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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
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7 MARKUS WILSON, et al.,

8 Plaintiffs,

9 v.

10 FRITO-LAY NORTH AMERICA, INC.,

11 Defendant.

Case No.12-cv-01586-JST

**ORDER GRANTING MOTION TO  
PARTIALLY LIFT STAY**

Re: ECF No. 154

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13 Before the Court is Defendant Frito-Lay North America, Inc.'s Motion to Partially Lift the  
14 Stay and Reinstate Motion for Summary Judgment. ECF No. 154. The Court previously stayed  
15 this case pending the resolution of two Ninth Circuit appeals: Jones v. ConAgra Foods, Inc., No.  
16 14-16327 (9th Cir. July 15, 2014) ("Jones") and Brazil v. Dole Packaged Foods, LLC, No. 14-  
17 17480, 2016 WL 5539863 (9th Cir. Sept. 30, 2016) ("Brazil"). The Ninth Circuit has since issued  
18 a decision in Brazil, but not in Jones. For the reasons set forth below, the Court will grant the  
19 motion to partially lift the stay with respect to Defendant's motion for summary judgment.

20 **I. BACKGROUND**

21 In March 2012, Plaintiffs Markus Wilson and Doug Campen filed a putative class action  
22 lawsuit alleging that Defendant misbranded several of its food products. ECF No. 1. On March  
23 13, 2015, Plaintiffs moved for class certification. ECF No. 119. Two weeks later, Defendant filed  
24 a motion for summary judgment. ECF No. 123. On April 24, 2015, Plaintiffs moved for a stay of  
25 all proceedings pending the Ninth Circuit's resolution of Jones, arguing that the decision would  
26 likely provide controlling authority on issues of class certification. ECF No. 136 at 4. Neither  
27 party discussed Brazil in its briefing on the stay motion.  
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1 On July 20, 2015, the Court<sup>1</sup> ordered a stay of Plaintiffs’ motion for class certification and  
 2 Defendant’s motion for summary judgment pending the Ninth Circuit’s resolution of Jones and  
 3 Brazil.<sup>2</sup> ECF No. 150. The Court explained that “it would be just as ill-advised to proceed with  
 4 [the motion for summary judgment] prior to a resolution of Brazil as it would be to proceed on the  
 5 class certification motion without resolution of Jones.” Id. at 4. Though it found Jones most  
 6 relevant to class certification, the Court also concluded that Jones is “likely to be relevant to — if  
 7 not dispositive of — both the motion for class certification and the motion for summary  
 8 judgment.” Id. at 3-4. The Court ordered the parties to notify the Court within 14 days of  
 9 publication of a decision by the Ninth Circuit. Id. at 5. The Court also stated that if Brazil and  
 10 Jones were not decided contemporaneously, the Court would entertain motions to partially lift the  
 11 stay. Id. On February 12, 2016, the Court terminated the motions for class certification and  
 12 summary judgment in light of the stay, allowing parties to re-file the motions after the resolution  
 13 of Brazil and Jones. ECF No. 152.

14 The Ninth Circuit issued a memorandum disposition in Brazil on September 30, 2016. The  
 15 Ninth Circuit has stayed Jones, however, pending the Supreme Court’s resolution of Microsoft  
 16 Corp. v. Baker, No. 15-457 (2015). Defendant now asks this Court to partially lift the stay with  
 17 respect to the motion for summary judgment and to reinstate the previous summary judgment  
 18 briefs. The parties do not dispute that the motion for class certification should remain stayed  
 19 pending a decision in Jones. See ECF No. 154 at 7-8; ECF No. 155 at 4-5.

20 **II. LEGAL STANDARD**

21 A court’s “power to stay proceedings is incidental to the power inherent in every court to  
 22 control the disposition of the causes on its docket with economy of time and effort for itself, for  
 23 counsel, and for litigants.” Landis v. North American Co., 299 U.S. 248, 254 (1936). A stay is  
 24 “an exercise of judicial discretion, and the propriety of its issue is dependent upon the  
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26 <sup>1</sup> This case was reassigned from Judge Conti to the undersigned on November 3, 2015.

27 <sup>2</sup> The Court independently discovered that a sister court, which stayed a similar case pending  
 28 Jones, had also granted a stay pending Brazil. See Leonhart v. Nature’s Path Foods, LLC, No. 13-  
 cv-00492, 2015 WL 3548212, at \*1 (N.D. Cal. June 5, 2015).

