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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KYM PARDINI and CARRIE WOOD, on)	Case No. 13-cv-01675-SC
behalf of themselves and all)	
others similarly situated,)	<u>ORDER GRANTING MOTION TO STAY</u>
)	
Plaintiffs,)	
)	
v.)	
)	
UNILEVER UNITED STATES, INC.,)	
)	
Defendant.)	
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Now before the Court is Plaintiffs' motion to stay this case pending the Ninth Circuit Court of Appeals' decision in Jones v. ConAgra Foods, Inc. The motion is fully briefed,¹ and the Court deems it suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons set forth below, the motion is GRANTED.

This is a putative consumer class action alleging the mislabeling of Defendant Unilever United States, Inc.'s

¹ ECF Nos. 54 ("Mot."), 55 ("Opp'n"), 56 ("Reply").

1 ("Unilever") product, I Can't Believe It's Not Butter! Spray
2 ("ICBINBS"). ICBINBS packaging allegedly contains multiple claims
3 -- both prominently on the front of the package and in the
4 nutrition information on the back -- that the product contains zero
5 grams of fat per serving. Plaintiffs allege that Defendant was
6 required by law to provide a notation that certain ingredients in
7 ICBINBS actually do contain fat. See ECF No. 38 ("MTD Order") at
8 2, 4-5, 21.

9 Plaintiffs now move to stay this case pending the Ninth
10 Circuit's decision in Jones. "[T]he power to stay proceedings is
11 incidental to the power inherent in every court to control the
12 disposition of the causes on its docket with economy of time and
13 effort for itself, for counsel, and for litigants." Landis v. N.
14 Am. Co., 299 U.S. 248, 254 (1936). When deciding whether to stay a
15 case, a court should consider "the possible damage which may result
16 from the granting of a stay, the hardship or inequity which a party
17 may suffer in being required to go forward, and the orderly course
18 of justice measured in terms of the simplifying or complicating of
19 issues, proof, and questions of law which could be expected to
20 result from a stay." CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th
21 Cir. 1962).

22 Unilever argues that this case should not be stayed because
23 Plaintiffs fail to provide specifics and because the Ninth Circuit
24 might take a long time to rule in Jones, which would prejudice
25 Defendant. See Opp'n at 1. The Court proceeds to analyze the
26 factors governing the grant of a stay laid out in Landis.

27 First is the damage that will result from a stay. Defendant
28 argues that it will be prejudiced by a delay in resolving this

1 case. Defendant claims that "a presumption of injury arises from
2 delay in resolving an action." Opp'n at 4. That is not quite
3 true. The case Defendant cites for that proposition actually held
4 that "[t]he law presumes injury from unreasonable delay."
5 Anderson v. Air W., Inc., 542 F.2d 522, 524 (9th Cir. 1976)
6 (emphasis added). Defendant does not adequately explain why
7 staying this case pending a potentially controlling Ninth Circuit
8 decision is unreasonable. Nor does Defendant explain why delay
9 would actually injure it in this case; because the stay puts this
10 case in abeyance, Defendant will not be required to expend time or
11 resources litigating this case until Jones is decided. The only
12 cognizable prejudice to Defendant is an unfavorable holding in
13 Jones that would damage its chances of winning this case.

14 Moreover, declining to stay this case might ultimately result
15 in an even longer delay and more hardship for the parties.
16 Plaintiffs have served discovery requests on Defendant, but no
17 documents have been produced and no depositions have been taken.
18 The hearing on Plaintiffs' motion for class certification is not
19 scheduled until October 13, 2015. See ECF No. 53 at 2. The
20 decision in Jones may well cause the parties to change their
21 factual and legal theories on class certification and alter the
22 discovery necessary to present their arguments. Jones may even
23 prompt a settlement, obviating the need for discovery at all. Even
24 if it does not, "further discovery and briefing on class
25 certification or decertification will likely be necessary" once the
26 decision is handed down. See Order Staying Case at 2, Parker v.
27 J.M. Smucker Co., No. 13-0690 SC (N.D. Cal. December 18, 2014).
28 Therefore, the Court finds that Defendant will suffer little or no

1 hardship due to the stay.

2 Second, the Court considers that hardship that will result if
3 the case goes forward. As discussed previously, there is risk of
4 significant hardship to both parties because the decision in Jones
5 is likely to prompt additional discovery and briefing on the class
6 certification issues. It will be easier for the parties and the
7 court if the class certification motion is briefed and argued only
8 once.

9 Finally, the Court turns to the simplifying or complicating of
10 issues, proof, and questions of law which could be expected to
11 result from a stay. Jones, like this case, is a putative consumer
12 class action. In Jones, the plaintiffs alleged that defendant
13 ConAgra Foods, Inc.'s ("ConAgra") website and products contain
14 deceptive and misleading information. See Jones v. ConAgra Foods,
15 Inc., No. C 12-01633 CRB, 2014 WL 2702726, at *1 (N.D. Cal. June
16 13, 2014). Among the allegedly deceptively labeled products was
17 ConAgra's PAM cooking spray, a product quite similar to ICBINBS.
18 Id. Judge Breyer denied motions to certify classes on the grounds
19 that the classes were not ascertainable and that individual issues,
20 rather than class-wide ones, predominated. Id. at *8-12, 14-19.
21 As Judge Breyer observed, the ascertainability issue is an
22 unsettled question of law in the Ninth Circuit. Judges in this
23 District have differed as to whether ascertainability is a formal
24 requirement for class certification and, if it is, how strictly
25 that requirement should be construed. See id. at 8-11.

