



1 Plaintiff filed a Reply (Doc. #30) in support of her Objection on August 8, 2007.

2 **I. BACKGROUND**

3 Plaintiff filed a class action Complaint in Nevada state court on April 20, 2007,  
4 alleging Defendants sold consumers “Ol’ Roy” brand pet food products labeled as “Made in  
5 USA” when in fact “components of the Ol’ Roy brand pet food products were made and/or  
6 manufactured in China.” (Notice of Removal [Doc. #1], Compl. at 2.) Plaintiff asserts  
7 claims for violation of the Nevada Deceptive Trade Practices Act (“NDTPA”) and similar  
8 statutes in other states (count one); fraud through intentional non-disclosure of material  
9 facts (count two); and unjust enrichment (count three). (*Id.* at 12-18.) Plaintiff seeks relief  
10 on behalf of herself and all consumers throughout the United States who purchased such  
11 products prior to March 16, 2007. (*Id.* at 2, 8.)

12 Defendant Wal-Mart Stores, Inc. (“Wal-Mart”) removed the action to this Court  
13 on May 25, 2007. (Notice of Removal.) On June 20, 2007, the Court consolidated Plaintiff  
14 Picus’ Complaint with three other complaints removed to the Court within days of each  
15 other. (Order [Doc. #15].) On June 28, 2007, the Judicial Panel on Multidistrict Litigation  
16 (“JPML”) conditionally transferred the case to the Northern District of New Jersey for  
17 consolidated pretrial proceedings in the In re Pet Foods Product Liability Litigation. (Joint  
18 Motion to Vacate Conditional Transfer Order [Doc. #28].) Defendant Del Monte Foods  
19 Company (“Del Monte”) thereafter requested a stay of all proceedings pending a ruling on  
20 transfer from the JPML. (Del Monte Foods Co.’s Emergency Mot. & Mem. of P. & A. in  
21 Support of Mot. to Stay Proceedings [Doc. #38].) Magistrate Judge Lawrence R. Leavitt  
22 granted the motion to stay with respect to discovery and scheduling obligations under  
23 Federal Rules of Civil Procedure 16 and 26. (Order [Doc. #42].)

24 Defendant Del Monte moves for partial dismissal for failure to state a claim. Del  
25 Monte argues Plaintiff fails to state a claim for relief under the Federal Trade Commission  
26 Act or related regulations because no private right of action exists under the Act or its

1 regulations. Del Monte also argues Plaintiff fails to state a claim for restitution,  
2 disgorgement, or injunctive relief under the NDTPA because the NDTPA does not permit  
3 such remedies. Del Monte further argues that Plaintiff has failed to state a claim for unjust  
4 enrichment because the Complaint alleges an adequate remedy at law and the claim fails on  
5 the merits because unjust enrichment requires showing the defendant retained a benefit.  
6 However, Del Monte argues it did not retain a benefit where the product recall permitted  
7 Plaintiff to return the product for a refund of the purchase price. Finally, Del Monte argues  
8 Plaintiff has failed to state a claim for deceptive trade practices under the statutory law of  
9 California, Arkansas, Alabama, and Delaware because she has failed to plead facts showing  
10 these states have any connection to Plaintiff's purchase of pet food in Nevada.

11 Defendant Menu Foods, Inc. ("Menu Foods") moves to dismiss the Complaint,  
12 arguing that because the pet food at issue was manufactured in the United States, the words  
13 "Made in USA" on the packaging were not deceptive. Additionally, Menu Foods argues  
14 Plaintiff lacks standing to assert relief under the laws of any jurisdiction other than Nevada  
15 because she purchased the food only in Nevada. Menu Foods further argues Plaintiff failed  
16 to plead her fraud claim with particularity by failing to specify each Defendant's alleged  
17 role in the fraudulent scheme. Finally, Menu Foods argues Plaintiff fails to state a claim for  
18 unjust enrichment because she cannot establish Menu Foods retained a benefit where  
19 Plaintiff could receive a refund pursuant to the voluntary recall of the pet food.

