Nos. 15-55727, 14-16327, 14-17480

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-55727
ROBERT BRISEÑO, ET AL., *Plaintiffs-Respondents,*
v.
CONAGRA FOODS, INC., *Defendant-Petitioner.*
Appeal from the United States District Court
for the Central District of California
Honorable Margaret M. Morrow

No. 14-16327
LEVI JONES, ET AL., *Plaintiffs-Appellants,*
v.
CONAGRA FOODS, INC., *Defendant-Appellee.*
Appeal from the United States District Court
for the Northern District of California
Honorable Charles R. Breyer

No. 14-17480
CHAD BRAZIL, *Plaintiff – Appellant,*
v.
DOLE PACKAGED FOODS, LLC, *Defendant – Appellee.*
Appeal from the United States District Court
for the Northern District of California
Honorable Lucy H. Koh

JOINT MOTION BY ALL PLAINTIFFS AND DEFENDANT DOLE PACKAGED FOODS IN THE ABOVE-CAPTIONED CASES TO HAVE CASES HEARD BY THE SAME MERITS PANEL

Briseño v. ConAgra Foods, Inc., No. 15-55727

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PRELIMINARY STATEMENT

This motion to have certain cases heard by the same merits panel is made jointly by four of the five parties to three pending appeals; specifically by all three sets of Plaintiffs in *Briseño v. ConAgra Foods, Inc.* No. 15-55727 ("*Briseño*"), *Jones v. ConAgra Foods, Inc.*, No. 14-16327 ("*Jones*"), and *Brazil v. Dole Packaged Foods, LLC*, No. 14-17480 ("*Brazil"*), and by Dole Packaged Foods, LLC, Defendant in *Brazil* (collectively, "Movants").

The remaining party, Defendant ConAgra Foods, Inc. ("ConAgra), supports the ultimate relief requested (and proposed in its 23(f) Petition that the cases be heard by the same merits panel), but Movants and ConAgra were unable to reach agreement on the specific language for this submission. ConAgra does not dispute – and, indeed, agrees – that all of these matters involve closely related issues and should be heard by the same merits panel. *See* ConAgra's 23(f) Petition in *Briseño*, No. 15-80040, Dkt. 1-2 (filed 3/09/2015), at 3-4 ("The most sensible course of action is for this Court to grant this petition to appeal, and decide these issues in conjunction with *Jones* and *Brazil*, both of which involve similar factual and legal issues to those here."); *see also id*. at 18-19 ("These issues will continue to result in conflicts until this Court definitively determines them. . . . The most sensible course of action is for this Court to grant this petition to appeal, and

decide these issues in conjunction with *Jones* and *Brazil* once and for all.") (footnote omitted).

By this motion, Movants do not intend to argue the merits of their respective cases or accept the truth of facts alleged by a different party, but simply to provide a summary of information and positions to illustrate the common issues between or among the actions. To the extent there is any inconsistency between a party's briefing and this motion, Movants intend that their respective briefing shall control.

INTRODUCTION

The Court's decisions on these cases will define the contours of the "ascertainability" doctrine in this Circuit, particularly as applied to cases involving low-priced consumer goods. For this reason, and because, between or among the cases, there are several other closely related issues concerning predominance, damages, restitution, and/or standing for a Rule 23(b)(2) injunctive relief class, Movants jointly request that these appeals be heard before the same merits panel.

Each of these three pending appeals arises from a class action lawsuit on behalf of consumers who allege that a "100% natural" or "all natural" claim on a food label was false, misleading, or unlawful. Each of these cases involves a low-priced consumer product, and two of the cases involve the same defendant, ConAgra Foods, Inc. ("ConAgra"). All three cases share closely-related legal issues that have arisen in food labeling cases throughout this Circuit and, therefore,

would be best heard by the same panel in the same oral argument session. But because there are several significant differences between these three cases, each case should be argued separately with the normally-allotted time for oral argument in each case.

Movants respectfully submit that presenting the cases to a single panel, during the same session, will minimize the risk of inconsistent results, ensure that the panel receives the benefit of argument from all counsel, and provide the panel with three different factual and procedural situations to consider when determining the contours of its eventual decisions, particularly on the issue of ascertainability. Moreover, having one panel hear all three cases will be more efficient for the Court and the litigants – a goal consistent with the Court's general internal policy. *See* Circuit Advisory Committee Note to Rules 34-1 to 34-3 ¶ (1); Ninth Circuit General Order 3.3.b. Movants do not request consolidation or alteration of briefing schedules (the cases are presently scheduled to be fully briefed by early February).[1] To date, none of the matters have been scheduled for oral argument.

