No. 14-17480

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAD BRAZIL,
Plaintiff-Appellant,

v.

DOLE PACKAGED FOODS, LLC,
Defendant-Appellee.

On Appeal from the United States District Court, Northern District of California,
The Honorable Lucy H. Koh, Judge Presiding
(Case No. C 12-01831 LHK)

APPELLEE'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Defendant/Petitioner Dole Packaged Foods, LLC notifies the Court that Petitioner's corporate parent entities are DPF Holdings, Inc. (Delaware, U.S.A.), Dole International Holdings, Inc. (Japan), and Itochu Corporation (Japan). No public corporation owns ten percent or more of its stock.

Dated: s/ William L. Stern
William L. Stern

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

RULES

OTHER AUTHORITIES

INTRODUCTION

Class counsel for Chad Brazil has filed 48 food misbranding class action cases in the Northern District of California alone.[1] Five are on appeal, all defeats.[2] These cases follow a pattern: None of the challenged products is contaminated, adulterated, short-weighted, or contains something different than what the labels promised. The wrong, instead, is a regulatory injury—the claimed violation of a rule or policy of the Food and Drug Administration (FDA).

In this case, the offending label says "All Natural Fruit," which appears on ten packaged fruit products. According to Mr. Brazil, this violates FDA's informal "natural" policy because the products contain citric acid and ascorbic acid, which are not allegedly "natural." Because of that regulatory crime, so the argument goes, everyone who bought these products since 2008 paid a premium for the words "All Natural Fruit," which Dole Packaged Foods, LLC (Dole) must return.

This appeal is different. Unlike the others, it is from both a merits and class certification ruling. Also, the district court considered Plaintiff's class certification evidence four times, so the decision to decertify was not lightly taken. And both

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[1] The Northern District has been deemed the "Food Court" as a result of these filings. *See* Paul M. Barrett, *California's Food Court: Where Lawyers Never Go Hungry*, Bloomberg Business, Aug. 22, 2013, *available at* http://www.bloomberg.com/bw/articles/2013-08-22/californias-food-court-where-lawyers-never-go-hungry. In fact, class counsel has expanded its claims beyond California, filing copycat cases in jurisdictions throughout the country. One of these copycat suits—*Kinney v. Dole Packaged Foods, LLC*, Case No. 14-5182-TLB (W.D. Ark.)—is an exact replica of Mr. Brazil's claims.

[2] *See Kane v. Chobani, LLC*, No. 14-15670 (appeal from order granting motion to dismiss); *Bishop v. 7-Eleven, Inc.*, No. 14-15986 (same); *Jones v. ConAgra Foods, Inc.*, No. 14-16327 (appeal from order denying class certification); *Bruton v. Gerber Prods. Co.*, No. 15-15174 (appeal from orders on motions to dismiss, denying motion to certify class, denying motion for partial summary judgment, and granting motion for summary judgment).

rulings happened after discovery closed, which means Plaintiff gave it his best shot and still fell short. There are no new facts or evidence if this case were to be remanded.

Mr. Brazil faces a daunting task. If the district court's summary judgment ruling was correct, he loses on the merits. That will dispose of the entire appeal, mooting the other issues. If he gets past that, he must show that the district court abused its discretion when, after close of discovery, it decertified the damages class that it had previously certified, and then re-abused its discretion by failing to grant Plaintiff's motion for reconsideration.

The Court should affirm for four reasons.

First, on summary judgment, there was no error. Plaintiff failed to adduce evidence that the products were not "natural." He also offered no classwide evidence that Dole's "All Natural Fruit" label was "likely to mislead" or classwide evidence of materiality. Affirming that merits ruling would end this appeal.

Second, in dismissing Plaintiff's unjust enrichment claim, there was no error. That claim duplicated Plaintiff's other claims and was for that reason not viable. Moreover, any error was harmless. After discovery closed, Mr. Brazil tried to reinstate that claim through a motion for reconsideration. But he presented no new facts or law, leaving the district court no choice but to deny his motion.

Third, the district court correctly dismissed Plaintiff's "illegal product" theory—the notion that proof of reliance is suspended by equating this regulatory infraction to trafficking in illegal substances or contraband. That argument has been rejected by every district court to have considered it, and for good reason.

Fourth, the district court correctly found that Plaintiff failed to present a viable damages model consistent with *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). There was no abuse of discretion in decertifying Mr. Brazil's Rule 23(b)(3) damages class. Plaintiff disagrees, and insists he can avoid *Comcast* by

relabeling his theory "restitution" or "unjust enrichment." He cannot. Finally, the class is not "ascertainable." Though not cited by the district court, this provides another, adequate ground to support the decertification order.

For all these reasons, the Court should affirm the judgment.

ISSUES PRESENTED

1. Did the district court correctly grant summary judgment on the merits given Plaintiff's failure to provide evidence of a violation of FDA's informal "natural" policy? Alternatively, may the Court affirm the judgment on other, adequate grounds, namely, that Plaintiff offered no classwide evidence that Dole's "All Natural Fruit" label was "likely to mislead," and also failed to offer classwide evidence of materiality or damages?

2. Did the district court correctly dismiss Plaintiff's claim for unjust enrichment on the ground that it duplicated his UCL, FAL, and CLRA claims? If not, was that harmless error given that Plaintiff moved for reconsideration after close of discovery and sought to reinstate that claim, but failed to present new facts or law?

3. Did the district court correctly dismiss Plaintiff's "illegal product" theory, which sought to suspend proof of reliance as part of his UCL "unlawful" claim?

4. Did the district court abuse its discretion in decertifying Plaintiff's Rule 23(b)(3) damages class after Plaintiff failed to present a viable damages model consistent with *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013)? Alternatively, may the Court affirm that ruling on other, adequate grounds, namely, that the class as defined is not "ascertainable"?

JURISDICTIONAL STATEMENT

Defendant agrees with Plaintiff's statement of jurisdiction.

STATEMENT OF THE CASE

A. Plaintiff's Complaint and the First Amended Complaint.

Plaintiff Chad Brazil ("Plaintiff") sued Defendant Dole Packaged Foods, LLC ("Dole" or "Defendant"), alleging a single violation of an FDA policy involving the "All Natural Fruit" statement on two of Dole's products based on the products' allegedly unnatural ingredients. (ER818, 822.) In his First Amended Complaint (FAC), Plaintiff expanded his claims to include eight FDA violations encompassing six products. (ER851-856.)

Plaintiff alleged that these infractions violate California's "Sherman Law" (ER 821), which he sought redress through eight state law claims and one federal claim: (i) California's unfair competition law (Cal. Bus. & Prof. Code § 17200) (UCL) as regards its "unlawful" prong; (ii) UCL's "unfair" prong; (iii) UCL's "fraudulent" prong; (iv) deceptive advertising under the False Advertising Law (Cal. Bus. & Prof. Code § 17500) (FAL); (v) untrue advertising; (vi) Consumer Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*) (CLRA); (vii) unjust enrichment; (viii) Song-Beverly Act (Cal. Civ. Code § 1790); and (ix) Magnuson-Moss Act (15 U.S.C. § 2301). (ER897-908.)

B. Dole's Motion to Dismiss the FAC and the District Court's Order.

The district court dismissed with prejudice Plaintiff's Song-Beverly Act, Magnuson-Moss Warranty Act, and unjust enrichment claims. (ER23-26.) It held that: (1) unjust enrichment was not a separate cause of action in California; and

that (2) the claim was entirely duplicative of his UCL, FAL, and CLRA claims. (ER25-26.)

C. Plaintiff's Second Amended Complaint.

Plaintiff filed a Second Amended Complaint (SAC). (ER912.) The district court dismissed with prejudice Plaintiff's website-based claims because Plaintiff did not allege he viewed or relied on the website. It also held that Plaintiff's "illegal product theory"—his claim that he need not prove actual reliance under the UCL's unlawful prong—"fails as a matter of law." (ER43 at 15-17.)

D. Plaintiff's Motion for Class Certification and the District Court's Orders in *Brazil I* and *Brazil II*.

Plaintiff moved for class certification. (ER195.) The district court granted in part and denied in part his motion on May 30, 2014. (ER 49 [*Brazil I*].) The court certified (i) a nationwide injunction class under Rule 23(b)(2), and (ii) a "damages" class, under Rule 23(b)(3). (ER83.)

In certifying the damages class, the court affirmed that under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013), Plaintiff must present a damages model consistent with his theory of liability. (ER73.) This was the price-premium attributable to the challenged "All Natural Fruit" statement. (ER74.) Plaintiff advanced three damages models, all based on his expert, Dr. Oral Capps. (*Id.*) The court rejected Plaintiff's "Full Refund" model because it assumed that consumers received "no benefit whatsoever" from the challenged products (ER75), and also rejected Plaintiff's "Price Premium" model because "Dr. Capps has no way of linking the price difference, if any, to the allegedly unlawful or deceptive label statements or controlling for other reasons why allegedly comparable products may have different prices." (*Id.*) However, the court accepted Plaintiff's

"Regression Model," because it could purportedly control for other factors impacting price to isolate the "the price premium attributable to Dole's use of the 'All Natural Fruit' label statements." (ER74.)

Dole moved for reconsideration. (CR145, 3-5.) The district court denied it, but noted that Dr. Capps gave "contradictory testimony" between the Dole case and another case brought by class counsel involving Twinings Tea, noted that Dole "raise[d] potentially legitimate concerns about [Plaintiff's] ability to prove damages," and invited Dole to move for decertification after close of discovery. (CR150, 6 [*Brazil II*].)