20 Plaintiff responds that although the Complaint mentions federal law, her first  
21 claim arises under state unfair practice laws, which may prohibit the same conduct as  
22 federal laws and regulations. The reference to federal law in Plaintiff's Complaint therefore  
23 is for the purpose of determining what "Made in USA" means, but does not attempt to  
24 allege a federal claim. Plaintiff contends that deceptive designations of geographic origin  
25 violate Nevada deceptive trade practices law and Defendants labeled the Ol' Roy pet food  
26 as "Made in USA" when it was not. As to the unjust enrichment claim, Plaintiff argues she

1 can plead remedies at law and her unjust enrichment claim in the alternative, and thus  
2 dismissal is inappropriate. On the merits, Plaintiff argues the recall notice does not negate  
3 any element of her unjust enrichment claim because the recall was for products containing  
4 contaminated ingredients from China, which are not coextensive with the mislabeled but  
5 uncontaminated products. With respect to restitution and injunctive relief, Plaintiff argues  
6 she is entitled to these remedies for at least two of her three claims, and therefore striking  
7 the remedies from the Complaint is unwarranted.

8 As to Defendant's jurisdictional arguments, Plaintiff contends that because each  
9 state's law prohibits the use of deceptive representations of geographic origin, there is no  
10 conflict of law and no obstacle to using Nevada law, or, alternatively, the law of  
11 Defendants' home states, for a nationwide class. Additionally, Plaintiff contends this issue  
12 relates to class manageability and should not be decided on a motion to dismiss. Finally,  
13 Plaintiff contends the Complaint adequately alleges fraud, and, to the extent it does not, the  
14 Court should apply a relaxed pleading standard because information detailing the precise  
15 role each Defendant played is within Defendants' exclusive control. Plaintiff requests leave  
16 to amend should the Court grant Defendants' motion to dismiss.

17 Plaintiff also objects to Exhibit A to Menu Foods' motion, arguing the exhibit is  
18 unauthenticated, irrelevant, hearsay, and evidence not properly considered under the motion  
19 to dismiss standard. Menu Foods responds by attaching an affidavit authenticating the  
20 exhibit and argues that because Plaintiff referred to the product recall in the Complaint, the  
21 exhibit is not extrinsic evidence.

## 22 **II. DISCUSSION**

23 In considering a motion to dismiss, "the court must construe the complaint in the  
24 light most favorable to the plaintiff, taking all her allegations as true and drawing all  
25 reasonable inferences from the complaint in her favor." Doe v. United States, 419 F.3d  
26 1058, 1062 (9th Cir. 2005). However, the Court does not necessarily assume the truth of

1 legal conclusions merely because they are cast in the form of factual allegations in the  
2 plaintiff's complaint. See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir.  
3 1994). There is a strong presumption against dismissing an action for failure to state a  
4 claim. Ileto v. Glock Inc., 349 F.3d 1191, 1200 (9th Cir. 2003). "The issue is not whether  
5 a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to  
6 support the claims." Hydrick v. Hunter, --- F.3d ----, 2007 WL 2445998, \*3 (9th Cir.  
7 2007) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

#### 8 **A. Objection to Defendant Menu Foods' Exhibit A**

9 Defendant Menu Foods attached as Exhibit A to its motion to dismiss a March  
10 16, 2007 recall notice announcing the recall of certain cat and dog food manufactured in  
11 late 2006 and early 2007. Plaintiff objects to the Court's consideration of this evidence in  
12 conjunction with the motion to dismiss. Plaintiff argues the recall notice is unauthenticated,  
13 irrelevant, hearsay, and evidence not properly considered under the motion to dismiss  
14 standard. Menu Foods responds by attaching an affidavit authenticating the exhibit and  
15 argues that because Plaintiff referred to the product recall in the Complaint, the exhibit is  
16 not extrinsic evidence.

