**STATE OF MINNESOTA**
**COUNTY OF DAKOTA**

**DISTRICT COURT**
**FIRST JUDICIAL DISTRICT**

File No. 19HA-CV-12-3237

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

Plaintiffs,

vs.

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

Defendant.

**ORDER DISMISSING PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT**

AND JUDGMENT



The above-entitled matter came before the Honorable Jerome B. Abrams, Judge of District Court, on July 31, 2014, at the Dakota County Courthouse, Hastings, Minnesota on the Defendant's motion to dismiss the First Amended Class Action Complaint for lack of jurisdiction, lack of standing, and failure to state a claim. Anne Regan, Attorney at Law, appeared as counsel for and on behalf of the Plaintiffs. Corey Gordon, Attorney at Law, appeared as counsel for and on behalf of the Defendant.

At the close of the hearing the Court invited counsel to submit additional written argument on the issue of standing; specifically under the state consumer protection laws cited by the Plaintiffs in their First Amended Class Action Complaint. The Plaintiffs were given a briefing deadline of August 14, 2014. The Defendant was given a deadline of August 22, 2014. Having received these additional arguments of the parties, the matter was taken under advisement on August 22, 2014.

Following receipt of the parties' final submission, Mr. Moshe B. Git filed a Motion

to Intervene on September 10, 2014. Both Plaintiffs' and Defendant's counsel filed objections to Mr. Git's motion. Matters related to the Motion to Intervene are decided herein, on the papers, without further argument.

Based upon the proceedings, this Court makes the following:

**ORDER**

1. The Defendant's motion to dismiss is granted. All of the Plaintiffs' claims asserted in the First Amended Class Action Complaint are dismissed with prejudice.
2. The attached memorandum is incorporated herein by reference.
3. The Motion to Intervene by Moshe B. Git is denied. The October 20, 2014 hearing shall be stricken from the Court's calendar.
4. This matter shall be assigned to the undersigned for any further proceedings before the Court.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: 10-3-2014

**BY THE COURT:**

Jerome B. Abrams
Judge of District Court

**JUDGMENT**

I HEREBY CERTIFY THAT THE ABOVE ORDER CONSTITUTES THE JUDGMENT OF THE COURT.

CAROLYN M. RENN, COURT ADMINISTRATOR

BY: Lisa Blasco DEPUTY

DATED: 10-6-14 (SEAL)

## INTRODUCTION AND OVERVIEW

This case presents unusual questions for decision by a state court. Since Congress adopted the Class Action Fairness Act of 2005, 28 U.S.C. § 1453, both the federal legislative and judicial branches have routinely precluded any action by state courts in matters pled as substantial class actions such as this case. Not only is this case exceptional procedurally, it also has substantial additional issues which, again, are infrequent before state courts. This lawsuit involves First Amendment religious questions; arguments about standing, not only under the Minnesota law, but also consumer protection acts of other states; and applying the results of the federal courts' rulings to these proceedings under the law of the case doctrine.

Despite these infrequently encountered legal challenges, this court has concluded the case should be dismissed for reasons set forth hereinafter. Principally, no court, state or federal, under the constitution of each governmental body, can decide the fundamentally religious questions of whether Defendant's products are kosher based upon the issue as presented in the pleadings.

As much as Plaintiffs maintain there can be a secular basis -- or at some means of defining kashrut that doesn't include courts making that decision based on religious principles -- they are mistaken. Jewish dietary laws have been around since time immemorial. Rules for kashrut are found in the Old Testament Books of Leviticus and Deuteronomy. These laws have been debated for millennia by religious scholars, and as argued at the hearing, continue to be debated. No court in the land can pick a side, interpretation, or point of view as to whether those religious requirements are met or unmet in these circumstances. As the pleadings and motions as submitted indicate, a qualified religious observer, hired by Defendant, has concluded that the products are

kosher and the process leading to the production of these products adequately complies with the edicts of kashrut. It would be unholy, indeed, for this or any other court to substitute its judgment on this purely religious question.

Assuming *arguendo*, that there is a means to test compliance with kashrut that does not trigger the impermissible involvement of government in religious affairs, plaintiffs' alleged damages appear to be at best uncertain and legally not provable. According to the plaintiffs' pleadings, some of defendant's products are kosher and some are not. We will never know which are which.

Even though it can be argued Minnesota state courts have lower requirements than federal courts for 'standing,' no remedy can be had without proof of legal damage. In other words, the plaintiffs themselves are lacking information – which is unobtainable by their own statements in the pleadings – as to their damages arising from their purchase and consumption of allegedly non-kosher products. They cannot establish under any standard a cognizable injury for which the law allows redress. A lower requirement for 'standing' in state court does not equate to an absence of standing being permissible.

At bottom, the ultimate remedy for those who feel they don't have confidence in the degree of kashrut observed in the production of defendants' products is not to purchase them. No court in the land, for reasons stated herein, can make this judgment.

**MEMORANDUM**

This matter comes before the Court on the Defendant's motion to dismiss the claims asserted by the Plaintiffs in their First Amended Class Action Complaint. The Plaintiffs asserted claims that the Defendant: (1) negligently represented its Hebrew

National Hot Dogs were 100% kosher; (2) violated the Nebraska Uniform Deceptive Trade Practices Act; (3) violated the Nebraska Consumer Protection Act; (4) violated the consumer protections laws of Minnesota, Arizona, California, Florida, Illinois, New York, Michigan, and Massachusetts; and (5) breached a contractual guarantee.[1] (Plaintiffs' First Amended Class Action Complaint, filed July 18, 2014, hereinafter "Pl. Am. Comp.," pp. 55-68). The Defendant seeks to dismiss all of these claims on the grounds that: (1) the Court lacks subject matter jurisdiction to decide issues necessary to the Plaintiffs' claims; (2) the Plaintiffs lack standing to assert their claims; and (3) the First Amended Complaint fails to state a claim for which relief can be granted. The Plaintiffs oppose the Defendant's motion to dismiss.

The Defendant "is a manufacturer and distributor of kosher meat products" including beef hot dogs, salami, sausage and deli meats. (Pl. Am. Comp. at ¶¶ 4, 43). Under the name Hebrew National, the Defendant markets and sells these products nationwide as "100% kosher." (Id. at ¶¶ 6, 43, 72). The Defendant specifically labels the Hebrew National products as being made from "Premium cuts of 100% Kosher Beef" and applies the "Triangle K" symbol to signify the product is kosher "as defined by the most stringent Jews who follow Orthodox Jewish Law." (Id. at ¶¶ 7, 66, 72-3, 75). The Defendant also provides a "kosher guarantee" for its hot dogs. (Id. at ¶ 188). The Plaintiffs contend that, despite these representations, the Defendant does not manufacture and distribute products that comply with the "exacting" and "stringent" standards and supervision represented. (Id. at ¶¶ 9-10). The products sold were not "100% Kosher" according to the Plaintiffs. (Id. at ¶¶ 4, 191). The Plaintiffs further

[1] In the First Amended Class Action Complaint these claims were respectively numbered Count I, Count II, Count III, Count IV, and Count VI. No Count V was set forth in the First Amended Class Action Complaint.

contend they purchased Hebrew National products at a premium price in reliance upon these misrepresentations. (Id. at ¶¶ 15, 18, 29-39).

The Defendant purchases beef to incorporate into the manufacture of its Hebrew National products from American Foods Group, LLC (hereinafter "AFG"). (Pl. Am. Comp. at ¶¶ 44, 62). The Defendant contracts with AER Services, Inc. (hereinafter "AER") to perform ritual slaughtering, processing, and inspection of cows provided by AFG. (Id.). AER leases space from AFG and hires specialized personnel to perform the ritual slaughtering, processing, and inspection. (Id. at ¶ 46). Triangle K, Inc. (hereinafter "Triangle K"), through Rabbi Aryeh Ralbag, "issues rabbinical rulings concerning the kosher processing activities related to the ritual slaughter, examination and supervision of the animals" performed by AER. (Id. at ¶ 48). Based upon these rulings and its activities, Triangle K certifies the beef slaughtered, processed, and inspected by AER and sold to the Defendant as kosher and authorizes the Defendant to apply its "hechsher;" a symbol or mark indicating the product is certified by Triangle K as kosher. (Id. at ¶¶ 55, 65). The Plaintiffs contend that some of the specialized employees of AER complained to AER and Triangle K "the procedures they witnessed at the AFG facilities rendered the meat being processed not kosher." (Id. at ¶ 63).

The Plaintiffs repeatedly assert there is no need for a determination to be made about what rules must be applied to declare a product kosher. (See, e.g., Pl. Am. Comp. at ¶ 80). The Plaintiffs assert that AER and Triangle K have set forth the "rules and requirements for kosher slaughter" in objective terms. (Id. at ¶¶ 82-85). The standards which have been violated, according to the Plaintiffs allegations are:

1.) improper manner and method of slaughter (Id. at ¶¶ 90, 95-7);

2.) animals slaughtered are not sufficiently healthy or clean (Id. at ¶¶ 91-4, 95-100);

3.) blood is not sufficiently washed from the meat produced (Id. at ¶¶ 1013);

4.) persons performing the ritual slaughter are not certified (Id. at ¶105); and

5.) meat is not properly segregated. (Id. at ¶ 106).

According to the Plaintiffs, the failure to comply with these standards means the Defendant was not meeting the "stringent and exacting standards as represented;" "a stricter standard of kosher." (Id. at ¶ 108).

