No.: _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEODORE BROOMFIELD, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

KONA BREWING CO., LLC, KONA BREW ENTERPRISES, LLC, KONA BREWERY LLC, and CRAFT BREW ALLIANCE, INC.,

Defendant-Appellant,

On Appeal from the United States District Court
for the Northern District of California
Case No. 5:17-cv-01027-BLF

DEFENDANT-PETITIONER CRAFT BREW ALLIANCE, INC.'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(F)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Petitioner Craft Brew Alliance, Inc. ("CBA") states that it has no parent corporation. Anheuser-Busch Companies, LLC owns 10 percent or more of CBA's stock. Anheuser-Busch Companies, LLC is a wholly-owned subsidiary of Anheuser-Busch InBev SA/NV (NYSE:BUD).

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INTRODUCTION

In this class action, Plaintiffs challenged Craft Brew Alliance, Inc.'s ("CBA") marketing of its Kona brand beer. Unlike most food-labeling class actions, however, the Plaintiffs did *not* challenge any verifiable statement about the beer. Instead, they allege that imagery on the beer packaging of certain six-and twelve-packs deceives consumers into believing all Kona beer is brewed exclusively in the state of Hawaii. Dkt. 94 at 1.

In certifying two classes of Kona purchasers, the District Court committed three manifest errors, each of which independently would justify reversal of certification. *First,* it failed to conduct a rigorous analysis of the Plaintiffs' theory of materiality as it applied to Rule 23, creating a class of purchasers who all allegedly gleaned the same material, misleading message from the imagery on the packaging. The question of whether imagery standing on its own without "specific and unequivocal" textual statements can trigger a classwide inference of reliance is one of first impression for this Circuit. *Second,* the District Court failed to conduct a rigorous analysis of whether Plaintiffs' proposed "conjoint analysis" could establish classwide damages attributable to Plaintiffs' theory of liability sufficient to meet the demands of *Comcast Corp. v. Behrend,* 569 US. 27 (2013). Third, the District Court accepted Plaintiffs' damages model despite its attempt to analyze an unstable market and its failure to assess both supply and demand. Given the

increasing use to which class-action plaintiffs are putting conjoint analysis, requiring rigorous scrutiny of this statistical method would provide important guidance to generalist courts deciding complex economic questions.

QUESTIONS PRESENTED

1. Whether the District Court manifestly erred in certifying a consumer-fraud class where there was no provably false statement at issue.

2. Whether the District Court manifestly erred in finding that Plaintiffs' proposed damages model satisfied *Comcast* when it did not measure damages attributable to Plaintiffs' theory of liability.

3. Whether the District Court manifestly erred in finding that Plaintiffs could calculate damages using conjoint analysis in an unstable market, without considering both supply and demand.

STATEMENT OF FACTS

Plaintiffs claim that packaging of certain Kona six-and twelve-packs deceives consumers into believing all Kona beer is brewed exclusively in the State of Hawaii. Dkt. 94 at 1. Despite the fact that Kona's packaging does not contain the statements "brewed in Hawaii" or "brewed exclusively in Hawaii," Plaintiffs contend that the Hawaiian imagery on the packaging improperly suggests that Kona beer is brewed exclusively in Hawaii. Dkt. 94 at 2-3. Plaintiffs claim that they and the class have unjustly paid a price premium for beer, because it is

actually brewed in several locations throughout the continental United States. Dkt. 94 at 1, 2-3.

The District Court held a class certification hearing on September 6, 2018, where CBA presented evidence that: (1) Plaintiffs' proposed materiality expert had not shown a common material misrepresentation in his consumer survey because he had not shown that the imagery on Kona's packaging was susceptible to a single, controlling interpretation, (2) Plaintiffs had not provided a proposed damages model that was tied to their theory of liability as required by *Comcast*, and (3) Plaintiffs had not shown that their expert's conjoint analysis was appropriate here to prove a classwide method of proving damages because, among other things, the beer market is too dynamic to use the conjoint method and that, even assuming the conjoint method could be used, Plaintiffs' expert failed to account for supply in his model.

