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9 **UNITED STATES DISTRICT COURT**  
10 **SOUTHERN DISTRICT OF CALIFORNIA**  
11

12  
13 ROBERT ADAM KENNEDY, an  
individual, on behalf of himself, and on  
14 behalf of all persons similarly situated,

15 Plaintiff,

16 vs.

17 NATURAL BALANCE PET FOODS,  
INC., a California corporation;

18 Defendant.  
19  
20  
21

CASE No. **07 CV 1082 H (RBB)**

**PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR CLASS  
CERTIFICATION**

**[F.R.C.P. § 23]**

Hearing Date: May 27, 2008  
Hearing Time: 10:30 a.m.

Dept.: Courtroom 13  
Judge: Hon. Marilyn L. Huff

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1 **I. INTRODUCTION**

2 Defendant Natural Balance Pet Foods, Inc. (“Natural Balance”) has cheated United  
3 States consumers and Defendant’s competitors alike by misrepresenting the origin of their  
4 Natural Balance brand pet food products as “MADE IN THE U.S.A.”.<sup>1</sup>

5 The rules established by the Federal Trade Commission and by 62 Fed. Reg. 63756  
6 (1997), provide that a product can be labeled “**Made in USA**” only where “**all or virtually**  
7 **all**” of the product is made in the United States.<sup>2</sup> Under this standard, “All or virtually all”  
8 means that “all significant parts and processing that go into the product must be of U.S. origin.  
9 That is, the product should contain no — or negligible — foreign content.” 62 FR at 63768.

10 In that Natural Balance admits that all products were mislabeled as Made in the USA  
11 until the Made in the USA designation was removed from the label, the proposed Class is  
12 properly defined as follows:

13 **All individuals in the United States who purchased one or more of the**  
14 **following Natural Balance brand pet food products labeled as “Made in the**  
15 **USA” since May 3, 2003:** Venison and Brown Rice Dry Dog Formula, Venison  
16 and Brown Rice Canned Dog Food, Venison and Brown Rice Formula Dog  
17 Treats, Venison and Green Pea Dry Cat Formula, Lamb Formula Canned Dog  
18 Food, Beef Formula Canned Dog Food, Chicken Formula Canned Dog Food,  
19 Ocean Fish Formula Canned Cat Food, Ultra Premium Formula Dry Dog Food,  
20 Reduced Calorie Formula Dry Dog Food, Ultra Premium Formula Dry Cat  
21 Food, Reduced Calorie Formula Dry Cat Food, Sweet Potato & Fish Dry Dog  
22 Food, Potato & Duck Formula Dry Dog Food, Organic Formula Dry Dog Food,  
23 Vegetarian Formula Dry Dog Food, Roll-A-Rounds Dog Treats, Sweet Potato  
24 & Fish Formula Treats, Potato & Duck Formula Treats, Crunch-E-Bones Treats,  
25 Turkey Formula Dog Food Rolls, Beef Formula Dog Food Rolls, Lamb Formula  
Dog Food Rolls, Liver Formula canned dog food, Duck and Potato Formula  
canned dog food, Sweet Potato & Fish canned dog food, Eatables Irish Stew  
canned dog food, Eatables Hobo Chili canned dog food, Eatables Southern Style  
Dumplin’s with Gravy, Eatables Chinese Take-Out W/Sauce, Ultra Formula  
canned cat food, Turkey & Giblets Formula canned cat food, Venison & Green  
Pea canned cat food, Chicken & Liver Pate Formula canned cat food, Tuna w/  
Shrimp Formula canned cat food, Salmon Formula canned cat food, Indoor Cat  
Formula canned cat food, Lamb Formula Frozen Loaf, Beef Formula Frozen  
Loaf, Chicken Formula Frozen Loaf, Raw Chicken Formula, and Raw Beef  
Formula. Excluded from this list are those specific purchases of Natural  
Balance products for which a full refund was paid to the consumer.

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26 <sup>1</sup> Defendant’s mislabeling exploits mounting consumer demand for “Made in the USA”  
27 products which is cheating not only consumers who buy Defendant’s products but also  
28 Defendant’s honest competitors who market pet food that is actually Made in the USA.

<sup>2</sup> Unless otherwise indicated, emphasis added and internal citations omitted.

1 (Plaintiff’s Motion to Amend and Proposed Second Amended Complaint, [Doc. No. 40].)

2 Here, liability can be determined on a class-wide basis because Defendant’s  
3 misrepresentation about the origin of their product was made at the time of each and every  
4 sale, was material and permeated the sales transaction as the only substantive representation  
5 about the product’s origin made on the package. Class litigation is clearly superior to  
6 individual resolution of each of the Class Members’ claims. In fact class litigation is the only  
7 practicable means by which the Class Members’ claims can economically be litigated.

8 Defendant’s principal place of business is Pacioma, California, and all of Defendant’s  
9 conduct that gives rise to the claims was committed in California. California law may be  
10 applied to the claims of all Class Members because the claims of each Class Member is  
11 emanates from Defendant’s wrongful conduct in California. A federal court applies the law  
12 of the forum state unless the defendant demonstrates a conflict between the law of the forum  
13 state and the law of some other potentially interested state that could affect the outcome of the  
14 action. Here no state allows businesses to falsely label products as “Made in the U.S.A.” and  
15 all states follow the federal standard outlawing false representations of geographic origin.

16 California choice of law jurisprudence mandates application of California law to class  
17 members nationwide because California’s interest in deterring wrongful business practices  
18 emanating from California that harms consumers in other states is stronger than the interest  
19 of any other state. Moreover even absent California law applying to the entire Class, a  
20 nationwide class would still be appropriate because applying the law of the states in which  
21 Class Members reside to their claims would not defeat predominance or make this action  
22 unmanageable.

23  
24 **II. STATEMENT OF FACTS**

25 This case arises from an unfair business practice perpetrated by the Defendant Natural  
26 Balance. Defendant is a company with its principal place of business in Pacioma, California.  
27 (Deposition of Joseph Herrick (“Herrick Depo”), at 6:6-12, attached as Exhibit #1 to the  
28 Declaration of Norman Blumenthal (“Blum Decl”).) Natural Balance sells certain “high

1 quality” pet food products primarily through Petco retail stores. Petco’s principal place of  
2 business is in San Diego, California.

3 Plaintiff Adam Kennedy is a consumer who purchased a number of Natural Balance’s  
4 pet food products during the Class Period which were falsely advertised and marketed by  
5 Defendant Natural Balance as “Made in the USA.” (Declaration of Adam Kennedy  
6 (“Kennedy Decl”) at ¶2.) Contrary to Defendant’s representation, however, the rice protein  
7 component in the product was discovered to be manufactured in China and numerous other  
8 components were discovered to be manufactured in other foreign countries, including foreign-  
9 sourced vitamins, foreign-sourced taurine, foreign-sourced lamb meal, and foreign-sourced  
10 venison meal. (Herrick Depo at 86:2-20, Exhibit #1 to the Blum Decl.)

11 On April 18, 2008, Plaintiff moved to amend the complaint incorporating this additional  
12 information and amending the class definition to include purchasers of these additional  
13 mislabeled pet food products. [Doc. No. 37 and 40]. Natural Balance does not, and cannot,  
14 dispute that these components of the pet food products were manufactured outside of the  
15 United States.

