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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CHAD BRAZIL, an individual, on his own behalf and on behalf of all others similarly situated,

Plaintiff,

v.

DOLE PACKAGED FOODS, LLC,

Defendants.

Case No. CV12-01831 LHK

DEFENDANT'S NOTICE OF MOTION AND MOTION TO DECERTIFY

Date: October 16, 2014
Time: 1:30 p.m.
Judge: Hon. Lucy H. Koh
Action Filed: April 11, 2012

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NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on October 16, 2014 at 1:30 p.m. or as soon thereafter as the matter may be heard, in the United States District Court, Northern District of California, San Jose Division, located at 280 South First Street, San Jose, CA 95113, before the Honorable Lucy H. Koh, defendant Dole Packaged Foods, LLC ("Dole") will move to decertify the "damages" and "injunction" classes that this Court certified pursuant to Fed. R. Civ. P 23(b)(3) and 23(b)(2) in its Order Granting in Part and Denying in Part Brazil's Motion for Class Certification, Dkt. No. 142.

In the alternative to decertifying the "damages" class, Dole respectfully asks the Court to conduct a non-testimonial "*Daubert*" review of the reliability and relevance of Dr. Oral Capps' expert testimony.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities and Declaration of William L. Stern, and on such other written and oral argument as may be presented to the Court.

Dated: August 21, 2014

WILLIAM L. STERN
CLAUDIA M. VETESI
LISA A. WONGCHENKO
MORRISON & FOERSTER LLP

By: */s/ William L. Stern*
William L. Stern

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DOLE PACKAGED FOODS, LLC

STATEMENT OF THE ISSUES TO BE DECIDED

This motion raises the following issues:

1. **Decertification of Damages Class.** Should the Court decertify the "damages" class in light of the final Report of, and the deposition testimony given by, Plaintiff's damages expert Dr. Oral Capps?

2. ***Daubert* hearing.** In the alternative, should the Court convene a non-testimonial *Daubert* hearing to assess whether the damages opinions offered by Dr. Capps are admissible?

3. **Ascertainability.** Should the Court decertify both the "damages" and "injunction" classes because the class includes products that did not have the challenged labeling, and thus includes uninjured class members who were never exposed to the alleged misrepresentations?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Court certified a "damages" class based on a regression model offered by Plaintiff's damages expert, Dr. Oral Capps, that the Court thought could satisfy *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). It denied Dole's motion for reconsideration, but observed that "Dr. Capps has offered somewhat contradictory testimony" and "Dole raises potentially legitimate concerns about Brazil's ability to prove damages." However, these challenges had to await "the close of expert discovery," after which Dole could move for decertification.

Expert discovery has closed. Dr. Capps issued his final report and gave a deposition.

Illumination has not been kind to Dr. Capps' model. His Report deviates from what he said he would do. It fails to follow the standard reference manual that courts use to weigh regression testimony. And it is hobbled by six material errors, any one of which by itself would justify decertification. Each compounds the other, resulting in an overwhelmingly flawed study.

The Court should decertify the "damages" class or, in the alternative, conduct a non-testimonial "*Daubert*" review of the reliability and relevance of Dr. Capps' testimony.[1]

In addition, the class includes a product that did not contain the challenged label statement throughout the class period. Thus Plaintiff's class includes class members who were never exposed to the label and could not have been injured. This defeats ascertainability.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Underlying Lawsuit—Substantive Allegations.

In his Third Amended Complaint, Plaintiff alleges that ten Dole products "contain the label statement 'All Natural Fruit,'" which is allegedly misleading because the "products contain both ascorbic acid (commonly known as Vitamin C) and citric acid, allegedly synthetic ingredi-

[1] Dole is simultaneously moving for summary judgment. If the Court were to grant this motion and decertify, it could then address summary judgment without running afoul of "one way intervention." The opposite is not true. *See Schwarzchild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) ("district courts generally do not grant summary judgment on the merits of a class action until the class has been properly certified and notified. The purpose of Rule 23(c)(2) is to ensure that the plaintiff class receives notice of the action well *before* the merits of the case are adjudicated"); *accord Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1074 (2007).

ents." (Order Granting in Part and Denying in Part Brazil's Motion for Class Certification, at 3:11-17 ("Order"), Dkt. No. 142.) "According to Brazil," FDA regulations "dictate that Defendant[] may not claim that a product is 'all natural,' if it contains 'unnatural ingredients such as added color, [or] synthetic and artificial substances.'" (*Id.*, 3:2-4.) Thus, says Mr. Brazil, the labels are "unlawful" and false and misleading under California law. (*Id.*, 2:24-26.)

B. The Two Certified Classes.

The Court certified two classes: (i) a nationwide injunction class under Rule 23(b)(2) comprised of all persons who, from April 11, 2008 to the present, bought a Dole fruit product bearing the front panel statement "All Natural Fruit" but which contained citric acid and ascorbic acid, and (ii) a "damages" class, under Rule 23(b)(3), comprised of California purchasers but otherwise defined the same as the injunction class. (Order, 35:8-19.)

C. Plaintiff's Three Damages Models.

Plaintiff advanced three damages models, all based on the Declaration of Dr. Capps. (Dkt. No. 101-9 ["First Report"].)

1. The Court Rejected "Price Premium" and "Full Refund" Models.

The Court rejected Dr. Capps' "price premium" model as "insufficient" under *Comcast*. (Order, 28:20-24.) "Dr. Capps has no way of linking the price difference, if any, to the allegedly unlawful or deceptive statements or controlling for other reasons why allegedly comparable products may have different prices." (*Id.*, 27:17-19; 28:20-24.) The Court rejected Dr. Capps' full refund model "because it is based on the assumption that consumers receive no benefit whatsoever from purchasing the identified products." (*Id.*, 26:21-29:3.)

