

A. The Kosher Food Industry Has Turned Into Big Business.

1. ConAgra Manufactures Hebrew National Products.

ConAgra Foods., Inc. is not a religious institution. Rather, ConAgra is one of the largest publically-traded corporations (NYSE: CAG; #215 on 2012 Fortune 500) in America. FAC ¶¶42-43. It is a secular company, holding no religious beliefs of its own. FAC ¶¶4-5. ConAgra's primary business is to manufacture a number of different lines of packaged food, including "Hebrew National" branded products. Through its Hebrew National division, ConAgra manufactures and brands kosher meat products such as hot dogs, salami and sausages. *Id.* As one of the Country's largest food companies, ConAgra's goal is to sell the greatest quantity of Hebrew National products to consumers for the highest possible price while minimizing manufacturing costs. *Id.*

2. The Growth of the Kosher Food Industry Among Mainstream Americans.

"Kosher food has blossomed to a \$9.4 billion a year industry whose sales climb at an annual rate of 15 percent." ConAgra Press Release, *Let's be Frank* (FAC Ex. J) (citing *The Kosher Food Market*, Mintel Report, October 2005)(Ex. 3); FAC ¶¶70. While

at one time kosher food was consumed primarily by people of the Jewish faith, today over 86% of kosher food is purchased by persons other than observant Jews. FAC ¶¶78.⁵ These consumers seek the quality assurances that kosher food is represented to have. Since kosher meat sells at a premium price compared to non-kosher meat, ConAgra has a financial incentive to expand sales of its Hebrew National brand. FAC ¶¶2-4, 15.

In recent years, in order to increase its profits, ConAgra has engaged in a major marketing campaign to try to capture a greater segment of the expanding kosher food market by emphasizing the strict and rigorous kosher standards that its Hebrew National products adhere to. FAC ¶¶68-72.⁶ ConAgra represents that while kosher food standards may have originated as a religious matter over 3,000 years ago, today the appeal of kosher foods has gone “mainstream with a passion” creating “surging demand” amongst consumers of all faiths:

Today, the appeal of kosher quality, especially for moms, is going mainstream with a passion. Indeed, for many Americans, kosher is the "new organic." This summer, with research confirming its growing appeal and relevance, Hebrew National(R) is launching a major marketing campaign to satisfy surging demand for its premium kosher all-beef franks

⁵ See also, *Spreading The Word On Kosher*, San Jose Mercury News, Aug. 16, 2012 (Ex. 4); *Kosher: The Hottest Word On Food Labels*, Burnham, www.npr.com, June 21, 2012 (“The kosher market is no longer limited to orthodox Jews. ...There is a feeling by many consumers that kosher is somehow better, more wholesome,” says Mintel analyst Lynn Dornblaser.”)(Ex.5).

⁶ ConAgra Press Release, *Hebrew National Launches Summer Campaign to Underscore Appeal of Kosher Quality as Valued Trustmark for Mainstream Americans*, June 15, 2006 (FAC Ex. I); ConAgra News Release, *ConAgra Foods – Survey – Seals & Standards of Quality Give Grocery Shoppers Confidence; Consumers Increasingly Seek Trust Marks as Signs of Better Food; Consumer Trend Towards Trust Marks; Organic and Kosher Trust Marks ‘Seal the Deal More Than Ever*, May 8, 2006 (FAC Ex. F).

among mainstream American shoppers, who are discovering anew kosher's value as a "trustmark" for great-tasting, good-for-you, quality food.

Hebrew National Launches Summer Campaign (FAC Ex. I); FAC ¶¶67-72.⁷ Thus, in 2006 ConAgra commissioned a national survey of consumer shopping habits and trends.⁸ The survey found that “kosher” is one of the top eight “seals, standards and symbols” (or “trustmarks”) on food labels that consumers rely on as a sign of quality food. FAC ¶¶69-72. In response, ConAgra aggressively sought to expand its business through new marketing campaigns aimed at emphasizing Hebrew National’s quality and strict observance of kosher processing standards.

The Kosher trend is also gaining momentum as more people come to understand the quality connection associated with the Kosher seal - which certifies both high-quality ingredients *and processes that meet strict Kosher standards*.

* * *

Many consumers find similar appeal for product attributes in both the Kosher and organic categories, as motivations for choosing Kosher - such as quality and purity of ingredients, and *adherence to strict standards during manufacturing* - are closely akin to the driving motivations behind the strong organic trend.

* * *

ConAgra Foods intends to position the brand to further accelerate the growing demand for Hebrew National franks, enhancing in-store marketing efforts to more clearly identify and highlight the benefits of Kosher.

⁷ See also Mintel Press Release, Feb. 2009. (“Kosher food has gained the reputation of being more carefully produced and thoroughly inspected than non-kosher food,” comments Marcia Mogelonsky, Ph. D, senior analyst at Mintel [Market Research]”)(Ex. 3).

⁸ ConAgra News Release, *ConAgra Foods – Survey – Seals & Standards of Quality Give Grocery Shoppers Confidence* (FAC Ex.F).

ConAgra Foods – Survey – Seals & Standards of Quality Give Grocery Shoppers Confidence, FAC ¶69 and Ex. F.

Because many of these standards involve inspecting and selecting only the very healthiest and cleanest cows, by emphasizing its “adherence to strict standards during manufacturing” ConAgra assures consumers that the meat used in Hebrew National products is of the very highest quality and not any “mystery meat surprise.”⁹ In doing so, ConAgra makes clear to consumers that there are strict processing standards for kosher food that “must” be followed by manufacturers and that ConAgra steadfastly follows those standards to the most rigorous and exacting degree.

Part of kosher's appeal is ***strict guidelines kosher manufacturers must follow*** to ensure cleanliness, purity of ingredients and safety. Kosher food preparation is supervised by a rabbi and includes examination of ingredients as well as processing and packaging equipment. ***These standards are so rigorous that a food can be barred from receiving kosher certification if even a single non-kosher ingredient that makes up only one-tenth of one percent of the total is found.***

Let's be Frank (FAC Ex. J)(emphasis added); *See also Hebrew National Launches Summer Campaign* (Ex. I to FAC)(same).

ConAgra further attempts to gain consumer's trust by promoting that “We answer to a higher authority;” that ingredients in Hebrew National products “meet a higher standard;” and by offering consumers its “kosher guarantee.” FAC ¶68, 72-73, 188.

⁹ *Let's be Frank - When Buying Hot Dogs, Parents Want 'Fun Food' They Can Trust, Not a 'Mystery Meat' Surprise*, ConAgra News Release, June 28, 2006 (FAC ¶70 and Ex. J)

Certainly, ConAgra makes no mention in any of its marketing materials of the story now told in its motion and Ralbag's affidavit – that there really are no definable kosher standards at all - just a series of loose suggestions, “presumptions,” and excuses for every conceivable rule and transgression that no two groups of Orthodox Jews can agree on, much less rigorously apply. Def. Br. at 10, 20, 23, 28.

3. ConAgra Itself Defines the Applicable Standard.

In order to best take advantage of the growing kosher trend, ConAgra sought to emphasize its products' strict adherence to the most rigorous standards of kosher. All of ConAgra's Hebrew National products come in packaging with a label that states the products are “MADE WITH PREMIUM CUTS OF **100% KOSHER BEEF.**” *See e.g.*, FAC Ex. A. Additionally, each package depicts the distinctive “Triangle K symbol” and the www.hebrewnational.com website on it. In turn, ConAgra defines its use of the term kosher and the Triangle K symbol on its website as follows:

Kosher, Shmosher—What's the Difference?

You've heard the word kosher, but did you know it literally means “fit to eat”? For more than 100 years, *Hebrew National® has followed strict dietary law, using only specific cuts of beef that meet the highest standards* for quality, cleanliness, and safety—so artificial flavors, colors, fillers, and by-products simply don't make the cut.

* * *

What Is Triangle K Supervision?

The Triangle K symbol is a trademarked logo *that signifies “kashruth” (kosher) as defined by the most stringent Jews who follow Orthodox Jewish Law.* It's a symbol of integrity, representing the most trusted and reliable name in *strict* rabbinical food certification and *supervision*. For more than half a century, Triangle K has been committed to making kosher food products available to people around the world.

KASHRUTH FOOD AND INGREDIENTS

Because chemicals and food additives make it increasingly difficult to determine the kashruth status of a product, all ingredients and equipment must pass *stringent supervision*. These standards are *so exacting* that an entire formula can be prohibited if the supervising rabbi finds in it even a single non-kosher ingredient that makes up only one-tenth of 1% of the total.

FAC ¶68 and Ex. B (emphasis added)

Thus, ConAgra itself, not any government, defines the precise standard that its Hebrew National products are represented to adhere to – the most stringent and exacting standard. In order to gain consumers’ trust, these representations are repeatedly reinforced in Hebrew National marketing materials.¹⁰ In addition to its “kosher guarantee,” ConAgra tells consumers in the “Manufacturing Kosher” and “Kosher Law Enforcement” sections of its webpage that “kosher observant consumers” are protected from consumer “fraud and misrepresentation” by “American law” and “state codes.” FAC ¶68 and Ex. B. By consistently and systematically marketing and advertising Hebrew National products in this way, and providing consumers a “kosher guarantee,” ConAgra ensured its customers that any Hebrew National products that they purchased

¹⁰ *Hebrew National Launches Summer Campaign* (FAC Ex. I)(“It is the close supervision and strict regulation that *guarantees* quality and cleanliness of kosher foods....The kosher certification of Hebrew National Franks *guarantees* that they are prepared at the highest level of quality....For more information about Hebrew National Franks and the kosher food preparation process visit [www.Hebrew National.com](http://www.HebrewNational.com)”). *See also Let’s Be Frank* (FAC Ex. J).

were 100% kosher according to the highest, strictest, most exacting and most rigorous standard – “no ifs, ands or butts” about it.¹¹

B. The Manufacture of Hebrew National Meat Products.

ConAgra obtains the meat used for its Hebrew National products from four slaughterhouses operated by American Foods Group (“AFG”), located in St. Paul and Long Prairie, Minnesota, Green Bay, Wisconsin and Gibbon, Nebraska. FAC ¶52. AFG is a secular company. While AFG owns and operates the slaughterhouses, another secular company, AER Services, Inc. (“AER”) conducts the kosher slaughtering services necessary to harvest the meat. FAC ¶54.

AER provides workers at each of the slaughterhouses that perform the necessary functions of the kosher process - slaughtering the cows in the required manner; inspecting the cows’ lungs for prohibited defects; washing, salting and preparing the meat; packing the meat in segregated cartons for shipment to Green Bay for further processing; and ultimately to the Hebrew National manufacturing plant in Michigan for final production, packaging and shipment to market. These AER employees have the titles of shochets (slaughterers), bodeks (lung inspectors), and mashigiachs (supervisors). FAC ¶53-54. AFG employees perform other functions on the slaughterhouse assembly line and are also responsible for the processing of the non-kosher meat.

ConAgra contracts with third-party kosher supervision and certification agency Triangle K, Inc. (“Triangle K”) to provide kosher food supervision and certification

¹¹ *Hebrew National Launches Summer Campaign*, (FAC Ex. I).

services. FAC ¶55. Triangle K is a privately-held, for-profit kosher certification company based in New York. Its website states that its certification is provided on any “product that meets the strictest criteria of what makes such items kosher.” FAC, footnote 5. Rabbi Ralbag is the owner and Head Kashruth Coordinator of Triangle K.

ConAgra represents that Triangle K maintains strict supervision over all slaughtering operations to ensure they were conducted according to most rigorous kosher standards. FAC ¶¶10, 15, 67. However, Triangle K personnel like Ralbag (who lives in New York) are rarely present at the AFG facilities and most kosher supervisory functions are performed by AER employees. FAC ¶58. Hence, in truth, there is not “strict supervision” by Triangle K over the manufacturing process, as represented, but rather only lax and sporadic supervision. FAC ¶¶10, 15, 28, 59, 63, 67. The AER employees, in turn, face severe pressure from AFG and AER personnel to meet artificial, pre-determined quotas (approximately 70% of the total cattle population brought to slaughter daily is supposed to produce kosher meat) and maximize kosher production, making the kosher inspection process defective and unreliable. FAC ¶¶93-94, 97. In this regard, a huge conflict exists when AER and AFG personnel are the only ones actually on-site on a daily basis to “supervise” the process and those secular entities have a significant financial incentive to mark the maximum amount of the meat harvested as kosher, as opposed to non-kosher, and not disclose all transgressions to Triangle K. FAC ¶62.¹² The

¹² ConAgra attempts to deny the existence of the factual incentive to AER to maximize the kosher “pass rate,” by offering the affidavit testimony of Terry Timmons of ConAgra and Don Mehesan of AFG - all while denying Plaintiffs any ability to take discovery or review the contracts referenced. This testimony is suspect. In prior litigation, AER

problem is compounded when AER's supervisors threaten AER workers in effort to prevent them from disclosing all deviances witnessed to Triangle K. FAC ¶¶11, 94, 107.

As the Complaint makes clear, during the relevant period, certain mashigiachs, shochets, bodeks and/or others employed by AER complained to AER or Triangle K that the procedures that they routinely observed at the AFG facilities failed to meet the strict kosher standard represented. FAC ¶¶63, 107. Despite this, little was done to correct the deviances from procedure. Rather, the workers making the complaints were threatened with adverse retaliation, such as termination or job transfers to other AER facilities in other states. FAC ¶¶11, 63, 94. As such, facts about violation of the quality standard were withheld from Triangle K. *Id.* Further, on the rare days that Ralbag or other Triangle K personnel (such as his sons) actually travelled from New York to inspect the AFG facilities, the workers were directed to essentially put on a "dog and pony show" for them by employing much stricter practices than those ordinarily used in their absence. FAC ¶100 (describing how the inflation of the cow's lungs with the air compressor to detect prohibited perforations only occurred on the rare occasions that the plant was being inspected, otherwise the machine was not operated). In turn, unchecked and non-kosher meat was often delivered to ConAgra and falsely packaged, labeled and sold to

principals testified that AER incurred "economic damage" when meat was marked and sold as non-kosher as opposed to kosher. Trial Testimony of Moshe Fyzakov in *Git v. AER Services, Inc.* at pp. 398, 402 (Exh. 6). Mehesan's testimony "there are no pass-rate quotas imposed," conflicts with the allegations in the FAC, testimony Plaintiffs have obtained and cannot be ruled on before Plaintiff is provided the opportunity to conduct even basic discovery.

the public (including the Class here) as being strictly 100% kosher having satisfied the most rigorous inspection. FAC ¶63.