The Plaintiffs do not assert, however, that Triangle K refused or failed to certify any of the Defendant's products as kosher or that the Defendant applied the Triangle K "hechsher" to its products without Triangle K's permission. The Plaintiffs assert the opposite; that Triangle K "operates as a for-profit kosher certifying agency for ConAgra and other food companies." (Id. at ¶ 49). Every Plaintiff alleges the "Triangle K symbol signifying the product to be strictly 100% kosher appeared on the product at the time of each purchase and were" observed but they "overpaid because the Hebrew National products purchased were not actually 100% kosher beef." (Id. at ¶¶ 29-38).

**Procedural Posture**

This matter has already been dismissed once on the grounds asserted by the Defendant. See Wallace v. ConAgra Foods, Inc., 920 F. Supp. 2d 995, 996-1000 (D. Minn. 2013). The Plaintiffs appealed and the dismissal with prejudice was reversed and the matter was remanded with direction to return the case to this Court. See Wallace v. ConAgra Foods, Inc., 747 F.3d 1025, 1033 (8th Cir. 2014). While the matter has been returned to this Court, a further discussion of the Defendant's prior motion to dismiss and the prior decisions are helpful in understanding this Court's decision.

The Plaintiffs commenced this action on May 18, 2012 by serving the Summons and Complaint upon the Defendant. On June 6, 2012, the Defendant filed a Notice of

Removal to Federal Court seeking removal of the action pursuant to 28 U.S.C. §§ 1332, 1443, and 1446. Following removal, the Plaintiffs amended their Complaint; a copy of which was filed with this Court on July 18, 2014 as the First Amended Class Action Complaint.

The Defendant's first motion to dismiss was granted for lack of subject matter jurisdiction because the Plaintiffs' claims were barred by the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. Wallace, 920 F. Supp. 2d at 997-1000. The Court noted that the First Amendment prohibits review or interpretation of doctrinal matters or tenets of faith. Id. at 998-9. The Plaintiffs claim the method of slaughter carried out by AER and certified by Triangle K violates several tenets of Kashrut and renders the meat produced not kosher and of lesser quality. Id. at 998-9. (See also Pl. Am. Comp. ¶¶ 4, 63, 90, 95-7, 191). The Plaintiffs also asserted that a quota of a "predetermined amount of the total cattle population (approximately 70%) brought to the AFG facility for slaughter produces kosher meat" rather than the approved process. Id. at 999 n. 5 (quoting Pl. Am. Comp. ¶ 93). In dismissing the Plaintiffs' claims the Court noted that the:

> Plaintiffs appear to concede that Defendant is not responsible for making kosher determinations with respect to the meat it uses in its Hebrew National products. For better or for worse, Plaintiffs made the tactical decision to leave Triangle K (the organization whose Orthodox rabbinical authority granted Defendant's Hebrew National products kosher certification) and AER (the entity whose employees are responsible for performing the kosher slaughters) out of this lawsuit. Importantly, however, for purposes of Defendant's advertising and labeling, Defendant relies on Triangle K for its certification that Defendant's Hebrew National products are kosher.

Id. at 998-9. The Court concluded it could not "determine whether Defendant's Hebrew National products are in fact kosher without delving into questions of religious doctrine"

in light of the Defendant's reliance upon the kosher determinations and certification by "Triangle K and its Orthodox rabbis." Id. at 999.

The Plaintiffs appealed the decision of the Federal District Court to the Eighth Circuit Court of Appeals. Wallace, 747 F.3d at 1027. The Court of Appeals vacated and reversed the dismissal and remanded the matter to Federal District Court with instructions to remand the matter back to this Court. Id. at 1033. In reaching this decision, the Court of Appeals expressly avoided deciding the "difficult First Amendment question of first impression" and instead decided the matter on grounds of Article III standing. Id. at 1029. The Court concluded the Plaintiffs had alleged an economic injury in fact but failed to allege a particularized and actual injury in fact. Id. at 1029-31. The Court also concluded the Class Action Fairness Act of 2005 (hereinafter "CAFA") did not grant the Plaintiffs Article III standing to pursue a suit in Federal Court in the absence of a particularized, actual injury in fact; or for an injury in law. Id. at 1031-3. Following the direction of the Court of Appeals, the Federal District Court remanded this matter to this Court for further proceedings; including the Defendant's present motion to dismiss.

**Standard for Analyzing Motion to Dismiss**

A party may move to dismiss a claim for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(a) & (e).[2] Motions to dismiss are decided by considering whether the allegations in the complaint, along with any documents referenced therein, set forth a legally sufficient claim. Krueger v. Zeman Const. Co., 758 N.W.2d 881, 884 (Minn. App. 2008) (quoting

[2] Minnesota law is applied to the Defendant's motion to dismiss. See Davis v. Furlong, 328 N.W.2d 150, 152-3 (Minn. 1983) (holding *lex loci* rule applies to application of procedural and remedy rules).

Elzie v. Commissioner of Public Safety, 298 N.W.2d 29, 32 (Minn. 1980)). "[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." Northern States Power Co. v. Franklin, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963) (citation omitted), quoted by Graphic Communications Local 1B Health & Welfare Fund "A" v. CVS Caremark Co., _____ N.W.2d _____, _____, 2014 WL 2965400, *7 (Minn. 2014). In reviewing the pleading, all facts alleged therein must be accepted as true and all reasonable inferences must be drawn in favor of the non-moving party. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553 (Minn. 2003) (citation omitted), quoted by Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 229 (Minn. 2008). "It is immaterial to our consideration here whether or not the plaintiff can prove the facts alleged." Elzie, 298 N.W.2d at 32 (quoting Royal Realty Co. v. Levin, 244 Minn. 288, 290, 69 N.W.2d 667, 670 (1955)). See also Martens v. Minnesota Min. & Mfg. Co., 616 N.W.2d 732, 739-40 (Minn. 200) (citing Royal Realty and Northern States Power). "[A] legal conclusion in the complaint is not binding [and a] plaintiff must provide more than labels and conclusions." Bahr v. Capella University, 788 N.W.2d 76, 80 (Minn. 2010) (citing Herbert, 744 N.W.2d at 229), cited by Graphic Communications, _____ N.W.2d at _____.

**Subject Matter Jurisdiction**

The Defendant seeks to dismiss the Plaintiffs' claims on the grounds that they are outside of the Court's jurisdiction because adjudicating the dispute would require deciding a religious question; whether the Defendant properly identified its products as kosher in reliance upon Triangle K's certification. (Memorandum in Support of Defendant ConAgra Foods, Inc.'s Motion to Dismiss the Amended Complaint, Filed

June 12, 2014, hereinafter "Def. Memo.," p. 7). By addressing this question, the Defendant argues the Court would become impermissibly entangled with religion and would serve to advance or inhibit one group of religious beliefs over another. (Def. Memo., pp. 7-8). The Plaintiffs disagree and argue their claims may be decided through neutral principles of law and no religious questions need to be addressed. (Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss, Filed July 18, 2014, hereinafter "Pl. Memo.," pp. 18-19). The Plaintiffs argue further that resolution of their claims on neutral principles of law will also prevent impermissible entanglement with religion. (Id. at pp. 22-3). Finally, the Plaintiffs argue a fraud and collusion exception should be applied in this case because the Defendant "insincerely clothed its representations in religious doctrine." (Id. at pp. 29-30). Having carefully reviewed the First Amended Class Action Complaint, the Court cannot identify a means by which the claims asserted can be adjudicated without becoming entangled in, or at a minimum interfering with or exerting government control over "rights of conscience," or inhibiting or advancing religion.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The Minnesota Constitution provides even greater protection by "preclude[ing] even an infringement on or an interference with religious freedom." State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990), quoted by Edina Community Lutheran Church v. State, 745 N.W.2d 194, 203 (Minn. App. 2008). See also Odenthal v. Minnesota Conference of Seventh-Day Adventists, 649 N.W.2d 426, 442 (Minn. 2002) (citing Hershberger). It provides:

The right of every man to worship God according to the dictates of his own

> conscience shall never be infringed; . . .; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state . . . .

Minn. Const. art. 1, § 16. These constitutional principles also apply to the exercise of judicial power. See Odenthal, 649 N.W.2d at 435.

"[T]he First Amendment severely circumscribes the role that civil courts may play in resolving . . . controversies over religious doctrine and practice." Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969). "[T]he Establishment Clause was intended to afford protection [to] 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Commission, 397 U.S. 664, 668 (1970)). "[A] state action must have a secular purpose, must neither inhibit nor advance religion in its primary effect, and must not foster excessive government entanglement with religion." Odenthal, 649 N.W.2d at 435 (citing Lemon, 403 U.S. at 612-3). Governmental power must be "neutrally employed." Board of Educ. Of Kiryas Joel Village School Dist. V. Grumet, 512 U.S. 687, 702-3 (1994) (hereinafter "Grumet") (citing Larkin v. Grendel's Den, 459 U.S. 116, 125 (1982)), discussed by Geraci v. Eckankar, 526 N.W.2d 391, 400 (Minn. App. 1995) (questioning continued vitality of "Lemon test" in light of Grumet). See also Presbyterian Church in U.S., 393 U.S. at 449 (stating "not every civil court decision [involving] claim[s] by a religious organization jeopardizes values protected by the First Amendment").