16 Defendant took no steps prior to this lawsuit to determine the true facts regarding the  
17 geographic origin of the Natural Balance brand pet food products. Only after this lawsuit was  
18 filed did Natural Balance review the sources of the manufactured components of Defendant’s  
19 pet food products. (Herrick Depo at 69:8-25 and 86:2-20.) At that time, Defendant confirmed  
20 that Natural Balance products were not manufactured in the United States and removed the  
21 “Made in the U.S.A.” designation from the Natural Balance products labels. Neither Plaintiff  
22 nor any member of the Class knew at the time of purchase of the substantive  
23 misrepresentation that permeated the purchase transaction. (Complaint at ¶¶ 39-41; Kennedy  
24 Decl at ¶4). This action is brought on behalf of all consumers throughout the United States  
25 who purchased one or more Natural Balance brand pet food products which were mislabeled  
26 as “Made in USA” during the applicable Class Period. (Complaint at ¶ 1).

27 Central to the Defendant’s marketing of certain of their Natural Balance products is the  
28 representation and designation that such products were “Made in USA.” Defendants package

1 these products with the designation on the label or packaging, in capital and bold lettering, that  
2 the products were “MADE IN USA.” (Complaint at ¶ 2; Herrick Depo at 17:9-14, 27:10-13  
3 and 61:7-10). **“Made in the U.S.A.” was the only substantive representation on the label**  
4 **of the Natural Balance products about the source of the product.** (Blum Decl, Exhibit #2.)

5 Studies by experts show that the “MADE IN USA” is a substantial factor in consumer  
6 purchasing decisions. (Declaration of Robert Klein (“Klein Decl”) at ¶¶5-6.) Indeed, in the  
7 context of food products, the designation that the products were “Made in USA” becomes a  
8 central and primary consumer concern because of fears about contaminants and the differences  
9 in health and safety procedures in foreign countries. (Complaint at ¶ 2; Klein Decl at ¶6;  
10 Kennedy Decl at ¶3).

11 All of the listed pet food products that were sold under the brand name “Natural  
12 Balance” to consumers in the United States were mislabeled in the same way. On each  
13 package of “Natural Balance” pet food, the label uniformly represents that the product was  
14 “MADE IN USA” in capital letters. (Complaint at ¶ 4; Herrick Depo at 17:9-14, 27:10-13  
15 and 61:7-10; Blum Decl at Exhibit #2). Contrary to this representation, the “Natural Balance”  
16 brand pet foods were not “Made in USA” as falsely designated, but instead, were made, in  
17 part, in China and other foreign countries. (Herrick Depo at 86:2-20.) After this action was  
18 filed, Natural Balance removed the “Made in USA” designation from Defendant’s product  
19 labels. (Herrick Depo at 69:8-25.)

20 Consumers and users of these products are particularly vulnerable to these deceptive  
21 and fraudulent practices. According to Plaintiff’s expert Robert Klein, the “Made in the USA”  
22 designation of origin is a material factor in consumers’ purchasing decisions, as they believe  
23 they are buying truly American products and supporting American companies and American  
24 jobs. Consumers generally believe that “Made in USA” products are higher quality products  
25 than those of other countries, which is especially true with regard to food products. (Klein  
26 Decl at ¶¶5-6.)

27 Unaware of the falsity of the Defendant’s country-of-origin claims, Plaintiff and the  
28 other members of the Class all purchased “Natural Balance” brand pet food products that had

1 been unfairly marketed and mislabeled by Defendant. (Kennedy Decl at ¶¶4-5.) State and  
2 federal laws uniformly outlaw this mislabeling to protect consumers and competitors alike  
3 from this type of false advertising and unfair business practice, as this mislabeling is likely to  
4 deceive consumers and in fact did deceive Plaintiff. (Klein Decl at ¶7; Kennedy Decl at ¶4.)  
5

### 6 **III LAW GOVERNING COUNTRY OF ORIGIN LABELING**

7 The country-of-origin designation is especially important and material in the context  
8 of food products because of the oversight one expects by the Food and Drug Administration  
9 and local health agencies over food products made in the United States. For example, food  
10 products made in foreign countries can be grown or made using banned pesticides and/or  
11 chemicals, which one would not expect to find in “Made in USA” labeled food products.  
12 Consumers who purchase food products labeled “Made in USA” reasonably believe that they  
13 are purchasing products which have been grown and made in accordance with state and federal  
14 regulations. These same regulations are not present in foreign countries where unsafe and  
15 deleterious chemicals may be used without regulatory oversight. (Complaint at ¶12). The fact  
16 that Defendant’s products, parts of which were manufactured in China and other foreign  
17 countries, was later combined in the United States does not entitle Defendants to falsely  
18 represent the source of all the products components, without limitation, as “Made in USA.”  
19 62 Fed. Reg. 63756, 63768 (Dec. 2, 1997).

20 The uniform federal standard only allows the “Made in USA” designation for products  
21 which are “all or virtually all” made in the United States.<sup>3</sup> 15 U.S.C. §45a. This requirement  
22 is especially important in the context of food products where the failures of Chinese  
23 manufacturing and safety are manifest. (Klein Decl at ¶6.)

24 California Business & Professions Code Section 17533.7 governs Defendant Natural

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25 <sup>3</sup> Under federal requirements, for a product to be called “Made in USA,” the product must be  
26 all or virtually all made in the United States. Under this standard, “All or virtually all” means  
27 that “all significant parts and processing that go into the product must be of U.S. origin. That  
28 is, the product should contain no — or negligible — foreign content.” See Federal Trade  
Commission publication “Complying with the Made In the USA Standard,” attached as  
Exhibit #3 to the Blum Decl. Defendant’s products do not meet this standard.

1 Balance's marketing and distribution of these products, stating in relevant part:

2 It is unlawful for any ... corporation... to sell or offer for sale in this State any  
3 merchandise ... [with] the words 'Made in the USA' ... or similar words when  
4 the merchandise or **any** ... part thereof has been entirely or substantially made,  
5 manufactured, or produced outside the United States.

6 The language of Section 17533.7 is clear – a product may not be represented as “Made  
7 in the USA” if even a part of the product was substantially made, manufactured or produced  
8 outside the United States. See Colgan v. Leatherman, 135 Cal. App. 4<sup>th</sup> 663, 684 (2006). The  
9 F.T.C. imposes a nearly identical requirement for “Made in the USA” claims:

10 [W]here a product is labeled or advertised as "Made in USA," the **marketer**  
11 **should possess and rely upon a reasonable basis that the product is all, or**  
12 **virtually all, made in the United States.** A product that is "all or virtually all"  
13 made in the United States is described typically as **one in which all significant**  
14 **parts and processing that go into the product are of U.S. origin, i.e.,** where  
15 there is only a *de minimis*, or negligible, amount of foreign content.

16 62 Fed. Reg. 63756, 63765 (1997).

17 In Colgan v. Leatherman, 135 Cal.App.4th 663 a tool manufacturer advertised 22  
18 products as “Made in the USA” when in fact certain parts of the tools were made in various  
19 foreign countries. Colgan, 135 Cal.App.4th at 673. The Colgan court upheld the trial court's  
20 summary judgment against Leatherman, stating:

21 **We affirm the summary adjudication that Leatherman violated the false**  
22 **advertising law and the CLRA because, as a matter of law, there was**  
23 **sufficient manufacturing of components abroad so as to make Leatherman's**  
24 **representations that its products were made in the United States deceptive...**  
25 **...We also affirm the summary adjudication that Leatherman violated section**  
26 **17533.7, and therefore the unfair competition law, by selling products**  
27 **represented as "Made in U.S.A." "when the merchandise or any article, unit, or**  
28 **part thereof, has been entirely or substantially made, manufactured, or produced**  
**outside of the United States." (§ 17533.7) **That a product may have been****  
**designed, processed and assembled in the United States does not preclude**  
**the conclusion that a "part" of the product was "substantially made,**  
**manufactured or produced" outside the United States.** As a matter of law,  
Leatherman's products were substantially made outside the United States.