Due to these transgressions and the unreliability of the kosher certifications on the meat regularly delivered to ConAgra, numerous kosher-observant AER workers who observed the daily processes refused to consume Hebrew National products. FAC ¶108. Instead, workers were permitted to have specific cows slaughtered and the meat processed in a more strict and exact fashion for their personal consumption. *Id.* Thus, specifically selected cows would be slaughtered and checked in strict accordance with the “rules,” unlike the cows that were routinely slaughtered for sale to ConAgra and use in Hebrew National products. *Id.*

C. “The Rules Governing Ritual Slaughter”

As described in the FAC, in prior litigation, Rabbi Ralbag, as well as the principals of AER, testified in absolute terms as to kosher slaughtering rules which “must” be complied with at the AFG Facilities which produces meat for ConAgra’s Hebrew National products. While Ralbag now offers a lengthy affidavit attempting to blur and confuse those lines, in these previous cases he had no difficulty succinctly listing the mandatory “rules” that were required to be followed in objective terms, as follows:

1. “As part of kashruth, an animal **may not** be eaten unless it is slaughtered according to a specific ritual, called shechitah. Shechitah **requires** that the animal be killed by cutting horizontally across the throat, severing the trachea (windpipe), the esophagus, the jugular veins, and the carotid arteries. The knife **must** be drawn across the throat of the animal in one or more swift, uninterrupted movements, and

the blade of the knife **must** be free of nicks or other imperfections. The underlying principle is to kill the animal as quickly and painlessly as possible.”

2. “[I]f any of the following five events occurs during schechitah, it will **disqualify** the schechitah and render the meat non-kosher: *sh’hiyah* – any pause or interruption, however slight, during the act of slaughter; *derasah* – any pressure applied to the knife; *hagramah* – any cutting out of the proper area; *ikur* – any tearing rather than severing of tissue; and chaladah – any cutting while the knife is under cover, such as by the hair, wool or feathers of the animal; the knife’s blade **must** be fully exposed at all times.”

3. “[T]he animal **must** be **entirely free** of specifically enumerated defects such as torn or perforated organ walls, missing or defective organs, missing limbs or broken bones, or the animal is forbidden for consumption. Thus, a bedikah, or rigorous inspection of the animal, **must** be performed at the time of slaughter.”

4. “[T]he ritual slaughter and inspection **must** be performed by a specially trained and licensed individual called a shochet.”

5. “A shochet **must** possess a kabbalah certificate issued by an Orthodox Jewish rabbi.” “[O]nly meat of animals slaughtered by a shochet who possesses a kabbalah certificate is fit for consumption. To obtain the kabbalah certificate, the shochet **must** pass an oral examination conducted by an Orthodox Jewish rabbi.”

Ralbag Aff. in *Maruani v. AER Services* at ¶¶5-10, FAC Ex. O (emphasis added).

Facts alleged in the FAC show that many of these rules were routinely ignored and that Ralbag was either not present to witness the practices actually being followed, or had

facts intentionally withheld from him regarding the violations. FAC ¶¶11, 93-94, 97, 100, 107.¹³

D. ConAgra And Ralbag Previously Represented That Kosher Manufacturing Standards Involved An Objective Standard That Were In No Manner Beyond The Ability Of Review.

Both ConAgra and Ralbag previously represented that kosher manufacturing standards involved an objective standard.

First, on its website, ConAgra represents to consumers that to the extent there are any variations in kosher manufacturing requirements from plant to plant, they are “*slight*” and “the requirements for the manufacture of *all kosher food* are based on the *same* fundamental principles of Jewish Dietary Laws.” FAC ¶ 67.

Second, as demonstrated, in marketing materials, ConAgra represented that there are “strict guidelines kosher manufacturers *must* follow to ensure cleanliness, purity of ingredients and safety.” FAC Ex. J.

Third, as shown above, Ralbag previously testified to the objective “rules” that “must” be followed. FAC Ex. O.

Fourth, in other litigation, AER personnel and its expert witnesses confirmed the objective rules employed at the AFG facilities with regard to the slaughter and processing of kosher meat for use in Hebrew National products. FAC ¶12.¹⁴

¹³ ConAgra’s contention Plaintiffs “do not allege that the kashrut violations occurred unbeknownst to ...Triangle K” is simply wrong. Plaintiffs allege throughout the FAC that ConAgra’s representations of “stringent supervision” of the meat processing by Triangle K was false as, *inter alia*, “[o]ften, however, Triangle K personnel are not at the AFG facilities.” See FAC ¶¶8-10, 15-16, 28, 59, 73, 100.

Fifth, in *Barghout v. Bureau of Kosher Meat and Food Control*, the National Jewish Commission on Law and Public Affairs ("COLPA") filed an amicus brief with the Fourth Circuit representing that the group "advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States." 1994 WL 16049942 at *1. The amicus brief was joined in by numerous national organizations of Orthodox Jewish rabbis and scholars including the Union of Orthodox Rabbis of the United States and Canada a/k/a/ Agudath Harabonim¹⁵ for which Rabbi Ralbag is a member, has continuously sat on the *Executive Committee* of "since the 1980's" and has served as the organization's formal "representative" in legal proceedings addressing kosher rules (see discussion of *Commack* below). Factual representations endorsed by Rabbi Ralbag in those proceedings, were the exact *opposite* of those that ConAgra and Ralbag now attempt to present to this court, namely: (1) that "there is no debate about the meaning of the word 'kosher' among different sects of Jews;" (2) that "the standard for kosher 'food requirements' is...undisputed;" (3) that "the word 'kosher' has a well-established meaning, in objective terms, when applied to the content and preparation of food;" (4) "[i]n no event does the determination depend on any spiritual factor;" and, (5) that "attempts to paint these dietary standards as a confusing swirl of freakish mysticism and bizarre spirituality, open to an infinite number of conflicting interpretations ...is untrue." Amicus Brief in *Barghout* at pp. 9-12.

¹⁴ For instance, Michael Small, who certifies food for Best Kosher Foods Corp., testified to the same objective "rules," verbatim.

¹⁵ "Agudath Harabonim" is another name for the "Union of Orthodox Rabbis of the United States and Canada." See, <http://trianglek.org/about.html> (Ex. 7).

Finally, in *Commack Self-Service Kosher Meats v. Weiss*, the Union of Orthodox Rabbis, formally intervened as a party in the case and filed numerous briefs making the same factual representations as in *Baughout*. In moving to intervene, the Union of Orthodox Rabbis represented that they were an organization “that represent the Jewish Orthodox community and its interest in the truthful use of the term ‘kosher.’” Intervenor’s Opening Brief, 2001 WL 34106424 at *7.¹⁶ Significantly, in that proceeding the Union of Orthodox Rabbis: (1) identified Rabbi Ralbag as its formal “representative;” (2) made factual representations based on Rabbi Ralbag’s deposition testimony that there was a “general broad consensus” as to the Orthodox kosher standard; (3) in claiming that they represented and “spoke for” the entire “Jewish Orthodox community” made clear that that community’s kosher standard could be presented with a single voice; (4) confirmed that there was no debate about the meaning of the word “kosher” among different “sects” of Jews, let alone within the Orthodox Jewish community; (5) conceded that consumers needed protection from the fraudulent mislabeling of products as kosher; and, (6) confirmed such standards could be adequately

¹⁶ See Memorandum of Law in Support of Motion to Intervene filed by Union of Orthodox Rabbis in *Commack* (“The proposed intervenors are...rabbinic and lay organizations that represent and *speak for* the observant Jewish community in the State of New York, elsewhere in the United State, and throughout the world.”...The [Union of Orthodox Rabbis *et al.*] are charitable organizations that serve and represent the Orthodox Jewish Community”....“The membership of these organizations has a strong interest in effective regulation of anyone who purports to be selling kosher food, and in the prevention of fraud against those who purchase kosher food because it satisfies their obligations as observant Jews.”)(Ex. 8).

adjudicated by a secular court without creating any excessive entanglement issues or need to pronounce religious doctrine. As stated:

In no event does the determination depend on any spiritual factor. It is solely a question of the food's physical attributes.

Since the term “kosher” relates to objectively ascertainable qualities of the product being sold -- i.e., its ingredients and how it has been processed -- this is not a case involving a term that has no objective meaning and has only theological significance. This case does not concern descriptive terms pertaining to religion that are amorphous and are definable only in religious terms. The word “kosher” has a well-established objective meaning when applied to the content and preparation of food. Nor is this a case in which enforcing consumer expectations will routinely catapult the state into interpretations of religious doctrine.

2001 WL 34106424 at *18.

Ultimately, the same representations were made to the U.S. Supreme Court. *See* Intervenor’s Petition for Writ of Certiorari, 2002 WL 32133572 (“The determination never depends on any spiritual factor. It is solely a question of the food's physical attributes.”)(Ex. 9).

III. ARGUMENT

A. ConAgra’s Attempt to Divest this Court of Jurisdiction Under Rule 12(b)(1) Fails.

1. The Court May Not Consider Matters Outside The Complaint Because ConAgra’s Motion Must Be Decided Under Rule 12(B)(6), Not Rule 12(b)(1).

ConAgra incorrectly challenges Plaintiffs’ consumer fraud, negligence, and breach of contract claims on subject matter jurisdiction grounds, bringing the first part of its motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). This is a transparent attempt to prejudice Plaintiffs, because in so moving, ConAgra claims it has a right to

introduce new facts and testimony (such as affidavits proffered by ConAgra's contractors and employees) outside of the Complaint, all while denying Plaintiffs any fair opportunity to conduct discovery on those same matters.

ConAgra's attempt to move under 12(b)(1) opposed to 12(b)(6) to justify the introduction of new facts is improper, because ConAgra's First Amendment arguments are affirmative defenses to Plaintiffs' statutory and common law claims, not arguments aimed at whether Plaintiffs have met the jurisdictional prerequisites of those claims. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694, 709 n.4 (2012) (affirming trial court's grant of summary judgment and deciding that ministerial exception to ADA operates as "an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar" because courts "must decide whether the claim can proceed [on the merits] or is instead barred by the ministerial exception"); *Watson v. Jones*, 80 U.S. 679, 732 (1871) (stating that "[t]here is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application"). As the Ninth Circuit explained in reversing the dismissal of Title VII claims due to Establishment and Free Exercise Clause defenses, to the extent any dismissal is proper, it would be under Rule 12(b)(6) not 12(b)(1):

Jurisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.... If the court ... exercise[s] its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Bollard v. California Province of the Society of Jesus, 196 F.3d 940 (9th Cir. 1999) (internal quotations and citations omitted).

Thus, consideration of the First Amendment defenses here does not require the Court to abstain from ruling on Plaintiffs' claims, because a court may always decide the merits of a consumer fraud, negligence, or breach of contract claim. No abstention doctrine is implicated and this case can be decided on "nonconstitutional grounds." *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 447 (1969).

ConAgra recognized as much when it removed this case, stating as grounds for removal that this Court had "subject matter jurisdiction pursuant to 28 U.S.C. §§1332 and 1441." Doc. No. 1, at 2. And, as described in their Complaint and further in this memorandum of law, the Court will apply neutral principles of law in determining this dispute. *See* FAC ¶¶12-14, 27-28. Accordingly, the Court must consider ConAgra's motion under the standard applied to Rule 12(b)(6), not Rule 12(b)(1), motions. Under the familiar standards of Rule 12(b)(6), the Court is forbidden to consider matters outside the pleadings. Fed. R. Civ. P. 12(b)(6).¹⁷

The cases ConAgra cites prove its error. For example, in *Commack Self-Service Kosher Meats v. Hooker*, 680 F.3d 194, 202-03 (2d Cir. 2012) (*Commack II*), the district court determined, and the Second Circuit affirmed, that New York's Kosher Protection Act of 2004 was constitutional under Rule 12(b)(6), not 12(b)(1). Many other cases it

¹⁷ Even if it does decide to consider matters outside the pleadings, it must give Plaintiffs the benefit of the doubt, and resolve any factual disputes in favor of Plaintiffs. Fed. R. Civ. P. 12(b)(6), 56.

cites were decided by summary judgment or jury. *See Commack Self Service Kosher Meats v. Rubin*, 986 F.Supp 153, 157-58 (E.D.N.Y. 1997)(“[B]ecause the constitutional challenges raised by plaintiffs are not entangled in a skein of state law that must be untangled before the federal case can proceed, there is no basis for abdicating federal jurisdiction.”)(citations omitted).

Even if this Court accepts ConAgra’s motion as one properly challenging the Court’s subject matter jurisdiction, nonetheless it still may not consider ConAgra’s factual refutations to the FAC. Factual challenges under Rule 12(b)(1) raise procedural concerns. A motion to dismiss brought under Rule 12(b)(1) may challenge the complaint on “its face or on the factual truthfulness of its averments.” *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). But factual challenges require the defendant to request an evidentiary hearing on the jurisdictional issue—which ConAgra has not done here—and allow the parties to submit evidence outside of the pleadings, and, if necessary, to conduct discovery. *Id.*; *see also Johnson v. United States*, 534 F.3d 958, 964-65 (8th Cir. 2008) (internal citations and quotations omitted). Of special relevance here, if requested, parties must also be afforded an opportunity to conduct discovery. *Johnson*, 534 F.3d at 964-65. In this regard, courts look to the precepts of Rule 56(f) in deciding whether further discovery on jurisdictional facts is required. *Id.*

Here, ConAgra, dubiously failing to cite this standard, claims that the Court may consider four affidavits in determining whether Plaintiffs’ factual allegations give rise to cognizable claims for consumer fraud, negligence, and breach of contract. Def. Br. at 25. After examining ConAgra’s pleadings and affidavits, Plaintiffs requested a fair

opportunity to conduct discovery regarding the factual matters presented, but ConAgra refused. Regan Aff. ¶¶7, 8. As described herein, and in Plaintiffs' 12(b)(1)/Rule 56(f) affidavit, ConAgra's representatives and affiants have given self-serving testimony that directly contradicts affidavit and other testimony provided in other cases, including the *Commack* litigation that ConAgra relies upon in its briefing. Regan Aff. ¶¶2, 9. ConAgra's testimony here seriously calls into question the credibility of its witnesses, in particular Rabbi Ralbag. Further, discovery is needed to ascertain if workers marked meat kosher because of adherence to kosher rules, or instead because of pressure from AER and AFG to satisfy quotas.

Plaintiffs, therefore, request that the Court permit discovery, as outlined in their 12(b)(1)/Rule 56(f) affidavit. Alternatively, the Court should strike ConAgra's affidavits and disregard ConAgra's factual arguments because discovery has not commenced.¹⁸

2. If The Court Rejects ConAgra's New Affidavits, It Is Clear That Plaintiffs State Valid Claims That Cannot Be Dismissed At The Pleading Stage.

