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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE: PACKAGED SEAFOOD PRODUCTS ANTITRUST LITIGATION

This Document Relates to:

The Direct Purchaser Plaintiff Class Action Track

Case No. 3:15-md-02670-JLS-MDD

MDL No. 2670

DEFENDANTS' OPPOSITION TO DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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1 **I. INTRODUCTION**

2 This Court should deny Direct Purchaser Plaintiffs' ("DPPs") Motion for
3 Class Certification because DPPs have no common evidence capable of proving
4 that all (or nearly all) of their proposed class was injured by the alleged conspiracy.
5 To meet this heavy burden, DPPs offer only the opinion of their expert witness,
6 Dr. Russell Mangum. But Dr. Mangum's opinions [REDACTED]
7 fall far short of the mark. [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 All told, Dr. Mangum's opinions fail as proof of classwide impact:
14 1. [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 2. [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 3. Dr. Mangum's [redacted]
2 [redacted] that are
3 self-serving, arbitrary, and contradicted by evidence. When these assumptions are
4 tested and removed, [redacted] is not reliable proof of
5 classwide impact:
6 (a) [redacted]
7 [redacted]
8 [redacted]
9 [redacted]
10 [redacted]
11 (b) [redacted]
12 [redacted]
13 [redacted]
14 [redacted]
15 [redacted]
16 [redacted]
17 [redacted]
18 [redacted]
19 (c) [redacted]
20 [redacted]
21 [redacted]
22 [redacted]
23 [redacted]
24 [redacted]
25 [redacted]
26 [redacted]
27 [redacted]
28 Dr. Mangum's opinions assume more than they prove, and it is his

assumptions—on the key issues that his methodology purports to prove—that render his opinion insufficient under Rule 23 and its predominance requirement. DPPs have no methodology capable of *proving* impact to all or nearly all of the proposed class, and their Motion for Class Certification should be denied.

II. BACKGROUND AND STATEMENT OF FACTS

A. The Parties

DPPs move to certify a class of persons and entities that "directly purchased packaged tuna products . . . from any Defendant at any time between June 1, 2011 and July 1, 2015." (DPPs' Mot. for Class Certification, ECF No. 1140, at 1.) This is a markedly shorter time period than was alleged in the operative complaint at the time their Motion was filed. That Complaint (and the others before it) alleged a conspiracy between Bumble Bee Foods LLC ("Bumble Bee"), Tri-Union Seafoods LLC d/b/a/ Chicken of the Sea ("COSI"), StarKist Co. ("StarKist"), and their parent companies (collectively, "Defendants") from at least July 1, 2004 through May 8, 2017. (Third Consol. Direct Purchaser Class Compl., ECF No. 911 ("Third Consol. Compl.") ¶¶ 1-2.)[1] [REDACTED] (Corrected Decl. of Russell W. Mangum, III, ECF No. 1192 ("Mangum Decl.") ¶ 8.)

Defendants Bumble Bee, COSI, and StarKist are suppliers of packaged tuna. [REDACTED]

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[1] DPPs filed an amended complaint on October 5, 2017, just 11 days ago and [REDACTED]

"Ex." refers to the Exhibits to the Declaration of Belinda S Lee in Support of Defendants' Opposition to DPPs' Motion for Class Certification, filed herewith.

B. Defendants' Different Tuna Procurement and Production Costs

Bumble Bee, COSI, and StarKist have very different procurement and processing practices, which means that ( ) the three companies have very different cost structures.

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1 **C. <u>The Parties' Expert Witnesses</u>**

2 DPPs retained Dr. Russell W. Mangum, III,

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5 Dr. Mangum begins his analysis with a

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18 *See In re LIBOR-*

19 *Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 494 (S.D.N.Y. 2018)

20 ("").

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Defendants retained Dr. John H. Johnson, IV, the President and CEO of Edgeworth Economics and former economics professor at Georgetown University and University of Illinois at Urbana-Champaign. (Ex. 5, Johnson Rep. ¶¶ 5-6.) Dr. Johnson has testified in numerous cases involving class certification and antitrust liability and damages, and has been accepted as an expert in economics, econometrics, and statistics by numerous federal courts. (*Id.* ¶ 6.)

III. LEGAL STANDARD

As the Supreme Court has stated: "Rule [23] imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). Plaintiffs must satisfy all four of Rule 23(a)'s subsections—numerosity, commonality, typicality, and adequacy—and at least one subsection of Rule 23(b). *See Comcast v. Behrend*, 569 U.S. 27, 33 (2013). A plaintiff's failure to carry its burden under every prong of Rule 23(a)

1 and at least one prong of Rule 23(b) precludes certification. *In re Lithium Ion*
2 *Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2017 WL 1391491, at *2-3
3 (N.D. Cal. Apr. 12, 2017) ("*Batteries*").

