Appeal No. 14-17480

IN THE UNTED 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
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CASE NO. C 12-01831

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332(d) because Defendant Dole Packaged Foods, LLC ("Dole") is a California limited liability corporation with its principal place of business in California, and Plaintiff Chad Brazil ("Plaintiff") alleged a nationwide class of over 100 members with different citizenship than Dole. The requisite amount in controversy exists because the claims of the class members exceed $5,000,000 in the aggregate. ER 822-823, 000025.

This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment on December 8, 2014, ER 127 and Plaintiff filed his notice of appeal on December 17, 2014. ER 128-31.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court err in dismissing Plaintiff's unjust enrichment claim as duplicative of Plaintiff's statutory claims?

2. Did the district court err in dismissing Plaintiff's UCL "unlawful" claims predicated on Dole's sale to Plaintiff of products that cannot legally be sold, held, or received in commerce?

3. Did the district court err at class certification in ruling that the only possible model of restitution in a food labeling case was to show the so-called "price premium" impact on the Plaintiff and the class, *i.e.*, the difference in value between a product as labeled and the product as received?

4. Did the district court err by decertifying the Rule 23(b)(3) class because class-wide damage calculations prevented the "predominance" requirement from being satisfied?

5. Did the district court err at summary judgment in ruling Plaintiff failed to provide sufficient evidence of how reasonable consumers would be deceived by Dole's "all natural" labels?

STATEMENT OF THE CASE

This is a food misbranding case. This case is about Dole's illegal, false or misleading "all natural" food labels. Dole sold Plaintiff and the class food products that were labeled on the front as containing only "all natural fruit" but which actually contained two artificial and synthetic ingredients, citric acid and ascorbic acid. This appeal arises out of a series of orders by the district court including (i) the dismissal under Fed. R. Civ. P. 12(b)(6) of certain claims including the unjust enrichment claim, (ii) the district court's orders granting class certification and then subsequently decertifying the Rule 23(b)(3) class, and (iii) the district court's grant of summary judgment to Dole.

On April 11, 2012, Plaintiff filed his Class Action Complaint ("Complaint") on behalf of a nationwide class. ER 818, 835, 836. Plaintiff brought this action against Dole for its food products that contained the label "all natural fruit." ER 835-836. Plaintiff's claims are predicated on violations of California's Sherman Food, Drug, and Cosmetic Law, CAL. HEALTH & SAF. CODE § 109875, *et seq*. ("Sherman Law"), which prohibits the sale of false, misleading and/or "misbranded" food. Under the Sherman Law, a food is "misbranded" if its labeling (1) is "false or misleading in any particular," and (2) violates the labeling

requirements of the Sherman Law or the Food Drug & Cosmetic Act, 21 U.S.C. § 301 *et seq.*[1]

It is also unlawful for any person "to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded," and "to receive in commerce any food that is misbranded or to deliver or proffer for delivery any such food." CAL. HEALTH & SAF. CODE § 110760 and CAL. HEALTH & SAF. CODE § 110770. *Any* Sherman Law violation is punishable up to a year in jail or a fine of up to $1000, or both. CAL. HEALTH & SAF. Code § 111825.

Plaintiff alleged causes of action under the "unlawful," "unfair," and "fraudulent" prongs of California's Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200, *et seq*. ("UCL"); False Advertising Law, CAL. BUS. & PROF. CODE § 17500, *et seq*. ("FAL"); California Legal Remedies Act, CAL. BUS. & PROF. CODE § 1750, *et seq* ("CLRA"); a common law cause of action for unjust enrichment; and breach of warranty claims. ER 838-848.

Plaintiff's Complaint alleged that Dole's label statements were not only "unlawful" by being misbranded via violations of both the Sherman Law and the FDCA and being sold as such, but also unfair and/or misleading. California law provides that such misbranded products cannot legally be manufactured, advertised, distributed, held or sold. Importantly, Plaintiff alleged that he was

[1] The Sherman Law adopts all food labeling regulations promulgated under the FDCA as the law of California. CAL. HEALTH & SAF. CODE § 110100.

harmed because he purchased products that he would not have purchased had he known that the sale was illegal. ER 835. Although reliance is immaterial to his "unlawful" claim under the UCL, Plaintiff did allege that he relied upon and was misled by Dole's "All Natural Fruit" label statements (among others). ER 835, 842.

On July 23, 2012, Plaintiff filed a First Amended Complaint ("FAC") that expanded the scope of his claims. ER 851-856. In addition to the "all natural" claims, Plaintiff alleged various Dole food products' labels made deceptive "fresh," "sugar free," "low calorie," nutrient content, and "health" claims. ER 862-890. On August 13, 2012, Dole moved to dismiss the FAC.

On March 25, 2013, the district court entered the first order relevant to this appeal. ER 1-27. The court granted in part and denied in part Dole's motion to dismiss the FAC. The district court rejected Dole's arguments regarding preemption, primary jurisdiction, Article III injury, and plausibility, but granted the motion under Fed. R. Civ. P. 9(b) as to the UCL, FAL and CLRA claims. The district court found that all three claims sounded in fraud, including Plaintiff's "unlawful" count, so it held the heightened pleadings standards of Rule 9(b) applied. ER 21. The district court granted Plaintiff leave to file another amended complaint on those three statutory claims. ER 6-22, 26-27.

Importantly, the district court dismissed with prejudice Plaintiff's cause of action for unjust enrichment. The district court ruled there was "no cause of action for unjust enrichment in California" and such a claim was "superfluous" of Plaintiff's UCL claim. ER 25-26.

On April 12, 2013, Plaintiff filed his Second Amended Complaint ("SAC"). ER 909-965. This complaint specifically named the thirty-eight Dole products at issue in the case. ER 909-911. Plaintiff made the same "all natural," "fresh," "sugar free," "low calorie," nutrient content, and "health" claims. ER 916-928. Plaintiff alleged he was damaged by purchasing Dole's products in 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. ER 911, 921, 924, 930. Dole moved to dismiss the SAC.

On September 23, 2013, the district court largely denied Dole's motion to dismiss the SAC. ER 28-48. As part of this order, however, the district court held that Plaintiff's UCL "unlawful" misbranding claim (referred to by the district court as the "illegal product" theory) must be dismissed with prejudice to the extent it seeks restitution for Dole's illegal sale under the Sherman Law of a food product that was "misbranded." ER 43. The district court held, in relevant part, that Plaintiff's illegal sale of a misbranded product "theory under the UCL is

inconsistent with the enhanced standing requirements for UCL claims imposed by Proposition 64 and the California Supreme Court's decision in *Kwikset*." *Id.*

On January 1, 2014, Plaintiff moved for certification of a smaller class than defined in the SAC. ER 195-229. The proposed class consisted of consumers in the United States that bought a Dole fruit product boasting on the front of its packages that it was nothing but "All Natural Fruit" but actually contained citric acid and ascorbic acid, both synthetic, artificial ingredients. Plaintiff included ten Dole products in this definition: Tropical Fruit (can), Mixed Fruit (cup), Mixed Fruit (bag), Diced Peaches, Diced Apples, Diced Pears, Mandarin Oranges, Pineapple Tidbits, Red Grapefruit Sunrise, and Tropical Fruit – cup. ER 204. All of these 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). ER 196. Plaintiff's expert on damages offered different methods of calculating restitution: the purchase price paid by class members, the net profit made by Dole as restitutionary disgorgement, the average wholesale price of the products paid by the class, a "benefit of the bargain" analysis comparing Dole products to non-Dole products, and a regression analysis model. ER 231, 234-240.

On May 30, 2014, the district court granted Plaintiff's motion and certified the following classes:

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. ER 83.

The district court found the classes were ascertainable ER 54-55 and that the four requirements of Rule 23(a) – numerosity, commonality, typicality and adequacy of representation – were satisfied. ER 59-65. The district court found an injunctive class appropriate under Rule 23(b)(2). ER 66-67. The district court also found that the superiority requirement of Rule 23(b)(3) was not contested by Dole and was therefore satisfied. ER 82-83.

Much of the district court's class certification opinion focused on the predominance element of Rule 23(b)(3). First, the court found a nationwide class inappropriate due to choice of law issues, but it did certify the California-only class and allowed it to proceed. ER 68-72. Second, the district court held – wrongly, as discussed below – that "the proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received." ER 74. Using this statement as its

basis, the district court rejected four of Plaintiff's five restitution models for (i) the amount the class paid for the misbranded products at issue, (ii) the disgorgement of Dole's net profits from the sales of the misbranded products, (iii) the value of the average wholesale price of the products, and (iv) the differences in price between the misbranded Dole products and similar competitive products without the misbranding. ER 235, 74-77. The district court held Plaintiff's final model, a regression analysis, satisfied the court's requirement that any restitution model trace "damages" solely to the impact of the "all natural fruit" misbranded label on changes in price or sales. ER 237-240, 78.

On June 12, 2014, Plaintiff filed a Third Amended Complaint ("TAC") which simply limited the products and claims in the case to mirror the class certification decision. ER 969-997. Again, there was no claim for unjust enrichment since the district court previously dismissed that claim with prejudice.