17 Federal Rule of Civil Procedure 12(b) provides that if the parties present to the  
18 court matters outside the pleadings in conjunction with a motion to dismiss for failure to  
19 state a claim under Rule 12(b)(6) and the court does not exclude the materials, the court  
20 shall treat the motion as one for summary judgment and shall give all parties reasonable  
21 opportunity to present pertinent materials in support. "A court may, however, consider  
22 certain materials--documents attached to the complaint, documents incorporated by  
23 reference in the complaint, or matters of judicial notice--without converting the motion to  
24 dismiss into a motion for summary judgment." United States v. Ritchie, 342 F.3d 903, 908  
25 (9th Cir. 2003). Where the plaintiff refers extensively to a document or the document forms  
26 the basis of the plaintiff's claim, the court may consider the document incorporated by

1 reference into the complaint, even if the plaintiff does not attach the document to the  
2 complaint. Id.

3           The Court will not consider Exhibit A in ruling on Defendant Menu Foods’  
4 motion to dismiss. The recall notice is not attached to the Complaint nor incorporated by  
5 reference therein. Although the Complaint refers to Defendants disclosing the use of  
6 ingredients manufactured in China on or after March 16, 2007, and refers generally to the  
7 2007 recall of Ol’ Roy brand products, the Complaint does not refer extensively to Menu  
8 Foods’ March 16, 2007 recall notice nor do Plaintiff’s claims rely upon the recall notice.  
9 Plaintiff asserts injuries arising from the alleged mislabeling of the products as “Made in  
10 USA,” not from the purchase and use of contaminated or recalled products. While the  
11 Court may take judicial notice of the fact that such a recall notice was issued on March 16,  
12 2007, the Court cannot take judicial notice of the truth of the facts asserted therein. See  
13 Fed. R. Evid. 201; Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001).  
14 Because the Complaint pleads that such a recall took place, the Court need not take judicial  
15 notice of Exhibit A. The Court therefore sustains Plaintiff’s objection to Exhibit A.

16           **B. Federal Trade Commission Act**

17           Del Monte argues Plaintiff fails to state a claim for relief under the Federal Trade  
18 Commission Act or related regulations because no private right of action exists under the  
19 Act or its regulations. Plaintiff clarifies that she does not assert a separate claim under  
20 federal law. Rather, the Complaint refers to federal law as a source of authority to  
21 determine when a product properly is labeled “Made in USA.” The Court therefore will  
22 deny as moot Defendant Del Monte’s motion to dismiss on this basis.

23           **C. Remedies Under the NDTPA**

24           Del Monte argues Plaintiff fails to state a claim for restitution, disgorgement, or  
25 injunctive relief under the NDTPA because the NDTPA does not permit such remedies.  
26 Plaintiff responds that a requested remedy is not the proper subject of a Rule 12(b)(6)

1 motion, and, in any event, she is entitled to these remedies for at least two of her three  
2 claims so the Court should not strike the requested relief from the Complaint.

3 Nevada law permits a victim of consumer fraud, which includes a victim of  
4 deceptive trade practices, to bring a private cause of action. Nev. Rev. Stat. § 41.600(1)-  
5 (2). Upon prevailing on such a claim, the court “shall award” the plaintiff “[a]ny damages  
6 that he has sustained” plus costs and reasonable attorney’s fees. *Id.* § 41.600(3). Section  
7 41.600 does not specifically permit a private party to obtain injunctive or other equitable  
8 relief in pursuing such a claim. In contrast, the NDTPA authorizes the State’s  
9 commissioner of consumer affairs, attorney general, and district attorneys to pursue claims  
10 for injunctive and equitable relief. *See* Nev. Rev. Stat. § 598.0963, § 598.0971, § 598.0985.

