No. 14-17480

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHAD BRAZIL,
Plaintiff—Appellant,

v.

DOLE PACKAGED FOODS, LLC,
Defendant—Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
HON. LUCY KOH, DISTRICT JUDGE • CASE NO. C 12-01831

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT—APPELLEE DOLE PACKAGED FOODS, LLC

[All parties have consented. FRAP 29(a).]

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by amicus curiae Chamber of Commerce of the United States of America of the following corporate interests:

a. Parent companies of the corporation / association:

None.

b. Any publicly held company that owns ten percent (10%) or more of the corporation / association:

None.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. It represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every economic sector, and from every geographic region of the country. One important Chamber function is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's businesses.

Cases raising significant questions about the standards for class certification are of particular concern to the Chamber and its members. Likewise, lawsuits against businesses alleging misleading labels on certain mass-produced foods are also of great interest to the Chamber and its members. In particular, this case involves the question of what remedy is available in these "mislabeling" cases, and whether plaintiffs may recover the same damages under two theories: both restitution (the price premium they paid) *and* unjust enrichment (disgorgement of profits). The Chamber

has a strong interest in helping the Court properly answer those questions because its members are defendants in a number of mislabeling lawsuits pending in this Circuit.

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(c)(5)

The Chamber obtained consent of all parties to file this brief. Accordingly, this brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

A plaintiff seeking class certification must meet all of Rule 23(a)'s requirements showing that there are sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, and must also satisfy at least one of Rule 23(b)(3)'s three requirements. To satisfy Rule 23(b)(3), "questions of law or fact common to class members [must] predominate over any questions affecting only individual members, and [the] class action [must be] superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3) obligates plaintiffs to show they can isolate the specific damages flowing from their theory of liability for all class members. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

In this case, plaintiff pleaded two class claims relevant to this appeal: one claim under California Business and Professions Code section 17200 (the Unfair Competition Law, hereinafter "UCL") and one claim under the common law for unjust enrichment. He contends the proposed class should be entitled to restitution for the UCL claim and to disgorgement of Dole's profits under the unjust enrichment claim.

The district court properly rejected both claims. In granting summary judgment to Dole on plaintiff's UCL claim, it correctly determined that plaintiff failed to meet the *Comcast* requirement for his UCL claim because his "damages model" did not isolate the price premium he alleges the class paid (what the class might be entitled to as restitution) as the result of the alleged mislabeling (the theory of liability). Because this damages model failed, the court dismissed the UCL claim for insufficient evidence. The district court then further found that the same damages analysis applies to the unjust enrichment claim, making the unjust enrichment claim duplicative of the UCL claim and dooming it on the merits for the same reason.

Plaintiff's argument on appeal that the unjust enrichment claim provides a different measure of damages is incorrect. In these circumstances, both claims measure the same quantum of damages. Thus, a mislabeling plaintiff's claim for unjust enrichment cannot salvage a damages model for restitution that otherwise fails under *Comcast*.[1] And, in any event, the class cannot recover *both* the price premium it paid as a

[1] In fact, unjust enrichment is not even a standalone claim in California. (*See* AB 18.)

result of the allegedly misleading label *and* the profits Dole derived from the allegedly misleading label. That would amount to double recovery which is unavailable by law and would raise serious due process concerns for the businesses targeted in these mislabeling lawsuits. That same price premium can be recovered only once (at most) assuming that there is an appropriate model that passes muster under *Comcast*.

I. UNDER *COMCAST*, A CLASS ACTION CANNOT BE CERTIFIED UNDER RULE 23(b)(3) UNLESS THE PROPOSED PLAINTIFFS HAVE PRESENTED A DAMAGES MODEL THAT ISOLATES THE PURPORTED DAMAGES ATTRIBUTABLE TO THE ALLEGED MISCONDUCT.