The legal principles prohibiting misrepresentation of products to consumers generally have a secular purpose and in nearly all situations can be neutrally employed

without excessive entanglement with religion. However, by challenging the Defendant's "kosher" representation, the Plaintiffs' claims in this case ask the Court to review a doctrinal determination made by a religious official regarding the propriety of a ritual process conducted in the furtherance of religious practices. The Plaintiffs' asserted problem with the Defendant's representation is that the products sold were not "100% kosher."[3] (Pl. Am. Comp. ¶ 4). The Defendant's representation was based upon the certification by Triangle K and Rabbi Ralbag; shown by the Triangle K "heschsher" applied "uniformly on every package of Defendant's Hebrew National Products" "to inform consumers that any Hebrew National product purchased is strictly 100% kosher . . ." (Id. at ¶ 75). The "kosher" representation and the certification was observed and relied upon by every Plaintiff. (Id. at ¶¶ 29-38). In other words, the Plaintiffs were all aware of the certification source underlying the Defendant's representation; in fact they relied upon it when purchasing the Hebrew National products. The Plaintiffs' claims therefore challenge the certification and underlying determination made by Triangle K that the beef and resulting products were kosher.[4]

The determination by Triangle K to certify beef as "kosher" arises out of Rabbi Ralberg's supervision of the ritualized slaughtering process and is intended to identify food that will help individuals follow religious dietary laws; specifically kashrut. (See, e.g., Pl. Am. Comp. ¶ 7). While the Plaintiffs assert they do not seek a "determin[ation] of what constitutes kosher or *kashruth* under Jewish religious law" and "do not seek to

[3] The Plaintiffs have not asserted that the Defendant's products were not made of 100% beef or were otherwise unsafe for human consumption. The Plaintiffs have also refrained from asserting that the Triangle K certification was fraudulently applied. The Plaintiffs' beef is with the approval of the ritual slaughtering process which resulted in certification and the "100% kosher" representation. The Plaintiffs assert the approval was improperly given, the certification improperly made, and the nature of the product represented in a misleading fashion.

[4] Neither Triangle K nor AER is a party to this action. For some unexplained reason the Plaintiffs challenge the propriety of the Triangle K certification and AER's performance of the ritual slaughtering process but have opted not to include Triangle K or AER as defendants.

have the court declare which standard of kashrut applies," their claims will require the Court to review the propriety of the rabbinical determination made by Rabbi Ralbag and Triangle K. (Pl. Am. Comp. ¶ 12, italics in original). The Plaintiffs' argument ignores the factual assertions they made in their First Amended Class Action Complaint that AER conducts a ritual process of slaughter supervised Rabbi Aryeh Ralbag or his designees. If the ritual process is properly conducted, in the opinion of Rabbi Ralbag and his designees, then they authorize the Defendant to make a representation and apply the Triangle K certification that the product is "kosher." The Plaintiffs' claims place the Court in the position of being an arbiter of the application of kashrut by a Rabbi over a kosher determination; an impermissible entanglement and infringement upon religious practices.

The Plaintiffs also specifically support their allegation that a quota, approximately 70% of the cattle provided by AFG to AER for slaughter, dictates which cows become "kosher" meats. (Pl. Memo. pp. 24-5; Pl. Am. Comp. ¶ 93). According to the Plaintiffs, this allegation of a quota would enable the Court to apply neutral legal principles without becoming entangled in religion. The Plaintiffs' First Amended Class Action Complaint alleges:

> Pressure is put on the employees inspecting and slaughtering the cows to maximize kosher meat production by slaughtering unclean cows. Further, certain quotas are applied at the AFG facilities to ensure that a certain predetermined amount of the total cattle population (approximately 70%) brought to the AFG facility for slaughter produces kosher meat to provide Defendant. By setting artificial, pre-determined quotas, *the kosher inspection process becomes defective and unreliable. Because of these quotas, meat from cows that* ***should not qualify for kosher certification*** *ends up being* ***marked kosher*** *and used in Hebrew National products.*
>
> (Pl. Am. Comp. ¶ 93 (emphasis added)).

Even adjudicating whether a pre-determined quota influences or factors into the

certification decision will require the Court to review the determination made by Triangle K and Rabbi Ralbag that the ritualized slaughtering process was performed in a manner sufficient to comply with their definition of kashrut and to justify calling the resulting product kosher. In other words, the Court would need to determine whether a religious official, Rabbi Aryeh Ralbag, made the "right" decision in accordance with his religious beliefs to certify something as "kosher."[5] This will require the Court to identify Rabbi Ralbag's beliefs of kashrut and to decide whether he properly exercised his responsibilities as a Rabbi. Such a determination entangles the Court with the practice of religion and causes the court to exercise control over and interfere with "the rights of conscience permitted." Minn. Const. art. 1, § 16.

There are some claims the Plaintiffs could have asserted that would allow the Court to exercise neutral principles of law without becoming entangled in or deciding a religious question. For example, if the Plaintiffs were asserting claims that the Defendant's products were misrepresented as 100% beef or that the Triangle K certification was being misapplied to products not so certified. While both of these questions may peripherally raise some religious concepts, they would not require a decision on a religious question or require the Court act as arbiter of a religious determination. In the former case the central question would be whether the products used 100% beef ingredients to justify the representation made. In the latter, the question would not be whether the products were kosher or whether a standard of kashrut was properly applied, but whether the mark was being used with the permission

[5] Based upon the relief sought by the Plaintiffs, the Court would also have to impose, through a temporary injunction, upon the Defendant's ability to call a product kosher even if a Rabbi says the product is kosher. In other words, granting the Plaintiffs'' requested relief would require the Court to supervise the application of kashrut as adopted by Rabbi Ralbag and Triangle K to the ritualized slaughtering process performed by AER. Based upon this supervision, the Court would have to determine whether the process was properly followed and the product could be represented as "100% kosher."

and consent of Triangle K or being misapplied to misrepresent the nature of the product. The Plaintiffs' claims in this case, however, turn on whether the Defendant's products are "kosher" "as defined by the most stringent Jews who follow Orthodox Jewish Law;" specifically whether Triangle K and Rabbi Ralbag properly exercised their beliefs concerning the ritual slaughter performed by AER so the Defendant could be authorized to sell the product as "kosher."

Based upon the injunctive relief sought by the Plaintiffs, the Court would also have to impose upon the Defendant's ability to call a product kosher even if a Rabbi says the product is kosher. In other words, granting the Plaintiffs' requested relief would require the Court to supervise the application of kashrut as adopted by Rabbi Ralbag and Triangle K to the ritualized slaughtering process performed by AER. Based upon this supervision, the Court would have to determine whether the process was properly followed and the product could be represented as "100% kosher." Unless of course, the Defendant decided to utilize a different Rabbi to certify its product as kosher. Then the Plaintiff or some other party could, according to the Plaintiffs in this case, permissibly request the Court review and oversee that Rabbi's determination that the ritualized slaughter complied with their beliefs of kashrut. As a civil court operating under the bounds of religious freedom guaranteed by both the United States and Minnesota Constitutions this Court is not in a position to oversee such religious practice.

As a final attempt to avoid dismissal for lack of subject matter jurisdiction, the Plaintiffs argue that the Court should conduct a "marginal civil court review" to determine whether the Defendant "has insincerely clothed its representations in religious doctrine;" what they call a fraud or collusion exception. (Pl. Am. Comp., pp. 28-9). Assuming, without so deciding, that such an exception exists, the Plaintiffs have

avoided making the challenge they now seek to assert to avoid a finding that the Court lacks subject matter jurisdiction to resolve their claims. The Plaintiffs have not challenged Triangle K's sincerity or authority to make rabbinical determinations that a food product is kosher. Triangle K is not even a party to this suit. As the Plaintiffs have pointed out, the Defendant does not hold a particular belief regarding the laws of kashruht and relies upon Triangle K to apply a religious belief, doctrine, and practice which supports the representation being made. (Pl. Am. Comp. ¶¶ 5, 55, & 65). Their attempt to rely upon a fraud or collusion exception is therefore rejected.

For the Plaintiffs to succeed on their claims the Court will have to determine that the Defendant misrepresented its products as "kosher." This would entangle the Court with the practice of religion by making it an arbiter of a religious determination already made by a religious official. Rabbi Ralbag and anyone who trusts his application of kashrut to certify a product as kosher has a constitutional right to exercise those religious beliefs without interference from or control exerted by this Court. If the Plaintiffs do not want to pay a premium because they disagree with or do not trust Rabbi Ralbag's kashrut determinations, then they can avoid purchasing the Defendant's products uniformly marked with the Triangle K certification. This Court cannot provide the protection or the remedy sought by the Plaintiffs without infringing upon and entangling itself with the exercise of religious determinations, practices, and doctrine; action prohibited by both the United States and Minnesota Constitutions. The Plaintiffs' claims must therefore be dismissed with prejudice for lack of subject matter jurisdiction.

**Standing**

As alternative grounds for dismissing the First Amended Class Action Complaint, the Defendant argues that the Plaintiffs lack standing to assert their claims because

they have failed to allege an injury in fact or standing through legislative enactment. The Defendant also argues that the "law of the case," as decided by the Eighth Circuit Court of Appeals, should be applied to hold that the Plaintiffs cannot establish an injury in fact. The Plaintiffs disagree and argue the "law of the case" doctrine does not apply and they have alleged an injury in fact. The Plaintiffs also argue they have alleged facts to establish standing under the state consumer protection laws cited in the First Amended Class Action Complaint. After carefully reviewing the First Amended Class Action Complaint, the Court concludes that the Plaintiffs, based upon the allegations set forth in their pleadings, are unable to prove they were injured or received a product different from what was represented. They therefore lack the requisite standing to proceed on their claims and the First Amended Class Action Complaint must be dismissed.

***Law of the Case Doctrine***

The Eighth Circuit Court of Appeals concluded that the Plaintiffs' Amended Complaint alleged an economic injury in fact but failed to allege a particularized and actual injury in fact. Wallace, 747 F.3d at 1029-31. In the absence of an injury in fact, the Plaintiffs' lacked Article III standing under CAFA and the United States Federal Courts lacked jurisdiction over the matter. Id. at 1031-3. The Defendant asserts these holdings are "law of the case" and operate to dispose of the Plaintiffs' negligence and breach of contract claims. The Plaintiffs' disagree and argue the Eighth Circuit Court of Appeals' decision is inapplicable in Minnesota District Court because it dealt with Article III standing; an issue not before this Court. For the reasons set forth below, the Court agrees that the law of the case doctrine is not applicable in this context even though this Court's review of the First Amended Class Action Complaint leads to a similar

conclusion.

