NO. 14-16327

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEVI JONES, *et al*.,

Plaintiffs-Appellants

v.

CONAGRA FOODS, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALFORNIA,
SAN FRANCISCO DIVISION

REPLY BRIEF OF APPELLANT LEVI JONES

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A. Plaintiff Jones Has Not Waived His Ability To Challenge The District Court's Imposition Of Ascertainability As An Independent Requirement Of Rule 23, And It Would In Any Case Be Inappropriate To Apply The Doctrine Of Waiver To This Issue Of Law

After demonstrating in his Opening Brief that "the policy underpinnings of the ascertainability doctrine are utterly incoherent," Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DePaul L. Rev. 305, 330-31 (2010), Plaintiff Jones argued against acceptance of the doctrine as an *independent* requirement of Rule 23 (*see* Appellant's Opening Br. 10-13). ConAgra urges this Court to defer consideration of this important issue, contending that the discretionary doctrine of waiver precludes appellate review. *Cf. Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals . . . ."). Actually, Jones has neither "conceded" nor "neglected" this issue. Regardless, a recognized exception to the doctrine of waiver exists for an issue – like this one – that is "purely one of law." *Howell v. State Bd. of Equalization*, 731 F.2d 624, 627 (9th Cir. 1984).

As an initial matter, contrary to ConAgra's representations, Jones never "conceded" before the district court that ascertainability stands as an *independent*,

implied *element* of Rule 23. This is the very reason that Jones made no mention of the doctrine in the opening memorandum supporting his class certification motion: ascertainability is *not* a separate prerequisite to certification. When replying to ConAgra's opposition, Jones allowed that ascertainability could be viewed as a necessary component of the class definition, ER 86, but that is a far cry from a concession that the concept is an independent criterion imposed by Rule 23. Indeed, ConAgra's opposition spoke of ascertainability in the context of a class definition, ER 157, but the district court went much further by regarding ascertainability as a distinct "part of Rule 23," even though the rule contains "no explicit ascertainability requirement," ER 19. Jones waived no rights to challenge the district court's elevation of ascertainability to an autonomous requirement of Rule 23.

Even if the question of ascertainability's proper place in the Rule 23 analysis had never been passed upon by the district court, the doctrine of waiver is inapplicable here. Whether it was correct to deem ascertainability a separate "part of Rule 23," ER 19, is a decidedly legal determination. It is therefore subject to this Court's instruction that a reviewing court might properly take up an issue for the first time on appeal if it is "purely one of law and the pertinent record has been fully developed," *Howell*, 731 F.2d at 627. The present circumstances fit comfortably within those guidelines, as the "purely" legal matter of ascertainability

"has been fully developed." *Id.* The scope and requirements of Rule 23 were the only subjects before the district court when it made the decisions presently under discussion, the Order Denying Class Certification canvassed cases on all sides of the ascertainability issue, ER 19-24, and ConAgra and its amici have devoted nearly 40 pages of briefing to the flawed proposition that "[a]scertainability is an essential prerequisite of class certification," ConAgra Br. 15; *see also id.* 15-21; Wash. Legal Found. Amicus Br. 6-23; Chamber of Commerce Amicus Br. 7-19.

It is plain that the propriety of including ascertainability within the Rule 23 framework has been fully explored and is ready for resolution. What is more, this is a "question[] of general impact" to all class actions. *Howell*, 731 F.2d at 627. As such, even supposing waiver was potentially applicable, the teachings from *Howell* and similar cases reveal the doctrine to be ill suited for this appeal. *Cf. Animal Protection Inst. of Am. v. Hodel*, 800 F.2d 920, 927 (9th Cir. 1988) ("[W]e will review an issue for the first time on appeal . . . when the issue is a legal one, not necessitating additional development of the record.").

B. "Ascertainability" Is Not An Independent Requirement of Rule 23

There is absolutely no mention of "ascertainability" in Rule 23, yet ConAgra and its amici insist that it is nevertheless a "fundamental precondition" to class certification. (ConAgra Br. 20.) They offer a series of red herrings to support their theory that ascertainability is an "essential" aspect of the rule, reaching to claim

that the doctrine's recognition is constitutionally mandated in order to protect the rights of both defendants and absent class members. As shown in the ensuing subsections of this Reply, the concerns paraded in the briefs submitted on behalf of ConAgra are either nonexistent or already sufficiently assuaged by the actual, *textual* elements of Rule 23. In the end, ConAgra and its amici have offered nothing to justify importation of an implied ascertainability requirement as an additional prerequisite to class certification.