ConAgra's attempt to introduce new facts which contradict those plead in the FAC is improper. ConAgra does this in a transparent attempt to manufacture a religious dispute where none existed before. ConAgra cannot credibly offer the new Ralbag Affidavit on grounds that Plaintiffs somehow misstated his earlier testimony defining the applicable kosher rules. Plaintiffs attached that affidavit as Exhibit O to the FAC and

¹⁸ To ensure that their rights to be heard on the merits are protected, Plaintiffs also submit affidavits supporting their allegations that ConAgra's products do not conform to the standards ConAgra represents in its marketing materials and labels. These affidavits are offered conditionally, in the event the court accepts Defendant's affidavits.

therefore, his prior testimony defining the objective “rules” he testified applied at the AFG facilities appears verbatim.¹⁹ FAC ¶12, 80-85. Those facts, as plead, must be accepted as true at this stage.²⁰

If the Court declines to consider ConAgra’s affidavits, which it should, it is clear that this case cannot be dismissed because Plaintiffs have alleged valid claims for consumer fraud, breach of contract and negligence and the new testimony cannot be used to defeat those allegations. On the other hand, even the affidavits are not stricken on procedural grounds; Plaintiffs still prevail for the reasons set forth below.

B. ConAgra’s Motion To Dismiss Under Rule 12(b)(6) Also Fails.

1. Because This Case Can Be Decided Using ConAgra’s Own Standards, ConAgra’s Motion to Dismiss Must Be Denied.

ConAgra mistakenly argues that Plaintiffs’ claims are barred by the entanglement and effects prongs of the *Lemon* test because “any resolution of Plaintiffs’ claims necessarily will require this court to enforce kashrut and evaluate the religious correctness of kosher determinations” made by Triangle K. Def. Br. at 9. This action does not require the Court to establish any standard for kosher or resolve any religious disputes. ConAgra itself chose the applicable “quality” standard and made representations to the public about Hebrew National products’ strict adherence to that

¹⁹ Further, many of the new facts offered have nothing to do with jurisdictional issues. For instance, the Timmons and Mehesan affidavits discuss the contractual relationships between ConAgra, AER, AFG and Triangle K, not any facts related to the Court’s jurisdiction. The Ben-David affidavit offers nothing but a blanket denial.

²⁰ *Ashley County, Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir.2009)(under Rule 12(b)(6) the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in the complaint must be taken as true).

standard. The Court here merely has to apply neutral principles of law to determine if ConAgra complied with its own affirmative representations to the consuming public. In these circumstances, the *Lemon* test is not implicated.

As made clear in *Minker v. Baltimore Annual Conference of United Methodist Church*, “the first amendment does not immunize the church from all temporal claims made against it....[the Plaintiff] need show only that *some* form of inquiry is permissible and *some* form of remedy is available to survive a motion to dismiss.” 894 F.2d 1354, 1360 (D.C. Cir. 1990)(citing *Costello Publishing Co. v. Rotelle*, 670 F.2d 1035, 1050 n. 31. (D.C.Cir.1981)(emphasis in original)). See also *Maruani v. AER Services*, 2006 WL 2666302 at *5-7 (D. Minn. Sept. 18, 2006) (same, citing *Drevlow v. Lutheran Church*, 991 F.2d 468, 471 (8th Cir. 1993) and *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363, n.3 (8th Cir. 1991)).

Here, the Court has two related paths to decide this matter using neutral principles of law without addressing any religious questions. First, this is a simple case of a secular company failing to adhere to the standard that it chose, adopted and represented to the public that its products strictly adhered to. The issues here can be resolved using neutral principles of law, such as contract law, consumer fraud law and the rules of evidence, and using the objective standards ConAgra, not Plaintiffs, define. Rabbi Ralbag's affidavit in the present case presents clear and direct contradictions to the representations he made in other litigation, where he stated that there is a clear, objective standard for what is considered kosher by Orthodox authorities and what rules “*must*” be followed to satisfy that standard. The question of whether those objective standards were not strictly

followed or not used at all to determine kosher status—rather, quotas were—is a pure factual question, not one requiring the establishment of any religious doctrine or resolution of any religious disputes.

Alternatively, if the Court finds that Ralbag's recent affidavit is credible, *or* that determining its credibility would implicate ecclesiastical questions (which it would not), the Court can simply refer to the affidavit and apply it to the facts of this case. If the Court does that, a clear case of consumer fraud is presented because ConAgra essentially admits through the affidavit to profiting from the perception that its products strictly adhered to a well-defined, particular standard that it now suddenly claims does not exist.

2. The Court Should Rely on Neutral Principles of Law and Deny ConAgra's Motion to Dismiss.

i. The Neutral Principles of Law Standard

While ConAgra argues that this Court must abstain from hearing this case, it fails to recognize that “not every civil court decision ... jeopardizes values protected by the First Amendment.” *Mary Elizabeth Blue Hull*, 393 U.S. 440 at 449. Although ConAgra frames its argument around the prongs of the *Lemon* test, in actuality it is asking the Court to apply the ecclesiastical abstention doctrine. For that doctrine to apply, the matter must: (1) be clearly committed by church law or state law to adjudication before a tribunal of a hierarchical church or a majority of a congregational church; and, (2) the controversy must be doctrinal in nature. *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (citing *Watson v. Jones*, 80 U.S. 679, 733-34 (1871)); *Piletich v. Detetich*, 328 N.W.2d 696, 699-700 (Minn. 1982). Neither requirement is met.

Under the “neutral principles of law” method a court can permissibly adjudicate secular disputes involving religious concepts, subject to the proviso that it may not resolve any doctrinal controversies in doing so. *See Jones* 443 U.S. at 603-05; *Piletech*, 328 N.W.2d at 699-700. The doctrine allows the adjudication of religious institutional disputes when they can be resolved according to legal rules or standards that have been developed and applied in a given field of law without particular regard to religious institutions or doctrines.²¹ Thus, “[t]he Establishment Clause is not implicated where neutral principals of law, developed and applied without particular regard to religious doctrines, establish the applicable standard of care.”²²

Jones v. Wolf involved “a dispute over the ownership of church property.” 443 U.S. 595 (1979).²³ Although the Supreme Court noted that “the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes,”²⁴ it nonetheless rejected a “rule of compulsory deference.” To that end, the Court held that a trial court may engage in a review of a property dispute using “neutral

²¹ *Jones*, 443 U.S. at 602-03; *Mary Elizabeth Blue Hull*, 393 U.S. at 449 (noting that “there are neutral principles of law, developed for use in all property disputes, which can be applied without ‘establishing’ churches to which property is awarded”); *Bendross v. Readon*, 89 So.3d 258, 260 (Fla.App.3 Dist 2012)(same).

²² *Olson v. First Church of Nazarene*, 661 N.W.2d 254 (Minn. App. 2003) (citing *Odenthal v. Minnesota Conference of Seventh Day Adventists*, 649 N.W.2d 426, 435 (Minn. 2002)) (“There can be no entanglement problem, however, when the dispute can be resolved according to “neutral principals of law”); *see also*, *Piletech*, 328 N.W.2d at 700-01.

²³ *Jones*, 443 U.S. at 597.

²⁴ *Id.* at 602 (quoting *Mary Elizabeth Blue Hull*, 393 U.S. at 449).

principles of law,” because the neutral principles approach allows a court to avoid “inquiry into religious doctrine.” *Id.* at 603 (quoting *Maryland & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 368 (1970)). “The method relies exclusively on objective, well-established concepts of law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.” *Id.*²⁵ Thus, a court may review transactions where religious entities engage in the sale of goods without running afoul of the First Amendment. *Id.* at 606.

3. Tort and Breach of Contract Claims Can be Resolved Applying Neutral Principles.

Contract and tort claims against religious organizations, and certainly against non-religious commercial entities, are routinely resolved without implicating the ecclesiastical abstention doctrine or the “excessive entanglement” test.²⁶ In *Watson v. Jones*, the

²⁵ It should be noted that *Jones v. Wolf* did not overrule the previous precedent of *Watson*, *supra* and its successor cases. Rather, the Court acknowledged that the constitutional principles on which it had based *Watson* was to safeguard against the State considering doctrinal matters, and that the “neutral principles of law” approach accomplished this goal.

²⁶ *E.g.*, *Olson*, 661 N.W.2d at 254 (applying neutral principals of law to negligence claims against a religious institution); *Odenthal*, 649 N.W.2d at 435 (same). *See also Martinelli v. Bridgeport Roman Cathoic Diocesan Corp.*, 196 F.3d 409, 431 (2d Cir. 1999) (holding that a fiduciary duty claim against a diocese was capable of being resolved using neutral principles”); *Smith v. O’Connell*, 986 F. Supp. 73, 77-80 (D.R.I. 1997) (applying “neutral principles of law” approach to the tort context, essentially equating it with the “neutral laws of general application” concept addressed in *Employment Div. v. Smith*, 494 U.S. 872 (1990)); *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1151 (E.D. Mich. 1995) (applying neutral principles of law approach to negligent supervision claim); *Moses v. Diocese of Colo.*, 863 P.2d 310, 320-21 (Colo. 1993) (en banc) (approving use of neutral principles approach to various tort claims, and

Supreme Court stated that “[r]eligious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints.” 80 U.S. at 714. The First Amendment, therefore, does not prevent courts from deciding secular civil disputes involving religious institutions when and for the reason that they require reference to religious matters. *See, e.g., Jones*, 443 U.S. at 603-05 (court permitted to decide issue as to church property even though it required court to examine religious documents). As the court in *Minker* explained, religious entities are not exempt from breach of contract actions:

A church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court. *Watson v. Jones*, 80 U.S. 679 (1871). In *Jones v. Wolf*, *supra*, the Supreme Court specified that courts may always resolve contracts governing “the manner in which churches own property, hire employees, or purchase goods.” *Id.* at 606.

* * *

But the first amendment does not afford defenses against promises made and contracts formed. A church, like any other employer, is bound to perform its promissory obligations in accord with contract law.

894 F.2d at 1361 (citations omitted).²⁷

similarly equating it with the “neutral laws of general application” concept of *Smith*, *cert. denied*, 511 U.S. 1137 (1994); *L.L.N. v. Clauder*, 563 N.W.2d 434, 440 (Wis. 1997) (examining “whether the determination of [a] claim for negligent supervision would allow a court to apply neutral principles of law”). Courts have also applied the neutral principles approach to suits against religious defendants involving civil rights, *see Krebs v. Keating*, 1997 WL 1070589, at *3 (Va. Cir. Ct. May 6, 1997)(Ex. 10).

²⁷ *See also Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985)(“Of course churches are not-and should not be-above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts.”); *Kleppinger v. Anglican Catholic Church, Inc.*, 715 A.2d 1033, 1038

The ecclesiastical abstention doctrine is not implicated even where religious doctrine may need to be reviewed in the course of determining a religious entity's contractual violation. "[C]ourts have the power, and perhaps a duty as well, to enforce secular contract rights, despite the fact that the contracting parties may base their rights on religious affiliations." *Elmora Hebrew Ctr., Inc. v. Fishman*, 593 A.2d 725, 729 (N.J. 1991). In such situations, any inquiry into religious principals is done "not to determine their validity," but to ascertain their relevance to a legal relationship established under neutral secular law. *Martinelli*, 196 F.3d at 431, citing *Jones*. As explained in *Protestant Reformed Church of Edgerton v. Templeman*, "If by contract the right to hold, control, use, or enjoy property depends upon adherence to, or teaching of, a religious doctrine, the civil courts will examine what, as a matter of fact, the doctrine is, and whether, as a matter of fact, this or that person adheres to or teaches it." 81 N.W.2d 839 (Minn. 1957).

Religious organizations can also be held liable for fraudulent activities without implicating the ecclesiastical abstention doctrine. In *Gonzalez v. Roman Catholic Archbishop of Manila*, the Supreme Court suggested an exception to the ecclesiastical abstention doctrine for fraudulent and collusive activities. 280 U.S. 1, at 16 ("[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation

(N.J. Super. Ct. Ch. Div. 1998) ("Neutral principles may be particularly suited for adjudications of civil contract actions as well.") (citing cases); *Anderson v. Watchtower Bible and Tract Society*, 2007 WL 161035 at *6 (Tenn. App. 2007) ("Consequently, religious organizations are subject to suit for many of their activities in the secular world, such as contracts with outside parties. Such suits do not involve questions of ecclesiastical cognizance.") (Ex. 11); *McKelvey v. Pierce*, 800 A.2d 840, 851 (N.J. 2002)(same).

before the secular courts as conclusive); *see also Jones*, 443 U.S. at footnote 8 (recognizing “fraud or collusion” exception).²⁸ For instance, in *Costello*, 670 F.2d at 1049-50, the D.C. Circuit reversed and remanded an order dismissing antitrust claims by a marketer of religious books against the Roman Catholic Church, and counterclaims for copyright infringement and unfair trade practices. While the Court expressed concern regarding “state entanglement in religious affairs,” it held that there was no “absolute exemption from the antitrust laws for economic pressure tactics, however predatory, that are religiously motivated.” Therefore, the Court held that on remand the district court must balance any of the defendant church’s First Amendment concerns against “the general community’s interest in conducting commerce free of anti-competitive arrangements.” *Id.*

Thus, under the neutral principals of law doctrine, courts have proper jurisdiction over claims challenging a commercial entity’s failure to supply goods as advertised or guaranteed. Were it otherwise, courts could not adjudicate, among other cases, (1) prisoners’ claims for kosher meals under the Free Exercise Clause, *see, e.g., Kahane v. Carlson*, 527 F.2d 492, 495 (2d Cir. 1975), (2) a trademark dispute involving kosher certification, *see Levy v. Kosher Overseers Ass’n of America, Inc.*, 104 F.3d 38 (2d Cir. 1997), or (3) a contract claim concerning the manufacture and sale of a kosher product,

²⁸ *See Drevlow*, 991 F.2d at 471, n. 2 (8th Cir. 1993); *Elmora Hebrew Ctr.*, F.2d at 732 (civil allegations such as the fraudulent diversion of funds and the possible alteration of a contract, “seem appropriate for civil adjudication without any danger of entanglement in religious doctrine or polity.”); *Bendross*, 80 So.3d at 261 (“[W]hen there is a showing of fraud, collusion, or arbitrary conduct on the part of church authorities, the courts will interfere to protect the rights of those imposed on.”)(citation omitted).

see Parev Products Co. v. I. Rokeach & Sons, Inc., 124 F.2d 147 (2d Cir. 1941). This rule is even more applicable where the entity engaging in the deceptive commercial activities, is an entirely secular company, holding no religious beliefs of its own, as ConAgra is here.