On September 25, 2018, the District Court certified two classes under Fed. R. Civ. P. 23(b)(2) and (b)(3). Dkt. 94. CBA sought leave for reconsideration on October 5, 2018, Dkt. 97, and the District Court denied CBA's motion for leave to seek reconsideration on October 16, 2018. Dkt. 100.

STANDARD OF REVIEW

Under Rule 23(f), interlocutory review is appropriate when (1) "the certification decision presents an unsettled and fundamental issue of law relating to

class actions, important both to the specific litigation and generally;" (2) the decision is "manifestly erroneous;" or (3) when "there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

ARGUMENT

I. This Court Should Take the Opportunity to Clarify When an Alleged Misrepresentation Is Sufficiently Definite to Justify a Finding of Predominance.

A predominant flaw in the District Court's opinion is that it finds CBA's alleged misrepresentations a common, predominating issue, even though Plaintiffs did not challenge a single statement CBA made. Instead, in certifying the class, the District Court relied on imagery on the packaging that evoked various scenes from the Hawaiian islands. Dkt. 94 at 20. The imagery notably did *not* include a single textual statement that Kona beer was brewed in Hawaii, let alone exclusively there. Nonetheless, Plaintiffs claimed that this imagery allegedly misrepresents that the beer is brewed in Hawaii. In so doing, Plaintiffs argued for a novel interpretation of California's consumer protection laws: holding a defendant liable for misrepresentation solely on the basis of an image, as opposed to a verbal statement.

Under California consumer-protection law,[1] if an allegedly misleading statement is "material," then a named plaintiff's proof of reliance may stand in for the remainder of the proposed class. *See Wiener v. Dannon Co.*, 255 F.R.D. 658, 669 (C.D. Cal. 2009); *Zakaria v. Gerber*, No. LA CV15–00200, 2016 WL 6662723, at *8 (N.D. Cal. Mar. 23, 2016). To qualify as "material," a statement must be relevant to all class members; otherwise reliance would necessarily vary from buyer to buyer. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022-23 (9th Cir. 2011), *abrogated on other grounds by Comcast Corp. v. Behrens*, 569 U.S. 27 (2013). "Stated in terms of reliance, materiality means that without the misrepresentation, the plaintiff would not have acted as he did." *Townsend v. Monster Beverage Corp*, 303 F.Supp.3d 1010, 1043 (C.D. Cal. 2018) (quoting *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 668 (1993)).

The District Court's certification order adopts the theory—advanced by Plaintiffs—that these images could *only* leave the impression that Kona beer was brewed exclusively on the Hawaiian islands. Dkt. 94 at 2-3. There is *no* statement on the packaging that the beer was brewed exclusively in Hawaii.

In certifying the class, the District Court relied on the logic the Supreme Court used in deciding *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013). There, the Supreme Court held that a plaintiff

[1] The District Court treated Plaintiffs' various consumer-fraud claims as identical for purposes of analyzing certification. Dkt. 94 at 16.

pursuing a securities fraud class action against a defendant does not have to prove materiality (an element of a 10b-5 claim) at the class certification stage. *Id.* at 459-60. The Court held, however, that a plaintiff did have to prove an "efficient market" exists in order to invoke a presumption that absent class members relied on the alleged misrepresentation. *Id.* at 463. The reason for requiring that showing is that, in an efficient market, representations about a security are quickly incorporated into the security's ultimate price. *Id.* at 462.

Here, the District Court adopted *Amgen*'s holding that, because materiality is a merits question evaluated according to an objective standard, it could assume that materiality, and therefore reliance, was common to the class. Dkt. at 19. But consumer-fraud class actions are different than securities fraud. In food-labeling class actions, there is no inquiry into whether the market for a particular product is efficient. (It likely is not.) Instead, to determine whether a plaintiff can prove materiality and therefore infer reliance on a representation, the plaintiff must show that there was a "common understanding" of what the representation meant. This makes sense; if consumers do not agree on the meaning of a representation, their reliance on it will likely differ. Under Ninth Circuit law, a court cannot uncritically accept the plaintiffs' allegation that a particular phrase has an unusual but somehow commonly understood meaning. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). Instead, plaintiffs must show, as a