On August 21, 2014, Dole filed a motion for summary judgment and a motion to decertify the classes. ER 329-377. The motion to decertify only attacked Plaintiff's regression analysis because the district court had forbidden the use of any other measure of restitution. Dole argued Rule 23(b)(3)'s predominance requirement was not satisfied. Plaintiff opposed both motions. ER 378-429. In the opposition to the motion for summary judgment, Plaintiff submitted evidence,

including Dole's own internal survey conducted for this litigation as support for how reasonable consumers would be deceived by Dole's labels. ER 417-418.

On November 6, 2014, the district court granted in part and denied in part the motion to decertify. ER 85-109. The court decertified the California damages class, but allowed the nationwide injunctive class to remain certified. ER 109. The district court held "Brazil has satisfied the requirements of Rule 23(a) and (b)(2), but he has failed to satisfy the predominance requirement of Rule 23(b)(3)." *Id*. The district court rejected Plaintiff's regression model. ER 91-109. The district court repeated itself from its earlier motion to dismiss ruling and held there was only a single way for Plaintiff to present evidence of restitution:

> The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received. This calculation contemplates the production of evidence that attaches a dollar value to the "consumer impact" caused by the unlawful business practices. Restitution is then determined by taking the difference between the market price actually paid by consumers and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices. Accordingly, Brazil must present a damages methodology that can determine the price premium attributable to Dole's use of the "All Natural Fruit" label statements.

ER 92 (citations omitted).

On November 19, 2014, Plaintiff sought leave to file a motion for reconsideration of the Court's decertification order and the March 25, 2013 order granting in part the motion to dismiss the FAC. ER 767-783. There, Plaintiff

asked the court, among other things, to allow Plaintiff's unjust enrichment claim to be reinstated because the law in the Ninth Circuit had changed since the order dismissing the claim.

On December 8, 2014, the district court denied Plaintiff's motion for reconsideration regarding the unjust enrichment claim. ER 123-126. That same day, the district court granted Dole's motion for summary judgment. ER 110-122. In its summary judgment opinion, the district court found 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." ER 115.

On December 17, 2014, Plaintiff filed his Notice of Appeal.

SUMMARY OF THE ARGUMENT

The district court made five reversible errors.

First, the district court dismissed Plaintiff's unjust enrichment claim at the onset as duplicative of Plaintiff's statutory claims. This is simply wrong for multiple reasons. Unjust enrichment is a separate cause of action in California, its elements are different, and its remedy is measured differently than restitution under the UCL, FAL or CLRA. Also, California statute, ignored by the district court, allows cumulative recovery. Finally, the district court essentially picked one of Plaintiff's claims over another. A party is entitled to allege all claims, even if deemed inconsistent, that are adequately pleaded.

Second, the district court erred in dismissing Plaintiff's illegal product theory based on Dole's sales of misbranded products. The district court mistakenly held that this particular claim was essentially based in fraud so Plaintiff would not have standing simply because they purchased misbranded products. This claim is different than the other parts of Plaintiff's case, however, in that Plaintiff alleges Dole sold illegal products that were "misbranded" under the Sherman Law. By doing so, Dole violated the Sherman Law. Plaintiff properly borrows these statutory violations and brings a claim pursuant to the UCL.

Third, the district court erred at class certification in ruling that the only possible model of restitution in a food labeling case was to show the so-called "price premium" impact on the Plaintiff and the class, *i.e.*, the difference in value between a product as labeled and the product as received. The district court limited Plaintiff's ability to prove the impact of the misbranded label on the consumer to a regression analysis. Restitution is not so limited and the district court should have allowed Plaintiff, instead, to offer proof of the advantage gained by Dole.

Fourth, the district court erred by decertifying the Rule 23(b)(3) class because individual issues predominated over class-wide damage calculations. Under California law, individual damage calculations do not defeat certification.

Fifth, the district court erred in granting summary judgment against Plaintiff. Contrary to the district court's finding, Plaintiff provided more than sufficient evidence of how reasonable consumers would be deceived by Dole's "all natural" labels.

ARGUMENT

I. Standards Of Review

This Court's review of a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is *de novo*. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013). In considering a motion to dismiss under Rule 12(b)(6), all allegations in the complaint must be taken as true and construed in the light most favorable to the plaintiff. *Sateriale v. R.J. Reynolds Tobacco Co*., 697 F.3d 777, 783 (9th Cir. 2012). A complaint need only allege sufficient facts to show "a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). At the pleading stage, a plaintiff is allowed to assert inconsistent or alternative theories of recovery. *Vicuña v. Alexia Foods, Inc*., 2012 U.S. Dist. LEXIS 59408, at *8 (N.D. Cal. Apr. 27, 2012).

This Court reviews the denial of class certification for an abuse of discretion, a determination that entails a two-step process. *See Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013). First, this Court "look[s] to whether the trial court identified and applied the correct legal rule to the relief requested." *Id.* (quotation omitted). The Court secondly looks to whether the trial court's resolution of the motion resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from facts in the record. *Id.*

A district court's summary judgment decision is reviewed *de novo*. *Jones v. Blanas*, 393 F.3d 918, 926 (9th Cir. 2004). On appeal, the court must "determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id*.

II. The District Court Made Errors Dismissing Certain Claims

A. The District Court Erred In Dismissing Plaintiff's Unjust Enrichment Claim.

The district court initially held that there was no cause of action for unjust enrichment in California, and unjust enrichment was duplicative of Plaintiff's UCL claim. ER 25-26. In its December 8, 2014 order denying reconsideration, however, the district court seemingly acknowledged that California law does, in fact, recognize a stand-alone cause of action for unjust enrichment, ER 124, but that Plaintiff still had "made no showing that, in this particular case, the damages figures for restitution and unjust enrichment would be any different." *Id*. The district court called the injury to Plaintiff "a corresponding loss" to the benefit received by Dole and thus prohibited. *Id*. The district court's analysis was wrong.

1. Unjust Enrichment Is A Stand-Alone Claim Under California Law.

In *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), the Ninth Circuit unequivocally held unjust enrichment is a separate cause of action under California law. The court held "the elements of unjust enrichment are

receipt of a benefit and unjust retention of the benefit at the expense of another." *Id*. at 1070. *See also*, *Ohno v. Yasuma*, 723 F.3d 984, 1006 (9th Cir. 2013). Since *Berger*, other courts have followed suit. *See Krouch v. Wal-Mart Stores, Inc*., 2014 U.S. Dist. LEXIS 152755, *14 (N.D. Cal. Oct. 28, 2014); *Gabriel v. Alaska Elec. Pension Fund*, 755 F.3d 647, 665 (9th Cir. 2014); *E.J. Franks Construction, Inc. v. Sohota*, 226 Cal. App. 4th 1123, 1128 (Cal. Ct. App. 2014); *Imber-Gluck v. Google, Inc.*, 2014 U.S. Dist. LEXIS 98899, **22-25 (N.D. Cal. July 21, 2014).

2. Plaintiff Is The Master Of His Complaint.

The district court's dismissal of Plaintiff's unjust enrichment claim ignores the proper Rule 12(b)(6) standard. A motion to dismiss challenges the legal sufficiency of the claims, and the court must construe the pleading in the light most favorable to the non-moving party taking all material allegations as true. *Sateriale*, at 783.

Rather than apply that standard, the district court posed the improper question of whether the UCL and unjust enrichment claims are duplicative. The district court erred by failing to address the question of whether the unjust enrichment claim was pleaded properly to state a viable claim. Plaintiff pleaded a viable unjust enrichment claim and its dismissal was improper. "It is axiomatic that the plaintiff is generally considered the 'master of his complaint,'" *Williams v. Caterpillar Tractor Co.*, 1986 U.S. App. LEXIS 33057, at *6 (9th Cir. June 12,

1986), and the district court cannot dismiss properly pleaded claims even if they are deemed inconsistent. *Vicuña*, 2012 U.S. Dist. LEXIS 59408, **8-9 (allowing an unjust enrichment claim to be pled alternatively). The district court chose to dismiss unjust enrichment, but it could just as easily have dismissed Plaintiff's UCL claim for the same reason – that it was duplicative of unjust enrichment. Neither result is justified at the pleading stage.

3. Unjust Enrichment Would Not Be Duplicative Because California Statutes Allow Cumulative Recovery.

The district court was incorrect in ruling an unjust enrichment claim would be duplicative.

