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# Classwide Damages Models in Misleading and False Advertising Consumer Class Actions

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# Classwide Damages Models in Consumer Class Actions

*August 25, 2022*

Bo Phillips and Rachel Lowe

# Introduction

- How to calculate damages when a product has value, but allegedly not as much as advertised?
- How much of the purchase price was “excessive”?
- How much of the excess can be attributed to a false or misleading label or advertisement?
- Examples: “natural cheese,” “Hawaiian” beer, nonfunctional slack-fill, technology products with certain privacy attributes

# Damages/Remedies Approaches

- Full Refund – refund the price paid for the product
- Profit Disgorgement – disgorge profits on allegedly deceptive products
- Actual Discount – discount the price of products to a “corrected” price reference
- Actual Damages
- Regression Analysis
- Other
  - Value of injunctive relief
  - Equitable theories – restitution
  - Statutory fees (i.e. NY GBL, CA CIPA)

# Federal Class Actions: Expert Analysis and Admissible Evidence

- Federal Rule of Evidence 702
- *Daubert* Test
- *Comcast* "Tethering" Requirement
- Case Studies (later in the program)

# Federal Rule of Evidence 702

- A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

  **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

  **(b)** the testimony is based on sufficient facts or data;

  **(c)** the testimony is the product of reliable principles and methods; and

  **(d)** the expert has reliably applied the principles and methods to the facts of the case.

# *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

- The trial judge must determine whether an expert is proposing to testify to (1) scientific knowledge, that is (2) relevant.
- District court is the "gatekeeper" for the trier of fact.
- "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue."
- Courts consider (1) whether the scientific theory can be or has been testified; (2) whether the theory has been subjected to peer review and publication; and (3) whether the theory has ben generally accepted in the relevant scientific, technical, or professional community.

# *Daubert*

- Some courts have questioned the appropriateness of *Daubert* for the purpose of class certification because the trial judge need not act as a gatekeeper for the jury. For example, in *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 360 (2011), the district court had found that *Daubert* did not apply at the class certification stage, and the Supreme Court expressed doubt about the lower court's holding (but did not reject it).
- Third, Fifth, Seventh, and Eleventh Circuits hold that the *Daubert* hurdle must be cleared at class certification.
  - "[W]e ask, when the cementing of relationships among proffered class members of liability or damages or both turns on scientific evidence should we insist that the metric of admissibility be the same for certification and trial. We answer that question in the affirmative; the *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify." *Prantil v. Arkema Inc.*, 986 F.3d 570, 575 (5th Cir. 2021).
  - *See also In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890-91 (11th Cir. 2011); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010).
- Ninth and Eighth Circuits hold that "a district court is not limited to considering only admissible evidence in evaluating whether Rule 23's requirements are met." *Sali v. Corona Reg'l Med. Ctr.,* 909 F.3d 996, 1005 (9th Cir. 2018).
  - "When conducting its 'rigorous analysis' into whether the Rule 23(a) requirements are met, the district court need not dispense with the standards of admissibility entirely. The court may consider whether the plaintiff's proof is, or will likely lead to, admissible evidence. Indeed, in evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in Daubert. But admissibility must not be dispositive. Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage."
    *Id*. (citations omitted)
  - *In re Zurn Pex Plumbing Prod. Liab. Litig*., 644 F.3d 604, 614 (8th Cir. 2011): "We conclude that the district court did not err by conducting a **focused** *Daubert* analysis…"
- How to raise? "Where, as here, a defendant did not raise a *Daubert* challenge to the expert evidence before the district court, the defendant forfeits the ability to argue on appeal that the evidence was inadmissible, but may still argue that the evidence is not capable of answering a common question on a class-wide basis." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022).