matter of fact, that their understanding is in fact common. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Various courts in this Circuit have taken this relationship between a "common understanding" of a representation and its materiality into account when deciding certification. As they have held, if a statement is not sufficiently definite, it will lack a single, let alone common, understanding, meaning a court cannot presume that class members relied on it. *Townsend*, 303 F.Supp.3d at 1045-46 (no predominance of common issues because no materiality and no inference of reliance where "rehydrates" not subject to single definition); *In re 5-Hour Energy Mktg. & Sales Practices Litig.*, No. ML 13-2438, 2017 WL 2559615, at *8-9 (C.D. Cal. June 7, 2017) (no materiality and no inference of reliance where no controlling definition of "energy"). By contrast, the District Court made no inquiry into whether Plaintiffs showed that proposed class members have a common understanding of what the imagery on the packaging means. Dkt. 94 at 19.

If words are susceptible to multiple interpretations, images are even more so. As a result, courts are reluctant to say with certainty that an image conveys a uniform message. *See, e.g.*, *Janney v. Mills*, 944 F.Supp.2d 806, 818 n.3 (N.D. Cal. 2013) (dismissing allegation of fraudulent misrepresentation based on nature imagery because "the allegation that an 'image of nature' can be viewed as

deceptively describing the ingredients in granola bars is entirely implausible"); *cf. Maneely v. Gen. Motors Corp.*, 108 F.3d 1176, 1180-81 (9th Cir. 1997) (images of people in bed of pickup truck could not create express warranty because they were not a "specific and unequivocal" statement).

The cases the District Court relied on to support its finding of materiality all point to a specific textual statement rather than an image. *See Wiener*, 255 F.R.D. at 663 (challenging statements that products were "scientifically proven" and "clinically proven" to improve digestion); *Johnson v. Gen. Mills, Inc.*, 275 F.R.D. 282, 287 (C.D. Cal. 2011) (challenging statement that product promoted digestive health); *In re 5-hour Energy Litig.*, 2017 WL 2559615 at *1 ("5-hour energy," "hours of energy"); *Zakaria v. Gerber*, No. LA CV15-00200, 2017 WL 9512587 at *1 (C.D. Cal. August 9, 2017) (identifying four separate statements); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-CV-00564, 2017 WL 4224723, at *1 (N.D. Cal. Sept. 22, 2017) ("made with real ginger"); *Townsend*, 303 F.Supp.3d at 1017 (identifying four challenged statements, including "hydrates like a sports drink" and "re-hydrate"); *Hadley v. Kellogg Sales Co.*, No. 16-CV-04955, 2018 WL 3954587 at *2 (N.D. Cal. Aug. 17, 2018) (products were "healthy," "nutritious," "wholesome," and "lightly sweetened").

Each of these statements conveys a specific message that can be proven false with qualitative evidence. The images on Kona's packaging do no such thing.

And courts in this Circuit have found that even some of these specific verbal statements were not clear enough to support an inference of reliance, usually because there is no "common understanding" of the terms at issue. *See, e.g.*, *Townsend*, 303 F.Supp.3d at 1047-48 ("Where plaintiffs fail to establish a controlling definition for a key term in an alleged misstatement" like "re-hydrate," courts have found materiality not subject to common proof); *In re 5-hour Energy*, 2017 WL 2559615 at *8-9 (where plaintiffs could not show term "energy" understood uniformly, plaintiffs could not show predominance); *Jones v. ConAgra Foods, Inc.*, No. C 12–01633, 2014 WL 2702726, *14 (N.D. Cal. Jun. 13, 2014) (denying certification because term "natural" had no fixed meaning, and therefore class lacked cohesion); *Astiani v. Kashi Co.*, 291 F.R.D. 493, 504 (S.D. Cal. 2013) (statement "Nothing Artificial" was material because it had a "clearly ascertainable meaning"); *see also Fitzhenry-Russell*, 2018 WL 3126385, at *16 (N.D. Cal. Jun. 26, 2018) (referring to "bucket of cases" denying certification because "there was no common understanding" of allegedly material terms).

As a result, the District Court's holding creates a split within the Ninth Circuit, between those cases that rely on "specific and unequivocal" written statements as material and deny materiality when there is no "common understanding," and a new line of reasoning that the mere presence of imagery on

packaging can constitute actionable misrepresentations that trigger a presumption of reliance on a specifically alleged message.