26 Those precise issues are frequently critically important in
27 consumer class actions. See, e.g., id. (denying motion for class
28 certification in part because classes were not ascertainable); In

1 re POM Wonderful LLC, No. ML 10-02199 DDP RZX, 2014 WL 1225184, at
2 *6 (C.D. Cal. Mar. 25, 2014) (granting motion to decertify class in
3 part because class was not ascertainable). Indeed, the undersigned
4 has already sided with those judges imposing a stricter
5 ascertainability requirement and held that some proposed consumer
6 classes fail to meet it. See, e.g., In re Clorox Consumer Litig.,
7 301 F.R.D. 436, 440 (N.D. Cal. 2014) (Conti, J.) (denying
8 certification of class of purchasers of defendant's cat litter
9 products in part because class not ascertainable); Sethavanish v.
10 ZonePerfect Nutrition Co., No. 12-2907-SC, 2014 WL 580696, at *4-6
11 (N.D. Cal. Feb. 13, 2014) (Conti, J.) (denying certification of
12 class of purchasers of defendant's nutrition bars because class was
13 not ascertainable).

14 The Jones plaintiffs' appeal presents four issues to the Ninth
15 Circuit: (1) imposition and analysis of the ascertainability
16 requirement; (2) analysis of the predominance requirement; (3)
17 determination of an acceptable damages theory; and (4) the decision
18 to deny class certification. See Brief of Appellant at 2, Jones v.
19 ConAgra Foods, Inc., No. 14-16327 (9th Cir. Nov. 21, 2014). Those
20 very same issues are almost certain to be raised in this case, and
21 they are likely to be dispositive on a motion for class
22 certification. Recognizing the importance of the issues before the
23 Ninth Circuit in Jones, a number of district court judges,
24 including the undersigned, have stayed consumer class actions
25 pending the Ninth Circuit's ruling. See, e.g., Order Staying Case,
26 Parker v. J.M. Smucker Co., No. 13-0690 SC (N.D. Cal. December 18,
27 2014) (Conti, J.) (sua sponte staying consumer food class action
28 case while class certification motion was pending until Jones is

1 decided); Order Staying Case, Allen v. ConAgra Foods, Inc., No. 13-
2 CV-01279-HSG (N.D. Cal. Feb. 20, 2015); Joint Stipulation and Order
3 to Stay Case, Swearingen v. ConAgra Foods, Inc., No. 13-cv-05322-SC
4 (N.D. Cal. Jan. 9, 2015) (granting parties' stipulation to stay
5 pending the outcome in the Jones appeal); Gustavson v. Mars, Inc.,
6 No. 13-CV-04537-LHK, 2014 WL 6986421 (N.D. Cal. Dec. 10, 2014)
7 (granting defendant's motion to stay consumer food class action
8 pending Jones).

9 Defendant's argument that it is unclear how the issues in
10 Jones apply to this case is entirely disingenuous. Defendant
11 feigns ignorance as to how Jones might control this case. See
12 Opp'n at 2 ("[Plaintiffs] have alleged no facts explaining
13 why . . . Jones will control this case."). Defendant goes on to
14 make the rather absurd argument that Plaintiffs' logic suggests
15 that "all cases should be stayed when a court of appeals is
16 considering an issue that is conceivably relevant" or that all
17 consumer class actions should be stayed until Jones is decided.
18 Id.

19 It is true that Plaintiffs' brief was short and generally
20 avoided any sort of analysis. But, given the specific issues
21 presented in Jones and the factual similarities to this case, the
22 potential for Jones to control this case is obvious. First, the
23 product involved in this case (ICBINBS) is very similar to one of
24 the products at issue in Jones (PAM cooking spray). Second, the
25 causes of action are nearly identical: plaintiffs in both cases
26 allege that marketing claims regarding the nutrition of defendants'
27 food products were false or misleading. Third, the legal issues to
28 be decided in Jones will undoubtedly have an important, and perhaps

1 dispositive, influence on the class certification process in this
2 case. Ascertainability and predominance issues have been fatal to
3 similar food product consumer class actions cases, and the Ninth
4 Circuit's clarification of a contentious area of law may well be
5 determinative here.

6 Thus the Court finds that there will be little to no damage to
7 Defendant from a stay. By contrast, failing to stay this case
8 might result in substantial hardship to both parties and deal a
9 severe blow to judicial economy. Perhaps most importantly, Jones
10 is very likely to simplify questions of law that might well be
11 dispositive to class certification in this case. As a result,
12 Plaintiffs' motion to stay this case is GRANTED. Within fourteen
13 (14) days of the Ninth Circuit's decision in Jones, the parties
14 shall file a joint notice of the decision with the Court.

15
16 IT IS SO ORDERED.

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18 Dated: April 15, 2015

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UNITED STATES DISTRICT JUDGE