"There exists a well-established rule that issues considered and adjudicated on a first appeal become the law of the case and will not be reexamined or readjudicated on a second appeal of the same case."[6] Lange v. Nelson-Ryan Flight Service, Inc., 263 Minn. 152, 155, 116 N.W.2d 266, 269 (1962), cert. den., 371 U.S. 953 (1963) (citations omitted), cited by McClelland v. McClelland, 393 N.W.2d 224, 226 (Minn. App. 1986). This doctrine is "a rule of practice that once an issue is considered and adjudicated, that issue should not be reexamined in that court or *any lower court* throughout the case." Peterson v. BASF Co., 675 N.W.2d 57, 65 (Minn. 2004), cert. granted and judgment vac'd on other grounds, 544 U.S. 1012 (May 2, 2005) (italics added). See also Sigurdson v. Isanti Cnty., 448 N.W.2d 62, 66 (Minn. 1989) (discussing but not applying doctrine); L.K. v. Gregg, 425 N.W.2d 813, 815 (Minn. 1988) (applying doctrine to bar re-litigation of previously decided issue); Mattson v. Underwriters at Lloyds of London, 414 N.W.2d 717, 719-20 (Minn. 1987) (discussing but not applying doctrine). The doctrine "is a rule of practice, not a limitation on the power of the court to re-review and overrule a prior decision." Lange, 263 Minn. at 156, 116 N.W.2d at 269.

The law of the case doctrine does not apply at this point of the case because there has been no decision rendered by this Court or a higher court. While the Eighth Circuit Court of Appeals' decisions are persuasive authority respected by this Court, their decisions are neither binding authority nor is the Eighth Circuit Court of Appeals a "higher" court. See, e.g., State v. Eichers, 840 N.W.2d 210, 216-7 (Minn. 2013) (stating

[6] An exception exists to application of the "law of the case" doctrine when there is an intervening change of controlling law. Interstate Power Co. v. Nobles Cty. Bd. of Comm'rs, 617 N.W.2d 566, 575 (Minn. 2000) (citation omitted); McClelland v. McClelland, 393 N.W.2d 224, 226-7 (Minn. App. 1986) (citations omitted). This exception also has an exception which results in application of the "law of the case" doctrine. Interstate Power, 617 N.W.2d at 575 (citations omitted; discussing application of law to pending matters with "vested rights"). Neither the exception of an intervening change of controlling law nor the "vested rights" exception are applicable in this case at this time.

Eighth Circuit caselaw regarding constitutional issue "not binding on Minnesota State courts" but persuasive); Citizens for a Balanced City v. Plymouth Congregational Church, 672 N.W.2d 13, 20 (Minn. App. 2003) (stating "court is bound by decision of the Minnesota Supreme Court and United States Supreme Court"); Northpointe Plaza v. City of Rochester, 457 N.W.2d 398, 403-4 (Minn. App. 1990) (stating that "state courts are bound only by decisions[, regarding federal statutes,] of the United States Supreme Court"). This is especially true when the issue is one of jurisdiction based upon standing. See Carter v. Cole, 526 N.W.2d 209, 214 (Minn. App. 1995) (stating "states have great latitude to determine the jurisdiction of their own courts"). Whether the Plaintiffs have standing to assert and this Court has jurisdiction to hear and decide their claims is not an issue that has been decided. The Eighth Circuit Court of Appeals' conclusion that the Plaintiffs failed to assert an injury in fact, however, is persuasive. While the law of the case doctrine cannot be applied in this instance, this Court also reaches the conclusion that the Plaintiffs have failed to allege the requisite standing to assert their claims.

***Injury in Fact***

Standing is a requirement that "a party ha[ve] a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." Sierra Club v. Morton, 405 U.S. 727, 732 (1972), cited by Lorix v. Crompton Co., 736 N.W.2d 619, 624 (Minn. 2007); Enright v. Lehmann, 735 N.W.2d 326, 329 (Minn. 2007); and State v. Philip Morris, Inc., 551 N.W.2d 490, 493 (Minn. 1996) (hereinafter "Phillip Morris"). "If a plaintiff lacks standing to bring a suit, the attempt to do so fails." Philip Morris, 551 N.W.2d at 493. "Standing is acquired in two ways: either the plaintiff has suffered some 'injury-in-fact' or the plaintiff is the beneficiary of some legislative enactment granting

standing." Lorix, 736 N.W.2d at 624. (citing Philip Morris, 551 N.W.2d at 493 and Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy, 301 Minn. 28, 31-2, 221 N.W.2d 162, 165 (1974)). See also Enright v. Lehmann, 735 N.W.2d at 329 (citing Snyder's Drug Stores, 301 Minn. at 31-2, 221 N.W.2d at 165). "An injury-in-fact is a concrete and particularized invasion of a legally protected interest." Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). See also Enright, 735 N.W.2d at 329 (citing Lujan, 504 U.S. at 560). "[A] party must show 'that *he personally* has suffered some *actual* or *threatened injury* as a result of the putatively illegal conduct of the defendant' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" In re Crown CoCo, Inc. 458 N.W.2d 132, 135 (Minn. App. 1990) (emphasis added; quoting Meadowbrook Women's Clinic, P.A. v. State of Minnesota, 557 F. Supp. 1172, 1174 (D. Minn. 1983)), cited by Builders Ass'n of Minn. v. City of St. Paul, 819 N.W.2d 172, 176 (Minn. App. 2012).

The Plaintiffs have not asserted a concrete and particularized invasion of a legally protected interest which can be redressed by a favorable decision. While the Plaintiffs have asserted an economic injury which could be compensable, they have also asserted an inability to prove actual individualized injury. The First Amended Class Action Complaint states it "is impossible for any reasonable consumer to detect" if a product has been fraudulently mislabeled as kosher. (Pl. Am. Comp. ¶ 1). Accepting this assertion as true means the Plaintiffs cannot and will never be able to prove the products they purchased at a premium price were not manufactured in accordance with all of the "exacting" and "stringent" standards and supervision represented by the "kosher" label. (Id. at ¶¶ 9-10). The Plaintiffs therefore lack standing to assert claims for any prior injury as a consequence of breach of contract or negligent

misrepresentation. They have also failed to allege any threat of a future injury for breach of contract because they have not asserted any intent to purchase Hebrew National products in the future. The Plaintiffs are also not threatened with any future injury as a consequence of the alleged misrepresentation because they are now aware of information which, if the Plaintiffs' allegations are accepted as true, would render any reliance upon the Defendant's representations unreasonable. The Plaintiffs have therefore failed to assert the requisite standing to bring their claims for breach of contract and negligent misrepresentation.

***Legislative Enactment***

The Plaintiffs asserted statutory claims pursuant to: the Nebraska Deceptive Trade Practices Act (Neb. Rev. Stat. § 87-301, et seq.; hereinafter "NDTPA") and Consumer Protection Act (Neb. Rev. Stat. § 59-1601, et seq.; hereinafter "NCPA"); the Minnesota Prevention of Consumer Fraud Act (Minn. Stat. § 325F.69; hereinafter "MPCFA"), Unlawful Trade Practices Act (Minn. Stat. § 325D.13; hereinafter "MUTPA"), and Deceptive Trade Practices Act (Minn. Stat. § 325D.44; hereinafter "MDTPA"); the Arizona Consumer Fraud Act (Ariz. Rev. Stat. § 44-1522, et seq.; hereinafter "ACFA"); the California Consumers Legal Remedy Act (Cal. Civ. Code § 1750, et seq.; hereinafter "CCLRA") and Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, et seq.; hereinafter "CUCL"); the Florida Deceptive and Unfair Trade Practices Act (Fla. Stat. § 501.201, et seq.; hereinafter "FDUTPA"); the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS § 505/2, et seq.; hereinafter "ICFA") and Deceptive Trade Practices Act (815 ILCS § 510/2, et seq.; hereinafter "IDTPA"); the New York Deceptive Acts and Practices (N.Y. Gen. Bus. Law § 349, et seq.; hereinafter "NYDAP"); the Michigan Consumer Protection Act (Mich. Comp. Laws § 445.901, et

seq.; hereinafter "MiCPA"); and the Massachusetts Consumer Protection Act (Mass. Ge. Laws Ch. 93A § 1 et seq.; hereinafter "MaCPA"). Each and every one of these consumer protection laws require a plaintiff allege and ultimately prove they were injured by the misrepresentation or are they are likely to be injured in the future. As described above, the Plaintiffs have alleged they are unable to prove any injury from the misrepresentation. In addition, they are now aware of the alleged misrepresentation and are therefore not likely to suffer any future injury from the representations challenged in this suit.

The NDTPA requires a party to allege future harm from deceptive acts and the NCPA requires allegations and proof of a direct injury. Neb. Rev. Stat. §§ 59-1609 (providing relief for "[a]ny person who is injured in his or her business or property") and 87-303(a) (providing for injunctive relief from "further violations" for "a person likely to be damaged by a deceptive trade practice"); Kanne v. Visa U.S.A. Inc., 723 N.W.2d 293, 301-2 (Neb. 2006) (concluding NCPA provides "potential damages remedy to a person injured in his or her business or property by a violation" not those that "are derivative or remote"); Reinbrecht v. Walgreen Co., 742 N.W.2d 243, 247-8 (Neb. App. 2007) (the NDTPA provides only prospective injunctive relief for personal damage which cannot occur once aware of the "deceptive act"). The Plaintiffs cite to Arthur v. Microsoft Co. and argue consumers have standing under the NCPA if the Defendant's "misrepresentations injure the people of Nebraska."[7] 676 N.W.2d 29 (Neb. 2004). The issue addressed in Arthur, however, is "whether an indirect purchaser may bring a civil

[7] The Plaintiffs have not addressed how they could assert standing under the NCPA when they have failed to identify a Nebraska resident who was allegedly injured. See Arthur, 676 N.W.2d at 37-8 (stating the NCPA "was intended to be a [] measure to protect Nebraska consumers . . . ." and "violations must directly or indirectly affect the people of Nebraska").

action under the" NCPA. Id. at 34. The Nebraska Supreme Court accepted "that any person *injured* by a violation may sue for damages" because "it [was] alleged that over 4,000 consumers [residing in Nebraska] have been injured." Id. at 35. As discussed above, the Plaintiffs have alleged an inability to prove an injury and now cannot prove any injury for a future violation of the NDTPA or NCPA.

