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

REPLY BRIEF OF APPELLANT

Charles Barrett
CHARLES BARRETT, P.C.
6518 Highway 100
Suite 210
Nashville, TN 37205
(615) 515-3393

Ben F. Pierce Gore
PRATT & ASSOCIATES
1871 The Alameda, Suite 425
San Jose, CA 95126
(408) 429-6506

Counsel for Plaintiff - Appellant Chad Brazil

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

INTRODUCTION

In its Answering Brief ("AAB"), Dole makes five arguments, all without merit.

First, Dole argues that Plaintiff/Appellant Chad Brazil ("Plaintiff") failed to adduce evidence that Dole's "All Natural Fruit" is not "natural," or that its label is "likely to mislead" consumers. But as Plaintiff demonstrated, Dole's "All Natural Fruit" is packed in two industrialized, man-made, mass-produced ingredients: citric acid and ascorbic acid. The versions of these acids used by Dole in its products are found neither in fruit, nor anywhere in nature. They are synthesized in overseas factories, usually in China. Dole's fruit marinates in artificial chemicals from the moment it is packaged. Additionally, Plaintiff offered the testimony of an expert chemist, Dr. Kurt Hong, who explained at length why the citric acid and ascorbic acid used by Dole are not "natural" ingredients. Under any definition of "natural," (including the FDA's) Dole's fruit, as packaged and sold to consumers, is not natural.

As to the likelihood of consumer deception, although California law does not require extrinsic evidence to show that Dole's labels are deceptive to reasonable consumers, Plaintiff produced, *inter alia*: 1) his own testimony that he read and reasonably relied on Dole's "All Natural" labels, was deceived thereby, and, importantly, he would not have purchased Dole's products if he had known

the truth; 2) Dole's labels, as to which the district court held it was not "unreasonable" for purchasers to believe that Dole's labels mean what they say: "That all the contents of the package, not just the fruit, [a]re all natural;" 3) the FDA's "natural" policy, pursuant to which the FDA finds the use of the label term "natural" non-misleading only "if the food does not contain added color, artificial flavors, or synthetic substances;" 4) FDA warning letters cautioning food manufacturers that "use of the claim 'All-Natural' on [a] product label is false and misleading" whenever the "product[] contain[s] [a] synthetic ingredient;" and 5) Dole's own consumer survey, which shows that, when shown a label bearing the challenged "all natural" claim, respondents reported the label conveyed that the product was "natural" at over 600% of the rate of those shown a label without the "natural" claim.

Second, Dole argues that Plaintiff's dismissed unjust enrichment claim was "duplicative" of his UCL and FAL claims. But the remedies for unjust enrichment (sometimes called quasi-contract), an independent claim under California law, are cumulative to, and broader than, the remedies for UCL and FAL violations. One remedy for unjust enrichment is the non-restitutionary disgorgement of a part of Dole's profits from the distribution of misbranded food, which is not available for UCL and FAL violations.

Third, Dole argues that its sale and distribution of misbranded food does not give rise to an unlawful prong UCL claim, and is subsumed by Plaintiff's fraud and false advertising claims. But the UCL contains separate and independent "fraudulent" and "unlawful" prongs. While Dole argues that consumers who purchase misbranded food suffer, at most, a "regulatory injury," California courts (and this Court) have held that a consumer who purchases a product that is unlawful to distribute, sell, purchase or hold suffers a "cognizable economic injury." There is no statutory or case law exemption for misbranded food, and neither fraud nor personal injury is a prerequisite for a claim under the UCL's unlawful prong.

Fourth, Dole argues that *Comcast* effectively reversed decades of UCL jurisprudence, such that Plaintiff must prove damages, in the form of a "price premium," to certify a restitution class. But *Comcast* didn't, and cannot, rewrite substantive California law. Neither the California legislature nor California courts have ever made certification of a UCL consumer class an arduous assignment. The district court, however, made it almost impossible.

Fifth, Dole argues that in *Carrera*, the Third Circuit rendered all small-dollar consumer classes not "ascertainable." As the district court recognized, however, "*Carrera* is not the law in the Ninth Circuit." Following *Byrd v. Aaron's*, it's now unclear whether *Carrera* as decided is still the law in the Third Circuit.

To borrow from Chief Justice John Roberts: The California legislature passed the Sherman Law to strengthen consumer protection, not to destroy it. If at all possible, courts must interpret the Sherman Law in a way that is consistent with the former, and avoids the latter. Dole offers no good reason to do otherwise.[1]

ARGUMENT

I. The District Court Erred In Granting Summary Judgment.

The district court granted summary judgment to Dole because it said Plaintiff failed to offer enough evidence on how reasonable consumers would be deceived by Dole's labels. This was error.

