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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: POM WONDERFUL LLC)	Case No. ML 10-02199 DDP (RZx)
MARKETING AND SALES)	MDL Number 2199
PRACTICES LITIGATION,)	
)	
)	ORDER GRANTING DEFENDANT'S MOTION
)	FOR DECERTIFICATION
)	
)	
)	
_____)	Dkt. No. 246

Presently before the court is Defendant's Motion to Decertify Class. Having considered the submissions of the parties, the court is inclined to GRANT the Motion.

I. Background

Plaintiffs' Master Consolidated Complaint ("MCC") alleges, on behalf of a class of consumers, that Defendant POMWonderful LLC ("Pom") falsely and misleadingly advertised that certain Pom juice products provide various health benefits, and that millions of dollars of scientific research demonstrate these benefits. The MCC brings causes of action for violations of 1) California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17200, et seq., 2) California's Unfair Competition Law ("UCL"), Cal. Civ. Code §

1 17200, et seq., and 3) California's Consumer Legal Remedies Act
2 ("CLRA"), Cal. Civ. Code § 1750, et seq.

3 On September 28, 2012, this court certified a damages class
4 comprised of all persons who purchased a Pom Wonderful 100% juice
5 product between October 2005 and September 2010. Now, after the
6 completion of discovery, Pom moves to decertify the class.

7 **II. Legal Standard**

8 An order regarding class certification is subject to
9 alteration or amendment prior to final judgment. Fed.R.Civ.P.
10 23(c)(1)(c). Such an order is, therefore, inherently tentative.
11 Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978). Thus,
12 this court is free to modify the certification order in light of
13 subsequent developments in the litigation. Gen. Tel. Co. of SW. v.
14 Falcon, 457 U.S. 147, 160 (1982). The court may decertify a class
15 at any time. Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 966 (9th
16 Cir.2009). On a motion for decertification, as at the
17 certification stage, the burden to demonstrate that the
18 requirements of Federal Rules of Civil Procedure 23(a) and (b) are
19 met lies with the party advocating certification. Marlo v. United
20 Parcel Serv. Inc., 639 F.3d 942, 947 (9th Cir. 2011).

21 **III. Discussion**

22 A. Damages

23 Defendant argues that Defendants have failed to show that
24 common issues of fact regarding Plaintiffs's damages predominate
25 over individualized questions, and that Federal Rule of Civil
26 Procedure 23(b)(3)'s predominance requirement has therefore not
27 been met. Defendant first argues that Plaintiffs fail to satisfy
28 new, more stringent predominance requirements set forth in the

1 Supreme Court's recent decision in Comcast Corp. v. Behrend, 133
2 S.Ct. 1426 (2013). Defendant further asserts that Plaintiffs' two
3 alternative damages models, a "Full Refund" model and a "Price
4 Premium" model, are each legally, as well as methodologically,
5 unsound. The court addresses each issue in turn.

6 1. Comcast

7 First, Defendant contends that Comcast constituted a change in
8 the law regarding damages inquiries under Rule 23(b)(3) and placed
9 a higher burden on Plaintiffs to satisfy Rule 23(b)(3)'s
10 predominance requirement. (Mot. at 4; Reply at 4.) In Comcast,
11 plaintiffs alleged four different theories of antitrust impact
12 against a cable television provider. Comcast, 133 S.Ct. at 1430.
13 The trial court found that three of the four theories were not
14 suited to classwide resolution. Id. at 431. The trial court found
15 the remaining theory capable of class-wide proof, and concluded
16 that damages on that single theory could be determined on a class-
17 wide basis. Id. The plaintiffs' damages expert calculated an
18 amount of damages, but used a model that did not isolate damages
19 resulting from any one of the four theories of antitrust impact.
20 Id. The district court nevertheless certified a plaintiff class,
21 and the Third Circuit affirmed. Id.

22 The Supreme Court granted certiorari to determine whether
23 "certification was improper because respondents had failed to
24 establish that damages could be measured on a classwide basis," and
25 reversed. Id. at 1431 n.4. The Court emphasized that class
26 certification inquiries, particularly regarding Rule 23(b)(3)'s
27 predominance requirement, require "rigorous analysis" that will
28 often overlap with the merits of the underlying claims. Id. at

1 1432. The Court looked, therefore, to the methodology employed by
2 plaintiffs' damages expert. Id. at 1433.