Id. at 672 (emphasis added).

Here, as in Colgan, Plaintiff alleges that Defendant Natural Balance's business practices  
violate California Business and Professions Code § 17200 and § 17500 (the “UCL”), as well  
as Civil Code § 1770, et seq. (the “CLRA”).

1 **IV. THIS ACTION MEETS REQUIREMENTS UNDER RULE 23(a) TO BE**  
2 **CERTIFIED AS A CLASS ACTION**

3 On a motion for class certification, the court does not inquire into the merits of  
4 plaintiffs' claims and accepts the substantive allegations of the complaint as true. Blackie v.  
5 Barrack, 524 F.2d 891, 901 (9th Cir. 1975), *cert. denied*, 429 U. S. 816(1976)); In re MDC  
6 Holdings Sec. Litig., 754 F. Supp. 785, 800 (S.D.Cal. 1990); Rannis v. Fair Credit Lawyers,  
7 2007 U.S. Dist. LEXIS 17856 at \*4 (C.D.Cal. March 12, 2007); In re Applied Micro Circuits  
8 Corp. Secs. Litig., 2003 U.S. Dist. LEXIS 14492 at \*6 (S.D.Cal. 2003). Accordingly, class  
9 certification should be granted where plaintiffs assert a claim which, assuming its merit,  
10 satisfies the requirements of Rule 23. Blackie, 524 F.2d at 901.

11 Rule 23(a) sets forth the four general criteria for certification of a class:

12 One or more members of a class may sue or be sued as representative parties on  
13 behalf of all only if (1) the class is so numerous that joinder of all members is  
14 impracticable, (2) there are questions of law or fact common to the class, (3) the  
15 claims or defenses of representative parties are typical of the claims or defenses  
16 of the class, and (4) the representative parties will fairly and adequately protect  
17 the interests of the class.

18 The court must also find that one of the three subdivisions Rule 23(b) is satisfied. Rule  
19 23(b)(3) requires that the questions of law or fact common to the class members predominate  
20 over any questions affecting only individual members, and that a class action is superior to  
21 other available methods for a fair and efficient adjudication of the controversy.

22 Here, the Class satisfies all the requirements of Rule 23(a) and (b)(3).

23 **A. Numerosity of the Class Makes Joinder Impractical**

24 "The prerequisite of numerosity is discharged if the class is so large that joinder of all  
25 members is impracticable." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)  
26 (quoting Fed. R. Civ. P. 23(a)(1)). "[I]mpracticability does not mean 'impossibility,'" but  
27 simply that joinder of all class members must be difficult or inconvenient. Harris v. Palm  
28 Springs Alpine Estates, Inc., 329 F.2d 909, 913 (9<sup>th</sup> Cir. 1964). The plaintiffs do not need to  
state the exact number of potential class members in order to satisfy this requirement but must  
only establish that joinder is impracticable through some reasonable estimate of the number

1 of potential class members. In Re Rubber Chemical Antitrust Litig., 232 F.R.D. 346, 350-51  
2 (ND Cal 2005).

3 The proposed class consists of thousands of consumers who purchased Natural Balance  
4 pet food products mislabeled as “Made in the U.S.A.” during the class period. This class is  
5 obviously so numerous that the joinder of each of these individuals is impractical. Based on  
6 the specific facts of this case, the numerosity requirement of Rule 23(a) is therefore clearly  
7 met. See Consolidated Rail Corp., v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995)  
8 (numerosity presumed once proposed class exceeds 40 members); Town of New Castle v.  
9 Yonkers Contracting Co., 131 F.R.D. 38, 41 (S.D.N.Y. 1990) (class of about thirty-six satisfied  
10 numerosity requirement); Sherman v. Griepentrog, 775 F. Supp. 1383, 1389 (D.Nev.  
11 1991)(certifying class where plaintiff was unable to determine how many members but had  
12 demonstrated the impracticability of joinder). This class is obviously so numerous that the  
13 joinder of each of these individuals is impractical. The numerosity requirement of Rule 23(a)  
14 is therefore clearly met.

15 **B. Common Questions of Law and Fact Exist**

16 Rule 23(a)(2) does not require that all questions of fact or law raised in the litigation  
17 be common. The existence of this common question of law is, in and of itself, sufficient to  
18 meet the commonality requirement. Even where factual differences may exist, such  
19 differences are not fatal if common questions of law exist - such as the interpretation and  
20 validity of the common law in question in the present case. Like v. Carter, 448 F.2d 798, 802  
21 (8<sup>th</sup> Cir. 1971), *cert. denied*, 405 U. S. 1045, 92 S.Ct. 1309, 31 L. Ed. 2d 588 (1972). This case  
22 presents common issues of both facts and law.

23 Indeed, there need be only a single issue common to all members of the class for the  
24 requirement of Rule 23(a)(2) to be met. Newberg On Class Actions, §3.10 (4th ed. 2003);  
25 Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1225 (9<sup>th</sup> Cir. 2007) (“one significant issue common  
26 to the class may be sufficient to warrant certification”) “All questions of fact and law need not  
27 be common to satisfy this rule.” Hanlon, supra, 150 F.3d at 1019. “The existence of shared  
28

1 legal issues with divergent factual predicates is sufficient, as is a common core of salient facts  
2 coupled with disparate legal remedies within the class.” Id. The common questions of law  
3 and fact in this case include:

- 4 1) Whether Natural Balance brand pet food products were represented on the  
5 package labeling to have been “Made in the USA”;
- 6 2) Whether Defendant’s “Made in the USA” representations or designations of  
7 geographic origin in connection with Natural Balance brand pet food products  
8 were false and/or deceptive;
- 9 3) Whether Defendant’s “Made in the USA” representations or designations of  
10 geographic origin in connection with Natural Balance brand pet food products  
11 violated 15 U.S.C. §45a and/or Cal. Bus. & Prof. Code § 17533.7;
- 12 4) Whether at the time the “Made in the USA” representations were made, Natural  
13 Balance possessed and relied upon a reasonable basis that the product was in  
14 fact” all or virtually all” made in the United States;
- 15 5) Whether the members of the Class sustained injury as a result of the  
16 Defendant’s conduct; and
- 17 6) Whether Defendant deceptively, unfairly or unlawfully received and/or retained  
18 revenue acquired through the alleged business practice.

19 There can be no dispute that the answer to each of these central questions will be identical for  
20 each member of the Class.

21 The commonality requirement is therefore satisfied where, as here, the plaintiff alleges  
22 a “common course of conduct.” Harris, supra, 329 F.2d at 914. In In re MDC Holdings, Judge  
23 Enright employed the Ninth Circuit “common course of conduct” test in certifying a class in  
24 a securities fraud action.

25 **Here, the existence, nature, and significance of material omissions and  
26 misrepresentations are issues common to all class members.** The claims  
27 against defendants arise out of the same set of facts and are based on common  
28 legal theories. *See Blackie*, 524 F.2d at 902-05. Further, the court finds that the  
complaint satisfies the "common course of conduct" theory enunciated in  
*Harris*. Here each Class members claim involves common questions of law and  
fact.

