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9 **UNITED STATES DISTRICT COURT**  
10 **SOUTHERN DISTRICT OF CALIFORNIA**  
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13 ROBERT ADAM KENNEDY, an individual,  
on behalf of himself, and on behalf of all  
14 persons similarly situated,

15 Plaintiff,

16 vs.

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

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

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

**[F.R.C.P. § 23]**

Hearing Date: June 16, 2008  
Hearing Time: 10:30 a.m.

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

1 **I. INTRODUCTION**

2 Plaintiff moved for certification based on Defendant Natural Balance, Inc.’s uniform practice  
3 of unlawfully, deceptively, and unfairly labeling four (4) Natural Balance brand pet food products as  
4 “Made in the USA.” since May 3, 2003. Defendant argues that certification of this class should be  
5 denied, based on a settlement class that was preliminarily certified in the Multi-District Litigation  
6 Proceedings No. 1850, *In Re Pet Food Products Liability Litigation*, Case No. 07-2867 (the “MDL”).  
7 For multiple reasons, the MDL settlement has absolutely no bearing on this Court granting Plaintiff  
8 Kennedy’s motion for class certification.

9 First, Defendant touts the transfer order of Snell v. Natural Balance, 2008 U.S. Dist. Lexis  
10 30433 (2008) (“Snell”) to the MDL, without even the courtesy of including a case cite to Snell or  
11 attaching the Snell decision to Defendant’s opposition. This way, Defendant could misrepresent to  
12 the Court that Snell holds that “Made in the USA” claims were being litigated and adjudicated in the  
13 MDL. In reality, Snell makes clear that “Made in the USA” claims were expressly *excluded* from the  
14 MDL. Snell, *supra*, 2008 U.S. Dist. LEXIS 30433, at \*3, fn 1, attached as Exhibit #2 to Declaration  
15 of Kyle Nordrehaug (“Decl. Nordrehaug”), submitted herewith.

16 Second, Margaret Picus v. Wal-mart Stores, Inc., et al., D. Nevada, C.A. No. 2:07-686, cited  
17 in the Snell transfer order, unlike Snell, *is* a class action that was filed in the Nevada District Court.  
18 Like Plaintiff Kennedy, Picus also asserts claims premised on the mislabeling of certain pet food  
19 products as “Made in the USA.” After considering the propriety of including Picus in the MDL, the  
20 MDL panel issued an “Order Vacating Conditional Transfer,” which states:

21 The complaint in the action before us alleges that defendants intentionally mislabeled  
22 one particular brand of pet food products as “MADE IN USA” when, in fact, a major  
23 component of the pet food was manufactured in China. **These allegations will likely  
24 require unique discovery and other pretrial proceedings. Accordingly, we are  
25 persuaded that inclusion of this action in MDL No. 1850 is not presently  
26 warranted.**

27 (*See* Exhibit #3 to the Decl. Nordrehaug; and Notice of Opt-Out [Docket No. 55]).<sup>1</sup>

28 The MDL appropriately excluded Picus because such claims, like those asserted by Plaintiff  
Kennedy, are very different from those raised in the MDL actions. Picus and Kennedy are based on

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<sup>1</sup> Emphasis added and internal citations omitted unless otherwise indicated.

1 the mislabeling of products as “MADE IN USA” during the last four years, while the MDL actions  
2 are premised on product liability causes of action, focusing on the individual damages caused to  
3 owners of pets that consumed the tainted pet food during a certain recall period in 2007. The  
4 distinction between these types of case was reiterated by the Snell court:

5 ...Snell is distinguishable from *Picus v. Wal-Mart Stores, Inc., et al.*, No. 2-07-686 (D.  
6 Nev.), in which we granted a motion to vacate. **The Picus claims arose solely from  
allegedly deceptive representation regarding the geographic origin of the pet food  
7 products, rather than from the death or illness of a pet.**

8 Snell, supra, 2008 U.S. Dist. LEXIS 30433 (Decl. Nordrehaug at Exhibit #2).

9 Third, as evidenced by the court’s reasoning above, the MDL cases are product liability cases,  
10 alleging design defects and/or manufacturing defects based on the contamination of specific lots of  
11 pet food sold in April of 2007 which were voluntarily recalled. (See Picus Order and Snell  
12 Complaint, attached as Exhibit #1 and #3 to Decl. Nordrehaug). This action, on the other hand  
13 addresses Defendant’s misrepresentations made prior to and during the contamination period, which  
14 provides for restitution for purchases of pet food products that were not recalled.