2. The Court Endorsed Dr. Capps' "Regression" Model.

The Court approved Plaintiff's damages model, which relied on a statistical method called "regression."[2] Unlike "price premium," that model "isolates the effect of the alleged

[2] "A regression is a statistical tool designed to express the relationship between one variable, such as price, and [independent] variables that may affect the first variable. Regression analysis can be used to isolate the effect of [defendant's] alleged [misconduct] on price, taking into consideration other factors that might also influence price, like costs and demand." *In re*

(Footnote continues on next page.)

misrepresentation by controlling for all other factors that may affect the price of Dole's fruit cups and the volume of Dole's sales…." (*Id*., 30:9-11.) The Court thought Dr. Capps' regression model "traces damages to Dole's alleged liability by accounting for several factors other than the alleged misbranding that might influence changes in price or sales." (*Id.*, 30:8-21.)

D. Dole Moved for Reconsideration, Which Was Denied.

Dole moved for reconsideration. (Dkt. No. 145.) The Court denied that motion but, in doing so, observed: "Dr. Capps has offered somewhat contradictory testimony (all in the context of other food misbranding cases pending in this district) as to whether or not his Regression Model can estimate damages even in the absence of labels that changed over the course of the class period." (Order, 5:12-16, Dkt. No. 150.) "[A]lthough Dole raises potentially legitimate concerns about Brazil's ability to prove damages," that needed to await "the close of expert discovery." The Court invited Dole to move for decertification. (*Id*., 6:3-10; 18-20.)

E. Expert Discovery Is Now Closed, and Dr. Capps Served His Final Report.

Dr. Capps' final Report is dated June 27, 2014 and is attached as Exhibit 1 to the Declaration of William L. Stern ("Stern Decl."). Dr. Capps gave a deposition on July 7, 2014. (Stern Decl. ¶ 3.) Expert discovery closed August 1, 2014. (Dkt. No. 160, at 4:15.)

The Report contains no discussion of "price premium," "disgorgement," or "full refund." (Capps Dep., 12:20-25[3]; 13:1-9 [Stern Decl. Ex. 2].)[4] The only damages model that Dr. Capps intends to present at trial is regression. (*Id*., 12:7-22; *see also* Stern Decl. Ex. 1.)

F. What Dr. Capps' Regression Model Tries to Show.

Dr. Capps' study purports to test a "null and alternative hypotheses." (Stern Decl. Ex. 1 ¶ 18.) Either the labeling statement "All Natural Fruit" has no impact on Dole's retail prices ("null hypothesis") or it is "positively associated with consumers' willingness to … pay a

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(Footnote continued from previous page.)

High-Tech Emp. Antitrust Litig., No. 11-CV-02509 LHK, 2014 WL 1351040, at *5 n.7 (N.D. Cal. Apr. 4, 2014) (citation omitted).

[3] Dr. Capps refers to "price premium" as "benefit of the bargain."

[4] The pages from Dr. Capps' deposition are attached as Exhibit 2 to the Stern Declaration.

premium for this attribute" ("alternative hypothesis"). (*Id.*; *see also* Rebuttal Report of Carol A. Scott ¶ 10 (Stern Decl. Ex. 3).)

1. Dr. Capps' Two-Step Approach.

Dr. Capps performed a two-step analysis. (Stern Decl. Ex. 1 ¶¶ 19, 29 and Ex. D; Stern Decl. Ex. 3 ¶ 11.) First, he used a "hedonic regression analysis" to determine the effect of an "All Natural Fruit" claim on retail prices for the accused products. He identified five factors (independent variables) that he thought would account for Dole's retail prices: (i) seasonality, (ii) the presence/absence of an "All Natural" label, (iii) package size, (iv) year, and (v) brand. In fact, Dr. Capps' model relies on just *two* variables: "Label" and "Brand." That is because "season" and "year" affect all brands equally, thus, they cannot account for price differences across brands. (Stern Decl. Ex. 2, 57:21-58:2; 60:12-61:5; Stern Decl. Ex. 3 ¶ 12.)

Second, Dr. Capps multiplies this coefficient[5] times the units that Dole sold. (Stern Decl. Ex. 1 ¶ 29; Stern Decl. Ex. 3 ¶ 14.) That yields an aggregate damages number. (Stern Decl. Ex. 1 at Exs. E-1, E-2.)

2. Dr. Capps' Regressions And His Two Scenarios.

Dr. Capps performed regression analyses for nine product categories using two different assumptions. (Stern Decl. Ex. 1 at Ex. D.) In "Scenario 1," he assumed that all Del Monte products were also misbranded, i.e., said "Natural" on the label.[6] In "Scenario 2," he assumed all Del Monte products are not misbranded. For both scenarios, he assumed that all "Private Label" and all non-Dole and non-Del Monte brands (e.g., Geisha, Musselman's) never say "Natural." (Stern Decl. Ex. 1 ¶¶ 21, 25, 26.)

As we show in Part IV.A.5 ("Flaw #5"), that assumption is false. It undermines his study.

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[5] The "coefficient" is "the percentage change in the price of the fruit product attribute to this labeling claim while controlling for all of the factors." (Stern Decl. Ex. 1 ¶ 20.) In other words, it is the implied change in the average price for the "misbranded" versus the "not misbranded" products.

[6] Mr. Brazil's lawyers sued Del Monte in a similar misbranding case pending in this district called *Kosta v. Del Monte Foods, Inc.*, No. 4:12-cv-01722-YGR (filed April 5, 2012).