The District Court's brief reference to Plaintiffs' proposed materiality expert (the District Court itself stated that Dr. Dennis's proffered testimony was not relevant "at this stage") (Dkt. at 19) does not change this analysis. Had the District Court conducted a rigorous analysis of Dr. Dennis's proffered testimony, it would have discovered that he simply *assumed* that the imagery on the packaging conveyed some message about the brewing location of Kona beer; in fact, he never tested the possibility that the packaging conveyed *no* information about where Kona was brewed. *Contrast* Dr. Dennis Rpt. at 18 (asking where beer brewed, giving no "no opinion" option) *with id.* at 17 (asking whether Kona beer was "more fun," offering "no expectations" option). The District Court, however, did not engage in this analysis of Dr. Dennis's report.

By failing to determine whether the allegedly misleading imagery was susceptible of a common interpretation, the District Court failed to conduct the "rigorous analysis" that lies at the heart of class certification. *Ellis*, 657 F.3d at 980-81.

II. This Court Should Take the Opportunity to Clarify Whether the Precise Alleged Misrepresentation Must be Shown to Respondents in a Conjoint Survey to Meet the Requirements of *Comcast.*

The District Court manifestly erred in finding that Plaintiffs' damages model met the requirements of *Comcast*. *Comcast* requires that a plaintiff establish "that damages are capable of measurement on a classwide basis." 569 U.S. at 34. That measurement cannot be "arbitrary," it "must measure only those damages attributable" to the theory of liability. *Id.* at 35; *see also Briseno v. ConAgra Foods, Inc.*, 674 F. App'x 654, 656-57 (9th Cir. 2017) (plaintiffs' damages model must limit price premium to only "a 'no-GMO' understanding of the label"). Here, Plaintiffs' theory of liability is that consumers paid a "price premium" for Kona beer based on the product packaging, which led them to believe the beers were brewed exclusively in Hawaii rather than in the continental United States. Dkt. 83 at 9. That would mean that only those damages attributable to the allegedly deceptive packaging images would be tied to Plaintiffs' theory of liability.

But Plaintiffs' model cannot measure the price premium attributable to Kona's packaging imagery, because their expert, Stefan Boedeker, never showed the allegedly deceptive images to his survey participants. Instead, he showed images of single beer bottles or cans and, inexplicably, full glasses of beer. *Id.*; see also Ex. C, Lemon Rep. ¶¶ 159-60; 166-67.

That omission should have proven fatal to Boedeker's damages analysis. The District Court excused Boedeker's failure to include Kona packaging imagery in his conjoint survey, noting that Plaintiffs' other expert, Dr. Dennis, conducted a consumer preference survey which showed participants certain images of Kona packaging. Dkt. 94 at 28. Believing that the work of the two experts was somehow "linked," the Court concluded that Boedeker had no obligation to show his survey participants the Kona images at the heart of this lawsuit. Dkt. 94 at 28-29.

The results of Dr. Dennis's consumer preference survey, however, cannot be imported into Boedeker's conjoint survey and treated as if it were simply part of the same work. Indeed, Dr. Dennis admits as much, stating that he simply did a consumer perception survey. Dr. Dennis Rpt. at ¶15. Moreover, Dr. Dennis conceded that "My survey does not attempt to quantify the price premium paid by consumers, if any, that is solely attributable to the challenged product packaging" (*Id.* at ¶6), and he testified that he was not opining in any way on how damages might be calculated. Dennis Dep. 38:25-39:7. Dr. Dennis explained that he did not attempt to do a conjoint survey of all purchasing factors that drive consumer demand, nor did he measure the importance consumers put on the imagery of Kona beer packaging. *Id.* at 150:7-14; 152:10-12. Further, Dr. Dennis did not determine that there is a common understanding among Kona beer consumers that the

packaging images on Kona beers convey the meaning to consumers that the beers are brewed exclusively in Hawaii. Courts routinely reject certification when the plaintiffs fail to establish a common meaning of an alleged misrepresentation because the plaintiffs cannot show the price premium paid was for the attribute consumers believed the product contained. In those situations, the plaintiffs fail to tie the damages model for the misleading statement to their theory of liability. *See Townsend*, 303 F. Supp. 3d at 1051 (rejecting certification in part because plaintiffs failed to show that consumers paid a price premium for a drink they believe contained electrolytes to be tied to their theory of liability); *In re. 5-Hour Energy Mktg. and Sales Practices Litig.*, 2017 WL 2559615, at *11 (rejecting plaintiffs' damages model where it failed to ascribe relative value to each of the contested product features).