# *Daubert*

- Beware of conflation with *Comcast* standard at summary judgment: Per the Ninth Circuit, the district court's reliance "on numerous cases that do not analyze the admissibility of conjoint analysis under Rule 702 or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), but rather consider its substantive probity in the context of either class-wide damages under *Comcast Corp. v. Behrend*, 569 U.S. 27, 34, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013), or under substantive state law…rises to an 'erroneous view of the law.'" *Macdougall v. Am. Honda Motor Co.*, No. 20-56060, 2021 U.S. App. LEXIS 37780, at *2 (9th Cir. Dec. 21, 2021).
  - "Because this is a case specific inquiry, Honda's argument that conjoint analysis categorically fails as a measure of economic damages is unavailing. While the district court must act as a 'gatekeeper' to exclude junk science that does not meet . . . reliability standards, the test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology, Honda's challenges—*inter alia*, the absence of market considerations, specific attribute selection, and the use of averages to evaluate the survey data—go to the weight given the survey, not its admissibility. …Accordingly, the district court abused its discretion by excluding Boedeker's testimony under *Daubert*." *Id*. at *3 (citations omitted).

# State Court Actions: Expert Analysis and Admissible Evidence

- California: *Sargon Enterprises, Inc. v. Univ. of S. Cal.* 55 Cal. 4th 747 (2012)
  - "There is only one standard for admissibility of expert opinion evidence in California, and *Sargon* describes that standard." *Apple Inc. v. Superior Court*, 19 Cal. App. 5th 1101, 1119, 1126 (2018) (vacating ordering granting motion for class certification where trial court did not apply Sargon to damages expert's opinion).
  - "[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. This means that a court may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Apple Inc.*, 19 Cal. App. 5th at 1118 (citing *Sargon*)

# *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013)

- "[A]ny model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." *Comcast Corp.,* 569 U.S. at 35.
- "The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*." *Id*. at 38.
- "We have interpreted *Comcast* to mean that plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Vaquero v. Ashley Furniture Indus., Inc*., 824 F.3d 1150, 1154 (9th Cir. 2016).

# Recent Decisions Applying *Comcast*

- *Comcast* has been cited by 2400+ federal court decisions; 927 of them are from courts in the Ninth Circuit
- Affirming holding that damages model failed to satisfy *Comcast*:
  - "The district court did not abuse its discretion in determining that plaintiffs' submission was insufficient. Plaintiffs argue that the district court did not conduct the requisite 'rigorous analysis,' but as the district court recognized, the court was 'unable to fulfill its obligation' because plaintiffs gave the court little to analyze. Plaintiffs' expert did not provide a workable method for classwide determination of the impact of the alleged antitrust violation. Instead, he merely asserted that he would be able to develop a model at some point in the future." *Ward v. Apple Inc.*, 784 F. App'x 539, 540 (9th Cir. 2019).
  - "Reitman's 'price premium' model failed to measure the price difference attributable to misleading statements on, or omissions from, the packaging. In other words, the model measured only the differing customer expectations based on various corrective statements in the abstract and failed to measure the "difference between what the plaintiff paid and the value of what the plaintiff received." Moreover, the district court correctly found that a full refund model was inappropriate for Reitman's proposed pentobarbital subclass because there were potential class members who never purchased bags with contaminant. …Reitman's failure to explain why a risk of contamination renders the product completely valueless for even those class members who did purchase a contaminated bag was a sufficient basis for rejecting the subclass they posited." *Reitman v. Champion Petfoods USA, Inc.*, 830 F. App'x 880, 881-82 (9th Cir. 2020).

# Defense Issues

- Basic FRE 702 and Daubert tests
- Reliability of underlying sales/price data
- Does the conjoint survey match the challenged claim?
- Possible overlap of consumer survey evidence
- Defining relevant markets and data
- Inducement/causation as individualized issues

# Recent Case Studies

- *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022)
- *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020)
- Excessive Fees Argument
- Decertification


# Class Wide Damage Models in Misleading and False Advertising Consumer Class Actions

**Jon Tomlin, Ph.D.**

August 25, 2022

ankura™

# Recently Filed Consumer Class Actions

## Product Labeling

- *Food content (e.g., fruit, protein); "maximum strength"*

## Automotive "Defects"

- Allegedly faulty engines, emissions software, fuel claims

## College Tuition "Refund"

- Claims related to online education.