California statutes expressly say remedies under the UCL and FAL and CLRA are independent and cumulative. CAL. BUS. & PROF. CODE § 17205 ("Unless otherwise expressly provided, the remedies or penalties provided by the chapter are *cumulative* to each other and to the remedies or penalties available under all other laws of this state."). *See also*, CAL. BUS. & PROF. CODE § 17534.5; CAL. CIV. CODE § 1752; *Rose v. Bank of America, N.A.*, 57 Cal. 4th 390, 398-99 (Cal. 2013) ("the UCL … is meant to provide remedies cumulative to those established by other laws"); *Blue Cross of California, Inc. v. Superior Court*, 180 Cal. App. 4th 1237, 1249 (Cal. App. 2d Dist. 2009) ("The UCL and the FAL also contain the following provision: 'Unless otherwise expressly provided, the

remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.' (Bus. & Prof. Code, §§ 17205, 17534.5.)"); *Bescos v. Bank of Am.*, 105 Cal. App. 4th 378, 387 (Cal. App. 2d Dist. 2003) ("The remedies it provides are cumulative to any other procedures or remedies for any violation or conduct provided for in any other law."). Thus, a party who lost a case with an unjust enrichment claim and a UCL claim could be forced to cumulatively pay restitution for the UCL claim and restitution for any unjust enrichment. *See, e.g., Thomas v. Imbriolo*, 2012 Cal. App. Unpub. LEXIS 3111 (Cal. App. 1st Dist. Apr. 25, 2012) (awarding $40,000,000 in restitution under the UCL and $36,829,373 in compensatory damages under CLRA for same approximately $40,000,000 in sales). The district court's rulings ignored these California statutes entirely. ER 1-27.

4. Unjust Enrichment Is Not Duplicative Because Unlike The UCL Its Remedy Can Be Disgorgement Of Profits.

The remedy for unjust enrichment is broader than the remedies available under the UCL, FAL and CLRA and includes "nonrestitutionary disgorgement." *Meister v. Mensinger*, 230 Cal. App. 4th 381 (Cal. App. 6th Dist. 2014). As such, the remedy for unjust enrichment would include the disgorgement of Dole's profits from the sale of its misbranded products.

In *Korea Supply Co. v. Lockheed Martin Corp*., 29 Cal. 4th 1134 (2003), the California Supreme Court concluded that only "restitutionary disgorgement" is available under the UCL. Under the UCL, "an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest." *Id*. at 1148. *See also, In re Google Android Consumer Privacy Litig*., 2014 U.S. Dist. LEXIS 31430, at *21 (N.D. Cal. Mar. 10, 2014) (non-restitutionary disgorgement "is not an available remedy under the UCL.").

Non-restitutionary disgorgement, however, under an unjust enrichment theory is different. *American Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451 (Cal. App. 2d Dist. 2014), expressly held that the restitution resulting from an unjust enrichment claim includes *nonrestitutionary* disgorgement and goes beyond the restitutionary disgorgement available under the UCL (or FAL or CLRA); *Foster Poultry Farms, Inc. v. SunTrust Bank*, 2008 U.S. Dist. LEXIS 36595 (E.D. Cal. May 2, 2008) (holding that "net profit, [is] the generally accepted measure for the equitable remedy of disgorgement damages").

The Court in *Idanta* stated:

> The cases cited by defendants that involve restitution under the unfair competition law are inapplicable "[b]ecause restitution in a private action brought under the unfair competition law is measured by what was taken from the plaintiff … rather than by the defendant's unjust enrichment."
>
> …

> *Colgan v. Leatherman Tool Group, Inc*. involved claims under the false advertising law, Business and Professions Code section 17500, and the unfair competition law, Business and Professions Code section 17200. As noted, nonrestitutionary disgorgement is not available for these claims.

Idanta, 225 Cal. App. 4th at 1482 n.21, 1492 n.29 (citations omitted).

In a food misbranding case, *Kosta v. Del Monte Corp*., 2013 U.S. Dist. LEXIS 69319 (N.D. Cal. May 15, 2013), Judge Gonzalez Rogers allowed Plaintiff's claim for unjust enrichment and its disgorgement and restitution remedies to proceed in a consumer protection case that also sought statutory remedies pursuant to the UCL, CLRA and FAL. *Id*. at *43-44.

In *Imber-Gluck v. Google, Inc.*, 2014 U.S. Dist. LEXIS 98899, 22-25 (N.D. Cal. July 21, 2014), the court allowed the plaintiff to proceed with claims based on the "unfair, deceptive, or misleading" aspects of the UCL, while simultaneously ruling that the unjust enrichment claim asserted in that case could go forward. *Id.* at *25. *Imber-Gluck* allowed the possibility of the plaintiff recovering disgorgement of profits as a result of unjust enrichment in addition to any remedies available under the UCL.

Numerous other cases allowed a party seeking a disgorgement remedy for unjust enrichment to proceed while also asserting claims pursuant to consumer protection statutes. *See, e.g., Valdez v. Saxon Mortg. Servs.*, 2015 U.S. Dist. LEXIS 2173 (C.D. Cal. Jan. 6, 2015); *Apple In-App Purchase Litig.*, 855 F. Supp.

2d 1030, 1042 (N.D. Cal. March 31, 2012); *Ellsworth v. U.S. Bank, N.A.*, 908 F. Supp. 2d 1063, 1088 (N.D. Cal. Dec. 11, 2012).

Likewise, California courts have repeatedly certified classes that simultaneously pursued recovery under the UCL and CLRA and the doctrine of unjust enrichment. *See, e.g.*, *Zeisel v. Diamond Foods, Inc.*, 2011 U.S. Dist. LEXIS 60608 (N.D. Cal. June 7, 2011); *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, 2008 U.S. Dist. LEXIS 95083, at **46-47, (C.D. Cal. Nov. 13, 2008); *In re Brazilian Blowout Litig.*, 2011 U.S. Dist. LEXIS 40158, at* 29 (C.D. Cal. Apr. 12, 2011); *Beck-Ellman v. Kaz USA, Inc*., 2013 U.S. Dist. LEXIS 60182, at *3 (S.D. Cal. Jan. 7, 2013); *Ellsworth v. U.S. Bank, N.A.*, 2014 U.S. Dist. LEXIS 81646, at *118 (N.D. Cal. June 13, 2014).

Meister v. Mensinger, 230 Cal. App. 4th 381 (Cal. App. 6th Dist. 2014) is instructive. In *Meister*, the court confirmed that the remedy for unjust enrichment can be nonrestitutionary disgorgement of a defendant's *profits*. *Id*. at *25. The court held "[d]isgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost." *Id*. at 398 (citing *County of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 542 (2007)). Importantly, the court stated:

> [T]he public policy of this state does not permit one to 'take advantage of his own wrong' regardless of whether the other party suffers actual damage. Where 'a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust … the defendant may be under a duty to give to the

> plaintiff the amount by which [the defendant] has been enriched.'" (citations omitted.)
>
> The emphasis is on the wrongdoer's enrichment, not the victim's loss. In particular, a person acting in conscious disregard of the rights of another should be required to disgorge all profit because disgorgement both benefits the injured parties and deters the perpetrator from committing the same unlawful actions again. Disgorgement may include a restitutionary element, but it '"may compel a defendant to surrender all money obtained through an unfair business practice … regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice."'

Meister, at **26-27. *See also*, *In re Verduzco*, 2015 Cal. App. Unpub. LEXIS 829, **34-35 (Cal. App. 4th Dist. Feb., 5, 2015) ("The emphasis is on the wrongdoer's enrichment, not the victim's loss.").

Meister, *Idanta* and *In re Verduzco* make clear that the remedy for unjust enrichment can be different than the restitutionary disgorgement required under the California statutes. An unjust enrichment claim for non-restitutionary disgorgement would specifically measure the gains and profits by Dole.

Here, the district court assumed that the measure of Plaintiff's loss and the the benefit to Dole would be identical, and therefore, duplicative. The court penalized Plaintiff for not pleading specific facts showing the amount of Dole's net profit or the retail amount spent by the class, or even the "price premium" that the Court said it wanted. ER 125. To be clear, at the pleading stage and without the benefit of any discovery a plaintiff is not responsible to include those kinds of

figures. Moreover, the district court admitted those remedies are certainly not automatically the same. "[R]estitution does not necessarily equal unjust enrichment." ER 125 (citing *Meister*). In this case, Dole manufactured the misbranded products and sold them to wholesalers, who in turn, sold to retailers. The 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. It is important to note, again, that Plaintiff alleged in the FAC, and in all subsequent complaints, that he was "misled by the Defendants' unlawful labeling practices and actions into purchasing products ***he would not have otherwise purchased*** had he known the truth about those products." ER 878. The district court's error was based on its criticism that Plaintiff had not proven (at the motion to dismiss stage, no less) that the potential recovery for statutory restitution and disgorgement unjust enrichment would be different. *Id*. They clearly can be very different and the district court should have afforded Plaintiff the opportunity in discovery to prove each potential manner of recovery.[2]

[2] Unlike the UCL, the amount of disgorgement available to Plaintiff and the class is determined by a jury. *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 728 (2000) (plaintiff entitled to a jury trial on claim for unjust enrichment "even when equitable principles are applied.")