The MCFA[8] and MUTPA are enforceable by private parties pursuant to Minnesota Statute § 8.31, subdivisions 1 and 3a which provide:

> any person *injured by* a violation of [the MCFA or MUTPA] may bring a civil action and recover damages . . . and receive other equitable relief as determined by the court.

(italics added), cited by Philip Morris, 551 N.W.2d at 496. If a plaintiff is unable to establish an injury, then they have "no basis for recovery." K.A.C. v. Benson, 527 N.W.2d 553, 562 (Minn. 1995), cited by D.A.B. v. Brown, 570 N.W.2d 168, 172-3 (Minn. App. 1997). See also Buetow v. A.L.S. Enterprises, Inc., 650 F.3d 1178, 1184-5 (8th Cir. 2011) (interpreting Minn. Stat. § 325D.70, subd. 1 to require injury for injunctive relief by private party under MCFA and Minn. Stat. § 325D.15 to require injury for injunctive relief under MUTPA). Under the MDTPA, "[a] person *likely to be damaged* . . . may be granted an injunction [] under the principles of equity and on terms that the court considers reasonable." Minn. Stat. § 325D.45, subd. 1 (italics added), cited by Philip Morris, 551 N.W.2d at 496. "Proof of monetary damage, loss of profits, or intent to deceive is not required." Minn. Stat. § 325D.45, subd. 1. However, a plaintiff "must have suffered an injury." Epland v. Meade Ins. Agency Associates, Inc., 564 N.W.2d

[8] In their Memorandum of Law Responding to the Court's Request for Additional Authority, filed August 14, 2014 (hereinafter "Pl. Memo. for Add. Auth."), the Plaintiffs' argue they have standing under Minnesota Statute § 325F.67 (False Statement in Advertising). The First Amended Class Action Complaint, however, does not assert a claim for a False Statement in Advertisement. The claims asserted were pursuant to Minnesota Statutes §§ 325D.13 & .44, and 325F.69. Consequently, the Court concludes this was a typographical error and not an attempt to assert an additional claim at this late stage in the proceedings.

203, 209 (Minn. 1997) (citing Snyder's Drug Stores, 301 Minn. at 32, 221 N.W.2d at 165). But see Philip Morris, 551 N.W.2d at 496 (stating "[i]njury, such as the plaintiffs have alleged, need not be proven" under the MDTPA). The Plaintiffs, however, cite to Wiegand v. Walser Automotive Groups, Inc., 683 N.W.2d 807 (Minn. 2004) and argue they have established an economic injury because they would not have purchased, or would only have purchased for a lower price, Hebrew National products if they had been aware of the misrepresentation.[9] In Wiegand the Minnesota Supreme Court rejected a justifiable reliance requirement for claims under the MCFA and imposed a "causal nexus" requirement to link the misrepresentation with the plaintiff's injury despite the presence of non-disputed representations which are contrary to the alleged misrepresentation. 683 N.W.2d at 811-3 (applying Group Health Plan, Inc. v. Philip Morris, Inc., 621 N.W.2d 2 (Minn. 2001)). The problem with the Plaintiffs' claim in this case, however, is not an inability to *prove a connection* between the misrepresentation and the alleged injury but an asserted inability to *prove the injury*. As discussed above, the Plaintiffs have asserted no one can prove they received a product different from what was represented. In addition, the Plaintiffs have not alleged nor are able to prove they are likely to be injured in the future. They therefore lack standing under the MCFA, MUTPA, and MDTPA.

[9] The Plaintiffs also cite to Laughlin v. Target Co., 12-489, 2012 WL 3065551 (D. Minn. July 27, 2012) (unpublished) and Sutton v. Viking Oldsmobile Nissan, Inc., C2-99-1843, 2001 WL 856250 (Minn. App. July 21, 2001) (unpublished) and argue they have alleged sufficient injury because they, like Laughlin and Sutton, would have declined to purchase a product or negotiated a lower price absent the misrepresentation. (Pl. Memo. for Add. Auth., pp. 8-9). Neither Laughlin nor Sutton, however, asserted an inability to prove their injury like the Plaintiffs in this case. Loughlin alleged the shoes purchased, like all of the shoes sold, "did not improve posture, reduce stress, and/or encourage muscle toning." Laughlin did not assert that her shoes may or may not fail to stand up to the representation. In Sutton, the Court of Appeals actually discussed the possible extent of Sutton's injury when it stated $743 was retained on the service contract and $152.77 was received back from the insurance company as a commission. This not only established but actually quantified the alleged injury. The Plaintiffs in this case, however, have asserted an inability to ever prove the product they purchased failed to conform to the representation.

The ACFA provides a private right of action against violating persons. Sellinger v. Freeway Mobile Home Sales, Inc., 521 P.2d 119, 1122 (Ariz. 1974) (citing A.R.S. § 44-1533). "To succeed on a claim of consumer fraud, *a plaintiff must show* a false promise or misrepresentation made in connection with the sale or advertisement of merchandise and consequent and proximate *injury resulting from the promise*." Kuehn v. Stanley, 91 P.3d 346, 351 (Ariz. App. Div. 2, 2004) (citation omitted; emphasis added). "It is clear that before a private party may exert a claim under the statute, he *must have been damaged by the prohibited practice*." Peery v. Hansen, 585 P.2d 574, 577 (Ariz. App.1978) (emphasis added). See also Sears v. Hull, 961 P.2d 1013, 1017 (Ariz. 1998) (stating "a distinct and palpable injury" must be alleged to gain standing and "[a]n allegation of generalized harm . . . is not sufficient"), cited by Aegis of Arizona, L.L.C. v. Town of Maran, 81 P.3d 1016, 1021-2 (Ariz. App. Div. 1 2003). The Plaintiffs in this case have alleged a conceptualized injury, economic harm, from the misrepresentation but have also asserted a complete inability to prove their injury occurred. The Plaintiffs have therefore failed to establish standing to assert a claim under the ACFA.

The Plaintiffs also assert claims under the CCLRA and the CUCL. Under the CCLRA relief is afforded to "[a]ny consumer who *suffers any damage* as a result" of a practice prohibited by the act. Cal. Civ. Code § 1780(a) (emphasis added). "[S]ome kind of damage must result" to a party for them to have standing under the CCLRA. Meyer v. Spring Spectrum L.P., 200 P.3d 295, 299 (Cal. 2009). Under the CUCL a person "who has suffered *injury in fact* and lost money or property as a result of the unfair competition" may obtain relief. Cal. Bus. & Prof. Code § 17204 (emphasis added). Prior to the passage of California Proposition 64, an uninjured person and a

person proceeding on behalf of the public possessed standing to sue under the CUCL. Branick v. Downey Sav. and Loan Ass'n, 138 P.3d 214, 217 (Cal. 2006). See also Kwikset Co. v. Superior Court, 246 P.3d 877, 884 (Cal. 2011) (discussing Proposition 64 and stating "[t]he intent of th[e] change was to confine standing to those actually injured . . . and to curtail the prior practice of filing suits on behalf of clients who have not used the [] product or service"). While the Plaintiffs argue they have asserted economic loss as their injury, this argument misses the point. The Plaintiffs in this case effectively seek to proceed as uninjured persons or on behalf of the public. They can allege overpayment but have admitted a complete inability to prove any one of them suffered damage or injury from the Defendant's representations. They are therefore uninjured or proceeding on behalf of all consumers because the misrepresentation harms the public in the abstract. The Plaintiffs therefore lack standing under the CCLRA and the CUCL.

The FDUTPA provides a declaratory and injunctive remedy to "anyone aggrieved by a violation" and a damages remedy for "a person who has suffered a loss as a result of a violation." Fla. Stat. § 501.211(1)-(2). An action for damages therefore requires the plaintiff to establish "actual damages." Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006) (citations omitted). See also Collins v. DaimlerChrysler Co., 894 So. 2d 988, 989-90 (Fla. Dist. Ct. App. 2004). While "the scope of the injunctive remedy is greater than the actual damage remedy," it is still limited to a person who was "aggrieved" or has "an injury sufficient to permit him to resort to the injunctive remedies of the statute." Klinger v. Weekly World News, Inc., 747 F. Supp. 1477, 1480 (S.D. Fla. 1990), cited by Big Tomato v. Tasty Concepts, Inc., 972 F. Supp. 662, 664 (S.D. Fla. 1997). See also Galstaldi v. Sunvest Communities USA, LLC, 637 F. Supp. 2d 1045,

1057-8 (S.D. Fla. 2009) (stating no requirement "plaintiff show an ongoing practice or irreparable harm;" only be "aggrieved"). As discussed above, the Plaintiffs have asserted an inability to establish an injury or that they are "aggrieved." See Guerrero v. Target Co., 889 F. Supp. 2d 1348, 1355-6 (S.D. Fla. 2012) (dismissing FDUTPA claim for failing to provide factual basis that product purchased was not as represented). The Plaintiffs therefore lack standing to assert a FDUTPA claim.