E. Discovery Closes, and Dole Moves for Decertification; the District Court's Order in *Brazil III*.

Plaintiff filed the operative Third Amended Complaint. (ER969 (TAC).) Fact discovery closed July 10, 2014 (CR82, 2), and expert discovery closed August 5, 2014. (CR162, 2.) Dr. Capps issued his final report. (ER361.)

Dole moved to decertify both classes. (CR171, 1.) The district court agreed that Dr. Capps' analysis was fatally flawed because it failed to control for other variables besides the "All Natural Fruit" statement affecting price. (ER102 [*Brazil III*].)[3] Because Dr. Capps could not measure the damages attributable to Dole's alleged mislabeling in accordance with *Comcast*, he could not meet Rule 23(b)(3)'s predominance requirement. (ER106.) The district court decertified Plaintiff's damages class, but allowed the injunctive relief class. (ER107, 109.)

[3] Dr. Capps issued nearly identical reports in all of class counsel's cases, including one on appeal in *Jones v. ConAgra Foods, Inc.*, No. 14-16327, in which a different judge in the Northern District (Breyer, J.) also rejected Dr. Capps' report and denied class certification.

F. Dole's Summary Judgment Motion and the District Court's Order.

The same day Dole moved for decertification, it also moved for summary judgment on Plaintiff's UCL, FAL, and CLRA claims. (ER339-351.) The district court granted Dole's motion, finding that Plaintiff failed to present sufficient evidence that Dole's "All Natural Fruit" statement was deceptive. (ER116-118.)

G. Plaintiff's Motion For Reconsideration and the District Court's Order in *Brazil IV*.

Plaintiff filed a motion for reconsideration as to (1) the district court's dismissal of Plaintiff's unjust enrichment claim in the FAC, and (2) *Brazil III*—the district court's decertification of Plaintiff's Rule 23(b)(3) damages class . (ER767.) The district court denied Plaintiff's motion. (ER125 [*Brazil IV*].)

With regard to unjust enrichment, the district court observed that Plaintiff's unjust enrichment claim was still duplicative of his UCL, FAL, and CLRA claims and were moot. (ER125.) Specifically, Plaintiff failed to show that, "in this particular case, the damages figures for restitution and unjust enrichment would be any different." (*Id.*) With regard to decertification, the district court found that Plaintiff's damages model was inconsistent with *Comcast*. (ER124.)

LEGAL STANDARD

The district court's order granting summary judgment is reviewed de novo, *Jones v. Blanas*, 393 F.3d 918, 926 (9th Cir. 2004), and so too is the district court's order dismissing Plaintiff's unjust enrichment claim. *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004). The district court's order decertifying the class is reviewed for abuse of discretion, *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 946 (9th Cir. 2011); *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510,

513 (9th Cir. 2013)), and so too is the district court's order denying Plaintiff's motion for reconsideration. *See Fiester v. Turner*, 783 F.2d 1474, 1476 (9th Cir. 1986); *Souza v. Estate of Bishop*, 821 F.2d 1332, 1334 (9th Cir. 1987).

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT.

All of Plaintiff's claims are based on the contention that the label phrase "All Natural Fruit" is false because citric acid and ascorbic acid are not "natural" within the meaning of FDA's informal "natural" policy. (ER118:1-4.) But Plaintiff had no evidence that the acids were not "natural," whereas Dole's unrebutted evidence showed that they were. Moreover, the district court correctly found that Plaintiff had no evidence "that the 'All Natural Fruit' label statement on the challenged Dole products was likely to mislead reasonable consumers." (ER115:18-20.)[4]

There was no error granting summary judgment. The Court should affirm for six reasons.

A. FDA's "Natural" Policy Does Not Carry the Force of Law.

The first reason to affirm is that FDA's "natural" policy is not a law that can be "borrowed." It is simply an informal guidance.

[4] The court also granted Dole's motion for summary judgment to the extent Plaintiff's claims were based on Dole's "All Natural Fruit" label being unlawful under the UCL. (ER121:10-122:10.) Plaintiff conceded that his unlawful claim also required a finding that Dole's label was misleading. (ER121:19-122:8.) Hence, his unlawful claim failed for the same reasons as his fraud claim. (*Id.*) Plaintiff does not appeal from that ruling.

FDA's "natural" policy is non-binding. Numerous courts, including in this Circuit, hold that it does not have the force of law. *Holk v. Snapple Beverage Corp*, 575 F.3d 329, 342 (3d Cir. 2009); *accord Barnes v. Campbell Soup Co*., No. C 12-05185 JSW, 2013 WL 5530017, at *8 (N.D. Cal. July 25, 2013) (FDA's "natural" policy is "non-binding guidance"); *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973. 979 (C.D. Cal. 2013) ("FDA's 'informal policy' regarding the definition of 'natural' does not establish a legal requirement") (citing *Ries v. Hornell Brewing Co.*, No. 10-1139–JF (PVT), 2010 WL 2943860, at *5 (N.D. Cal. July 23, 2010).

While a UCL "unlawful" claim may borrow the violation of an underlying law, a non-binding policy statement does not qualify. You cannot "violate" non-binding guidance. Nor does the Sherman Law qualify for "borrowing." It incorporates only "food labeling *regulations*" that FDA has "*adopted*." Cal. Health & Safety Code § 110100 (emphasis added). FDA's "natural" policy is neither a "regulation," nor was it "adopted." FDA itself regards it merely as an "advisory opinion" or guidance. *See* 21 C.F.R. § 10.85(d), (e), (j). It simply means that FDA will not object to a food label that meets its conditions.[5]

For this reason alone, this Court should affirm.

B. Plaintiff Presented No Evidence That The Products Violated FDA's Informal "Natural" Policy.

Even if FDA's "natural" policy is a "law" that could be violated, this Court should still affirm. Under FDA's "natural" policy, a food is considered "natural" if (i) nothing artificial or synthetic (including color additives regardless of source)

[5] *See* FDA, "What is the meaning of 'natural' on the label of food?," which can be found at http://www.fda.gov/aboutfda/transparency/basics/ucm214868.htm (last visited on May. 26, 2015).

has been included in, or has been added to, a food," (ii) "that would not normally be expected to be in the food." 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993); (ER975 ¶ 32). The district court correctly found that Plaintiff failed to prove this. (ER118-121.)

1. First Prong—Plaintiff Presented No Evidence To Contradict Dole's Supplier Certificates That Citric Acid and Ascorbic Acid Are Not "Artificial or Synthetic."

Dole produced certifications from three suppliers who attested that Dole's citric acid and ascorbic acid *are* "natural." (ER339-340.) Plaintiff failed to rebut these certifications. On appeal, he does not even mention them. Although Plaintiff's expert (Dr. Kurt Hong) opined that the two acids are not "natural," he never addressed the supplier certifications.[6] Nor did any other witness. Those certifications stood unrebutted.

Instead, Plaintiff relies on four FDA warning letters sent to other companies.[7] These letters simply list a series of alleged regulatory violations and ask those companies to take corrective action. (*See* ER766, 762, 751, 754.)

FDA warning letters are "informal" and "advisory." *Reid v. Johnson & Johnson*, 780 F.3d 952, 962 n.5 (9th Cir. 2015). According to FDA, they have no

[6] Dr. Hong incorrectly asserts that the *processing* of the ingredients render citric acid and ascorbic acid unnatural. (ER341:1-5.) But Dr. Hong is confusing FDA's natural policy (which has no "minimal processing" requirement) with USDA's, which does. (*Id.*)

[7] *See* ER766 (FDA letter to Alexia Foods); ER762 (FDA Letter to Shemshad Food Products); ER751 (FDA Letter to Oak Tree Farm Dairy); ER754 (FDA Letter to Hirzel Canning Company).

force of law and no probative value.[8] In *Holk*, the Third Circuit held that "isolated instances of enforcement" shown by FDA warning letters regarding the term "natural" were not entitled to weight. 579 F.3d at 341-42.

There is no mystery. Dole's expert, Dr. Montville, a Professor of Food Science at Rutgers University, explains that citric acid and ascorbic acid are typically produced through natural fermentation. (CR110 (Declaration of Thomas J. Montville) ¶ 5.) "The citric acid in this case is the same as that extracted from citrus fruits" and "[t]he ascorbic acid is the same as that found in dark green leafy vegetables and citrus fruits." (*Id.*) He concluded that they are "natural" within the meaning of FDA's policy. (*Id.*)

The district court correctly found that Plaintiff failed to prove that Dole's citric acid and ascorbic acid are not "natural."[9] This Court should affirm.

2. Second Prong—Plaintiff Presented No Evidence That Citric And Ascorbic Acid Are "Not Normally to Be Expected."

Likewise, Plaintiff had no evidence to prove the second prong, namely, that the ingredients were not "normally to be expected in the food." As the district court explained, that lapse was "not for want of opportunity." (ER118:23.) In responding to Dole's contention interrogatories, Plaintiff promised to submit the

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[8] *See* FDA Regulatory Procedures Manual, § 4-1-1, *available at* http://www.fda.gov.downloads/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176870.htm (last visited May 26, 2015) ("A Warning Letter is informal and advisory").

[9] Plaintiff's "separate" claim of falsity is also based on the same argument that the labels violate FDA's "natural" policy. (AOB54-55.) Hence, that claim fails too.

necessary facts in his expert reports (ER118:23-119:2) but never did. (ER119:2-5.)[10] In short, Mr. Brazil lost because he had no evidence.

On appeal, he does not deny that he offered no evidence of what consumers "normally … expected" as regards to citric and ascorbic acids. Instead, he argues that this second prong does not exist. (AOB50-51.)