5. The Remedy For Unjust Enrichment Is Not Limited To A "Price Premium."

Plaintiff's recovery pursuant to an unjust enrichment claim would not be limited to the district court's "price premium." The remedy can be something different, including Dole's profits for its misbranded product sales. The Restatement (Third) of Restitution & Unjust Enrichment, §3 (2011), which is followed in California, *see Bank One, Dearborn, N.A. v. Maisel*, 2004 U.S. Dist. LEXIS 2406, *24 (N.D. Cal. 2004), provides that "[a] person is not permitted to profit by his own wrong," and the official notes to this section state:

> When the defendant has acted in conscious disregard of the claimant's rights, the whole of the resulting gain is treated as unjust enrichment, even though the defendant's gain may exceed both (i) the measurable injury to the claimant, and (ii) the reasonable value of a license authorizing the defendant's conduct. Restitution from a conscious wrongdoer may therefore yield a recovery that is profitable to the claimant …
>
> Restitution requires full disgorgement of profit by a conscious wrongdoer, not just because of the moral judgment implicit in the rule of this section, but because any lesser liability would provide an inadequate incentive to lawful behavior. If A anticipates (accurately) that unauthorized interference with B's entitlement may yield profits exceeding any damages B could prove, A has a dangerous incentive …. The objective of that part of the law of restitution summarized by the rule of § 3 is to frustrate any such calculation. …
>
> The existence of colorable or even plausible justification does not immunize the defendant in such cases from a liability to disgorge gains that are determined--after the fact--to have been realized through interference with another's interests, or in breach of a duty owed to the other. In this respect, a liability to disgorge profits resembles the liability in damages that would result from a breach of

> the same duty: the actor takes the risk that conduct undertaken in good faith may prove to interfere with the protected interests of another ….
>
> The text of § 3 is carried over from Restatement of Restitution § 3 (1937), omitting the concluding words "at the expense of another." The purpose of this change is to avoid any implication that the defendant's wrongful gain must correspond to a loss on the part of the plaintiff. (On the meaning of the words "at the expense of another," see § 1, Comment a.) On the contrary, it is clear not only that there can be restitution of wrongful gain exceeding the plaintiff's loss, but that there can be restitution of wrongful gain in cases where the plaintiff has suffered an interference with protected interests but no measurable loss whatsoever.

§3, official notes.

The official comments to §49 of the Restatement point out that §49 "identifies six potentially different standards for measuring enrichment" and indicates that the "value to the recipient" approach which focuses on the benefit of the improper claim to a defendant is "usually the most restrictive (and therefore the most favorable to a defendant) of the available measures of enrichment" and is thus typically reserved for involving an "innocent recipient" who "obtained unrequested, nonreturnable benefits." To be sure this is not the case with Dole.

In stark contrast, §49(4) of the Restatement states:

> (4) When restitution is intended to strip the defendant of a wrongful gain, the standard of liability is not the value of the benefit conferred ***but the amount of the profit wrongfully obtained***. Unjust enrichment in such cases is measured by the rules of § 51(4)-(5).

Section 51(4) of the Restatement indicates that the appropriate measure in such a context is the "net profit attributable to the underlying wrong" unless a "market value" measure would impose greater liability.

Section 51(5), in turn, provides:

> (5) In determining net profit the court may apply such tests of causation and remoteness, may make such apportionments, may recognize such credits or deductions, and may assign such evidentiary burdens, as reason and fairness dictate, consistent with the object of restitution as specified in subsection (4). The following rules apply unless modified to meet the circumstances of a particular case:
>
> (a) Profit includes any form of use value, proceeds, or consequential gains (§53) that is identifiable and measurable and not unduly remote.
>
> (b) A conscious wrongdoer or a defaulting fiduciary who makes unauthorized investments of the claimant's assets is accountable for profits and liable for losses.
>
> (c) A conscious wrongdoer or a defaulting fiduciary may be allowed a credit for money expended in acquiring or preserving the property or in carrying on the business that is the source of the profit subject to disgorgement. By contrast, such a defendant will ordinarily be denied any credit for contributions in the form of services, or for expenditures incurred directly in the commission of a wrong to the claimant.
>
> (d) A claimant who seeks disgorgement of profit has the burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain. Residual risk of uncertainty in calculating net profit is assigned to the defendant.

Importantly, California precedent like *Meister* and §51(5)(d) of the Restatement and its Official Comments make clear that while a plaintiff has the burden of producing evidence permitting a reasonable approximation of the

amount of the defendant's wrongful gain, much of the burden with respect to calculating the defendant's net profits is actually assigned ***to the defendant*** and that once the plaintiff produces a possible minimum and maximum range, the burden to demonstrate the appropriateness of anything less than the maximum falls on the defendant. Once a plaintiff has established the amount, "if the damages proven could be reduced proportionately, that burden rests upon the defendant." "[W]here it is clear … a defendant has been at fault and … has caused some part of the plaintiff's damages, the burden of proof should rest on him to show the extent of his contribution, and … if he cannot sustain it he should be liable for the entire loss." *Meister*, 230 Cal. App. 4th at 396-398.

Meister is in accord with the official comment to §51 Restatement which it cites and quotes:

> This Restatement adopts a more modern and generally useful rule that the claimant has the burden of producing evidence from which the court may make at least a reasonable approximation of the defendant's unjust enrichment. If the claimant has done this much, the defendant is then free (there is no need to speak of "burden shifting") to introduce evidence tending to show that the true extent of unjust enrichment is something less. If the claimant's evidence will not yield even a reasonable approximation, the claim of unjust enrichment is merely speculative, and disgorgement will not be allowed.
>
> . . . .
>
> Underlying the rules about evidentiary burdens in these cases is the equitable disposition that resolves uncertainty in favor of the claimant against the conscious wrongdoer. "Reasonable approximation" will suffice to establish the disgorgement liability of a conscious

> wrongdoer, when the evidence allows no greater precision, because the conscious wrongdoer bears the risk of uncertainty arising from the wrong.

Restatement (Third) of Restitution & Unjust Enrichment, §51 cmt. i.

The district court's belief that Plaintiff is limited to seeking a price premium and precluded from seeking non-restitutionary disgorgement cannot be squared with the text of these cases or the Restatement upon which the holdings in these cases are based.

B. The District Court Erred By Dismissing Plaintiff's "Illegal Product" Theory

1. The Sale Of Misbranded Food Is Not Grounded In Fraud And Gives Rise To A UCL "Unlawful" Prong Claim.

The sale or receipt of a misbranded food product is an illegal act in California and nationwide. CAL. HEALTH & SAF. CODE § 110760 ("It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded."); 21 U.S.C. § 331; CAL. HEALTH & SAF. CODE § 110770 ("It is unlawful for any person to receive in commerce any food that is misbranded or to deliver or proffer for delivery any such food."). These acts give rise to Plaintiff's right to recover for the restitution suffered as a result of unknowingly engaging in this illegal transaction.

The district court committed reversible error in dismissing Plaintiff's claims premised on the unlawful sale of misbranded food to Plaintiff in violation of §

110760, ER 912, 953, 960, based on the court's erroneous belief that Plaintiff's payment of money for misbranded food that was illegal to sell or hold did not result in Plaintiff having standing to sue.

The court based its holding on the erroneous belief that:

> The gravamen of Brazil's claims under the UCL's unlawful, unfair, and fraud prongs is that Defendants' labeling was deceptive. Brazil must therefore demonstrate that he actually relied on Defendants' alleged misrepresentations.
>
> . . . . .
>
> Moreover, Brazil's "illegal product" theory is inconsistent with the enhanced standing requirements for UCL claims imposed by Proposition 64 and the California Supreme Court's decision in *Kwikset*. As explained in *Kwikset*, the voters enacted Proposition 64 in 2004 as a means of "confin[ing] standing to those actually injured by a defendant's business practices and [] curtail[ing] the prior practice of filing suits on behalf of clients who have not used the defendant's product or service, *viewed the defendant's advertising*, or had any other business dealing with the defendant." 51 Cal. 4th at 321 (emphasis added) (internal quotation marks omitted). Were the Court to hold that Brazil, who never viewed the Health Claims, has standing to bring claims based solely upon allegations that he would not have purchased a product that was misbranded, purchasers who never "viewed the defendant's advertising" or misleading labeling would have standing to sue. Such a holding is inconsistent with Proposition 64 and *Kwikset*.

ER 42-43.

The district court failed to follow the post-Proposition 64 precedents of the California courts that establish that the sale of a product in violation of a statute

prohibiting its sale can serve as the basis for a UCL claim by the purchaser of the product.

In particular, the district court refused to follow the California Appellate Court holdings in *Steroid Hormone Product Cases*, 181 Cal. App. 4th 145, 157 (2010), and *Medrazo v. Honda of N. Hollywood*, 205 Cal. App. 4th 1, 12 (2012). In *Medrazo*, the plaintiff purchased a motorcycle that was sold illegally without a particular tag in violation of California's Vehicle Code. The court found that plaintiff had established an economic injury caused by the defendant's alleged unfair competition: she had purchased a product that defendant "allegedly was not legally allowed to sell" and therefore a UCL claim would lie even absent any reliance on product labeling. *Id.* In *Steroid Hormone*, the court recognized a UCL claim would exist for purchasers who bought a product that was illegal to sell or possess absent any reliance on product labeling. *Steroid Hormone*, 181 Cal. App. 4th at 157.