Rule 23(b)(3) "'requires a court (before certifying a class action) to find that 'the questions of law or fact common to class members predominate over any questions affecting only individual members.'" *Comcast*, 133 S. Ct. at 1432 (quoting Rule 23(b)(3)). As part of that finding, a court must determine that the proposed plaintiffs can measure the damages (in this case, the restitution) that they would be entitled to recover if they win the lawsuit: "at the class-certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its liability case . . . .'" *Id.* at 1433. A model that does not tie damages to

liability "cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.*

In *Comcast*, the plaintiffs alleged that Comcast harmed cable subscribers in the Philadelphia area by eliminating competition and holding prices for cable services above competitive levels. *Id.* at 1430. Specifically, the plaintiffs alleged four damages theories for how Comcast supposedly increased cable rates:

> "First, Comcast's clustering made it profitable for Comcast to withhold local sports programming from its competitors, resulting in decreased market penetration by direct broadcast satellite providers. Second, Comcast's activities reduced the level of competition from 'overbuilders,' companies that build competing cable networks in areas where an incumbent cable company already operates. Third, Comcast reduced the level of 'benchmark' competition on which cable customers rely to compare prices. Fourth, clustering increased Comcast's bargaining power relative to content providers."

Id. at 1430-31. "The District Court accepted the overbuilder theory of antitrust impact as capable of classwide proof and rejected the rest." *Id.* at 1431. The plaintiffs' damages model, however, included damages resulting from all four theories. *Id.* at 1434-44. The Supreme Court, in a "straightforward application of class-certification principles," found class certification improper because plaintiffs could not show that they could

precisely separate out the damages flowing from the only remaining theory of liability. *Id.* at 1433, 1435.

In short, the Supreme Court held that "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class" in situations where the damages methodology cannot account solely for the impact arising from the challenged conduct. *Id.* at 1433; *see also id.* ("[A] model purporting to serve as evidence of damages in this class action must measure only those damages attributable to [reduced overbuilder competition]. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).")

In this case, to support his claim for restitution under the UCL, plaintiff presented a model that attempted to isolate the price premium attributable to the alleged mislabeling, i.e., the amount plaintiffs paid for Dole's food products over what would they have paid had the products not been mislabeled. As in *Comcast*, the district court found that plaintiff's proposed model failed to isolate the harm arising from his theory of liability—in this case, the price premium attributable to the alleged mislabeling. (1 ER 105.) Among other deficiencies, the model rested on

assumptions about competing products that were "either false or untested," including whether the non-Dole products actually made the *same* allegedly misleading statement at issue in this case on *their* labels. (1 ER 103-04.) Plaintiff failed to control (or even attempt to control) other factors that affect Dole and its competitors' pricing: for example, claims made on the product labels *besides the claim at issue in this case*. (1 ER 104.) Accordingly, the district court properly decertified the damages class for failing to satisfy the requirements of Rule 23(b)(3). (1 ER 109.)

II. THE DISTRICT COURT PROPERLY FOUND THAT PLAINTIFF COULD NOT PLEAD AROUND *COMCAST* WITH HIS UNJUST ENRICHMENT CLAIM.

Plaintiff now tries to avoid the result described in Section I by purporting to distinguish between the recovery available for his UCL claim (with restitution) and his unjust enrichment claim (with disgorgement of profits). But as the rest of this brief explains, in these circumstances, there is no meaningful difference between those two types of recovery. Thus, plaintiff's unjust enrichment claim provides no work-around to his failure to satisfy Rule 23(b)(3)'s requirements for his UCL claim. This Court should affirm the district court's rejection of the artificial distinction plaintiff tries to draw.

A. In mislabeling cases, both disgorgement of profits and restitution require the same damages analysis.

As previously noted, plaintiff alleges that Dole mislabeled some of its food products, and seeks monetary compensation under two theories: restitution for his UCL claim, and disgorgement of profits under his unjust enrichment claim. (6 ER 838-40, 846.) The district court determined that plaintiff failed to meet the *Comcast* requirement for his UCL claim because his "damages model" did not isolate the price premium he alleges the class paid (what the class might be entitled to as restitution) as the result of the alleged mislabeling (the UCL theory of liability). (1 ER 107.) The district court also dismissed the unjust enrichment claim, holding first that unjust enrichment was not a separate cause of action (1 ER 25) and in any event was duplicative of plaintiff's UCL claim (1 ER 26). Later, when ruling on plaintiff's motion for reconsideration, the court held that the unjust enrichment claim also failed for the same reason that Dole's UCL claim failed. (1 ER 124-25). In particular, the court granted summary judgment on plaintiff's UCL claim due to insufficient evidence, and held that the unjust enrichment claim fails for the same reason. (1 ER 125.) The court also held that plaintiff "made no showing that, in this particular case, the damages figures for restitution [under the UCL] and unjust

enrichment would be any different." (*Id.*) These holdings are correct and should be affirmed.