1. The Existing Elements Of Rule 23 Adequately Protect A Defendant's Legitimate Due Process Interests

ConAgra and its amici purport to believe that imposing ascertainability as an independent element of Rule 23 is imperative so that defendants can exercise their so-called Due Process right to identify class members in order to "'challenge class membership'" and "ensur[e] that any recovery to the class corresponds to the actual damages allegedly suffered by absent class members." Chamber of Commerce Amicus Br. 10, 13 (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 309 (3d Cir. 2013)); *see also* ConAgra Br. 16, 17. Far from being constitutionally compelled, determination of the identities of absent class members is no valid concern of a defendant challenging certification.

Fundamentally speaking, the claim that ConAgra deserves the opportunity to challenge individual claimants' class membership has no foundation in the law. Shorn of hyperbole, this is really just an individualized damages argument

masquerading as an ascertainability concern. It is well established that individualized damages arguments do not defeat class certification. *See, e.g., Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) ("[D]amage calculations alone cannot defeat certification.") and discussion *infra*. To the extent that ConAgra has individualized defenses, it is free to try those defenses against individual claimants *after* the common issues have been litigated and resolved. *See McCrary v. Elations Co.*, No. EDCV 13-00242 JGP (OPx), 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014); *Johns v. Bayer Corp.*, 280 F.R.D. 551, 560 (S.D. Cal. 2012); *Johnson v. Gen. Mills, Inc.*, 276 F.R.D. 519, 524 (C.D. Cal. 2011).

What is more, in a case such as this, involving false representations concerning a consumer product, the seller's "aggregate liability is tied to a concrete, objective set of facts – its total sales – that will remain the same no matter how many claims are submitted" *Forcellatti v. Hyland's, Inc.*, No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, at *5 (Apr. 9, 2014). Once total damages are established, a defendant has no legitimate interest in how those damages are distributed. *See Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's . . . ."); *accord Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1259 (11th Cir. 2003). As this

Court reiterated in *Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996) (emphasis added), a "[defendant's] interest is *only* in the total amount of damages for which it will be liable."

Succinctly stated, ConAgra does not have a Due Process interest in the identities of class members, or in defending against claims of class membership.

2. The Existing Elements Of Rule 23 Adequately Protect Due Process Interests Of Absent Class Members

ConAgra further maintains that purported Due Process concerns of absent class members also dictate the judicial insertion of ascertainability as a separate element of Rule 23 so that it will be "clear later on whose rights are merged into the judgment, that is, who gets the benefit of any relief and who gets the burden of any loss." *Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011). This alleged "concern" is properly served by the traditional view of ascertainability as an adjunct to the class definition, requiring only that a class be "defined by objective criteria." *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 475 (N.D. Ill. 2009), *aff'd*, 606 F.3d 391 (7th Cir. 2010). Such a properly crafted definition eliminates the possible confusion envisioned by ConAgra, allowing "a prospective plaintiff to identify himself or herself as having a right to recover *based on the description*." *McCrary*, 2014 WL 1779243, at *8 (emphasis added) (quotation omitted).

With this much understood, it is plain that absent class members possess no Due Process concerns justifying importation of ascertainability as a separate prerequisite to class certification.

3. The Existing Language Of Rule 23 Already Incorporates Essential Aspects of "Ascertainability," Making Recognition Of The Doctrine As A Separate Element Completely Unnecessary

Curiously, ConAgra believes that Rule 23's tacit acceptance of various attributes of "ascertainability" supports adoption of the doctrine as a separate element. ConAgra's argument, however, supports the opposite.

ConAgra asserts that Rule 23(b)(3)(D) is "closely tied" to ascertainability because it requires analysis of "the likely difficulties in managing a class action," Fed. R. Civ. P. 23(b)(3)(D), but that just proves Plaintiff's point. If a proposed class action is "unmanageable," a court can simply declare it to be so under subsection (b)(3)(D); there is no need for a *separate* ascertainability requirement. It is similar for the "notice provisions" ConAgra heralds. Importantly, the extant notice terms of the rule satisfactorily account for the Due Process rights of absent class members, and those factors implicitly assume that there will be some class members who cannot be identified. *See* Fed. R. Civ. P. 23(c)(2)(B) (directing individual notice to class members "who can be identified through reasonable efforts"); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950) ("[I]n the case of persons missing or unknown, employment of indirect or

even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights."); *Six (6) Mexican Workers*, 904 F.2d at 1306.