4 **A. <u>Predominance</u>**

5 By proceeding under Rule 23(b)(3), DPPs must show that: (1) "questions of
6 law or fact common to class members predominate over any questions affecting
7 only individual members"; *and* (2) class litigation is "superior to other available
8 methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P.
9 23(b)(3). The Supreme Court has explained that a common issue "is capable of
10 classwide resolution" when its truth or falsity can be resolved "in one stroke."
11 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Predominance "tests
12 whether proposed classes are sufficiently cohesive to warrant adjudication by
13 representation," and is similar to, but more demanding than the commonality
14 analysis under Rule 23(a). *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 623
15 (1997). As the D.C. Circuit observed, "class certification is far from automatic" in
16 cases seeking to satisfy Rule 23(b) under the predominance requirement. *In re*
17 *Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013)
18 ("*Rail Freight I*").

19 In price-fixing cases, Rule 23(b)(3) requires a showing that common
20 evidence will predominate on *every* element of a Sherman Act Section 1 claim:
21 "(1) whether there was a conspiracy to fix prices in violation of the antitrust laws;
22 (2) the fact of plaintiffs' antitrust injury, or 'impact' . . . and (3) the amount of
23 damages sustained as a result of the antitrust violations." *In re Optical Disk Drive*
24 *Antitrust Litig.*, 303 F.R.D. 311, 318 (N.D. Cal. 2014) ("*ODD*").[3] Antitrust

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26 [3] This means that common evidence about the existence of a conspiracy, such as guilty pleas or *per se* antitrust allegations, is not sufficient to certify a class.
27 *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F. 3d 305, 308 n.2, 325 (3d Cir. 2008), *as amended* (Jan. 16, 2009) (reversing grant of class certification where
28 two defendants had pleaded guilty); *ODD*, 303 F.R.D. at 325 (denying certification after one defendant and four employees pleaded guilty).

plaintiffs have the burden of presenting a "method for proving impact on a class-wide basis." *In re High-Tech Emps. Antitrust Litig.*, 289 F.R.D. 555, 566 (N.D. Cal. 2013) ("*High Tech Emps.*") (collecting cases). If a methodology cannot determine classwide impact in one stroke, Rule 23 is not satisfied and certification should be denied. *Id.*; *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 496 (N.D. Cal. 2008) ("*GPU*") (finding no predominance because the expert's methodology could not determine impact to the class with a single regression).

B. Uninjured Class Members Must Be *De Minimis*

DPPs' method for proving classwide impact must be capable of showing that the alleged conspiracy impacted "all (or nearly all)" of the proposed class. *High-Tech Emps.*, 289 F.R.D. at 567. Certification is only proper when "the uninjured parties represent a *de minimis* portion of the class." *See In re Lidoderm Antitrust Litig.*, No. 14-md-02521-WHO, 2017 WL 679367, at *11, 20 (N.D. Cal. Feb. 21, 2017) ("*Lidoderm*"); *see also In re Asacol Antitrust Litig.,* No. 18-1065, 2018 WL 4958856, at *6-10 (1st Cir. Oct. 15, 2018) ("*Asacol*") (reversing class certification because district court had erred in holding that 10% uninjured class numbers was *de minimis*); *accord In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 135 (D.D.C. 2017) ("*Rail Freight IV*") ("The Court views the 'all or virtually all' and the 'de minimis' standards as two sides of the same coin.").[4]

C. Rigorous Analysis and Regression Analyses

"Before certifying a class, the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (citations omitted). This means courts must resolve "factual disputes necessary to determine" whether Rule 23 is satisfied, including those "staged [by] a battle of the

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[4] [redacted] this standard, Defendants use this phrasing.

experts." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982-84 (9th Cir. 2011); *see also Comcast*, 529 U.S. at 35 (requiring "a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim").