Dole argues in response that (i) Plaintiff has no evidence the two ingredients were really synthetic, (ii) the FDA natural policy is informal guidance only and, essentially, meaningless, i.e., "who cares if we violated it," (iii) Plaintiff did not show the policy was violated because there was no evidence the two man-made ingredients that were added to the products were not normally expected to be in the

[1] Dole begins its brief by referring to the Northern District as the "food court" and points out that there is a similar action pending in the Western District of Arkansas, *Kinney v. Dole*, Case No. 14-5182-TLB (W.D. Ark.). "Food court" is a sophomoric, pejorative term used by Dole's counsel at oral argument. As for other cases, Dole fails to point out that *Kinney* alleges a class of injured Arkansas consumers based on Arkansas law. Finally, the notion that the four similar cases also on appeal, *Kane v. Chobani, LLC*, No. 14-15670, *Bishop v. 7-Eleven, Inc.*, No. 14-15986, *Jones v. ConAgra Foods, Inc.*, No. 14-16327, and *Bruton v. Gerber Prods. Co.*, No. 15-15174, are an indictment of food-labeling litigation, is wrong. The Hon. Lucy H. Koh had three of those cases and other judges have rendered opposite rulings from Judge Koh.

food, (iv) Dole's evidence that the ingredients were indeed natural, namely three letters from Chinese suppliers of the acids and its litigation consumer survey, somehow went "unrebutted," (v) "all natural fruit" means what Dole says it does, not the Plaintiff, and (vi) there was no proof the labels were likely to deceive reasonable consumers. AAB 8-17.

A. Plaintiff Produced Sufficient Evidence The Two Acids Were Not "Natural."

Although the district court did not address these issues, Dole misstates the record when it says "Plaintiff had no evidence that the acids were not natural" or that Dole's supposed evidence went "unrebutted." AAB 8. Plaintiff offered plenty of such evidence at summary judgment (ER 787-814) including the detailed expert report of Dr. Kurt Hong (ER 735-748), Executive Director of the Center for Clinical Nutrition and Applied Health Research at Keck School of Medicine at the University of Southern California. ER 737. Dr. Hong described in detail how the citric acid and ascorbic acid used by Dole is manufactured. He concluded that both acids are artificial and synthetic, chemical preservatives. ER 742-748.

Plaintiff also offered other evidence (ER 799-801) including the testimony of Dr. Hany Farag (Dole VP of Quality and Regulatory Affairs) that he agrees with Dr. Hong that the manufacturing process by which these ingredients were made rendered them "highly processed." ER 800. Plaintiff also noted, among other things, that ascorbic acid is specifically listed as a "synthetic" under the Code of

Federal Regulations, and the FDA has also expressly stated in multiple warning letters that citric acid is "synthetic" as it violates the FDA policy when included in a product labeled "natural." ER 800-801.

Dole's internal emails also showed that Dole's employees know these two ingredients to be artificial. For example, in an email string titled "Natural or Artificial?," Dole employees inquire about whether certain ingredients are natural. Dr. Hany Farag affirmed that citric acid and ascorbic acid are synthetic, as opposed to natural, which contradicted his sworn deposition testimony. ER 800.

In the face of this evidence, Dole relies on certifications from three suppliers purportedly attesting to the naturalness of those ingredients as well as its survey prepared for litigation. AAB 10-11. At best, this evidence can only be described as weak and self-serving, and the suggestion that it went unrebutted in the face of Plaintiff's evidence is contradicted by the record.[2]

B. Plaintiff Produced Sufficient Evidence Of Classwide Deception.

The FDA's natural policy is evidence of what the FDA deems to be misleading to reasonable consumers. This is evidence of classwide deception. The FDA's work in determining that certain labels are misleading has purpose and meaning. The district court refused to allow Plaintiff to use the violation of this

[2] Judge Koh even referred to one of the certifications as "admittedly ambiguous." ER 56.

policy to show classwide deception, however. The district court was wrong. This kind of evidence shows "a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care." ER 117 (citing *Clemons v. DaimlerChrysler Corp*., 534 F.3d 1017, 1026 (9th Cir. 2008).[3]

1. The FDA Natural Policy And Warning Letters Reflect FDA's Findings And Policy.

Dole argues the natural policy is irrelevant because it is "non-binding." AAB 9. Dole is wrong. The Supreme Court has held that a federal agency's interpretation of its own regulation is "controlling" unless it is "plainly erroneous or inconsistent with the regulation.'" *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989). The decisions of the Ninth Circuit are in accord. "We give wide deference to an agency's reasonable interpretation of its own regulation." *Public Lands for the People, Inc. v. United States Dep't of Agric.*, 2012 U.S. App. LEXIS 20175 (9th Cir. 2012). "[W]here an agency interprets its own regulation, even if through an informal process, its interpretation