15 At best, the settlement reached in the MDL may create an affirmative defense as to certain  
16 purchases by certain members of this putative class, who do not opt out of the MDL Settlement and  
17 receive a refund for their purchase of recalled product. As a result, the Defendant’s affirmative  
18 defense to certain claims regarding purchases of recalled products is a common issue that may be  
19 appropriately answered on a class wide basis.

20 Plaintiff Kennedy, to avoid any confusion, has elected to opt out of the MDL Settlement, in  
21 accordance with the Preliminary Approval Order. (*See* Notice of Opt-Out, [Docket No. 55]).<sup>2</sup>  
22 Another class member will be objecting to the MDL Settlement, in order to clarify that the release  
23 language of the settlement should not release the claims for purchases of Natural Brand pet food  
24 products that were mislabeled as “Made in the USA” but were not part of the recall. This is  
25 consistent with the exclusion of the claims in Picus from the MDL. In the meantime, Plaintiff’s

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26 <sup>2</sup> Defendant submitted a second brief on this issue by filing a response to Plaintiff’s notice. This  
27 “response,” which is in reality a supplement to Defendant’s opposition, violates (a) Local Rule 7.1(h),  
28 in that the filing causes the argument in opposition to Plaintiff’s Motion for Class Certification to  
exceed twenty-five (25) pages. Accordingly, Plaintiff would respectfully request the Court to strike  
the “response” as an untimely motion under Local Rule 7.1(e)(7).

1 prosecution of this case must proceed, as Plaintiff is not a member of the MDL Settlement Class. For  
2 these reasons, the Plaintiff respectfully submits that this Court should pay no heed to Defendant's  
3 misrepresentations concerning the affect of the MDL Settlement on this class action, which are best  
4 left as affirmative defenses.

5 **II. THE PUTATIVE CLASS DEFINITION**

6 Defendant only provides this Court with a portion of Plaintiff's class definition. The complete  
7 class definition is fully set forth as follows, with the portion omitted by Defendant included in bold:

8 All individuals in the United States who purchased one or more of the following  
9 Natural Balance brand pet food products labeled as "Made in the USA" since May 3,  
10 2003: Venison and Brown Rice Dry Dog Formula, Venison and Brown Rice Canned  
11 Dog Food, Venison and Brown Rice Formula Dog Treats, and/or Venison and Green  
12 Pea Dry Cat Formula. **Those specific purchases of Natural Balance products for  
13 which a full refund was paid to the consumer should be excluded from the Class.**

14 Contrary to Defendant's representations, each of the four (4) products are not necessarily  
15 "recalled products" within the meaning of the MDL settlement. "Recalled products" are defined to  
16 include only those products that were recalled "between March 16, 2007 and the present because of  
17 the allegedly contaminated wheat gluten and/or rice protein concentrate." (MDL Settlement  
18 Agreement ("MDL Doc. 151-3"), attached to Def's RJN [Docket No. 55]). Each of the products in  
19 this case that were sold between May 3, 2003 and March 16, 2007 are, therefore, not recalled products  
20 by definition. Consequently, a large portion of this class are not members of the MDL Settlement  
21 Class, which only includes:

22 All persons and entities who purchased, used or obtained or whose pets used or  
23 consumed Recalled Pet Food Products...

24 (MDL Doc. 151-3, Def's RJN [Docket No. 55]). In the case of Plaintiff Kennedy, he made purchases  
25 of Defendant's mislabeled product which were not tainted and not recalled as set forth in his  
26 Declaration.<sup>3</sup> Moreover, the proposed class definition seeks to exclude refunded purchases. Allowing  
27 only the MDL Settlement to provide compensation for Defendant's recall, therefore, leave many  
28 members of this class without a remedy for Defendant's wrongful conduct that was not part of the  
29 recalled purchases.

30 <sup>3</sup> Defendant provides no evidence establishing that Plaintiff Kennedy even purchased tainted  
31 product that was recalled.

1 **III. DEFENDANT IS IN VIOLATION OF THE COURT’S ORDER**

2 According to Defendant, a series of “mini-trials” will be needed to determine which products  
3 sold by Natural Balance were mislabeled as “Made in the USA.” The Court may, however, rest  
4 assured that this outcome will not occur.