As the district court held, "[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." (1 ER 92 (citing *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 694 (2006)).) "Typically, the defendant's benefit and the plaintiff's loss are the same, and restitution requires the defendant to restore the plaintiff to his or her original position." *Am. Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451, 1482 (2014), *modified* (May 27, 2014).

Here, where the benefit and loss coincide—"the benefit to the one and the loss to the other are co-extensive"—"the result . . . is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered." Restatement (First) of Restitution § 1 cmt. d (1937) (emphasis added)[2].

[2] Below, plaintiff posited that "Food manufacturers who unlawfully label their products, but price those products the same as the competition, would be unjustly enriched with greater market share, but actually escape (continued...)

Unjust enrichment, in contrast, starts from a different premise:

> "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.'"

Am. Master Lease LLC, 225 Cal. App. 4th at 1482.

Although unjust enrichment starts from a different premise, the measure of recovery for unjust enrichment—at least in a food mislabeling case—is necessarily the same as the measure for restitution: the premium (if any) the business charged for the food as a result of the allegedly misleading claim on the label. *See id.* at 1486 ("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,' and '[t]he profit for which the wrongdoer is liable . . . is the net increase in the assets of the wrongdoer, to the extent that this increase

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(...continued)
liability." (ECF No. 117 at 21.) But in that hypothetical case, it would not be the food buyers who would have suffered the injury, but rather the food manufacturers' competitors (for their lost market share); restitution *to those competitors* and disgorgement would once again be the same.

is attributable to the underlying wrong.'" (quoting Restatement (Third) of Restitution & Unjust Enrichment § 51(4) (2011)); *see also* Restatement (First) of Restitution § 1 cmt. d ("[W]here a person . . . makes an overpayment . . ., the payee would be unjustly enriched by the amount of the overpayment if he were permitted to keep it and the payor would be unjustly deprived of that amount if he were not permitted to recover it.")).

Plaintiff nevertheless argues on appeal that the measures of damages are not the same and he is entitled to a potentially larger recovery on the unjust enrichment claim than on the UCL claim because "*nonrestitutionary disgorgement* . . . goes beyond the restitutionary disgorgement [restitution] available under the UCL." (AOB 17.) Plaintiff seeks to recover disgorgement of Dole's profits under its unjust enrichment claim and the amount paid by the proposed class as restitution under the UCL.

Because "[t]he emphasis" of disgorgement "is on the wrongdoer's enrichment, not the victim's loss," it may be theoretically possible in some cases that disgorgement and restitution *could* measure different things. *Am. Master Lease LLC*, 225 Cal. App. 4th at 1482. But in a mislabeling case, both disgorgement of profits and restitution measure the same

quantum of damages and require the same analysis—any amount the plaintiffs overpaid attributable to the alleged mislabeling necessarily equals the total amount the defendant was unjustly enriched by those same alleged misstatements. Food products have intrinsic value regardless of any alleged inaccuracy in their labels. Thus, damages for mislabeling must be limited to only the price *premium* attributable to the alleged misstatement on the label. And a damages model that cannot show the price premium paid by the class attributable to the alleged mislabeling to support restitution damages for a UCL claim necessarily also fails to show the allegedly ill-gotten price premium earned by Dole and sought to be disgorged by plaintiff's unjust enrichment claim.

Plaintiff relies on cases explaining that nonrestitutionary disgorgement disgorges ill-gotten gains from a defendant, or the profits from his wrongful act. (*See* AOB 19-20, 22-26.) But here, where the alleged wrongful act is mislabeling, the *profits* at issue are the profits made as a result of the allegedly misleading claim. Again, Dole's food products have intrinsic value; short of committing theft, plaintiffs could not have obtained them—properly labeled or not—without paying *something* for them at the grocery store. Thus, it's only the *extra* amount

that plaintiffs allege Dole received due to mislabeling that is the proper measure of disgorgement.

Next, plaintiff claims that restitution and disgorgement could be different because Dole manufactured the products and sold them to wholesalers, who in turn sold to retailers. (AOB 21.) But there is no reason to believe that a manufacturer would not capture the entire price premium attached to any misleading label statement, pass that premium on to any wholesaler, who would then pass it on to the retailer and ultimately the retail buyer. To the extent a wholesaler or other middle man adds an *additional* price premium attributable to the allegedly misleading statement on the label, restitution of the price premium paid by the class would capture the entire price premium available through disgorgement of the defendant's ill-gotten profit *and* an additional amount (attributable to the wholesaler, not to the alleged misstatements on the label). In any event, this argument also fails under *Comcast*—plaintiff did not introduce any damages model attempting to isolate price increases due to wholesalers' conduct from increases attributable to Dole's alleged misstatements.