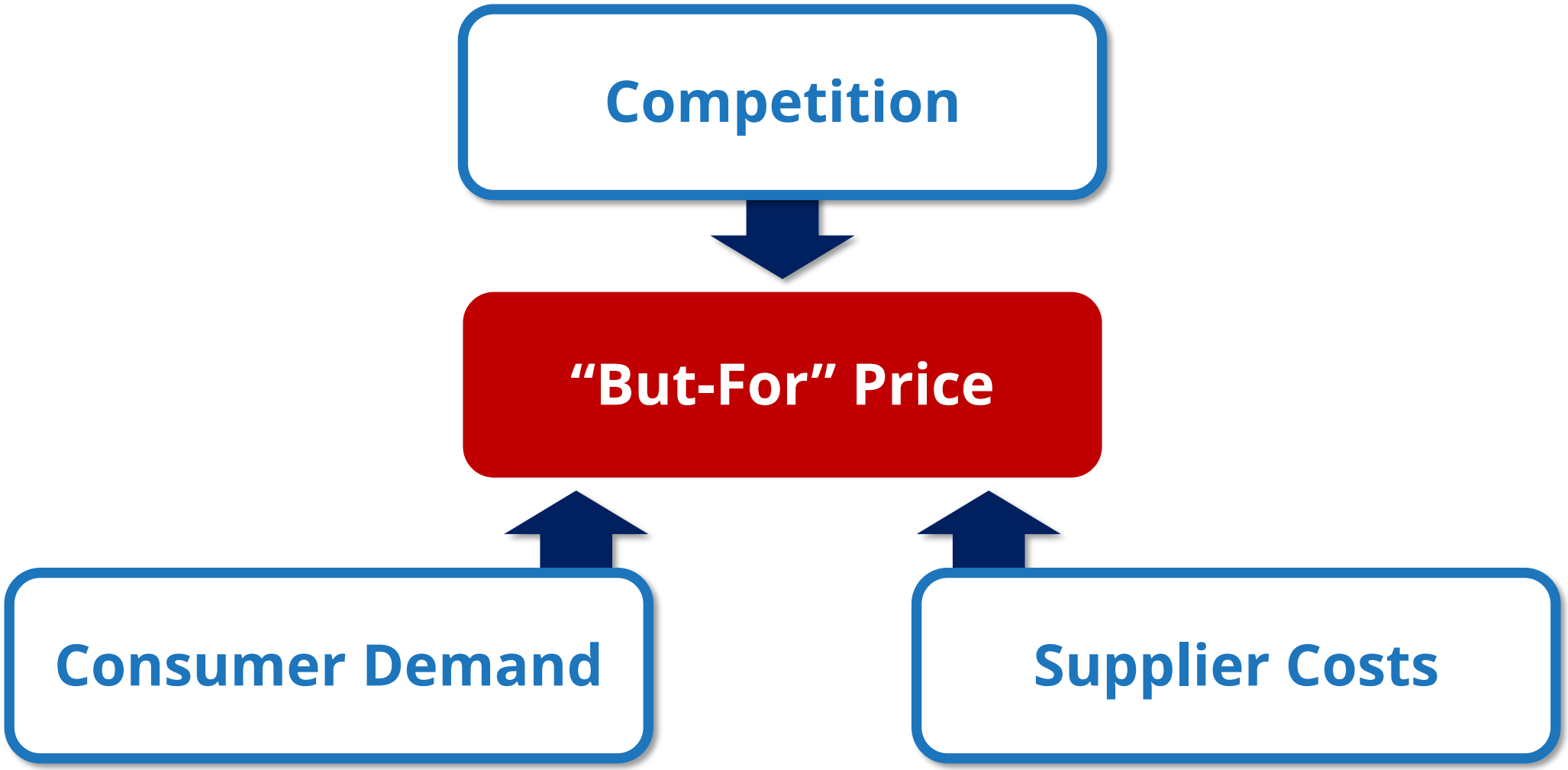
# Restitution: The Price Premium Concept

**Price Premium**

**Actual Price**


**"But-for" Price**

# The Three Key Economic Factors



# Primary Models Used by Plaintiff Experts

## Hedonic Regression

- Statistical analysis which purports to isolate a price premium from pricing data

## Conjoint Analysis

- Surveys of consumers

## Simple Methods

- Example: Average price premium versus a benchmark product

# Should an Expert Actually Need to Complete the Analysis for Class Certification?

- Information is not always available to conduct a reliable analysis
  - A regression or survey
  - Data may not be available – length of time, breadth of products, geographic scope.
  - Information on product features may not be available
- Ultimately, the three economic factors need to be accounted for:
  - Demand
  - Costs
  - Competition
- Some courts may accept a "just trust me approach" at class certification but later decertify the class.
  - But what if settlement is reached before this?