3 The Court concluded that, because plaintiffs' damages model
4 assumed the validity of all four of plaintiffs' theories of
5 antitrust impact, including three theories unsuitable to class
6 treatment, the damages model failed to tie damages to the lone
7 remaining theory of liability. Id. at 1433-34. Thus, the Court
8 reasoned, plaintiffs had not established that damages were capable
9 of measurement on a classwide basis, and without such a showing,
10 plaintiffs could not show that classwide issues of fact
11 predominated over individual questions and satisfied Rule 23(b)(3).
12 Id. at 1433.

13 Defendant here suggests that, under Comcast, Plaintiff's
14 damages model must not only prove classwide damages but must also
15 "distinguish accurately between injured and uninjured persons, and
16 calculate the amount of individual damages." (Mot. at 5.) This
17 court declines to adopt Defendant's expansive reading of Comcast.
18 Defendant cites the Federal Circuit's decision in In re Rail
19 Freight Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2013)
20 for support. There, the court interpreted and applied Comcast for
21 the essential proposition that "[n]o damages model, no
22 predominance, no class certification." In re Rail Freight, 725
23 F.3d at 253. Contrary to Defendant's argument, however, the court
24 also explicitly stated, "That is not to say the plaintiffs must be
25 prepared at the certification stage to demonstrate through common
26 evidence the precise amount of damages incurred by each class
27 member." Id. at 252. Rather, as the Ninth Circuit has explained,
28 Comcast holds that, under rigorous analysis, "plaintiffs must be

1 able to show that their damages stemmed from the defendant's
2 actions that created the legal liability." Leyva v. Medline
3 Indus., Inc., 716 F.3d 510, 514 (9th Cir. 2013). Thus, the court
4 proceeds to examine Plaintiffs' damages models and the relationship
5 of those models to Plaintiffs' legal theories, without requiring,
6 as Defendant would have it, that the models distinguish injured
7 class members from uninjured persons or reveal the amount of each
8 individual's damages.

9 2. Full Refund Model

10 The question whether Plaintiffs' damage models measure
11 classwide damages remains. "At class certification, plaintiff must
12 present a likely method for determining class damages"
13 Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365, 379 (N.D.
14 Cal. 2010). Plaintiffs' damages expert, David Nolte, utilized two
15 alternative models.¹ The first of these, the "Full Refund" model,
16 assumes that consumers would not have purchased Defendant's juices
17 if not for the alleged misrepresentations. Under that scenario,
18 the Full Refund model uses the full retail price paid as the
19 measure of damages. (Nolte Deposition 118:8-10 ("[I]f the health
20 benefits were what caused the purchase, at least predominantly,
21 then a [full] refund would be appropriate;" Nolte Report at 14.)
22 The Full Refund model concludes that consumers spent \$450 million
23 on Pom's 100% pomegranate juice and juice blends during the class
24 period, and that class damages are 100% of the amount paid, or \$450
25 million. (Nolte Report at 14.)

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27 ¹ Nolte did not "endeavor[] to draw a conclusion regarding
28 which one of those two [models] is necessarily the right one."
(Nolte Depo. at 110::18-19.)

1 Defendant argues that the Full Refund model is invalid because
2 it fails to account for any value consumers received. (Mot. at 6.)
3 Even putting aside any potential health benefits, Defendant argues,
4 consumers still received value in the form of hydration, vitamins,
5 and minerals. (Mot. at 7.) Nolte acknowledged that the Full
6 Refund model does not account for any value, such as calories or
7 hydration, received. (Nolte Dep. 141:17-25.)