[3] Notably, Plaintiff does not have to show consumer deception for the unjust enrichment claim. In *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), the Ninth Circuit 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. The focus on is the defendant's conduct. *Ellsworth v. U.S. Bank, N.A.*, 2014 U.S. Dist. LEXIS 81646, *93 (N.D. Cal. June 13, 2014) (in certifying an unjust enrichment class "again, the case remains about the reasonableness of the kickbacks or backdating, not choices that buyers make to take an easy insurance option.").

of an ambiguous regulation is controlling under *Auer* unless 'plainly erroneous or inconsistent with the regulation.'" *Id.*

An agency's non-binding interpretations such as the natural policy or warning letters are expressions of its policy or regulatory interpretation which should be given substantial weight by the courts. For example, the Ninth Circuit has previously deferred to an agency interpretation expressed in a proposed rule lacking the force of law stating:

> Although the federal Secretary's Action Transmittal and subsequent Notice of Proposed Rulemaking may not in themselves have the force of law, ***they constitute the Secretary's authoritative administrative interpretation of the governing statute***. In these documents the federal Secretary has expressed the firm view that section 657(b) now requires the states to consider timely support payments withheld from wages in the month when due. We find the Secretary's interpretation of the statute reasonable and defer to it.

Vanscoter v. Sullivan, 920 F.2d 1441, 1449 (9th Cir. 1990) (emphasis added).

The FDA's July 2012 Regulatory Procedures Manual[4] provides that warning letters likewise have significant weight:

> The agency position is that Warning Letters are issued only for violations of ***regulatory significance***. Significant violations are those violations that may lead to enforcement action if not promptly and adequately corrected. A Warning Letter is the agency's principal means of achieving prompt voluntary compliance with the Federal Food, Drug, and Cosmetic Act (the Act).

---

4 http://www.fda.gov/iceci/compliancemanuals/regulatoryproceduresmanual/default.htm#_top

> The Warning Letter was developed to correct violations of the statutes or regulations.….
>
> A Warning Letter is informal and advisory. ***It communicates the agency's position on a matter***, but it does not commit FDA to taking enforcement action. For these reasons, FDA does not consider Warning Letters to be final agency action on which it can be sued.….
>
> The Warning Letter is the agency's principal means ***of notifying regulated industry*** of violations and achieving prompt voluntary correction.

Manual, p. 4-2, 4-3 (emphasis added). Moreover, the FDA has specifically indicated that it posts warning letters to inform all food manufacturers of their legal obligations. The FDA intends that "Warning Letters would clarify the FDA's expectations for food manufacturers as they review their current labeling."[5] The "agency also anticipates that other firms will examine their food labels to ensure that they are in full compliance with food labeling requirements and make changes where necessary."[6]

---

5 http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm202726.htm

6 http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm202734.htm

2. The FDA's Natural Policy Means Nothing Artificial Or Synthetic Has Been Added.

The district court held that there is a two pronged test to the FDA natural policy and Plaintiff failed to offer proof the two ingredients were not "normally expected to be in the food." ER 118. Dole agreed, but only cited to the rules of grammar in support of its position. AAB 12. Dole tells this Court to ignore everything written by the FDA including its website (AOB 48) and multiple warning letters (AOB 40, 48), and instead tells this Court that the FDA website is merely an overview, (AAB 13), and that repeated FDA warning letters are non-binding and, frankly, of no consequence. AAB 13.

Importantly, Dole fails to address Plaintiff's citation to the Hirzel Canning Co. warning letter in which the FDA found the use of the phrase "natural" on canned tomatoes was misleading because they were canned with citric acid. AOB 51. As stated, tomatoes naturally contain citric acid. *Id*. The FDA was concerned with the added citric acid. This is the same situation here. This warning letter completely undercuts Dole's argument that there are two prongs to the FDA natural policy.

The FDA's statements on its natural policy are substantial record evidence of classwide deception. Dole has no support for its position and has simply ignored the FDA's clear position.

3. Plaintiff Produced Evidence From Which A Jury Could Find That Dole's Acids Are "Not Normally Expected" To Be In Fruit.

Regardless of whether there really is a "second prong" to the FDA natural policy (there really isn't), Plaintiff presented evidence that viewed "in the light most favorable to the nonmoving party," *see Jones v. Blanas*, 393 F.3d 918, 926 (9th Cir. 2004), demands that summary judgment should have been denied.