As Boedeker professed, the results of a conjoint survey are only as reliable as the survey's ability to "mimic" the choices that consumers make in the real world. Boedeker Dep. at 210:10-18. By failing to test the images of Kona packaging, Boedeker's damages model is inconsistent with Plaintiffs' liability case and fails to measure "'only those damages attributable' to Plaintiffs' theory of liability because it unmoors Plaintiffs' damages from the specific [conduct] alleged to have harmed them." *Davidson v. Apple, Inc.*, No. 16-CV-04942, 2018 WL 2325426, at *23 (N.D. Cal. May 8, 2018) (quoting *Comcast*, 569 U.S. at 35).

In *Davidson v. Apple Inc.*, the District Court recently denied Plaintiffs' motion for class certification in a case involving allegations that Apple failed to disclose a defect in the iPhone 6 and iPhone 6 Plus. *Id*. at *22-23. There, the plaintiffs put forward a damages model (also from Boedeker) that relied on a conjoint survey in which he only asked respondents about a generic defect instead of the alleged defect that specifically affected the phone's touchscreen. *Id*. at 23. The court concluded that the damages model failed to meet the requirements of *Comcast* because the underlying survey did not correspond to the plaintiff's theory of liability. *Id*. The same flaw arises in the conjoint survey here, compelling the same result.

In this case, however, a boundary has been crossed that poses grave consequences for defendants in consumer fraud class actions. If Boedeker is relieved of showing his conjoint survey participants the very images that Plaintiffs claim are deceptive, then what is an expert economist required to show conjoint survey participants? Plainly, this decision opens the door to speculative, conjoint-based damages opinions which are untethered to the plaintiffs' liability theories in future cases. CBA respectfully requests that this Court reverse the ruling of the District Court because Boedeker's conjoint damage model does not meet the requirements of *Comcast*.

III. This Court Should Take the Opportunity to Clarify Whether a Conjoint Damages Model Must Account for Market Instability and Actual Quantity of the Product at Issue.

Finally, the District Court failed to undertake a "rigorous analysis" of Plaintiffs' conjoint analysis. *Ellis*, 657 F.3d at 984 ("rigorous analysis" includes engagement with factual disputes over expert theories). Conjoint analysis measures a consumer's willingness to pay for certain features of a product on their own. Its use as a measurement of damages in class actions is still in its infancy, but growing quickly among plaintiffs' experts. *Zakaria*, 2017 WL 9512587 at *19 (citing recent cases using method). Courts within this Circuit have applied varying tests to determine whether the proffered conjoint analysis passed muster under *Comcast*. *See, e.g.*, *Saavedra v. Eli Lilly & Co.*, No. 2:12–cv–93662014, WL 7338930 (C.D. Cal. Dec. 18, 2014) (conjoint based damages model which failed to account for demand and attempted to analyze non-efficient market did not support class certification); *Lanovaz v. Twinings N. Am., Inc.*, No. C-12-02646, 2014 WL 1652338, at *6 (N.D. Cal. Apr. 24, 2014) ("the difference between the market price actually paid by consumers and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices" is proper measure). The District Court manifestly erred accepting a damage model that made a series of assumptions not supported by the actual evidence in this case. In particular, the District Court overlooked the uncontroverted evidence that the marketplace is not

sufficiently stable to justify conjoint analysis and that Plaintiffs' damage model failed to account for supply as well as demand in calculating price premiums.