District courts have already stayed numerous actions in anticipation of the Court's resolution of the issues presented by these three cases. *See, e.g., Koller v. Med Foods, Inc.*, No. 14-cv-02400-RS, 2015 U.S. Dist. LEXIS 167760 (N.D. Cal.

[1] In *Jones v. ConAgra Foods, Inc.*, briefing was completed on March 6, 2015. In *Brazil v. Dole Packaged Foods, LLC,* briefing was completed on July 10, 2015. The briefing in *Briseño v. ConAgra Foods, Inc.* is currently scheduled to be completed by early February 2016.

Dec. 14, 2015); *Samet v. Kellogg Co.*, No. 5:12-cv-01891-PSG, 2015 U.S. Dist. LEXIS 152651 (N.D. Cal. Nov. 10, 2015); *Thomas v. Costco Wholesale Corp.*, No. 12-cv-02908-BLF, 2015 U.S. Dist. LEXIS 149060 (N.D. Cal. Nov. 2, 2015); *Park v. Welch Foods, Inc.*, No. 5:12-cv-06449-PSG, 2015 U.S. Dist. LEXIS 144463 (N.D. Cal. Oct. 22, 2015); *Astiana v. Hain Celestial Grp., Inc.*, No. 11-cv-6342-PJH, 2015 U.S. Dist. LEXIS 138496 (N.D. Cal. Oct. 9, 2015); *Wilson v. Frito-Lay N. Am., Inc.*, No. 12-CV-1586 SC, 2015 U.S. Dist. LEXIS 94179 (N.D. Cal. July 20, 2015); *Leonhart v. Nature's Path Foods, Inc.*, No. 13-cv-00492-BLF, 2015 U.S. Dist. LEXIS 73269 (N.D. Cal. June 5, 2015); *Pardini v. Unilever United States, Inc.*, No. 13-cv-01675-SC, 2015 U.S. Dist. LEXIS 49752 (N.D. Cal. Apr. 15, 2015); *Allen v. ConAgra Foods, Inc.*, No. 3:13-cv-01279-WHO, (ECF No. 152) (N.D. Cal. Feb. 20, 2015); *Swearingen v. ConAgra Foods, Inc.*, No. 3:13-cv-05322-VC, (ECF No. 36) (N.D. Cal. Jan. 9, 2015); *Gustavson v. Mars, Inc.*, No. 13-cv-04537-LHK, 2014 U.S. Dist. LEXIS 171736 (N.D. Cal. Dec. 10, 2014).

Accordingly, Movants respectfully request that the three cases proceed to completion of their separate briefing on their current schedules, and be set for hearing, at the earliest feasible date, before the same merits panel, with a full allotment of time for oral argument in each case.

I. SUMMARY BACKGROUND OF EACH CASE

A. *Briseño v. ConAgra Foods, Inc.*, No. 15-55727

Plaintiffs-Respondents in *Briseño* are thirteen consumers living in eleven different states who purchased Wesson Oils between January 2007 and their entry into the case. The *Briseño* Plaintiffs allege that throughout the class period, every bottle of Wesson Oil carried a front label stating the product was "100% Natural." Plaintiffs contend this label is false and misleading under the relevant state laws because the cooking oils are alleged to contain GMOs.

On February 23, 2015, the district court certified eleven separate state classes under Rule 23(b)(3). In doing so, the district court held, among other things, that the classes were ascertainable and that the predominance requirement as to both reliance/materiality and damages had been met. Specifically, as to ascertainability, the district court held that (i) the *Briseño* Plaintiffs' proposed class definition "identifies putative class members by objective characteristics; this is the mark of an ascertainable class," and (ii) under the circumstances here, class member self-identification through a claim form or declaration is a sufficiently reliable method for determining class membership at the appropriate time. As to predominance, the district court identified the primary common question as whether ConAgra's conduct in labeling Wesson Oils as "100% Natural," despite making them from GMO ingredients, deceives or misleads a "reasonable

consumer" – which the court held was the liability standard under each of the certified state consumer protection law claims.

With respect to damages, the *Briseño* Plaintiffs proposed an expert-supported damages methodology, which the district court accepted. That methodology consisted of: (i) a hedonic regression analysis to isolate the percentage of a cooking oil's actual retail price attributable to the presence or absence of a "Natural" label (*i.e.*, the total "price premium" attributable to the presence of the "Natural" label claim on Wesson Oils); and (ii) a conjoint analysis that would measure the percentage of the "price premium" specifically attributable to a customer's belief that "100% Natural" means "no GMOs." The district court held that the *Briseño* Plaintiffs' proposed damages model satisfied the *Comcast* standard. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Finally, the district court denied the *Briseño* Plaintiffs' request for certification of an injunctive relief class under Rule 23(b)(2), holding that the class representatives lacked constitutional standing under Article III because their declarations stating that they "will consider" or "might consider" purchasing Wesson Oil in the future did not establish a sufficiently "concrete" or "real and immediate" threat of future injury.[2]

[2] The Rule 23(b)(2) issue is not part of the Rule 23(f) appeal in *Briseño*, but this Court's decision regarding Rule 23(b)(2) standing in the related *Brazil* case may have a direct effect on this issue when the case returns to the district court.