754 F. Supp. at 801.

Commonality does not require that the members of the class be identically situated,  
only that there exists one or more factual or legal questions common to all members. Jenson  
v. Continental Fin. Corp., 404 F. Supp. 806 (D. Minn. 1975). This threshold of

1 “commonality” is not particularly high. Jenkins v. Raymark Ind., Inc., 782 F.2d 468, 472 (5th  
2 Cir. 1986); Newberg On Class Actions, §3.10 (4th ed. 2003). Indeed, if a claim “arises out  
3 of the same legal or remedial theory, the presence of factual variations is normally not  
4 sufficient to preclude class action treatment.” Donaldson v. Pillsbury Co., 554 F.2d 825, 831  
5 (8<sup>th</sup> Cir. 1977), *cert. denied*, 434 U.S. 856 (1977).

6 This requirement is met if common questions of liability are present, even if there may  
7 be individual variations or differences in damages. “[A] difference in the amount of damages  
8 does not defeat commonality” Alameda Oil Company v. Ideal Basic Industries, Inc., 326 F.  
9 Supp. 98 (D. C. Colo. 1971); Bowling v. Pfizer, Inc., 143 F.R.D 141 (S.D.Ohio 1992). In re  
10 Workman’s Comp., 130 F.R.D. 99, 104 (D. Minn. 1990). Thus, the commonality requirement  
11 is undoubtedly met here.

12 **C. The Claims of the Class Representative Are Typical of Those of the Class**

13 The typicality requirement ensures that the claims of the representatives and those of  
14 the absent class members are sufficiently similar so that the representative’s acts safeguard the  
15 interests of the class. In re MDC Holdings, *supra*, 754 F. Supp. at 801; Littlewolf v. Hodel,  
16 681 F. Supp. 929 (D.D.C. 1988); *see also* 7A C.A. Wright, A. Miller & M. K. Kane, Federal  
17 Practice and Procedure: Civil §1764.

18 The typicality prerequisite “is fulfilled if ‘the claims or defenses of the representative  
19 parties are typical of the claims or defenses of the class.’” Hanlon, *supra*, 150 F.3d at 1020  
20 (quoting Fed. R. Civ. P. 23(a)(3)). “Representative claims are ‘typical’ if they are reasonably  
21 co-extensive with those of absent class members; they need not be substantially identical.”  
22 Id.; *see also* Dukes, *supra*, 474 F.3d at 1232.

23 In order to show typicality, the named representative need merely show that he has been  
24 injured in the same manner as the rest of the class; even if his claims are not “identical” to  
25 those of the entire class. Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 505 (9<sup>th</sup> Cir. 1980);  
26 Perez v. Personnel Board of the City of Chicago, 690 F.Supp. 670, 673 (N.D. Ill. 1988);  
27 Newberg on Class Actions, Third Edition, §3.13 at 328 (The typicality requirement is usually  
28

1 met “when it is alleged that the same unlawful conduct was directed at or affected both the  
2 named plaintiffs and the class sought to be represented” ).

3 Typicality is therefore also satisfied where, as here, the named Plaintiff and the  
4 members of the proposed Class all have claims arising from the same scheme. Rannis, supra,  
5 2007 U.S. Dist. LEXIS 17856 at \*11-\*12; In re Auction Houses Antitrust Litig., 193 F.R.D.  
6 162, 164 (S.D.N.Y. 2000) (“claims and defenses are typical if they stem from the same event,  
7 practice, or course of conduct that forms the basis of the claims of the class and are based on  
8 the same legal or remedial theory.”) Differences in the amount of damages cannot defeat  
9 typicality. Blackie, 524 F.2d at 909; Schwartz v. Harp, 108 F.R.D. 279, 282 (C.D. Cal. 1985).

10 In the present case, the claims of the proposed Class Representative are not merely  
11 typical; rather they are identical to the claims of each and every other Class Member.  
12 (Kennedy Decl at ¶¶3-5; Klein Decl at ¶6.) The conduct of Defendant was uniform and likely  
13 to deceive every consumer. (Klein Decl at ¶¶6-7.) The relief sought is the same relief which  
14 could be sought by each individual member of the class. All damages arise out of the same  
15 course of conduct engaged in by Defendant and can be calculated by an expert. (Klein Decl  
16 at ¶¶8-9.) Thus, the typicality requirement is undoubtedly met in this case.

17 **D. The Proposed Class Representatives Will Fairly and Adequately Protect**  
18 **The Interests of the Class**

19 Rule 23(a)(4) requires that the Court must find that “the representative parties will  
20 fairly and adequately protect the interests of the class.” There are two conditions which must  
21 be met in order to satisfy this requirement. First, "the named representative must appear able  
22 to prosecute the action vigorously through qualified counsel," and "second, the representatives  
23 must not have antagonistic or conflicting interest with the unnamed members of the class."  
24 Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978); See also Sosna v.  
25 Iowa, 419 U.S. 393, 403 (1975); In Re: Northern District of California, Dalkon Shield IUD  
26 Products Liability Litig., 693 F.2d 847, 855 (9<sup>th</sup> Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

27 “Only a conflict that goes to the very subject matter of the litigation will defeat a  
28 party’s claim of representative status” Hirschfeld v. Stone, 193 F.R.D. 175, 183 (S.D.N.Y.

1 2000). Rule 23(a)(4) requires that the court must find that “the representative parties will fairly  
2 and adequately protect the interests of the class.”

3 In the present action, the proposed Class Representative can fairly and adequately  
4 protect the interests of all members of the class inasmuch as the representative Plaintiff is a  
5 purchaser of Natural Balance brand pet food and suffered the identical damage due to the same  
6 acts, omissions and practices of Defendant. (Kennedy Decl at ¶¶2, 7, 8.)

7 Blumenthal & Nordrehaug are presently Class Counsel of record and are experienced  
8 in the prosecution of consumer class actions. The firm resume is attached as Exhibit #4 to the  
9 Blum Decl. Plaintiff’s counsel are capable of, and committed to, prosecuting this action  
10 vigorously on behalf of the class. See In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 481-82  
11 (W.D. Pa 1999). Therefore, the adequacy requirement is also undoubtedly met here.

12  
13 **V. PLAINTIFF SATISFIES RULE 23(B)**

14 **A. The Predominance Requirement Is Met**

15 Rule 23 (b) provides that a class may be maintained if “the court finds that the questions  
16 of law and fact common to the members of the class predominate over any questions affecting  
17 only individual members.” This action meets the predominance requirement because  
18 generalized evidence of the Defendant’s conduct will prove or disprove an element of the  
19 claim on a simultaneous class-wide basis. Indeed, there is no doubt that the “fundamental  
20 question” here asserts a remedy to a “common legal grievance.” Lockwood Motors v. General  
21 Motors, 162 F.R.D. 569, 580 (D.Minn. 1995); Lindquist v. Farmers Ins. Co., 2008 U.S. Dist.  
22 Lexis 11832, at \*17-\*22 (D.Az. 2008); Doe v. Guardian Life Ins. Co. of America, 145 F.R.D.  
23 466, 475 (N.D. Ill. 1992).

24 Predominance of common issues does not mean that individual issues will be non-  
25 existent. Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34, 37 (S.D.N.Y. 1977)  
26 (“[t]he predominance requirement calls only for predominance, not exclusivity, of common  
27 questions”). “[C]lass certification does not require that the common questions be completely  
28

1 dispositive of the litigation.” In re Citric Acid Antitrust Litig., 1996 U.S. Dist Lexis 16409  
2 (N.D. Cal. 1996).

3 Further, this court follows the Ninth Circuit, along with the overwhelming weight of  
4 authority, in refusing to find that class certification is defeated by the possibility of  
5 individual questions pertaining to one of the elements of the case’s causes of action.  
6 *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975), *cert. denied*, 429 U.S. 816, 97  
7 S.Ct. 57 (1976); *In Re MDC Holdings Securities Litigation*, 754 F. Supp. 785 (S.D.  
8 Cal 1990); *Lubin v. Sybedon Corp.*, 688 F. Supp. 1425 (S.D. Cal. 1988).