4. Application of Neutral Principals Method Shows That the Court Can Resolve Plaintiffs' Claims Without Any "Excessive Entanglement".

i. No Claims Are Made Against Any Religious Entity And Plaintiffs Are Not Trying To Have The Court Dictate Any Religious Doctrine.

The ecclesiastical abstention doctrine does not prevent this Court from adjudicating this dispute because: (1) there is no commitment by the parties to adjudicate the dispute before a tribunal of a hierarchial church or the majority of a congregational church, and; (2) the controversy is not doctrinal in nature.

First, as confirmed in *Watson*, the ecclesiastical abstention doctrine applies in situations where a plaintiff has voluntarily consented to resolution of disputes before a hierarchical or congregational church:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. *All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.*

Watson 80 U.S. at 728-29. Thus, *Watson* teaches that what is abstained from is court resolution of doctrinal or internal governance issues which, *by virtue of the parties'*

voluntary association in the church, have been assigned to the church and the church only for resolution.

Here, no claims are made by any member against any hierarchical religious entity that he/she belongs to. Unlike cases ConAgra cites where claims were brought by church members or employees against their church, no Hebrew National consumer has expressly or implicitly agreed to have any claims against ConAgra heard before any authoritative ecclesiastical body. The claims at issue are limited to those presented by third-parties against an unrelated secular corporation. Further, as ConAgra concedes, there is no hierarchical church order or central authority to resolve disputes such as this. *Ralbag Aff.* ¶35.

Second, the dispute at hand is not “doctrinal in nature” since it does not involve any fundamental deviation in faith or basic beliefs between factions. *Piletich*, 328 N.W.2d at 700. The court is not asked to resolve any religious disputes regarding ConAgra’s beliefs or to establish any religious doctrine or kosher rules to the exclusion of others. Rather, the Court is only asked to hold ConAgra to the statements it made to consumers describing and guaranteeing the products it sold. “Since it is not a doctrinal matter, nor a matter committed to adjudication by the highest tribunal in a hierarchical church, there is no First Amendment barrier to resolution by the civil courts.” *Id.*

In direct contrast to this case, the Establishment Clause cases on which ConAgra relies either involve: (1) intra-church disputes between a church and its own members; or, (2) situations where state governments enacted statutes establishing a religious preference. As such, they are easily distinguished.

Here the state does not dictate the applicable standard. Rather, ConAgra does. Thus, unlike *Commack Self Service Kosher Meats v. Weiss*, 294 F.3d 415 (2d Cir. 2002), *Barghout v. Bureau of Kosher Meat*, 66 F.3d 1337 (4th Cir. 1995) and *Rav-Dan's County Kosher, Inc. v. New Jersey*, 608 A.2d 1353 (N.J. 1992), this is not a case where any government has selected and imposed any particular kosher standard on merchants causing religious discrimination or any excessive state entanglement in religion. In each of those cases, the state sought to impose a particular standard on kosher manufacturers by enacting statutes defining “kosher” as coterminous with “Orthodox” Jewish definition of kosher. Because the state’s adoption of the particular standard was perceived to favor that standard over other standards, the courts found that those statutes violated the Establishment Clause. Here, that is not an issue. ConAgra itself selected and promoted its own standard and are only being held to it by Plaintiffs.

The Court need not resolve any ecclesiastical dispute to determine whether ConAgra, in the scope of commercial transactions, represented that its Hebrew National products adhered to a particularly rigorous and exacting kosher standard, when neutral facts show they did not (*i.e.*, quotas pushed by secular entities, not application of kosher rules, used to mark meat kosher), and offered a “kosher guarantee.” The Court, rather, simply has to evaluate whether the factual representations ConAgra elected to make to consumers regarding its products actually complied with the production process it utilized. At all times, ConAgra was free to select any kosher certifier it wanted. At all times, the selected certifier was free to apply any standard it wanted in deciding whether to certify ConAgra’s products as kosher. But ConAgra cannot affirmatively represent

that its products meet a more exacting and rigorous standard than those actually employed or, as described below, represent that its products adhere to a definition that it now claims does not even exist. To insulate a secular commercial entity from liability in such situations would provide it with a competitive advantage and likely itself violate the First Amendment.²⁹

ii. The Court Only Has To Determine if ConAgra Complied With Its Own Affirmative Representations To The Consuming Public.

This dispute can be resolved using neutral principals of law, such as contract law, consumer fraud law and the rules of evidence. ConAgra affirmatively represents to the consuming public that all Hebrew National products strictly satisfy a particular kosher standard--i.e., 100% kosher “*as defined by the most stringent Jews who follow Orthodox Jewish Law.*” ConAgra also offered consumers a “kosher guarantee.” FAC ¶72. ConAgra purposely chose to enter the marketplace and promote its products as adhering to the strictest possible kosher standard in order to expand and maximize its potential customer base (and profits).

²⁹ See *Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 298-299 (1985)(holding Establishment Clause did not exempt commercial activities of religious foundation from Fair Labor Standards Act on grounds that business were “vehicles for spreading religious gospel to public” and the “admixture of religious motivations does not alter a businesses’ effect on commerce.” “By entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees.”); *Swaggert v. Board of Equalization*, 493 U.S. 378 (1990)(religious entity engaged in commercial activities could not claim they were exempt from sales tax reporting requirements under Establishment Clause theory); *Malicki v. Doe*, 814 So.2d 347, 365 (Fla. 2002)(“To hold otherwise and immunize the Church Defendants from suit could risk placing religious institutions in a preferred position over secular institutions, a concept both foreign and hostile to the First Amendment.”)

In doing so, at no time did ConAgra disclose that the represented standard was far too vague or amorphous to define or for anyone to actually be held to. Instead, ConAgra reassured consumers that there were “strict guidelines kosher manufacturers *must* follow” and that it met them in every respect.

In prior litigation, Rabbi Ralbag and others (such as the principals of AER and its testifying expert witnesses) described in a clear objective terms what the Orthodox kosher “rules” that “must” be complied with at the AFG facilities were. Further in the *Barghout* and *Commack* cases, Ralbag endorsed the position that: “The determination *never* depends on any spiritual factor. It is solely a question of the food's physical attributes.” 2002 WL 32133572.

Plaintiffs allege and witnesses will testify that the “rules” that ConAgra stated “must” be complied with were not strictly adhered to in practice. As a result, ConAgra’s representations were misleading. It does not require the resolution of any religious disputes for a court to determine that if Plaintiffs’ allegation that quotas pushed by AER and AFG, *not* kosher rules, determined how meat was marked, the strict standard being held out by ConAgra was not complied with.

iii. The Sham Affidavit Doctrine Applies to Triangle K’s Proffered Affidavit.

While Rabbi Ralbag takes issue with Plaintiffs’ allegations, his prior testimony on kosher standards drastically conflicts with his present testimony in this matter which *now* offers the Court numerous inconsistent statements and excuses (or “presumptions”) for

ConAgra's alleged transgressions, and does not defeat Plaintiffs' claims, especially at this early stage when Plaintiffs have been refused any discovery.

The sham affidavit doctrine provides that a party cannot create a factual dispute by submitting an affidavit which contradicts the affiant's prior testimony. As the Eighth Circuit has noted "[a] party should not be allowed to create issues of credibility by contradicting his own earlier testimony." *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1366 (8th Cir. 1983).³⁰

Here, Rabbi Ralbag, through his inconsistent affidavit, is now attempting to retract positions he previously endorsed, including testimony describing the mandatory "rules" that he said "must" be employed at the slaughtering facilities that produce meat for Hebrew National products. While the sham affidavit doctrine is generally employed where a party is attempting to avoid summary judgment by manufacturing a factual dispute where none previously existed, the instant situation is analogous and the doctrine should apply with equal force. In both scenarios, a subsequent affidavit is being offered to create a factual dispute where the affiant's original testimony made clear there was none. Ralbag's previous testimony and the position he endorsed in *Commack* was clear. Now, however, when faced with allegations that those objective rules were breached, ConAgra offers a conflicting affidavit hoping to manufacture theological disputes

³⁰ See also *Children's Broadcasting Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1020 (8th Cir. 2001) (holding that the "inconsistent testimony does not create a genuine issue of material fact" sufficient to prevent summary judgment); *Herring v. Canada Life Assur. Co.*, 207 F.3d 1026, 1030 (8th Cir. 2000) (refusing to find a genuine issue of material fact based on inconsistent testimony and holding that "if testimony under oath could be abandoned many months later by the filing of an affidavit, probably no cases would be appropriate for summary judgment.").

previously denied to exist and to disingenuously bypass the neutral principals of law doctrine. The Court should not endorse these disingenuous tactics and should disregard the affidavit.

But even if the Court chooses to apply the new Affidavit, as shown below, ConAgra has essentially conceded the case because then it is clear that it deceptively marketed its products as adhering to a particular standard that it now states is incapable of definition.

iv. Quotas, Not Religious Rules, Determined Whether Meat Was Marked Kosher.

Plaintiffs allege that quotas, not strict application of kosher rules, were the real determining factor in the AFG facilities when marking meat as kosher. FAC ¶¶93-94, 97. Plaintiffs allege that while Triangle K personnel were not present at the AFG facilities, AER and AFG personnel pushed employees to mark meat kosher in order to satisfy predetermined quotas not due to satisfaction of any kosher rules. It does not require the resolution of any religious disputes for a court to determine that if quotas pushed by AER and AFG, *not kosher rules*, were the real reason meat used by ConAgra was marked as kosher, the strict and exacting standard being held out was not complied with. In fact, this is precisely the type of claim that Chief Judge Davis determined could be resolved using neutral principals in *Maruani v. AER*, 2006 WL 2666302 at *6-7 stating: “The Court's task then is not to determine whether the religious reason is legitimately based on

religious doctrine, the court's task is to determine whether the religious reason is the real reason for the employer's actions.”³¹ (Ex. 12).

5. Even if Accepted at Face-Value, the Standard Ralbag Now Describes Does Not Match What Was Represented to the Public.

i. ConAgra Misrepresented the Standard Actually Employed.

ConAgra represented that the strictest and most exacting standard was employed. ConAgra also represented that Hebrew National products were “made with premium cuts of 100% Kosher Beef,” contained “only kosher ingredients,” and that its “standards are so exacting that an entire formula can be prohibited if the supervising rabbi finds in it even a single non-kosher ingredient that makes up only one-tenth of 1% of the total.” Now, Ralbag comes forth and describes the actual standard that he employs and considers “perhaps the most important principal” to be something quite different. Ralbag Aff. ¶¶83-86. There, Ralbag explains that the ultimate standard governing kosher determinations for ConAgra is really one of “presumptions” and “principal of the majority.” *Id.* In describing this, Ralbag now explains that where mixed meat items are at issue (as all hot dogs, salami and sausages are) they can potentially contain up to 49% of what was once non-kosher meat and still qualify as kosher. In such situations, Ralbag explains that he will consider any minority part of the meat mixture that had once been

³¹ *Citing Rohland v. St. Cloud Christian School*, 2004 WL 2940889 (Minn.Ct.App. Dec. 21 2004)(Ex. 13); *see also Minker*, 894 F.2d at 1360 (permitting minister’s breach of contract action against church to proceed when issue could “be adduced by fairly direct inquiry into whether [minister’s] superintendant promised him a more suitable congregation”); *Catholic High School Ass’n v. Culvert*, 753 F.2d 1161, 1168-69 (2d Cir 1985)(school board was “free to determine, using dual-motive analysis, whether religious motive was in fact cause of discharge”).

non-kosher to be transformed and “nullified by the majority.” *Id.* at ¶85. In describing these “presumptions,” Rabbi Ralbag equates the standard applied to one where a husband’s paternity of a child is “presumed,” “even if there is evidence to suggest otherwise,” just “because the majority of cohabitations of a married couple are performed by the husband.” Ralbag Aff. at ¶¶83-86.

Even accepting this testimony at face-value, it does not require the resolution of any religious dispute to see that the standard now stated to be employed is far different from the standard ConAgra represented to the public. In turn, this Court only needs to determine if the actual standard employed was consistent with what was disclosed, causing the likelihood of confusion in reasonable consumers.

ii. To The Extent ConAgra Now Claims That There Is No Definition Of “*Kosher*’ As Defined By The Most Stringent Jews Who Follow Orthodox Jewish Law,” It Has Represented To Consumers That It Follows An Illusory Standard And Engaged In Consumer Fraud.

Even accepting Ralbag’s recent affidavit at face value, it is clear that ConAgra has engaged in consumer fraud by representing to the public that its Hebrew National products strictly adhere to a particular standard it now claims does not even exist. Here, having created an entire marketing scheme to profit off the representations to consumers that all Hebrew National products met a strict definition and standard of kashrut, ConAgra and Ralbag now suddenly want to claim that *no such definition or standard has ever existed*. Such conduct presents a straightforward case of consumer fraud--representing that goods factually adhere to a stated standard that Defendant now concedes does not even exist. Essentially ConAgra has represented to consumers that it follows an

illusory standard in exacting fashion in order to induce consumers to purchase Hebrew National products.

Proof of this deceptive conduct does not require the Court to resolve any religious disputes at all, but only review the marketing materials that ConAgra used to promote Hebrew National products and determine if those statements were likely to mislead reasonable consumers, in light of its recent statements. As shown, ConAgra represented that all Hebrew National products are marked with the Triangle K symbol which signifies “kosher as defined by the most stringent Jews who follow Orthodox Jewish Law” and that there are “strict guidelines kosher manufacturers must follow.” FAC ¶¶67, 70. ConAgra represented that there was “slight” but no material variations from plant to plant” on kosher manufacturing requirements. It did so, by holding up Rabbi Ralbag and Triangle K as the “the most reliable name in strict rabbinical food certification and supervision.” Ralbag, in turn, in *Commack*, publically endorsed the position “there is no debate about the meaning of the word ‘kosher’ among different sects of Jews” and the Orthodox standard of kosher is definable in “objectively ascertainable qualities of the product being sold – i.e., its ingredients and how it has been processed,” not one that “has only theological significance.”³²

Yet now, in direct contrast, ConAgra and Ralbag state that no such definition exists because different Orthodox sects “vigorously” disagree on the applicable standard

³² Intervenors’ Brief in *Commack*, 2001 WL 34106424 at *18; COLPA Amicus Brief in *Barghout*, 1994 WL 16049942, at *10-11.

and whose rules are “most stringent.” *See* Def. Br. at 10, 28; Ralbag Aff. ¶¶34, 37-38, 49:

37. There are today *vibrant and vigorous disagreements* amongst various streams of orthodox Judaism....there is no one “orthodox” understanding...Moreover, it is commonplace amongst orthodox Jews, particularly ultra-orthodox Jews, to view their particular approach to halacha as the “most stringent.”