The district court's holding is incorrect for several reasons. First, Plaintiff had dealings with Dole – he was a purchaser of Dole's products and, as described below, was injured by Dole's illegal sale of those products and suffered a resulting economic loss caused by Dole's misconduct. Thus, Plaintiff was within the universe of consumers that were not supposed to be affected by Proposition 64's new standing requirements, which were only designed to eliminate those persons

with no dealings with a defendant and no injury attributable to defendant's misconduct. As stated in *Kwikset*, which the district court purported to rely upon:

> While the voters clearly intended to restrict UCL standing, they just as plainly preserved standing for those who had had business dealings with a defendant and had lost money or property as a result of the defendant's unfair business practices. ….As we shall explain, a party who has lost money or property generally has suffered injury in fact. Consequently, the plain language of these clauses suggests a simple test: To satisfy the narrower standing requirements imposed by Proposition 64, a party must now (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, *i.e.*, economic injury, and (2) show that that economic injury was the result of, *i.e.*, caused by, the unfair business practice or false advertising that is the gravamen of the claim.

Kwikset Corp. v. Superior Ct., 51 Cal. 4th 310, 321-322 (2011). Here, contrary to the district court's holding, the gravamen of the claim under Plaintiff's illegal sale theory was not that the labels were somehow misleading but rather that Dole caused Plaintiff an economic injury by selling him and the class misbranded food in violation of a statute that prohibits the sale of misbranded food.[3]

[3] Food can be misbranded for many reasons, including reasons not related to labeling. *See e.g.* CAL HEALTH & SAF. CODE § 110661 (food misbranded if manufactured or packed in unregistered facility). The district court took issue with Plaintiff's illegal sale theory because in the court's mind "purchasers who never 'viewed the defendant's advertising' or misleading labeling would have standing to sue." ER 43. The court over-applies the purpose of Proposition 64, since that reasoning would preclude claims by purchasers who are sold misbranded or adulterated food so long as there was nothing misleading on the label. The UCL is both broadly written and construed to give a claim for relief for these kinds of "non-misleading" types of statutory violations. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 325 n.17 (2009) ("There are doubtless many types of unfair business practices in which the concept of reliance, as discussed here, has no application.").

The district court's view of Prop 64's effect is completely contrary to California law that "repeatedly and consistently [held] that relief under the UCL is available without individualized proof of deception, reliance and injury." *Gutierrez v. Wells Fargo Bank, NA*, 589 Fed. Appx. 824, 827 (9th Cir. 2014) (citing *Tobacco II*). Consequently, the named plaintiff must establish reliance or injury, but the named plaintiff need only show a reasonable consumer would be deceived and not that the named plaintiff was deceived.

2. An Economic Injury Results When A Consumer Purchases A Misbranded Product.

The district court failed to understand how the unlawful sale of a product in violation of § 110760 could cause an injury to a purchaser of that product. ER 41-42. There are several ways.

Sufficient injury for Article III, UCL, FAL, and CLRA standing results when a consumer purchases a product that he would not have otherwise purchased but for a defendant's misconduct. This Court observed:

> Article III standing exists when a plaintiff purchases a product she would not have otherwise purchased but for the alleged misconduct of the defendant…. Contrary to the dissent's assertion, Galope's standing does not turn on whether she actually made interest payments that were adjusted in response to the allegedly manipulated LIBOR rate. *Galope's cognizable injury occurred when she purchased the loan*, not upon payment of LIBOR-affected interest….

Galope v. Deutsche Bank Nat'l Trust Co., 566 Fed. Appx. 552, 552 (9th Cir. 2014). The Court held:

> We reverse the district court's ruling that Galope lacks statutory standing to pursue her LIBOR-based …UCL … and FAL... claims against the … Defendants…. *Galope has statutory standing to pursue these claims because she alleged that she purchased a loan that she would not have otherwise purchased but for the … Defendants' alleged misconduct.*

Id. at 553 (emphasis added, citations omitted). Where plaintiffs allege they were induced to buy a product they would not have otherwise purchased a "quintessential injury-in-fact" occurs because the "plaintiffs spent money that, absent defendants' actions, they would not have spent." *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011). The economic injury results due to the funds expended for such a product. *See Chavez v. Blue Sky Natural Bev. Co.*, 340 Fed. Appx. 359, 361 (9th Cir. 2009).

The injury in such a circumstance is the loss of funds paid in a transaction that would have been avoided had a defendant's conduct been known. This is even truer in the present situation where Plaintiff has alleged that the transactions are illegal and expressly outlawed by statute.[4] Additionally, where, as here, plaintiffs

[4] Plaintiff was justifiably unaware that the misbranded food products he purchased were misbranded and illegal to sell. Dole was not. "Where the illegality of a bargain is due to '(a) facts of which one party is justifiably ignorant and the other party is not, or (b) statutory or executive regulations of a minor character relating to a particular business which are unknown to one party, who is justified in assuming special knowledge by the other party of the requirements of the law, the

"state that they would not have purchased [a product] had there been proper disclosure" of relevant facts, that is sufficient to plead causation. *Maya* 658 F.3d at 1070.

Steroid Hormone is instructive. There the plaintiff brought a class action after he had purchased nutritional supplements from GNC that contained an illegal steroid. California law prohibited the sale of that steroid without a prescription. The plaintiff brought several claims including one under the UCL's unlawful prong. The appellate court ruled that the "two predominant issues (other than [the plaintiff]'s individual standing)" were (1) whether GNC's sale of androstenediol products was unlawful; and if so, (2) the amount of money GNC "may have ... acquired by means of" those sales that must be restored to the class." 181 Cal. App. 4th at 155.

Additionally, certain circuits have expressly held that that misbranded food products are worthless as a matter of law and thus have a fair market price of zero. In *United States v. Gonzalez-Alvarez*, 277 F.3d 73, 77-78 (1st Cir. 2002) the First Circuit stated, "we first determine the value of the adulterated milk. The government contends that because the adulterated milk could not lawfully be distributed in interstate commerce, 21 U.S.C. § 331(a), and was subject to seizure,

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illegality does not preclude recovery by the ignorant party…." *Owens v. Haslett*, 98 Cal. App. 2d 829, 834 (1950).

21 U.S.C. § 334(a)(1), 5 the value of the milk in the silos was zero as a matter of law."

The district court's refusal to recognize this fact was error both with respect to the court's price premium analysis (since a worthless product would have a quantifiable premium equal to the purchase price) and with respect to the Plaintiff's other restitution models.

III. The District Court Made Errors At Class Certification

A. The District Court Abused Its Discretion By Holding The Only Possible Measure Of Restitution In A Food Labeling Case Is The "Price Premium."

In its order granting class certification, the district court held that all of the class certification requirements under Rule 23 had been satisfied. ER 75. In its order decertifying the damages class the district court focused on the predominance element in Rule 23(b)(3). ER 91. In both orders, the district court cited *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663 (2006) for the premise 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." ER 74-92. The district court made two errors. One, it did not permit Plaintiff to present a model of restitution by gains made by Dole and, two, it stated (essentially as a matter of policy) that a refund of the purchase price would be an unfair "windfall" for the class. ER 75.

1. The District Court Misreads *Colgan.*

The district court unduly limited the measure of restitution to the price premium suffered by a consumer relying on *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 694 (2006), to justify its erroneous approach. The district court misreads *Colgan's* holding, however.

First, *Colgan* itself confirms that restitution can be measured in terms of the defendant's profit from its wrongdoing and is not merely limited to the damage suffered by consumers as a result of that wrongdoing. *Id.* at 700. *Colgan* confirms that restitution has a dual function. *Id.* at 695. Restitution is not merely a form of compensatory relief but also a public policy tool to deter wrongdoing. *Id. See also, Guido v. L'Oreal*, 2013 U.S. Dist. LEXIS 94031, at *36 (C.D. Cal. 2013) ("returning money unjustly taken from the class, and deterring the defendant from engaging in future violations of the law."). *Colgan's* holdings on these points were acknowledged by the district court but then were ignored when the district court described the type of restitution it would allow in this case. Despite acknowledging that "restitution may be measured in terms of Dole's ill-gotten gains" and further quoting *Colgan* as recognizing that restitution can be "either the dollar value of the consumer impact realized or the advantage by [the defendant]" the district court limited the Plaintiff to a measure of restitution that focused solely on the loss suffered by Plaintiff and refused to allow Plaintiff to use other acceptable forms of

restitution such as Dole's profits or sales, that would focus on Dole's gain. ER 74, 92, 100, 101.[5]

Second, the *Colgan* trial court's actions are distinguishable from this case. There, the trial court had chosen to limit the restitution to a compensatory measure and had not attempted to calculate or craft a deterrent disgorgement remedy. *Colgan*, 135 Cal. App. 4th at 697. According to the appellate court:

> In this case, the trial court intended its restitution order to be restorative in that Leatherman was ordered to pay restitution only to persons who purchased the tools at issue in California during the class period. The trial court did not purport to impose a disgorgement remedy, even if it could. At issue is the amount of restitution necessary to make injured consumers whole and whether there must be evidence to support that amount.

Id. at 697. The court needed evidence to support its consumer damage calculation. Unfortunately, it simply had no evidence at all. *Id*. The court then chose an arbitrary 25 percent of gross receipts as the measure of restorative restitution despite the fact that there was no support for that measure as either a form of consumer compensation or disgorgement of the defendant's profits. The Appellate Court reversed and held an arbitrary number could not be used.