11 The parties have not identified a case in which the Nevada Supreme Court has  
12 addressed whether a private party is entitled to pursue injunctive relief or other equitable  
13 remedies under § 41.600, and the Court could locate none. Where a state has not addressed  
14 a particular issue, a federal court must use its best judgment to predict how the highest state  
15 court would resolve it “using intermediate appellate court decisions, decisions from other  
16 jurisdictions, statutes, treatises, and restatements as guidance.” *Strother v. S. Cal.*  
17 *Permanente Med. Group*, 79 F.3d 859, 865 (9th Cir. 1996) (quotation omitted); *Med. Lab.*  
18 *Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806, 812 (9th Cir. 2002). In making  
19 that prediction, federal courts look to existing state law without predicting potential changes  
20 in that law. *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326, 1327 (9th Cir. 1986). Although  
21 federal courts should not predict changes in a state’s law, they “are not precluded from  
22 affording relief simply because neither the state Supreme Court nor the state legislature has  
23 enunciated a clear rule governing a particular type of controversy.” *Air-Sea Forwarders,*  
24 *Inc. v. Air Asia Co.*, 880 F.2d 176, 186 (9th Cir. 1989) (quotation omitted). The Court  
25 looks to Nevada rules of statutory construction to determine the meaning of a Nevada  
26 statute. *In re First T.D. & Inv., Inc.*, 253 F.3d 520, 527 (9th Cir. 2001).

1 Under Nevada law, a court should construe a statute to give effect to the  
2 legislature's intent. Richardson Constr., Inc. v. Clark County Sch. Dist., 156 P.3d 21, 23  
3 (Nev. 2007). If the statute's plain language is unambiguous, that language controls. Id. If  
4 the statute's language is ambiguous, the Court "must examine the statute in the context of  
5 the entire statutory scheme, reason, and public policy to effect a construction that reflects  
6 the Legislature's intent." Id. "If a statute expressly provides a remedy, courts should be  
7 cautious in reading other remedies into the statute." Builders Ass'n of N. Nev. v. City of  
8 Reno, 776 P.2d 1234, 1235 (Nev. 1989); see also Chavez v. Sievers, 43 P.3d 1022, 1025-26  
9 & n.10 (Nev. 2002). Additionally, a court may infer the legislature's intent to limit  
10 remedies where it provides for a remedy in one section but fails to do so in a related  
11 provision. Cf. Hamm v. Carson City Nugget, Inc., 450 P.2d 358, 360 (Nev. 1969) ("By  
12 providing for civil liability in one section and failing to do so in the section immediately  
13 following, the legislature made its intention clear.").

14 Here, the Nevada legislature expressly provided for a remedy for private litigants  
15 pursuing deceptive practices claims in the form of damages plus costs and attorney's fees.  
16 The Court therefore will not read into the statute other remedies, particularly where the  
17 overall statutory structure suggests the Nevada legislature intended otherwise. The Nevada  
18 legislature specifically authorized the commissioner of consumer affairs, the attorney  
19 general, and district attorneys to pursue injunctive and other equitable relief to remedy  
20 deceptive trade practices but declined to include those same remedies in the section  
21 referring to private causes of action for consumer fraud. Having expressly provided for  
22 those remedies for state officials but not for private actors, the Nevada legislature expressed  
23 its intent to permit victims of consumer fraud to recover damages, but placed enforcement  
24 of Nevada deceptive practices law through injunctions and other equitable remedies in the  
25 hands of state officials.

26 ///

1           Accordingly, the Court will grant Defendant Del Monte's motion to dismiss  
2 Plaintiff's request for injunctive and other equitable relief under the NDTPA. However,  
3 Plaintiff may proceed on her NDTPA claim for damages, costs, and attorney's fees.  
4 Additionally, this ruling does not preclude Plaintiff from seeking injunctive or equitable  
5 relief on her other claims.

#### 6           **D. Unjust Enrichment**

7           Defendants argue Plaintiff has failed to state a claim for unjust enrichment  
8 because the Complaint alleges an adequate remedy at law; therefore Plaintiff may not  
9 pursue an equitable remedy. Additionally, Defendants argue the claim fails on the merits  
10 because Defendants did not retain a benefit where the product recall permitted Plaintiff to  
11 return the product for a refund of the purchase price. Plaintiff argues she can plead in the  
12 alternative and thus dismissal is inappropriate. On the merits, Plaintiff argues the recall  
13 notice does not negate any element of her unjust enrichment claim because the recall was  
14 for products containing contaminated ingredients from China, which are not coextensive  
15 with the mislabeled but uncontaminated products.