1 circumstances of the particular case.” Nken v. Holder, 556 U.S. 418, 433 (2009) (internal  
2 alterations, citations, and quotations omitted).

3 District courts consider three factors when deciding whether to stay proceedings: (1) “the  
4 possible damage which may result from the granting of a stay”; (2) “the hardship or inequity  
5 which a party may suffer in being required to go forward”; and (3) “the orderly course of justice  
6 measured in terms of the simplifying or complicating of issues, proof, and questions of law which  
7 could be expected to result from a stay.” CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962).

### 8 **III. DISCUSSION**

#### 9 **A. New Conditions Relevant to Lifting Stay**

10 The Court has the discretion to grant or lift stays depending on the circumstances of the  
11 particular case. Nken, 556 U.S. at 433. Here, the circumstances have changed since the Court  
12 imposed the stay. Those changes justify partially lifting the stay.

#### 13 **1. Ninth Circuit Decision in Brazil**

14 The Court noted in its stay order that Brazil is more relevant to the motion for summary  
15 judgment while Jones is more relevant to the motion for class certification. ECF No. 150 at 4  
16 (“The . . . appeal briefs pending before the Ninth Circuit call directly into question many of the  
17 same factual circumstances and points of law Defendant argues merit the grant of summary  
18 judgment in this case. . . . As Brazil appears [to] be largely if not directly on-point for the  
19 summary judgment motion at bar, it would be just as ill advised to proceed with this motion prior  
20 to a resolution of Brazil as it would be to proceed on the class certification motion without  
21 resolution of Jones.”). The issuance of the Brazil decision, though non-precedential, eliminates  
22 the main reason for staying Defendant’s motion for summary judgment.

#### 23 **2. Resolution of Jones Has Minimal Bearing on the Present Case**

24 There is no need to wait for a decision in Jones to proceed with the motion for summary  
25 judgment. The issue on appeal in Jones is whether the district court erred in denying class  
26 certification. See Brief of Appellant at 10, Jones v. ConAgra Foods, Inc., No. 14-16327 (9th Cir.  
27 Nov. 21, 2014). The Ninth Circuit’s ruling is therefore unlikely to affect the summary judgment  
28 proceedings here, and does not justify a continued stay of that motion. See Lockyer v. Mirant

1 Corp., 398 F.3d 1098, 1113 (9th Cir. 2005) (vacating a district court’s stay where the case would  
2 be unaffected by the result of a separate proceeding).

3 Plaintiffs’ contrary arguments are unpersuasive. Although Plaintiffs emphasize that  
4 Defendant twice relied on the district court’s decision in Jones in its summary judgment motion,  
5 any reliance is minimal and does not justify a stay. First, Defendant cited Jones in support of its  
6 argument that Plaintiffs lack standing to seek injunctive relief because they have no plans to buy  
7 the disputed products in the future. ECF No. 123 at 22 (citing Jones for the proposition that “some  
8 courts have held that . . . it is plaintiff’s burden to establish clearly and unequivocally that he will  
9 buy the products again in the future and thus stands to be harmed by them.”). But this is only one  
10 of Defendant’s standing arguments; Defendant also claimed that Plaintiffs cannot seek injunctive  
11 relief because Frito-Lay stopped using the labels and would not use them in the future. Id.  
12 Therefore, Jones is unlikely to be dispositive on Defendant’s standing argument. Moreover, Jones  
13 is factually distinct from this case. In Jones, the plaintiff never alleged a future intent to purchase  
14 the challenged products, whereas here, that fact is disputed. See Jones v. ConAgra Foods, Inc.,  
15 No. 12-1633, 2014 WL 2702726, at \*13 (N.D. Cal. June 13, 2014); ECF No. 155 at 6. Finally, the  
16 Court is not without guidance on the issue of standing to seek injunctive relief in a consumer  
17 labelling case. See, e.g., Lilly v. Jamba Juice Co., No. 13-CV-02998-JST, 2015 WL 1248027  
18 (N.D. Cal. Mar. 18, 2015). The Court can decide the standing question without waiting for Jones.