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[5] This district court stated that "[a]lthough restitution may be measured in terms of Dole's ill-gotten gains, the question it asked was what price premium, if any, can be attributed to Dole's use of the "All Natural Fruit" label on the challenged products. ER 74. For that reason, the district court defined restitution as the "difference between the market price *actually paid by consumers* and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices." *Id.* (emphasis added).

Colgan, therefore, thus does not stand for the proposition that a plaintiff is limited to a consumer injury or price premium damage model. Nor does *Colgan* stand for the proposition that California law precludes a measure of restitution measured in terms of a defendant's profits or the advantage realized by a Defendant. *Colgan* does stand for the proposition that if a Court indicates it intends to calculate a restorative measure of restitution, it must utilize data that measures such an effect. In contrast, a deterrent measure of restitution would utilize data that measures a defendant's profits or the advantage realized by a defendant.

2. A Refund Of The Money Spent By The Class Is Also An Appropriate Form Of Restitution.

a. Plaintiff And The Class Made "Tainted" Purchasing Decisions

In *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), the California Supreme Court case recognized broader forms of restitution and placed fewer requirements on consumers to prove their injuries or damages. *Tobacco II* cites section 17203 as proof that because restitution can and should focus on forcing wrongdoers to disgorge their ill-gotten gains, restitution under the UCL is available without individualized proof of deception, reliance and injury. For example, the Court discussed the "concern that wrongdoers not retain the benefits of their

misconduct." *In re Tobacco II*, 46 Cal. 4th at 320. That case does not have the cramped vision of restitution that the district court used here.[6]

The Ninth Circuit follows the rationale of *Kwikset* and recognizes that where a Plaintiff alleges that he was induced to buy a product that he would not have otherwise purchased the economic injury equates to the price paid for such a product. "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." *Kwikset,* 51 Cal. 4th at 329-30. *See also, Chavez v. Blue Sky Natural Bev. Co.*, 340 Fed. Appx. 359, 361 (9th Cir. 2009) ("Chavez personally lost the purchase price, or part thereof, that he paid for those beverages").

According to the Ninth Circuit, a tainted purchasing decision entitles consumers to full refunds as restitution, even when the product had residual value, if that product was worthless to them. This is because "[t]he fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds for each detector that is not useful to them." *Fed. Trade*

[6] In an opinion concurring in part and dissenting in part from *Tobacco II*, Justice Baxter "recognized that under the majority's holding in *Tobacco II* a consumer is entitled to a full refund of the purchase price for a tainted purchase decision even if the product was worth exactly what the consumer paid for it." *Id.* at 336 n.5.

Comm'n v. Figgie Int'l, Inc., 994 F.2d 595, 606 (9th Cir. 1993). As stated by this Court:

> One might even say that, in effect, California has created what amounts to a conclusive presumption that when a defendant puts out tainted bait and a person sees it and bites, the defendant has caused an injury; restitution is the remedy.

Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1021 (9th Cir. 2011).

As the Ninth Circuit has explained, using the example of a dishonest rhinestone merchant, to curtail remedies for dishonest trade practices is contrary to the purpose of consumer protections statutes, which is to restore the victim to the status quo:

> Courts have previously rejected the contention "that restitution is available only when the goods purchased are essentially worthless." To understand why, we return to the hypothetical dishonest rhinestone merchant. Customers who purchased rhinestones sold as diamonds should have the opportunity to get all of their money back. We would not limit their recovery to the difference between what they paid and a fair price for rhinestones. The seller's misrepresentations tainted the customers' purchasing decisions. If they had been told the truth, perhaps they would not have bought rhinestones at all or only some. The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds for each detector that is not useful to them.

Id.(citations omitted). *See also, Thomas v. Imbriolo*, 2012 Cal. App. Unpub. LEXIS 3111, at *21-22 (Cal. App. 1st Dist. Apr. 25, 2012) ("That the jury did not subtract the fair market value of the product does not, as Imbriolo contends, mean the jury disregarded the jury instructions. The jury simply determined the fair

market value of the product was zero, perhaps in light of the testimony of class members who stated they would not have purchased Avacor had they known the truth about it. The court also concluded Avacor was worthless"); *Sanbrook v. Office Depot, Inc.*, 2009 U.S. Dist. LEXIS 30857 at *16, 2009 WL 840020 (N.D. Cal. Mar. 30, 2009) (same). Similarly, California courts award the full purchase price to someone who purchased a product that is illegal and a crime to possess. *See De La Hoya v. Slim's Gun Shop*, 80 Cal. App. 3d Supp. 6, 146 Cal. Rptr. 68 (Cal. App. Dep't Super. Ct. 1978) (rejecting challenge to the award of damages for the purchase price of an illegal gun).

b. Misbranded Food Is Contraband

California's Sherman Law makes it "unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded." CAL. HEALTH & SAF. CODE § 110760. Plaintiff has alleged that the products in question were misbranded for a number of reasons. As recognized this year by Judge Grewal of this District in another similar misbranded food case involving fruit products like the present action, CAL. HEALTH & SAF. CODE § 110825 "imposes liability of 'not more than one year in the county jail or a fine of 'not more than one thousand dollars' for *any* violation of *any* provision in *any* part of the statute regulating misbranded food." including § 110760. *Park v. Welch Foods*,

Inc., 2014 U.S. Dist. LEXIS 37796, at *5 (N.D. Cal. Mar. 21, 2014) (emphasis in original). As noted by Judge Grewal:

> The fact remains, however, that in California, "[i]t is unlawful for any person to…hold or offer for sale any food that is misbranded," and the statute establishing that is subject to the punishments described above. That means that Plaintiffs could, in fact, be arrested and prosecuted for unlawful possession of misbranded goods.

Id. at *5-6. Like other Judges before him who presided over cases involving illegal products, Judge Grewal noted that the products in question were "contraband" and that it was plausible that consumers would refrain from purchasing illegal products that could subject them to criminal liability. *See Myers v. Malone & Hyde, Inc.*, 173 F.2d 291, 295 (8th Cir. 1949) ("they were contraband under the law of the United States and as such they were not merchantable."). This was so even though the food in question was "Good Food" that was not misbranded because it was unfit for consumption but rather because it suffered from labeling violations. *Id.*; *Porter v. Craddock*, 84 F. Supp. 704, 710 (D. Ky. 1949) (same)

According to Judge Grewal, "Welch's argument that the allegations should be struck because other consumers may opt not to buy Welch's products if they know of the potential for criminal liability speaks to precisely that point." *Park*, at *6. In this regard, Judge Grewal was in accord with other California authorities

who recognize consumers are entitled to get their money back. *See Steroid Prod. Cases*, 181 Cal. App. 4th at 157.

B. The District Court Erred When It Decertified The Rule 23(b)(3) Class Because Of Damage Calculations.

The district court decertified the damages class only because, in its opinion, Plaintiff had failed to show a way to prove class-wide damages. "Accordingly, because Brazil's proposed damages model fails to provide a means of showing damages on a class-wide basis through common proof, the Court concludes that Brazil has not satisfied the Rule 23(b)(3) requirement that common issues predominate over individual ones. The Court must therefore decertify the Damages Class." ER 107.

This was error. The Ninth Circuit follows the rule that the existence of individual or unique damages issues will not preclude certification. *Levya v. Medline Industries, Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (holding that individualized "damage calculations alone cannot defeat certification"). Multiple other Circuit courts have emphasized this point in even stronger terms. *See, e.g., Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 801 (7th Cir. 2013) ("[i]t would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages"); *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 860-61 (6th Cir. 2013) (holding that, post-

Comcast, "it remains the black-letter rule that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members"); *Roach v. T.L. Cannon Corp.*, --- F.3d ----, 2015 WL 528125, at *5 (2d Cir. Feb. 10, 2015) (same); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) (same).

Moreover, the Ninth Circuit has made clear that in light of *Tobacco II*, in situations where all class members are exposed to the identical type of labeling claim (like here), individual issues cannot be found to predominate with respect to deception, reliance or injury/damage issues because the UCL provides for class-wide relief without individualized proof that members of the class relied on the labeling claim or were deceived by the labeling claim or were injured or damaged by the labeling claim. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011).

As stated by this Court in *Stearns*:

> Unfortunately, the district court did not have the benefit of *In re Tobacco II Cases* …. when it ruled, and that case makes all the difference in the world…
>
> The court had no doubt 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. …. but it decidedly did not change the California rule "that relief under the UCL is available without individualized proof of deception, reliance and injury." …. Thus, the district court's concerns about reliance and causation were not well taken.

. . . .

> We do not, of course, suggest that predominance would be shown in every California UCL case. For example, it might well be that there was no cohesion among the members because they were exposed to quite disparate information from various representatives of the defendant. ….On this record, that does not appear to be the case, and the district court did not rule that it was.

Stearns, 655 F.3d at 1020.