The Supreme Court's mandate of a "rigorous analysis" at the class certification stage applies with particular force to the scrutiny of an expert's regression models. "Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it." *Rail Freight I*, 72 F.3d at 255. As the Supreme Court explained, courts should not simply rubber stamp regression models: "Under that logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide[.]" *Comcast*, 569 U.S. at 35-36 (emphasis in original); *see also Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 Fed. App'x 296, 299 (5th Cir. 2004) (multiple regression analysis is "not a magic formula"); *GPU*, 253 F.R.D. at 491 (certification is not "automatic every time counsel dazzles the courtroom with graphs and tables."); ABA Section of Antitrust Law, Econometrics: Legal, Practical, and Technical Issues 355-56 (2d ed. 2014) ("[R]egression analysis will always yield a result. Whether a regression is useful for assessing classwide impact is a different question.").[5]

IV. DPPs LACK COMMON PROOF OF CLASSWIDE IMPACT

DPPs have not satisfied Rule 23(b)(3) because their methodology for evaluating and measuring impact to the proposed class:

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[5] Although Rule 23(b)(3)'s predominance requirement is more stringent than the admissibility standards set forth by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), Dr. Mangum's methodology and analyses are flawed and unreliable such that they would be inadmissible under those standards as well. *See, e.g.*, *Batteries*, 2017 WL 1391491, at *18 ("[W]hile the Court does not find [plaintiffs' expert] Dr. Noll's methodology to be unreliable, it does find that Dr. Noll's analysis ultimately does not satisfy DPPs' burden under Rule 23(b)'s predominance requirement.").

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12 *In re Plastics Additives*
13 *Antitrust Litigation*, where the court found the plaintiffs could not rely on the
14 results of a "pooled" regression to demonstrate common impact. No. 03-CV-2038,
15 2010 WL 3431837, at *16-17, 19 (E.D. Pa. Aug. 31, 2010) ("*Plastics*"). There,
16 plaintiffs presented a "pooled" regression that,
17 estimated a single industry-wide overcharge. *Id*. at *15-16. The
18 defendants' expert tested the pooled regression by running regressions individually
19 for class members and found that the individual regressions showed no proof of
20 impact to substantial portions of the proposed class. *Id*. at *16-17. The *Plastics*
21 court credited the results of the individual regressions defendants tested,[6] and
22 rejected the plaintiffs' model because "the single estimates produced by [plaintiff
23 expert's] regressions are in fact not representative of individual class member
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[6] In *Plastics*, the defendants' expert modified the plaintiffs' pooled regression to run different individual regressions for each direct purchaser.

experience." *Id*. at 16; *see also Food Lion, LLC v. Dean Foods Co.*, 312 F.R.D. 472, 489 (E.D. Tenn. 2016) (rejecting model that "assumes that the average overcharge applies to each individual class member and each product in each zip code" because when run on a "zip code by zip code basis . . . [the] model showed no evidence of impact for 26.3% of zip codes").

Just yesterday, the First Circuit reversed an order granting class certification for lack of predominance. The district court had determined that 10% uninjured class members was *de minimis*, but the First Circuit reversed, finding that the individual inquiries required to determine which of the 10% had been injured would "predominate and render adjudication unmanageable[.]" *Asacol*, 2018 WL 4958856, at *2-3, 8, 11-12. The *Rail Freight* district court, on remand, similarly found that 12.7% of a class "is beyond the outer limits of what can be considered *de minimis* for purposes of establishing predominance." *Rail Freight IV*, 292 F. Supp. 3d at 137-38 (observing that 5% to 6% appears to constitute the "outer limits" of the *de minimis* threshold).

See Lidoderm, 2017 WL 679367, at *11,

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[7]

DPPs have failed to demonstrate predominance under Rule 23, and their Motion should be denied.

B.

Rail Freight I, 725 F.3d at 252-53 (vacating class certification based on district court's failure to consider the effect of false positives).

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2 *See, e.g.*, *Concord*
3 *Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) (rejecting
4 damages model that "failed to account for market events that both sides agreed
5 were not related to any anticompetitive conduct" and "did not separate lawful from
6 unlawful conduct"); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353
7 (3d Cir. 1975) (vacating judgment where expert failed to distinguish between
8 "losses resulting from unlawful, as opposed to lawful, competition.").[8]
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These are not cherry-picked results.

See *Food Lion,* 312 F.R.D. at 495 (denying class certification in part because plaintiffs' proffered regression model "does not reliably measure the effect of the alleged conspiracy" since it "does not find zero overcharges for these purchases [that were unrelated to the conspiracy]"); *Plastics*, 2010 WL 3431837, at *17 ("Plaintiffs' proposed method of proof demonstrates impact where

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there in fact was none, [and therefore the] motion for certification will be denied.”).

C. DPPs' Claimed "Evidence" of Common Impact Relies on Arbitrary and Incorrect Assumptions

As such, DPPs lack reliable common proof of classwide impact.