Dole argues that Dr. Hong's report "failed to 'opine on whether citric acid and ascorbic acid would not normally be expected to be in'" the Dole products. AAB 12. This is incorrect. Dr. Hong's report did not use the exact words "normally expected to be in," but these are not magic words. His report still presents evidence sufficient for a jury to find that these two ingredients are not normally found in Dole's products. For example, Dr. Hong's report states that the acids are "added" to Dole's products, and are "artificial and/or synthetic." ER 740. He says synthetic substances are "not natural," "man-made," and "produced artificially regardless of whether it mimics a natural substance." ER 741. Artificial substances are "created or caused by people." ER 741. Given that the evidence is viewed in Plaintiff's favor, a jury could find that these kinds of man-made, added ingredients would not normally be found in Dole's fruit.[7] [8]

[7] Dole also argues that its interpretation of the phrase "All Natural Fruit" is literally true. The relevant evidence is Plaintiff's testimony stating that the entire package

II. Plaintiff's Unjust Enrichment/Quasi Contract Claim Should Have Been Allowed.

A. California Allows This Claim

Since Plaintiff filed his opening brief, this Court held in *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753 (9th Cir. 2015) – a labeling case similar to this one – a standalone cause of action premised on common law principles of restitution exists under quasi contract where a defendant had been unjustly enriched. The Court held:

> Astiana alleged in her First Amended Complaint that she was entitled to relief under a "quasi-contract" cause of action because Hain had "entic[ed]" plaintiffs to purchase their products through "false and misleading" labeling, and that Hain was "unjustly enriched" as a result. This straightforward statement is sufficient to state a quasi-contract cause of action.

Id. at 762-63. Plaintiff clearly met the pleading requirements for such a claim. ER 846 (¶¶ 139-140), 906 (¶¶ 275-276). Dismissal was error.[9] [10]

---

was free of artificial ingredients, which the district court found, and Dole concedes, was "not necessarily unreasonable." ER 118.

[8] The district court did not address materiality in its summary judgment order. Materiality cannot seriously be questioned though. *See Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013); *Ries v. Ariz. Bevs. United States Llc, Hornell Brewing Co.*, 287 F.R.D. 523, 531 (N.D. Cal. 2012). Plaintiff offered abundant evidence that Dole's labels were material. ER 805-811.

[9] The U.S. Chamber of Commerce essentially repeats Dole's arguments on unjust enrichment and *Comcast* in its *amicus* brief.

[10] Even prior to *Astiana*, California recognized unjust enrichment. *See Ohno v. Yasuma*, 723 F.3d 984, 1006 (9th Cir. 2013) ("The Supreme Court of California

Dole incorrectly argues Plaintiff's unjust enrichment claim was not an alternative theory or claim distinct from the Plaintiff's statutory claims (which are all non-cumulative statutory claims), and falsely claims that *Astiana* "did not address whether an unjust enrichment claims based on the same facts and requesting the same remedy as UCL, FAL, and CLRA, claims as here, is an 'alternative theory.'" AAB 20. In fact, *Astiana* is directly on point. It did allow an unjust enrichment claim and a UCL claim based on the same facts and seeking the same remedy. It expressly held that the Plaintiff had stated a "valid quasi-contract claim seeking the remedy of restitution," *Astiana*, 783 F.3d at 762, when reversing the lower court's holding that said:

> while restitution is available as a remedy for plaintiffs' other causes of action, it is not a standalone cause of action in California and is nonsensical as pled in any event. … Plaintiffs' eighth cause of action is thus dismissed without leave to amend. Plaintiffs may still seek restitution as a remedy should liability be established as to their remaining causes of action.

Littlehale v. Hain Celestial Group, Inc., 2012 U.S. Dist. LEXIS 162530, *3 (N.D. Cal. July 2, 2012).

Moreover, in addition to any overlapping remedies, Plaintiff here seeks an additional remedy (nonrestitutionary disgorgement) that is not available for Plaintiff's statutory claims.

---

and California Courts of Appeal have recognized actions for relief under the equitable doctrine of unjust enrichment."); *Berger*, 741 F.3d at 1070 (same).

B. Disgorgement Is An Available Remedy

First, contrary to Dole's contention, Plaintiff sought "damages, restitution or disgorgement to Plaintiff and the Class for all causes of action …" ER 848 (¶ B); 908 (¶ B).

Second, disgorgement of profits is an available remedy in consumer protection cases as well as breach of fiduciary duty cases. *See* Restatement of the Law 3d, Restitution and Unjust Enrichment ("Restatement"), § 51(4), AOB 23-24. California courts have cited the Restatement's language confirming the availability of disgorgement to punish conscious wrongdoing. In *Meister v. Mensinger*, 230 Cal. App. 4th 381, 398 (Cal. App. 6th Dist. 2014) the Court highlighted the disjunctive "or" when stating:

> "The object of restitution … is to eliminate profit …" of the "conscious wrongdoer, *or* … defaulting fiduciary without regard to notice or fault …." (Rest.3d Restitution and Unjust Enrichment, § 51, subd. (4), italics added.) Indeed, "[t]he object of the disgorgement remedy—to eliminate the possibility of profit from conscious wrongdoing—is one of the cornerstones of the law of restitution and unjust enrichment."

Id. *Meister* extends to situations like here that involve "unfair business practice[s]," and holds that "[w]ithout this result, there would be an insufficient deterrent to improper conduct that is more profitable than lawful conduct.'" *Id.* at 399. Here, Dole is the conscious wrongdoer.

