

## California Northern District Judges Split on Sufficiency of Damages Evidence at Class Certification - Will Ninth Circuit Weigh In?

Judges in the U.S. District Court for the Northern District of California are split on the sufficiency of damages evidence at the class certification stage. [Jones v. ConAgra Foods, Inc.](#), No. C 12-01633 CRB, 2014 WL 2702726 (N.D. Cal. Jun. 13, 2014) is the most recent decision. In *Jones*, Judge Charles R. Breyer rejected each of the plaintiffs' three damages models ("full refund," "price premium," and "regression") as incapable of showing class-wide damages under the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Judge Breyer ultimately denied class certification in *Jones*. By contrast, in two other cases, Judge Lucy H. Koh accepted the plaintiffs' regression damages models and certified California classes. [Brazil v. Dole Packaged Foods LLC](#), No.12-CV-01831-LHK, 2014 WL 2466559 (N.D. Cal. May 30, 2014); [Werdebaugh v. Blue Diamond Growers](#), No. 12-CV-2724-LHK, 2014 WL 2191901 (N.D. Cal. May 23, 2014). The plaintiffs in the *Jones* case have filed a notice of appeal. Dole Packaged Foods is seeking a permissive appeal in its case under Federal Rule of Civil Procedure ("Rule") 23(f). Thus, the Ninth Circuit will have the opportunity to weigh in on this issue. But it likely will be several months before the Ninth Circuit issues any decision. *Jones v. ConAgra Foods Class Cert Order* This blog covered the *Jones* decision in its entirety [previously](#). This article reviews only the factual background and the rulings on damages issues in *Jones*. **Factual Background in Jones** At issue in *Jones* are three distinct product lines: Hunt's tomato products, PAM cooking spray products, and Swiss Miss hot cocoa products. The plaintiffs challenged each product line in different ways.

- As to the Hunt's tomato products, the plaintiffs alleged that they were deceptively labeled as "100% Natural" or "Free of artificial ingredients & preservatives" when they contained citric acid and/or calcium chloride.
- As to the PAM products, the plaintiffs alleged that they were deceptively labeled as "100% NATURAL" but contained undisclosed petrochemicals such as petroleum gas (liquefied), propane, propane 2-methyl (isobutane) and butane.
- As to the Swiss Miss products, the plaintiffs alleged that they were deceptively labeled as "Natural Source of Antioxidants" or "Natural Antioxidants Are Found in Cocoa," but the products failed to meet the minimum nutritional requirements required for that antioxidant claim.

Judge Breyer's 46-page opinion reviewed standing, ascertainability, and each requirement under Rule 23. While finding for the plaintiffs on a few disputed issues (plaintiff Jones had standing, was typical, and was adequate in the Hunt's case; counsel in the PAM case was adequate to represent the class), the *Jones* Court ruled for ConAgra on the ascertainability and predominance issues. Judge Breyer also rejected an injunctive relief class under Rule 23(b)(2) due to the plaintiffs' lack of standing. **The Jones Court Ruled on All Damages Issues for ConAgra** Judge Breyer ruled on all damages issues for ConAgra, which paved the way for his denial of the plaintiffs' motion for class certification. The Court recited *Comcast's* rule that, to satisfy the predominance inquiry, the class action plaintiff must present a model that (1) identifies damages that stem from the defendant's alleged wrongdoing and (2) is susceptible of measurement across the entire class. "At class certification, the plaintiff must present a likely method for determining class damages, though it is not necessary to show that his method will work with certainty at this time." Judge Breyer first rejected the "full refund" model offered by the plaintiffs' expert, Dr. Oral Capps. The Court reasoned that full restitution "fails to take into account the value class members received by purchasing the products." Judge Breyer next considered the "price premium" model, also known as the "benefit of the bargain" approach. With this model, Dr. Capps took a comparable product - a Safeway Kitchens canned tomato sauce - and compared the price between it and the allegedly mislabeled