9 Knapp v. Gomez, 1991 U.S. Dist. LEXIS 11012, \*4 (S.D. Cal. June 25, 1991).

10 Individual issues arise in all class actions, particularly one of this magnitude and  
11 where a unitary scheme or course of conduct is the common question. To allow  
12 various secondary issues to preclude the certification of a class would render  
13 Rule 23 ‘an impotent tool . . .’

14 Steiner v. Equimark Corp., 96 F.R.D. 603, 612-13 (W.D. Pa. 1983).

15 In this case, common questions of fact and law predominate. Plaintiff has alleged a  
16 common course of wrongdoing based on the same misrepresentation. Adjudication of the  
17 common issues surrounding Defendant’s uniform conduct will establish Defendant’s liability  
18 on a class-wide basis.

19 This case is especially appropriate for class action treatment because Plaintiff’s two  
20 causes of action under the UCL and the CLRA present purely common issues of law and fact  
21 that should be decided on a class-wide basis. The California Legislature designed the CLRA  
22 to facilitate consumer class actions. Civil Code § 1781(b); Hogya v. Superior Court, San Diego  
23 County, 75 Cal. App. 3d 122, 136-7, 140 (1977) (if the statutory requirements § 1781(b) “are  
24 satisfied, a trial court is under a duty to certify the class and is vested with no discretion to deny  
25 certification based upon *other* considerations.”) Further, the CLRA was specifically intended to  
26 provide a class-wide remedy to consumers for deceptive representations regarding geographic  
27 origin. Civil Code §1770(a)(4).

28 The UCL prohibits any conduct that is either unfair or unlawful or deceptive.  
Committee on Children's Television v. General Foods Corp., 35 Cal.3d 197, 210 (1983).  
These sections are designed to protect the reasonable expectations of consumers. As held in  
State Farm Fire and Casualty Co. v. Superior Court, 45 Cal. App. 4<sup>th</sup> 1093, 1103-4 (1996):

1 Because section 17200's definition is disjunctive, a "business act or practice is  
2 prohibited if it is "unfair" or "unlawful" or "fraudulent." In other words, a  
3 practice is prohibited if it is "unfair" or "deceptive" even if not unlawful and vice  
4 versa....The standard is intentionally broad, thus allowing courts maximum  
discretion to prohibit new schemes to defraud... [A]n "unfair business practice  
occurs when the practice is immoral, unethical, oppressive, unscrupulous or  
substantially injurious to consumers."

5 Moreover, the UCL does **not** require any reliance by the consumer or proof that any  
6 individual consumer was actually deceived. Committee, supra, 35 Cal.3d 197, 211; Fletcher  
7 v. Security Pacific Nat'l Bank, 23 Cal. 3d 442, 453 (1979). **The test is an objective one**  
8 **depending on whether the defendant's conduct was "likely to deceive" a reasonable**  
9 **consumer, and therefore amenable to class-wide adjudication.** Williams v. Gerber, 2008  
10 U.S. App Lexis 8599, at \*7-\*8 (9<sup>th</sup> Cir. April 21, 2008) (reversing decision of Judge Miller and  
11 affirming "likely to deceive" standard); Committee, supra, 35 Cal.3d at 211; Chern v. Bank of  
12 America, 15 Cal. 3d 866, 876 (1976); Aron v. U-haul Co., 143 Cal.App.4th 796, 806 (2006).<sup>4</sup>  
13 These decisions, including the recent decision by the Ninth Circuit in Williams, confirm that  
14 this Court's opinion that "Defendants' factual disputes do not provide a ground upon which  
15 to dismiss Plaintiff's claim" was correctly decided and continues to apply. Kennedy v. Natural  
16 Balance Pet Foods, 2007 U.S. Dist. Lexis 57766, at \*12 (S.D. Cal. 2007).<sup>5</sup>

17 As held in Prata v. Superior Court, 91 Cal. App. 4th 1128, 1144-1145 (2001), the proper  
18 focus of a UCL case is not whether individual consumers were actually misled and injured.  
19 "[T]here is no need to examine each consumer transaction to establish a violation of section

20 \_\_\_\_\_  
21 <sup>4</sup> As held by the California Supreme Court in Californians for Disability Rights v. Mervyn's,  
22 LLC, 39 Cal. 4th 223, 232 (2006), these substantive rules governing liability under the UCL  
were not changed by the Proposition 64 amendment to standing provisions.

23 <sup>5</sup> Defendant will likely continue to argue that Defendant is not liable because Defendant was  
24 not aware of the foreign manufactured components of the products, however, this argument  
is entitled to short shrift. Not only is this argument contrary to the legal standard cited above,  
25 but further, this purported ignorance of the truth does not permit Natural Balance to make  
affirmative representations that the products were "Made in the USA." *See e.g.* Civil Code  
26 § 1710 (defining fraud as "the assertion, as a fact, of that which is not true, by one who has no  
reasonable ground for believing it to be true.") Further, the FTC addressed this issue when  
27 holding that marketers must have a "reasonable basis" for Made in the USA representations,  
and "it is deceptive, therefore, to make a claim unless, at the time the claim is made, the  
28 marketer possesses and relies upon a reasonable basis substantiating the claim. Thus, a  
"Made in USA" claim, like any other objective advertising claim, must be truthful and  
substantiated." 62 Fed. Reg. at 63767; see also Exhibit #3 to the Blum Decl.

1 17200. The issue is, instead, whether the program as a whole was likely to mislead...” *Id.* at  
2 1145. Once broad dissemination of common false statements to the class has been established,  
3 “the ultimate question of whether the undisclosed [or affirmatively misrepresented]  
4 information was material [is] a common question of fact suitable for treatment in a class  
5 action.” *Mass. Mutual Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1294 (2002);  
6 *see also Blakemore v. Superior Court*, 129 Cal. App. 4th 36, 56 (2005) (rejecting argument that  
7 the varied subjective reasons for each class member’s conduct was relevant to liability or class  
8 certification under the UCL). Thus, the legal standard by which the Court evaluates the  
9 defendant’s conduct in a UCL case is objective and does not depend on the state of mind of  
10 any particular class member.

11 In *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496 (2003), the appellate court  
12 held that for claims brought under the UCL, an advertisement “is judged by the effect it would  
13 have on a reasonable consumer.” *Id.* at 506-07. The standard “is that of the ordinary consumer  
14 acting reasonably under the circumstances.” *Id.* at 509-10, 512. *Mass. Mutual, supra*, 97 Cal.  
15 App. 4th 1282, expressly approved the certification of a consumer claim under the UCL and  
16 CLRA where, as here, the action challenged a uniform practices by defendants. *Id.* at 1286.  
17 *Mass. Mutual* sets forth the elements of a UCL claim and focused the certification inquiry on  
18 the conduct of the defendant, not the plaintiff:

19 **Importantly, California courts have repeatedly held that relief under the**  
20 **UCL is available without individualized proof of deception, reliance and**  
**injury.**

21 97 Cal. App. 4th at 1288; *see also Corbett v. Superior Court*, 101 Cal. App. 4th 649, 672  
22 (2002). Moreover, the UCL imposes “strict liability” and does not require proof of intent to  
23 deceive:

24 The plaintiff need not show that a UCL defendant intended to injure anyone  
25 through its unfair or unlawful conduct. **The UCL imposes strict liability when**  
26 **property or monetary losses are occasioned by conduct that constitutes an**  
**unfair business practice.**

27 *Cortez v. Purolater Air Filtration*, 23 Cal 4th 163, 181 (2000).  
28

1 California courts have defined “unfair” practices to encompass any conduct that  
2 “offends established public policy or when the practice is immoral, unethical, oppressive,  
3 unscrupulous or substantially injurious to consumers.” People v. Casa Blanca Convalescent  
4 Homes, 159 Cal. App. 3d 509, 530 (1984). The determination of “unfairness” focuses solely  
5 on the objective conduct of each Defendants, which is common to each and every class  
6 member. **Defendant’s conduct was also” unlawful” because labeling of Natural Balance**  
7 **products as “Made in the USA” violates 15 U.S.C. §45a, 62 Fed. Reg. 63756, and Cal.**  
8 **Bus. & Prof. Code § 17533.7, which is a certifiable claim.** See Lazar v. Hertz Corp., 143  
9 Cal. App. 3d 128, 139 (1983) (certifying class where “the claimed common questions of law  
10 and fact uniting the class” alleged conduct “in violation of California law.”)