Dole argues "misconduct" covers only the practices covered by Section 44. This is incorrect. Section 51(1) states "the term 'misconduct' designates an actionable interference by the defendant with the claimant's legally protected interests for which the defendant is liable under §§ 13--15 or §§ 39--46 of this Restatement." Thus, a defendant can be subject to disgorgement for misconduct covered by Section 13, applicable here, which states:

> (1) A transfer induced by fraud or material misrepresentation is subject to rescission and restitution. The transferee is liable in restitution as necessary to avoid unjust enrichment.

Section 44 is inapplicable here. It is only "a residual rule, covering those instances of unjust enrichment from wrongful interference with legally protected interests not covered by the more specific rules of §§ 40—43" which in turn cover "Gains realized by misappropriation, or otherwise in violation of another's legally protected rights," Restatement, Chapter 5, Introductory Note and § 44 Comment. As such, the Court should properly focus on the applicable sections and language like the Introduction and §§ 3, 13, 49, and the portions of §51 that apply to conscious wrongdoers.

Third, Dole's attack on disgorgement remedies as "windfalls," is inconsistent with cases like *Meister* and Section 3 of the Restatement, which states: "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."

C. Dole's Other Arguments Also Fail.

Comcast is not violated by seeking disgorgement of the amount Dole was unjustly enriched pursuant to an unjust enrichment claim. Where a mislabeled product is at issue, the measure of that enrichment can be pegged at either the total purchase price paid, or alternatively, Dole's profits from sales.[11] Dole's argument ignores Plaintiff's "illegal product" theory for selling a misbranded product and the fact that misbranded products are contraband and unsaleable. Dole was therefore enriched by the sales price, or in the alternative, its profits from unlawful sales.

Section 49(4) of the Restatement states that when a wrongful gain is at issue, unjust enrichment is measured by the rules of Section 51(4)-(5) of the restatement stating:

> (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).

[11] Moreover, as described in Section IV(C) herein, Dole has the burden to prove any reductions to the recovery to Plaintiff and class members. Section 51(5)(d) of the Restatement and its Official Comments make clear that once Plaintiff produces a possible minimum and maximum range, the burden to demonstrate the appropriateness of anything less than the maximum falls on Dole. *Meister,* 230 Cal. App. 4th 381, 396-399.

Section 49(4). Section 51(4) says 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.

Next, Dole's arguments that dismissal was "harmless" and that Plaintiff "made no showing that the damages figures for restitution and unjust enrichment would be different" have no merit. AAB 20-24. Plaintiff's unjust enrichment claim was dismissed at the *pleading* stage prior to the opening of discovery and Plaintiff's motion for leave to file for reconsideration of that dismissal was denied. ER 1-27; ER 123-126. Plaintiff had no opportunity to submit evidence with regard to this claim. Moreover, Dole and the district court were wrong in claiming that Plaintiff was required to differentiate between the remedies available under unjust enrichment and the remedies under the UCL, FAL, and CLRA.

For similar reasons, this Court should reject Dole's frivolous argument that Plaintiff waived his right to challenge the unjust enrichment dismissal because discovery was closed when Plaintiff sought leave to file a motion for reconsideration. This claim was dismissed prior to discovery, no discovery was had with respect to the claim, and Plaintiff's motion for leave was denied. Plaintiff was thus denied even the opportunity to file a motion for reconsideration, and in any event it is clear error to dismiss such a claim as duplicative. *See Astiana*, 783 F.3d 762-763.

III. Plaintiff's UCL "Illegal Product" Theory Is Viable.

Dole argues Plaintiff's "illegal product" theory was correctly dismissed because it was "grounded on statements made only on Dole's website" and this claim is based on fraud. AAB 25, 28. Both are wrong.

Some background is helpful. The district court dismissed this claim/theory in its order dismissing parts of the Second Amended Complaint ("SAC"). ER 28-48. In the SAC, Plaintiff alleged that other Dole products (besides those listed later at class certification) violated the Sherman Law and were therefore "misbranded." For example, Dole's bagged Mixed Berries and frozen Blueberries violated 21 C.F.R. § 101.54(g) (incorporated into the Sherman Law) because they were labeled "A Variety of Powerful Antioxidants" and "Packed with Antioxidants" even though there were not enough antioxidants included in either that allowed this statement. ER 934 (¶ 115), 938 (¶ 134).[12] Because of these violations, these products were "misbranded" and illegal to sell. The district court's ruling dismissed these claims in addition to the blueberry health claims described in its order. ER 41.

Plaintiff asserted a UCL "unlawful" claim based on the sale of products that cannot legally be bought or sold. Under the Sherman Law, it is unlawful for any

[12] Cal. Health and Safety Code § 110670 states: "Any food is misbranded if its labeling docs not conform with the requirements for nutrient content or health claims as set forth in Section 403(r) (21 U.S.C. Sec. 343(r)) of the federal act and the regulations adopted pursuant thereto."