# Battlegrounds in Recent Models
## *The Simple Approach*

**Plaintiff's expert proposes calculating damages using a simple benchmark.**

- ***Ursula Freitas v. Cricket Wireless (N.D. CA 2022)***

  - Plaintiffs' expert proposes a regression model at class certification
  - Class is certified
  - Plaintiffs' expert later calculates damages by taking different in average prices with no adjustment for "confounding factors"
  - Class is decertified for damages model failing to meet *Comcast.*

# Battlegrounds in Recent Models
# *Hedonic Regressions*

- **Hedonic Regression**
  - Expert purports to form a model that controls for factors that impact price (size of the product, product features) while isolating the price impact of allegedly false advertising (e.g., "organic")
- **Often critical battle** – Are other important features really accounted for?
  - For example, if the brand name is not being accounted for, this, and not a labeling claim, may be driving the price premium
- **Accepted in several cases in which a class was certified**
  - *In re: Kind LLC (S.D. NY 2021)*
- **Rejected when court finds that an important factor is not controlled for**
  - *Schechner v. Whirlpool (E.D. Michigan 2019)*

# Battlegrounds in Recent Models: Surveys

## Survey Design

- Often **accepted** (*Maldonado v. Apple (N.D. Cal 2021*)
- But can be **rejected** if survey questions are not properly framed
  - *Price v. L'Oréal U.S. Inc. (S.D. NY 2021)*

## Do the results from a survey capture the three key economic factors?

- Only surveying consumers' "willingness to pay" – which relates to demand
- What about the other two key factors – costs and competition?

# Conjoint Surveys and the Supply Side

- A proper model of a **“price premium”** needs to consider supply factors that impact prices
  - A conjoint survey, by itself, **DOES NOT** do this
- Nevertheless, experts sometimes opine that their conjoint survey controls for supply by using arguments such as:
  - Prices used in the survey are based on actual prices which “already” account for supply
  - Past quantities are fixed as a matter of “history”
  - The expert examined the competition in the relevant industry

# Conjoint Surveys – Mixed Case Decisions

Some recent decisions have accepted conjoint surveys and apparently accepted assertions by plaintiff experts that they considered supply:

| ***MacDougall v. Am. Honda Motor Co., Inc. (9th Cir. 2021)*** | ***Javier Cardenas, et al. v. Toyota Motor Corporation (S.D. Florida 2021)*** | ***Bechtel v. Fitness Equip. Servs. (S.D. Ohio 2021)*** |
|---|---|---|
| 9th Circuit reverses District Court Decision excluding expert's testimony for failing to consider supply | Court certifies a class based on a conjoint survey that uses "actual price" and "actual quantity" but no consideration of supply | Court accepts conjoint survey that does not consider supply. |

# Conjoint Surveys – Mixed Case Decisions

However, other recent decisions reflect an understanding that a conjoint survey does not incorporate supply:

***Joseph Mier v. CVS Pharmacy, Inc. (C.D. Cal, 2022)***

Rejects conjoint for failing to address supply – class is not certified

***In Re: Volkswagen "Clean Diesel Marketing (N.D. Cal 2020)***

Excludes conjoint for failing to account for supply factors.

***In Re: General Motors Ignition Switch Litigation (S.D. NY 2019)***

Concludes conjoint analysis of plaintiffs' expert fails to account for supply – grants summary judgment.

- Market value is "a product of both a consumer's willingness to pay ***and*** a merchant's willingness to sell"

# A New Approach in Conjoint Surveys: Market Simulation

- Combines conjoint analysis with cost conditions and an assumption about competitive interaction
  - Has been used in academic research.
  - Has been proposed by some experts and plaintiff attorneys
- Utilized by experts in some recent cases
  - *Allegra v.* Luxxotica (E.D. NY, 2022)

# The Market Simulation Approach – Will it be Reliable?

- Unlike experts making pure assertions that conjoint considers supply, the approach has economic support, but requirements must be met for a reliable analysis.
  - Reliable conjoint survey
  - Accurate consideration of costs
  - Appropriate assumption about competition and costs
  - Sufficient Data

# Summary of the Current Landscape

Plaintiff damages models differ – but typically fall into the areas of conjoint surveys and hedonic regressions

Acceptance of models often turns on whether a model has accounted for major factors impacting price other than allegedly false or misleading advertising

## Hedonic Regression

- Does the regression accurately account for factors impacting price?