On March 9, 2015, ConAgra petitioned this Court pursuant to Federal Rule of Civil Procedure 23(f) for permission to take an interlocutory appeal of the district court's Order Granting in Part and Denying in Part Plaintiffs' Amended Motion for Class Certification. On May 13, 2015, this Court granted ConAgra's Rule 23(f) petition. Later on May 13, 2015, the parties filed a joint stipulation in the district court to stay the case pending resolution of the appeal, which the district court granted on May 15, 2015. ConAgra filed its opening brief on September 21, 2015, the *Briseño* Plaintiffs filed their answering brief on December 18, 2015, and ConAgra's optional reply brief is presently due on February 3, 2016 (pursuant to a streamlined request to extend time).

In its opening brief, ConAgra contends that the district court erred as to (i) ascertainability, (ii) typicality, (iii) predominance as to the materiality of the natural label and as to damages, and (iv) superiority.

B. *Jones v. ConAgra Foods, Inc.*, No. 14-16327

Plaintiffs in *Jones* alleged that ConAgra represented three different food products to be "100% Natural" on the front of those products' labels, when, in fact, the products contained chemical preservatives, synthetic chemicals, and other artificial ingredients.[3] The *Jones* Plaintiffs further alleged that, throughout the class period, they and other class members purchased ConAgra's deceptively-

[3] The three products at issue in *Jones* are certain varieties of Pam cooking spray, Hunt's canned tomatoes, and Swiss Miss cocoa.

labeled products, reasonably relying on the "natural" claims on ConAgra's package labeling. The *Jones* Plaintiffs alleged they did not know, and had no reason to know, that ConAgra unlawfully and deceptively labeled those products, and that they would not have purchased those products if they had known the truth about ConAgra's labels.

The *Jones* Plaintiffs filed separate class certification motions for each of the three products at issue. The district court denied all three of the *Jones* Plaintiffs' class certification motions, finding, among other things, that none of the proposed classes was ascertainable and that individual questions predominated over common questions as to both reliance and as to damages with respect to each of those proposed classes. The parties to *Jones* then stipulated to dismissal of the district court action so that the plaintiffs in that action could appeal the district court's class certification denial. The present *Jones* appeal is limited to one Plaintiff and one product line: Plaintiff Jones and certain varieties of Hunt's canned tomato products.

Jones filed his opening brief on November 21, 2014. Con Agra filed its answering brief on January 21, 2015, and Jones filed his reply brief on March 6, 2015. The following three *amicus curiae* briefs were filed: (i) the Center for Science in the Public Interest and Public Citizen, Inc., on November 25, 2014; (ii) the Washington Legal Foundation, on January 28, 2015; and (iii) the Chamber

of Commerce of the United States of America, on January 28, 2015. No further proceedings or deadlines are set in this appeal.

In his opening brief, Jones contends that the district court erred as to (i) ascertainability, (ii) predominance as to materiality, reliance, and damages, and (iii) in refusing to certify a class seeking injunctive relief.

C. *Brazil v. Dole Packaged Foods, LLC*, No. 14-17480

Plaintiff Brazil alleged that Dole sold food products that were prominently labeled as containing only "All Natural Fruit," but which actually contained two artificial and synthetic ingredients: citric acid and ascorbic acid. Plaintiff alleged that he was misled by Dole's unlawful labels into purchasing products he would not have otherwise purchased had he known the truth about those products, including whether the products were misbranded, thereby suffering damages.

Brazil included ten Dole products in his class definition,[4] and alleged that those products are substantially similar because they are the same type of food (packaged fruit), make the same front-of-the-label representation (All Natural Fruit), and contain the same artificial and synthetic ingredients (ascorbic acid and citric acid).

[4] The products at issue in *Brazil* are Tropical Fruit (can), Tropical Fruit (cup), Mixed Fruit (cup), Mixed Fruit (bag), Diced Peaches, Diced Apples, Diced Pears, Mandarin Oranges, Pineapple Tidbits, and Red Grapefruit Sunrise.

