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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GINA WOOD, Plaintiff and Appellant, v. HONEY BAKED HAM, INC., Defendant and Respondent.	B261248 (Los Angeles County Super. Ct. BC475867)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.

Franceschi Law Corporation and Ernest J. Franceschi for Plaintiff and Appellant.

Peterson, Martin & Reynolds and M. Henry Walker for Defendant and Respondent.

INTRODUCTION

Gina Wood appeals from a judgment in favor of Honey Baked Ham, Inc. after a court trial on her claims for unfair competition and false advertising in connection with a newspaper advertisement for quarter hams. The trial court found that Wood did not meet her burden of proving the advertisement was deceptive or misleading to a reasonable consumer. We conclude Wood has not shown the evidence compels a contrary finding, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Gina Wood Decides To Buy a Quarter Ham*

On December 23, 2011 Gina Wood saw a newspaper "flyer" for a Honey Baked Ham quarter ham. The quarter ham is a relatively new product by Honey Baked Ham, which has patented its process of quartering a ham, to appeal to customers in a small market segment who want a ham for a smaller social gathering. Quarter hams come in a great variety of sizes and weights; a quarter ham can feed between four and 17 people.[1]

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[1] Over the years, hogs have genetically changed, and the sizes of half hams and quarter hams have increased. Genetic changes in pigs typically occur at one to three percent per year. (Clark, *Does Dolly Deserve Defense? An Analysis of the Patentability of Cloned Livestock* (2014) 15 J. High Tech. L. 135, 163.) "[G]enetic selection of animals for rapid weight gain and other traits," however, has resulted "in very excitable pigs . . . who are extremely difficult to move in a quiet manner at the slaughter plant." (Wolfson, *Beyond the Law: Agribusiness*

At the top of the advertisement is a picture of a small girl, who appears to be pouting, next to the lines "Unfortunately, kids tell the truth. 'It's HoneyBaked or nothing!'" In the middle of the advertisement is a picture of a partially-sliced ham, below the words "The HONEYBAKED HAM Company—Delight, Indulge, Save!" and above the words "AFFORDABLE EXCELLENCE." In the lower right corner of the advertisement are the words "IT TAKES DAYS TO MAKE A HANDCRAFTED LEGEND — · MARINATED FOR DAYS · SLOOOWLY SMOKED · SECRET CRUNCHY SWEET GLAZE."

In the lower left corner of the advertisement is the language that gives rise to this lawsuit. In a box with a notched border, the following words appear: "New! HoneyBaked® Quarter Ham. Spiral sliced & Crunchy Sweet Glaze. STARTING AT $23.99. Just the Right Size For Smaller Groups Serving Up to 5 People." The font of the language "starting at" is much smaller than the font of "$23.99." At the bottom of this portion of the advertisement, in smaller font, are the words "A limited number of Quarter Hams are available at each location. Offer available while supplies last. At participating locations only. Valid through 12/31/11."

Wood decided to buy the quarter ham for a holiday party she and her husband, Ernest Franceschi, were going to attend. Wood called the Honey Baked Ham store in Culver City to reserve a quarter ham. An employee of the store took her reservation, gave her a reservation number, and told her to arrive at the store early the next day.

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and the Systemic Abuse of Animals Raised for Food or Food Production (1996) 2 Animal L. 123, 134.)

B. *Wood Pays $6.71 More Than She Wanted To Pay for the Quarter Ham*

Wood went to the Culver City store the next morning with the advertisement and her reservation number. After waiting 30 minutes in the crowded store, Wood presented her reservation number to a store employee and received a quarter ham with a price of $30.70. According to Wood, when she showed the employee the advertisement, the employee said, "We're out of those. We don't have those." The employee also said what Wood was holding was "advertising, not a coupon," and that the prices for the quarter hams varied. When asked if she wanted the $30.70 ham, Wood reluctantly agreed to buy it, even though she believed the advertisement was a coupon for a $23.99 quarter ham. Wood did not ask for a cheaper or smaller ham, nor did she ask to speak with a manager. Wood also observed store employees tell other customers who were holding the advertisement, "it's not a coupon."

Wood had noticed the "starting at" language before the price of $23.99 and had seen "starting at" in other advertisements. She believed, however, that the "starting at" language in this advertisement referred to half hams, full hams, and other larger sizes of hams that cost more than $23.99. Wood also assumed that the next larger size ham would be double the price.