8 Defendant is correct. "The False Advertising Law, the Unfair
9 Competition Law, and the CLRA authorize a trial court to grant
10 restitution to private litigants asserting claims under those
11 statutes." Colgan v. Leatherman Tool Group, Inc., 135 Cal.App.4th
12 663, 694 (2006). "The difference between what the plaintiff paid
13 and the value of what the plaintiff received is a proper measure of
14 restitution." In re Vioxx Class Cases, 180 Cal.App.4th 116, 131
15 (2009). "A party seeking restitution must generally return any
16 benefit that it has received." Dunkin v. Boskey,
17 82 Cal.App.4th 171, 198 (2000) (internal quotations and citation
18 omitted). Restitutive recovery requires evidence of the actual
19 value of what the plaintiff received. In re Vioxx, 180 Cal.App.4th
20 at 131.

21 Plaintiffs argue that if a jury determines that consumers did
22 not receive any wanted benefit from Defendant's juices, a full
23 refund would be appropriate. In determining the appropriate amount
24 of restitution, however, the question is not whether a plaintiff
25 received the particular benefit he sought or what the value of that
26 benefit was or would have been. Plaintiffs do not cite, nor is the
27 court aware of, any authority for the proposition that a plaintiff
28 seeking restitution may retain some unexpected boon, yet obtain the

1 windfall of a full refund and profit from a restitutionary award.
2 Nor can Plaintiffs plausibly contend that they did not receive any
3 value at all from Defendant's products.² Because the Full Refund
4 model makes no attempt to account for benefits conferred upon
5 Plaintiffs, it cannot accurately measure classwide damages.

6 3. Price Premium Model

7 Plaintiffs' second, alternative damages model is a "Price
8 Premium" model. The Price Premium model assumes that, absent the
9 alleged misrepresentations, "demand for Pom would have been less
10 and the Pom market price would have been lower." (Nolte Report at
11 16.) The Price Premium model quantifies damages "by comparing the
12 price of Pom with other refrigerated juices of the same size." Id.
13 This model yields a damage calculation of "about \$290 million."
14 Id.

15 i. Fraud on the Market Theory

16 The parties appear to agree that the Price Premium model
17 depends upon a "fraud on the market" theory. Discussed most often
18 in regard to issues of reliance in the context of securities fraud
19 litigation, frauds on the market result where misrepresentations
20 artificially inflate the price of a stock or other security. See
21 United States v. Berger, 587 F.3d 1038, 1042 (9th Cir. 2009).
22 Frauds on the market are only possible in efficient markets, where
23 the price of (in most cases) a stock is determined by openly
24 disseminated information about a business. See Binder v.
25 Gillespie, 184 F.3d 1059, 1064 (9th Cir. 1999). Because a material

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27 ² In other words, the Full Refund model depends upon the
28 assumption that not a single consumer received a single benefit, be
it hydration, flavor, energy, or anything else of value, from
Defendant's juices.

1 misrepresentation made in an efficient market will affect the price
2 of a security, regardless whether a particular investor hears the
3 misrepresentation, a stock purchaser's reliance on the
4 misrepresentation is often presumed. Id.

5 Plaintiffs essentially assert (1) that a presumption of
6 reliance dependent upon Defendant's alleged material
7 misrepresentations establishes the existence of a fraud on the
8 entire juice market, (2) that because of that fraud on the market,
9 every consumer who purchased Defendant's juices was similarly
10 damaged, regardless of motivation or satisfaction, and (3) damages
11 can therefore be measured on a classwide basis. (Opp. at 13:12-
12 16.) In other words, Plaintiffs contend that Plaintiff's
13 misrepresentations shifted the demand curve for Pom juices upward
14 and increased the market price, such that everyone who bought Pom
15 juice paid more than they would have in the absence of the alleged
16 misrepresentations.

17 As this court explained at the certification stage, before the
18 conclusion of discovery, the facts alleged here could conceivably
19 support a presumption of reliance for purposes of proving liability
20 under the CLRA. (Class Certification Order, Dkt. 111 at 10 (citing
21 Johnson v. General Mills, Inc., 275 F.R.D. 282, 289 (C.D. Cal.
22 2011) and Chavez, 268 F.R.D. at 376.)) Whether the entire class
23 can be said to have relied upon the alleged misrepresentations for
24 liability purposes, however, does not necessarily speak to the
25 adequacy of a damages model. Indeed, Plaintiffs cite no authority
26 for the proposition that a fraud on the market theory has any
27 relevance to damages.