This Court has also held in *Stearns* that the fact that relief under the UCL is available without individualized proof of deception, reliance and injury (1) does not create an Article III standing issue and (2) does not preclude class restitution on a class-wide basis. As stated by this Court in *Stearns*:

> The injury here meets both of those requirements. Each alleged class member was relieved of money in the transactions. Moreover, it can hardly be said that the loss is not fairly traceable to the action of the Appellees within the meaning of California substantive law. …. That law, as already noted, keys on the wrongdoing of Appellees and is designed to protect the public (including the proposed class members). Tobacco II …. In other words, this is not a case, as was possible under California's UCL before it was amended, where the representative plaintiff need not even show any connection to a defendant's conduct; it is plainly a case where Appellants' claim is that they came, saw, were conquered by stealth, and were relieved of their money.

Id. at 1020-21. *See also*, *Gutierrez v. Wells Fargo Bank, NA*, 2014 U.S. App. LEXIS 20892, **3-4 (9th Cir. 2014) ("Rather, California law permits plaintiffs to

recover any property that "may have been acquired by means of" a defendant's false or misleading statements. Cal. Bus. & Prof. Code § 17203").[7]

IV. The District Court Erred In Granting Summary Judgment To Dole.

A. California Law Does Not Require Extrinsic Evidence To Show Dole's Labels Are Deceptive To Reasonable Consumers.

The district court granted summary judgment because it said Plaintiff had failed to show that it was "deceptive" for Dole to describe its products as "All Natural Fruit," even though the products contain synthetic ingredients. ER 120-121.[8] In so holding, the district court disregarded and denigrated the "scientific literature [and] anecdotal evidence" offered by Plaintiff. *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1361 (2003) (quotation omitted). The district court instead required something more, relying on federal authorities holding that "anecdotal evidence alone is insufficient to prove that the public is

[7] Additionally, the (b)(3) class should have remained certified because of the possibility of an award of nominal damages. *See* CAL. CIV. CODE § 3360. Courts allow the recovery of nominal damages if real, actual injury has occurred and damages have been suffered, but the extent and amount of the injury and damages cannot be determined from the evidence presented. *ProMex, LLC v. Hernandez*, 781 F. Supp. 2d 1013, 1019 (C.D. Cal. 2011). The Ninth Circuit has stated class members are entitled to nominal damages. *Cummings v. Connell*, 402 F.3d 936, 942-45, 2005 U.S. App. LEXIS 4954 (9th Cir. 2005).

[8] "Summary judgment is generally an inappropriate way to decide questions of reasonableness because the jury's unique competence in applying the reasonable man standard is thought to ordinarily preclude summary judgment." *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 868 (9th Cir. 2010) (quotation omitted).

likely to be misled." *Ries v. Ariz. Beverages USA LLC*, No. 10-01139, 2013 WL 1287416, at *6 (N.D. Cal. Mar. 28, 2013) (quotation omitted). ER 118.[9] But those "[f]ederal cases . . . do not accurately reflect California law," *Consumer Advocates*, 113 Cal. App. 4th at 1361; *Silicon Image, Inc. v. Analogix Semiconductor, Inc.*, 642 F. Supp. 2d 957, 969 (N.D. Cal. 2008) ("The [c]ourt rejects . . . the federal cases that have held that false advertising claims under California law require extrinsic evidence that customers are likely to be deceived."), and California law controls here. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) ("[F]ederal courts sitting in diversity apply state substantive law . . . .").[10]

B. The "Primary Evidence" To Establish A Label Is Misleading "Is The Advertising Itself"

The FAL, UCL, and CLRA look to whether "members of the public are likely to be deceived" by the claim. *Brockey v. Moore*, 107 Cal. App. 4th 86, 99 (2003) (quotations omitted). This standard focuses on the effect the challenged statement has upon the "reasonable consumer," a shorthand term for the "ordinary

[9] The *Ries* opinion relied heavily on *Haskell v. Time, Inc.*, 965 F. Supp. 1398 (E.D. Cal. 1997), a case that was specifically rejected by the California Court of Appeals in *Brockey v. Moore*, 107 Cal. App. 4th 86, 99.

[10] The district court did not address California cases like *Consumer Advocates*, which refuse to follow the federal standard for demonstrating deception. *See generally Colgan*, 38 Cal. Rptr. 3d at 48 (federal cases have improperly "imported into the California UCL standards of proof derived from federal Lanham Act cases").

consumer within the target population." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 510 (2003).[11]

"The primary evidence" of whether a label is misleading "is the advertising itself," *Brockey*, 107 Cal. App. 4th at 100 (emphasis added). After all, the "'misleading character' of a . . . representation 'appears on applying its words to the facts.'" *Colgan*, 38 Cal. Rptr. 3d at 46 (quoting *People v. Wahl*, 100 P.2d 550 (1940)). Further, in assessing the language of a manufacturer's claim, it is important to distinguish between "factual representations" and "boasts" that are "all-but-meaningless superlatives." *Consumer Advocates*, 113 Cal. App. 4th at 1361. For factual representations the likelihood to deceive may be resolved *as a matter of law*. *See Colgan*, 38 Cal. Rptr. 3d at 49.

Dole's representation that its products are "All Natural Fruit" is a "factual representation," *Consumer Advocates*, 113 Cal. App. 4th at 1361. The district court even held it was not "unreasonable" for purchasers to believe that representation means what it says: "That *all* the contents of the package, not just the fruit, [a]re all natural." ER 118 (emphasis added) (quotation omitted); *see also Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008) ("[T]he statement that Fruit Juice Snacks was made with 'fruit juice and other all natural

[11] The reasonable consumer "may well be unwary," *Lavie*, 105 Cal. App. 4th at 508, and is neither "exceptionally acute and sophisticated" nor the "least sophisticated" among peers, *id.* at 509, 510 (quotation omitted). She is simply "ordinary." *Id.* at 510.

ingredients' could *easily* be interpreted by consumers as a claim that all ingredients in the package were natural . . . ."). This was not, in fact, the case – and consumers were misled – considering that the products contained the synthetic ingredients citric acid and ascorbic acid.

The misleading nature of Dole's labels is manifest by applying the "words" of Dole's representation – "All Natural Fruit" – to the fact that synthetic ingredients are included. As the district court conceded, reasonable shoppers reading that language would expect to be purchasing a package of food bereft of synthetic contents, ER 118, but that is not what they obtained. In these circumstances, Dole's "representations were deceptive as a matter of law," *Colgan*, 38 Cal. Rptr. 3d at 49, and the district court committed error when it entered summary judgment by concluding otherwise.

C. Plaintiff Offered Additional Evidence Demonstrating Dole's Labels Are Deceptive To Reasonable Consumers.

Besides the labels, Plaintiff offered other evidence showing Dole's label would be deceptive to reasonable consumers. The district court, however, either ignored the evidence altogether or misconstrued the evidence, especially the FDA position on misleading "natural" claims.

First, Plaintiff testified the labels mislead him. ER 430, 440, 441, 461, 462, 479. The district court acknowledged this and even held this position was "not necessarily unreasonable." ER 118. Plaintiff verified that he was misled when he

"assume[d] that the entire contents of [a] package [labeled "All Natural Fruit"] would be all natural." ER 463, 425. The district court maligned Plaintiff's account as a mere "isolated example of deception," ER 120, even though the "standard for whether an act or practice is misleading is an objective one." *Guido*, 2013 U.S. Dist. LEXIS 94031, at * 31. The district court's offhand dismissal of the class representative's testimony was improper.[12]

Second, the FDA has established a "natural" policy that establishes when the FDA deems a label misleading. The FDA only finds the use of the label term "natural" legitimate "if the food does not contain added color, artificial flavors, or synthetic substances." This policy comes straight from the FDA website. ER 756-758. In a series of warning letters over the years, the FDA routinely repeated this policy and cautioned manufacturers that "use of the claim 'All-Natural' on [a] product label is false and misleading" whenever the "product[] contain[s] [a] synthetic ingredient." ER 766; *see also* ER 762 (specifying that "the term 'natural' on a food label [is] truthful and non-misleading only when nothing artificial or synthetic has been included in, or has been added to, a food that would not normally be expected to be in the food"); ER 751 (same); ER 754 (same). The district court disregarded these letters, however, and argued it was "notable" that it

[12] "The district court's holding is contrary to any reasonable interpretation of the facts. For example, the bags of Dole frozen mixed fruit simply contained fruit impregnated with citric acid and ascorbic acid so the fruit, which was the only thing in the bag, could hardly be viewed as "natural." ER 816-817.

was not aware of "a single FDA letter warning Dole about its 'All Natural Fruit' labels," ER 119. That misses the point. "The FDA uses warning letters . . . to police objectionable food and beverage labels [in order] to obtain voluntary and prompt corrective action *for what it considers to be significant violations of the FDCA*." *Reid v. Johnson & Johnson*, No. 12-56726, 2015 WL 1089583, at *7 n.5 (9th Cir. Mar. 13, 2015) (emphasis added). Consequently, regardless of whether the FDA has ever sent a warning letter to Dole, it is evident that the FDA regards Dole's use of "All Natural" here to be "misleading," ER 766, and a "*significant* violation of the FDCA," *Reid*, 2015 WL 1089583, at *7 n.5 (emphasis added).