ConAgra’s representations to consumers clearly imply that there is an objective standard that its Hebrew National products strictly adhered to. Yet now it appears that ConAgra made these factual representations knowing that the represented standard was completely illusory because it now claims that numerous Orthodox sects “*vigorously disagree*” with Triangle K’s standard and take the position that their contrary standard is really the one “*defined by the most stringent Jews who follow Orthodox Jewish Law.*”

Given its recent statements, it is clear ConAgra violated the consumer fraud laws at issue by, *inter alia*:

- i. selling products that didn’t comply with the standard represented;
- ii. causing likelihood of confusion or of misunderstanding as to the approval or certification of goods;
- iii. representing that Hebrew National products have characteristics, ingredients or benefits that they do not have;
- iv. representing that Hebrew National products are of a particular standard, quality or grade, or that goods are of a particular style, if they are of another;

- v. advertising Hebrew National products with intent not to sell them as advertised or in a manner tending to mislead or in any way deceive a person;
- iv. using a scheme or device to defraud by means of obtaining money or property by knowingly false or fraudulent pretenses, representations, or promises.
- v. engaging in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce

See e.g., Nebraska Revised Statutes §§87-302(2), (5), (7), (9), (15); §59-1602; *see also*, Minn. Stat. §§8.31, 325D.44 *et. seq.*, 325F.69 *et seq.*

Certainly, given the representations now made in ConAgra's motion papers, material facts were withheld from consumers and ConAgra had no basis to represent Hebrew National products in the deceptive manner it did.

iii. The Relief Sought Does Not Create Any Excessive Entanglement

Finally, ConAgra completely misinterprets the remedy sought by Plaintiffs. Def. Br. at 21-22. Plaintiff does not seek to have the Court mandate any kosher standards nor impose them on religious organization. Rather, the injunction Plaintiff seeks is to have ConAgra (not Triangle K) stop making misleading statements about its products. FAC ¶145. Certainly, it is not beyond the Court's jurisdiction to enjoin a purely secular company from deceptively representing that its products strictly adhere to standard that it now claims does not exist. *See Orange County District Attorney Press Release, Anaheim Market to Pay Over \$535,000 in Settlement for Falsely Advertising and Selling Various*

Generic Meats as Halal, November 21, 2011 (court permanently enjoined retail supermarket from mislabeling non-Halal meat as Halal in violation of unfair business practice statutes)(Ex. 14).

6. ConAgra’s Conclusion That Despite Plaintiffs’ Allegations, Hebrew National Products Are Kosher, is Based on Incomplete Facts.

Ralbag’s ultimate conclusion that even if the allegations in the FAC are accepted as true, Hebrew National products are nevertheless kosher not only conflicts with his prior testimony as to the mandatory rules that “must” be followed “otherwise, meat is not considered kosher,”³³ but also ignores critical facts plead. The FAC makes clear that quotas pushed by AER and AFG in Ralbag’s absence, not adherence to religious rules, determined whether meat was ultimately marked kosher. These quotas demonstrate that a genuine factual dispute exists as to the ConAgra affiants’ contentions, and that there exists a non-religious basis on which to decide the merits of Plaintiffs’ claims. At this early, pre-discovery stage of the litigation, the Court cannot resolve this dispute in ConAgra’s favor.

C. Adjudication Of Plaintiffs’ Claims Does Not Violate The Free Exercise Clause.

ConAgra additionally argues that the Free Exercise Clause of the First Amendment bars the adjudication of Plaintiffs’ claims. ConAgra, again, mistakenly argues that Plaintiffs are seeking “determinations of the meaning of religious kosher rules and seeking[ing] to impose their own particular view of *kashrut*...” Def. Br. at 24. This is simply not the case.

³³ FAC Ex. O at ¶2.

In addition to the fact that the First Amendment does not prohibit a court from adjudicating a matter involving a religious doctrine when neutral laws of general application can be applied to resolve the dispute, it is a well established principle that neutral laws of general application do not violate the First Amendment simply because they have the incidental effect of burdening a particular religious practice. *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Jones*, 443 U.S. at 605. In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court expressly rejected the argument that the First Amendment protects all conduct prompted by religious beliefs. 494 U.S. 872, 882 (1990). Specifically, the *Smith* court held that the free exercise clause did not prevent a state from applying criminal laws prohibiting drug use to smoking peyote during a religious rite. The Court stated:

Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.

Id.

Smith recognized that the free exercise clause prohibits a state from regulating conduct because of the religious beliefs that it represents. However, the Court declined to extend that prohibition to neutral laws of general application even if they established standards of conduct that may conflict with a particular religious belief. Similar to the Respondents in *Smith*, ConAgra now seeks to carry the meaning of “free exercise of religion” too far. ConAgra appears to contend that by affixing a Kosher label on its

Hebrew National products, ConAgra has placed itself beyond the reach of consumer protection laws-- laws not specifically directed at any purported religious practice, but at general conduct of neutral application. ConAgra, in other words, is arguing that requiring a secular business to observe a generally applicable law, that forbids the fraudulent mislabeling of a food product, is a prohibition of the free exercise of religion.

Permitting ConAgra to place its conduct outside the reach of consumer protection statutes merely because it places a Kosher label on its products would create the unacceptable anomaly in the law that was feared by the Supreme Court in *City of Boerne v. Flores* – “a constitutional right to ignore neutral laws of general applicability.” 521 U.S. at 513.³⁴ It is easy to envision the kinds of “anomalies” that could result from such an absolutist interpretation of the free exercise clause. For example, laws prohibiting murder would have no application to human sacrifices performed pursuant to some religious practice. As explained in *Jones v. Wolf*, “[t]he neutral-principles approach cannot be said to ‘inhibit’ the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees or purchase goods.” *Id.* at 606.

ConAgra’s contention that Plaintiffs are seeking a determination of the meaning of kosher rules is incorrect. Plaintiffs’ theories do not require the Court to establish any

³⁴ Indeed, permitting ConAgra to engage in conduct proscribed by consumer protection laws that must be observed by everyone else in the marketplace simply because ConAgra places a kosher label on its products might be viewed as the kind of official recognition of a religion that is prohibited by the establishment clause. *See Boerne*, 521 U.S. 537 (Stevens, J., concurring).

standard for kosher or resolve any religious disputes as ConAgra itself established the applicable standard and made representations to the public about its strict adherence to that standard. This Court is only asked to merely apply neutral principals of law to determine if ConAgra complied with its own affirmative representations to the consuming public.

No question exists that the principles of law at issue are both neutral and generally applicable. It is not even alleged that they are directed at or were designed to suppress the kosher labeling practices of ConAgra, or that they selectively burden religiously-inspired conduct. *Cf. Lukumi Babalu Aye*, 508 U.S. at 545-46 (holding ordinance prohibiting animal sacrifice unconstitutional because it was motivated by a desire to suppress the practices of a particular religion and did not apply equally to the killing of animals for non-religious purposes). On the contrary, it is clear that these principles have evolved without regard to the practices of any religion and that they are uniformly applicable whether the conduct in question is religiously inspired or not.³⁵ Consequently, judging ConAgra's liability in accordance with these principles does not violate their free exercise rights. *Smith v. O'Connell*, 986 F. Supp. 73, 79-80 (D.R.I. 1997).

³⁵ ConAgra serves the general public in competition with ordinary commercial enterprises, and the mislabeling and misbranding of its products as Kosher would undoubtedly give ConAgra an unfair advantage over their competitors and trustworthy consumers. It is exactly this kind of "unfair method of competition" that consumer protection statutes intended to prevent and the admixture of religious motivations does not alter a business's effect on commerce. By entering the economic arena and trafficking in the marketplace, ConAgra has subjected itself to the standards Congress has prescribed for the benefit of consumers. *See Alamo Foundation*, 471 U.S. at 299.

D. Plaintiffs Have Standing.

ConAgra erroneously argues that Plaintiffs lack standing because: (1) Plaintiffs have not alleged that they are observant Jews who keep kosher, and (2) they have not identified which specific packages of Hebrew National beef were not kosher. Both arguments misapprehend Plaintiffs' Complaint. The latter argument foists a pleading burden on Plaintiffs that does not exist.

First, the Class is defined to include all purchasers of Hebrew National products, not only observant Jewish purchasers. FAC ¶117. Plaintiffs' claims, injuries and membership in the class do not turn on any specific religious beliefs they may hold. Rather, their injury and standing derives from the fact they paid a premium price for a deceptively marketed product that failed to meet the manufacturer's guarantee. FAC ¶¶3, 29-41, 109-112. *See generally Smajlaj v. Campbell Soup Co.*, 782 F. Supp.2d 84, 99 (D.N.J. 2011) (explaining that under New Jersey Consumer Fraud Act, consumer only needed to plead that he "was misled into buying a product that was ultimately worth less to the consumer than the product he was promised").

In fact, ConAgra is specifically aware that Hebrew National customers are not primarily observant Jews, but rather "mainstream" consumers who view its kosher marks as "trusted seals, standards and symbols of higher quality" and pay "premium prices"—because "Kosher is the New Organic." FAC ¶¶68-70. Plaintiffs allege that they purchased "Hebrew National products because [they] believed the kosher title and certification made them a higher quality product than other meat products on the market." FAC ¶¶15, 18, 29-41, 109-110. In turn, Plaintiffs allege that they were injured when they

“overpaid” a premium price for a product that did not satisfy the represented standard.
Id.

Second, Plaintiffs do not merely allege that random and sporadic Hebrew National packages failed to meet the represented standard. Rather, Plaintiffs allege a systematic failure to comply with the represented standard, affecting *all* Hebrew National packages, including those purchased by Plaintiffs. *See* FAC ¶¶4, 7, 9, 93-94, 109-110. Quotas, not adherence to ecclesiastical rules, determined kosher status.

In any event, given that this case turns both on ConAgra’s omissions and misrepresentations, Plaintiffs are not required to identify which packages of Hebrew National beef were rendered non-kosher. “Although it is often the case that the difference between the promised product and the product actually received is some defect or flaw in the product, *there is no requirement that the product actually received be defective or deficient in any way other than that it is not what was promised.*” *Smajlaj*, 782 F. Supp.2d at 99. Thus, unlike the cases ConAgra relies upon, Plaintiffs’ claim is not that ConAgra produces a harmful product. Def. Br. at 45 (citing *In re Zurn Pex*, 644 F.3d at 616-18). Instead, Plaintiffs’ claims are that ConAgra—negligently or knowingly—falsely advertises its products as consistently adhering to a specific quality standard when they do not. For non-observant, non-Jewish consumers, this may not render Hebrew National beef inedible. Yet it does not make ConAgra products any better than a cheaper-priced brand that does not represent as itself as being “100% kosher.”³⁶

³⁶ *See e.g.* Intervenor’s Brief in *Commack*, *supra* at 10 (“When a vendor represents that his food is kosher, he is able to command a premium price.”)(Ex. 9).

Accordingly, contrary to ConAgra's contentions, Plaintiffs have demonstrated (1) injury-in-fact that is "actual or imminent;" (2) a causal connection between their injury and ConAgra's actions; and (3) redressability through state statutory and common law claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

E. The Federal Meat Inspection Act Does Not Preempt Plaintiffs' Claims.

Plaintiffs' consumer fraud, negligence, and breach of contract claims are not preempted by the Federal Meat Inspection Act, 21 U.S.C. §601 et seq. ("FMIA"). To establish preemption under the FMIA, ConAgra has to show that two conditions are met: (1) "[a] state law must impose marking, labeling, packaging or ingredient requirements; and, (2) those requirements must be '*in addition to, or different than*' those required under federal law." *Meanurit v. ConAgra Foods, Inc.*, 2010 WL 2867393, at * 1-2 (N.D. Cal. July 20, 2010)(Ex. 15). As the party claiming preemption, ConAgra bears the burden of persuasion. *Williams v. NFL*, 582 F.3d 863, 879 (8th Cir. 2009). ConAgra has not done so.

1. Plaintiffs' claims do not impose any new labeling requirements.

Contrary to ConAgra's mischaracterization, Plaintiffs' claims do not seek to impose *any* additional labeling requirements upon Hebrew National beef, much less labeling requirements that are "in addition to, or different from those made under this [Act]." 21 U.S.C. §678. Plaintiffs do not seek to have ConAgra put any new types of "marking, labeling, packaging or ingredient requirements" on Hebrew National packages. Plaintiffs only seek to have ConAgra's current packaging refrain from having false or misleading statements on it, which is entirely consistent with the FMIA. Under the

FMIA, states have “concurrent jurisdiction” over matters which “prevent the distribution of...meat products that have labeling that is false or misleading.” *Kuenzig v. Kraft Foods, Inc.*, 2011 WL 4031141, at *4 (M.D. Fla. Sept. 12, 2011)(Ex. 16). Further, nothing in the FMIA regulates misleading statements on ConAgra’s websites, marketing materials and advertisements.

The cases on which Defendant relies are distinguishable as they involved claims challenging only the defendants’ labeling. Unlike the plaintiffs in both *Meanurit* and *Kuenzig* Plaintiffs here only seek to ensure that ConAgra’s products adhere to the standards that ConAgra *itself* defines, promotes and “guarantees” on its website, marketing materials, and advertisements. *See* FAC ¶¶67-77, 133 (“[ConAgra] itself states on its website: ‘We feel the consumer is to be protected. If a market section says it is kosher, it should be kosher without the buyer having to carefully check the ingredients.’”). In *Meanurit*, the plaintiff complained that labels on ConAgra’s meat pot pies insufficiently warned consumers that they might contain pathogens that would not be killed if inadequately cooked. 2010 WL 2867393 at *1-2. Similarly, in *Kuenzig*, the plaintiff asserted that manufacturer claims relating to the “percent fat free” nature of lunch meat were inherently misleading because they were based upon the number of fat grams as a percentage of the product weight, not the total number of calories. 2011 WL 4031141 at *6. In both cases, plaintiffs sought to impose on the defendant food manufacturers not only a correction of a false statement, but an entirely new type or category of marking beyond what federal law required.

Here, in contrast, Plaintiffs do not claim that ConAgra's labels require any different type or category of information. Plaintiffs only challenge ConAgra's false and misleading statements. Further, Plaintiffs claims do not focus solely on Hebrew National's packaging and labeling. Plaintiffs' claims challenge misrepresentations on ConAgra's marketing materials and its guarantee, as well. Nothing in the FMIA regulates statements on ConAgra's out-of-store websites, marketing materials and advertisements. As a result, those statements are certainly not subject to the FMIA and any preemption claim.³⁷

2. Even if Plaintiffs' claims sought to establish labeling requirements, these requirements are not "in addition to, or different from" those required by the FMIA.