That is patently false. Mr. Brazil admitted below that this prong was very much part of FDA's "natural" test: "Natural" means that "nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food *that would not normally be expected to be in the food*." (ER412, 3:22-25 (emphasis added).)

Plain English also says he is wrong. The last clause ("that would not normally be expected to be in the food") modifies the first phrase ("nothing artificial or synthetic"). By Plaintiff's reading, these words would be surplusage, a construction to be avoided. *United States v. Vidal*, 504 F.3d 1072, 1083 (9th Cir. 2007).

Finally, Plaintiff's authorities do not support him. He points to the "FDA Basics" page on FDA's website, which provides a three sentence Q&A regarding "natural" labeling:

> What is the meaning of 'natural' on the label of food? From a food science perspective, it is difficult to define a food product that is 'natural' because the food has probably been processed and is no longer the product of the earth. That said, FDA has not developed a definition for use of the term natural or its derivatives. However, the agency has not objected to the use of the term if the

[10] *See* ER119:2-4; CR180-6 (Dr. Hong's report failed to "opine on whether citric acid and ascorbic acid 'would not normally be expected to be in' the challenged Dole products").

> food does not contain added color, artificial flavors, or synthetic substances.

(AOB48; ER757-758.) This is simply an overview. There is no indication that this informal "Q&A" was intended to supplant the FDA's "natural" policy, which is set forth in the Federal Register.

Once again, Plaintiff cites the FDA warning letters (AOB48) but, as noted, those are non-binding, they were directed to different manufacturers and different products, and have no force of law. (ER119:12-24.) The district court agreed, and also found that they failed to address the "not normally to be expected" prong. (*Id*.)

In contrast to the absence of evidence from Plaintiff, Dole's consumer survey found that most consumers *expected* the products to contain citric acid and ascorbic acid. And by a lopsided margin, 87% of consumer had no expectation that the citric and ascorbic acids would be "natural." (ER266 (Declaration of Kent Van Liere) ¶ 38.)

C. "All Natural Fruit" Means The *Fruit* Is "Natural."

Even if Plaintiff had evidence to support his claim, the Court should still affirm. A literal interpretation of the phrase "All Natural Fruit" is that the *fruit* is "all natural," not that the entire product is natural. (ER339:17-22.) As such, the literal meaning is true. (*Id*.)

The district court agreed. While it held that Mr. Brazil's non-literal interpretation was "not necessarily unreasonable" (ER118:1-13), it also ruled that one person's testimonial is just anecdote. It is insufficient to stave off summary judgment in a class action case. (*Id*.) That was correct. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008) ("a few isolated examples of actual deception are insufficient"); *Heighley v. J.C. Penney Life Ins.*

Co., 257 F. Supp. 2d 1241, 1260 (C.D. Cal. 2003) ("anecdotal evidence alone is insufficient to prove that the public is likely to be misled") (citation omitterd); *Brockey v. Moore*, 107 Cal. App. 4th 86, 99 (2003); *S. Bay Chevrolet v. Gen. Motors Acceptance Corp*., 72 Cal. App. 4th 861, 896 (1999); *see also William H. Morris Co. v. Group W. Inc.*, 66 F.3d 255, 258 (9th Cir. 1995); *Churchill Vill., LLC v. Gen. Elec. Co*., 169 F. Supp. 2d 1119, 1131 (N.D. Cal. 2000); *Haskell v. Time, Inc*., 965 F. Supp. 1398, 1407 (E.D. Cal. 1997).

On appeal, Plaintiff pivots. He now says that no evidence was necessary to prove deception because the phrase "All Natural Fruit" is "deceptive as a matter of law." (AOB47.)[11] But he did not raise this argument below and cannot raise it now. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Moreover, it contradicts what Mr. Brazil told the district court, that deception "is a textbook example of a fact dispute not suitable for summary judgment." (ER414:3-4.) Having told the court that deception is factual and losing, Mr. Brazil should not be allowed to claim on appeal that it is legal.

Plaintiff's flip-flop aside, his contention makes no sense. He relies on the district court's statement that his subjective meaning is "not necessarily unreasonable" (AOB47), but one man's "not unreasonable" meaning should not be mistaken for evidence that most consumers would share Mr. Brazil's non-literal interpretation.

If Mr. Brazil's personal musings teach us anything, it is that the phrase "All Natural Fruit" may have different meanings. (ER4-5.) FDA thought so, for it

[11] Plaintiff also argues that the "jury's unique competence in applying the reasonable man standard is thought to ordinarily preclude summary judgment." (AOB44.) But his cited case, *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858 (9th Cir. 2010) involved the reasonableness of an airline's conduct in the context of international flights governed by international treaties. It had nothing to do with the "reasonable man" standard under the UCL. *Id.* at 868.

declined to adopt a fixed meaning of the term "natural" in 1993 because it found that consumers, food industry experts, and scientists espoused divergent views about the term when used to describe food products. 58 Fed. Reg. at 2407. A phrase with multiple meanings cannot be "deceptive as a matter of law."

In the end, Plaintiff's evidence is nothing more than his conclusory statement that "consumers were misled—considering that the products contained the synthetic ingredients citric acid and ascorbic acid." (AOB47.) He has no proof.[12]

Accordingly, Plaintiff has failed to show that the district court erred by failing to find that the labels were deceptive per se.

D. Plaintiff Presented No Evidence of Classwide "Deception."

In its motion below, Dole argued that the district court could enter summary judgment based on Plaintiff's lack of classwide evidence of damages. (ER349-50; *see also* Section IV). The district court did not reach this, but it provides an alternative ground for affirming. *See, e.g., Wood v. City of San Diego*, 678 F.3d

[12] Nor can Plaintiff's authorities save him. The plaintiff in *Brockey v. Moore*, 107 Cal. App. 4th 86, 99 (2003) offered evidence of actual consumer deception, along with expert testimony. In *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1361 (2003), the court found some of defendant's statements actionable where defendant simply disagreed with plaintiffs' interpretations. And in *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 682-83 (2006), *as modified on denial of reh'g* (Jan. 31, 2006), the statement "Made in the U.S.A." was deceptive on its face. By contrast, Plaintiff's claim here is based on FDA's "natural" policy, which by its very expression depends on evidence of consumer perception. Finally, *Williams v. Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008) involved a "bait-and-switch" in which the front label represented that "fruit juice snacks" contained actual fruit from the depicted images of fruit, yet it did not. *Id.* Notably, this Court held that deception required factual development and was not amenable to adjudication on the pleadings. *Id.*

1075, 1086 (9th Cir. 2012) ("We can affirm the district court on any basis supported by the record.").

Plaintiff does not dispute that in order to prevail on his UCL, FAL, and CLRA claims, he must prove that a significant portion of reasonable consumers could be misled by Dole's "All Natural Fruit" label statement. (*See* AOB45; ER117:13-25 (citing *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 506-08 (2003).) Instead, he argues that the district court ignored his "scientific literature [and] anecdotal evidence." (AOB44.) He is wrong.

First, Plaintiff protests that the district court required Plaintiff to offer a consumer survey or similar extrinsic evidence. (*See* AOB44-45.) It did no such thing. Rather, it required him to adduce evidence that could pass muster under *Clemens*, 534 F.3d at 1026. (ER120.)

Second, the district court properly found that Plaintiff's evidence failed under *Clemens*. In fact, Plaintiff's only evidence of deception was his own deposition testimony. (ER117:26-118:6.) No case holds that a named plaintiff's testimony alone is enough to prove that an entire class was deceived.[13]

Plaintiff contends that he had other evidence. But if he means FDA's natural policy and the FDA warning letters, those say nothing about *Dole*'s label statement.[14]

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[13] Plaintiff's reliance on *Guido v. L'Oreal, USA, Inc.*, Nos. CV 11-1067 CAS (JCx), CV 11-5465 CAS (JCx), 2013 U.S. Dist. LEXIS 94031, at *31 (C.D. Cal. July 1, 2013), is misplaced. There, the court was discussing the standard for deception under *New York* law, and stated: "As with California's UCL, the 'standard for whether an act or practice is misleading is an objective one, requiring a showing that a reasonable consumer would have been misled by the defendant's conduct.'" *Id.* (citation omitted).

[14] Plaintiff argues that FDA's natural policy is akin to "scientific literature" acceptable to show the falsity of advertising, and cites to *Consumer Advocates*, 113

Plaintiff's citation to *Rubio v. Capital One Bank*, 613 F.3d 1195, 1200-02 (9th Cir. 2010) undermines his argument. (*See* AOB49-50.) In *Rubio*, "evidence on how a reasonable consumer will understand the term 'fixed rate'" was based on consumer testing conducted by a research firm. 613 F.3d at 1200-02; (ER119:25-120:6.) Mr. Brazil offered nothing like that.

Third, although Dole was not obliged to adduce any evidence, its own consumer survey refutes a finding of deception. (ER262-264.) Plaintiff attacks Dr. Van Liere's survey (AOB51-54), but challenging the evidence of one's opponent is not the same as having evidence of one's own.

Plaintiff had no evidence of classwide deception. This Court could affirm the district court's summary judgment ruling on that basis.

E. Plaintiff Presented No Evidence of Classwide "Materiality."

Likewise, Plaintiff had no evidence of classwide materiality. *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1181-82 (9th Cir. 2003) (granting summary judgment for defendant on UCL claim because alleged misrepresentations were immaterial). Indeed, he does not even mention materiality in his appeal. Moreover, as with deception, Dole's own consumer survey refutes materiality. (*See* ER262-264.)