It is assuredly these sort of realities which prompted one federal circuit court to reflect that the concept of ascertainability is "perhaps superfluous," *Davis v. Cintas Corp.*, 717 F.3d 476, 483 n.1 (6th Cir. 2013), and other courts to "suggest that concerns regarding the ascertainability of the proposed class are handled more properly under requirements governing pleading, standing, and Rule 23 prerequisites as opposed to *implying* any threshold requirements to Rule 23." *Warnock v. State Farm Mut. Auto. Ins. Co.*, No. 5:08-cv-DCB-JMR, 2011 WL 1113475, at *9 n.4 (S.D. Miss. Mar. 24, 2011) (emphasis added) (quotation omitted). In the end, for this and other reasons previously addressed, ConAgra has furnished this Court with no reason to imply ascertainability as an independent element of Rule 23. *See Philip Morris Cos. v. Miner*, 2015 Ark. 73, at 15 ("Rule 23 does not require the [trial] court to make an explicit ruling on whether the class is ascertainable.").

C. The Proposed Class Is Ascertainable

Properly understood, ascertainability merely requires that a class be defined "by reference to objective criteria." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012); *see also Matamoros v. Starbucks Corp.*, 699 F.3d 129,

139 (1st Cir. 2012) ("The presence of . . . an objective criterion overcomes the claim that the class is unascertainable."). Plaintiff's proposed definition easily passes that bar. Courts within this Circuit regularly order certification where, as here, "the class definition clearly defines the characteristics of a class member by providing a description of the allegedly offending product and the eligible dates of purchase." *McCrary*, 2014 WL 1779243, at *8; *see also, e.g., Forcellati*, 2014 WL 1410264, at *5 (certifying class "precisely defined . . . based on . . . objective criteria: purchase of Defendant's . . . products within a prescribed time frame.").

ConAgra does not deny that the class definition is suitably objective, but rather contests ascertainability by countering that the class is not properly "verifiable." But "verifiability" is not a prerequisite to class certification, either under the express terms of Rule 23 or traditional notions of ascertainability.[1] Instead, this alleged feature of the implied ascertainability requirement appears to have originated with the opinion of the United States Court of Appeals for the

[1] ConAgra professes that the "numbered courts of appeals" have "each . . . endorsed" an ascertainability requirement. Some of the authorities cited in support of this premise are nothing short of questionable. *See Ihrke v. N. States Power Co.*, 459 F.2d 566 (8th Cir.) (panel opinion with one judge dissenting on theory that certification should have been granted, and another concurring based on belief that the case was moot), *vacated as moot*, 409 U.S. 815 (1972). More tellingly, the cases cited by ConAgra refer to ascertainability as requiring nothing more than an objective class definition. *See, e.g., Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012) ("For a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria.").

Third Circuit in *Carrera*, 727 F.3d at 304, 311, a decision that has been much maligned and is "not . . . the law in the Ninth Circuit," *McCrary*, 2014 WL 1779243, at *8 (collecting cases).

Even so, ConAgra's claim that the class cannot be "verified" is built upon its idea that there was significant variation between the labels for the relevant Hunt's products. The record before the district court refutes this contention. Upon inspection of ConAgra's sales data, Plaintiff's expert explained that over 99% of the products in question bore the representation "All Natural," ER 1072, and *all* of the products included as an ingredient "citric acid and/or calcium chloride," ER 150-51. ConAgra does not (and cannot) challenge the merits of this testimony. It rather attempts to seize on an apparent computer processing error, which caused *charts* prepared by the expert to appear "unintelligible" in the Excerpts of Record.[2] At base, though, the record is clear that virtually 100% of the products in dispute are subsumed within the class definition.[3] Plaintiff presented unrebutted sworn

[2] While the charts suffered from a computer glitch, Jones is re-submitting the charts (under seal). Regardless, the original charts presented to the district court were not at all muddled. ConAgra also claims that the district court accepted the expert report only with "limitations," but the "limitations" perceived by the district court were unrelated to ascertainability. *See* ER 45. Furthermore, contrary to ConAgra's suggestions, Appellant's Opening Brief pointed this Court directly to the portions of the record establishing that virtually all class members purchased affected products. (Appellant's Opening Br. 17 (citing ER 1072, 1074-75).)

[3] Though Judge Breyer failed to hold the class ascertainable despite this fact, ConAgra disagrees that he imposed a "receipt requirement." But one of the express reasons listed to support his conclusion that ascertainability was lacking

testimony from its expert, and that testimony is critical to the ascertainability issue. ER 1072.

It is therefore unrefuted that almost anyone who bought a Hunt's canned tomato product in California during the relevant time frame is a member of the class. Though "verifiability" is no precondition to certification, this class is verifiable, and manageable under Rule 23(b)(3)(D). *Cf. In re Nexium Antitrust Litig.*, Nos. 14-1521, 14-1522, 2015 U.S. App. LEXIS 968, at *32-33 (Jan. 21, 2015) ("The *Halliburton* Court contemplated that a class with uninjured members could be certified if the presence of a *de minimis* number of uninjured members did not overwhelm the common issues for the class."). It is also ascertainable. ConAgra's arguments should be rejected.