ConAgra also cannot show Plaintiffs' state law claims impose requirements that are "in addition to, or different from" those in the FMIA. 21 U.S.C. §678. Their claims instead fall within the FMIA's express savings clause, which states that the FMIA "shall not preclude any State...from making requirement[s] or taking other action, *consistent with this [Act]* with respect to any other matters regulated under this Act." *Id.* (emphasis added); *see also National Meat Ass'n v. Harris*, 132 S.Ct. 965, 969 n.3, 10 (2012), 21 U.S.C. §607(d) (FMIA expressly forbids false and misleading labels and does not preempt consistent state laws.)

Even the cases ConAgra cites demonstrate that Plaintiffs' claims are not preempted: In *Kuenzig*, the court did not find preemption of the plaintiffs' Little FTC act claims—which Plaintiffs likewise assert here through the state Consumer Fraud claims—

³⁷ *Cf. Wyeth v. Levine*, 555 U.S. 555 (2009).

because those claims could be based upon violation of the FMIA and PPIA. *Id.* at *7 (explaining that a violation of the Florida Deceptive Trade Practices Act...“can be based on a violation of...the FMIA and PPIA’s prohibition against misleading labels”). The court similarly found a claim for breach of express warranty would not be preempted because “an express warranty claim merely holds the defendant responsible for delivering the product as warranted.” *Id.* Plaintiffs’ claims here similarly attempt to enforce ConAgra’s representations and guarantees.

Moreover, kosher meat certification and labeling are specifically excluded or impliedly exempt from the purview of the FMIA and the USDA’s authority, confirming that no conflict exists. *See* Export Guidelines, www.fsis.usda.gov/OFO/export/israel.htm (stating that “*FSIS personnel have no responsibility for certifying to the authenticity of the Kosher identification of the product*”)(Ex.17). With respect to kosher meat labeling, all the USDA does is “verify...that the appropriate religious organization was contacted.” USDA, Ask FSIS, http://askfsis.custhelp.com/app/answers/detail/a_id/375/kw/kosher (stating that FSIS does not monitor slaughter or production of the product, or determine the “acceptability of the ritual used,” but might “verify that the label is not falsified by verifying that the appropriate religious organization was contacted”)(Ex.18).

Consistent with this implied exemption, numerous states, including Illinois, Minnesota, New York, and Arizona, have laws that fill the gap that the FMIA leaves with regard to kosher meat certification and labeling. Some ritual requirements of the Jewish

faith”—as a “humane” method of slaughter.³⁸ Notably, despite the fact that the FMIA itself defines humane methods of slaughter, this definition not contained in the FMIA.³⁹ As evidenced by the *Commack* litigation, some states prohibit the sale of any food or meat fraudulently labeled as kosher. *See, e.g.*, Minn. Stat. §31.651 (“No person shall sell or expose for sale any poultry, poultry products, meat, or meat representations and falsely represent the same to be kosher”). Despite the long-standing existence of these state laws relating to the production and labeling of kosher meat and other foods, ConAgra has not provided a single authority holding that any are preempted because of a conflict with the FMIA.

ConAgra’s additional caselaw is inapposite or simply explains preemption principles, without providing any support for ConAgra’s argument that Plaintiffs’ claims here are preempted. In *Jones v. Rath Packing Co.*, the Supreme Court invalidated California legislation imposing a net weight or measure standard upon any commodity

³⁸ E.g., N.H. Rev. Stat. Ann. §427.33 (1998); Md. Code Ann. Agric. §4-123.1 (1998); Minn. Stat. Ann. §31.59 (West 1998).

³⁹ The Poultry Products Inspection Act (“PPIA”) specifically exempts for inspection purposes “persons slaughtering, processing or otherwise handling poultry or poultry products which have been or are to be processed as required by recognized religious dietary laws, to the extent that the Secretary determines necessary to avoid conflict with such requirements.” 21 U.S.C. §464 (a)(3); *see* FSIS Directive 6030.1, Rev. 1, Aug. 10, 2005 (“Religious Exemption for the Slaughter and Processing of Poultry”)(Ex. 19). While no specific exemption exists under the FMIA for ritual or kosher slaughter as exists under the PPIA, the Secretary of Agriculture has issued fact sheets showing that USDA/FSIS do not have responsibility for overseeing either the slaughter or labeling of kosher meat. *See* FAC; *see also* http://askfsis.custhelp.com/app/answers/detail/a_id/375/kw/kosher (stating that FSIS does not monitor slaughter or determine the “acceptability of the ritual used” but may “verify that the label is not falsified by verifying that the appropriate religious organization was contacted”)(Ex. 18).

that differed from the requirements imposed by federal legislation and regulation. 430 U.S. 519, 526-27, 532-33 (1977). Similarly, *National Meat Association v. Harris* struck down a California criminal law prohibiting the slaughter or sale of nonambulatory animals because that law placed requirements upon slaughterhouses that did not exist under the FMIA, and which did not fall under the express savings clause. 132 S.Ct. at 970-71.

ConAgra cannot point to a single decision where a court has declared that the FMIA preempts state laws seeking to enforce the veracity of a label or marketing materials declaring a product to be “100% kosher” according to the definition ConAgra employs here. Its motion to dismiss on preemption grounds must be denied.

F. Plaintiffs’ Claims Under The Nebraska Consumer Protection Laws Should Not Be Dismissed As Those Laws Are Properly Applied In This Case.

ConAgra’s attempt to dismiss Plaintiffs’ claims under the Nebraska consumer protection laws is unavailing. ConAgra argues that: (1) Plaintiffs are not entitled to relief under the Nebraska Uniform Deceptive Trade Practices Act (“UDTPA”) because Plaintiffs now know the truth regarding the fraudulent label of Hebrew National beef products and therefore cannot allege future harm in order justify injunctive relief; (2) Plaintiffs claims under the Nebraska Consumer Protection Act (“NCPA”) fail because no named Plaintiff is from Nebraska and the NCPA cannot be applied to the fraudulent labeling of Hebrew National products because such conduct is regulated exclusively by the USDA; and (3) Minnesota choice-of-law rules preclude application of Nebraska law to Plaintiffs’ claims. As demonstrated below, each argument fails.

1. Plaintiffs' Claims For Injunctive Relief Under The UDTPA Are Proper As Plaintiffs Properly Allege Facts Sufficient to Create An Inference Of Future Harm.

The UDTPA is to be broadly interpreted to encourage claims to be brought in the public's interest and to stop deceptive practices. The conduct complained of need not actually deceive and injure the named Plaintiffs; it merely needs to be capable of likely deceiving or confusing to members of the public. Neb. Rev. Stat. 87-303.

Standing is acquired in two ways: either the plaintiff has suffered some "injury-in-fact" or the plaintiff is the beneficiary of some legislative enactment granting standing. The consumer fraud statutes at issue all contain broad grants of standing. Through Neb. Rev. Stat. 87-303, the Nebraska legislature has expressly granted standing to any "person likely to be damaged by a deceptive trade practice of another" to bring suit for injunctive relief. Injury, monetary damage, loss of profits, or intent to deceive need not be proven to pursue a claim under the DTPA. Further, both Nebraska and non-Nebraska residents have standing to assert claims. Neb. Rev. Stat. 87-304(c) ("The Uniform Deceptive Trade Practices Act shall apply to deceptive trade practices conducted in whole or in part within the State of Nebraska against residents or nonresidents of this state.")

ConAgra's overly restrictive interpretation of the UDTPA, and its "future" injury requirement, essentially abrogates the statute and its expansive construction and application by courts. According to ConAgra, the moment any injured person gains enough knowledge to even articulate a claim that passes muster under Rules 8, 9 and 12, that person automatically loses standing because she is no longer likely to be deceived by a still ongoing practice, having filed a complaint articulating the violation. ConAgra's

argument is entirely circular here because under its interpretation of the statute, 1) no individual can state a claim until they have been injured and can articulate the violation in a complaint (i.e., a justicable controversy), but 2) once the person discovers that they have been harmed and can articulate it in a complaint, they can no longer plead a “future” injury, and therefore lack standing. Def. Br. at 38. Judge Olesiky rejected the same argument with respect to Minnesota’s near-identical UDTPA, stating: “To bar a person injured by a deceptive trade practice from bringing an action under the DTPA merely because they are now forewarned against such practice would seem to run counter to the remedial nature of the DTPA.” *Boschee v. Burnet Title Company*, No. 03-016986 at *12 (Minn. Dist. Ct. Apr. 24, 2006)(Ex. 20).

In any event, in these circumstances it is untrue that Plaintiffs cannot be harmed in the future – they may purchase Hebrew National products in the future, yet because of ConAgra’s non-public practices, receive meat that does not meet the represented standard. Any ongoing fraud is next to impossible for a consumer to detect and ConAgra denies that the alleged violations are occurring, yet refuses discovery. Hence, the named Plaintiffs do not currently possess all facts to completely eliminate the likelihood of future injury.

ConAgra’s reliance on *Reinbrecht v. Walgreen Co.*, 742 N.W.2d 243 (Neb. Ct. App. 2007) is misplaced. First, *Reinbrecht* was decided under a summary judgment standard, not Rule 12’s notice pleading standard.

Second, unlike the situation in *Reinbrecht*, where the alleged deceptive practice – selling a book of ten 37-cent stamps, with an aggregate face value of \$3.70, for a marked

up price of \$4.99, was clear on its face - here facts pertaining to meat marking practices at the AFG facilities remains concealed from future consumers (including Plaintiffs) and absent the discovery / litigation process, is impossible for them to detect and confirm. In contrast, in *Reinbrecht* it was evident on the face of the product before the sale that a book of ten 37-cent stamps did not equal \$4.99, but only \$3.70. Plus, there were no allegations that ten 37-cent stamps were not being provided in the package.

Reinbrecht would only be factually akin to this case if Walgreens was selling and labeling its sealed stamp books as U.S. postage stamps when, in fact, they were not but instead, counterfeit stamps or Canadian stamps. As such, at least until trial when the fact finder can resolve the issue based on evidence, Plaintiffs remain in the dark and remain “person[s] likely to be damaged by a deceptive trade practice of another,” with standing to seek an injunction prohibiting the alleged practices. Finally, *Reinbrecht* is distinguishable because there, the Plaintiff failed to even allege that he was a person “likely to be damaged by Walgreens’ practice in the future. 742 N.W. 2d at 248. Here, in direct contrast, Plaintiffs absolutely allege that unless ConAgra’s deceptive conduct is enjoined, they are likely to suffer future harm. FAC ¶145, 159 (“Unless enjoined,...the Class will continue to purchase Hebrew National products at artificially high premium prices and consumer products they are led to believe are 100% kosher, which in truth are not.”).

Because the Plaintiffs and the class remain persons likely to be damaged by the deceptive trade practice of another, standing to pursue claims under the UDTPA for injunctive relief exists.

2. Plaintiffs' Claims Under The Nebraska Consumer Protection Act Are Not Exempted.

ConAgra argues that Plaintiffs' Nebraska Consumer Protection Act ("NCPA") claim should be dismissed because the NCPA exempts all "transactions otherwise permitted, prohibited, or regulated under laws administered by... any regulator body or officer acting under the statutory authority of this state or the United State." Def. Br. at 39. Were ConAgra's reading correct, all businesses would be inoculated against consumer protection claims, as every "industry and transaction" is regulated to some degree. ConAgra's reasoning is illogical on its face and unsupported by both the statutory text and case law it cites.

ConAgra's exemption argument is misplaced for several reasons. First, the relevant exception in Neb. Rev. Stat. §59-1617 is far narrower than ConAgra acknowledges. As explained in *Hage v. General Service Bureau*, 306 F. Supp.2d 883 (D. Neb. 2003), §59-1617 does not provide blanket immunity to all businesses that simply happen to be regulated in some way or another by a federal or state agency. Rather, the exemption is far narrower and only attaches if the specific "conduct itself" being challenged is regulated.

However, particular conduct is not immunized from the operation of the Consumer Protection Act merely because the actor comes within the jurisdiction of some regulatory body, the immunity arises if the conduct itself is also regulated.

Hage, 306 F.Supp.2d at 890.

The same conclusion was reached in *Jenkins v. Gen. Collection Co.*, 538 F. Supp. 2d 1165, 1176 (D. Neb. 2008) where the court held that unless there is a showing that

“the specific acts allegedly committed by Defendants are subject to regulation,” the conduct is not exempt from the NCPA.⁴⁰

Here ConAgra cannot credibly argue the “the specific acts allegedly committed by Defendants are subject to regulation” – it spends nearly thirty pages of its brief arguing that courts, as well as other state and federal regulatory bodies, lack jurisdiction to regulate kosher production and certification matters and therefore, have not done so. Further, none of the provisions of the FMIA that ConAgra cites address the deceptive marketing or production of kosher food products. The USDA does not inspect meat for any type of kosher compliance or accurate kosher representations.

Statutory exemptions must be strictly construed. *See White v. State*, 540 N.W.2d 354, 358 (Neb. 1995); *State ex re Halloran v. Hawes*, 279 N.W. 2d 96, 100 (Neb. 1979). Yet ConAgra has failed to come forward with a single statute or case holding that the deceptive marketing of kosher food products by a secular business are exempted from the purview of the NCPA due to an existing regulation that covers the field.

None of the cases ConAgra cites support dismissal on the ground the matters raises are already regulated by other state or federal laws. In fact, the cases ConAgra cites all involve specific conduct in the heavily-regulated banking sector - not one has

⁴⁰ *See also Wrede v. Exchange Bank of Gibbon*, 531 N.W.2d 523, 529 (Neb. 1995) (“The teaching of *Kuntzelman [v. Avco Financial Services of Nebraska, Inc.]*, 291 N.W.2d 705 (1980)] is that while particular conduct is not immunized from 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.”); *Jackson v. Pfizer, Inc.*, 432 F. Supp. 2d 964, 967 (D. Neb. 2006) (“Federal labeling laws are minimum standards; they do not necessarily shield manufacturers from state law liability.” (quoting *Witczak v. Pfizer, Inc.*, 377 F. Supp. 2d 726, 732 (D. Minn. 2005))).

anything to do with the specific type of misleading food marketing at issue here. Thus, *Little v. Gillette*, 354 N.W.2d 147 (Neb. 1984), *Wrede*, 531 N.W.2d at 529 and *Hydroflo Corp. v. First Nat'l Bank*, 349 N.W.2d 615, 622 (Neb. 1984) are all factually distinguishable. In those cases the “conduct itself” (i.e., the specific banking practices at issue) was regulated; here, in sharp contrast, that is not the case.