11 All issues of fact and law regarding Defendant’s liability under the UCL and the CLRA  
12 are common to the entire Class making certification appropriate. Because each Class Member  
13 purchased a mislabeled product which was deceptively marketed and sold, each Class Member  
14 is entitled to restitution in an amount to be determined as the objective evidence shows that  
15 they were all likely to be deceived by the mislabeling. (Klein Decl at ¶7.)

16 **B. A Class Action Suit is the Superior Method of Litigating This Claim**

17 The facts of this case demonstrate that the superior method of litigating this case is by  
18 class action. As previously established, common questions of law and fact predominate over  
19 individual issues. In fact, the claims are identical for all the Class Members. In addition to the  
20 economic benefit certification as a class action provides to the litigants, class certification also  
21 benefits the Court by preserving valuable judicial resources by disposing of all of these claims  
22 in a single manageable action, as opposed to multiple actions. See Dukes, supra, 474 F.3d at  
23 1244 (“[I]t would be better to handle this case as a class action instead of clogging the federal  
24 courts with innumerable individual suits litigating the same issues repeatedly.”) Thus, the  
25 interests of judicial economy would best be served by certifying this action as a class action.

26 Any notion that such claims could be litigated individually is wholly unrealistic and  
27 contrary to the philosophy of Rule 23. To investigate and litigate each claim individually  
28

1 would effectively close the courthouse doors to the absent class members. Plaintiff can foresee  
2 no management difficulties which should preclude this action from being maintained as a class  
3 action. Granting class certification ensures that the merits of the case can be fairly, fully and  
4 consistently litigated and that a final determination, on the merits, can be reached.

5 As the California Supreme Court held in Linder v. Thrifty Oil Co., 23 Cal. 4<sup>th</sup> 429, 445  
6 (2000):

7 **[T]he benefits of certification are not measured by reference to individual**  
8 **recoveries alone.** Not only do class actions offer consumers a means of  
9 recovery for modest individual damages, but such actions produce “several  
10 salutary by-products including a therapeutic effect upon those sellers who  
indulge in fraudulent practices, aid to legitimate business enterprises by  
curtailing illegal competition and avoidance to the judicial process of the burden  
of multiple litigation involving identical claims”.

11 Lebrilla v. Farmers Group, Inc., 119 Cal. App. 4<sup>th</sup> 1070 (2004), held that class  
12 certification of claims under the UCL and the CLRA was mandated because “the amount of  
13 recovery for each class member makes separate small actions impractical.” Id. at 1087. Class  
14 certification is therefore crucial and necessary to effectuate complete disgorgement and to  
15 insure that the Defendants are not permitted to retain any portion of the wrongfully acquired  
16 funds. See Fletcher, supra, 23 Cal. 3d at 451-2. Class certification is therefore superior to any  
17 other method of litigating these common claims.

## 18

### 19 **VII. A NATIONWIDE CLASS SHOULD BE CERTIFIED**

20 Defendant’s principal place of business is Paicoma, California and all of Defendant’s  
21 conduct that gives rise to each Class Member nationwide was committed in California.  
22 (Herrick Depo at 6:6-9, 78:17-23 and 96:16-20.) California law may be applied to the claims  
23 of all Class Members because the claims of each Class Member is connected to Defendant’s  
24 wrongful conduct in California. A federal court applies the law of the forum state unless  
25 defendants demonstrate a conflict between the law of the forum state and the law of some other  
26 potentially interested state that could affect the outcome of the action. Here no state allows  
27

1 businesses to falsely label products as “Made in the U.S.A” when they are not and all states  
2 follow the federal standard outlawing false representations of geographic origin.

3 California choice of law jurisprudence, which applies in this diversity action, mandates  
4 application of California law to class members nationwide because California’s interest in  
5 deterring wrongful business practices committed within its borders that emanate from  
6 California and harms consumers in other states is stronger than the interest of any other state.  
7 Moreover even if this were not a case where California law applied to the nationwide Class,  
8 a nationwide class would still be appropriate because applying the law of the states in which  
9 Class Members reside to their claims would not defeat predominance or make this action  
10 unmanageable.

11 **A. California Law May Be Applied to all Class Members Under Shutts and**  
12 **Norwest**

13 Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) requires a “significant contact  
14 or aggregation of contacts” to the claims asserted by the members of the class “to ensure that  
15 the choice of law is not arbitrary or unfair.” Id. at 821-822. The Shutts test is satisfied where  
16 each class member claims injury caused by conduct committed in California. See In re  
17 Ditropan XL Antitrust Litig., 2007 WL 1411617 \*2, fn. 3 (N.D.Cal. May 11, 2007); In re  
18 Worlds of Wonder Securities Litig., 1990 WL 61951 (N. D.Cal. March 23, 1990); Wershba  
19 v. Apple Computer, Inc., 91 Cal.App. 4<sup>th</sup> 224, 241-243 (2001); Norwest Mortgage, Inc. v.  
20 Sup. Ct., 72 Cal. App. 4<sup>th</sup> 214, 226 (1999).

21 **California statutes may be applied to the claims of nonresidents where a defendant**  
22 **commits wrongful conduct in California because California has a strong interest in**  
23 **protecting California residents and nonresidents alike from wrongful conduct emanating**  
24 **from California.** Diamond Multimedia Systems, Inc. v. Superior Court, 19 Cal.4th 1036,  
25 1059-1060 (1999); Wershba, supra, 91 Cal.App.4th at 242; Clothesrigger, Inc. v. GTE Corp.  
26 191 Cal.App.3d 605, 612-616 (1987).

27  
28

1 Due process is satisfied under Shutts, where as here, the defendant committed conduct  
2 in the forum state that injured nonresident class members. As Judge White recently held in In  
3 re Ditropan XL, *supra*, 2007 WL 1411617 :

4 However, non-California resident plaintiffs may bring a UCL claim based on  
5 misconduct that occurs within California. *Northwest Mortgage, Inc. v. Superior*  
6 *Court*, 72 Cal.App.4th 214, 222, 224-25, 85 Cal.Rptr.2d 18 (1999) (citing  
7 *Diamond Multimedia Syst., Inc. v. Superior Court*, 19 Cal.4th 1036, 1063-64, 80  
8 Cal.Rptr.2d 828, 968 P.2d 539 (1999)). **Because Alza's principal place of  
9 business is in California, it is reasonable to infer the alleged misconduct  
10 occurred within California.**

11 Id. at \*2, fn. 3.

12 In re Ditropan is consistent with numerous earlier cases that have held that Shutts is  
13 satisfied by allegations of conduct committed in California. In re Computer Memories  
14 Securities Litig., 111 F.R.D. 675, 686 (N.D.Cal. 1986) held that California law could be  
15 applied to the claims of nonresident class members under Shutts where some of the defendants  
16 had their principal place of business in California, “the public offering of securities involved  
17 in the case emanated from California and most of the activities of the defendants in connection  
18 with the public offering took place in California.” Id. at 686-87.