5 Defendant has violated the Court’s April 21, 2008 Order which ordered Defendant to identify  
6 the foreign-sourced components included in the pet food products at issue in this case and pay  
7 sanctions. (Minute Order, [Docket No. 41].) This Order was issued after Plaintiff filed a motion to  
8 compel responses to interrogatories on March 21, 2008. [Doc. No. 36]. Although the sanctions have  
9 been paid, Defendant has failed to produce answers to the applicable discovery. Had Defendant  
10 actually provided this information to Plaintiff, the full extent of Defendant’s mislabeling could have  
11 been clearly demonstrated by merely pointing to the answers to Plaintiff’s interrogatories.

12 For this reason, pursuant to Fed. R. Civ. Proc. 37, Plaintiff will be filing a motion for sanctions  
13 for Defendant’s violation of the Court’s discovery order. The Court should refuse to allow Defendant,  
14 as a party that has disobeyed a critical discovery order, “to support or oppose designated claims or  
15 defenses, or [prohibit] that party from introducing designed matters in evidence[.]” Fed. R. Civ. P.  
16 37(b)(2)(B).

17 Defendant’s own conduct in failing to comply with the Court’s Discovery Order has resulted  
18 in substantial prejudice to Plaintiff, which Defendant is now taking the opportunity of to exploit. In  
19 the opposition, Defendant eagerly delves into the merit issues of whether the vitamins included in the  
20 products were *de minimis* or whether the vitamins should be classified as “raw materials” which are  
21 common questions. Since Defendant defied the Court’s Order and failed to respond as to which  
22 foreign-sourced components were included in the products, Plaintiff is unfairly prejudiced by  
23 Defendant’s merit-based arguments. Defendant should not be permitted to take advantage of any  
24 information gap, created by Defendant’s own malfeasance.<sup>4</sup>

25 \_\_\_\_\_  
26 <sup>4</sup> For example, contrary to Defendant’s testimony, Defendant’s opposition now asserts for the  
27 first time that “the only potentially foreign-sourced raw ingredients or materials were rice protein  
28 concentrate, taurine, and certain vitamins.” (Def. Opp., pg 11.) Plaintiff will seek evidence  
preclusion to prevent Defendant from making such unverified statements and from engaging the Court  
in any “mini-trials” on this issue. The fact that Defendant mislabeled the products as “Made in the  
USA” should be deemed admitted, because Defendant defied the Court’s Order and failed to answer

1 Finally, the Court should, respectfully, resist Defendant’s invitation to pre-judge the merits  
2 of Plaintiff’s case. While the “Court must perform a ‘rigorous analysis’ to determine whether Plaintiff  
3 has satisfied the aforementioned requirements...the Court does not scrutinize the merits of Plaintiff’s  
4 case on a Motion for Class Certification.” Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975).  
5 Rather, the Court should accept all Plaintiff’s allegations as true. Id.

6 **IV. CALIFORNIA LAW APPLIES TO THE CLAIMS OF EACH CLASS MEMBER**

7 Defendant misleads the Court by suggesting that different state’s laws would apply to the  
8 claims of Plaintiff and the members of the class.

9 **A claim under the UCL may be asserted by a non-resident plaintiff alleging**  
10 **unfair business conduct that occurred in or emanated from California.** Norwest  
11 Mortgage, Inc. v. Superior Court, 72 Cal. App. 4th 214, 222, 85 Cal. Rptr. 2d 18  
(1999); see also Clothesrigger, Inc. v. GTE Corp., 191 Cal. App. 3d 605, 236 Cal.  
Rptr. 605 (1987).

12 TruePosition, Inc. v. Sunon, Inc., 2006 U.S. Dist. LEXIS 32918 (E.D. Pa. May 23, 2006)

13 Ignoring this rule, as well as the line of California cases cited in Plaintiff’s Motion, Defendant  
14 instead discusses the inapposite case of Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180  
15 (2001) (“Zinser”), which has nothing to do with consumer protection statutes.

16 **In Zinser, the defendant was an Australian company (ARI).** ARI designed, manufactured  
17 and distributed lead, which was later included in allegedly defective pacemakers that were sold  
18 throughout the United States. Zinser, however, did not involve wrongful conduct occurring in  
19 California. Zinser, therefore, properly required analysis of the conflict of laws of the fifty states  
20 before applying California law to claims of class members throughout the United States.