3. The Results of Dr. Capps' Regressions, and Scenarios 1-3.

The results of Dr. Capps' regressions are set forth in Exhibit E. Under Scenario 1, his model predicts an average retail price premium of 16.66%, ranging from 3.66% for pineapple to 41.59% for tropical fruit. (Stern Decl. Ex. 1 ¶ 25 and Ex. E-1; Stern Decl. Ex. 2, 50:9-17.) Under Scenario 2, he predicts an 8.96% average retail premium. (Stern Decl. Ex. 1 ¶ 25 and Ex. E-2; Stern Decl. Ex. 2, 51:16-24.)

For Scenario 3, Dr. Capps performed no regression. Instead, he assumes that the same price-premium of 40.54% found by Professor Anstine in an unrelated 2007 yogurt study could obtain, then applies that to Dole's fruit products. (Stern Decl. Ex. 1 ¶ 25 and Ex. E-3.)

4. Dr. Capps Performed Nine Regressions, Not Ten.

Dr. Capps did no regression for "Red Grapefruit Sunrise" because "no data were available." (Stern Decl. Ex. 1 ¶ 22; Stern Decl. Ex. 2, 33:1-18.) Thus, Plaintiff has no damages model for that product aside from Scenario 3 (the yogurt analogy).

III. THE LEGAL STANDARD

Fed. R. Civ. P. 23(c)(1)(C) provides: "An order that grants or denies class certification may be altered or amended before final judgment." "A district court may decertify a class at any time." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009); *Ries v. Ariz. Beverages USA LLC*, No. 10-01139 RS, 2013 U.S. Dist. LEXIS 46013, at *9 (N.D. Cal. Mar. 28, 2013). "The standard used by the courts in reviewing a motion to decertify is the same as the standard when it considered Plaintiffs' certification motions." *Ries*, 2013 U.S. Dist. LEXIS 46013, at *9-10 (quoting *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 410 (C.D. Cal. 2000)). On a motion for decertification, the burden remains on the plaintiff to demonstrate that the Rule 23 requirements are met. *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011).

"Certification is only appropriate if a rigorous analysis indicates the prerequisites of Rule 23(a) have been satisfied." *Ries*, 2013 U.S. Dist. LEXIS 46013, at *10 (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992)). This '"rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim.'" *Ellis v. Costco Wholesale*

Corp., 657 F.3d 970, 980 (9th Cir. 2011) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).

IV. ARGUMENT

A. The Court Should Decertify the "Rule 23(b)(3)" Damages Class.

As this Court said, *Comcast* requires that "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." (Order, 25:21-23 (citing *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).) Plaintiff's model "must measure only those damages attributable to [the defendant's conduct]. 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)." (Order, 25:12-16 (citing *Comcast*, 133 S. Ct. at 1433; *see also id.*, 25:21-23 ("plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability.").)

Dr. Capps' Report does not pass that test. As Dole will show, there are six separate flaws in Dr. Capps' model. Any one, by itself, warrants decertification.[7] Moreover, the Report deviates from what he said he would do, and it fails to adhere to generally accepted standards of "regression" analysis.[8] Finally, the Report lacks the feature that saved Dr. Leamer's regression analysis in *High-Tech Employee Antitrust Litigation.*

1. Flaw #1: The Court Approved a "Sales" Regression, But Dr. Capps Performed a Very Different "Price" Regression.

In his First Report, Dr. Capps said he would use regression to model "the portion of *sales* gleaned by Dole as a result of the false and misleading label statement 'All Natural Fruit.'" (First Report ¶¶ 2, 18, 23 (emphasis added).) The Court accepted that, and warned that the model

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[7] These same flaws mean that the Court could also enter summary judgment. (*See* Dole's concurrently-filed motion for summary judgment, Section IV.E.)

[8] *See* Federal Judicial Center's "*Reference Guide on Multiple Regression*," part of the *Reference Manual On Scientific Evidence*, pp. 303-357 (3d ed. 2011) ("*Reference Manual*"). Dr. Capps is familiar with the *Reference Manual* but he did not consult it in preparing his Report. (Stern Decl. Ex. 2, 17:4-10.)

would have to explain changes in Dole's *sales*.[9] That is not what he did. In his final Report, Dr. Capps purported to measure the change in Dole's *retail prices*. This is inappropriate, and warrants decertification for two separate reasons.

First, it is not what Dr. Capps promised or what the Court approved. More than that, by opting to model price, Dr. Capps has simply recreated a more elaborate version of the "Price Premium" model that this Court rejected already. (*Cf.* Order, 27:12-29:3; Stern Decl. Ex. 3 ¶ 24.)

The reason for Dr. Capps' flip-flop is instructive, because it is the same reason he was forced to withdraw his regression model in *Lanovaz v. Twinings*. As he told Judge Whyte: "[I]t is not possible in [*Twinings*] to invoke a regression analysis approach because of the lack of any variation in sales or units sold attributed to the antioxidant claims."[10] Here too, Dr. Capps needed a "test" (the accused Dole products) and a "control" group (i.e., the same products without the offending statement). But there were no "before-and-after" labels for nine of the ten Dole products. (Stern Decl. Ex. 2, 34:3-12.) No problem, figured Dr. Capps, he would pose a different question and measure "retail price." (*Id.*, 42:18-43:6.)

The Court asked for a model that would answer the question: What happened to Dole's sales when the labels changed? But Dr. Capps realized he could not answer that (Stern Decl. Ex. 2, 41:15-43:6) so he changed the question to, How much more would a retailer charge if a label said "All Natural Fruit"? In short, he measured the wrong thing.