A. The Court Did Not Rigorously Analyze Whether Plaintiffs Accounted for Supply in Their Damage Model.

A conjoint analysis may provide a measure of individual preferences or a willingness to pay for certain product features, but by itself does not reflect the actual market prices that would be charged in a competitive market. Prices, as most economists know, are made up of both demand *and* supply. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 4-5 (5th ED. 1998). Determining price, therefore, requires consideration of supply as well as demand. Dkt. 85 at 20-22. A damages model based solely on consumers' "willingness to pay" for product attributes cannot predict actual product prices, which is why courts in the Ninth Circuit have consistently rejected conjoint analyses that do not address supply-side factors that set real-world market prices. *See, e.g.*, *In re NJOY, Inc. Consumer Class Action Litig.*, No. CV 14-428-JFW, 2016 WL 787415, at *7 (C.D. Cal. Feb. 2, 2016); *Saavedra* at *4-5 (same); *Davidson v. Apple, Inc.*, 2018 WL 2325426, at *23; *see also In re Tobacco Cases II*, No. JCCP 4042, 2013 WL 7154428, at *6-7 (Cal. Super. Ct. 2015) ("conjoint analysis has not been accepted in the relevant scientific community as a means of assigning a monetary value to any particular [product] attribute.").

In this case, the District Court found Plaintiffs' damages model sufficiently accounted for supply because Plaintiffs' expert used "the number of units sold and prices that were extant in the market—that is, supply is fixed." Dkt. 94 at 31-32. The District Court relied on *Hadley*, 2018 WL 3954587, holding that conjoint analysis can account for supply-side factors if: "(1) the prices used in the surveys underlying the analysis reflect the actual market prices that prevailed during the class period; and (2) the quantities used (or assumed) in the statistical calculations reflect the actual quantities of products sold during the class period." Dkt. 94 at 32 (citing *Hadley*, 2018 WL 3954587, at *13).

In *Hadley*, the court found that crucial supply-side factors were considered because the expert's prices "mirrored those observed in the market and were based on actual sales data, and because the model held the quantity constant." Dkt. 94 at at 32 (citing *Hadley*, 2018 WL 3954587, at *13). The plaintiff's expert held quantity constant in *Hadley* "by *using the quantities of the challenged products that were actually sold* during the class period . . . ." *Hadley* at *13 (emphasis added). Here, in contrast, Plaintiffs' damages model does *not* use actual sales data or actual quantities of Kona beer sold during the class period. Nowhere in his report does Plaintiffs' expert demonstrate that he consulted data to determine these figures. The only way to account for "actual quantities" of Kona beer sold during

the class period is from analyzing the Nielsen data that CBA produced in this case but Plaintiffs' expert testified he did not consider that data. Dkt. 97 at 5.

Instead, Plaintiffs' damages model uses market share ("Volume in % of Market"), not quantity (number of units sold), to determine supply. Dkt. 97 at 5. The model does not, as it should, hold that number constant; Plaintiffs' expert's market share figures vary across his various simulations. Dkt. 97 at 5. Contrary to Plaintiffs' unsupported argument, their damages model is simply devoid of any evidence of the number of units of Kona beer sold during class period. It is simple logic that if Plaintiffs' expert is using a "range of prices" he cannot be holding anything constant or fixed, including quantity or supply. Dkt. 97 at 6.

Plaintiffs' damages model therefore failed to meet the requirements noted in *Hadley* that the statistical calculations reflect the "actual quantities of products sold during the class period." *Hadley*, 2018 WL 3954587, at *13. Because Plaintiffs' damages model is devoid of quantities or units sold during the class period, Plaintiffs' model necessarily failed to sufficiently account for critical supply-side factors. Therefore, the District Court manifestly erred in finding that the damage model satisfied Rule 23(b)(3)'s predominance requirement that damages were "capable of measurement on a classwide basis." Dkt. 94 at 32-33 (citing *NJOY*, 2016 WL 787415, and *Saavedra*, 2014 WL 7338930); *Comcast*, 569 U.S. at 34.

B. Conjoint Analysis is Invalid When the Marketplace is Unstable.

Numerous cases evaluating the use of conjoint surveys have recognized that the Choice-Based Conjoint analysis methodology Plaintiffs' expert performed is appropriate *only* where the marketplace for the product is relatively stable. *See In re Dial Complete Mktg. & Sales Pracs. Litig.*, 320 F.R.D. 326, 337 (D.N.H. 2017) (price must be tethered to "real and stable market"); *Saavedra*, 2014 WL 7338930, at *4-5 (C.D. Cal. Dec. 18, 2014); *Fitzhenry-Russell*, 2018 WL 3126385 at *8.