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 and Safety Code §§ 110760, 110770 (emphasis added). In fact, *any* Sherman Law violation is punishable up to a year in jail or a fine of up to $1000, or both. Cal. Health & Safety Code § 111825. As set out in SAC, Plaintiff pleaded that he would not have purchased Dole's products had he known of this illegality. *See* ER 914 (¶ 6), 926 (¶¶ 75-76), 927 (¶ 83), 933 (¶¶ 113-114), 936 (¶¶ 123-124), 954 (¶ 195), 955 (¶ 199).

While *one* theory advanced by Plaintiff is that Dole's labels were unlawful because they misleading and deceived consumers, that is not the basis of the "illegal product" theory. This theory is not based on particular label statements, but rather Dole's distribution of products that cannot legally be bought or sold. Contrary to Dole's citations and argument, Plaintiff did not allege fraud or misrepresentation here; just the distribution of an illegal, misbranded product. Plaintiff "borrowed" these Sherman Law violations and brought a UCL claim. *See Alvarez v. Chevron Corp*., 656 F.3d 925, 933 n.8 (9th Cir. 2011).

The Supreme Court of California is supported by *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).[13]

While Dole attempts to distinguish the cases relied upon by Plaintiff, neither Dole nor any of its cases present any cogent reason why Proposition 64 would not allow a UCL claim based on an "illegal product" theory as set out in the SAC, or why allegations that Plaintiff would not have purchased Dole's products had he known of their illegality does not satisfy the "as a result of" causation standard

[13] The Supreme Court of California did not address an "illegal sale" theory in footnote 9 of *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011). In *Kwikset*, the court said that to prove "as a result of" causation in a fraud based claim, the plaintiff has to show "actual reliance on the allegedly deceptive or misleading statements." *Kwikset*, 51 Cal. 4th at 326. The court also noted that the plaintiff had to show reliance in an unlawful claim because the predicate unlawfulness was based on statutes that "simply codify prohibitions against certain specific types of misrepresentations." *Id*. at *326 n.9. The statutes at issue were Cal. Bus. & Prof. Code § 17500 ("False or misleading statements generally"), Cal. Bus. & Prof. Code § 17533.7 (prohibiting "made in U.S.A." representations on products made outside of the U.S.A.), and Cal. Civ. Code § 1770(a)(4) ("Using deceptive representations or designations of geographic origin in connection with goods or services."), which are all expressly based on making false or misleading statements. Here, the predicate unlawfulness is selling a misbranded product that cannot legally be bought or sold, and Plaintiff submits that his "unlawful sale" theory is not among the types where reliance on any particular label misrepresentation has any application. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 326 n.17 (2009) ("We emphasize that our discussion of causation in this case is limited to such cases where, as here, a UCL action is based on a fraud theory involving false advertising and misrepresentations to consumers. The UCL defines 'unfair competition' as 'includ[ing] any unlawful, unfair or fraudulent business act or practice....' (§ 17200.) There are doubtless many types of unfair business practices in which the concept of reliance, as discussed here, has no application.")

imposed by Proposition 64. In fact, all Dole does is restate over and over that when a claim "is based on misrepresentation" reliance is required. AAB 25-29. Plaintiff agrees. As alleged, though, this theory is not based on misrepresentations. It is based on illegal sales in violation of the Sherman Law §§ 110760 and 110770.[14]

Plaintiff's claims do not run afoul of Proposition 64, which only restricted private standing under the UCL "to any person who has suffered injury in fact and has lost money or property as a result of unfair competition." *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 788 (2010) (internal quotation marks omitted). The California Supreme Court has explained the intent of Proposition 64's "change was to confine standing to those actually injured by a defendant's business practices and to curtail 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." *Id.* (internal quotation marks

[14] Dole also makes two misstatements. First, it says "Mr. Brazil had to admit that even his 'unlawful' claim required a finding of deception." AAB 28. Plaintiff told the court in response to Dole's summary judgment – well after the court had dismissed Plaintiff's illegal product theory – that he could still prove an unlawful claim based on violation of Cal. Health and Safety Code § 110660 ("Any food is misbranded if its labeling is false or misleading in any particular"). ER 811-812. This claim, unlike the illegal sale claim, *is* based on misrepresentation. This is different than Plaintiff's illegal sale claim. Second, Dole oddly says the "SAC repeatedly acknowledges that the alleged 'unlawfulness' is based entirely on consumer deception." AAB 28. As explained herein, this is incorrect.

omitted). Despite Proposition 64's stricter standing requirements, the Supreme Court has been careful to note the initiative "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*." *Id*. (emphasis added); *accord*, *Hinojos*, 718 F.3d at 1103-1104; *Kwikset*, 51 Cal. 4th at 321.