F. Plaintiff Presented No Evidence of Classwide Damages.

As we will explain below, the district court properly decertified a damages class. (*See* Section IV.) For those same reasons, this Court could affirm the

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Cal. App. 4th at 1361, in support. (AOB50.) *Consumer Advocates*, however, says nothing about FDA policies qualifying as "scientific literature."

summary judgment ruling on the alternative ground that Plaintiff lacks "substantial evidence" supporting his proposed damages figure.

The district court's decision to grant summary judgment was correct. If this Court were to agree, it would dispose of this entire appeal. Plaintiff's other assignments of error all go to damages or to class certification, but those would be moot if the district court correctly found against Mr. Brazil on the merits.

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S UNJUST ENRICHMENT CLAIM.

A. The District Court Properly Dismissed Plaintiff's Unjust Enrichment Claim At The Pleading Stage.

One would think that a plaintiff who lost on the merits would start his appeal there. Not Mr. Brazil. Merits come last. (*See* AOB44-55.)

Instead, Plaintiff's opening argument is that the district court should not have dismissed his "unjust enrichment" claim, and he rhapsodizes about the enhanced damages (disgorgement) that he was denied as a result. (AOB13-25.) He is wrong.

The district court denied that claim because it was unclear if unjust enrichment was a separate cause of action (ER25-26), and, even if it was, it was duplicative of his UCL, FAL, and CLRA claims. (ER26.) Both were correct.

First, the district court was correct that "'[un]just enrichment is not a cause of action, just a restitution claim.'" (ER25 (quoting *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1307 (2011).) As this Court recently held in *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753, 762 (9th Cir. 2015), "in California, there is not a standalone cause of action for 'unjust enrichment,' which is synonymous with 'restitution.'" *Id.* (citations omitted).) Thus, the first part of the court's ruling was correct.

Second, the district court was also correct that Plaintiff's unjust enrichment claim was duplicative of his legal remedies under the UCL, FAL, and CLRA. All seek the same remedy: repayment of the full purchase price. (*Compare* ER898 ¶ 217) ("disgorge Defendants' ill-gotten gains and to restore to any Class Member any money paid for the Misbranded Food Products") *with* ER906 ¶ 276 (disgorgement of "ill-gotten benefits" and repayment of "all monies paid to Defendants for products at issue" for unjust enrichment claim).)

Equity requires dismissal of this duplicative legal remedy. *See Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996) ("Under California [] law, unjust enrichment is an action in quasi-contract, which does not lie when an enforceable, binding agreement exists defining the rights of the parties."); *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 260 (2011), *as modified* (Dec. 28, 2011) (affirming dismissal of unjust enrichment claim because "plaintiffs' remedies at law are adequate (counts alleged under the CLRA, the UCL, and common law fraud), [so] a claim for restitution, alleging that [defendant] has been unjustly enriched by its fraud, is unnecessary. This conclusion follows from the general principle of equity that equitable relief (such as restitution) will not be given when the plaintiff's remedies at law are adequate.").

Plaintiff disagrees, and says he should have been allowed to plead unjust enrichment as an alternative theory. (*See* AOB15.) But unjust enrichment was no *alternative* theory; rather, it sought the *same* remedy based on the *same* facts as his UCL and other claims.

In re Ford Tailgate Litigation, No. 11-CV-2953-RS, 2014 WL 1007066 (N.D. Cal. Mar. 12, 2014), is instructive. There, the court dismissed a duplicative unjust enrichment claim, stating that, "Plaintiffs are, of course, entitled to plead alternative claims." *Id.* at *5. "However, 'where the unjust enrichment claim relies upon the same factual predicates as a plaintiff's legal causes of action, it is

not a true alternative theory of relief but rather is duplicative of those legal causes of action.'" *Id.* (citations omitted); *see also In re Apple & AT & T iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d 1070, 1077 (N.D. Cal. 2011) ("plaintiffs cannot assert unjust enrichment claims that are merely duplicative of statutory or tort claims").

Astiana is not to the contrary. There, the unjust enrichment claim could have been construed as a separate action for quasi-contract. *Astiana*, 783 F.3d at 762. *Astiana* did not address whether an unjust enrichment claim based on the same facts and requesting the same remedy as UCL, FAL, and CLRA claims, as here, is an "alternative" theory.

The district court was correct. Plaintiff's unjust enrichment claim duplicates his UCL, FAL, and CLRA claims.

B. Any Error Was Harmless, Because Plaintiff Had a Second Chance to Reinstate His Claim Through Reconsideration, Yet He Presented No Evidence of Unjust Enrichment.

After discovery closed, Plaintiff filed a motion to reconsider the dismissal of his unjust enrichment claim.[15] (ER767.) He argued that the claim should be revived because the law in California had changed, and now recognizes unjust enrichment as a separate cause of action. (ER773.) Plaintiff also argued that unjust enrichment would provide a broader "nonrestitutionary" disgorgement remedy than would be permitted under his UCL claims, and that this remedy would be cumulative to those claims. (ER 773-74.)

All of that is academic. To win reinstatement of his unjust enrichment claim, it was incumbent on Mr. Brazil to adduce "new material facts or a change in

[15] Plaintiff also moved for reconsideration regarding the district court's decertification order, which is addressed in Section III below.

law" to justify granting that motion. N.D. Cal. Civil L.R. 7-9(a). He did not. Despite two years of discovery, "Brazil has made no showing that … the damages figures for restitution and unjust enrichment would be any different." (ER125.)

Plaintiff's motion for reconsideration and its denial for failure to adduce any new facts means that any error is harmless. "[I]n order to reverse, [the court] must find that the error affected the substantial rights of the appellant." *Obrey v. Johnson*, 400 F.3d 691, 699 (9th Cir. 2005). Put differently, the harmless error rule says that a reviewing court should "ignore errors that do not affect the essential fairness of the trial." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984); *see also* 28 U.S.C. § 2111; Fed. R. Civ. P. 61 (codifying harmless error rule.)

Mr. Brazil had a second chance to revise his unjust enrichment claim. He failed, but not because of any error by the district court. His injury was self-inflicted; he failed to offer up facts to prove his unjust enrichment claim or to show that it did not duplicate his other claims.

Even if California law now recognized unjust enrichment as a standalone claim, that did not solve Plaintiff's duplication problem. As the district court explained, "[i]t is [only] when 'a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss' that unjust enrichment would not be duplicative of restitution." (ER125 (citing *Meister v. Mensinger*, 230 Cal. App. 4th 381, 398 (2014)).). "In this case, by contrast, Brazil alleges that he suffered a loss by overpaying for the challenged Dole products as a result of their 'All Natural Fruit' label statement." (*Id.*) Because Plaintiff's loss was identical to Defendant's gain, the court held that Plaintiff "made no showing that, *in this particular case*, that the damages figures

for restitution and unjust enrichment would be any different." (*Id.* (emphasis added).)[16]

The district court is not alone in this. Other district courts handling similar food misbranding cases brought by the same class counsel rejected the same argument. *See Leonhart v. Nature's Path Foods, Inc.*, No. 13-CV-00492-BLF, 2014 WL 6657809, at *7 (N.D. Cal. Nov. 21, 2014) (Freeman, J.); *Ivie v. Kraft Foods Global, Inc.*, No. C-12-02554-RMW, 2015 WL 183910, at *1-2 (N.D. Cal. Jan. 14, 2015) (Whyte, J.).

Plaintiff disagrees, insisting that unjust enrichment does not duplicate because he could get cumulative recovery (AOB15-16) and because it affords him a different, disgorgement measure. (AOB16-21.) But as to the former, Plaintiff is asking for double recovery—the money he lost in purchasing Dole fruit products (via California's consumer protection statutes) *plus* the money Dole gained (via his unjust enrichment theory).[17] That violates *Comcast*, as it fails to "measure only those damages attributable to [his] theory [of liability]." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). It also violates principles of restitution. The Restatement precludes liability for restitution to prevent unjust enrichment if it would result in a "windfall to the claimant, or would otherwise be inequitable in a

[16] Notably, discovery was closed when Plaintiff filed for reconsideration. (CR82, 2.) Plaintiff thus had all the evidence he needed to prove his unjust enrichment claim was not duplicative, but he failed to present it to the district court. To the extent he now attempts to present new evidence suggesting his claim was not duplicative, he has waived such arguments. *See Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011) ("we will not reframe an appeal to review what would be in effect a different case than the one decided by the district court.").

[17] In fact, Plaintiff appears to argue that he is entitled to recovery four times over—once for each of his UCL, FAL, and CLRA claims, and then unjust enrichment claims based on the same exact facts and circumstances.

particular case." Restatement (Third) of Restitution and Unjust Enrichment § 44(3)(b) (2011).[18]

As for disgorgement, Plaintiff never sought this measure under his unjust enrichment claim. Instead, he sought "restitution to Plaintiff and the Class of all monies *paid* to Defendants for the products at issue." (ER 906 (¶ 276) (emphasis added).) This theory was not in his complaint and, as such, reconsideration is not available to fix a litigant's own oversight. *See, e.g.*, *Ivie*, 2015 WL 183910, at *2 (denying reconsideration of dismissal of plaintiff's unjust enrichment claim, in part, because plaintiff's first amended complaint requested only restitution as a remedy for unjust enrichment—it did not include a claim for disgorgement).

Plaintiff's disgorgement measure also flunks *Comcast*. He seeks disgorgement of all profits obtained by Dole, regardless of whether the profits are attributable to the allegedly misleadingly "All Natural Fruit" statement. (*See* AOB22 (asserting that the remedy for unjust enrichment includes "Dole's profits for its misbranded product sales).)[19] Disgorgement would also violate the UCL.