3. The Court Should Reject Defendants’ Attempt To Preclude The Application of Nebraska Consumer Protection Laws.

ConAgra asks the court to preclude the application of Nebraska law to this case on choice of law grounds. The Court should decline but in the event the court finds Nebraska law does not apply, Count IV presents alternative claims under the consumer protection laws of each Plaintiff’s state of residence.

In conducting a choice of law analysis, the question is which state has the greatest interest in policing ConAgra’s misconduct originating in and emanating from its offices in Nebraska. ConAgra agrees that Minnesota’s choice of law rules govern, but ignores: (1) the far reaching impact of its misconduct that originated and emanated from its headquarters in Nebraska; (2) Nebraska’s consumer protection statutes apply to residents and non-residents alike when “deceptive trade practices are conducted in whole or in part within the State of Nebraska;”⁴¹ and, (3) the impact on Nebraska’s strong reputation for quality products and honest dealing.

ConAgra’s attempt to resolve this issue is premature given that no related discovery has occurred. *Cantonis v. Stryker Corp.*, 2010 WL 6239354, *3 (D. Minn.

⁴¹ Neb Rev. Stat. §87-304(c)

Nov. 23, 2010)(Ex. 21). Choice of law calculus necessarily involves a factual analysis of the contacts each potential state law has with the Plaintiffs' legal theory. *See In re St. Jude Medical, Inc. Silzone Heart Valves Prods. Liab. Litig.*, 2006 WL 2943154, *4 (D. Minn. Oct. 13, 2006) ("*SJM II*", *rev'd on other grounds*, 522 F.3d 836 (the threshold choice of law inquiry for consumer claims required court to evaluate where marketing and distribution efforts were based, labels were drafted; product was developed, corporate FDA regulatory affairs were managed, and consumer inquiries were directed)(Ex. 22); *Mooney v. Allianz Life Ins. Co., of N. Am.*, 244 F.R.D. 531, 536 (D. Minn. 2007) (same). Here, facts obtained in discovery will confirm Nebraska's aggregation of contacts.

ConAgra purposely ignores Plaintiffs' allegations that all decisions related to the previously discussed public misrepresentations regarding Hebrew National products, as well as the marketing and labeling for the products, originated in and emanated from ConAgra's primary offices in Nebraska causing harm to consumers nationwide. FAC ¶¶6, 17, 21, 25. As ConAgra cannot plausibly argue that Plaintiffs' allegations suggest the conduct occurred primarily *outside* Nebraska, it is clear that, for purposes of this motion at the very least, Nebraska law must apply.

i. Nebraska's Aggregation Of Contacts With Plaintiff's Claim Demonstrates That Nebraska Law Is One Of The Available Choices For This Court To Apply.

Plaintiff's claims support the constitutional application of Nebraska law. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (holding, Due Process test for choice of law requires that state whose law is ultimately chosen must be among those

states with “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor unfair.”). The Eighth Circuit has held that a choice-of-law analysis needs to be conducted where state laws present substantive conflicts. *In re St. Jude Medical*, 425 F.3d 1116, 1120 (8th Cir. 2005) (“*SJM I*”). Because Nebraska has significant contacts with Plaintiffs’ claims, Nebraska has met the threshold Due Process test for applying its law. The only questions that remain are whether there is a substantive conflict between the remaining states’ laws, and, if so, whether Minnesota’s choice of law rules favors applying Nebraska’s consumer protection statutes to these circumstances.

Because this Court sits in the District of Minnesota, it must apply Minnesota’s conflict of law rules. *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 736 (8th Cir. 1995). As such, the Court must first determine whether any potential conflict involves substantive rather than procedural/remedial laws. *Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. Ct. App. 2004). If procedural or remedial, the law of the forum applies. *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 29 (Minn. 1996). Differences that present “outcome determinative” conflicts are considered substantive. *Schumacher*, 676 N.W.2d at 689.

ii. There Are No Outcome Determinative Conflicts Between The Nebraska Consumer Laws And At Least 32 Other States’ Consumer Law Applicable to Plaintiffs’ Claims.

In *SJM II*, Judge Tunheim found all 50 states had passed consumer statutes addressing the defendant’s alleged conduct and identified four potential areas of outcome determinative conflict among the states’ consumer protection laws: (1) the type of

scienter required; (2) whether *individual* reliance is required; (3) whether there was a private cause of action; and, (4) whether material omissions are prohibited. *SJM II*, 2006 WL 2943154 at *5 n.4.⁴² Any other identifiable conflict is procedural and therefore omitted from the conflict analysis under Minnesota law. *Id.* at *5. Despite 18 states having at least one outcome determinative conflict, the Court determined that Minnesota's consumer laws should apply pursuant to the Leflar/*Milkovich* choice-influencing factors, *infra*. *Id.* at *5 n.4.

Here, ConAgra attempts to manufacture outcome determinative differences in the Nebraska consumer laws by (1) arguing that a Wisconsin district court has noted that the UDTPA differs from the uniform version; and, (2) noting that the definitions of “unlawful conduct” and the available damages under the Minnesota and Nebraska statutes are different. Def. Br. at 42. However, neither is an outcome determinative conflict in the context of consumer fraud – “different” alone does not amount to an “outcome determinative conflict.”

In *SJM II*, Judge Tunheim determined that 32 jurisdictions⁴³ have no outcome determinative conflicts in their consumer laws. *See Id.* at *5 n.3. Included in those 32

⁴² The court did not reiterate the fifty-state analysis and simply referred to the plaintiffs' analysis. Plaintiffs provide that analysis, in relevant part, as referenced by Judge Tunheim, No. 01-md-1396, Doc. 409 and Doc. 409-14 (Ex. 23).

⁴³ Minnesota, Alaska, California, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, Washington, and West Virginia.

jurisdictions is Nebraska. As such, 31 states have no outcome determinative conflict with Nebraska consumer protection laws, including a majority of those where named plaintiffs reside.⁴⁴

Ignoring that a Court in this District has previously determined that these state laws do not substantively conflict with Nebraska law, ConAgra argues semantics – that slight outcome determinative differences exist in different definitions of “unlawful conduct”. This argument is unpersuasive as different states express the same concept with slightly different words given the nuances of the English language.

iii. Even If There Are Outcome Determinative Conflicts of Law, Precedent Clearly Points to Nebraska as Having the Greater Interest over and Contacts with Plaintiffs’ Claims.

Even if, *arguendo*, an outcome determinative conflict existed, the inquiry continues.⁴⁵ Courts applying Minnesota’s rules then look to the “choice-influencing considerations” crafted by Professor Robert Lefflar. *Milkovich v. Saari*, 203 N.W.2d 408, 412-16 (Minn. 1973). These factors include:

- a. Predictability of results;
- b. Maintenance of interstate and international order;

⁴⁴ California, Florida, Illinois, Michigan, Minnesota, and New York.

⁴⁵ See *SJM II*, 2006 WL 2943154 at *5 n.4 The Court in *SJM II* noted that the substantive conflicts in the 18 jurisdictions were based on the type of scienter required, whether individual reliance is required, whether the state recognizes a private cause of action, and whether material omissions are prohibited. The Court found that the following jurisdictions have outcome determinative conflicts with Minnesota law: Alabama, Arizona, Arkansas, Colorado, Georgia, Indiana, Iowa, Maryland, Nevada, New Mexico, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Wisconsin, and Wyoming.

- c. Simplification of the judicial task;
- d. Advancement of the forum's governmental interests; and
- e. Application of the better rule of law.

Id. at 412; *Mooney*, 244 F.R.D. at 535-36. Without question, these choice influencing factors favor application of Nebraska law.

a. Predictability of Results

The predictability factor addresses “whether the choice of law was predictable *before* the time of the transaction or event giving rise to the cause of action.” *Danielson v. National Supply Co.*, 670 N.W.2d 1, 7 (Minn. Ct. App. 2003) (emphasis in original). It applies “primarily when parties desire *advance* notice of which state law will govern in *future* disputes.” *Id.* (emphasis in original). In the consumer context, Courts have held that, if applicable at all, this factor favors applying the law of the state where the conduct originated and emanated. *See SJM II*, 2006 WL 2943154 at *5 (finding predictability favored application of Minnesota consumer protection law, “[t]o the extent that this factor is relevant here”).

Minnesota's choice of law rules provide that courts apply the *Milkovich* factors differently depending on the type of legal claim alleged. For instance, personal injury cases are treated differently than contract cases, particularly with regard to the predictability factor. ConAgra's ignores this and therefore fails its “obligation . . . to be true to the method rather than to seek superficial factual analogies between the cases and import wholesale choice of law analysis contained therein.” *Jepson v. Gen. Cas. Co.*, 513 N.W.2d 467, 470 (Minn. 1994). Had ConAgra reviewed and discussed the cases from

this District that actually address *consumer protection* claims in the context of the *Milkovich* factors, it would have noted that all courts that have addressed the issue have held that the predictability factor favors application of Nebraska law where deceptive conduct emanated from Nebraska. *See Mooney*, 244 F.R.D. at 536 (holding this factor favors application of Minnesota law: “[B]oth non-Minnesota class members and Allianz could have predicted that Minnesota law would govern claims based on Allianz’s allegedly fraudulent activities that emanated from Minnesota.”); *SJM II*, 2006 WL 2943154 at *5 (determining that defendant could easily anticipate that it would be subject to the laws of its home state, and it was also less burdensome to expect defendant to understand and follow its home state’s laws rather than all fifty.).

ConAgra cites *Foster v. St. Jude Med., Inc.*, 229 F.R.D. 599, 605 (D. Minn. 2005) in support of its conclusion that the predictability factor does not favor application of Nebraska law. However, that case involved a motion for class certification that lacked Minnesota’s choice of law analysis. Moreover, the cited excerpt from *Foster* does not refer to consumer protection claims, but rather to negligence, implied warranty, express warranty, and strict liability claims that require a different predictability standard than the one twice adopted in this District for consumer protection claims. *Compare Foster*, 229 F.R.D 605 (D. Minn. 2005) (emphasizing application of the laws of the state where the defective device was implanted for negligence, implied warranty, express warranty, and strict liability claims), *with SJM II*, 2006 WL 2943154 at *5 (emphasizing application of the laws of the state both defendants and consumers would reasonably expect –

defendant's home jurisdiction and/or where the alleged fraudulent activities emanated from).

Despite ConAgra's references to its activities in other jurisdictions and Plaintiffs' locations, Minnesota's choice of law rules dictate that deceptive conduct conceived in and emanating from Nebraska supports the application of Nebraska law.

b. Maintenance of Interstate and International Order.

The second factor ensures that Nebraska has sufficient contacts with and interest in the facts and issues being litigated. *Danielson*, 670 N.W.2d at 8; *see also, Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618, 620 (8th Cir. 2001) (“[This] factor is generally not implicated if the state whose law is to be applied has sufficient contacts with and interest in the facts and issues being litigated.”). As such, Minnesota courts view the “sufficient contacts” standard as a reiteration of the constitutionally sufficient contacts test. *Stenzel v. State Farm*, 379 N.W.2d 674, 676 (Minn. Ct. App. 1986). In the context of this case, Nebraska's significant contacts with ConAgra favors application of its law. *See SJM II* at *5 (“[T]he Court concludes that Minnesota has significant contacts with each plaintiff's claims by virtue of the domicile and claims-related activities of defendant.”).

In arguing that Nebraska law should not apply to out of state class members' claims, ConAgra cites numerous outlier cases in which a states consumer protection laws were applied to claims of class members from that particular state. In *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 2004 WL 909741 (D. Minn. Apr. 28, 2004)(Ex. 24), the Court applied Minnesota's consumer protection statutes to *all* out-of-

state class members' claims. There, consumers made purchases in different states outside Minnesota. In response to what ConAgra now argues, the Court held:

Minnesota has the most significant interest in the claims at issue here, requiring the Court to apply Minnesota law to those claims. As the class certification Order noted, Lutheran Brotherhood is organized under the laws of Minnesota and is headquartered in Minnesota, and according to Plaintiffs, much of the conduct occurred in or emanated from Minnesota.

Id. at *5-6. Thus, the states' interests were determined by significant contacts rather than where each "sale" occurred or class member resided. Similarly, Nebraska has the most significant interest in the claims at issue, as ConAgra, while incorporated in Delaware, is headquartered in Nebraska, and the alleged fraudulent conduct was developed in and emanated from its principal offices in Nebraska. FAC ¶¶6, 17, 21, 25, 115.

c. Simplification of the Judicial Task

This factor concerns this Court's ability to discern and apply the law of a state other than Minnesota. Except for complex issues of international law, this factor is rarely important. This is especially true of federal courts, which regularly apply the law of states other than the one in which they sit. Plaintiffs agree with ConAgra that this factor is neutral.

d. Advancement of the Forum's Governmental Interests

ConAgra, in its argument, over simplifies this factor. While common sense suggests that a forum's interests are advanced by the application of its own laws, this factor examines more than just whether its interests are advanced. Rather, this factor involves determining what would most effectively advance a "significant interest of the forum" state. *Jepson*, 513 N.W.2d at 472. This factor ensures that courts do not apply

rules of law inconsistent with its forum's concept of fairness and equity. *Board of Regents v. Royal Ins. Co. of Amer.*, 503 N.W.2d 486, 490–91 (Minn. Ct. App. 1993) (citation omitted), *aff'd in part, rev'd in part*, 517 N.W.2d 888 (Minn. 1994).

Nebraska and Minnesota consumer protection laws do not materially conflict with each other. Application of Nebraska law is consistent with Minnesota's concept of fairness and equity, as class members' consumer rights will be vindicated in a materially consistent manner. Plaintiffs believe that this factor supports the application of Nebraska law, especially considering the predictability and maintenance of interstate order factors. *See Jepson*, 513 N.W.2d at 472 (Minnesota forum applying North Dakota law, as the facts of the case, caused the court's choice of law analysis to be influenced more by the predictability and maintenance of the interstate order factors than it by the governmental interest factor.) At worst, this factor is neutral as it no more favors application of non-Nebraska law.

e. Application of the Better Rule of Law

Plaintiffs agree that Minnesota courts have ignored this factor for some time.

iv. Choice of Law Summary

While ConAgra's motion should be denied as premature prior to discovery, the Court should also reject ConAgra's argument based on Plaintiffs' allegations in their Complaint. In addition to the facts discussed above that demonstrate Nebraska's overwhelming contacts, Plaintiffs also assert a nationwide class, a consequence of ConAgra's uniform conduct. ConAgra should not be permitted to prejudice the factual

and legal development of this case by seeking to disregard its home state's substantive law.

G. Plaintiffs' Consumer Fraud Allegations Are Sufficiently Detailed.

1. The Requisite Pleading Standard Is Satisfied.

ConAgra argues that Plaintiffs fail to allege the particulars of the alleged consumer fraud in Count IV the FAC, including the "where" and "when" of the alleged fraud. Plaintiffs submit that the allegations in the FAC are more than sufficiently detailed (spanning 70 pages) to allow ConAgra to respond to their allegations, therefore satisfying the requirements of Rule 9(b).