C. *Wood Files This Action*

Wood filed this action on December 27, 2011, individually and on behalf of a class of quarter ham purchasers in California. In the operative first amended complaint, Wood alleged, on behalf of herself and all similarly situated persons who

purchased quarter hams at any California Honey Baked Ham store in November and December 2011, that the advertisement "appeared to be a coupon good for the purchase of a [quarter] ham at the discounted price of $23.99 up to the expiration date of December 31, 2011." She alleged that the advertisement was "calculated to create the impression that any person could 'clip the coupon' and present same" and buy a quarter ham for $23.99. She also alleged that she paid "the regular price of $30.70," which "result[ed] in an overcharge of $6.71 and monetary loss to her personally." Wood alleged causes of action for violations of Business and Professions Code sections 17200 and 17500, the unfair competition and false advertising laws, and Civil Code section 1770, subdivision (a)(9), a provision of the Consumer Legal Remedies Act prohibiting deceptive advertising. She sought disgorgement of between $1 million and $3 million in overcharges, an injunction, and attorneys' fees. On September 6, 2013 the court denied Wood's motion for class certification.

The court conducted a court trial on October 14, 2014. Richard Gore, an officer of Honey Baked Ham, testified that, although the company had an unlimited supply of quarter hams because employees can always create a quarter ham out of a half ham or a whole ham, a quarter ham might not be available at a particular time because a store could run out of hams entirely, the ham cutting machine might be temporarily out of order, or no one might be available to cut a ham. There was also testimony about whether the advertisement was an "upsell," which Gore testified was an explanation "to the customer that there's a different way to purchase our products that may be a better value for them." Gore explained: "The quarter ham upsell is explaining to the customer that if they came to purchase a

quarter ham for whatever dollar amount, that there's an advantage to purchasing a larger ham. . . . So there's a procedure that we go through to explain to the customer why it would be to their benefit to purchase a larger ham."[2]

Gore did not learn of any other customers who were confused about the "starting at" language of the advertisement. Nevertheless, Gore investigated Wood's claim and ordered an analysis of the cash register tapes for sales at the Culver City store on December 24, 2011. A review of those sales figures showed that many of the quarter hams the Culver City store sold on that date were sold at prices at or below $23.99, and that there were smaller hams available at the Culver City store when Wood purchased her quarter ham. Gore also testified that, pursuant to the company's policy of keeping the customer happy, the store

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[2] The settled statement includes testimony about several emails, including an email to Gore from a market researcher about the quarter ham advertisement, an email from someone who handled placement of the advertisement, and an email regarding "Quarter Ham Upsell." The emails, however, are not in the record, and the testimony in the settled statement about the emails essentially consists of Gore denying the implications of cross-examination questions by counsel for Wood. The settled statement states that the email from the individual who handled advertising placement stated, "Please note that the $23.99 coupon on the front side backs the $22 off coupon on the back side and if clipped will cut into the $22 Off Coupon." Gore did not remember receiving this email. Gore testified that if Honey Baked Ham had anticipated a customer would have viewed the advertisement as a coupon the company would not "have had it line up with the back page," but neither the company nor consumers viewed the advertisement as a coupon.

employees would have found Wood a smaller ham if she had asked for one, or discounted a larger ham to $23.99.

D. *The Trial Court Finds Wood Did Not Prove Her Claims*

The trial lasted less than one day. There was no court reporter, and neither side requested a statement of decision. The court's ruling is also not in the record, but the judgment submitted by Honey Baked Ham includes the language of the court's ruling.

The court found that a quarter ham is a ham "cut by hand from a full ham from the hind leg of the hog, so the size and weight of each Quarter Ham varies considerably." The "starting at" language of the advertisement "is intended to state that Quarter Hams can be as low as the designated price." Although the advertisement "used a dashed or serrated border around the box describing" the quarter ham, Honey Baked Ham "did not intend for this to be a coupon that had to be presented at the time of purchase."

The court ruled Wood did not meet her burden of proof that the advertisement was likely to deceive the members of the public or a reasonable consumer. The court found that the advertisement "states in bold letters that Quarter Hams are offered at prices 'STARTING AT $23.99.' The [advertisement] cannot be reasonably interpreted as offering all Quarter Hams at a single price of $23.99. Hams and similar meat products are generally priced by weight, and weights and prices vary considerably. [Wood's] interpretation of the [advertisement] as offering a single price for all Quarter Hams is contrary to both

common experience and the clear and express language of the advertisement."