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[18] Plaintiff's authority does not counsel otherwise. Plaintiff cites relevant statutory provisions noting the availability of cumulative remedies (AOB15 (citing Cal. Bus. & Prof. Code §§ 17205, 17534.5, 1752) but none of these statutes support double-recovery here. Nor does the authority on which he relies. (AOB15-16.) These cases merely reiterate the availability of cumulative remedies under California's consumer protection statues. *See, e.g.*, *Rose v. Bank of Am.*, N.A., 57 Cal. 4th 390, 398-99 (2013) (remedies under the UCL are cumulative to other laws), *cert. denied*, 134 S. Ct. 2870 (2014); *Blue Cross of Cal., Inc. v. Super. Ct.*, 180 Cal. App. 4th 138, 1256-57 (2009) (same), *as modified on denial of reh'g* (Jan. 12, 2010); *Bescos v. Bank of Am.*, 105 Cal. App. 4th 378, 387-88 (2003); *Thomas v. Imbriolo*, No. A130517, 2012 WL 1427360, at *11 (Cal. Ct. App. Apr. 25, 2012) (awarding restitution under the UCL and compensatory damages under the CLRA). *Thomas*, cited at AOB16, is an unpublished case and should not have been cited.

[19] To the extent Plaintiff seeks disgorgement of those profits only attributable to the alleged overcharge based on Dole's "All Natural Fruit" labels,

See Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1147-48 (2003) (UCL monetary relief is limited to "'restor[ing] to any person in interest' any money or property acquired through unfair practices."). It also violates the Restatement. *Cf.* Restatement, *supra*, § 44 cmt. a (unjust enrichment unavailable if "its effect would be inconsistent with other rules that define the defendant's liability or the claimant's remedies.").[20]

For these reasons, this Court should affirm the district court's dismissal of Plaintiff's unjust enrichment claim, as well as the denial of his motion for leave to file a motion for reconsideration.

III. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S "ILLEGAL PRODUCT" THEORY.

Plaintiff next assigns error to the district court's rejection of his "illegal product" theory. (AOB26-33.) Specifically, the district court dismissed the claims

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rather than all of Dole's profits from selling the fruit products, he fails to show how this calculation would differ from measuring the price premium based on the challenged statements. Plaintiff's conclusory statement that "[t]he loss suffered by Plaintiff (either refund of the purchase price or the price premium) would likely be different than the amount of Dole's profits generated from sales to wholesalers" (AOB21), is insufficient to show otherwise. Nor did Plaintiff present this argument to the district court. He cannot raise new arguments on appeal. *See Baccei*, 632 F.3d at 1149.

[20] Plaintiff's authorities at pages 16-17 are inapposite. Both *American Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451, 1458 (2014), *as modified* (May 27, 2014) and *Meister v. Mensinger*, 230 Cal. App. 4th 381 (2014), are breach of fiduciary cases. Their holdings do not apply to Plaintiff's consumer class action claims. *See Ivie*, 2015 WL 183910, at *2 ("There is no support in the cases cited by plaintiff [*Idanta* and *Meister*] for awarding the full purchase price, or any amount greater than the profit attributable to the mislabeling."). Plaintiff fails to cite a single consumer class action decision demonstrating that nonrestitutionary disgorgement would be appropriate in this context. (*See* AOB18-19 (citing cases).)

in Plaintiff's SAC that were grounded on statements made only on Dole's website, which Plaintiff never saw. (ER48.)[21] In doing so, the court held that Plaintiff's "illegal product theory"—his claim that, because he purchased "illegal" products, he need not prove actual reliance to sustain a claim under the UCL's unlawful prong—failed as a matter of law. (ER43.)

There was no error. The Court should uphold the dismissal of Plaintiff's "illegal products" theory.

The Court might wonder: why does this theory matter? It matters because Plaintiff has shown by this appeal that he has no evidence that anyone was deceived by, let alone relied upon, the label statement "All Natural Fruit." So, he is searching for a theory that, on remand, would allow him to sue—without having to prove deception or reliance—over alleged regulatory infractions that few consumers even saw and even fewer cared about. (*See* AOB28-33.)

There is no short-cut to proof. The California Supreme Court has confirmed that where a plaintiff alleges misrepresentations on product labels, as here, actual reliance is required under all prongs of the UCL. *See Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 326-27 (2011). This is because Proposition 64 imposed the requirement that plaintiffs must show loss of money or property *as a result of* the disputed business practice. Cal. Bus. Prof. Code § 17204 (emphasis added).[22] In *Kwikset*, plaintiffs claimed the labeling statement "Made in the U.S.A." was false

[21] You can't rely on something you didn't see. *See Rice*, 330 F.3d at 1181-82 (product statement that plaintiff did not see until after purchase cannot be material). Mr. Brazil may as well sue Dole over a puddle in which he didn't slip and fall.

[22] Indeed, Proposition 64 was enacted specifically to prohibit cases like Plaintiff's by preventing suits filed on behalf of "clients who have not … viewed the defendant's advertising…" *Kwikset*, 51 Cal. 4th at 321 (citing *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal. 4th 223, 228 (2006) (quoting Prop. 64, § 1 (b)(3))).

and misleading under all three prongs of the UCL, including the "unlawful" prong. *Kwikset*, 51 Cal. 4th at 317. Rejecting the same argument that Plaintiff asserts here, the court held that "when, as here, the predicate unlawfulness is misrepresentation," the actual reliance requirement "applies equally to the 'unlawful' prong of the UCL." *Id.* at 327 n.9 (citation omitted).[23]

In *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777 (9th Cir. 2012), this Court agreed that reliance is necessary to show causation where, as here, the claim is based on a misrepresentation. *Id.* at 793 (finding that plaintiffs did not allege reliance on a rewards program, and "[g]iven the absence of an alleged causal connection between the alleged misrepresentations and the plaintiffs' injuries, the district court properly dismissed the UCL claim"); *see also In re Actimmune Mkt. Litig.*, No. C 08-02376 MHP, 2010 U.S. Dist. LEXIS 90480, at *23 (N.D. Cal. Sept. 1, 2010) ("Establishing that a defendant violated a law only accomplishes half of a plaintiff's burden in a UCL unlawful prong action"), *aff'd*, 464 F. App'x 651 (9th Cir. 2011).[24]

Plaintiff disagrees, citing *In re Steroid Hormone Product Cases*, 181 Cal. App. 4th 145 (2010), and *Medrazo v. Honda of N. Hollywood*, 205 Cal. App. 4th 1 (2012). Those cases only show how far afield Plaintiff has strayed.

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[23] *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), does not hold otherwise. That case did not involve unlawful prong claims. In finding that actual reliance is required for UCL fraud claims, the court noted, "[t]here are doubtless many types of unfair business practices in which the concept of reliance … has no application." *Id.* at 325 n.17. *Kwikset* clarified that *Tobacco II*'s reliance requirement applies equally to unlawful prong claims based on misrepresentations.

[24] The court in *Actimmune* explained that if plaintiffs could allege an FDCA or Sherman Law violation, they would then have to show "that they were injured 'as a result of' defendants' law-violating conduct [which] places the burden on plaintiffs to establish that they *actually relied* upon the representations." 2010 U.S. Dist. LEXIS 90480, at *23 (emphasis added).

Steroid Hormone involved a product that contained undisclosed androstenediol, a "Schedule III controlled substance," which is illegal to possess without a prescription. Few would argue against the proposition that slipping an illegal drug undisclosed into a nutrition supplement is material. To date, no court in any of class counsel's food misbranding adventures has accepted Mr. Brazil's analogy to *Steroid Hormone*. *Cf. Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1131 (N.D. Cal. 2014); *Gitson v. Trader Joe's Co.*, No. 13-cv-01333-WHO, 2013 WL 5513711, at *6 (N.D. Cal. Oct. 4, 2013); *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 WL 2702726, at *18 (N.D. Cal. June 13, 2014).

As for *Medrazo*, the plaintiff in that case sued under the UCL "unlawful" prong after a motorcycle dealership charged her fees that were not disclosed on the required "hanger tag." The court found that the plaintiff lost money because she paid fees that were illegally exacted—outside the contract.[25] Moreover, *Medrazo* addressed what *absent class members* must prove; it did not address a named plaintiff's proof. In fact, this Court in *Stearns v. Ticketmaster Corp.* recognized that "California law had been changed by the voters so that a person who sought to be a class representative did have to show some additional factors as to himself, including injury in fact and causation." 655 F.3d 1013, 1020 (9th Cir. 2011).[26]

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[25] Plaintiff also cites another adulterated food case: *United States v. Gonzalez-Alvarez*, 277 F.3d 73, 77-78 (1st Cir. 2002). There, the defendant sold a product—milk—that was physically contaminated. *Id.* at 76. Moreover, *Gonzalez-Alvarez* is a First Circuit case that involved federal criminal laws; not claims under the UCL.

[26] Plaintiff's reliance on *Gutierrez v. Wells Fargo Bank, NA*, 589 F. App'x 824, 827 (9th Cir. 2014) is misplaced for the same reason. There, the court held that proof of deception, reliance and injury is unnecessary for *non-named class members*. *Id.* *Galope v. Deutsche Bank National Trust Co.*, 566 F. App'x 552 (9th Cir. 2014), is similarly unhelpful. *Galope* involved claims regarding loan terms, and the court did not address the reliance requirement at all. And in *Maya v.*

These cases bear little resemblance to the case at hand. Mr. Brazil was not charged a hidden fee, nor was he unwittingly sold a product with an undisclosed illegal substance. Those are the kinds of injuries that would exist independent of Dole's "All Natural Fruit" representations.[27] Here, there is no injury apart from the alleged regulatory infraction.