19 Second, Defendant cites Jones to support its argument that Plaintiffs failed to establish  
20 that the Frito-Lay labels were deceptive. ECF No. 123 at 29-31. Specifically, Defendant argues  
21 that Plaintiffs improperly rely on an expert report regarding the labels’ materiality to show  
22 deceptiveness,<sup>3</sup> and that this Court should reject Plaintiffs’ expert report in any event because a  
23 similar report was rejected by the district court in Jones. Id. at 30. In Jones, the district court  
24 rejected the plaintiff’s expert report because it was “ipse dixit” on the issue of materiality. Id. The  
25 Ninth Circuit, therefore, may not even address the expert report in the context of deceptiveness, if

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27 <sup>3</sup> Materiality is a separate element from the likelihood of deception. ECF No. 123 at 30 (citing  
28 Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 309 n.5 (1st Cir. 2002)  
 (“Whether a misrepresentation is material is . . . a separate inquiry from whether a  
 misrepresentation deceived the consuming public.”)).

1 it discusses the report at all. Regardless, the Court can make a finding on the materiality and  
2 deceptiveness of the Frito-Lay labels based on existing case law.

3 Plaintiffs separately argue that this Court should wait for Jones because the Ninth Circuit is  
4 reviewing the district court's rejection of the plaintiff's proposed damages model. Again, the  
5 differing procedural postures of the two cases counsels against a stay. Here, Defendant argues on  
6 summary judgment that Plaintiffs do not seek damages nor do they have a claim for damages.  
7 ECF No. 123 at 19-20, 27-28. In Jones, the Ninth Circuit will address the propriety of the  
8 damages model in the context of class certification. The Ninth Circuit's decision, while relevant  
9 to class certification, has little bearing on the motion for summary judgment. Therefore, the Court  
10 will not continue the stay on Defendant's motion for summary judgment.

11 **B. CMAX Factors**

12 When considering a stay, courts consider the possible damage that could result from  
13 staying the case, the hardship or inequity caused by moving forward, and the orderly course of  
14 justice. CMAX, 300 F.2d at 268. At this time, these factors weigh in favor of lifting the stay with  
15 respect to the summary judgment motion.

16 Jones will provide only minimal guidance related to Defendant's summary judgment  
17 motion. Additionally, it could be many months before the Ninth Circuit decides Jones, which has  
18 been stayed pending a decision by the Supreme Court in Baker. It would be inefficient to delay  
19 Defendant's motion for summary judgment for an undefined period of time to wait for a case that  
20 has so little relevance to the summary judgment proceedings. See Yong v. INS, 208 F.3d 1116,  
21 1119 (9th Cir. 2000) ("If a stay is especially long or its term is indefinite, we require a greater  
22 showing to justify it."). This is particularly so in a case, like this one, that has been pending since  
23 2012.

24 Neither party will be prejudiced if the stay is lifted with respect to the summary judgment  
25 motion. Plaintiffs have raised concerns about the cost of duplicative briefing if they have to  
26 respond to the motion for summary judgment now and re-file their motion for class certification  
27 after Jones is decided. But because the summary judgment motion is fully briefed, the risk of  
28 harm from duplicative filings is minimal. This case has been pending for five years. The Court

1 declines to continue the stay of Defendant's motion for summary judgment based on a marginally  
2 relevant appellate case.

3 **CONCLUSION**

4 The circumstances have changed since the stay was imposed and it is in the interest of  
5 justice to continue with summary judgment proceedings. The Court grants Defendant's motion to  
6 partially lift the stay with respect to the motion for summary judgment. The motion for class  
7 certification remains stayed pending the Ninth Circuit's resolution of Jones.

8 The parties do not need to provide supplemental briefing regarding Brazil. The Court will  
9 not, however, entertain arguments about other new cases at the hearing on the motion for summary  
10 judgment if those arguments are not first presented in writing. Given the amount of time that has  
11 elapsed since the motion for summary judgment was originally filed, the Court will allow for the  
12 filing of an amended motion for summary judgment (and amended opposition). If no amended  
13 motion is filed by February 24, 2017, at 5:00 p.m., the Court will reinstate Defendant's summary  
14 judgment motion, and Plaintiffs will have the customary time to respond under the local rules.

15 IT IS SO ORDERED.

16 Dated: February 10, 2017

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19 JON S. TIGAR  
United States District Judge