16           Under Nevada law, unjust enrichment is "the unjust retention . . . of money or  
17 property of another against the fundamental principles of justice or equity and good  
18 conscience." Asphalt Prods. Corp. v. All Star Ready Mix, Inc., 898 P.2d 699, 701 (Nev.  
19 1995) (quotations omitted). Nevada recognizes the general rule that equitable remedies are  
20 not available where the plaintiff has a full and adequate remedy at law. State v. Second  
21 Judicial Dist. Court in & for Washoe County, 241 P. 317, 322 (Nev. 1925).

22           Federal Rule of Civil Procedure 8(e)(2) provides that a party may state claims  
23 alternately, and may "state as many separate claims or defenses as the party has regardless  
24 of consistency and whether based on legal, equitable, or maritime grounds." The liberal  
25 policy reflected in Rule 8(e)(2) instructs courts not to construe a pleading "as an admission  
26 against another alternative or inconsistent pleading in the same case." McCalden v. Cal.

1 Library Ass'n, 955 F.2d 1214, 1219 (9th Cir. 1990) (quoting Molsbergen v. United States,  
2 757 F.2d 1016, 1019 (9th Cir. 1985)). Thus, although a plaintiff may not recover on both  
3 theories, “a plaintiff may claim . . . remedies as alternatives, leaving the ultimate election  
4 for the court.” E.H. Boly & Son, Inc. v. Schneider, 525 F.2d 20, 23 n.3 (9th Cir. 1975); see  
5 also Hubbard Bus. Plaza v. Lincoln Liberty Life Ins. Co., 596 F. Supp. 344, 347 (D. Nev.  
6 1984) (stating a “claimant is entitled to introduce his evidence in support of all his claims  
7 for relief; if he doesn’t make an election among them, the trier of fact decides which, if any,  
8 to sustain.”).

9 The Court will not dismiss Plaintiff’s unjust enrichment claim even though  
10 Plaintiff also has alleged claims for legal relief. Under Rule 8(e)(2), Plaintiff may plead the  
11 unjust enrichment claim in the alternative to her legal claims.

12 The Court also will not dismiss the claim on the merits. Defendants argue they  
13 did not “retain” a benefit because, pursuant to the recall, Plaintiff could have returned her  
14 pet food for a refund. However, Plaintiff’s claim potentially encompasses more than the  
15 contaminated pet food recalled in late 2006 and early 2007. Rather, Plaintiff’s claim relates  
16 to all Ol’ Roy pet food products Defendants labeled as “Made in USA” which allegedly  
17 were manufactured in whole or in part in China, whether subject to the recall or not. The  
18 Court therefore will deny Defendants’ motion to dismiss Plaintiff’s unjust enrichment  
19 claim.

#### 20 **E. Law of Other Jurisdictions**

21 Plaintiff’s Complaint seeks to assert claims on behalf of a nationwide class and  
22 alleges all states’ laws are substantively similar in that all would prohibit deceptive  
23 representations of a product’s geographic origin. (Compl. at 12.) The Complaint  
24 specifically refers to the laws of Delaware, California, Arkansas, and Alabama, in addition  
25 to Nevada. (Id. at 12-13.) Defendants argue Plaintiff has failed to state a claim for  
26 deceptive trade practices under the statutory law of states other than Nevada because she

1 has failed to plead facts showing these states have any connection to Plaintiff's purchase of  
2 pet food in Nevada. Defendants also argue Plaintiff has failed to show Nevada law can  
3 apply to potential class members who purchased the pet food outside Nevada. Plaintiff  
4 responds that because each state's law prohibits the use of deceptive representations of  
5 geographic origin, there is no conflict of law and no obstacle to using Nevada law, or,  
6 alternatively, the law of Defendants' home states, for a nationwide class. Additionally,  
7 Plaintiff contends this issue relates to class manageability and should not be decided on a  
8 motion to dismiss.