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1 Nor, for that matter, is the court aware of any authority
2 applying a fraud on the market theory to a consumer action.
3 Putting that issue aside, a plaintiff alleging a fraud on the
4 market must show that the relevant market is efficient. See
5 Smilovits v. First Solar, Inc., 295 F.R.D. 423, 429 (D. Ariz.
6 2013). This court is not persuaded, nor do Plaintiffs contend,
7 that the market for Defendant's high-end refrigerated juice
8 products operates efficiently. Instead, Plaintiffs assert that
9 they need not demonstrate market efficiency because, for liability
10 purposes, reliance is presumed. Put differently, Plaintiffs argue
11 that because a fraud on the market gives rise to a presumption of
12 reliance, the reverse is true, and a presumption of reliance
13 necessarily means there has been a fraud on the market.

14 Plaintiffs' logic is flawed. A fraud on the market cannot
15 exist without an efficient market. Binder, 184 F.3d at 1064. By
16 definition, an efficient market prices a good on the basis of all
17 available material information. See Note, The Fraud-on-the-Market
18 Theory, 95 Harv. L. Rev. 1143, 1154 (1982). Reliance comes after
19 the fact. Plaintiffs appear to suggest that, given a presumption
20 of reliance, materiality of a misrepresentation is a substitute for
21 market efficiency.³ This reasoning has some superficial appeal, as
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23 ³ Plaintiffs' citation to In re Steroid Prod. Cases, 181 Cal.
24 App. 4th 145 (2010) does not support their contention that "the
25 measure of restitution or damages may be determined on a class-wide
26 basis through proof of materiality of the misrepresentation."
27 (Opp. at 15:1-2.) While the Steroid court did state that a
28 plaintiff could show that "deceptive conduct caused the same damage
to the class by showing that the alleged misrepresentation was
material . . .," the court was referring to "damage" in the actual
injury sense, and not, as Plaintiffs suggest, in reference to
restitution or monetary damages. In re Steroid, 181 Cal. App. 4th
at 156-57.

1 universal reliance upon a material fact might have some ultimate
2 effect on demand and prices. If information had no effect on
3 demand, the argument goes, it would not be material in the first
4 instance. Efficiency, however, is not demonstrated simply by any
5 change in price, but rather, in large part, by a change in price
6 that has some empirically demonstrable relationship to a piece of
7 information. Binder, 184 F.3d at 1065. In an inefficient market,
8 in contrast, some information is not reflected in the price of an
9 item. See In re Genesisintermedia, Inc., No. CV 01-9024-SVW, 2007
10 WL 1953475 at *5 (C.D. Cal. June 28, 2007). In such a market, even
11 a material misrepresentation might not necessarily have any effect
12 on prices. Absent such traceable market-wide influence, and where,
13 as here, consumers buy a product for myriad reasons, damages
14 resulting from the alleged misrepresentations will not possibly be
15 uniform or amenable to class proof.⁴

16 ii. Relationship to Theory of Liability

17 Even assuming that a fraud on the market theory is relevant to
18 a damages inquiry, and that it can be applied in the consumer
19 context, and that it can exist outside an efficient market, and
20 that its existence is established by a presumption of reliance,
21 Plaintiffs "must be able to show that their damages stemmed from
22 the defendant's actions that created the legal liability."
23

24 ⁴ The theoretical possibility of "fluid recovery," or a class
25 action cy pres remedy, does not affect the predominance inquiry
26 with respect to class damages. See Feitelberg v. Credit Suisse
27 First Boston, LLC, 134 Cal. App. 4th 997, 1015 (2005). Fluid
28 recovery is a means of paying out damages, not of determining what
a damage award should be. See Kraus v. Trinity Mgm't Servs., 23
Cal.4th 116, 127 (2000). Furthermore, even in class actions, fluid
recovery cannot be used as a means to obtain nonrestitutionary
disgorgement. Feitelberg, 134 Cal. App. 4th at 1016-20.