Measuring "retail price" is very different than measuring "sales." Retail price is the "bid," and it is a "supply side" variable, i.e., the "ask." But "price" tells us nothing about whether consumers will *agree* to pay that price or *how many* consumers will do so. (Stern Decl. Ex. 3

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[9] Order, 29:17-21 ("Dr. Capps proposes to determine Dole's gains from its alleged misrepresentations . . . on its product labels, using regression analysis to control for other variables that could otherwise explain changes in Dole's *sales*.") (emphasis added); *see also id.*, 30:8-11 ("The Court finds that Dr. Capps' Regression Model sufficiently ties damages to Dole's alleged liability under *Comcast*. Dr. Capps' Regression Model isolates the effect of the alleged misrepresentation by controlling for all other factors that may affect the price of Dole's fruit cups and the volume of Dole's *sales*.") (emphasis added).

[10] Reply Declaration by Dr. Oral Capps in Support of Plaintiff Nancy Lanovaz's Motion for Class Certification ¶ 20, filed in *Lanovaz v. Twinings N. Am., Inc.*, No. 5:12-cv-02646-RMW, Dkt. No. 114-6.

¶ 22.) Sales, or quantities purchased, on the other hand, is a "demand" variable. It measures consumers' demand in the market. (*Id*.)

Second, that difference matters. After changing the question to suit his data, Dr. Capps had to change the "dependent variable" in his regression from "sales" to "retail price." To illustrate the error, imagine Ford Motor Company wanting to know how much it could boost *sales* if it could improve a model's fuel efficiency by, say, 5 mpg. Dr. Capps would have created a model that correlates the *price* of cars—in general—with higher mpg ratings. "Wait a minute," Ford would counter, "how would you know if the price difference isn't because of the brand (Mercedes Benz vs. Hyundai) or the model (Jeep Cherokee vs. Mini Cooper)?" (*See* Stern Decl. Ex. 3 ¶ 25.) Dr. Capps would have no answer. He tested the wrong question.

So too here. Dr. Capps' regression model appears, on the surface, to be more sophisticated than the "price premium" model this Court rejected, but, in substance, it is the same thing. (Stern Decl. Ex. 3 ¶ 25.) If anything, it is worse. In the "price premium" approach at least, Dr. Capps would have compared the price of real comparable products to Dole's accused products and then arrived at a price premium by subtraction. Instead, he created a "Rube Goldberg" model in which he had to create fictional comparables that no consumer ever saw or bought, imputed to them an average price, then compared the actual price of Dole's real products to the imputed average price of the made-up inventory. The model is profoundly flawed. (*Id.* ¶ 8.)

Dr. Capps' Report suffers from five other flaws, discussed next.[11]

2. Flaw #2: Dr. Capps' Model Confounds "Brand" and "Label."

The Court accepted Dr. Capps' regression model as *Comcast*-compliant because it would "ensure[] that factors like brand loyalty and product quality remain constant." (Order, 30:15-16.)

[11] Since this Court's Order, Judge Breyer rejected Dr. Capps' regression model, noting: "Capps does not provide a clearly defined list of variables, he has not determined whether the data related to any or all of his proposed control variables exists, and he has not determined, or shown how he would determine, which competing and complementary products he would use." *Jones v. Conagra Foods, Inc.*, No. C 12-01633 CRB, 2014 U.S. Dist. LEXIS 81292, at *77-78 (N.D. Cal. June 13, 2014). All of the *Conagra* flaws pertain here, and then some.

Not so. Dr. Capps defines away or ignores all differences between brands and products, save sometimes the difference in number of ounces sold per unit (which he calls the "size" variable). (Stern Decl. Ex. 3 ¶ 27.)[12]

For each of his nine regressions Dr. Capps has identified (i) an accused Dole product, (ii) a supposedly "comparable" Del Monte product, and (iii) one or more supposedly comparable "private label" products. For the Dole product, the variable "Label" always gets coded as "1," meaning that the attribute (a misbranded label) is present. (Stern Decl. Ex. 3 ¶ 32.) Thus, if we know that the "Brand" is "Dole," the "Label" is always "1"— misbranded. For Scenario 1, he assumes Del Monte is also misbranded, so, again, the "Label" is "1"—misbranded. He always assigns "Private label" a code of "0", meaning "not misbranded."

Consider what he has just done: If we know the brand (e.g., Dole, Del Monte, Libby's Safeway) we know with 100% certainty the value for "Label"—either "1" or "0." Statisticians call this "perfect colinearity" between variables, in this case, between "Brand" and "Label." But as Professor Rubinfeld explains: "When two or more explanatory variables are correlated perfectly—that is, when there is *perfect colinearity*—one cannot estimate the regression parameters. The existing dataset does not allow one to distinguish between alternative competing explanations of the movement in the dependent variable." *Reference Manual*, p. 324.

This Court's decision in *High-Tech Employee Antitrust Litigation* illustrates, by contrast, what went amiss here. In that case, the defendants in an antitrust case attacked plaintiffs' expert's regression model on the ground that it was incapable of segregating the impact on compensation attributable to the challenged employment agreements from the effects on so-called "untainted" agreements. 2014 WL 1351040, at *16. But there, defendants did not attack the "unchallenged" employment agreements. There were real-world "before" and "after" employment agreements, so the defendants' "disaggregation" criticism was purely "hypothetical." *Id.*

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[12] Dr. Capps includes "size" as a variable in Scenario 1 but not Scenario 2. Why? Both scenarios use the same comparables. (Stern Decl. Ex. 3, 14 n.31.) Dr. Capps never explains the disappearance of the "size" variable. *Cf. Reference Manual*, p. 331 (a party offering regression must "fully disclose … the methods of analysis."