The court also cited what it called "compelling evidence" of the sales at the Culver City Honey Baked Ham store on December 24, 2011. This evidence showed that Honey Baked Ham sold quarter hams "at prices at or below $23.99 throughout the day, at all registers—including the register where [Wood] made her purchase." The court found that Honey Baked Ham "did not engage in practices that were likely to deceive, because a substantial portion of its customers bought Quarter Hams at or below the starting price designated in the advertisement."

Finally, the court rejected Wood's claim that the conduct of Honey Baked Ham was a deceptive "bait and switch"[3] or "upsell"[4]

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[3] "A 'bait and switch' is a form of false advertising in which advertisements may not be bona fide because what the merchant intends to sell is significantly different from that which drew the potential customer in. [Citation.] The practice involves 'luring prospective purchasers through the "bait" of a desirable item, and then talking the customer into or steering him over to a less desirable item, presumably with greater profit margin for the seller.'" (Stern, Bus. & Prof. Code, § 17200 Practice (The Rutter Group 2016) ¶ 4:35, pp. 4-11 to 4-12.) A conventional example of a bait and switch is where "a retail store advertises a washing machine at a low price intending to attract consumers who will be told that all the machines have been sold and will be urged to buy a more expensive substitute." (*Goldberg v. 401 North Wabash Venture LLC* (7th Cir. 2014) 755 F.3d 456, 460.)

[4] An "upsell" is a sales pitch, often by a telemarketer, for additional products or services. (*West Corp. v. Superior Court* (2004) 116 Cal.App.4th 1167, 1170.) "'[I]n any upsell, the seller or telemarketer initiates the offer; it is not the consumer who

program, where the company "lured customers into its stores with a lowball price of $23.99 for Quarter Hams and then pressured them into paying a higher price." The court found that the evidence showed Wood's experience "was an aberration" and that Wood, like other customers at the Culver City store that day, "could have purchased a Quarter Ham at or below $23.99 if she had clearly expressed her desire to do so."

The trial court entered judgment against Wood on November 17, 2014. Honey Baked Ham gave notice of entry of judgment on November 19, 2014. Wood filed a timely notice of appeal on January 9, 2015.

DISCUSSION

A. *Applicable Law*

Business and Professions Code section 17200, the unfair competition law, "prohibits any unfair, unlawful, or fraudulent business act or practice." (*CADC/RADC Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775, 792 (*Bradley*).) Section 17500, the false advertising law, prohibits false or misleading statements in the advertisement of goods or services. (*L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Assn. of Los*

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solicits or requests the transaction. This means that the consumer is hearing the terms of that upsell offer for the first time on the telephone. The consumer has not had an opportunity to review and consider the terms of the offer in a direct mail piece, or to view an advertisement and gather information on pricing or quality of the particular good or service before determining to make the purchase.'" (*Id.* at p. 1176, italics omitted, quoting Federal Trade Commission, Telemarketing Sales Rules, 68 Fed.Reg. 4580, 4597 (Jan. 29, 2003).)

Angeles (2015) 239 Cal.App.4th 918, 922; *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1236.)

Wood bases her unfair competition claim on an allegation of deceptive advertising. She contends that Honey Baked Ham's "advertisement was deceptive and misleading and violated" Business and Professions Code section 17500 and Civil Code section 1770, subdivision (a)(9). (See *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311-312 [a deceptive advertising claim is an allegation under the third prong of the unfair competition law "of a fraudulent business act or practice"]; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950-951 [a violation of the false advertising law "necessarily violates" the unfair competition law]; *Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 124, 154 ["[f]alse advertising under [the false advertising law] constitutes a fraudulent business practice under the [unfair competition law]"].)

The unfair competition and the false advertising laws "'prohibit "not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." [Citation.] Thus, to state a claim under either the [unfair competition law] or the false advertising law, based on false advertising or promotional practices, "it is necessary only to show that 'members of the public are likely to be deceived.'" [Citations.] This is determined by considering a reasonable consumer who is neither the most vigilant and suspicious of advertising claims nor the most unwary and unsophisticated, but instead is 'the ordinary consumer within the target population.' [Citation.] '"Likely to deceive" implies more than a mere possibility that the advertisement might conceivably

be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.'" (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 226.) The question whether consumers are likely to be deceived is generally a question of fact. (*Ibid*; see *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1376.)