II. Any Questions Of Reliance Or Materiality Do Not Predominate Over Common Issues

ConAgra concedes that "materiality is a common question across the class." ConAgra Br. 35. ConAgra thus does not contest Plaintiff's argument that it would have been error for the district court to have denied class certification on the

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was that this case did not present a situation "where consumers are likely to have retained receipts." ER 23 (quotation omitted). ConAgra also disclaims that the opinion threatens the viability of consumer class actions generally, based on Judge Breyer's supposition that he "*might*" determine that "a class of 'all people who bought Twinkies'" is ascertainable. ER 23 (emphasis added). Hardly a ringing endorsement for consumer class actions.

grounds that materiality was an individual issue precluding class certification.[4] Rather, ConAgra seeks to defend the district court's finding that materiality issues precluded class certification on the grounds that "Plaintiff lost on the common question of materiality" and thus "individual questions would predominate with respect to reliance or causation." ConAgra Br. 35.

ConAgra's argument fails for a number of reasons, most notably because it directly contradicts U.S. Supreme Court precedent making clear that, to the extent the district court decided the materiality issue at the class certification stage and Jones "lost" it, the district court engaged in an improper determination of a merits-based question at the class certification stage. Any such determination violates the well-settled law that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95, 185 L. Ed. 2d 308 (2013). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id*. at 1195.

In *Amgen*, the Supreme Court was confronted with a situation very much like the present one. The cause of action in *Amgen* (like the CLRA claim here)

[4] Jones continues to maintain that the district court committed this error when holding that materiality issues precluded class certification, while ConAgra argues that the district court's denial of class certification was based on a merits-based finding that Jones failed to prove materiality.

required a showing of reliance. However, because it was recognized that "requiring proof of direct reliance 'would place an unnecessarily unrealistic evidentiary burden on [a] plaintiff,'" the plaintiffs could "invoke a rebuttable presumption of reliance on material misrepresentations." *Id.* at 1192. This is identical to the situation here, in which ConAgra concedes, "California courts … have permitted a presumption or inference of classwide (and thus common) reliance or causation where plaintiffs can prove that "*material* misrepresentations were made to the class members." ConAgra Br. 33.

In *Amgen*, the U.S. Supreme Court expressly held that there was no requirement to "prove the materiality of [defendant's] alleged misrepresentations and omissions at the class-certification stage" since "the question of materiality is common to the class, and because a failure of proof on that issue would not result in questions 'affecting only individual members' predominating." *Amgen*, at 1197. The Supreme Court further confirmed that "whether a statement is materially false is a question common to all class members and therefore may be resolved on a class-wide basis after certification." *Id.* Thus, the common question as to whether the "100% Natural" and "Free Of Artificial Ingredients & Preservatives" labeling statements deployed on ConAgra's product's labels were materially false should have supported class certification and not precluded it. *Amgen*, at 1197.

ConAgra concedes that "materiality is an objective standard" and materiality "is judged by a 'reasonable man' standard." ConAgra Br. 33, 35. As such, it was improper for the district court to decide the materiality issue at the class certification stage because precedent requires that reasonableness determinations are the province of the jury. According to the U.S. Supreme Court in *Hana Fin., Inc. v. Hana Bank*, 190 L. Ed. 2d 800, 805-06 (U.S. 2015), "[w]e have long recognized across a variety of doctrinal contexts that, when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decision maker that ought to provide the fact-intensive answer." By effectively granting summary judgment on the question of materiality despite it being judged by a "reasonable" standard,[5] the district court effectively disregarded this Court's holding in *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 868 (9th Cir. 2010) (stating that "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 ordinarily to preclude summary judgment."); *see also Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1157 (9th Cir. 2009) (quotation omitted).

[5] The district court ruled against Jones on materiality, which ConAgra concedes "is as plain-vanilla a factual determination as they come" (ConAgra Br. 34), not based on an absence of evidence but because the Court believed Jones's materiality evidence was "somewhat weak." This is improper because 1) materiality determinations are the province of the jury and 2) disputed fact issues should be submitted to the jury.

Because class members' reliance is not relevant for the underlying UCL and FAL claims, materiality is not an issue that should have precluded class certification of these claims. Similarly, because as ConAgra concedes, "[r]elief is accordingly available [for these claims] 'without individualized proof of deception, reliance and injury.' *In re Tobacco II Cases*, 207 P.3d at 35" (ConAgra Br. 37), there could be no individualized issues related to deception, reliance or injury which could preclude class certification. Nevertheless ConAgra argues the district court was justified in denying class certification for these claims. ConAgra's argument is misplaced for several reasons. First, in focusing on issues such as can size, ConAgra ignores the fact that the district court expressly premised its decision in part on impermissible factors related to deception, reliance, and injury.