The ICFA affords a private cause of action for damages and injunctive relief to "[a]ny person who suffers actual damage as a result of a violation." 815 Ill. Comp. Stat. 505/10a(a). See also Pappas v. Pella Co., 844 N.E.2d 798-9 (Ill. App. 2006) (stating "actual damages" element of ICFA claim); Askin v. Quaker Oats Co., 818 F. Supp. 2d 1081, 1083-4 (N.D. Ill. 2011) (holding diminution in value or payment of premium based upon representation "actual damage"). The possibility or risk of having suffered an injury, even based upon an allegation of diminished value, is not a sufficient "injury" necessary to state a claim under the ICFA. Kelly v. Sears Roebuck and Co., 720 N.E.2d 683, 690 (Ill. App. 1999). Like Kelly, the Plaintiffs in this case have asserted the possibility they may have been injured by the representation while also asserting an inability to otherwise prove the existence of absence of the injury. They therefore fail to state a claim under the ICFA. A separate cause of action for injunctive relief is afforded under the IDTPA to "[a] person likely to be damaged by a deceptive trade practice of another [and] [p]roof of monetary damage, loss of profits or intent to deceive is not required." 815 Ill. Comp. Stat. 510/3. "[A] plaintiff must minimally allege that he is likely to be damaged by another's deceptive trade practice" and "purely speculative" "allegations of harm" are insufficient. Baughman v. Martindale-Hubbell, Inc., 472 N.E.2d 582, 585 (Ill. App. 1984) (citing Engell, Inc. v. Weniger, 418 N.E.2d 915, 918-9 (Ill. App.

1981)). See also Popp v. Cash Station, Inc., 613 N.E.2d 1150, 1157 (Ill. App. 1992) (explaining "[t]he problem in most consumer actions under the [I]DTPA is the inability to allege facts indicating the likelihood of damage in the future" because the harm has usually already occurred). In this case, the Plaintiffs have not asserted a likelihood that they will be harmed by the alleged misrepresentation in the future. The Plaintiffs therefore lack standing to assert claims under the ICFA and the IDTPA.

The Plaintiffs have asserted a claim under the NYDAP which affords a remedy to "any person who has been injured by reason of a violation." N.Y. Gen. Bus. Law § 349(h). To state a cognizable NYDAP claim a plaintiff must "plead that they have suffered actual injury caused by a materially misleading or deceptive act or practice." City of New York v. Smokes-Spirits.Com, Inc., 911 N.E.2d 834, 839 (N.Y. 2009) (citations omitted). See also Vigiletti v. Sears, Roebuck & Co., 42 A.D. 3d 497, 498 (N.Y. 2007) (stating same; citations omitted) and Stutman v. Chemical Bank, 731 N.E.2d 608, 612 (N.Y. 2000) (stating same; citations omitted). An injury is broader than "pecuniary harm" and may encompass a claim for diminution in value but the failure to prove actual harm will be dispositive. Cox v. Microsoft Co., 10 Misc. 3d 1055(A), 4-5 (N.Y. Sup. Ct. July 29, 2005) (unreported), cited by Jernow v. Wendy's Intern., Inc., 07 Civ. 3971, 2007 WL 4116241, *3 (S.D.N.Y. Nov. 15, 2007) (unpublished). The Plaintiffs state they cannot prove they were actually injured and therefore fail to state a claim under the NYDAP.

The MiCPA provides a remedy for damages to "[a] person who suffers loss as a result of a violation of th[e] act [and] may bring a class action on behalf of persons residing or injured in this state for the actual damages caused." Mich. Comp. Laws § 445.911(3). An injury may occur when a purchaser does not receive what they

reasonably expected to receive. Mayhall v. A.H. Pond Co., Inc., 341 N.W.2d 268, 271-2 (Mich. App. 1983), cited by Gilkey v. Central Clearing Co., 202 F.R.D. 515, 526 (E.D. Mich. 2001)). They must, however, be injured. See id. at 272 (stating complaint alleged "center diamond is not perfect" as represented).[10] The MiCPA also allows for "a person to bring an action to" obtain a declaratory judgment or "enjoin in accordance with the principles of equity a person who is or is about to engage" in the deceptive act. Mich. Comp. Laws § 445.911(1). Injunctive relief, however, is only available if the person can establish "a real and imminent danger of irreparable injury." Head v. Philips Camper Sales & Rental, Inc., 593 N.W.2d 595, 603 (Mich. App. 1999 (quoting ETT Ambulance Service Co. v. Rockford Ambulance, Inc., 516 N.W.2d 498, 501 (1994)). The Plaintiffs have failed to allege an ability to prove they suffered an injury or the existence of a real and imminent danger which will cause them to suffer irreparable injury. They have therefore failed to establish standing to assert a claim under the MiCPA.

Massachusetts provides consumers with a remedy for damages under the MaCPA if they have "been injured." Mass. Gen. Law. ch. 93A § 9(1).[11] "[A] plaintiff seeking a remedy under [the MaCPA] must demonstrate that [] a [] deception caused a loss." Hershenow v. Enterprise Rent-A-Car Company of Boston, Inc., 840 N.W.2d 526, 533 (Mass. 2006), discussed by Roberts v. Enterprise Rent-A-Car Co. of Boston, Inc., 840 N.E.2d 541, 543-4 (Mass. 2006). The MaCPA "does not authorize purely vicarious suites by self-constituted private attorneys-general." Roberts, 840 N.E.2d at 543-4

[10] The Defendant also cites to the unpublished opinions, Galecka v. Savage Arms, Inc., 313350, 2014 WL 2931859 (Mich. App. June 26, 2014) and Sternberg v. Michigan State University, 281521, 2009 WL 131737 (Mich. App. Jan. 20, 2009), for this same proposition. The Court finds these opinions persuasive.

[11] A "person who engages in the conduct of any trade or commerce" may also obtain injunctive relief if they "suffer[] any loss of money or property" or may suffer such a loss as a result of the deceptive practice. Mass Gen. Law. ch. 93A § 11. The Plaintiffs have asserted an inability to establish any loss of money or property caused by or resulting from the alleged misrepresentation or deceptive practice.

(internal quotation omitted). The Plaintiffs cite to Leardi v. Brown, 474 N.E.2d 1094, 1101 (Mass. 1985) and argue consumers may have standing under the MaCPA "even where there are no actual damages, but only invasion of a legally protected interest." (Plaintiffs' Memorandum of Law Responding to the Court's Request for Additional Authority, filed August 14, 2014 (hereinafter "Pl. Memo. for Add. Auth."), p. 6). The Massachusetts Supreme Court, however, has clarified the language referred to by the Plaintiffs and stated:

> the violation of the legal right that has created the unfair or deceptive act or practice must cause the consumer some kind of separate, identifiable harm arising from the violation itself. To the extent that [] Leardi can be read to signify that "invasion" of a consumer plaintiff's established legal right in a manner that qualifies as an unfair or deceptive act under [the MaCPA] automatically entitles the plaintiff to at least nominal damages (and attorney's fees), we do not follow the Leardi decision. Rather, . . . a plaintiff bringing an action for damages under [the MaCPA], must allege and ultimately prove that she has, as a result, suffered a distinct injury or harm that arises from the claimed unfair or deceptive act itself.

Tyler v. Michaels Stores, Inc., 984 N.E.2d 737, 745-6 (Mass. 2013) (internal citations omitted). The Plaintiffs have alleged a distinct injury suffered as a consequence of the claimed unfair or deceptive act; payment of a premium for products represented as kosher. Their claims fail because, according to the First Amended Class Action Complaint, it is impossible to prove the misrepresentation occurred in any individually purchased product and they have not alleged that all of the products sold failed to stand up to the representation.

As a necessary element of a cause of action under all of the consumer protection statutes the Plaintiffs would have to prove either an injury or the likelihood or imminent threat of a future injury. They have asserted an inability to prove such an injury or that they will be injured in the future as a consequence of the alleged misrepresentations.

This inability also deprives the Plaintiffs of the ability to assert claims for relief under their non-statutory theories; negligent misrepresentation and breach of contract. To prevail on a negligent misrepresentation claim a plaintiff must prove, among other things, they were "financially harmed by relying" upon the false information. Hardin County Sav. Bank v. Housing and Redevelopment Authority of City of Brainerd, 821 N.W.2d 184, 192 (Minn. 2012) (citations omitted). A plaintiff seeking to prevail on a claim for breach of warranty must prove "a causal link between the breach and the alleged harm." Peterson v. Bendix Home Systems, Inc., 318 N.W.2d 50, 52-3 (Minn. 1982), discussed by Lyon Financial Services, Inc. v. Illinois Paper and Copier Co., 848 N.W.2d 539, 544 n. 6 (Minn. 2014). By the Plaintiffs own assertions, they cannot prove any individualized harm was caused by the misrepresentation or breach because they are unable to show an injury in any particular purchase. In the absence of an ability to prove a requisite element for the relief sought, the Plaintiffs' statutory consumer protection claims and non-statutory claims must be dismissed.

**Other Grounds for Failure to State a Claim**

In addition to their subject jurisdiction and standing arguments, the Defendant also argues the Plaintiffs' claims must be dismissed because they are preempted by the Federal Meat Inspection Act, Minnesota's choice of law rules preclude application of the NDTPA and NCPA, the negligent misrepresentation claim is barred by the economic loss doctrine, and the Plaintiffs have failed to establish privity and presuit notice for their breach of contract claims. The Plaintiffs disagree and argue their claims are not preempted, it is premature to perform a choice of law analysis, the economic loss doctrine does not apply their claims under Nebraska law or the law of any state where a Plaintiff is a resident, they do not need to establish privity for their breach of contract

claim because it is based upon a product-caused injury and fraud, deceit, or misrepresentation, and presuit notice was either made or is a factual question inappropriate for resolution on a motion to dismiss. Although it appears as though the Plaintiffs' claims may be preempted, the Court lacks sufficient information at this early stage in the proceedings to make that determination. It is also premature to perform a choice of law analysis at this point in the proceedings because the Plaintiffs' claim may be resolved without reaching a conflict between various state laws. Finally, the Court declines to decide this matter on grounds of the economic loss doctrine or privity and pre-suit notice because resolving the case on those grounds may require a choice of law analysis or further facts not available at this time.