## Conjoint Survey

- Are survey questions properly framed?
- It doesn't account for supply
  - Will some courts continue to accept these models by themselves?
- Has a method been incorporated (market simulation) to attempt to account for supply

# Contact Information

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# Study 1: *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022)

- What happened?
  - Alleged tuna price fixing; up to 28% of the class was uninjured
- Complicated procedural history.
  - An en banc ruling in 2022 vacated a prior Ninth Circuit ruling with important class certification holdings for defendants.
  - The *vacated* ruling (*Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 786 (9th Cir. 2021), *overruled*) held:
    - "There is reason to be wary of overreliance on statistical evidence to establish classwide liability. Academic literature abounds observing that "judges and jurors, because they lack knowledge of statistical theory, are both overawed and easily deceived by statistical evidence." "If Plaintiffs' model indeed shows that more than one-fourth of the class may have suffered no injury at all, the district court cannot find by a preponderance of the evidence that "questions of law or fact common to class members predominate over any questions affecting only individual members." *Id.* at 786, 792.
    - "The district court's gloss over the number of uninjured class members was an abuse of discretion….Deferring determination of classwide impact effectively amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *Id.* at 793.

# *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022)

- En banc ruling:
  - "When individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions. In an analogous context, we have held that a district court is not precluded from certifying a class even if plaintiffs may have to prove individualized damages at trial, a conclusion implicitly based on the determination that such individualized issues do not predominate over common ones." *Id.* at 668-69.
  - "Therefore, we reject the dissent's argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members. Dissent at 77. This position is inconsistent with Rule 23(b)(3), which requires only that the district court determine after rigorous analysis whether the common question predominates over any individual questions, including individualized questions about injury or entitlement to damages. *See* Fed. R. Civ. P. 23(b)(3)." *Id.*

# *Dissent in Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022)

- The majority needlessly creates a circuit split: "[By] allowing more than a *de minimis* number of uninjured class members tilts the playing field in favor of plaintiffs. By expressly rejecting a *de minimis* rule, the majority's opinion will invite plaintiffs to concoct oversized classes stuffed with uninjured class members—with little fear of having their class certification bids being denied for lack of 'predominance' or 'commonality.' And in creating these grossly oversized classes, plaintiffs will inflate the potential liability (and ratchet up the attorney's fees based in part on that amount) to extract a settlement, even if the merits of their claims are questionable." *Id*. at 692.
- "While this case centers on the narrow issue of price-fixing of canned tuna, its implications extend beyond to a wide sea of class action cases. I fear that today's decision will unleash a tidal wave of monstrously oversized classes designed to pressure and extract settlements." *Id.*
- Allowing overbroad classes including uninjured class members may create the need for extensive mini-trials, which themselves run contrary to the concept of class actions: "**But here, it will not be a 'mechanical task' to calculate the damages for each class member. The district court will need to conduct individualized mini-trials to determine whether each class member suffered an injury, and if so, what the damages are for each member. That would upend Rule 23's commonality requirement.** The majority opinion notes that commonality may still be met, even if a defendant "might attempt to pick off the occasional class member here or there." Maj. Op. 56, n. 31 But our case does not involve a "pick off" of a few uninjured class members, but rather a massive grab bag of class members—perhaps almost a third of the class—who may not have suffered any harm. The district court thus will have to engage in individualized mini-trials to figure out who suffered an injury." *Id.* at 691.