Moreover, ConAgra would have this Court ignore the fact that the district court found that the challenged "100% Natural" labeling claims were "facially uniform" but denied certification because "consumer's understanding of those representations would not be.'" ER 31 (*quoting* ConAgra's Opposition to Plaintiff's Motion For Certification).[6] Thus ConAgra ignores the fact that in denying certification, the district court ignored the uniform labeling and instead focused on how that labeling was individually perceived and relied upon despite

[6] The district court failed to analyze whether there were any individualized issues with regard to the challenged "free of artificial ingredients & preservatives" claim. Thus, there was no stated reason for denying certification on predominance grounds for this claim.

the fact that California courts have "repeatedly and consistently [held] that relief under the UCL is available without individualized proof of deception, reliance and injury." *In re Tobacco II Cases*, 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20, 35 (Cal. 2009). 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; *Gutierrez v. Wells Fargo Bank, NA*, 2014 U.S. App. LEXIS 20892 at *4 (9th Cir. Oct. 29, 2014).

In fact, the district court's misguided views on class wide reliance issues were expressly rejected by this Court in *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. Cal. 2011), when it reversed the lower court's denial of certification based on a finding that individual issues of reliance predominated.

Here, the class had cohesion as all members were exposed to the exact same labeling misstatements made by ConAgra through the food manufacturer's uniform labeling practices. Arguments that ConAgra placed paper labels with identical representations on different *sized* cans, or that cans may have contained whole, diced, chopped or stewed tomatoes does not alter that cohesion. Jones sought to challenge two facially *uniform* statements across the products purchased by the class. As such, this case does not fall outside the general predominance rule identified in *Stearns*. Thus, the district court's denial of certification based on the possibility that some class members might not have relied on the labeling

statements or might have relied on them in a different manner to a lesser degree is improper and should be reversed.

III. ConAgra Fails To Demonstrate That Damages Prevent Certification

In his opening brief, Jones demonstrated that common issues predominate and that the class should have been certified under Rule 23(b)(3). ConAgra fails to adequately rebut Jones' assertions.

A. ConAgra Ignores That Damages Alone Cannot Defeat Certification

Notably absent from ConAgra's discussion of predominance as it relates to the issue of damages is any discussion of the well-settled law that the issue of damages alone cannot defeat class certification. The law is well settled that individual questions as to damages cannot, by themselves, defeat class certification. (*See* Appellant's Opening Br. 31-32 (citing, among others, *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513-14 (9th Cir. 2013) and *Amgen, Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013) (holding that Rule 23 (b)(3) "does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classified proof"))).

Recently, the Second Circuit Court of Appeals, in *Roach v. T.L. Cannon Management Corp.*, 2015 U.S. LEXIS 2054 (2d Cir. Feb. 10, 2015), considered this same question, and adopted the Ninth Circuit's *Leyva* decision. In *Roach*, the Second Circuit reviewed the district court's denial of Rule 23(b)(3) certification

based on its construing *Comcast* as holding the putative class plaintiff must offer a damage model "susceptible of measurement across the class" for Rule 23(b)(3) certification, and that failure to do so is "fatal to the certification question." *Roach*, 2015 U.S. LEXIS 2054, *6. Faced with that issue, the Second Circuit held that "*Comcast* did not hold that a class cannot be certified under Rule 23(b)(3) simply because damages cannot be measured on a classwide basis." *Id*. at *14-18 (*citing Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1430 and 1436 (2013); *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir. 2014); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013); *Leyva v. Medline Indus. Inc*., 716 F.3d 510, 514 (9th Cir. 2013); *accord Catholic Healthcare W. v. U.S. Foodservice, Inc.*, 729 F.3d 108, 123 n.8 (2d Cir. 2013)). Hence, the *Roach* Court reversed the denial of class certification and upheld the well-established rule "that 'the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification' under Rule 23 (b)(3)." *Roach*, 2015 U.S. LEXIS 2054, *9-11.

The proper question is whether individual questions will predominate over common questions. *Halliburton*, 134 S. Ct. at 2408; *see also Roach*, 2015 U.S. LEXIS 2054, *9-10 and 16 (holding "the fact that damages may have to be ascertained on an individual basis is [simply one factor] we must consider in deciding whether issues susceptible to generalized proof 'outweigh' individual ones"). Here, Jones demonstrated that common questions predominate, irrespective

of the commonality of the damage question. Hence—even assuming *arguendo* that ConAgra's assertions that damage issues do not predominate were true—certification is not defeated.