products. But Judge Breyer called this approach "deeply flawed." The Court stated, "It is inadequate to identify a single comparator, given the seven product lines and multiple varieties within each Hunt's product line." Moreover, the comparator product itself was labeled "100% natural." The Court also noted that Safeway Kitchens is a generic brand, while Hunt's is a "market leader." Finally - and this is where Judge Breyer diverged with Judge Koh - Judge Breyer rejected Dr. Capps' regression, or econometric, approach as "vague and abstract." The aim of the regression approach is to find the difference in sales of the products before and after the challenged claims first appeared on the labels. But, Judge Breyer ruled, Dr. Capps did not provide a clearly defined list of variables, did not determine whether the data related to any or all of his proposed control variables exists, and did not determine which competing and complementary products he would use. Accordingly, the Court denied certification in each of the three proposed classes. *Brazil v. Dole Packaged Foods, LLC* *Werdebaugh v. Blue Diamond Growers* In contrast to Judge Breyer in the *Jones* case, Judge Koh accepted the regression model proposed by Dr. Capps in the *Dole* and *Blue Diamond* cases. This blog previously covered the [Dole](#) and [Blue Diamond](#) cases. **Factual Background in Dole and Blue Diamond** At issue in *Dole* were 10 fruit products, which the plaintiff alleged were deceptively labeled as "All Natural Fruit" when they contained ascorbic acid (commonly known as Vitamin C) and citric acid. At issue in *Blue Diamond* were 18 almond milk products, which the plaintiff alleged were deceptively labeled "All Natural" despite containing potassium citrate, and that the ingredient name "evaporated cane juice" violated federal and California law. **The Dole and Blue Diamond Courts Accept Only the Regression Damages Model** Before addressing damages, both the *Dole* and *Blue Diamond* Courts found for the plaintiffs on ascertainability and each of the Rule 23 issues. And the Court in both cases rejected the plaintiffs' proposed full refund model as "not the proper measure of damages." Similar to the *Jones* Court's reasoning, Judge Koh ruled that consumers receive benefits "in the form of calories, nutrition, vitamins, and minerals," from the product, and a proper damages model must account for those benefits. Judge Koh also rejected Dr. Capps' price premium model in both cases. Among other bases, she reasoned that the price premium model failed to account for any differences between the products at issue and comparable products, such as brand loyalty or quality differences between brand and generic products. Turning to the plaintiffs' proposed regression models, the Court in both cases found that Dr. Capps' proposed regression models sufficiently tied damages to the respective defendants' alleged liability under *Comcast*. Judge Koh found that the proposed regression analysis would isolate the effect of the alleged misrepresentation by controlling for all other factors that may affect the price of the product and the volume of sales. Further, the proposed regression model would ensure that brand loyalty and product quality variables remained constant, but controlled for variables such as advertising expenditures, price differences among competing and complementary products, the disposable income of consumers, and population. In both cases, the Court rejected the defendants' argument that Dr. Capps must have run his regressions by the class certification stage, particularly given the defendants' failure to have completed the relevant document production in time. Accordingly, Judge Koh certified a California damages class in both *Dole* and *Blue Diamond*. **What's Next?** The Ninth Circuit will not issue any decision on the *Jones* appeal until 2015, as the briefing is not scheduled to be complete until December 2014. And even then, the Ninth Circuit could find another issue dispositive and not reach the damages issue. In *Dole*, the appeal is discretionary and the Ninth Circuit might not even hear the appeal. If the Ninth Circuit in either case reaches the damages issues, then it probably will affirm the respective Courts' rejection of the "full refund" model as a windfall to the plaintiffs and the "price premium" model due to the lack of appropriate comparator products in those particular cases. As to a regression model, the Ninth Circuit might strike a middle ground between *Jones* on the one hand and *Dole* on the other. To the extent that the *Jones* case suggests that a plaintiff must show at the class certification stage that her damages model will work with certainty, the Ninth Circuit may disavow that suggestion as inconsistent with *Comcast*. See *Comcast*, 133 S. Ct. at 1433 (stating that plaintiff's damages model calculations "need not be exact"). In that regard, the Ninth Circuit will have room to affirm the *Dole* Court's acceptance of the untested proffered regression model, because Judge Koh emphasized that the defendant had "not provided the necessary discovery for Dr. Capps to finish his analysis." In the meantime, courts may continue to reject "full refund" and "price premium" damages models, but continue to split on the sufficiency of a regression analysis to demonstrate that damages are capable of classwide measurement. The more complete the defendant's document production is at the class certification stage, the more receptive a court

might be to a defendant's objections to a plaintiff's hypothetical damages models. And until any binding authority comes down from the Ninth Circuit, parties involved in food litigation and their counsel will continue to monitor decisions on damages for nuances that could tip the balance in a particular case.

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