B. The district court correctly determined that plaintiff's price premium model failed under *Comcast* to isolate only those damages resulting from the alleged misconduct. Because disgorgement of profits under an unjust enrichment theory requires an identical analysis, it would fail for the same reason.

Plaintiff's model, which the district court preliminarily approved, "purports to determine [through regression analysis] the price premium attributable to Dole's use of the 'All Natural Fruit' label on its products." (1 ER 93.) "'Regression analysis involves the quantification of the relationship between a variable to be explained, known as the dependent variable and additional variables that are thought to produce or to be associated with the dependent variable, known as the explanatory or independent variables.'" (*Id.*) "The goal of regression analysis is 'to isolate whether a particular relationship exists between the dependent and independent variables and for measuring the magnitude of this relationship while controlling for other factors that could also influence the dependent variable.'" (*Id.*)

But the district court determined that plaintiff failed to show how his damages model controlled for other variables affecting price—variables in addition to the alleged mislabeling. (1 ER 102) For example, the model did not control for advertising, even though plaintiff's expert admitted that

advertising expenditures would be reflected in the retail price of the products. (*Id.*; *see also* 1 ER 104 (the model did not control for multiple label claims on one product, or for premiums related to how the products are packaged).)

In addition, the district court found that many of the model's assumptions about competing products were either false or untested. (1 ER 103.) A cornerstone assumption, which plaintiff's expert admitted he had not checked in person, was whether the competing products had the same allegedly misleading claim on their labels. (*Id.*) Accordingly, the district court was correct when it concluded that plaintiff's methodology "cannot survive *Comcast*." (*Id.*)

Given that in a mislabeling case like this one, a restitution analysis under the UCL and a disgorgement analysis under an unjust enrichment theory capture the same damages (*supra*, § II.A), plaintiff would fare no better presenting a model that would isolate Dole's alleged benefit from the challenged label claim. That model would likewise have to account for the same variables that plaintiff ignored in attempting to satisfy his burdens under a UCL restitution theory.

Plaintiff appears to argue in his opening brief that the burden should shift to Dole to provide a damages model for plaintiff's unjust enrichment claim. (AOB 24-25.) This is contrary to the customary burden of proof for any plaintiff. Indeed, the authority cited by plaintiff all starts with *the plaintiff* "'producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain," (AOB 24) or " mak[ing] at least a reasonable approximation of the defendant's unjust enrichment '" (AOB 25). Plaintiff simply cannot circumvent *Comcast* by pleading an unjust enrichment claim in an effort to shift to the defendant the burden of coming up with a damages model. And disgorging more profits from businesses than they made as a result of an allegedly misleading statement on a label would raise serious due process issues. *See, e.g.*, *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1088 (9th Cir. 2003) (citing 1 Dan B. Dobbs, Law of Remedies § 4.5(5) (2d ed. 1993) (disgorgement is limited to the amount of the unjust enrichment)); *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1145 (2003) ("[A]n order for disgorgement 'may compel a defendant to surrender all money obtained *through an unfair business practice* . . . .'" (emphasis added)).

C. Plaintiffs are also not entitled to a double recovery for the same damages.

"'The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*." *Comcast*, 133 S. Ct. at 1435 (quoting Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011)). "Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence." *Tavaglione v. Billings*, 4 Cal. 4th 1150, 1158 (1993); *Lazar v. Superior Court*, 12 Cal. 4th 631, 649 (1996) ("[A]ny overlap between damages recoverable in tort and damages recoverable in contract would be limited by the rule against double recovery."); *see also Cnty. of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 541 (2007) (affirming judgment where the trial court awarded damages to disgorge ill-gotten gains instead of computing the plaintiff's loss).