Plaintiff also argues that Proposition 64 does not apply to him because his "illegal product" theory is not grounded in fraud. (AOB29.) But as the district court found, the gravamen of his claims is that Dole's labeling is *deception*. (ER42:25-26.) And Mr. Brazil had to admit that even his "unlawful" claim required a finding of deception. (ER121:19-122:8.) Finally, Mr. Brazil is impeached by the SAC, which asserted that, "[u]nder both the Sherman Law and FDCA section 403(a), food is 'misbranded' if 'its labeling is false or misleading in any particular,'" and "[m]isbranding reaches not only false claims, but also those claims that might be technically true, but still misleading." (ER915 ¶¶ 9-10.) The SAC repeatedly acknowledges that the alleged "unlawfulness" is based entirely on consumer deception. (*See, e.g.*, ER916 (California and federal laws require that

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Centex Corp., the plaintiff's claims were not under the UCL, FAL, or CLRA. 658 F.3d 1060, 1065-66 (9th Cir. 2011). Finally, in *Chavez v. Blue Sky Natural Beverage Co.*, 340 F. App'x 359, 361 (9th Cir. 2009), the plaintiff ***relied*** on the defendant's misrepresentations that the defendant's soda was "made in New Mexico" when it was, in fact, made in California.

[27] In *Gitson*, 2013 WL 5513711, at *6, the plaintiffs relied on *In re Steroid Hormone*, for the proposition that "the reasonable consumer standard doesn't apply when the product at issue is unlawful to sell or possess." The district court disagreed, reasoning that "*In re Steroid Hormone Prod.* explicitly applied the reasonable person standard and found that it had been satisfied because a reasonable person would not knowingly purchase a Schedule III controlled substance, which is illegal to possess without a prescription. *That is a far cry from this case.* The Court will not presume that a reasonable person would not have purchased the products at issue had the person known of the alleged mislabeling." *Id.* (internal citation omitted; emphasis added.)

"the label must meet certain legal requirements that help consumers make informed choices and ensure that they are not misled and that label claims are truthful, accurate, and backed by scientific evidence").) In the end, Plaintiff is impeached by his allegations.[28]

District courts in other food misbranding cases have uniformly rejected Plaintiff's "illegal product" theory.[29] As Judge Conti put it: "Ignoring these basic legal rules would invite lawsuits by all manner of plaintiffs who could simply troll grocery stores and the Internet looking for any food product that might form the

[28] Plaintiff states in a footnote that he was "justifiably unaware that the misbranded food products he purchased were misbranded and illegal to sell. Dole was not." (AOB31 n.4.) To the extent Plaintiff is trying to argue that Dole's failure to disclose the fact that the products were allegedly "misbranded" and thus "illegal," the district court held that such an omission claim failed. (ER45:17-46:19); *see Kane v. Chobani*, No. 12-cv-02425, 2013 WL 52892535, at *9 n.6 (N.D. Cal. Sept. 19, 2013) ("Plaintiffs have not alleged that Defendant had a duty to disclose or identified the basis for this duty."); *see also Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1143 (9th Cir. 2012) (manufacturer's duty to disclose only triggered when there is an unreasonable safety hazard).

[29] *See Bruton v. Gerber Prods Co.*, No. 12-CV-02412-LHK, 2014 WL 172111, at *9 (N.D. Cal. Jan. 15, 2014); *Pardini v. Unilever U.S., Inc.*, 961 F. Supp. 2d 1048, 1059-60 (N.D. Cal. 2013); *Figy v. Amy's Kitchen, Inc.*, No. CV 13-03816 SI, 2013 WL 6169503, at *13 (N.D. Cal. Nov. 25, 2013; *Leonhart*, 2014 WL 6657809, at *4; *Kane*, 2013 WL 5289253, at *9-10; *Maxwell v. Unilever U.S., Inc.*, No. 5:12-CV-01736-EJD, 2014 WL 4275712, at *7-8 (N.D. Cal. Aug. 28, 2014); *Swearingen v. Amazon Preservation Partners, Inc.*, No. 13-cv-04402-WHO, 2014 WL 1100944, at *2-3 (N.D. Cal. Mar. 18, 2014); *Gitson*, 2013 WL 5513711, at *6; *Jones*, 2014 WL 2702726, at *18; *Pratt v. Whole Foods Mkt. Cal., Inc.*, No. 5:12-CV-05652-EJD, 2014 WL 1324288, at *8 (N.D. Cal. Mar. 31, 2014); *Victor v. R.C. Bigelow, Inc.*, No. 13-cv-02976-WHO, 2014 WL 1028881, at *7 (N.D. Cal. Mar. 14, 2014); *De Keczer v. Tetley USA, Inc.*, No. 5:12-CV-02409-EJD, 2014 WL 4288547, at *8-9 (N.D. Cal. Aug. 28, 2014); *Thomas v. Costco Wholesale Corp.*, No. 5:12-CV-02908-EJD, 2014 WL 1323192, at *6-7 (N.D. Cal. Mar. 31, 2014); *Bishop v. 7-Eleven, Inc.*, 37 F. Supp. 3d 1058, 1066-67 (N.D. Cal. 2014). *Bishop* is currently on appeal before this Court. *See Bishop v. 7-Eleven, Inc.*, No. 14-15986 (filed May 19, 2014).

basis of a class-action lawsuit. Surely that is not the point of these consumer protection laws." *Wilson v. Frito-Lay N. Am., Inc.*, 961 F. Supp. 2d 1134, 1143-44 (N.D. Cal. 2013). Little did Judge Conti know that class counsel brought these suits in precisely this way, by trolling grocery stores and the Internet looking for regulatory infractions.

Plaintiff's "illegal product" theory fails as a matter of law. The Court should affirm the district court's ruling.

IV. THE DISTRICT COURT PROPERLY DECERTIFIED PLAINTIFF'S 23(B)(3) DAMAGES CLASS.

The district court weighed Plaintiff's class certification evidence four times. Initially, it certified a damages class. But after discovery closed, the flaws in Dr. Capps' analysis were fully exposed, and the district court decertified Plaintiff's Rule 23(b)(3) "damage" class. That ruling was correct.

This Court should affirm. Alternatively, it should affirm the ruling on the ground that the damages class is not "ascertainable."

A. The District Court Properly Granted Dole's Motion to Decertify the Rule 23(b)(3) Class.

The district court found that Dr. Capps' ultimate regression analyses failed *Comcast*—none of the regressions he proposed could control for factors in addition to the "All Natural Fruit" statement that impacted price. His model therefore failed to isolate the price premium attributable to Dole's alleged misconduct. (ER105.) As such, the district court held that "*Comcast* requires [it] to find that the Rule 23(b)(3) predominance requirement has not been satisfied." (*Id.*)

1. The Price Premium Attributable to the "All Natural Fruit" Statement is the Only Viable Measure of Recovery Under *Comcast* and California Law.

The district court correctly limited the measure of Plaintiff's recovery to the difference between the value of what he paid and what he received: the price-premium attributable to the "All Natural Fruit" statement. (ER92.) The court premised its ruling on the Supreme Court's holding in *Comcast* as well as state-law limitations on restitution under California's consumer protection statutes.

Plaintiff ignores *Comcast*. Nowhere in his 55-page brief does he even cite it. That is damning, given that the district court ruling he challenges was based on *Comcast*.

In *Comcast*, the Supreme Court held that, to satisfy Rule 23(b)(3)'s predominance requirement, a plaintiff must present a damages model that measures only those damages attributable to his theory of liability. *Comcast*, 133 S. Ct. at 1433; *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (citing *Comcast*, 133 S. Ct. at 1435 ("The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*.") (internal quotation marks omitted)); *Lindell v. Synthes USA*, No. 11-CV-02053-LJO-BAM, 2014 WL 841738, at *14 (E.D. Cal. Mar. 4, 2014) (*Comcast* "reiterate[s] a fundamental focus of the Rule 23 analysis: The damages must be capable of determination by tracing the damages to the plaintiff's theory of liability."), *report & recommendation adopted*, 2014 WL 1794467 (E.D. Cal. May 6, 2014). Every court facing mislabeling claims has accordingly required plaintiffs to put forth a *Comcast*-complaint damages model.[30]

[30] *See, e.g.*, *Lanovaz v. Twinings N. Am., Inc.*, No. C-12-02646-RMW, 2014 WL 1652338, at *5 (N.D. Cal. Apr. 24, 2014) ("plaintiff must show that monetary relief resulting from the defendant's conduct is measurable 'on a class-wide basis

In this case, Plaintiff's liability theory was that Dole's label statement "All Natural Fruit" was unlawful and deceptive and, as a result, he "paid a premium price" for those products. (ER978 ¶ 48; ER988 ¶ 105.) Given these allegations, *Comcast* requires that Plaintiff present a model that measures "the difference between the market price actually paid [for the Dole products] and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices." (ER74.)