Brazil's damages expert offered five different methods of calculating restitution and damages: (i) the purchase price paid by class members; (ii) the net profit made by Dole as restitutionary disgorgement; (iii) the average wholesale price of the products paid by the class; (iv) a "benefit of the bargain" analysis comparing Dole products to non-Dole products; and (v) a regression analysis model.

On May 30, 2014, the district court granted Brazil's class certification motion and certified both a nationwide Rule 23(b)(2) injunctive class and a California state Rule 23(b)(3) class, defined as follows:

> Rule 23(b)(2): All persons in the United States who, from April 11, 2008, until the date of notice, purchased a Dole fruit product bearing the front panel label statement 'All Natural Fruit' but which contained citric acid and ascorbic acid.
>
> Rule 23(b)(3): All persons in California who, from April 11, 2008, until the date of notice, purchased a Dole fruit product bearing the front panel label statement 'All Natural Fruit' but which contained citric acid and ascorbic acid.

The district court further held 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." From that premise, the district court rejected the first four of the *Brazil* Plaintiff's five restitution models, but found that the last one, a regression analysis, satisfied the

Court's requirement that any restitution model calculate "damages," limited to the "price premium" impact of the "All Natural Fruit" misbranded label.

On November 6, 2014, the district court decertified the damages class, holding that "[t]he Court finds that Dr. Capps' Regression Model does not sufficiently isolate the price impact of Dole's use of the 'All Natural Fruit' labeling statements." The district court, however, denied Dole's motion to decertify the injunction class. On December 8, 2014, the district court granted Dole's summary judgment motion, concluding that there was "insufficient evidence that the 'All Natural Fruit' label statement on the challenged Dole products was likely to mislead reasonable consumers and that the label statements were therefore unlawful on that basis."

Brazil filed his opening brief on March 27, 2015. Dole filed its answering brief on May 27, 2015, and Brazil filed his reply brief on July 10, 2015. The Chamber of Commerce of the United States of America filed an *amicus curiae* brief on June 3, 2015. No further proceedings or deadlines are set in this appeal.

In his opening brief, Brazil contends that the district court erred in (i) dismissing Plaintiff's unjust enrichment and UCL "unlawful" claims, (ii) decertifying the damages class due to a lack of predominance as to damages, and (iii) granting summary judgment because Brazil failed to provide sufficient

evidence of how reasonable consumers would be deceived by Dole's "all natural" labels.

ARGUMENT

HAVING THE SAME MERITS PANEL HEAR ALL THREE CASES WILL PROMOTE JUDICIAL ECONOMY AND PRECEDENTIAL UNIFORMITY.

Because *Briseño, Jones*, and *Brazil* raise several related issues, most notably a substantial opportunity for the Court to define the contours of ascertainability as applied to cases involving low-priced consumer goods, having the same merits Panel hear all three cases would promote efficiency for the Court and the parties, and reduce the risk of inconsistent rulings.

The common issues regarding ascertainability concern the legal parameters of that doctrine and the required showing, if any, by a named plaintiff or class member to meet that court-constructed standard. As noted, all three cases involve low-priced consumer goods.

As to establishing predominance for certification under Rule 23(b)(3), common issues include: (i) whether, or the extent to which, plaintiffs must establish a uniform meaning of the word "natural," and (ii) whether a classwide inference of reliance is permitted and, if so, the threshold level of proof for such an inference.

All three cases involve related questions concerning the available measures of compensatory damages and/or restitution, as well as questions concerning acceptable methodologies to establish that relief, in food-product false labeling cases.

Finally, as to the issue of the propriety of certifying Rule 23(b)(2) injunctive relief classes, two of the three cases implicate the question of whether Article III standing imposes an absolute requirement that a named plaintiff testify that they will purchase the product again, or whether a lesser commitment to future purchases is sufficient for standing (such as that a consumer would "consider" purchasing again if the injunctive relief were granted).

Granting the request for *Briseño,* No. 15-55727, *Jones*, No. 14-16327, and *Brazil*, No. 14-17480, to be assigned to the same merits panel would not only promote efficiency, but also maximize uniformity between rulings and reduce the risk of inconsistent results in cases likely to define the contours of the ascertainability doctrine in this Circuit. *See* Goelz & Watts, Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice 9:59 (The Rutter Group 2015) ("Certain areas of jurisprudence tend to generate a number of cases presenting similar issues . . . The court tries to cluster these cases for argument and hearing, to promote uniformity in its precedent.").

CONCLUSION

For all of the foregoing reasons, Movants respectfully request that the *Briseño, Jones*, and *Brazil* cases be assigned to the same merits panel and argued separately during the same session before that panel.

Dated:

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2015, 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. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/*Adam J. Levitt
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