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By E-Filing

Molly C. Dwyer, Clerk of Court
Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Chad Brazil v. Dole Packaged Foods, LLC, No. 14-17480*

Dear Ms. Dwyer:

Pursuant to FRAP 28(j), Appellee Dole Packaged Foods, LLC ("Dole") submits the following supplemental authority in support of its Answering Brief: *Khasin v. R.C. Bigelow, Inc.*, Case No. 12-cv-02204-WHO (N.D. Cal. Aug. 12, 2015) (Order Regarding Dispute Over Discovery of Profits) (attached hereto).

In *Khasin*—one of class counsel's 48 other food misbranding cases filed in the Northern District of California—Judge Orrick rejected the plaintiff's demand for discovery on the defendant's profits and costs to support his claim for unjust enrichment because the plaintiff was not entitled to this nonrestitutionary disgorgement remedy.

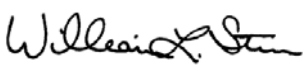
As the court explained, "[t]he law is clear in this District that '[t]he proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received, not the full purchase price or all profits.'" *Id.* at 1:22-2:3 (quoting *Trazo v. Nestle USA, Inc.*, 12-cv-02272-PSG, 2015 WL 4196973, at *3 (N.D. Cal. July 10, 2015) and citing *Ivie v. Kraft Foods Global, Inc.*, 12-cv-02554-RMW, 2015 WL 183910, at *2 (N.D. Cal. Jan. 14, 2015) and *Brazil v. Dole Packaged Foods, LLC*, 12-cv-01831-LHK, 2014 WL 5794873, at *5 (N.D. Cal. Nov. 6, 2014)).

Relying on Judge Grewal's order in in another of class counsel's mislabeling actions—*Trazo* (ECF No. 25-2)—limiting the remedy for unjust enrichment to restitutionary disgorgement, Judge Orrick held that, because the plaintiff was not entitled to nonrestitutionary disgorgement of profits, he was not entitled to discovery on this issue. *Id.* at 2:3-13.

Khasin further confirms Judge Grewal's holdings in *Trazo*, *Coffey*, and *Belli* that "nonrestitutionary disgorgement is not the appropriate remedy for a quasi-contract claim based on alleged mislabeling of a consumer product." (ECF Nos. 25-2, 25-3, and 25-4 at 6:13-14.) Together with Judge Whyte's decision denying *restitutionary* disgorgement for

unjust enrichment in *Lanovaz v. Twinings* (ECF No. 21), these orders demonstrate that Plaintiff is not entitled to any form of relief for his unjust enrichment claim. This Court should deny Plaintiff's request to reverse the district court's orders dismissing unjust enrichment and denying reconsideration.

Respectfully submitted,



William L. Stern

Attachments

cc: All Counsel

EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALEX KHASIN,

Plaintiff,

v.

R. C. BIGELOW, INC.,

Defendant.

Case No. 12-cv-02204-WHO

ORDER REGARDING DISPUTE OVER DISCOVERY OF PROFITS

Re: Dkt. No. 96

Plaintiff Alex Khasin alleges that defendant R.C. Bigelow Inc. made false health claims by promoting the presence of antioxidants in its tea products and claiming associated health benefits. The parties have filed a joint letter disputing Khasin's entitlement to discovery of Bigelow's profits and costs. Dkt. No. 96. Khasin argues that "[a]s long as a theory of recovery of unjust enrichment is present in the case, Plaintiff is allowed to seek some percentage of Defendant's net profits as a remedy for himself and the class." *Id.* at 3. Bigelow counters that its profits and costs are irrelevant because the proper measure of restitution in a food labeling case is the price premium attributable to the challenged label (the difference between the product as labeled and the product as received), not its profits. Bigelow is correct.

The law is clear in this District that "[t]he proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received, not the full purchase price or all profits." *Trazo v. Nestle USA, Inc.*, 12-cv-02272-PSG, 2015 WL 4196973, at *3 (N.D. Cal. July 10, 2015) (citations omitted); *see also Ivie v. Kraft Foods Global, Inc.*, 12-cv-02554-RMW, 2015 WL 183910, at *2 (N.D. Cal. Jan. 14, 2015) ("plaintiffs may only recover restitutionary damages, which would be the price premium attributable to the offending labels, and no more"); *Brazil v. Dole Packaged*

Foods, LLC, 12-cv-01831-LHK, 2014 WL 5794873, at *5 (N.D. Cal. Nov. 6, 2014) ("The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received."). As Judge Grewal of this District observed in rejecting the same argument made by Khasin's counsel in a different food labeling case:

> [Khasin] cites a number of cases to support his argument that he can pursue nonrestitutionary disgorgement under a quasi-contract theory. But none of those cases address that remedy in the context of a product mislabeling claim. The nonrestitutionary disgorgement remedy which [Khasin] seeks would require [Bigelow] "to surrender ... all profits earned as a result of [the alleged] unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice."

Trazo, 2015 WL 4196973, at *3 (citing *Kor. Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1145 (2003)). Khasin is not entitled to do so.

Khasin's request is DENIED. Bigelow states that its gross sales and the retail pricing of the products at issue have already been produced or are already available to Khasin. Dkt. No. 96 at 5. Khasin does not dispute this or explain why that information is not sufficient to present a damages theory based on the difference between the products as labeled and the products as received.

IT IS SO ORDERED.

Dated: August 12, 2015

WILLIAM H. ORRICK
United States District Judge