# Study 2: *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020)

- "That a State may authorize its courts to give equitable relief unhampered by the restriction that an adequate remedy at law be unavailable cannot remove that fetter from the federal courts." *Id.* (cleaned up)
- Thus: "Sonner must establish that she lacks an adequate remedy at law before securing equitable restitution for past harm under the UCL and CLRA."
- Sonner fails to make such a showing. Initially, the operative complaint does not allege that Sonner lacks an adequate legal remedy. …More importantly, Sonner concedes that she seeks the same sum in equitable restitution as "a full refund of the purchase price"—$32,000,000—as she requested in damages to compensate her for the same past harm. Sonner fails to explain how the same amount of money for the exact same harm is inadequate or incomplete, and nothing in the record supports that conclusion.
- "Accordingly, because Sonner fails to establish that she lacks an adequate remedy at law…the district court did not err in dismissing Sonner's claims for equitable restitution under the UCL and CLRA."

# *Sonner v. Premier Nutrition Corp.* Applied

- *Sonner* has been applied in numerous cases to dismiss equitable claims for relief – including restitutionary and injunctive relief – where the plaintiff also sought damages for the same harm and failed to establish that damages were inadequate
- Examples*:*
  - *Gardiner v. Walmart, Inc.*, No. 20-cv-04618-JSW, 2021 U.S. Dist. LEXIS 211251, at *20 (N.D. Cal. July 28, 2021)(dismissing equitable claims: "Plaintiff also argues that he lacks an adequate remedy at law because lost economic opportunities related to reductions in credit scores and reputational concerns related to identity theft cannot be remedied monetarily. However, Plaintiff does not allege that he suffered these harms. Even if he had, he offers no explanation why monetary damages could not remedy these harms.")
  - *In re MacBook Keyboard Litig.*, No. 5:18CV2813-EJD, 2020 U.S. Dist. LEXIS 190508, at *11 (N.D. Cal. Oct. 13, 2020) ("[N]umerous courts in this circuit have applied *Sonner* to injunctive relief claims.")
  - *Heredia v. Sunrise Senior Living LLC,* No. 8:18-cv-01974-JLS-JDE, 2021 U.S. Dist. LEXIS 43704, at *15 (C.D. Cal. Feb. 10, 2021) ("Plaintiffs' claim for equitable restitution under the UCL is DISMISSED WITH PREJUDICE" based on *Sonner*).
- Even where *Sonner* is *not* applied on a motion to dismiss, the court notes that *Sonner* must be met later in the case.
- Will Plaintiffs be able to certify damages classes under Rule 23(b)(3) where they cannot pursue an injunctive relief under 23(b)(2) when *Sonner* is appropriately applied?

# Study 3: *Montera v. Premier Nutrition Corp.*, No. 16-cv-06980-RS, 2022 U.S. Dist. LEXIS 144491, at **1-3 (N.D. Cal. Aug. 12, 2022)

- Class action of New York purchasers of Joint Juice (a glucosamine and chondroitin beverage) tried to a jury
- Jury awarded statutory fees
- After the close of all evidence, the jury determined that Plaintiff and the Class suffered actual damages in the amount of $1,488,078.49, representing **full refunds** of the money they paid for Joint Juice.
  - "Plaintiff argues that rather than Joint Juice being 'not precisely what [consumers] believed they were buying[,]' *id.*, Joint Juice was nothing like what they thought they were buying and thus valueless for them." *Montera*, 2022 U.S. Dist. LEXIS 75843, at *41 n.12
- Plaintiff asked the Court to impose statutory damages in the amount of $50 per unit sold for violations of NY GBL § 349 and $500 per unit sold for violations of GBL § 350, as well as prejudgment interest.
- NY GBL Statutory Damages reduced from $91 million to $8 million
  - "A reduction of statutory damages is permitted under Supreme Court and Ninth Circuit law, and is warranted in this case because the calculated amount of statutory damages, $91,436,950, is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."
  - "The statutory damages in this case veer away from serving a compensatory purpose and towards a punitive purpose. A reduction of statutory damages to $8,312,450 is therefore appropriate."