Here, there were no "before-and-after" Dole labels, as Dr. Capps concedes. (*Cf.* Stern Decl. Ex. 2, 34:3-12.) He had to create them, but in doing so he created perfect colinearity between two variables he was measuring, namely, "Brand" and "Label." Thus, his analysis is indistinguishable from the studies cited in *High-Tech Employee Antitrust Litigation* at footnote 39, in which "damages models failed to take into account critical variables that could have impacted the independent variable at issue." 2014 WL 1351040, at *18 n.39 (citing *Concord Boat Corp. v. Brunswick Corp*., 207 F.3d 1039, 1056 (8th Cir. 2000); *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1998)).) In short, Dr. Capps' model is undone by perfect colinearity, a flaw that was not present in Dr. Leamer's study. *Cf. High-Tech Emp. Antitrust Litig.*, 2014 WL 1351040, at *16-17.[13]

What Dr. Capps did next is especially damning. Recognizing that perfect colinearity is fatal to regression, Dr. Capps manipulated his coding to create a distinction that doesn't exist in the real world. He was stuck with his "Label" coding—either misbranded ("1") or not misbranded ("0")—so his only choice was to manipulate "Brand." That is exactly what he did.

For Scenario 1, his "Brand" coding is binary: (i) Dole or (ii) Not Dole. Dole is given a value of "1" and everything else is thrown into the "Not-Dole" bucket and assigned a value of "0." (Stern Decl. Ex. 3 ¶¶ 33-43; Scott Dep., 111:12-113:7 [Stern Decl. Ex. 4].) But what does that mean? In Dr. Capps' world, "Del Monte" and "Private Label" are the *same* "Brand," i.e., they have the exact same value. (Stern Decl. Ex. 4, 113:1-5.) That expedient may have solved the problem of perfect colinearity, but it was intellectually dishonest.

First, instances in which Dole sold the same product (either with or without the offending label) do not magically appear and disappear just because Dr. Capps changed his coding. The sky doesn't become green just because someone says it is.

[13] What Dr. Capps has done is tantamount to what would have happened in *High Tech Employee Antitrust Litigation* if there were no pre-"conspiracy" employment agreements and Dr. Leamer had to manufacture a "control group" by hypothesizing a group of fictional employers as well as the salary/benefit terms in such made-up employment agreements.

Second, the distortion is amplified because the made-up "Brand" variable sorts different brands into only one of two possible groups, thereby muddling together very different brands by the simple expedient of declaring them, by fiat, as equal in value to each other (e.g., Del Monte = Private Label = Not Dole). (Stern Decl. Ex. 3 ¶ 28.)

Third, within the "Not Dole" bucket, Dr. Capps assumes that the only difference between Del Monte, on the one hand, and Private Label/Geisha/Madam products, on the other, is that Del Monte is misbranded and the others are not. But that is exactly the sort of facile analysis the Court disapproved when it rejected Dr. Capps' "price premium" model. (Stern Decl. Ex. 3 ¶ 34.)[14]

It also defies common sense.[15] For citrus fruits, for example, Dr. Capps' model assumes that all of the "Not Dole" brands (e.g., Del Monte, Geisha, Madam, and Private Label) have the same value. But if that were true, all of those "brands" should have the same effect on price. We know this is untrue. True, Del Monte, Geisha, Madam, and Private Label may be priced *differ-ently* than Dole, but the magnitude of the price difference varies across these brands, and it varies most acutely between Del Monte versus the Private Labels. (Stern Decl. Ex. 3 ¶ 33.)

3. Flaw #3: Dr. Capps' Model Improperly Uses Retail-Level Data.

There is more. The Court said that any damages need to address "the benefit Dole received from its label statements." (Order, 33:27.) Dr. Capps' model ignores "the benefit Dole received" because he uses retail sales figures. (Stern Decl. Ex. 2, 22:2-3.) Retail prices are what retailers receive. Anything a retailer charges above wholesale cost benefits the retailer, not Dole. (Stern Decl. Ex. 3 ¶ 46.) This is a design flaw in Dr. Capps' study that cannot be fixed.

Dr. Capps knows that Dole does not sell to retail customers and does not set retail prices. (Stern Decl. Ex. 2, 23:6-10.) He had copies of Dole's wholesale price sheets. (*Id*., 22:19-23:5.)

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[14] Scenario 2 suffers from the same problem. In Scenario 2, the "base case," or "0" value is given to both Dole and Del Monte brands, and the Private Label brand is given a value of "1" for the "Brand" variable. In other words, Private Label is coded as "1" on the brand value, and *any* other, non-Private Label brand would be coded as "0" and treated as if its "Brand" is equivalent to all other non-private label brands. (Stern Decl. Ex. 3, 16 n.36.)

[15] Prof. Rubinfeld notes that results must be evaluated for their practical import as well as their statistical significance. *Reference Manual*, pp. 318-19.

He could have done a wholesale price regression, but he lacked the data "on a weekly basis." (*Id*., 86:3-9; 73:5-12; *see also id.*, 22:19-24.)[16] His hedonic regression methodology focuses on the "retail price," and it doesn't matter to his model what Dole charges. (*Id*., 73:2-5.) Moreover, he knows that Dole uses line pricing (*id*., 84:7-10), which means that Dole charges the same price to *its* wholesale customers regardless of what the label says.

In *Weiner v. Snapple Beverages Corp.*, No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *8 (S.D.N.Y. Aug. 5, 2010), Snapple's use of line pricing was compelling evidence of no premium:

> Snapple's wholesale list prices for its "All Natural" beverages, diet beverages with artificial sweeteners, and unsweetened iced tea drinks, are uniform. Because Snapple "line prices" its beverages, wholesale list prices are based on the size of the bottle and the number of bottles in a package, not on whether the beverage is labeled "All Natural." Consistent with this practice, Snapple's price lists to its distributors, and the distributors' price lists to retailers, indicate no price differences between Snapple's "All Natural" beverages and its diet beverages of the same size and package.