19 In re Pizza Time Theatre Litig., 112 F.R.D. 15, 20 (N.D.Cal. 1986), certified a  
20 nationwide class applying California law to all class members after first finding that there were  
21 sufficient contacts under Shutts. In re Worlds of Wonder, *supra*, 1990 WL 61951, at \*5, also  
22 certified a nationwide class applying California law to the claims of all class members because  
23 there were “significant contacts” that made application of California law to all class members  
24 constitutional under Shutts. Church v. Consolidated Freightways, Inc., 1992 WL 370829, at  
25 \*6 (N.D. Cal. 1992), also certified a subclass applying California fraud and negligent  
26 misrepresentation law to the claims of both California and nonresident class members, and  
27 held that there were sufficient California contacts with the claims of all class members under  
28 Shutts. *See also* In re Activision Securities Litig., 621 F. Supp. 415, 430 (N.D. Cal. 1985).

California law may properly be applied to the claims of nonresidents under Shutts where  
defendants commit wrongful conduct in California. In Clothesrigger, *supra*, 191 Cal.App.3d  
at 613, the court held that defendant’s California contacts satisfied Shutts for the claims of

1 nonresident class members. The California Supreme Court adopted Clothesrigger's analysis  
2 in Diamond Multimedia, supra, 19 Cal.4th at 1064-65, and again in Washington Mutual Bank,  
3 v. Superior Court, 24 Cal.4th 906, 1082 (2001). Wershba, supra, 91 Cal.App.4th 145, applied  
4 Clothesrigger and Diamond Multimedia to hold that defendant's wrongful conduct in  
5 California satisfied the significant contact standard under Shutts.

6 Norwest Mortgage, supra,. applied this same due process analysis. Norwest considered  
7 the application of the UCL to claims of nonresident class members and applied Shutts to  
8 separate the class members into three categories: "(1) California residents; (2) non-California  
9 residents alleging conduct in California; and (3) non-California residents alleging conduct  
10 outside of California." Id., 72 Cal. App. 4<sup>th</sup> at 222. As Norwest held, under Shutts, the UCL  
11 could be constitutionally applied to both Categories 1 and 2. In the instant case, the  
12 nonresident class members are all Category 1 or 2 because their claims all arise from conduct  
13 committed in California.<sup>6</sup>

14 Under Norwest, application of California law is prohibited only to claims arising "**from**  
15 **conduct occurring entirely outside of California.**" Id. at 243 ; *see also* Wershba, supra, 91  
16 Cal.App.4th at 243 ("[A] California court may properly apply the same California statutes at  
17 issue here to non-California members of a nationwide class where the defendant is a California  
18 corporation and **some or all of the challenged conduct** emanates from California.").

19 As Norwest explained, in Diamond Multimedia the California Supreme Court "rejected  
20 the defendants' argument against extraterritorial application of domestic statutes and noted that  
21 '[t]he presumption against extraterritoriality is one against an intent to encompass *conduct*  
22 occurring in a foreign jurisdiction in the prohibitions and remedies of a domestic statute.'" 72  
23 Cal.App. 4<sup>th</sup> at 222, *quoting* 19 Cal.4th at 1059, n. 20.

24  
25  
26 <sup>6</sup> Plaintiff anticipates that Defendant may cite Nordberg v. Trilegiant Corp., 445 F. Supp. 2d  
27 1082 (N.D.Cal. 2006), to argue that the CLRA claims may only be brought on behalf of  
28 California residents. In Nordberg, the defendant was headquartered in Connecticut and did  
not commit any conduct that emanated from California. Id. at 1087. Accordingly, the plaintiffs  
in that case were Category 3 under Norwest unlike the Category 2 nonresident Class  
Members in this case injured by Defendant's wrongdoing in California.

1 Indeed, Diamond Multimedia observed that the presumption against extraterritorial  
2 application of California statutes “**has never been applied to an injured person's right to**  
3 **recover damages suffered as a result of an unlawful act or omission committed in**  
4 **California.**” Id. at 1059 (emphasis added). See also Deirmenjian v. Deutsche Bank, A.G.,  
5 2006 WL 4749756 at \*35. (C.D.Cal. 2006) (“the presumption against extraterritoriality does  
6 not apply when the underlying conduct largely occurred within California.”); Friese v. Superior  
7 Court, 134 Cal.App.4th 693, 702-03 (2006); Wershba, supra, 91 Cal.App.4th at 243.  
8 Therefore, California law may be applied to all Class members’ claims.

9 **B. California’s Comparative Impairment Choice of Law Test Also Supports**  
10 **Application of California Law to the Nonresident Class Members in this**  
11 **Case**

12 California cases and decisions by federal courts also strongly support application of  
13 California law to all the claims in this case. “**California's interest in deterring fraudulent**  
14 **conduct by businesses headquartered within its borders and protecting consumers from**  
15 **fraudulent misrepresentations emanating from California would override any possible**  
16 **interest of any other state in application of its own laws to its residents' claims.”**  
17 Clothesrigger, supra, 191 Cal.App.3d 605 at 614. The California Supreme Court adopted the  
18 Clothesrigger analysis in Diamond Multimedia and recognized that “California also has a  
19 legitimate and compelling interest in preserving a business climate free of fraud and deceptive  
20 practices.” 19 Cal.4th at 1064.

21 Under the comparative impairment standard, California law will apply to all class  
22 members’ claims unless: (1) a true conflict exists between the laws of the applicable states; (2)  
23 each state has an interest in having its law applied; and (3) that the interest of some other state  
24 could be more impaired than would California's if its own law were not applied. Washington  
25 Mut. Bank, supra, 24 Cal. 4<sup>th</sup> at 1080-1.

26 California law may be used on a classwide basis so long as its application is not  
27 arbitrary or unfair with respect to nonresident class members (*Phillips Petroleum*  
28 *Co. v. Shutts*, supra, 472 U.S. at pp. 821-822 [105 S.Ct. at p. 2979]), and so long  
as the interests of other states are not found to outweigh California's interest in  
having its law applied.

1 Id. at 921.

2       **The burden is on the proponent of foreign law to demonstrate that “foreign law,**  
3 **rather than California law, should apply to class claims.”** Washington Mutual, 24 Cal. 4<sup>th</sup>  
4 at 921. *See also* Wershba, 91 Cal.App.4th at 244; In re First Alliance Mortg. Co., 269 B.R.  
5 428, 448 (C.D. Cal. 2001). Under the law and facts of this case, Defendant can not meet the  
6 burden of showing that any other state has an interest against application of California law that  
7 outweighs the compelling California interest articulated in Clothesrigger and Diamond  
8 Multimedia.

9       In re Activision, *supra*, certified a nationwide class with California law applicable to  
10 all class members and described the Defendant’s burden:

11       **Defendants must do more than show a variance in the law. They must show**  
12 **that the interest of the other states in having their laws followed is greater**  
13 **than California's interest in applying its own law.** This is a substantial  
14 burden for defendants to overcome given that Activision’s principal place of  
15 business is in California, the issue emanated from California, and the purchaser’s  
16 acceptances were directed at California.