# Study 4: Decertification: A willingness to decertify?

- **Where Plaintiffs' Expert's Conjoint Analysis Did Not Reflect What Actually Happened:**
  - "Under California consumer protection laws, plaintiffs can measure class-wide damages using methods that evaluate what a consumer would have been willing to pay for the product had it been labeled accurately. *See Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015). Such methods must, however, reflect supply-side considerations and marketplace realities that would affect product pricing. Accordingly, the district court's subsequent holding that Dr. Howlett's conjoint analysis was inadequate for measuring class-wide damages was not illogical, implausible, or without support in the record. *See United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009). Dr. Howlett's conjoint analysis did not reflect market realities and prices for infant formula products. Dr. Howlett's conjoint analysis showed only how much consumers subjectively valued the 1st and Only Seal, not what had occurred to the actual market price of Good Start Gentle with or without the label. Thus, regardless whether consumers were willing to pay a higher price for the labelled product, the expert's opinion did not contain any evidence that such higher price was actually paid; hence, no evidence of restitution or actual damages was proffered." *Zakaria v. Gerber Prods. Co.,* 755 F. App'x 623, 624-25 (9th Cir. 2018) (affirming trial court's decertification of class action).
  - "Here, Dr. Dubé's Conjoint Survey Analysis does not seek to isolate the alleged damages stemming from Defendants' alleged misrepresentations – that the Challenged Claims "Keratindose" and "Pro-Keratin" lead consumers to believe the Challenged Products contain keratin. Because the survey combines "Keratindose" and "Pro-Keratin" with "+ Silk," the analysis does not tell the Court whether the survey respondents would pay a price premium because the product is advertised as containing keratin, because it is advertised as containing silk or a combination of the two." *Price v. L'Oréal USA, Inc.*, No. 17 Civ. 614 (LGS), 2021 U.S. Dist. LEXIS 187099, at *13 (S.D.N.Y. Sept. 29, 2021).

# Decertification: A willingness to decertify?

- **Where Plaintiffs Pursued a Full Refund Theory:**
  - "Plaintiff did not demonstrate how full restitution would be calculated in their motion for class certification. In fact, Dr. Krosnick's report to the Court largely made no mention of how the proposed survey design would demonstrate a zero-value theory. To the extent that the proposed survey did support a zero-value finding, it did so through its price premium proposal, which was ultimately not completed. Moreover, the survey that was conducted addressed the question: '*if given the choice*, would people buy a sanitizer that kills 99.99 percent of germs or a sanitizer that kills less than 99.99 percent of germs?' This survey design does not clearly demonstrate that consumers assign zero value to CVS hand sanitizer; instead, it merely shows potential consumer preference between products, which is not sufficient to support the Plaintiff's claim for full restitution." *Mier v. CVS Pharmacy*, No. SA CV 20-01979-DOC-ADS, 2021 U.S. Dist. LEXIS 246066, at *9 (C.D. Cal. Nov. 19, 2021) (citations omitted) [*renewed motion for certification later denied; appeal pending as of 8/22*]
- **Noting the Inability to Perform the Proposed Analysis and Calculations Is Grounds for Decertification:**
  - "This is enough to be sound and useful for certification purposes. If evidence emerges at trial that substantially impeaches Dr. Allenby's methods and conclusions, the door may be opened to consideration of decertification." *DZ Reserve v. Meta Platforms, Inc.*, No. 3:18-cv-04978-JD, 2022 U.S. Dist. LEXIS 57112, at *24 (N.D. Cal. Mar. 29, 2022)
  - The Court is satisfied at the certification stage that the conjoint analysis and premium calculation can be performed on a class basis, following completion of the merits phase of the case. However, as discussed above, if it becomes apparent that the planned analysis and calculations of damages/restitution cannot be performed classwide, then this would potentially serve as grounds to decertify the class. *Prescod v. Celsius Holdings, Inc.*, No. 19STCV09321, 2021 Cal. Super. LEXIS 8246, at *75 (L.A. Super. Ct. Aug. 2, 2021)
- **Who bears the burden of proof on decertification?**
  - "Even at decertification, the plaintiff bears the burden of proof and must establish by a preponderance of the evidence that the requirements of Rule 23 are met." *Price v. L'Oréal USA, Inc.*, No. 17 Civ. 614 (LGS), 2021 U.S. Dist. LEXIS 187099, at *10 (S.D.N.Y. Sept. 29, 2021)
  - "The Ninth Circuit has not affirmatively articulated the burden of proof for decertification." *Vasquez v. Leprino Foods Co.*, No. 17-cv-00796-AWI-BAM, 2022 U.S. Dist. LEXIS 79674, at *22 n.6 (E.D. Cal. Apr. 29, 2022)

# Thank you!

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