It is undisputed that Plaintiff had business dealings with Dole, and purchased Dole's products. The allegations in the SAC also plainly show that Plaintiff lost money as a result of Dole's unfair business practices, in that he purchased a product that he would not have had he known of its illegality.[15] [16]

IV. The District Court Erred In Holding That Restitution Is Limited To Return Of Any "Price Premium."

A. *Comcast* Changes Nothing.

Dole suggests that the Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), is the primary case in this appeal, and that it

[15] To the extent Plaintiff's illegal product claim is viewed as being based on a misrepresentation, the *only* applicable misrepresentation would be the implicit representation in offering the products for sale that he can be legally bought and sold.

[16] Under Plaintiff's unjust enrichment claim, this kind of illegal contract would allow a consumer to get a refund. *Berger* said the unjust enrichment is essentially "money had and received." That being the case, a refund is the remedy. *See McClory v. Dodge*, 117 Cal. App. 148, 152 (Cal. App. 3d Dist. 1931) ("Therefore, respondent having parted with his property under an illegal contract and not being *in pari delicto* and the illegal contract remaining purely executory, has a right to recover his property in an action for money had and received. And, under such circumstances, the law implies a promise to refund it.").

should have been the focus of Plaintiff's opening brief. It isn't, which is why it wasn't. In *Comcast*, the Supreme Court stated that a "plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." *Comcast*, 133 S. Ct. at 1433. Thus, a plaintiff may not offer a damages model based on, say, a fraud analysis in a simple breach of contract case. Fraud damages do not flow from breach of contact. *Comcast* stands for nothing greater or lesser than that.[17]

In *Comcast*, the plaintiffs, alleging antitrust violations, identified four practices they claimed create anti-competitive pricing in the relevant market and introduced an expert's report setting forth a methodology for measuring damages on a classwide basis. *Comcast*, 133 S. Ct. at 1430–31. The trial court held that only one of the four practices could give rise to liability, yet, after further briefing, found the expert's damages model still relevant, for its method did not depend on the presence of all four of the challenged practices. *See id*. at 1439.

For the majority, Justice Scalia stated that as the plaintiffs' damages model was based on all four challenged practices, rather than tethered specifically to the one that the district court had accepted, the "model f[ell] far short of establishing

[17] *See Fosbre v. Las Vegas Sands Corp.*, 2015 U.S. Dist. LEXIS 77774, *10 (D. Nev. June 15, 2015) ("*Comcast* thus is not the sea change that defendants suggest.").

that damages [were] capable of measurement on a classwide basis." However, even that comes with an asterisk, because the need to prove damages on a classwide basis through a common methodology was never challenged by the respondent, and as Justices Ginsberg and Breyer observed in their dissent, "the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable on a class-wide basis." *Comcast*, 133 S. Ct. at 1436; *see also, e.g.*, *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) ("In this circuit, however, damage calculations alone cannot defeat certification.").[18] To put a finer point on it, "[t]he Court's ruling is good for this day and case only." *Comcast*, 133 S. Ct. at 1437.

According to both the district court and Dole, *Comcast* went much farther, precluding recovery under an unjust enrichment theory in addition to statutory remedies (which are expressly cumulative), *see* AAB 22, precluding any possible measure of damages other than the "regression analysis" allowed by the district court in the class certification opinion, *see* AAB 30-37, and even, apparently, requiring evidence of classwide damages on the Rule 23(b)(2) claim and/or

[18] Other federal courts agree. *See, e.g.*, *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 138 (2d Cir. 2015) ("Common issues—such as liability—may be certified, consistent with Rule 23, even where other issues—such as damages—do not lend themselves to classwide proof."); *accord Catholic Healthcare W. v. U.S. Foodservice Inc.* (*In re U.S. Foodservice Inc. Pricing Litig.)*, 729 F.3d 108, 123 n. 8 (2d Cir. 2013).

Plaintiff's individual claim (even though the damages class had already been decertified), *see* AAB 17-18.

Both overstate *Comcast*. According to the *Comcast* majority, its decision "turns on the straightforward application of class-certification principles," *Comcast* 133 S.Ct. at 1433 and the dissent's contention that "the opinion breaks no new ground on the standard for certifying a class action," *id*. at 1436 (Ginsburg and Breyer, JJ., dissenting).

In *Comcast*, the Supreme Court found that the damages model did not satisfy the requirements of Rule 23(b)(3) because it conflated all four theories of antitrust violation without differentiating between the harms caused by each theory. Critically, separating out the damages attributable to one theory of antitrust violation susceptible of classwide proof from the damages attributable to the three other theories could require an individualized, subscriber-by-subscriber analysis. *Id*. at 1435. The prospect of this individualized analysis, in turn, precluded class certification. As explained by the Sixth Circuit:

> *Comcast* applies where multiple theories of liability exist, those theories create separable anticompetitive effects, and the combined effects can result in aggregated damages….Where there is no chance of aggregated damages attributable to rejected liability theories, the Supreme Court's concerns do not apply.