9 Plaintiff's Complaint seeks to initiate a nationwide class action which would  
10 apply relevant state deceptive practices laws to class members' claims. Which law to apply  
11 to which class members is a question suited for determination at the class certification stage.  
12 Variances in applicable state laws may make class litigation unmanageable or defeat the  
13 predominance of common issues necessary for class certification. See Hanlon v. Chrysler  
14 Corp., 150 F.3d 1011, 1022-23 (9th Cir. 1998) (considering the effect of variations in state  
15 law on the predominance of common issues for class certification); see also In re Warfarin  
16 Sodium Antitrust Litig., 391 F.3d 516, 529 (3d Cir. 2004) (instructing district courts to  
17 consider variations in state laws in evaluating manageability of class litigation); In re  
18 Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002) (finding a proposed  
19 nationwide class unmanageable because the claims would have to be adjudicated under the  
20 laws of many different jurisdictions). Such considerations are premature at this stage,  
21 where Plaintiff has not yet moved for certification of her proposed nationwide class. The  
22 Court therefore will deny Defendants' motion to dismiss on this basis, without prejudice to  
23 renew these arguments at the class certification stage.

#### 24 **F. Packaging Was Not Deceptive**

25 Defendant Menu Foods argues that because the pet food was manufactured in the  
26 United States, the packaging was not deceptive. The Complaint, however, alleges the pet

1 food was “manufactured either in whole or in part, in China.” (Compl. at ¶ 5.) At the  
2 motion to dismiss stage, the Court must take Plaintiff’s allegations as true. Defendants’  
3 argument raises a factual dispute not appropriate for resolution in deciding a motion to  
4 dismiss. The Court therefore will deny Defendant Menu Foods’ motion to dismiss on this  
5 basis.

### 6 **G. Pleading Fraud With Particularity**

7 Defendant Menu Foods argues Plaintiff failed to plead her fraud claim with  
8 particularity by failing to specify each Defendant’s alleged role in the fraudulent scheme.  
9 Plaintiff responds that the Complaint adequately alleges fraud, and, to the extent it does not,  
10 the Court should apply a relaxed pleading standard because information detailing the  
11 precise role each Defendant played is within Defendants’ exclusive control. Plaintiff  
12 requests leave to amend should the Court grant Defendants’ motion to dismiss.

13 Federal Rule of Civil Procedure 9(b) requires a plaintiff alleging fraud to state  
14 with particularity in the complaint the circumstances constituting fraud. Fed. R. Civ. P.  
15 9(b). To satisfy this burden, the complaint ““must set forth more than the neutral facts  
16 necessary to identify the transaction.”” Yourish v. Cal. Amplifier, 191 F.3d 983, 993 (9th  
17 Cir. 1999) (footnote omitted) (quoting In re GlenFed Sec. Litig., 42 F.3d 1541, 1548 (9th  
18 Cir. 1994) (en banc)). The United States Court of Appeals for the Ninth Circuit has defined  
19 “neutral facts” to mean the ““time, place, and content of an alleged misrepresentation.”” Id.  
20 at 993 n.10 (quoting GlenFed, 42 F.3d at 1547-48). In addition to the neutral facts, a  
21 plaintiff also must explain what is false about a statement and why it is false. Id. at 993.  
22 “[M]ere conclusory allegations of fraud are insufficient.” Moore v. Kayport Package Exp.,  
23 Inc., 885 F.2d 531, 540 (9th Cir. 1989).