21 Defendant, on the other hand, is a California corporation with its principal place of business  
22 in California with all conduct and sales emanating from California. Defendant has offered no  
23 evidence to rebut these conceded facts. Nor has Defendant rebutted Plaintiff’s assertion that the  
24 wrongful acts of deciding to mislabel and selling the mislabeled products were undertaken by Natural

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26 \_\_\_\_\_  
27 Plaintiff’s interrogatories and state, under oath, which foreign-sourced components were included in  
28 the products at issue. Further, Defendant’s argument ignores that “venison,” the primary  
component of the products, was conceded to be foreign-sourced. (Herrick Depo at 86:2-20,  
Exhibit #1 to the Declaration of Blumenthal [Doc. No. 50-3].)

1 Balance, as a California company, solely in California.<sup>5</sup>

2 Here, Plaintiff properly seeks to apply California law to remedy the misconduct of Natural  
3 Balance, a California company, based on California consumer protection statutes. In this situation,  
4 the rule is straightforward: “**Clothesrigger explicitly held that California courts normally may**  
5 **apply California's pro-consumer laws to consumers from other states.”** Wershba v. Apple  
6 Computer, Inc., 91 Cal.App. 4<sup>th</sup> 224 at 243 (2001).<sup>6</sup> Here, just as in Clothesrigger and Wershba, while  
7 some of the ultimate retain transactions may have occurred outside California, all conduct and  
8 representations by the Defendant emanated from California.

9 **A California court may properly apply the same California statutes at issue here**  
10 **to non-California members of a nationwide class where the defendant is a**  
11 **California corporation and some or all of the challenged conduct emanates from**  
12 **California.**

13 Wershba, supra, 91 Cal.App.4th at 242.

14 The defendant in Wershba also tried to demonstrate differences between the laws of California  
15 and the laws of the other fifty states. In response, the Wershba court held:

16 Even though there may be differences in consumer protection laws from state to state,  
17 this is not necessarily fatal to a finding that there is a predominance of common issues  
18 among a nationwide class. As the Ninth Circuit Court of Appeals has observed, state  
19 consumer protection laws are relatively homogeneous:

20 **"the idiosyncratic differences between state consumer protection laws are not**  
21 **sufficiently substantive to predominate over the shared claims" and do not**  
22 **preclude certification of a nationwide settlement class.**

23 Wershba, supra, 91 Cal. App. 4th at 244, citing Hanlon v. Chrysler Corporation, 150 F.3d 1011, 1019  
24 (9th Cir. 1998).

25 Similarly here, Defendant’s opposition has only displayed the mere idiosyncracies that exist  
26 between state consumer protection laws. Defendant has done nothing to rebut Plaintiff’s assertion  
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28 <sup>5</sup> Zinser and the other cases cited by Defendant involve dissimilar lawsuits in that the plaintiffs  
there assert causes of action where “the applicable law *derives* from the law of the fifty states.” *See*,  
*e.g.*, Chin v. Chrysler Corp., 182 F.R.D. 448, 453 (D.N.J. 1998) (plaintiff asserts a products liability  
cause of action); Ziner, supra, 253 F.3d 1180 (2001) (plaintiff asserts a products liability cause of  
action); Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986) (plaintiff asserts claim under  
Magnuson-Moss Act which calls for application of state written and implied warranty law).

<sup>6</sup> A district court exercising diversity jurisdiction applies the choice of law rules of the forum  
state in deciding conflicts of law, which in this case is California. Waggoner v. Snow, Becker, Kroll,  
Klaris & Krauss, 991 F.2d 1501, 1506 (9th Cir. 1993).

1 that sufficient contacts exist between Natural Balance and California. If anything, Defendant has only  
2 succeeded in misplacing the applicable burden in the choice of law analysis.

3 Under California law, where there is sufficient contact existing between the Defendant's  
4 conduct and California, the burden is then on Defendant to show that the laws of a forum other than  
5 California should apply:

6 So long as the requisite significant contacts with California are shown to exist,  
7 sufficient to meet constitutional standards, **the burden is on the parties challenging**  
8 **the nationwide certification** to demonstrate that "foreign law, rather than California  
9 law, should apply to class claims."

10 Wershba, supra, 91 Cal. App. 4th at 244.

11 Here, Defendant has not shown that mislabeling products as "Made in the USA" is proper in  
12 any of the other forty-nine (49) states or, even if so, shown that such law would preclude a non-  
13 California class member from being a member of the class and seeking redress under California law.  
14 Defendant has also failed to demonstrate that any states would have their interest impaired by  
15 applying California's Unfair Competition Law to the injuries suffered by non-residents of California.  
16 Indeed, such a showing would be extremely difficult, as "California's consumer protection laws are  
17 among the strongest in the country." Wershba, supra, 91 Cal. App. 4th at 242.<sup>7</sup>

18 **V. THE UNFAIR COMPETITION LAW DOES NOT REQUIRE INDIVIDUALIZED**  
19 **PROOF OF INJURY AS APPLIED IN THIS CASE**

20 Defendant argues that Plaintiff's claims are not typical of the claims of other class members  
21 because his "understanding" of the term "Made in the USA" may be different from the understanding  
22 held by the other class members. This argument is entitled to short shrift.