2010 WL 3119452, at *10 n.19; *accord Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW(AGRx), 2012 WL 8019257, at *11 (C.D. Cal. Apr. 12, 2012) ("[P]rice differences at the vast array of retail establishments that sell the Products" precludes finding a premium).

Plaintiff has the burden of adducing a damages model that satisfies *Comcast*. A wholesale regression model at least might have addressed the requirement. A retail price model cannot.

4. Flaw #4: Dr. Capps' Model Does Not Control for Other Variables.

There is still more. The Court believed Dr. Capps' model could "isolate[] the effect of the alleged misrepresentation by controlling for all other factors that may affect the price of Dole's fruit cups and the volume of Dole's sales." (Order, 30:8-21.) The "other factors" the Court identified that needed to be controlled included "Dole's advertising expenditures, the prices of

[16] Dr. Capps speculates he would have found a price premium at the wholesale level. (Stern Decl. Ex. 2, 87:17-18.) But this is impeached by his admission that Dole uses "line pricing."

competing and complementary products, the disposable income of consumers, and population."[17] Dr. Capps' final Report controls for none of these.

First, Dr. Capps did not control for advertising. (Stern Decl. Ex. 2, 70:3-71:2.) He omitted it, first, because he thought this was reflected in "price" and, second, because advertising expenditures are not readily available.

Second, Dr. Capps' "year" variable is intended to capture changes in consumers' disposable income as well as any differences in the general economic environment from year to year. (*See* Stern Decl. Ex. 1 ¶¶ 20, 21.) Yet, population is not explicitly in his model and, in any case, he never explains why disposable income or population would vary across brands. (*Cf. Id.* ¶ 21.)

Third, Dr. Capps does not control for prices and variations in competing products. This is a serious flaw, to which we devote a separate discussion. (*See* Part IV.A.5., below.)

Apart from "Label" and "Brand," the only other variable that accounts for differences in price between brands is "size." However, this is a factor in only three of the regressions in Scenario 1 and only two of the regressions in Scenario 2. Why? The odd disappearance of "size" in some regressions and its appearance in others is never explained. Yet, logic tells us that "size" and packaging matters. Most of the accused Dole products come in "four packs," which means four, 4-oz. (single-serving) cups. A competitor product sold in 20 ounces (as in the pineapple tidbit category) not only contains more ounces, it is probably a single can. Any parent with school-age children will tell you that a 4-ounce cup of peaches that can fit into a child's lunch box does not have the same value as a 16-oz. can of peaches. Mr. Brazil even testified that he bought the products due to "convenience." (Decl. of Claudia M. Vetesi in Support of Opp'n to Class Certification, Ex. A at 219:16-24, Dkt. No. 106.) Dr. Capps begs to differ; packaging is irrelevant to price because, to him, the only issue is reducing all of the products to a common denominator of dollars-per-ounce. (Stern Decl. Ex. 2, 40:10-12.)

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[17] The Court relied on Dr. Capps' promise, found in paragraph 20 of the First Report, in which he described "commonly recognized factors" that "are associated with sales," including the "price of the product, prices of competing and complementary products, income, advertising, seasonality, and regional differences," and he said his model would "control[] for these factors…." (Order, 29:11-17 (citing First Report ¶ 20).)

Nor does he account for confounding label statements. For example, the term "All Natural Fruit" is sometimes accompanied by a "no sugar added" claim, which might be important to some consumers. If so, then the "All Natural Fruit" claim will absorb some of the variation that properly belongs to "no sugar added." (Stern Decl. Ex. 3 ¶ 56.)

Dr. Capps dismisses the omitted variables by saying that "in most cases, these factors are not directly measurable." (Stern Decl. Ex. 1 ¶ 23.) The problem, however, is not that they can't be measured. The problem is that he didn't want to. He doesn't have the data that might show, for example, why someone might pay more for convenient packaging such as a single-serving of fruit, and he doesn't want to be bothered collecting it.

5. Flaw #5: Dr. Capps' Model is an Embarrassment of Data Errors.

We now come to what is perhaps Dr. Capps' most serious offense: His model is rife with data problems. These render everything he did unreliable.

First, as noted above, Dr. Capps performed no regression on the accused grapefruit product. (Stern Decl. Ex. 1 ¶ 22.) He concedes that damages cannot be calculated on a classwide basis. Whatever else it does, the Court should decertify the damages class as to that product.

Second, Dr. Capps wrongly assumes that none of the "private label" brands have a "natural" claim on their labels. As noted above, he codes all "Private Label" brands as "0" for purposes of the "Label" variable. This poses several problems.

In the first place, this Court has already held that private labels are *not* comparable for purposes of Dr. Capps' "price premium" model. (Order, 28:8-24.)[18]

In the second place, Dr. Capps' assumption that all of the private label products do not have a "natural" claim (Stern Decl. Ex. 2, 30:6-21) is false. This assumption is fundamental to his

[18] The Court cited Mr. Brazil's testimony that "it is [his] expectation that [he] would pay more for a named brand . . . than … a generic brand." (Order, 28:3-4.) Consequently, this Court rejected Dr. Capps' price-premium model as inconsistent with "*Comcast*'s requirement that class-wide damages be tied to a legal theory, nor can this court conduct the required 'rigorous analysis' where there is nothing of substance to analyze." (*Id.*, 28:25-27.)

model, but Dr. Capps did little to confirm it.[19] He simply took the IRI data about "Private Label" products in the same category and assumed none had a "Label" issue. He didn't reject a single private label that the IRI data collected. (Stern Decl. Ex. 2, 90:9-12.) He has no idea if any of the Del Monte or "Private Label" brands did or didn't have "natural" on their labels. (*Id*., 26:10-16; 27:3-6.) He assumed from "experience" that private labels do not say "natural." (*Id*., 27:7-24.)