***Preemption***

The Defendant argues that the Plaintiffs' claims are preempted by the Federal Meat Inspection Act, 21 U.S.C. § 601 et seq. (hereinafter "FMIA"), because the Plaintiffs seek to impose additional or different labeling requirements than those set forth by the FMIA. The Plaintiffs disagree and argue they "do not seek to impose *any* additional labeling requirements upon Hebrew® National beef [but] only challenge [the Defendant's] false and misleading statements." (Pl. Memo., p. 16). The false and misleading statements challenged by the Plaintiffs, however, is the representation that Hebrew National products are "kosher." (See Pl. Am. Comp. ¶¶ 4, 7, 9-10, 72-3, 75, 188, & 191). It appears the Plaintiffs' claims would likely be preempted by the FMIA and the labeling rules and requirements promulgated under that Act but the Court lacks the factual record at this point to make that determination.

The FMIA imposes labeling requirements upon "any meat or meat food product prepared for commerce" inspected pursuant to the Act to avoid "misbranding" of the

product. 21 U.S.C. § 607(a)-(b) (referencing 21 U.S.C. § 601(n)). These requirements were enacted "to protect the consuming public from meat and meat food products that are [] misbranded and to assist in efforts by State and other Government agencies to accomplish this objective." 21 U.S.C. § 661(a). The Act also expressly preempts any "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than those made under" it for "articles prepared at any establishment under inspection in accordance with" the Act. 21 U.S.C. § 678, discussed by Jones v. Rath Packing Co., 430 U.S. 519, 530-2 (1977). See also National Meat Ass'n v. Harris, ____ U.S. ____, ____, 132 S. Ct. 965, 970-5 (2012) (applying wide sweeping preemption clause to California statutory scheme). If the FMIA has been applied to the products and the labeling at issue in this case, because they are subject to inspection under the Act, then it would appear the Plaintiffs' claims under state law are preempted. See Brandt v. Marshall Animal Clinic, 540 N.W.2d 870, 878 (Minn. App. 1995) (holding similar "different from, or in addition to" language in the Virus-Serum-Toxin Act, 21 U.S.C. §§ 151-9 preempted negligence, misrepresentation, false advertising, and breach of warranty claims).[12]

The parties have directed the Court's attention to several websites of the Food Safety and Inspection Service (hereinafter "FSIS") division of the United States Department of Agriculture; the Defendant in an apparent attempt to indicate regulations regarding labeling of products with the "kosher" designation have been implemented

[12] The parties also cite to two unpublished Federal District Court opinions which hold claims of the same type as those brought by the Plaintiffs were preempted by the FMIA. Kuenzig v. Kraft Foods, Inc., 8:11-cv-838-T-24, 2011 W.L. 4031141 (M.D. Fla. Sept. 12, 2011) (unpublished) (holding CAFA claims for injunction, breach of warranty, an unfair and deceptive trade practice, and negligent misrepresentation were preempted by FMIA because labeling approved by United States Department of Agriculture, Food Safety and Inspection Service); Meaunrit v. ConAgra Foods Inc., C 09-02220, 2010 W.L. 2867393 (N.D. Cal. July 20, 2010) (unpublished) (holding plaintiff's consumer fraud and warranty claims were preempted by FMIA).

and by the Plaintiffs to indicate no such regulation exists. These references indicate FSIS does not monitor the ritual slaughter for a label to bear the "kosher" designation but that they "may verify that the label is not falsified by verifying that the appropriate religious organization was contacted;"[13] they "have no responsibility for certifying to the authenticity of the Kosher identification of the product" when exported to Israel;[14] allows use of the term "kosher" "only on the labels of meat and poultry products prepared under rabbinical supervision;"[15] and, as part of a Food Standards and Labeling Policy Book, states "kosher" may be used on a label pursuant to "certifications by an appropriate third party authority."[16] It appears that FSIS has promulgated some regulations regarding packaging and labeling products which are designated "kosher" and, in Minnesota at least, laws consistent with those requirements have been enacted. See 21 U.S.C. § 678 (exempting from preemption State "requirement or [] other action, consistent with" the Act); Minn. Stat. § 31.651, subds. 1 & 4 (requiring products sold as "kosher" "display a stamp, label, or other type of indicia from a rabbinic authority indicating that the products were prepared or processed in accordance with that rabbinic authority" and stating "[t]he absence of a duly sanctioned kosher 'plumba,' mark, stamp, tag, brand, or label . . . shall be prima facie evidence that such product is nonkosher").

Assuming FSIS reviewed the Defendant's packaging and labeling and found it satisfactory, then the Plaintiffs' claims would appear to be preempted by the FMIA. The

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[13] http://askfsis.custhelp.com/app/answers/detail/a_id/375/kw/kosher (cited by both parties).
[14] The Plaintiffs provided reference to the site: www.fsis.usda.gov/OFO/export/israel.htm but when the Court attempted to access that site, it was redirected to the FSIS "home site." The quotation therefore comes from Exhibit 1 attached to the Affidavit of Hart L. Robinovitch filed July 18, 2014 .
[15] http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/meat-and-poultry-labeling-terms (cited by the Defendant).
[16] http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf (cited by the Defendant).

Plaintiffs argue their claims are not preempted because they "only seek to have [the Defendant's] current packaging refrain from having false or misleading statements on it." (Pl. Memo. p. 16). FSIS review, however, of the packaging and labeling would presumably confer upon the products an acceptance that they are not false or misleading under the FMIA for using the "kosher" designation because they are certified by Triangle K. As discussed above, the Plaintiffs do not contend that the Defendant impermissibly applied the Triangle K certification to its products. Consequently, a declaration or some relief enforceable by a Minnesota Court and predicated upon a conclusion contrary to the one reached by FSIS would be prohibited by the preemption clause of the FMIA because it would require a State to impose a different or additional requirement for use of the term "kosher" on the product package.

While the Defendant's preemption arguments appear to be well founded, the limited record upon which the Defendant's motion to dismiss is predicated makes it impossible for the Court to determine, with any certainty, that the FMIA applies to the Defendant's Hebrew National products.[17] While it is almost certain the FMIA is applicable in this instance, the Plaintiffs' First Amended Class Action Complaint does not include factual allegations sufficient to allow the Court to reach that conclusion. Whether the products at issue were or are subject to inspection under the FMIA is a factual question which cannot be resolved solely upon the Plaintiffs' Amended Complaint. The relief sought by the Defendant on preemption grounds must therefore be denied at this time.

[17] In reaching this conclusion the Court attempted to find a mark indicating compliance with the meat inspection requirements of the FMIA, 21 U.S.C. § 611, on the package of Hebrew National Beef Franks set forth in Exhibit A to the Plaintiffs' First Amended Class Action Complaint. While it appears that such a mark may be located on the front of the package of Hebrew National Beef Franks near the lower right corner of the package, the quality of the reproduction prevented the Court for ascertaining the content of the mark.

***Choice of Law Rules***

The Defendant argues that Minnesota's choice of law rules preclude application of the NDTPA and NCPA. (Def. Memo., pp. 23-6). The Plaintiffs argue a choice of law analysis requires a factual analysis of "the contact each potential state law has with the Plaintiff's legal theory" and any choice of law determination at this time is premature. (Pl. Memo., p. 30). The first consideration when analyzing a choice of law issue "is whether the choice of one state's law over another's creates an actual conflict." Jepson v. General Cas. Co. of Wisconsin, 513 N.W.2d 467, 469 (Minn. 1994) (citations omitted). If no actual conflict exists, then it is unnecessary to conduct a choice of laws analysis. See Nodak Mut. Ins. Co. v. Am. Fam. Mut. Ins. Co., 604 N.W.2d 91, 94 n. 2 (Minn. 2000) (citing Jepson, 513 N.W.2d at 469). "A conflict exists if the choice of one forum's law over the other will determine the outcome of the case." Id. at 94 (citation omitted). At this point in the case, the choice of Nebraska law, under the NDTPA and the NCPA, will not result in a different outcome than Minnesota Law, under the MDTPA, MPCFA, and MUTPA. Under both the NDTPA and the MDTPA the Plaintiffs had to allege claims for future injury or harm to avoid dismissal of their claims. Under the NCPA, MPCFA, and MUTPA the Plaintiffs would be required to prove they each suffered an injury to avoid dismissal of their claims. The Plaintiffs are unable to demonstrate the necessary injury, harm, or damage under the statutory consumer protection schemes for either Nebraska or Minnesota. Therefore, no conflict exists and the Court declines to conduct a choice of law analysis at this time.

***Economic Loss Doctrine***

The Defendant argues, *ad passim*, that the Plaintiffs' negligent misrepresentation claims are barred by the economic loss doctrine. In Minnesota this doctrine is codified

and prohibits a buyer from "bring[ing] a common law misrepresentation claim against a seller relating to the goods sold [] unless the misrepresentation was made intentionally or recklessly." Minn. Stat. § 604.101, subd. 4, applied by Valspar Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359, 370 (Minn. 2009). As currently plead, the Plaintiffs have alleged negligent misrepresentation solely based upon the representation of the goods sold. If Minnesota law were applied to the claim, then it would be barred by Minnesota Statute § 604.101, subdivision 4.[18] The Court does not reach this issue, or the corollary choice of law analysis which may follow, however, because the Plaintiffs' claim for negligent misrepresentation may be dismissed on the constitutional and standing grounds discussed above.