23 Business & Professions Code § 17200 ("UCL") defines unfair competition as "any unlawful,  
24 unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."  
25 Courts have interpreted § 17200 as authorizing actions for injunctive relief, and allowing restitution  
26 even "**without individualized proof of deception, reliance, and injury if necessary to prevent the**  
27 **use or employment of an unfair practice.**" Montano v. Eagle III Diversified, 2002 U.S. Dist.

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28 <sup>7</sup> Defendant does not contest that a California class is most certainly certifiable, as would  
a nationwide Class applying California law to protect consumers from mislabeling emanating  
from California.

1 LEXIS 10840, \*13-14 (C.D. Cal. 2002), citing to Freeman v Time, Inc., 68 F 3d 285, 288 (9th Cir.  
2 1995). Under § 17200, the elements of a tort need not be proven. Rather, claimants must only show,  
3 as an **objective standard**, that "members of the public are likely to be deceived." Id. at 289, quoting  
4 Bank of the West v Super Ct, 2 Cal 4th 1254, 1267 (1992).

5 Contrary to Defendant's misplaced concerns about Plaintiff's typicality, under § 17200, the  
6 Court will not be faced with individualized inquiries concerning class members' "understanding" of  
7 "Made in the USA." As held in Prata v. Superior Court, 91 Cal. App. 4th 1128, 1144-5 (2001), the  
8 proper focus of a UCL case is not whether individual consumers were actually misled and injured.  
9 "[T]here is no need to examine each consumer transaction to establish a violation of section  
10 **17200. The issue is, instead, whether the program as a whole was likely to mislead...**" Id.

11 Defendant cites to In Re Sears, Roebuck & Co. Tools Marketing & Sales Practices Litigation  
12 ("Sears") (MDL-1703) 2007 U.S. Dist. Lexis 89349 (N.D. Ill. 2007), for the proposition that a  
13 nationwide class may not be maintainable for "Made in the USA" claims. This case is easily  
14 distinguishable. In Sears, the claim asserted therein required individualized proof of damages under  
15 the Illinois Fraud and Deceptive Business Practices Act ("IFDPA"). Under the IFDPA, the plaintiffs  
16 *and* the members of the class must prove that the defendant intended the plaintiffs and the members  
17 of the class to rely on the deception and that actual damages were proximately caused by the  
18 deception. Oshana v. Coca-Cola Co., 472 F.3d 506, 513 (7th Cir. Ill. 2006). The issues of the IFDPA  
19 in Sears which precluded certification are not present in this case because the UCL is a consumer  
20 protection statute that does not require any need for individual analysis. Prata, supra, at 1267.

21 **VI. PLAINTIFF HAS SHOWN THAT A CLASS ACTION IS SUPERIOR TO AN**  
22 **INDIVIDUAL ACTION**

23 Defendant claims that the fact that "various products implicated in this lawsuit vary  
24 dramatically in price" may cause a "problem" if a class is certified. This same argument has been  
25 frequently discussed by courts, and just as frequently, rejected. Class certification is not defeated  
26 merely because individualized damage issues may remain. Whiteway v. FedEx Kinko's Office &  
27 Print Servs., 2006 U.S. Dist. LEXIS 69193 (N.D. Cal. Sept. 13, 2006).

28 Defendant next argues that this class action should not be certified because other class actions

1 with identical allegations against the Defendant have not been filed. This argument is a non-sequitur.  
2 There is no requirement, nor logical basis for requiring, a plaintiff to demonstrate that other similar  
3 lawsuits have been filed as class actions. To the contrary, the absence of such individual actions  
4 affirms that this is a case where “numerous parties suffer injury of insufficient size to warrant  
5 individual action and when denial of class relief would result in unjust advantage to the wrongdoer”  
6 which is appropriate for class certification Linder v. Superior Court, 23 Cal. 4<sup>th</sup> 429, 435 (2000);  
7 Chamberlan v. Ford Motor Co., 223 F.R.D. 524, 527 (N.D. Cal. 2004).