B. Plaintiff Jones Has Submitted A Certifiable Recovery Model

ConAgra would have Rule 23 requiring putative class representatives to present exact damage models for each class member. That standard is not found in the law.

A class action plaintiff is only required to provide a reasonable estimate of his damages. *Vaccarino v. Midland Nat'l Life Ins. Co.*, 2014 U.S. Dist. LEXIS 18601, 35-36 (C.D. Cal. Feb. 3, 2014). Not surprisingly, ConAgra interprets *Comcast* as requiring Jones to present—at the class certification stage—a damages model that would provide an exact damage calculation for each class member. As numerous courts have held, *Comcast* imposed no such requirement. ConAgra is overreaching on *Comcast*.

ConAgra asserts that the class is not certifiable because of a purported "lack of cohesion" among the label claims to which the class members were exposed. (ConAgra Br. 38). That argument ignores applicable law.

First, (as detailed *supra*) each of ConAgra's products contained deceptive and unlawful statements (stating "100% Natural" and "Free of artificial ingredients & preservatives" while containing unnatural and/or synthetic ingredients).

Contrary to ConAgra's assertion, the exposure of and purchase by the putative class members to these misbranded products unifies, rather than divides, the class.

Second, ConAgra ignores California law providing the district court broad discretion to determine the restitutionary remedy to be awarded under the UCL and FAL. California law is well settled that this Court has broad discretion to fashion an appropriate remedy under the UCL for ConAgra's unlawful and misleading label practices. The California Supreme Court has held that "[t]he object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.,* 29 Cal. 4th 1134, 1149 (2003). Here, Jones sought restitution for the funds in which Jones and the class have an ownership interest.

Each member of the putative class paid funds for ConAgra's misbranded products. That unifies the class and entitles them to a remedy.

ConAgra's demand that damages be proven exactly for each class member is not the applicable law. *Comcast* provides this principle. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) ("Calculations need not be exact . . . ."); *see also Knutson v. Daily Review, Inc.*, 548 F.2d 795, 811 (9th Cir. 1976) (stating proof of damages is sufficient "if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate).

As applied here—where Jones presented claims of restitution—the district court has "very broad" discretion in determining the award for restitution. ConAgra sold misbranded products to the putative class. *Colgan v. Leatherman Tool, Group, Inc.*, 135 Cal. App. 4th 663, 694-95 (Ct. App. 2nd 2006) (*citing Cortez v. Purolator Air. Fil. Prod. Co.*, 23 Cal. 4th 163, 179-80 (Cal. 2000) (noting Section 17203 provides the court authority to "make such orders or judgments … as may be necessary to prevent the use or employment … of any practice which constitutes unfair competition … or as may be necessary to restore … money or property); *see also Astiana v. Kashi*, 291 F.R.D. 493, 506 (C.D. Cal. 2013)(quotation omitted). The goals of Plaintiff's restitution claims are to "return[] money unjustly taken from the class, and deter[] the defendant from engaging in future violations of the law." *Guido v. L'Oreal*, 2013 U.S. Dist. LEXIS 94031, at *36 (C.D. Cal. 2013); *see also Korea Supply*, 29 Cal. 4th at 1149 (the purpose of restitution is "to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.").

ConAgra argues against certification of Plaintiff's proposed remedies of disgorgement of purchase price, or the alternate calculations of the difference of price from the comparator product or regression analysis to calculate the value associated with the misbranding statements. ConAgra's position (1) ignores the "very broad" discretion provided to the trial court in the restitution award and (2)

would ignore restitution's goal of deterring future conduct by the defendant. *See Guido*, 2013 U.S. Dist. LEXIS 94031, at *36. Each of the monetary remedies proposed by Jones presents a certifiable model of restitution relief. Thus, even though monetary remedy issues cannot alone defeat certification (as discussed above), that issue presents a predominating common question.[7]

Concerning Plaintiff's demonstrated remedy of the price difference between ConAgra's Hunt's product and the comparator product, ConAgra's argument is a renewed tenuous assertion relying on *Comcast* that Plaintiff is limited in recovery to the "damages attributable to th[e] theory of liability." ConAgra's argument is that Plaintiff and the class can only recover the amount associated with the misbranding label statements. The monetary remedies Jones provides, however, do just that, since they relate to the sales of the misbranded products. Further, that argument again ignores the broad discretion to award restitution.