Sadly, Dr. Capps is wrong. Professor Scott found six private labels that had "natural" or "organic" claims on them in various Bay Area markets.[20] (Stern Decl. Ex. 3 ¶ 68.) She has photographs showing examples of them. (*Id*. at Ex. 5.) Unfortunately, IRI does not disclose the brands' actual identities so no one will ever be able to verify if Dr. Capps' supposed "control" group did, or did not, have a "natural" statement on the label. (*Id.* ¶ 58.) Rule 23 cannot be satisfied if a damages expert "has done nothing to confirm that his proposed approaches would be workable in [a given] case." *Weiner*, 2010 WL 3119452, at *8.

In the third place, there were numerous other Private Label products identified in the IRI data that Dr. Capps, inexplicably, did not use. As Professor Scott shows, for some accused products there were as many as 17 potential "comparables" from which to choose, but Dr. Capps chose just one or perhaps two. (Stern Decl. Ex. 3 at Ex. 6A-6H.) Why did he omit some and exclude others? He never says. Some of the *included* Private Label products had the largest volume of sales and, since high volume could easily coincide with low price, his selection criteria may have biased the data by emphasizing comparables with the greatest price disparity. (*Id*. ¶ 71.)[21]

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[19] Dr. Capps tried to verify label statements by looking at a website, but this was spotty at best. (Stern Decl. Ex. 2, 29:14-22; 30:6-21; 32:4-8.) For only one comparable (Musselman's) did he verify its label by going to a grocery store. (*Id*., 32:15-19.)

[20] A product that is organic is also "natural," but a product that is "natural" may not be organic, *i.e.*, "organic" is a higher standard than "natural." *See* Jeffrey Anstine, *Organic and All Natural: Do Consumers Know the Difference?*, 26 J. of Applied Econ. & Pol'y 15 (2007).

[21] Dr. Capps will excuse his omission by saying that of the omitted IRI codes may have had missing values for some time periods. (*See* Stern Decl. Ex. 1 ¶¶ 22, 24; Stern Decl. Ex. 2, 90:9-22.) But rejecting data because of the study design one chooses is no excuse. His omission of key data points means that Dr. Capps' analysis does not represent the range of products available to the proposed class, and cannot be generalized to the market as a whole. (Stern Decl. Ex. 3 ¶ 71.)

Third, Dr. Capps' regressions for "Diced Apples" and "Wildly Nutritious Mixed Fruit" used a different regression methodology due to limitations in data availability. (Stern Decl. Ex. 1 ¶ 24.) For the Apples category, Dr. Capps uses Dole prices and the prices for a "composite category" of various non-Dole brands (Del Monte, Goya, Musselman's, and MW Polar) that he assumes do not have an "All Natural Fruit" label. For frozen "Mixed Fruit," he uses prices from a Private Label as a comparator. (Stern Decl. Ex. 3 ¶ 45.)[22] Higher prices may be correlated with "Label," but he may as well have been throwing darts wearing a blindfold. Any estimate of the effect of "Label" for these two products is completely speculative. (*Id*.)

Fourth, Dr. Capps incorrectly coded the data for "Citrus Fruit." (Stern Decl. Ex. 3 ¶ 72.) This was probably just a mistake, but it calls into question the integrity of his results.[23]

6. Flaw #6: Dr. Capps' Scenario 3 Flunks *Comcast*.

Scenario 3 asks the Court to approve a model that uses no regression at all, rather, he wants the jury to assume that the same 40.54% price premium found by Professor Anstine in a study of yogurt pricing applies here. But he never explains how a 2007 yogurt study is analogous, let alone how it could isolate the "label effect" of a "Natural" statement on Dole's products in a manner that could satisfy *Comcast*. If anything, Dr. Anstine's study makes Dr. Capps' study look worse.

First, why yogurt? Dr. Capps cites other studies that used hedonic regression to estimate the effect of a "natural" or "organic" label on prices. (Stern Decl. Ex. 1 ¶ 19.) Did he choose the yogurt study over the others because it yielded one of the highest coefficients for the effects of "natural" labels? (*Cf.* Stern Decl. Ex. 3 ¶ 80.) He never says. If so, that ought to raise an eyebrow.

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[22] Dr. Capps needed to create "comparable" brand data in this way because of missing values for some weeks for either Dole or the other brands or both. The Parks regression procedure Dr. Capps used requires a balanced design, *i.e.*, the same number of time periods for each brand. Thus, the regressions run for these two product categories used an ordinary least squares procedure instead. (Stern Decl. Ex. 3 ¶ 45.)

[23] Dr. Capps also omits the "size" variable for this product category in Scenario 2, as shown in his SAS results. (*See* Stern Decl. Ex. 1 at Ex. D; Stern Decl. Ex. 3 ¶ 72.) He never explains why.

Second, Dr. Anstine's model showed a high r-squared (0.92 for milk and 0.90 for yogurt), which means it could predict the label effect on price with 92% and 90% accuracy.[24] By contrast, Dr. Capps' regressions show r-squareds as low as 0.03—a three percent accuracy rate.

Third, Professor Anstine's data were collected from 31 grocery stores in a single neighborhood such that all grocery stores where a typical resident of the region could shop were included. His study captured over 20 attributes of various milk and yogurt products including price and brand but also fat free, light, artificial sweetener, topping, fruit, calories, etc. That gave Dr. Anstine detailed knowledge of each product that was included in his database. In contrast, Dr. Capps has no data about actual comparables, and simply makes assumptions about one of his primary variables, "Label" (e.g., not misbranded) in the comparables. As noted, Dr. Capps has no knowledge of any other differences between labels of different brands, for example, whether they say "no sugar added," "low calorie," or other statements that could affect demand.