Every court to address class counsel's similar mislabeling claims agrees that the proper measure is "price premium." *See, e.g., Jones*, 2014 WL 2702726, at *19 ("[t]he difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution") (citations omitted); *Lanovaz*, 2014 WL 1652338, at *6 ("plaintiff must provide *substantial evidence* showing the price premium attributable to Twinings use of the label [statement]") (emphasis added); *Ogden v. Bumble Bee Foods, LLC*, No. 5:12-CV-01828-LHK, 2014 U.S. Dist. LEXIS 565, at *51 (N.D. Cal. Jan. 2, 2014) ("restitution requires that Ogden also present evidence of the difference in value between what she spent and what she received"); *Werdebaugh*, 2014 WL 2191901, at *22 ("The proper measure of restitution in a mislabeling case is the amount necessary to compensate the

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through use of a common methodology.'") (quoting *Comcast*, 135 S. Ct. at 1430), *recons. denied*, 2014 WL 7204757 (N.D. Cal. Dec. 17, 2014); *Jones*, 2014 WL 2702726, at *19 (under *Comcast*, "plaintiff must also present a model that (1) identifies damages that stem from the defendant's alleged wrongdoing and (2) is 'susceptible of measurement across the entire class'" to satisfy the predominance inquiry); *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-2724-LHK, 2014 WL 2191901, at *21 (N.D. Cal. May 23, 2014) ("A Plaintiff that seeks certification under Rule 23(b)(3) must present a damages model that is consistent with its liability case.").

purchaser for the difference between a product as labeled and the product as received.").[31]

California law is in complete accord. Restitution is limited to "'returning to the plaintiff funds in which he or she has an ownership interest.'" *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 697 (2006) (quoting *Korea Supply*, 29 Cal. 4th at 1149). In the mislabeling context, the proper measure of restitution is "[t]he difference between what the plaintiff paid and the value of what the plaintiff received." *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009); *accord Colgan*, 135 Cal. App. 4th at 700 (restitution award must quantify "either the dollar value of the consumer impact or the advantage realized by [the defendant]."). Damages calculations in mislabeling cases must therefore subtract from any recovery "the actual value of what the plaintiff received." *In re Vioxx Class Cases*, 180 Cal. App. 4th at 131.

2. Plaintiff is Not Entitled to Nonrestitutionary Disgorgement or a Full Refund.

Instead of addressing *Comcast*, Mr. Brazil claims that the district court should have certified a damages class based on other theories: nonrestitutionary disgorgement (AOB35) or full refund (AOB36-41.) Neither is appropriate.

First, as explained in Section IV.A.1 above, Plaintiff is not entitled to disgorgement of Dole's profits beyond the price premium associated with any alleged mislabeling: nonrestitutionary disgorgement is unavailable under the UCL.

[31] Other courts addressing similar mislabeling to those filed by class counsel claims concur. *See, e.g.*, *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 579 (C.D. Cal. 2014) (where plaintiff alleged "100% Natural" statement misled consumers into believing challenged products did not contain genetically modified organisms (GMOs) under "*Comcast* [the plaintiff] must be able to isolate the price premium associated with misleading consumers in that particular fashion.").

(*See also* AOB17 (citing *Korea Supply* as prohibiting nonrestitutionary disgorgement).) While Plaintiff relies on *Colgan* in claiming the district court failed to "calculate or craft a deterrent disgorgement remedy" (AOB35), *Colgan* does not stand for this proposition. As the district court correctly noted, *Colgan* limits restitution to either the "'dollar value of the consumer impact or the advantage realized by [the defendant].'" (ER92 (quoting *Colgan*, 135 Cal. App. 4th at 700).) Whether measured by the consumer's loss or the defendant's gain, *Colgan* requires that Plaintiff's recovery be tethered to the impact of the statement he challenges: the price premium. *See Colgan*, 135 Cal. App. 4th at 700. Plaintiff has no support for his claim to anything more.[32]

Second, Plaintiff is not entitled to a "full refund" of his purchase price. (AOB36-40.) This measure has been universally rejected by district courts in the mislabeling context because it fails to account for the value of the purchased products, aside from a challenged statement, that a consumer receives. *See, e.g.*, *Jones*, 2014 WL 2702726, at *19 ("Return of the full retail or wholesale prices is not a proper measure of restitution, as it fails to take into account the value class members received by purchasing the products"); *accord Werdebaugh v. Blue Diamond Growers*, No. 12-CV-02724-LHK, 2014 WL 7148923, at *3 (N.D. Cal. Dec. 15, 2014) (in decertifying plaintiff's damages class based on Dr. Capps' similar flawed regressions, reaffirming its prior holding that the "'full refund' and 'price premium' models[] were inconsistent with Plaintiff's liability case and unable to 'offer a class-wide measure of damages that is tied to' the harm

[32] Plaintiff also argues that the court misread *Colgan* as limiting restitution to the price premium suffered by the consumer. (AOB34.) He is wrong. The court quoted *Colgan* in noting that Plaintiff's remedy could be measured by either the consumer's loss or the defendant's gain. (ER92.) But here, the measure of Dole's gain is the same as Plaintiff's loss: the price premium.

attributable to Defendant's labeling claims"); *Lanovaz*, 2014 WL 1652338, at *6; *In re POM Wonderful LLC*, No. ML 10-02199 DDP (RZx), 2014 WL 1225184, at *3 (C.D. Cal. Mar. 25, 2014) (rejecting full refund model in mislabeling case because "it fails to account for any value consumers received.").

Plaintiff admits that the products have "residual value," but contends a full refund is warranted because he would not have purchased the products absent Dole's "mislabeling." (AOB37.) The court *In re POM Wonderful* rejected this exact argument. It found that plaintiffs presented no "authority for the proposition that a plaintiff seeking restitution may retain some unexpected boon, yet obtain the windfall of a full refund and profit from a restitutionary award." 2014 WL 1225184, at *3. Because the plaintiffs could not "plausibly contend that they did not receive any value at all from Defendant's [beverage] products," and "[b]ecause [plaintiffs'] Full Refund model ma[d]e[] no attempt to account for benefits conferred upon Plaintiffs," the court held that the model could not accurately measure classwide damages. *Id.*

As in *In re POM Wonderful*, Plaintiff fails to present any authority suggesting that a full refund is appropriate here. Instead, he relies on decisions that are: (1) procedurally inapposite pleading cases;[33] (2) factually distinguishable;[34] or

[33] *See, e.g.*, *In re Tobacco II Cases*, 46 Cal. 4th at 320 (addressing injury requirement for standing under Proposition 64); *Chavez*, 340 F. App'x at 361 (alleged loss of purchase price is sufficient injury-in-fact for purposes of standing); *Stearns*, 655 F.3d at 1021 n.13 (describing standing requirements for restitution).

[34] *See, e.g.*, *F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595, 599 (9th Cir. 1993) (FTC awarded statutory restitution for purchase price of heat detectors falsely advertised as reliable "life-saving fire warning devices"); *Sanbrook v. Office Depot, Inc.*, No. C-07-05938 RMW, 2009 WL 840020, at *2 (N.D. Cal. Mar. 30, 2009) (refund for failure to perform "contractually required service" in breach of contract action); *De La Hoya v. Slim's Gun Shop*, 80 Cal. App. 3d Supp. 6, 8, 146 Cal. Rptr. 68 (App. Dep't Super Ct. 1978) (refund for unknowing purchase of

(3) which expressly undermine his position.[35] Here, where Plaintiff received benefits from Dole's fruit products apart from the "All Natural Fruit" statement (including calories, taste, health, convenience, etc.), he is not entitled to a full refund. Any decision to the contrary would provide him and putative class members with an unwarranted windfall.

Plaintiff also returns to his failed "illegal product theory" to suggest he is entitled to a full refund. (AOB39-41.) But as explained in Section III above, this theory has no merit: courts have uniformly rejected it.[36] Plaintiff relies on 1949 out-of-circuit authority that is either distinguishable[37] or, as with *Kwikset*, that

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stolen gun under breach of warranty of title action); *Thomas v. Imbriolo*, No. A130517, 2012 WL 1427360, at *7 (Cal. Ct. App. Apr. 25, 2012) (refund for "worthless" hair growth plan that failed to work as advertised). Plaintiff is also prohibited from relying on *Thomas*, as it is an unpublished California appellate opinion. *See* Cal. R. Ct. 8.1115 (a) (prohibiting citation or reliance by a party or court on any unpublished appellate court decision).

[35] *See, e.g.*, *Kwikset*, 51 Cal. 4th at 329 ("For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid *more* for than he or she otherwise might have been willing to pay if the product had been labeled accurately.") (emphasis in the original).

[36] Plaintiff cites one case in support: *Park v. Welch Foods, Inc.*, No. 5:12-CV-06449-PSG, 2014 WL 1231035 (N.D. Cal. Mar. 20, 2014). (*See* AOB39-40.) In *Park*, the district court refused to strike allegations related to Plaintiff's "illegal product theory" at the pleading stage, noting that, "however unlikely," Plaintiff's theory was sufficient to allege injury under Rule 8's liberal plausibility standard. 2014 WL 1231035, at *2. The court in *Park* did not endorse the viability of this theory beyond the pleadings, however, nor did it hold that this theory would entitle Plaintiff to a full refund.

[37] *See Porter v. Craddock*, 84 F. Supp. 704, 710 (W.D. Ky. 1949) (refund where merchant knew purchaser was securing misbranded goods for resale).

refutes his position, demonstrating recovery here is limited to price premium.[38] Accordingly, Plaintiff fails to show that a measure other than price premium applies in this case.

B. The District Court Did Not Abuse Its Discretion In Denying Plaintiff's Motion for Leave to Reconsider the Decertification Order.

One month after the district court's decertification order, Plaintiff asked the court to reconsider its ruling because "damages alone does not defeat class certification." (ER774 (citing *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975).)

The district court denied Plaintiff's motion. It clarified that it decertified Plaintiff's 23(b)(3) class not because of individualized damages issues, but rather because Plaintiff "failed to isolate the price premium attributable to Dole's 'All Natural Fruit' label statement, as required by *Comcast* []." (ER124.) Plaintiff's authorities addressing individualized damage issues, including *Leyva.*, 716 F.3d 510, and *Jimenez v. Allstate Insurance Co.*, 765 F.3d 1161 (9th Cir. 2014), were therefore inapposite. (ER 124.)