The measure of restitution is not limited to the difference between what a plaintiff paid for an unlawful product and the value received. In fact, the measure of restitution can even be "broader than simply the return of money that was once in the possession of the person from whom it was taken . . ." *Juarez v. Arcadia*

[7] There are no individualized issues for the Court to consider. As the restitution remedy, the Court can accept (1) the full disgorgement model, (2) the difference in sales between ConAgra and competitor products, or (3) the regression analysis performed by Dr. Capps. As detailed in the Opening Brief, disgorgement is a proper remedy of restitution. *Korea Supply Co.*, 29 Cal. 4th at 1145; see also *Johns*, 2012 U.S. Dist. LEXIS 60121, at *12.

Fin'l, LTD., 152 Cal. App. 4th 889, 915 (2007). In *Juarez*, the court explained:

> Ordinarily, the measure of restitution is the amount of enrichment received . . . but as stated in Comment e [of the Restatement on Restitution], if the loss suffered differs from the amount of benefit received, the measure of restitution may be more or less than the loss suffered or more or less than the enrichment. (internal citation omitted).

Restitution addresses the "concern that wrongdoers not retain the benefits of their misconduct." *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 452 (1979). "A court awarding restitution under the California consumer protection laws has 'very broad' discretion to determine an appropriate remedy award as long as it is supported by the evidence and is consistent with the purpose of restoring to the plaintiff the amount that the defendant wrongfully acquired.'" *Astiana*, 291 F.R.D. at 506 (quoting *Wiener*, 255 F.R.D. at 670-71).

Restitutionary disgorgement can be awarded based on common evidence available from ConAgra's own records of its sales, profits, and pricing data as well as third party sources. *See Ziesel v. Diamond Foods, Inc.*, 2011 WL 2221113, at *10 (N.D. Cal. June 7, 2011).

The Ninth Circuit has specifically rejected the district court's proposed limitation of recovery to the difference between the value paid and the fair price of the product. *FTC v. Publrs. Bus. Servs.,* 2013 U.S. App. LEXIS 19336, at *34 (9th Cir. 2013)(citing *FTC v. Figgie Int'l*, 994 F.2d 595, 606-607 (9th Cir. 1993))

("once a defendant is found liable for deceptive acts or practices [w]e would not limit their recovery to the difference between what they paid and a fair price for [the product]. The seller's misrepresentations tainted the customers' purchasing decisions. If they had been told the truth, perhaps they would not have bought [the product] at all or only some.") Here, ConAgra's argued limitation is unfounded and details error in the district court's opinion.

ConAgra's attacks on Plaintiff's expert Dr. Oral Capps's recovery models ignore that Plaintiff did not need to present any exact measure of recovery and the broad discretion of the available restitution remedy. Further, to the extent this Court would impose that standard, Dr. Capps' alternative model—of a regression analysis—in fact does perform this calculation of the value of the misbranding statement. While ConAgra argues this calculation must be performed for each class member, that is found nowhere in the law. As discussed above, ConAgra's only interest is in the aggregate damage award.

In fact, courts analyzing *Comcast* have reiterated that—even assuming *arguendo* plaintiff is required to calculate the value associated with the misbranding statement as a damage calculation—the class plaintiff need only show the "aggregate damage amount," not how much each individual class member was damaged. *In re Nexium*, 2015 U.S. App. LEXIS 968, at *19-28. Here, Plaintiff's claims for liability against ConAgra stem from the same liability causing conduct

(*e.g.*, misbranding of food products leading to liability). Hence, Plaintiff need only demonstrate the "aggregate amount" stemming from that liability. Plaintiff provides methods to do just that, being either disgorgement, total price difference between Hunt's product and comparator totaled for the class, or the regression total. *See In re Nexium*, 2015 U.S. App. LEXIS 968. at *17-19, *20-25. The *In re Nexium* court explains that other circuits adopt this identical view of *Comcast*. *Id*. at *17-18.[8]

This demonstrates that ConAgra both (1) ignores the discretion of the court in the amount of the restitution award and (2) ignores that, at best, *Comcast* only requires the link of the aggregate monetary recovery to the liability causing conduct. Here, Plaintiff presents a monetary recovery model related to ConAgra's sale of misbranded products under the UCL and FAL, which results in a restitution award totaling an aggregate amount to be considered by the court in exercising its discretion. Plaintiff's proposed model establishes the required linkage: each of the products at issue contains misbranded label statement, and Plaintiff's claims and calculations are tied to those misbranded products.

Regression models are well accepted by courts. *In re High-Tech Empl. Antitrust Litig.*, 2014 U.S. Dist. LEXIS 47181, at *58; *see also In re Cathode Ray*

[8] Further, to the extent ConAgra's argument is that uninjured persons may be included within the class, that does not defeat certification. *In re Nexium*, 2015 U.S. App. LEXIS 968 at *17-22.