In re VHS of Michigan, Inc., 601 F. App'x 342, 344 (6th Cir. 2015) (citations omitted). Here, there was not one damages model encompassing multiple theories

of recovery, there were multiple damages models which the district court rejected for one reason or another.

B. California Law On Restitution Is Not So Stringent.

Plaintiff's primary complaint on appeal is that the district court restricted Plaintiff to the "price premium" approach in the first place, when the governing California law is not nearly so narrow. AOB 33-41.

As set out in Plaintiff's opening brief, the district court rejected multiple restitution models and finally limited Plaintiff to a regression analysis, which the court ultimately threw out because it could not account for all possible variables *See* ER 74-78, 91-109, 235. The district court erred as a matter of California law in so limiting Plaintiff's theories. As Judge Snyder of the Central District of California observed:

> As such, plaintiffs' damages model need only calculate damages as accurately as required by California law-***Comcast did not authorize federal courts to rewrite state substantive laws of damages. Here, California "law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation."***

Vaccarino v. Midland Nat. Life Ins. Co., No. 2:11-CV-05858-CAS, 2014 WL 572365, at *11 (C.D. Cal. Feb. 3, 2014) (emphasis added). *See also*, *In re BP p.l.c. Sec. Litig*., 2014 U.S. Dist. LEXIS 69900, *79-81 (S.D. Tex. May 20, 2014) (citing *Vaccarino*) ("Plaintiffs' damages model need not be perfect."). Even *Comcast* said

"[c]alculations need not be exact, but just "must be consistent with its liability case." *Comcast*, 133 S. Ct. at 1433.

C. It Is Dole's Burden To Prove Any "Value."

Plaintiff alleged in pleadings, and testified in deposition, that he would not have purchased the products at issue if he had known that the products were illegal to possess, or filled with artificial ingredients. It was a "tainted" purchasing decision. The district court, citing *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 1351 (2003), however, rejected all theories of restitution other than the price premium because, in the district court's view, Plaintiff must have received *some* value. ER 75. Dole agrees and wants Plaintiff to be forced to prove whatever value he was given, if any. AAB 34-35.

However, the district court incorrectly placed that burden of proof on Plaintiff. Any proof of value is necessarily an affirmative defense, which Dole bears the burden of proving. This is reflected in Dole's affirmative defense number seventeen in its Answer to the SAC: "any claims for damages or other monetary recovery by Plaintiff, or on behalf of persons claimed to be members of the purported class, must be offset and reduced by the value received." ER 191. Dole bears this burden of proof, not Plaintiff. *See Akhtar v. Mesa*, 698 F.3d 1202, 1210 (9th Cir. 2012) ("the defendant bears the burden of proof"). Dole offered no proof of this setoff.

D. What If There Were No "Price Premium?"

The district court's ruling on price premium begs a question: what if there was no "price premium?" Assume the value of the product as labeled was the same as the value of the product without a label. The label, therefore, had no impact on price. Under the district court's reasoning there could be no restitution. However, assume further this same consumer bought the product only because of the misleading label statement and would not have purchased it otherwise. Is this consumer unable to bring a case? Under the district court's reasoning, that consumer is out of luck. This "all or nothing" stance cannot be reconciled with California's consumer protection law. That consumer has a claim for false advertising and may seek the money he lost, *i.e.*, the money he spent that he would not have.

V. The District Court Was Correct On Ascertainability.

The district court found that ascertainability was not a problem at class certification because the class was "precisely defined," "the alleged misrepresentations appeared on the actual packages of the products purchased," and "all of Dole's customers received ascorbic acid and citric acid that was made in a similar way." ER 54-56. Dole simply rehashes its argument on *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) which is not even the law in this Circuit, for good reason. *See Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App. 4th 1290,

1305, 184 Cal. Rptr. 3d 415, 428 (2015) ("*Carrera* has been roundly criticized by district courts within the Ninth Circuit.").

Finally, it is now uncertain whether *Carrera* is even good law in the Third Circuit. *See Byrd v. Aaron's, Inc.*, 784 F.3d 154, 174-175, 178 (3d Cir. 2015).

CONCLUSION

The district court's orders should be reversed.

Dated: July 10, 2015.

Respectfully submitted,

/s/ *Charles Barrett*
Charles Barrett
CHARLES BARRETT, P.C.
6518 Highway 100
Suite 210
Nashville, TN 37205
(615) 515-3393
charles@cfbfirm.com

Ben. F. Pierce Gore
PRATT & ASSOCIATES
1871 The Alameda, Suite 425
San Jose, CA 95126
(408) 429-6506
pgore@prattattorneys.com

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,973 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Time New Roman type.

/s/ *Charles Barrett*
Charles Barrett

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 July 10, 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