"Given that the FDA has indicated in warning letters that claims like '[All Natural]' are not authorized [as Dole uses them], [Dole] cannot shield itself from liability with the FDA's regulations." *Reid*, 2015 WL 1089583, at *12. To be sure, the FDA's policy position on this subject is similar to the evidence of agency interpretation deemed by this Court as relevant to show "how a reasonable consumer will understand" a particular representation. *See Rubio v. Capital One Bank*, 613 F.3d 1195, 1200-02 (9th Cir. 2010).

In *Rubio*, to determine how a reasonable consumer would construe the term "fixed rate," this Court placed much emphasis on the opinion adopted by the Federal Reserve Board of Governors. *Rubio*, 613 F.3d at 1200-02. The FDA's stance on the "All Natural" question, as reflected in its warning letters, deserves

equivalent influence, but the district court improperly distinguished *Rubio* on the basis that "'consumer testing' conducted by an independent research firm," ER 120, played a part in development of the guidelines at issue there. The critical point in *Rubio*, though, was not how a particular decision came about, but that "the very agency tasked with implementing" the statute under review had passed upon "how a reasonable consumer [would] understand" certain language. *Rubio*, 613 F.3d at 1200. The same is true here.

Fundamentally, the FDA policy on the claim "All Natural" (*i.e.*, that the term is misleading when it refers to a product that includes synthetic ingredients) is akin to the "scientific literature" acceptable in California to show the falsity of advertising. *See Consumer Advocates*, 113 Cal. App. 4th at 1361.

The district court made another error when it held Plaintiff had not shown a violation of the FDA policy because there was no evidence that citric acid and/or ascorbic acid "would not normally be expected to be in the food." ER 118-119. The violation of FDA policy, therefore, could not be used as additional evidence of how reasonable consumers could be misled. *Id*. To be sure, this is not the correct FDA policy. Again, the FDA deems a "natural" label misleading to consumers if the food does contains "added color, artificial flavors, or synthetic substances." ER 757. That is the entire test. All of the relevant warning letters say the same thing. There is not a single word from the FDA that suggests, for example, that if a

product contains citric acid when it comes off the tree that a producer is allowed to use synthetic, processed citric acid and then refer to the product as "natural." Quite the opposite. For example, in a 2001 warning letter to Oak Tree Farm Dairy, the FDA said adding citric acid to an iced tea product was misleading because citric acid had been added to the tea. ER 750-751. Also, in a 2001 warning letter to Hirzel Canning Co., the FDA said that adding citric acid to Hirzel canned tomatoes violated the FDA policy and was therefore misleading. ER 753-754. Notably, citric acid naturally occurs in tomatoes.[13] This warning letter belies the district court's finding. [14]

Third, while Plaintiff's evidence is sufficient to defeat summary judgment, Dole itself filled the record with evidence about reasonable consumers. Dole submitted a litigation-generated consumer survey in opposition to both class certification and summary judgment. ER 244-328. Dr. Van Liere's consumer study, however, *actually supports the Plaintiff's claims* once the data is analyzed and accurately reported. The survey shows that when shown a label with the

[13] "One of the major organic acids present in tomato fruit tissue is citric acid." *See* American Society of Plants Biologists. www.plantphysiol.org/content/84/4/993.full.pdf. Last visited March 24, 2015.

[14] Persons who buy something said to be "*All* Natural" clearly do not expect an item filled with synthetic ingredients. *Cf. Colgan*, 38 Cal. Rptr. 3d at 47-49 (deciding, as a matter of law, that persons who bought something supposedly "Made in U.S.A." were misled when they actually acquired a product with many foreign elements).

challenged "all natural" claim, respondents reported the product conveyed that it was "natural" at over 600% of the rate of those shown a label without the claim. Van Liere tries to hide this fact by falsely claiming that the Survey data shows that "the packaging used in the test conditions had about a 26 percent higher rate of mentions of 'natural' than the control conditions" but a 31% response rate is not a mere 26% higher than a 5% response rate, it is north of 600 percent higher than a 5% response rate (since percentage differences are calculated using division not subtraction). ER 263. In our case Dr. Van Liere found a 26% differential but ignored it. In other cases, Dr. Van Liere has said much lower numbers would lead to a confusing or misleading label. The Fourth Circuit found "Dr. Van Liere's survey yield[ed] a net confusion rate of 17 percent - that is, 17 percent of consumers demonstrate actual confusion. This result is clear evidence of actual confusion for purposes of summary judgment." *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 158 (4th Cir. 2012).

The survey data actually shows:

- 58% of respondents shown a label with the challenged "all natural" claim failed to recognize that the product contained both ascorbic acid and citric acid as ingredients, a higher percentage than those shown a control label. ER 265.
- 31% of respondents shown a label with the challenged "all natural" claim failed to recognize that the product contained either citric acid or ascorbic acid, notwithstanding the ingredient list on the label, a higher percentage than those shown a control label. ER 265.
- respondents shown a label with the challenged "all natural" claim who recognized the product contained citric acid and ascorbic acid

erroneously identified those acids as natural at a 30% greater rate than those shown the control label. ER 267.

- respondents shown a label with the challenged "all natural" claim who recognized the product contained citric acid (but not ascorbic acid) erroneously identified the citric acid as natural at over a 42% greater rate than those shown the control label. ER 267.
- Table 3 shows that 36% of respondents shown a label with the challenged "all natural" claim who recognized an acid was present incorrectly believed that one or more of the acid ingredients was natural while only 16% correctly recognized that one or more of the acids was artificial or synthetic. ER 267. In contrast, the control group had a lower percentage that incorrectly believed that one or more of the acid ingredients was natural and a higher percentage that correctly recognized that one or more of the acids was artificial or synthetic. ER 267.

Importantly, the district court ignored this survey. By doing so, the district court failed to consider that the answers to certain questions in Dole's consumer survey suggest the labels would be misleading to a reasonable consumer. For example, of the 168 respondents asked question Q22, overwhelming majorities indicated that that they would agree that to be "natural" citric acid would "not be synthetic" (over 75%); would be "minimally processed" (over 76%); would "exist in nature" (over 90%) and would "not be chemically altered" (over 62.5%). ER 267, 326. In contrast, of the 168 respondents asked question Q22, only a small minority indicated that that they would not agree with the view that to "natural" citric acid would "not be synthetic" (under 12%); would be "minimally processed" under 10%); would "exist in nature" (under 1.2%) and would "not be chemically altered" (under 13.2%). ER 267, 326.

Similarly, of the 103 respondents asked question Q23, overwhelming majorities indicated that that they would agree that to be "natural" ascorbic acid would "not be synthetic" (over 82.5%); would be "minimally processed" (over 76.6%); would "exist in nature" (over 92.2%) and would "not be chemically altered" (over 85.4%). ER 267, 326. In contrast, of the 168 respondents asked question Q23 only a small minority indicated that that they would not agree with the view that to "natural" ascorbic acid would "not be synthetic" (under 10.7%); would be "minimally processed" (under 13.6%); would "exist in nature" (under 3.9%) and would "not be chemically altered" (under 11.7%) ER 267, 326.

Plaintiff's submission of Plaintiff's testimony, the labels, and the additional evidence including the Dole survey evidence should have precluded summary judgment had it not been ignored by the district court.

D. The District Court Completely Ignored Plaintiff's Evidence The Labels Were Also "False."

The TAC alleges Dole violated CAL. HEALTH & SAF. CODE § 110660. ER 974, 975, 978, 980, 983. This rule states "any food is misbranded if its labeling is false ***or*** misleading in any particular." The district court discussed the evidence about the misleading nature of the labels at length but completely ignored Plaintiff's evidence that the labels were false, i.e., not "natural." Plaintiff's expert, Dr. Kurt Hong, discussed at length how the citric acid and ascorbic acid used by Dole were not truly "natural" ingredients. ER 735-748. The FDA agrees. ER 745.

The district court ignored the fact that Plaintiff offered evidence that Dole's labels were "false" which is separate and apart from the labels being misleading.

CONCLUSION AND PRAYER

For the foregoing reasons, the district court's orders (i) dismissing the unjust enrichment count, (ii) dismissing the "illegal product" UCL theory, (iii) granting class certification, in part, but limiting Plaintiff's remedy to a consumer measure of the "price premium," (iv) granting decertification of the damages class, and (v) granting summary judgment should be reversed and the case remanded to the district court for further proceedings.

Dated: March 27, 2015.

Respectfully submitted,

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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 March 27, 2015.

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/ *Charles Barrett*
Charles Barrett

STATEMENT OF RELATED CASES

Appellant states that the following cases are related to this case: *Kane v. Chobani, Inc.*, United States Court of Appeals for the Ninth Circuit, No. 14-15670 and *Bishop v. 7-Eleven, Inc.*, United States Court of Appeals for the Ninth Circuit, No. 14-15986. Both cases raise the same or closely related issues regarding allegations of "unlawful" claims under the UCL.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,966 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type.

/s/ *Charles Barrett*
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