24 A complaint does not satisfy Rule 9(b) where it “merely lump[s] multiple  
25 defendants together.” Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007).  
26 Rather, when suing more than one defendant, the complaint’s allegations must differentiate

1 among the defendants and inform each defendant separately of the allegations surrounding  
2 his alleged participation in the fraud. Id. “In the context of a fraud suit involving multiple  
3 defendants, a plaintiff must, at a minimum, ‘identif[y] the role of [each] defendant[ ] in the  
4 alleged fraudulent scheme.’” Id. at 765 (quoting Moore, 885 F.2d at 541). However, courts  
5 must not “make Rule 9(b) carry more weight than it was meant to bear.” GlenFed, 42 F.3d  
6 at 1554. So long as the complaint sufficiently describes the circumstances of the alleged  
7 fraud so that the defendant adequately is able to respond, the complaint meets the  
8 particularity requirement of Rule 9(b). Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir.  
9 1997).

10 Plaintiff’s Complaint alleges the time, place, and content of the alleged  
11 misrepresentations as the labels of specified Ol’ Roy brand pet products labeled as “Made  
12 in USA” prior to March 16, 2007. The Complaint also identifies the content of the alleged  
13 misrepresentation as the labeling of the Ol’ Roy products as “Made in USA” in capital  
14 letters on the product packaging. Finally, Plaintiff’s Complaint identifies why this  
15 statement is false by alleging that in fact the pet food contained components manufactured  
16 in whole or in part outside the United States, and despite knowing the source of these  
17 components was outside the United States, Defendants nevertheless labeled the pet food  
18 “Made in USA.”

19 The Complaint does not lump Defendants together or make blanket allegations  
20 referring only to “defendants” as a group. Rather, the Complaint identifies each Defendant  
21 separately by name and alleges Defendants Menu Foods, Del Monte, and Sunshine Mills  
22 “each participated in the packaging or labeling of different Ol’ Roy brand pet food  
23 products,” and “participated with Wal-Mart in the fraudulent labeling of Ol’ Roy pet food  
24 products.” (Compl. at ¶ 6.) With respect to Defendant ChemNutra, the Complaint alleges  
25 ChemNutra imported wheat gluten manufactured in China to be used as an ingredient in the  
26 Ol’ Roy pet food. (Id.) The Complaint also alleges ChemNutra “participated in the scheme

1 and practice of labeling the Ol' Roy brand pet food products as 'Made in USA' and/or were  
2 responsible for the mislabeling of the Ol' Roy brand pet food products as 'Made in USA.'"

3 (Id.)

4 The Complaint contains specific allegations as to each Defendant and identifies  
5 the neutral facts of the alleged fraud as well as allegations explaining why the alleged  
6 misstatements are false. The Complaint's allegations are sufficiently particular to permit  
7 Defendants to respond adequately, and the Court therefore will deny Defendants' motion to  
8 dismiss for failure to plead fraud with particularity.

9 **III. CONCLUSION**

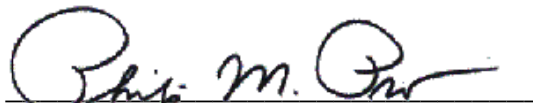
10 IT IS THEREFORE ORDERED that Defendant Del Monte Foods Company's  
11 Partial Motion to Dismiss (Doc. #9) is hereby GRANTED in part and DENIED in part. The  
12 motion is granted with respect to Plaintiff's request for injunctive and other equitable relief  
13 under the NDTPA. The motion is denied in all other respects.

14 IT IS FURTHER ORDERED that Defendant Sunshine Mills, Inc.'s Joinder in  
15 Del Monte's Partial Motion to Dismiss (Doc. #19) is hereby GRANTED in part and  
16 DENIED in part. The motion is granted with respect to Plaintiff's request for injunctive  
17 and other equitable relief under the NDTPA. The motion is denied in all other respects.

18 IT IS FURTHER ORDERED that Defendant Menu Foods, Inc.'s Motion to  
19 Dismiss (Doc. #18) is hereby DENIED.

20 IT IS FURTHER ORDERED that Defendant ChemNutra, Inc.'s Joinder to Menu  
21 Foods, Inc.'s Motion to Dismiss (Doc. #21) is hereby DENIED.

22  
23 DATED: October 12, 2007

24  
25   
26 PHILIP M. PRO  
United States District Judge