Fourth, Dr. Anstine observed some colinearity between some of the brand names and the label variables. But at least he reported the different correlations so that the reader could take this into account in interpreting the findings. Dr. Capps did not. (Stern Decl. Ex. 3 ¶ 75.)[25]

B. In the Alternative, the Court Should Conduct a Non-Testimonial "*Daubert*" Review under Fed. R. Evid. 702 to Determine the Reliability and Relevance of Dr. Capps' Regression Model.

In the alternative, the Court should conduct a non-testimonial "*Daubert*" review of the reliability and relevance of Dr. Capps' testimony. Professor Scott, a Professor of Marketing at UCLA's Anderson School of Business, testified that Dr. Capps' model fails the test of *Daubert*:

> Q: Do you have an opinion as to whether the scientific community would accept the manner in which Dr. Capps has applied regression to the data?

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[24] "R-squared" is a statistics term that represents how well a particular dependent variable explains what is being measured. *See* Richard A. Wehmhoefer, Statistics in Litigation 83 (McGraw Hill 1985). For example, if a dependent variable perfectly explained what was being analyzed, the r-squared would be 1. On the other hand, if a dependent variable only explained what was being measured 25% of the time, the r-squared would be .25.

[25] *Cf. Reference Manual*, p. 316 ("[f]ailure to account for nonlinearities [in the estimated equation] can lead to either overstatement or understatement of the effect of a change in the value of an explanatory variable on the dependent variable").

> A. I do not believe so. Let's put it this way, no, they would not. No one who understands the marketplace and the differences between brands would accept this report.

(Stern Decl. Ex. 2, 146:23-147:4.) In *Wal-Mart v. Dukes*, the Supreme Court indicated that *Daubert* review of the reliability of expert testimony under Federal Rule of Evidence 702 is appropriate at the class certification stage. 131 S. Ct. 2541, 2553-54 (2011). Courts in this district agree. *See Ralston v. Mortg. Investors Grp., Inc.*, No. 08-536-JF (PSG), 2011 U.S. Dist. LEXIS 138149, at *11 (N.D. Cal. Nov. 30, 2011); *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, 276 F.R.D. 364, 369-70 (C.D. Cal. 2011) (same); *Heisler v. Maxtor Corp.*, No. 5:06-cv-06634 JF (PSG), 2011 U.S. Dist. LEXIS 43380, at *18 (N.D. Cal. Apr. 20, 2011).

C. The Court Should Also Decertify Because the Class is Not Ascertainable.

The Court found the class ascertainable based on the assumption that the alleged misrepresentations were on all products, so "there is no concern that the class includes individuals who were not exposed to the misrepresentation." (Order, 7:22-24 (citation omitted).) But the "All Natural Fruit" statement was not added to the Wildly Nutritious Signature Blends Mixed Fruit label until 2009. (Decl. of David Spare in Support of Dole's Opp. to Class Certification ¶ 4, Dkt. No. 107.) Thus, not all class members were exposed to the challenged labeling. This Court has denied certification for this exact reason. *See Bruton v. Gerber Prods. Co.*, No. 12-CV-02412-LHK, 2014 U.S. Dist. LEXIS 86581, at *24-30 (N.D. Cal. June 23, 2014) (label changes made it impossible to determine by "objective" means who was injured). *See also Jones v. Conagra Foods, Inc.*, No. C 12-01633 CRB, 2014 U.S. Dist. LEXIS 81292, at *35-38 (N.D. Cal. June 13, 2014) (same). The same is true here.

V. CONCLUSION

For all the foregoing reasons, this Court should decertify the classes or, in the alternative, conduct a non-testimonial "*Daubert*" review of Dr. Capps' testimony.

Dated: August 21, 2014

MORRISON & FOERSTER LLP

By: /s/ *William L. Stern*
William L. Stern
Attorneys for Defendants
DOLE PACKAGED FOODS, LLC

ECF ATTESTATION

I, Lisa A. Wongchenko, am the ECF User whose ID and password are being used to file the following: **DEFENDANT'S NOTICE OF MOTION AND MOTION TO DECERTIFY**. In compliance with General Order 45, X.B., I hereby attest that William L. Stern has concurred in this filing.

Dated: August 21, 2014

WILLIAM L. STERN
CLAUDIA M. VETESI
LISA A. WONGCHENKO
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By: */s/ Lisa A. Wongchenko*
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CHAD BRAZIL, an individual, on his own behalf and on behalf of all others similarly situated,

Plaintiff,

v.

DOLE PACKAGED FOODS, LLC,

Defendant.

Case No. CV12-01831 LHK

[PROPOSED] ORDER GRANTING DEFENDANT DOLE PACKAGED FOODS, LLC'S MOTION TO DECERTIFY

Hearing Date:	October 16, 2014
Time:	1:30 p.m.
Judge:	Hon. Lucy H. Koh
Action Filed:	April 11, 2012

[PROPOSED] ORDER

On May 30, 2014, the Court certified a 23(b)(3) "damages" class, and a 23(b)(2) "injunction" class in this action. (Docket No. 142.) On August 21, 2014, Defendant Dole Packaged Foods, LLC ("Dole") moved to decertify the classes.

The matter came before this Court for hearing on October 16, 2014, with all parties appearing through counsel. Having considered all the papers filed by the parties in connection with Dole's Motion to Decertify, the parties' arguments at the hearing on this matter, the documents previously filed, and other matters of which the Court may properly take judicial notice, the Court hereby **GRANTS** Dole's Motion to Decertify.

IT IS SO ORDERED.

Dated: _____

_____
HONORABLE LUCY H. KOH
United States District Court Judge