17 621 F. Supp. at 430.

18       In re Computer Memories, *supra*, 111 F.R.D. at 685, also certified a nationwide class  
19 with California law to be applied to all class members because defendants failed to meet their  
20 burden of showing that other states had interests that would be more impaired by application  
21 fo California law. Where the corporate defendants had their principal place of business in  
22 California and made misrepresentations that emanated from California “[t]hese contacts give  
23 rise to a multitude of interests California has in applying its own law.” Id. at 686.

24       In re Pizza Time, *supra*, certified a nationwide class against a California defendant  
25 where the misrepresentations emanated from California. The court held that California law  
26 applied because “defendants have failed to carry their burden of showing that the interests of  
27 other jurisdictions would be more impaired by application of California tort law than their  
28 own.” Id. 112 F.R.D. at 20-21. In so holding, the court observed that “**each jurisdiction**

1 **would rather have the injuries of its citizens litigated and compensated under another**  
2 **state's law than not litigated or compensated at all.”** Id. at 20.<sup>7</sup>

3 In Diamond Multimedia, supra, at 1064-5, the California Supreme Court recognized  
4 California’s compelling interest in providing redress for wrongful conduct occurring in or  
5 emanating from California that injures consumers residing in other states. California law  
6 therefore properly applies to the claims of all Class Members because the “core decision” to  
7 label these products as “Made in the USA,” without any knowledge as to the products’ true  
8 origin, were all made in California at Defendant’s principal and only place of business. In re  
9 Wells Fargo, 2007 U.S. Dist. LEXIS 60551, at \*9-\*10 (N.D. Cal. Aug. 13, 2007); Wershba,  
10 supra, 91 Cal. App. 4th at 242.

11 Here, the deceptive, unfair and unlawful business practices by Defendant were  
12 committed in California, emanated from California and harmed consumers in California and  
13 other states which gives California a strong interest in addressing the wrongful conduct  
14 committed within its borders. There is no evidence that any other state where any non-resident  
15 class member resides has a conflicting interest which would prevent their residents from  
16 recovery under California law.

17  
18 **C. A Nationwide Class Could Be Certified Even If California Law Were Not**  
**Applicable to All Class Members**

19 Because the conduct violates federal law and the laws of all other states, the litigation  
20 would still be manageable even if Defendant could prove a true conflict. Plaintiff respectfully  
21 submits, however, that there are no outcome determinative conflicts of law among the states  
22 whose laws might be applicable because no state law permits Defendant’s deceptive, unfair  
23 and unlawful conduct of falsely mislabeling their product as to origin in violation of uniform  
24 federal law and regulations. The laws of the United States, California, the other 49 states and  
25 the District of Columbia uniformly do not allow businesses to cheat to compete for market

26  
27 <sup>7</sup> See also Clothesrigger, 191 Cal.App.3d at 614. (“California's more favorable laws may  
28 properly apply to benefit nonresident plaintiffs when their home states have no identifiable  
interest in denying such persons full recovery.”) As Wershba noted “California's consumer  
protection laws are among the strongest in the country.” 91 Cal. App. 4<sup>th</sup> at 242.

1 share by misrepresenting the origin of the sellers' product. Mislabeling a product's origin  
2 violates 15 U.S.C. §45a and the consumer protection statutes of every other state and the  
3 District of Columbia. Federal law creates a uniform standard for whether a product can be  
4 truthfully labeled "Made in the USA." 62 FR at 63768. Plaintiff performed a detailed analysis  
5 of the laws of the various states and could find no conflict of state laws on this issue and  
6 therefore no manageability problem. **All states follow federal law on this issue.**

7 Courts properly certify nationwide classes applying either the law of the forum state or  
8 the law of multiple states where there is no prohibitive conflict among state law that would  
9 make the litigation unmanageable. "Courts have expressed a willingness to certify nationwide  
10 classes on the ground that relatively minor differences in state law could be overcome at trial  
11 by grouping similar state laws together and applying them as a unit." In re Prudential Ins. Co.  
12 Am. Sales of Litig. Agent Actions, 148 F.3d 283, 315 (3d Cir. 1998)(affirming multi-state  
13 certification ); *see also* In re School Asbestos Litig., 789 F.2d 996, 1011 (3d Cir. 1986);  
14 Thorogood v. Sears Roebuck & Co., 2007 WL 3232491 (N.D. Ill. November 1, 2007)  
15 (certifying multi-state class comprising residents of 28 states under their respective consumer  
16 fraud statutes); In re Nigeria Charter Flights Contract Litig., 233 F.R.D. 297, 305-06  
17 (E.D.N.Y. 2006) (potential differences in the applicable state law do not defeat class  
18 certification where the defendant fails to show that they would create insuperable obstacles);  
19 Steinberg v. Nationwide Mut. Ins. Co., 224 F.R.D. 67 (E.D.N.Y.2004); Miles v. Am. Online,  
20 Inc., 202 F.R.D. 297 (M.D.Fla. 2001)(certifying nationwide class); In re Copley Pharm., Inc.,  
21 161 F.R.D. 456, 465 (D.Wyo. 1995)(denying motion to decertify nationwide class where  
22 differences in state law would not make action unmanageable); Elliott v. ITT Corp., 150  
23 F.R.D. 569, 580-81 (N.D.Ill.1992); In re Alexander v. Centrafarm Group, N.V., 124 F.R.D.  
24 178, 186 (N.D.Ill.1988); Longden v. Sunderman, 123 F.R.D. 547, 555-556 (N.D. Tex. 1988)  
25 (granting nationwide certification where defendants failed to show substantive variations in  
26 state fraud laws); In re LILCO Securities Litig., 111 F.R.D. 663, 670 (E.D. N.Y. 1986)  
27 (certifying nationwide class action); Dekro v. Stern Bros. & Co., 540 F. Supp. 406, 418 (W.D.

28

1 Mo. 1982) (nationwide certification granted where defendants failed to show substantive  
2 variations in state fraud laws that would affect the outcome of the action).

3 Accordingly, Plaintiff is certain that California law applies to the claims of each Class  
4 Member nationwide. Nevertheless, were the consumer statutes of various states to be applied,  
5 nationwide certification would still be appropriate where, as here, Defendant cannot show any  
6 outcome determinative conflict that would make the litigation unmanageable.

7 **VIII ANY DOUBT AS TO CLASS CERTIFICATION SHOULD BE RESOLVED IN  
8 FAVOR OF CERTIFYING THE CLASS**

9 Any doubt regarding whether to certify a class must be resolved in favor of certification.  
10 In determining motions to certify a class: “The interests of justice require that in a doubtful  
11 case. . . any error, if there is to be one, should be committed in favor of allowing the class  
12 action.” Esplin v. Hirschi, 402 F.2d 94, 101 (10<sup>th</sup> Cir. 1968), *cert. denied*, 394 U.S. 928, 898  
13 S. Ct. 1194, 22 L.Ed.2d 459 (1969) Id.; *accord* Green v. Wolf Corp., 406 F.2d 291 (2d Cir.  
14 1968), *cert. denied*, 395 U. S. 977, 89 S. Ct. 2131, 23 L. Ed. 2d 766 (1969).

15 **IX. CONCLUSION**

16 For all of the reasons discussed herein, Plaintiff respectfully submits that this case  
17 should be certified to proceed as a nationwide class action.

18  
19  
20 BLUMENTHAL & NORDREHAUG

21 Dated: April 23, 2008

22 By: s/Norman B. Blumenthal  
23 Norman B. Blumenthal, Esq.  
24 Attorneys for the Plaintiff

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