While Rule 9(b) involves a heightened pleading standard, it also must be interpreted "in harmony with the principles of notice pleading...enabling the defendant to respond specifically, at an early stage of the case, to potentially damaging allegations of immoral and criminal conduct." *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001). "[A] complaint need not be filled with precise detail in order to satisfy Rule 9(b) since one of the main purposes of the rule is to 'facilitate a defendant's ability to respond and to prepare a defense to charges of fraud.' Thus, Rule 9(b) does not require that the exact particulars of every instance of fraud be alleged, so long as the complaint includes enough detail to inform the defendant of the 'core' factual basis for the fraud claims." *Moua v. Jani-King of Minnesota, Inc.*, 613 F. Supp. 2d 1103, 1110 (D. Minn. 2009)(citing *Commercial Prop. Invs., Inc. v. Quality Inns Int'l, Inc.*, 61 F.3d 639, 644 (8th Cir.1995)). *See also*, *Smajlaj*, 782 F. Supp.2d at 99.

Plaintiffs allege that ConAgra misrepresents that Hebrew National products are “made with premium cuts of 100% kosher beef” according to the strictest standards on all of its product labels and include photographs of the beef franks label to the FAC, as well as other specific marketing materials in the FAC.⁴⁶ Noting that a specific Plaintiff saw Exhibit A to the FAC on a package of beef franks at a specific supermarket on a specific date is unnecessary given that Plaintiffs allege that the “representation appears uniformly on every package of Defendant’s Hebrew National products sold to the Class.”⁴⁷ The FAC indicates that Plaintiffs and the Class were exposed to countless advertisements that contain the phrases noted above, which were representative of ConAgra’s Hebrew National advertising campaign. Even in instances where “Plaintiffs cannot recall each advertisement relied upon or the precise language of such advertisements” it “does not divest them of standing to challenge a purportedly false advertising campaign to which they were undisputedly exposed.” *Buetow v. A.L.S. Enterprises, Inc.*, 713 F. Supp. 2d 832, 838 (D. Minn. 2010), *rev on other grounds*, 650 F.3d. 1178 (8th Cir. 2011);

With regards to how much each Plaintiff paid for Hebrew National products, the amounts may vary to small degrees but the fact remains that each “paid a premium price for Defendant’s Hebrew National products because they were labeled and represented to be strictly 100% kosher beef” and therefore overpaid, causing injury, an ascertainable loss, and establishing standing.⁴⁸

⁴⁶ FAC ¶64, FAC Ex. A (beef frank packaging), FAC Ex. B (Hebrew National website – containing videos of two TV advertisements), and D (ConAgra website).

⁴⁷ FAC ¶75.

⁴⁸ FAC, at ¶¶29, 30, 31, 32, 33, 34, 35, 36, 37, and 38.

In sum, Plaintiffs allegations include more than “enough detail to inform [ConAgra] of the ‘core’ factual basis for the fraud claims”, including specific phrases and even examples of specific advertisements and product labels. As such, Plaintiffs have satisfied Rule 9(b)’s heightened pleading standard. To the extent the Court requires additional information; leave is requested to replead with greater specificity

2. Plaintiffs Have Standing to Pursue Injunctive Relief.

ConAgra repeats the same argument made in its NDTPA section to argue that that because Plaintiffs are now aware that certain Hebrew National products were not made with “made with premium cuts of 100% kosher beef” that they now cannot be deceived again in the future. As explained above, while Plaintiffs may now be aware of certain aspects of ConAgra’s past conduct, they, like all class members, are still subject to ConAgra’s misleading marketing campaign and may be injured in the future. ConAgra denies the conduct alleged is occurring. *See* Def. Br. at 1, 25 and Exs. M and N. Until tested in discovery, and resolved at trial, the matter is unresolved and Plaintiffs lack full knowledge. Until then, and the court enjoins the conduct, Plaintiffs and all class members remain at risk.

ConAgra wrongly relies on cases involving the application for the equitable remedy of injunctive relief, as opposed to injunctive relief imposed as a specifically authorized statutory remedy. “[A] showing of irreparable harm is unnecessary when a statute specifically authorizes injunctive relief.” *State ex rel. Hatch v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 572 (Minn. Ct. App. 2005). There is no doubt that the legislative purpose of the statutes under which Plaintiffs seek relief is to prevent the very

kind of misleading conduct and false advertising ConAgra has engaged in and that that purpose would be served by enjoining these practices. *See* Minn. Stat. §325D.09 (“[T]he general welfare of the state will be benefited by[] the suppression of the trade practices hereinafter defined.”). As such, Plaintiffs have standing to pursue their claims for injunctive relief against ConAgra.

H. Plaintiffs’ Breach of Contract Claims Do Not Require Direct Privity with ConAgra.

1. ConAgra’s Privity Argument is Wrong.

ConAgra notes the general rule the Plaintiffs generally need to allege privity between themselves and the other party in a breach of contract action. Yet it fails to note the rule is generally inapplicable, on grounds of public policy, in cases involving injury caused by impure and unwholesome food products.⁴⁹ In addition, it has long been recognized that where recovery for a product-caused injury is sought on the grounds that the manufacturer was guilty of fraud, deceit, or misrepresentation, as Plaintiffs do here, the injured person need not be in privity of contract with the defendant.⁵⁰

⁴⁹ Arizona: *Crystal Coca-Cola Bottling Co. v. Cathey*, 317 P.2d 1094 (Ariz. 1957); California: *Burr v Sherwin Williams Co.*, 268 P. 2d 1041 (Cal. 1954); Florida: *Florida Coca-Cola Bottling Co. v. Jordan*, 62 So. 2d 910 (Fla. 1953); Illinois: *Sharpe v Danville Coca-Cola Bottling Co.*, 132 N.E.2d 442 (Ill. 1956); Massachusetts: *Sullivan v. H. P. Hood & Sons, Inc.*, 168 N.E.2d 80 (Mass. 1960); Michigan: *Dobrenski v. Blatz Brewing Co.*, 41 F. Supp. 291 (W.D. Mich. 1941) and *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 90 N.W.2d 873 (Mich. 1958); Minnesota: *Uppgren v Executive Aviation Services, Inc.*, 326 F Supp 709 (D. Md 1971); Nebraska: *Asher v. Coca Cola Bottling Co.*, 112 N.W.2d 252 (Neb. 1961); and New York: *Rypins v. Rowan*, 219 N.Y.S.2d 288 (Sup. Ct. 1961).

⁵⁰ *Hruska v. Parke, Davis & Co.*, 6 F.2d 536, 537 (8th Cir. 1925) (“[a] careful reading and analysis of the pleading of plaintiff will disclose the action as pleaded to be not entirely based on negligence, but to possess many, if not all, the elements of an action for

2. Plaintiffs' Pre-Suit Notice Satisfied the UCC, Despite No Requirement To Do So.

ConAgra argues that Plaintiffs' breach of contract claim fails for lack of a pre-suit notice under the U.C.C. Providing pre-suit notice was unnecessary because (1) ConAgra was aware of its fraudulent conduct and (2) the claims involved injuries suffered by consumers.⁵¹

Despite the lack of a U.C.C. requirement, Plaintiffs Stillwill and Saenz-Valiente, provided the requisite pre-filing notice on behalf of themselves and the Class, including the other named Plaintiffs, on April 26, 2012 prior to their filing suit.⁵² Plaintiff Burnham later provided notice on May 18, 2012. The remainder of the Plaintiffs provided notice by serving the complaint more than 30 days before the complaint was filed. These pre-filing notices satisfied any arguable U.C.C.'s requirement to inform ConAgra that it had breached its contractual guarantees and that Plaintiffs would seek damages.⁵³ "The notice provision is not intended to 'operate as a technical procedural

fraud, in which the element of privity of contract would not be an essential one."); *O'Brien v. Am. Bridge Co. of New Jersey*, 125 N.W. 1012, 1013 (1910).

⁵¹ *In re McDonald's French Fries Litig.*, 503 F. Supp. 2d 953, 956 (N.D. Ill. 2007) ("Direct notice is not required when (1) the seller has actual knowledge of the defect of the particular product; or (2) a consumer plaintiff suffers a personal injury, in which case the notice requirement could be satisfied by filing a lawsuit against the seller.").

⁵² See FAC Ex. K

⁵³ *Truesdale v. Friedman*, 132 N.W.2d 854, 856 (1965).

barrier to deny claimants the opportunity to litigate the case on the merits.”⁵⁴ Moreover, “[t]he sufficiency of notice of a breach of warranty is a jury question” and not ripe for adjudication at this early stage of litigation.⁵⁵ Ultimately, the complete futility of the process and ConAgra’s argument here is revealed by the fact it failed to even respond to the initial notice sent.

I. The Economic Loss Doctrine Does Not Apply.

Plaintiffs’ negligence claim is not barred under the economic loss doctrine. The economic loss doctrine has notable exceptions, all of which apply to Plaintiffs’ negligence claim. In *Lesiak v. Central Valley Ag Cooperative, Inc.*, the Nebraska Supreme Court explained that the doctrine “should not be interpreted so broadly as to undermine tort law and preclude tort remedies in situations which, historically, have presented viable tort cases.” 808 N.W.2d 67, 81-82 (Neb. 2012). The court recognized that Plaintiffs who do not have the opportunity to bargain over possible damages, and thus assign risk, should not be precluded from asserting traditional “tort remedies.” *Id.* at 84-85. In rejecting the so-called “disappointed expectations test,” the court explained that:

[T]he “disappointed expectations” test seems to create a presumption that by entering into a contract, a party’s exclusive remedy for foreseeable harm (traditionally the province of tort law) is found only through contractual provisions. This might make sense if the parties did in fact bargain over the possible occurrence

⁵⁴ *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 5 (Minn. 1992) (overruled on other grounds).

⁵⁵ *Id.*, citing *Northern States Power Co. v. ITT Meyer Industries*, 777 F.2d 405, 408 (8th Cir.1985).

of damage, because then a court would be deferring to the parties' intentions as expressed through their contract. But where the damages were never bargained for and are not expressly dealt with in the contract, it makes no sense to preclude a party's traditional tort remedies. In other words, if a party to a contract has not relinquished independent tort rights through private ordering, it is unfair to say that those independent tort rights have been lost because they might have been bargained away.

Id. at 84 (internal citations and quotations omitted). Thus, in Nebraska the doctrine applies only where economic losses are either 1) "caused by a defective product or 2) caused by an alleged breach of a contractual duty, where no tort duty exists independent of the contract itself." *Id.*

Here, ConAgra argues that there is no contractual relationship between the parties. Def. Br. at 49-50. While this is wrong, and a contractual relationship in fact exists, this case still falls within the exceptions the *Leziak* court recognized. Plaintiffs here did not have the possibility of bargaining over their damage.

Moreover, as Plaintiffs explain herein, *see* §III(D), *infra*, this is not strictly a product defect action. At its core, Plaintiffs' negligence claim hinges on ConAgra's misrepresentations to consumers. FAC ¶142. Plaintiffs assert that ConAgra owed a duty to them to "properly and accurately label the Hebrew National food products it sold." FAC ¶133. It is reasonably foreseeable that consumers who purchase Hebrew National products rely on ConAgra to "only label and sell foods marked as being strictly 100% kosher," FAC ¶134. These misrepresentations and mislabeling were material to their decision to purchase Hebrew National products. Accordingly, consumers nationwide have been damaged by ConAgra's misrepresentations, having paid a premium price for

products that are not manufactured according to the “strict” standards ConAgra represents in its marketing materials. Plaintiffs’ allegations therefore fall into both of the *Leziak* exceptions.

Like Nebraska, other states where Plaintiffs reside do not apply the doctrine to cases alleging negligent misrepresentation,⁵⁶ fraud,⁵⁷ or fraudulent inducement.⁵⁸ Similarly, some jurisdictions do not apply the doctrine where the party asserting damages lacks privity with the manufacturer.⁵⁹ Accordingly, no matter what state’s law applies, the economic loss doctrine does not bar Plaintiffs’ negligence claims.

⁵⁶ *First Midwest Bank, N.A. v. Stewart Title Guarantee Co.*, 843 N.E.2d 327, 333-34 (Ill. 2006) (recognizing exceptions to the “Moorman Doctrine” where (1) the plaintiff sustained personal injury or property damage resulting from a sudden or dangerous occurrence; (2) where the plaintiff’s damages are proximately caused by a defendant’s intentional, false representation (i.e., fraud); or (3) where the Defendant, who is in the business of supplying information for Plaintiff’s use, makes a negligent misrepresentation); *Kalmes Farms, Inc. v. J-Star Industries, Inc.*, 2004 WL 114976, at *5-6 (D. Minn. 2004) (allowing negligent misrepresentation claims to proceed, despite the economic loss doctrine, when the Defendant was negligent in discovering or communicating information that the ordinary person would have discovered or communicated)(Ex. 25).

⁵⁷ *Canal Elec. Co. v. Westinghouse Elec. Co.*, 973 F.2d 988, 998 (1st Cir. 1992) (stating that the Massachusetts economic loss doctrine does not restrict recovery in cases where the defendant engages in an intentional tort); *CompuTech Int’l Inc. v. Compaq Computers Corp.*, 2004 WL 1126320, at *10 (S.D.N.Y. May 21, 2004) (observing that neither the court nor the parties have found a single case in which New York courts have applied the economic loss doctrine to an intentional tort)(Ex. 26).

⁵⁸ *Huron Tool and Engineering Co. v. Precision Consulting Servs., Inc.*, 532 N.W.2d 541, 543-44 (Mich. Ct. App. 1995) (not applying the economic loss doctrine in cases where the purchaser was fraudulently induced into purchasing the good because the purchaser was “tricked into contracting.”).

⁵⁹ *Flagstaff Affordable Housing Ltd. P’ship v. Design Alliance, Inc.*, 223 P.3d 664, 667 (Ariz. 2010)(finding that the principal function of the economic loss doctrine was not

IV. CONCLUSION

For all the foregoing reason, Defendants' motion should be denied.

Respectfully submitted,

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implicated when the plaintiff lacks privity with the defendant and therefore, in such cases, courts should instead focus on whether the applicable substantive law allows liability); *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958) (stating that a defendant's negligence which results in damage to the property or economic interests of a person not in privity, could support recovery if the defendant was under a duty to protect those interests); *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973) (holding that a plaintiff, who may foreseeably be injured or who sustained economic losses, may pursue claims against the defendant who proximately caused his injury by the negligent performance of a duty, notwithstanding the absence of privity).