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a. ██████████ **ss Period**

Until recently, DPPs consistently alleged a conspiracy that lasted from July 1, 2004 to May 8, 2017. (*See* Third Consol. Compl. at ¶¶ 2, 225.) ██████████

b. ██████████

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[12] ██████████ EPPs maintained their original, longer class period in another amended complaint filed *after* EPPs' motion. (Fifth Am. Consol. Class Action Compl. of the Indirect Purchaser End Payer Pls., ECF No. 1208, ¶ 2.) It was not until after Defendants' October 2, 2018 opposition to EPPs' motion ██████████ (Sixth Am. Consol. Class Action Compl. of the Indirect Purchaser End Payer Pls., ECF No. 1461, ¶ 2.)

DPPs may not put forth "just *any* method for proving

[13] Dr. Mangum states that there may have been some impact in the last months of Benchmark 2, leading up to the beginning of the Class Period. (*Id.* ¶ 164.)

common impact on a classwide basis"—their methodology must be "a reliable means of common proof." *Reed v. Advocate Health Care*, 268 F.R.D. 573, 593 (N.D. Ill. 2009) (emphasis in original). DPPs cannot satisfy this burden with Dr. Mangum's [REDACTED]

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[REDACTED] in *Batteries*, the court rejected a regression model that did not incorporate actual cost data from all Defendants for all products. *See*, *e.g.*, *Batteries*, 2017 WL 1391491, at *17-18 ("Dr. Noll's analysis fails to provide a firm foundation for class certification because he was unable to complete an analysis based on the actual cost data for any products other than [one defendant's products]."). The *Batteries* court acknowledged that, although it was "unclear where to lay the blame" for the missing data, "the [c]ourt nevertheless cannot ignore the large gaps in the evidence supporting the ability to demonstrate impact and damages on a class-wide basis." *Id.* at *17-18 (denying direct purchaser plaintiffs' motion because their regression was "based on incomplete and admittedly insufficient data sets."); *see also In re Class 8 Transmission Indirect Purchaser Antitrust Litig.*, 140 F. Supp. 3d 339, 353 (D. Del. Oct. 21, 2015), *vacated in part on other grounds*, 679 Fed.Appx. 135 (3d Cir. 2017) (denying class certification when the expert's model excluded available data that was related to the prices it was trying to predict); *In re Photochromic Lens Antitrust Litig.*, No. 8:10-CV-00984-T-27EA, 2014 WL 1338605, at *23 (M.D. Fla. Apr. 3, 2014) "([Direct purchaser plaintiffs] fail to provide a workable methodology for

1 demonstrating that the claims can be proven with common evidence because [their
2 expert] failed to use the actual transactional prices when that data was available.").
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20 compromise his model's reliability and it should
21 be rejected for this reason alone.
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At either level, DPPs have failed to show impact to all or nearly all of their proposed class.

* * *

Rule 23 "commands" courts to take a "hard look at the soundness of statistical models that purport to show predominance." *Rail Freight I*, 725 F.3d at 255; *see also ODD*, 303 F.R.D. at 320 ("[T]he inquiry must be to determine if the proffered expert testimony has the requisite integrity to demonstrate class-wide impact."). Dr. Mangum's Pooled DPP Model and its unsupported assumptions are not proof of classwide impact, and DPPs' Motion should be denied.

V. CONCLUSION

DPPs have no common method capable of proving antitrust injury to all or nearly all of the class they seek to certify, and therefore, DPPs' Motion for Class Certification should be denied.

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Dated: October 16, 2018

Respectfully submitted,

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SIGNATURE ATTESTATION

Under Section 2.f.4 of the Court's CM/ECF Administrative Policies, I hereby certify that authorization for filing this document has been obtained from each of the other signatories shown above, and that all signatories have authorized placement of their electronic signature on this document.

October 16, 2018

s/ Belinda S Lee
Belinda S Lee

Counsel for Defendants StarKist Co. and Dongwon Industries Co., Ltd.

1 **CERTIFICATE OF SERVICE**

2 I certify that on October 16, 2018, I filed the foregoing document with the
3 Clerk of the Court for the United States District Court, Southern District of
4 California, by using the Court's CM/ECF system, which will serve electronic
5 notification of this filing to all counsel of record. I further certify that on October
6 16, 2018, I caused counsel of record to be served with a true, correct, and un-redacted
7 copy of the foregoing document via e-mail.
8
9 October 16, 2018 s/ Belinda S Lee
10 Belinda S Lee
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