8 Defendant’s argument also misreads the discussion of Fed. R. Civ. Proc. 23(b)(3)(B) in Berley  
9 v. Dreyfus Co., 43 FRD 397, 398 (S.D.N.Y. 1967). Berley opined that a class of litigants should not  
10 be certified where the defendant had offered to reimburse the purchase price of stock sold to its  
11 customers. Had Defendant actually offered to reimburse the class for the purchase price of the four  
12 (4) products at issue in this case that were sold since May 2003, 23(b)(3)(B) may impact certification  
13 here. Defendant has, however, made no such offer. Thus, the maintenance of this suit as a class  
14 action is warranted.

15 **VII. PLAINTIFF’S CLAIM DOES NOT “BORROW” FROM THE CLRA**

16 Defendant’s claim that Plaintiff’s UCL claim is “borrowing from” or is “founded on” the  
17 CLRA is a red herring. The UCL defines "unfair competition" to include "any unlawful, unfair or  
18 fraudulent business act or practice." Cal. Bus. & Prof. § 17200.<sup>8</sup>

19 In order to satisfy the unlawful prong of the UCL, the broad scope of Section 17200 allows  
20 the borrowing of violations of other laws to treat them as *independently* actionable unfair practices.  
21 Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr.  
22 2d 548, 973 P.2d 527 (1999). The Cel-Tech court also held that the UCL may borrow standards from  
23 the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or  
24 deceptive acts or practices. Id. at 186.

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26 <sup>8</sup> Regardless of whether Defendant’s conduct was “unlawful” under the UCL, Plaintiff  
27 has adequately alleged that the mislabeling of Defendant’s products was deceptive. These  
28 allegations, standing alone, are sufficient to state a UCL cause of action under the fraudulent  
prong of the UCL. Committee on Children's Television v. General Foods Corp., 35 Cal.3d  
197, 211 (1983).

1 Here, Plaintiff alleges the CLRA as a separate and independent cause of action from the UCL  
2 cause of action. To satisfy the unlawful prong of the UCL, Plaintiff borrows from the rules  
3 established by the Federal Trade Commission and by 62 Fed. Reg. 63756 (1997), but not the CLRA.  
4 (*See* PI’s Motion for Class Certification, pg. 1 [Docket No. 50]).

5 Defendant also argues that Plaintiff’s UCL claim is “borrowing” from Cal. Bus. & Prof. Code  
6 §17533.7, which provides that “[i]t is unlawful for any person...to sell or offer for sale in this State”  
7 merchandise mislabeled as “Made in the USA.” This law applies to Defendant’s conduct in  
8 California. Because all conduct of the Defendant occurred in California and defrauded resident and  
9 non-resident consumers of Natural Balance pet food products alike, a nationwide class is clearly  
10 certifiable because California has a strong interest in protecting California residents and nonresidents  
11 alike from wrongful conduct emanating from California. Diamond Multimedia Systems, Inc. v.  
12 Superior Court, 19 Cal.4th 1036, 1059-1060 (1999); Wershba, supra, 91 Cal.App.4th at 242;  
13 Clothesrigger, Inc., 191 Cal.App.3d at 612-616.

14 **VIII. CONCLUSION**

15 Rule 23(a) provides five (5) prerequisites to a class action, all of which have been met in this  
16 case. (1) Defendant has not contested the fact that the class is so numerous that joinder of all  
17 members is impracticable. (2) The question of whether Defendant mislabeled the Natural Balance  
18 brand pet foods as “Made in the USA” is a question of law and fact that is common to the class.  
19 Defendant’s arguments to the contrary either (a) improperly contest the merits of Plaintiff’s claims;  
20 or, (b) merely illustrate the existence of affirmative defenses, which are also common issues. (3)  
21 Plaintiff’s claims are typical of the claims or defenses of the class. (4) Defendant does not contest that  
22 Plaintiff will fairly and adequately protect the interests of the class. (5) Finally, Plaintiff has  
23 demonstrated that under Linder, a class action is superior to individual litigation, because the amount  
24 of recovery for each class member makes separate, small actions impractical. Because California law  
25 applies to Defendant’s in-state conduct and the practice of Defendant violates federal law, Plaintiff  
26 respectfully submits that class certification should be ordered.

27 Dated: June 9, 2008

BLUMENTHAL & NORDREHAUG

By: s/Norman B. Blumenthal  
Norman B. Blumenthal, Esq.

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