Where class action plaintiffs have two theories that would allow them to recover *the same money*, they may seek to recover under both theories "in the event that one of these bases for recovery is later invalidated." *Hart v. Rick's Cabaret Int'l, Inc.*, No. 09 Civ. 3043 (PAE),

2014 WL 6238175, at *24 n.16 (S.D.N.Y. Nov. 14, 2014) *motion to certify appeal denied*, No. 09 Civ. 3043 (PAE), 2014 WL 7183956 (S.D.N.Y. Dec. 17, 2014). But actually recovering under both theories would be impermissible double recovery. *See Stockwell v. City & Cnty. of San Francisco*, No. C 08-5180 PJH, 2015 WL 2173852, at *12 (N.D. Cal. May 8, 2015) ("Plaintiffs may be correct . . . that . . . if they succeed on their FEHA claim, the ADEA claim becomes superfluous because of the bar against double recovery . . . .").

Even where two theories "allege[ ] invasions of different rights," based on "two separate causes of action," and ""the facts would support recovery upon either theory,"" *double* recovery is impermissible. *DuBarry Int'l, Inc. v. Sw. Forest Indus., Inc.*, 231 Cal. App. 3d 552, 564 (1991) (internal quotation marks omitted) ("'[R]ecovery could not be twice had . . . .'"); *cf. Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1010 (9th Cir. 1994) ("[T]he recovery of both plaintiff's lost profits and disgorgement of defendant's profits is generally considered a double recovery under the Lanham Act.")

Here, plaintiff seeks double recovery—restitution of any price premium *paid* (under the UCL) *and* disgorgement of the same price premium *received* (for the equitable claim of unjust enrichment). (AOB 15-16.) According to plaintiff, double recovery is allowed because "cumulative recovery" is available under the UCL. (AOB 15 (emphasis omitted).) But unjust enrichment, as an equitable principle, bridges *the gap* (if any) between what a plaintiff is entitled to recover and what a defendant should, in all fairness, disgorge. "[B]efore it can grant relief on [the] equitable claim [for unjust enrichment], a court must examine the particular circumstances of an individual case and assure itself that, without a remedy, inequity would result or persist." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009); *accord Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 260 (2011) ("[E]quitable relief . . . will not be given when the plaintiff's remedies at law are adequate."); *see Sec. & Exch. Comm'n v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir. 1971) (upholding a restitution of profits (disgorgement) award to the SEC, which avoided the potential for double recovery by ensuring any private judgments would be paid from the disgorgement fund). Plaintiff confuses the potential for recovery under *either* theory (with both

surviving a motion to dismiss, for example) with the potential for *double* recovery. (AOB 18-19.)

There is simply no authority for the counterintuitive proposition that a class could recover everything it is entitled to in equity and then recover the same amount again under the UCL. Plaintiff cites one, unpublished decision—*Thomas v. Imbriolo*, A130517, 2012 WL 1427360 (Cal. Ct. App. Apr. 25, 2012)—but the issue of double recovery wasn't raised or addressed in that case. *Thomas* is thus no help to plaintiff.

The California Supreme Court, on the other hand, did address the issue in determining what remedies are available under the UCL. Holding that disgorgement is not an available remedy under the UCL, the court explained that if a defendant were forced to disgorge its profits to a competitor, "there might be little left for [the direct victim] to recover, even though it is the party ostensibly entitled to restitutionary relief." *Korea Supply Co.,* 29 Cal. 4th at 1152. In other words, the court assumed that the defendant could not be subject to both disgorgement to a competitor and restitution of the same money to the victim; the court assumed that there was one pot of money that would have to be divided between potential claimants. *See id.* "While restitution is limited to restoring

money or property to direct victims of an unfair practice, a potentially unlimited number of individual plaintiffs could recover nonrestitutionary disgorgement. Allowing such a remedy would expose defendants to multiple suits *and the risk of duplicative liability* without the traditional limitations on standing." *Id.* at 1151 (emphasis added). The district court properly rejected plaintiff's entitlement to such a double recovery.

CONCLUSION

Plaintiff attempts to recover the same money twice—once as the money allegedly overpaid by the proposed class, and again as the money allegedly overcharged by Dole. Such a double recovery is contrary to law and would raise serious due process concerns. In any event, the district court correctly rejected both theories under *Comcast*. Because plaintiff's

damages model does not isolate the price premium attributable to the allegedly misleading label, this Court should affirm the district court's order decertifying the class.

June 3, 2015

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June 3, 2015
Date

s/ Jeremy B. Rosen
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I hereby certify that on June 3, 2015, I electronically filed the foregoing **BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT—APPELLEE DOLE PACKAGED FOODS, LLC [All parties have consented. FRAP 29(a).]** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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