Unless an advertisement is directed to a particularly susceptible audience or specific group of consumers, the same reasonable consumer standard applies to claims for violation of Civil Code section 1770. (*Paduano v. American Honda Motor Co., Inc.* (2009) 169 Cal.App.4th 1453, 1497; see *Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1304 ["the reasonable consumer standard is also established for" Civil Code section 1770]; *Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360 [reasonable consumer standard of Business and Professions Code sections 17200 and 17500 applies to Civil Code section 1770].)

B. *Standard of Review*

We generally review the trial court's factual findings after a court trial for substantial evidence. (*Mission West Properties, L.P. v. Republic Properties Corp.* (2011) 197 Cal.App.4th 707, 712; *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 285.) We view all factual matters most favorably to the prevailing party and in support of the judgment, and ordinarily look only at the evidence supporting the successful party, disregarding the contrary showing, thus

resolving all conflicts in favor of that party. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60; accord, *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571; *Meyers v. Board of Administration etc.* (2014) 224 Cal.App.4th 250, 258; see *Smith v. Home Loan Funding, Inc.* (2011) 192 Cal.App.4th 1331, 1335 ["'[i]n viewing the evidence, we look only to the evidence supporting the prevailing party'" and "'[w]e discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact'"].) "When we consider whether the evidence was sufficient to support the . . . verdict, we review the entire record in the light most favorable to the judgment to determine whether there are sufficient facts, contradicted or uncontradicted, to support the judgment. [Citation.] Substantial evidence is evidence that is reasonable and credible. In evaluating the evidence, we accept reasonable inferences in support of the judgment and do not consider whether contrary inferences may be made from the evidence." (*Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 462-463; see *Smith v. Home Loan Funding, Inc.*, *supra*, 192 Cal.App.4th at p. 1335 ["'[w]here the trial court or jury has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable'"].)

The substantial evidence standard "'is typically implicated when a defendant contends that the plaintiff succeeded at trial in spite of insufficient evidence.'" (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465.) The "standard, however, can be 'misleading' in cases when the judgment for one party is based on the other party's failure to satisfy a burden of proof." (*Eriksson v. Nunnink* (2015)

233 Cal.App.4th 708, 732.) Where, as here, the trier of fact has found that the party with the burden of proof did not carry that burden, "'it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. . . . [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838; accord, *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769; *Wells Fargo Bank, N.A. v. 6354 Figarden General Partnership* (2015) 238 Cal.App.4th 370, 390; *Agam v. Gavra* (2015) 236 Cal.App.4th 91, 108; see *In re R.V.* (2015) 61 Cal.4th 181, 201 [where party fails to meet its burden on an issue in the trial court, "the inquiry on appeal is whether the weight and character of the evidence . . . was such that the [trial] court could not reasonably reject it"].)

Moreover, "[w]here, as here, the judgment is against the party who has the burden of proof, it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor. That is because unless the trial court makes specific findings of fact in favor of the losing plaintiff, we presume the trial court found the plaintiff's evidence lacks sufficient weight and credibility to carry the burden of proof. [Citations.] We have no power on appeal to judge the credibility of witnesses or to

reweigh the evidence." (*Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486.)

C. *The Evidence in the Settled Statement Does Not Compel a Finding in Favor of Wood*

The trial court found that the advertisement would not likely have deceived a significant number of reasonable consumers or members of the public. The court reasoned that "starting at" was unambiguous and meant exactly that: the price of a quarter ham started at $23.99 but could be higher. The advertisement was not for a fixed price of $23.99. The court also relied on common knowledge that ham and other meats are generally sold by weight, and the price for a cut of meat varies by weight. The court also found that Wood's experience was aberrant.