***Privity and Presuit Notice***

Finally, the Defendant argues, in another *ad passim* reference, that the Plaintiffs' breach of warranty claims fail because of lack of privity and failure to plead sufficient pre-suit notice. At least in Minnesota, privity is not required for a breach of warranty

[18] Application of law from other states may require a similar result. See, e.g., Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance, Inc., 223 P.3d 664, 667 (Ariz. 2010) (defining economic loss doctrine as "a common law rule limiting a contracting party to contractual remedies for the recovery of economic losses unaccompanied by physical injury to persons or to other property"); Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp., 694 P.2d 198, 209 (1984) (holding "[w]here economic loss, in the form of [] diminished value [] is the plaintiff's only loss, the policies of the law generally will be best served by leaving the parties to their commercial remedies") abrogated on other grounds by Phelps v. Firebird Raceway, Inc., 210 Ariz. 403, 111 P.3d 1003 (2005); Robinson Helicopter Co., Inc. v. Dana Co., 102 P.3d 268, 272 (Cal. 2004) (reiterating that economic loss rule bars tort "damages for inadequate value . . . without any claim of personal injury or damages to other property"); Neibarger v. Universal Cooperatives, Inc., 486 N.W.2d 612, 620-1 (Mich. 1992) (applying economic loss doctrine to bar tort claim when "product was not of the quality expected [] or promised" and the "failure of the product to perform as expected [] cause[d] damage to other property"); and Lesiak v. Central Valley Ag Co-op., Inc., 808 N.W.2d 67, 81 (Neb. 2012) (holding "economic loss doctrine precludes tort remedies where the damages caused were limited to economic losses[, unaccompanied by personal injury or other property damage,] and where either (1) a defective product caused the damage or (2) the duty which was allegedly breached arose solely from the contractual relationship between the parties"). But see Huron Tool and Engineering Co. v. Precision Consulting Services, Inc., 532 N.W.2d 541, 543 (Mich. App. 1995) (distinguishing Neibarger and refusing to apply economic loss doctrine to prevent claim for an "intentional tort;" such as fraud).

claim under the Uniform Commercial Code (hereinafter "UCC") as adopted.[19] See Minn. Stat. § 336.2-318 (using alternative C of UCC); Minnesota Min. and Mfg. Co. v. Nishika Ltd., 565 N.W.2d 16, 21 (Minn. 1997) (discussing application of Minn. Stat. § 336.2-318 and holding "those who purchase, use, or otherwise acquire warranted goods have standing to sue for purely economic losses"). See also Thayer v. Pittsburgh-Corning Co., 703 N.E.2d 221, 224-5 (Mass. App. 1998) (discussing history eliminating privity requirement under Massachusetts version of UCC). But see Ariz. Rev. Stat. § 47-2318 (UCC alternative A); Fla. Stat. § 672.318 (UCC alternative A); 810 Ill. Comp. Stat. 5/2-318 (UCC alternative A); Mich. Comp. Laws § 440.2318 (UCC alternative A); Neb. Rev. Stat. U.C.C. § 2-318 (UCC alternative A); and N.Y. U.C.C. § 2-318 (UCC alternative B).[20] Granting the Defendant's motion to dismiss the Plaintiffs' breach of warranty claim on grounds of lack of privity is therefore inappropriate at this stage of the proceedings.

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[19] The Uniform Commercial Code recommended three alternatives for enactment by adopting states. U.C.C. § 2-318 (1966). These included:

> Alternative A
> A seller's warranty whether express or implied extends to *any natural person who is in the family or household of his buyer or who is a guest in his home* if it is reasonable to expect that such person may use, consume or be affected by the goods and who is *injured in person* by breach of the warranty. A seller may not exclude or limit the operation of this section.
>
> Alternative B
> A seller's warranty whether express or implied extends to *any natural person* who may reasonably be expected to use, consume or be affected by the goods and who is *injured in person* by breach of the warranty. A seller may not exclude or limit the operation of this section.
>
> Alternative C
> A seller's warranty whether express or implied extends to *any person* who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect *to injury to the person of an individual* to whom the warranty extends.

Id. (emphasis added to identify material differences).

[20] While this difference in law may create a need for a choice of law analysis, the Plaintiffs' claims may be dismissed without confronting whether choosing one state's version of the Uniform Commercial Code over another state's version will determine the outcome of the case.

In addition, the UCC, at least as adopted in Minnesota, requires buyers "within a *reasonable time* after the[y] discover[] or should have discovered any breach notify the seller of [the] breach or be barred from any remedy." Minn. Stat. § 336.2-607(3)(a) (emphasis added), cited by Willmar Cookie Co. v. Pippin Pecan Co., 357 N.W.2d 111, 115 (Minn. App. 1984). "What constitutes a 'reasonable time' is a jury question and depends on the facts and circumstances of the case." Willmar Cookie Co., 357 N.W.2d at 115 (citations omitted). See also Marvin Lumber and Cedar Co. v. PPG Industries, Inc., 401 F.3d 901, 907 (8th Cir. 2005) (applying Minnesota law and stating "[i]t is true that sufficiency of notice [] ordinarily is a question of fact to be determined by a jury" but upholding judgment as a matter of law on issue). The Plaintiffs have provided assertions that the Defendant was given some notice of their claims at least as early as April and May of 2012. Whether this was sufficient or reasonable notice for the "class period" during which the Plaintiffs' allege the breach occurred is a question that cannot be resolved on the Defendant's motion to dismiss. The Defendant's motion to dismiss on failure to provide the required pre-suit notice shall therefore be denied at this time.

**Notice to Intervene**

Moshe B. Git (hereinafter "Git"), a former employee of AER seeks to intervene in this matter. Both the Plaintiffs and the Defendant timely objected to Git's Notice to Intervene and the Dakota County Court Administrator scheduled a hearing for October 20, 2014 to address the Request for Intervention.

Git seeks to intervene as a matter of right, pursuant to Rule 24.01 of the Minnesota Rules of Civil Procedure, and seeks permission to intervene pursuant to Rule 24.02 of the Minnesota Rules of Civil Procedure. Git asserts "a grave injustice will incur to him personally [] as a result of statements made during the [Motion to Dismiss]

hearing." He argues the manner of termination of his employment from AER was misrepresented by the Defendant and apparently seeks to collaterally attack the matter of Moshe B. Git v. AER Services, Inc. (Court File Number 19HA-CV-11-401)[21] and Git v. AER Servs., Inc., No. A12-0167, 2013 WL 1092199 (Minn. App. Mar. 18, 2013)). Finally, Git argues the Motion to Dismiss, which was argued prior to his request to intervene, should be denied. He does not, however, assert any interest in the transactions or claims at issue in this matter.

Rule 24.01 of the Minnesota Rules of Civil Procedure allows a party to intervene as a matter of right in an action when they "claim[] an interest relating to the property or transaction which is the subject of the action and [are] so situated that the disposition of the action may as a practical matter impair or impeded the applicant's ability to protect that interest" if not "adequately represented by existing parties." A party may also be allowed to intervene if, in the Court's discretion, there is "a common question of law or fact" provided intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." Git has not asserted any interest in the transactions which are the subject matter of this action; purchase of Hebrew National products. He has also failed to assert a common question of law or fact which is related to his claims. The Court in these proceedings is not deciding whether Hebrew National products are or are not kosher nor is it deciding any issues regarding Git's employment relationship with AER. While Git may have an opinion regarding the issues raised by the parties in as part of the Defendant's Motion to Dismiss, he has not asserted a cognizable legal interest which shares a question of law or fact that will be decided as a part of this

[21] An Affidavit of Rabbi Moshe Fyzakov filed in the Git v. AER matter was referenced by the Plaintiffs in their Third Amended Class Action Complaint, at paragraph 85, and included thereof as Exhibit Q.

matter. In other words, Git's rights and obligations are not affected to any extent greater than that of any other member of the general public having an interest in these proceedings. Git's request to intervene shall therefore be denied.

**Conclusion**

The Plaintiffs' claims must be dismissed with prejudice because they seek a remedy not available from this Court. The Plaintiffs' beef is that they disagree with Triangle K's decision to certify, as kosher, the products sold by the Defendant. While the Plaintiffs' concern that the Defendant may be taking advantage of the "kosher" label as a "trust mark" to increase its profit may be well founded, the Constitutional prohibitions prevent this Court from undertaking a review of a religious determination that a ritual has been properly followed to allow a religious designation. (See Pl. Am. Comp. ¶ 69). The Plaintiffs' remedy must be to the "higher authority" the Defendant answers to or, simply, to avoid purchasing products certified by Triangle K and sold by the Defendant and thereby deprive the "trust mark" of its value. (See Pl. Am. Comp. ¶ 68 (referencing Defendant's slogan since 1965 that they "answer to a higher authority")).

The Plaintiffs' claims also universally fail because they have affirmatively alleged an inability to prove a required element. The Plaintiffs have asserted a complete inability to prove an individualized injury caused by the alleged misrepresentation. This is fatal to their claims, the statutory consumer protection claims as well as their negligent misrepresentation and breach of contract claims, because it deprives them of standing. On this alternative and independent ground the Plaintiffs' claims must also be dismissed.

In light of these two separate and independent grounds to dismiss the Plaintiffs'

claim, the Court refrains from performing a choice of law analysis and reaching a conclusion regarding the impact of the economic loss doctrine, privity of contract, or the UCC pre-suit notice provisions. The Court also declines to decide the Defendant's motion on preemption grounds based upon the record presently before it.