The District Court's holding is contrary to the cases on which it relied in analyzing Plaintiffs' conjoint analysis. Dkt. 94 at 31-34. *Saavedra*, *Fitzhenry-Russell*, *Hadley*, and *In re Dial*, all recognized the importance of market stability to the proper application of conjoint analyses. In *Saavedra*, the court declined to certify a damages class, in part, because the prescription drug market was not an efficiently functioning market, meaning it could not reliably predict prices. 2014 WL 7338930, at *5

In *Fitzhenry-Russell*, the court and the parties understood that the conjoint model "was performed in a market that is long-established and efficient, where retailers' pricing is responsive to market forces." 2018 WL 3126385, at *8. And the conjoint analysis in *In re Dial*, was similarly conducted in a stable market (soap). 320 F.R.D. 326, 335 (D.N.H. 2017).

The District Court inexplicably rejected CBA's unrebutted evidence that Plaintiffs' expert provided the Court with *no evidence* that the beer market is sufficiently stable in order to use his Choice-Based Conjoint analysis model and, furthermore, that the marketplace for beer is too dynamic to support Plaintiffs' damage model. Dkt. 94 at 34. In particular, the District Court did not address CBA's unrebutted evidence that the craft beer market here is neither "long-established" like in *Fitzhenry-Russell* nor "relatively stable" like in *In re Dial*, as demonstrated by the explosion in the number of breweries in the United States from 2012-2017. Dkt. 85 at 23 (citing Lemon Rep. ¶ 201). Plaintiffs' expert did not dispute that the beer market is unstable; in fact, he claimed the *actual* market for beer had no bearing on his model of demand for Kona beer and his estimate of consumer harm. *Id.* at 24. In addition, unlike the "single market price" Plaintiffs' expert assumed, real world data proves that Kona beer prices fluctuated daily across different stores. Dkt. at 85 at 3; Dkt. 97 at 3. Plaintiffs offered *no* evidence to dispute this data.

The District Court manifestly erred in finding that Plaintiffs could rebut CBA's evidence showing market instability by *simply claiming* the market was stable and that discounts apply to *all* craft beer. Dkt. 94 at 31. As CBA argued, Plaintiffs adduced *no evidence* to support these assertions. Dkt. 97 at 3. In fact, Plaintiffs' expert conceded that "craft beer sales *grew* by 6.2% [in 2016], reaching

12.3% of the U.S. beer market by volume and 21.9% by dollar value." Dkt. 97 at 3. That concession of rapid growth in a single market segment directly undercuts the Plaintiffs' assurance that the market is "stable" enough to justify using Choice-Based Conjoint analysis.

The District Court manifestly erred in accepting Plaintiffs' damage model under *Comcast* because the model makes a series of assumptions that find no support in the real world.

CONCLUSION

The District Court's order certifying a class in this case contained three clear, reversible errors. Each of these errors is sufficient reason to reverse the certification. But, just as important, each of these errors is either egregious enough or novel enough that appellate guidance would not just be useful, but essential for litigants going forward. For this reason, CBA respectfully requests that this Court hear its appeal.

Respectfully submitted,

/s/ Tammy B. Webb

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Counsel for Craft Brew Alliance

STATEMENT OF RELATED CASES

Petitioner is unaware of any related cases pending in this Court that are related to this appeal, as defined and required by Circuit Rule 28.2.6.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this Petition is proportionately spaced, has a typeface of 14 point and contains 4,759 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Tammy B. Webb
Tammy B. Webb

CERTIFICATE OF SERVICE

I, Tammy B. Webb, hereby certify that I electronically filed the foregoing Petition for Permission to Appeal Pursuant to FRCP 23(f) 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 October 22, 2018, which will send notice of such filing to all registered CM/ECF users.

I further certify that on October 22, 2018, I served the foregoing on the interested parties in this action by sending true and correct copies via U.S. Mail pursuant to Fed. R. App. P. 25(c)(1) as follows:

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