The evidence at trial, as summarized in the settled statement, does not compel a contrary finding. The language of Honey Baked Ham's advertisement for the quarter ham would not, as a matter of law, likely mislead or deceive "the ordinary consumer within the target population." (*Chapman v. Skype Inc.*, *supra*, 220 Cal.App.4th at p. 226; see *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 100 ["'the primary evidence in a false advertising case is the advertising itself'"]; accord, *Hypertouch, Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th 805, 839.) Indeed, a reasonable consumer would understand the words "starting at $23.99" to mean that a quarter ham would cost $23.99 or more, depending on the weight, and that the smaller the quarter ham, the lower the price. (See *Kenney v. Glickman* (8th Cir. 1996) 96 F.3d 1118, 1120 ["meat and poultry are sold by weight"].) Common knowledge and experience confirms this. (See *Lara v.*

Nevitt (2004) 123 Cal.App.4th 454, 460 [jury can make inferences "using common sense"]; *People v. Bogle* (1995) 41 Cal.App.4th 770, 778 ["'jurors must be given enough latitude in their deliberations to permit them to use common experiences and illustrations in reaching their verdicts'"]; *People v. Jordan* (1962) 204 Cal.App.2d 782, 790 ["trier of fact may use common sense and his general experience in observing the conduct of human beings in reaching a conclusion from the facts proved"].) Wood submitted no evidence, in the form of a survey or testimony by other customers, that there was any likelihood the advertisement deceived any members of the public. Even Wood admitted she had prior experience with advertisements that included the "starting at" language.[5]

Wood cites to no "uncontradicted and unimpeached" evidence of such a character and weight that it leaves "'no room for a judicial determination that it was insufficient to support'" the trial court's finding. (*Almanor Lakeside Villas Owners Assn. v. Carson*, *supra*, 246 Cal.App.4th at p. 769.) Wood did testify she believed the "starting at" language referred to half- or full-sized hams. None of the language in the advertisement, however, refers to half hams or full hams. Not only was the trial court

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[5] Vehicle Code section 11713.1, subdivision (i)(1), provides that, when a licensed car dealer advertises using "phrases such as 'starting at,' 'from,' 'beginning as low as,' or words of similar import . . . in reference to an advertised price, the advertisement shall disclose the number of vehicles available at that advertised price." Wood has not cited to any similar statute or regulation governing the sale of ham. In any event, the advertisement stated that only certain locations were participating, there was a limited number of quarter hams available at each location, and the offer was subject to supply limits.

entitled to discredit Wood's testimony on this point (see *Gargir v. B'nei Akiva* (1998) 66 Cal.App.4th 1269, 1277 [trier of fact can "exercise[] its common sense to reject all of plaintiff's testimony even without" an instruction on the issue]; *Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1511 [trier of fact can reasonably reject testimony "as belying common sense"]), the trial court was entitled to conclude that, even if Wood were confused by the "starting at" language, a reasonable consumer would not have been. (Cf. *B.V.D. Co. v. Davega-City Radio, Inc.* (S.D.N.Y. 1936) 16 F.Supp. 659, 660-661 [advertisements stating that customers could buy for $2.74 women's swim suits that were "'[r]egularly up to $5.00'" and had "'[v]alues up to $5.00'" were deceptive because the store only included in the sale swim suits that regularly sold for $3.95].)

Nor does the evidence compel a finding contrary to the court's finding that Honey Baked Ham did not engage in a deceptive "bait and switch" or "upsell" scheme of luring customers to stores with "a lowball price of $23.99" and then pressuring them into paying a higher price for a quarter ham. The trial court credited Gore's testimony that the advertisement was not an improper "upsell campaign" and concluded that Wood's "argument has no merit." The court impliedly found that what counsel for Wood suggested was a nefarious quarter ham upsell was not a scheme to get customers to pay more for a quarter ham, but rather an explanation to customers that they could obtain a better value by purchasing a ham larger than a quarter ham (for example, by buying a half ham rather than two quarter hams). The trial court also credited Gore's testimony that Wood could have purchased a quarter ham for $23.99 or less if she had asked. There is no evidence in the settled statement that, by offering the

customer the opportunity to obtain a better price per pound for a larger cut of ham, Honey Baked Ham intended to sell its customers a significantly different or more expensive quarter ham. In fact, there was no "switch": Honey Baked Ham advertised quarter hams starting at $23.99, and Wood received a quarter ham for a few dollars more than $23.99. (See *L-3 Global Communications Solutions, Inc. v. U.S.* (Fed.Cl. 2008) 82 Fed.Cl. 604, 613 [in order to show a bait and switch, "an actual 'switch' [must have] occurred"].) And the evidence showed that the Culver City Honey Baked Ham store sold quarter hams "at prices at or below $23.99 throughout the day, at all registers." All Wood had to do was ask for a smaller ham. Instead, she filed a class action, and failed to meet her burden of proof.

DISPOSITION

The judgment is affirmed. Honey Baked Ham, Inc. is to recover its costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J. KEENY, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.