Tube Antitrust Litig., 2013 U.S. Dist. LEXIS 137944 at *88-89; *In re Toyota Motor Corp. Hybrid Brake Mktg.*, 2012 U.S. Dist. LEXIS 151559, at *18-19 (C.D. Cal. Sept. 20, 2012). Contrary to ConAgra's assertion, the law is clear that Dr. Capps need not capture every possible variable in his model, but, rather, he need only account for the "major factors." *Edwards v. Nat. Milk Prod. Fed.*, No. C-11-04766-JSW, 2014 U.S. Dist. LEXIS 130621, *18 (N.D. Cal. Sept. 16, 2014) (citing *Bazemore v. Friday*, 478 U.S. 385, 400, 106 S. Ct. 3000 (1986)). Such is particularly the case, here, given the trial court's broad discretion in providing a restitution award.

Plaintiff provided the district court with three methods of calculating restitution remedies through common proof, all of which relate to Plaintiff's restitution remedy tied to his theory of liability under the UCL and FAL. The district court erred in rejecting those theories and denying certification based on the issue of the monetary remedy.

C. Disgorgement Is The Proper Remedy For Plaintiff's Unjust Enrichment Claim

ConAgra's attempts to equate the unjust enrichment remedy with that of restitution is improper. Disgorgement is the remedy for unjust enrichment. "Disgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost." *Meister v. Mensinger*, 230 Cal. App. 4th 381, 398 (2014) (citing *County of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 542 [2007];

Feitelberg v. Credit Suisse First Boston, LLC, 134 Cal. App. 4th 997 (2005)). The *Meister* Court further explains that "[t]he emphasis is on the wrongdoer's enrichment, not the victim's loss," and, "[i]n 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." *Id.* That opinion makes clear that, under California law, "[t]here is no standard formula to measure it," and "[r]ecovery is not prohibited just because the benefit cannot be precisely measured." (*Id*.) *Meister*, 230 Cal. App. 4th at 400-01 (quoting *Ajaxo Inc. v. E*Trade Financial Corp*., 187 Cal. App. 4th 1295 (2010)).

IV. The District Court Abused Its Discretion By Refusing to Certify A Rule 23(b)(2) Class

For the reasons stated in Plaintiff's opening brief, the district court erred when it refused to certify a 23(b)(2) class. *Chapman v. Pier 1 Imps. (U.S.), Inc.*, 631 F.3d 939 (9th Cir. 2011) cited by ConAgra actually supports the Plaintiff's position as it makes clear that due to the "deterrent effect doctrine" injunctive relief is not only available to a person who intends to revisit a situation where they were injured by a regulatory violation but also to a person who does not intend to revisit a situation where they were injured by a regulatory violation because the possibility of a future injury deters them from doing so. *Chapman* at 944, 949-50. Thus, in the present case, the fact that Plaintiff was deterred from purchasing

mislabeled and misbranded ConAgra products that were illegal to sell or hold until they were relabeled so as to be compliant with federal and state labeling laws should not bar the Plaintiff from seeking injunctive relief challenging the mislabeling and misbranding of those products.[9]

In addition, "[a] case such as this which is 'capable of repetition, yet evading review' is not moot" *Cerro Wire & Cable Co. v. Federal Energy Regulatory Com.*, 677 F.2d 124, 127 n.2 (D.C. Cir. 1982). Moreover, Plaintiff submits that ConAgra utterly fails to demonstrate why the ongoing risks to the Plaintiff from ConAgra's illegal labeling practices detailed in Plaintiff's opening brief were implausible or "highly attenuated" or "farfetched."

ConAgra citation to inapposite case law regarding the proper scope of injunctive relief is unavailing. In this case, the requested relief matched the scope and nature of the violation. Plaintiff sought to enjoin ConAgra's improper use of the claim "100% natural" and in particular the improper use of the claim "100% natural" on ConAgra canned tomato products that contained unnatural ingredients. Plaintiff sought that injunction because he had been injured by the purchase of ConAgra's canned tomato products labeled "100% natural" that contained

[9] ConAgra's reliance on *O'Shea v. Littleton*, 414 U.S. 488 (1974) and its progeny is misplaced, as this Court has distinguished *O'Shea* as imposing a more restrictive standard in situations involving federal interference into sensitive state activities. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 789-90 (9th Cir. 2014) ("We have come to view *O'Shea* as standing for [a] more general proposition . . . .").

unnatural ingredients. This injunctive relief is properly matched to the injury and claim.

CONCLUSION AND PRAYER

For the reasons stated in Plaintiff's Opening Brief and this Reply, the district court's Order denying Jones' Motion for Class Certification should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted,

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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 6,994 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 Time New Roman type.

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Dated: March 6, 2015

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 6, 2015.

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