Plaintiff commits the same error here. Citing *Levya*, he argues that "existence of individual or unique damages issues will not preclude class certification." (AOB41.) That may be true, but it is of no consequence. Plaintiff's reliance on *Stearns*, 655 F.3d at 1020 (AOB42), as well as out-of-circuit decisions addressing individualized damages calculations, is similarly misplaced. (*See* AOB41 (citing *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013)

[38] *See Myers v. Malone & Hyde, Inc.*, 173 F.2d 291, 292 (8th Cir. 1949) (buyer's damages for purchase of misbranded foods were "purchase price, freight charges and costs and expenses of the condemnation and sale, *less* the amounts it had obtained as stated") (emphasis added).

(no requirement that "every class member have identical damages.").) As the district court correctly noted, none of these decisions "address a plaintiff's inability to measure the damages attributable to the defendant's conduct under *Comcast*." (ER124.)

For these reasons, the district court did not abuse its discretion in denying Plaintiff's motion for leave for reconsideration.

C. In the Alternative, Decertification Was Proper Because Plaintiff's Damages Class Is Not "Ascertainable."

Even if this Court were to find that Plaintiff's failure to comply with *Comcast* did not warrant decertification, it should affirm the district court's ruling because Plaintiff's damages class is not "ascertainable."

"[T]he party seeking certification must demonstrate that an identifiable and ascertainable class exists." *Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011); *In re Clorox Consumer Litig.*, 301 F.R.D. 436, 440 (N.D. Cal. 2014). Class members must be identifiable by objective criteria "without extensive and individualized fact-finding or mini trials." *Carrera v. Bayer Corp*., 727 F.3d 300, 303-04 (3d Cir. 2013) (citation and quotation marks omitted).

The district court could have denied class certification on this ground, but did not. There are two reasons why this presents another, alternative ground on which to affirm the decision to decertify.

1. Which Ascorbic Acid and Citric Acid?

First, there is the problem of "*which* citric and ascorbic acid?" It is not enough to have bought a qualifying Dole fruit product. As the TAC states, Dole's offense was not that it used citric acid and ascorbic acid, but that it used *synthetic*

versions. (ER972 ¶ 14.) Thus, Mr. Brazil needed to show that an objective means exists for showing that all class members' purchases involved a *synthetic* and not a non-synthetic citric or ascorbic acid. He had no evidence to prove this.

As Dr. Montville explains, citric and ascorbic acids are typically produced through natural fermentation. (CR110 ¶ 5.) And as noted above, three of the suppliers of Dole's citric acid and ascorbic acid have produced certifications attesting that their ingredients are "natural." Thus, any putative class members who bought products that used those suppliers' ingredients received "natural"—*non*-synthetic—citric and ascorbic acid.

This is fatal to ascertainability. The labels themselves do not indicate which process was used to derive the citric or ascorbic acid. They simply recite "citric acid" and "ascorbic acid." (*See, e.g.*, ER 981.) To figure out which process was used would require a massive scavenger hunt, tantamount to a product recall. What might that look like? The ten products at issue were manufactured in China, Thailand, Philippines, Swaziland, and California. (CR108 ¶ 4.) Dole owns the California facility, while Dole's affiliates own the facilities in Philippines and Thailand. But third-party co-packers own the China and Swaziland facilities. Each facility sources its own ingredients. (*Id*.)

Even more daunting is the task of tracing the source of citric and ascorbic acid from each consumer back through the supply chain. Indeed, it is impossible unless a class member kept his product package. (*Id*. ¶ 7.) Although Mr. Brazil retrieved some of his Dole packages from the garbage after he met with class counsel (CR106, 15:11-16:9), it is unreasonable to assume that other consumers saved their spent containers.

Collins v. Safeway Stores, Inc., 187 Cal. App. 3d 62 (1986) is illustrative. There, the class representatives bought eggs that had been recalled but there was no way to identify which customer bought cartons with the contaminated eggs.

Class certification was denied due to lack of ascertainability. *Id*. at 69-70; *see also Oshana v. Coca-Cola Co*., 472 F.3d 506, 514 (7th Cir. 2006) (class of purchasers of "fountain" Diet Coke who complained they were misled by the suggestion it did not contain saccharin was unascertainable because the class "could include millions who were not deceived [by the alleged misrepresentations] and thus have no grievance."); *accord In re Facebook, Inc., PPC Advert. Litig*, 282 F.R.D. 446, 460-61 (N.D. Cal. 2012) (class certification denied/plaintiff could not distinguish between "fraudulent" and "invalid" clicks); *Thompson v. Auto. Club of S. Cal.*, 217 Cal. App. 4th 719, 732 (2013) (individual inquiries were necessary to identify which class members had a valid claim and which did not).

This case is the essence of an un-ascertainable class. Judge Hamilton found this problem fatal to class certification in another food misbranding case on similar facts in *Astiana v. Ben & Jerry's Homemade, Inc*., No. C 10-04387 PJH, 2014 U.S. Dist. LEXIS 1640 (N.D. Cal. Jan. 7, 2014). There, plaintiff alleged that certain of Ben & Jerry's "all natural" ice cream products were processed with a synthetic alkali, but she could not show *which* ice cream products were made with the "synthetic" alkali (potassium carbonate) as opposed to a "non-synthetic" alkali (sodium carbonate). *Id*. at *9-10.

2. Which Labels, and When?

Relying on the Third Circuit's decision in *Carrera*, some courts in this circuit have held that, where the defendant is a wholesale manufacturer with no records to identify purchasers, self-identification by affidavit won't work. *Jones*,

2014 WL 2702726, at *10; *accord In re Clorox*, 301 F.R.D. at 441; *Xavier*, 787 F. Supp. 2d at 1090.[39]

But even courts that accept "self-identification by affidavit" will deny class certification on ascertainability grounds if class members are required to recall more than just "I bought." In *Bruton v. Gerber Products Co.*, No. 12-CV-02412-LHK, 2014 U.S. Dist. LEXIS 86581 (N.D. Cal. June 23, 2014), for example, plaintiffs bought eight Gerber baby food products whose labels changed during the class period, but sought to certify a class of purchasers of 69 products. The court denied certification. It is too much to expect class members to remember the product packaging, whether the purchase was one of the qualifying flavors, and whether the label contained a challenged statement versus something benign. *Id.* at *25-28.

The same patchwork exists here. (*See* ER57.) The task of remembering whether a consumer purchased a fruit cup, canned, or bagged fruit product since 2008: (1) made by Dole (as opposed to a competitor); (2) in a qualifying flavor; (3) during the class period in question; (4) that contained a qualifying "All Natural Fruit" label, is too much to ask of a consumer.

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[39] *See also Algarin v. Maybelline*, LLC, 300 F.R.D. 444, 456 (S.D. Cal. 2014) ("[c]ases where self-identification alone has been deemed sufficient generally involve situations where consumers are likely to retain receipts"); *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGRx), 2012 WL 8019257, at *5-6 (C.D. Cal. Apr. 12, 2012); *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696, at *5 (N.D. Cal. Feb. 13, 2014) ("Court finds the reasoning of *Carrera* and *Xavier* more persuasive"); *In re POM Wonderful*, 2014 WL 1225184, at *6; *Hodes v. Van's Int'l Foods*, No. CV 09-1530 RGK (FFMx), 2009 WL 2424214, at *4 (C.D. Cal. July 23, 2009); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *13 (S.D.N.Y. Aug. 5, 2010); *Karhu v. Vital Pharm., Inc.*, No. 13-60768-CIV, 2014 WL 815253, at *3 (S.D. Fla. Mar. 3, 2014).

As another district court observed in a case brought by class counsel challenging Hunt's canned diced tomatoes: "[I]t is hard to imagine that [class members] would be able to remember which particular Hunt's products they purchased from 2008 to the present, and whether those products bore the challenged statements." In this case, as with Hunt's, "there were 'literally dozens of varieties with different can sizes, ingredients, and labeling over time' and 'some Hunt's cans included the challenged language, while others included no such language at all." *Jones*, 2014 WL 2702726, at *10. As the court in *Bruton* put it, given the variations in labeling, ingredients, packaging, and retail placement, there is no "'precise, objective, and presently ascertainable [method] that it is administratively feasible to determine whether a particular person is a class member.'" *See, e.g.*, *Bruton*, 2014 U.S. Dist. LEXIS 86581, at *25, *28-30, *32-33.

This Court can affirm the district court's holding on this alternative ground.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment.

Dated: May 27, 2015

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STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the Ninth Circuit, Defendant-Appellee Dole Packaged Food, Inc. states that the following cases, currently pending before this Court, are related: *Kane v. Chobani, LLC*, No. 14-5670 (addressing dismissal of unjust enrichment claim and other claims based on reliance in case involving allegedly false and misleading labels); *Bishop v. 7-Eleven, Inc.*, No. 14-15986 (addressing dismissal of claims involving non-actionable labels based on reliance and standing); *Jones v. ConAgra Foods, Inc.*, No. 14-16327 (addressing denial of class certification based on ascertainability, predominance, and standing in case involving allegedly false and misleading labels); and *Bruton v. Gerber Products Co.*, No. 15-15174 (addressing dismissal of claims, granting of summary judgment, and denial of class certification in case involving allegedly false and misleading labels).

Dated: May 27, 2015

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CERTIFICATE OF COMPLIANCE

I, the undersigned, certify the following:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 12,619 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared using a proportionally spaced typeface in Microsoft Word in 14-point Times New Roman.

Dated: May 27, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 27, 2015.

I certify that all of the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 27, 2015

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