1 Leyva, 716 F.3d at 514; see also Comcast, 133 S.Ct. at 1433-34.
2 Plaintiffs must demonstrate, therefore, that Defendant's alleged
3 misrepresentations caused Plaintiffs to pay a "price premium" of
4 \$290 million more than Plaintiffs otherwise would have paid for
5 Defendant's products in the absence of the misrepresentations.

6 Plaintiffs' damages expert, Mr. Nolte, testified that he "did
7 a study that showed there was a price premium." (Nolte Dep. at
8 152:12-13.) Without any survey or other evidence of what
9 consumers' behavior might otherwise have been, and after excluding
10 a series of products for various reasons of varying persuasive
11 power, the Price Premium model uses an average of refrigerated
12 orange, grape, apple, and grapefruit juice prices as a benchmark.⁵
13 (Nolte Report at 18.) While Nolte opined that "the price premium
14 is attributed to something, and health benefits would seem to be a
15 logical inference in light of this particular product," he also
16 explained that he "didn't do a study that addressed various
17 consumer motivations." (Nolte Depo. at 152:17-20, 153: 13-15.)

18 In other words, as Plaintiffs acknowledge, Nolte made no
19 attempt, let alone an attempt based upon a sound methodology, to
20 explain how Defendant's alleged misrepresentations caused any
21 amount of damages. Instead, Nolte simply observed that Pom's
22 juices were more expensive than certain other juices. Rather than
23 answer the critical question why that price difference existed, or
24 to what extent it was a result of Pom's actions, Nolte instead
25 assumed that 100% of that price difference was attributable to

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27 ⁵ There does not appear to be any basis to believe that fully
28 informed consumers would choose one or any of these juices, nor to
believe that class members would all pay the same amount for the
alternate juices.

1 Pom's alleged misrepresentations. Put differently, Nolte assumed,
2 without any methodology at all to support the assumption, that not
3 a single consumer would have chosen Pom juice over some
4 agglomeration of orange, grapefruit, apple, and grape juice if not
5 for Pom's allegedly deceptive advertising.⁶ Rather than draw any
6 link between Pom's actions and the price difference between the
7 four-juice average benchmark price and average Pom prices, the
8 Price Premium model simply calculates what the price difference
9 was. This damages "model" does not comport with Comcast's
10 requirement that class-wide damages be tied to a legal theory, nor
11 can this court conduct the required "rigorous analysis" where there
12 is nothing of substance to analyze.⁷

13 B. Ascertainability

14 Courts have often held that, in addition to the Rule 23
15 factors, plaintiffs seeking class certification must demonstrate
16 that an ascertainable class exists. See Wolph v. Acer Am. Corp.,
17 272 F.R.D. 477, 482 (N.D. Cal. 2011); Chavez, 268 F.R.D. at 376;
18 see also Berqer v. Home Depot USA, Inc., 741 F.3d 1061, 1071 n.3
19 (9th Cir. 2014) (referring to "threshold ascertainability test").
20 This is not to say that the identities of class members must be
21 known at this stage, but rather that there must be some
22

23 ⁶ The methodology required to explain consumer behavior will
24 vary, of course, with the nature of the relevant product and
25 circumstances of sales. Single use products, such as, for example,
26 an expensive pill claiming to cure baldness, likely require less
27 rigorous methodologies and models than do consumables such as
28 Defendant's juices, which consumers presumably purchase for a wide
variety of reasons.

⁷ For these and related reasons, Nolte's report and testimony
are not admissible under Daubert v. Merrell Dow Pharm., Inc., 509
U.S. 579 (1993).

1 administratively manageable method of determining whether a person
2 is a class member. Id.

3 Class actions, and consumer class actions in particular, each
4 fall on a continuum of ascertainability dependent upon the facts of
5 the particular case or product. While no single factor is
6 dispositive, relevant considerations include the price of the
7 product, the range of potential or intended uses of a product, and
8 the availability of purchase records. See Red v. Kraft Foods,
9 Inc., No. CV 10-1028-GW, 2012 WL 8019257 at *5 (C.D. Cal. Apr. 12,
10 2012.) In situations where purported class members purchase an
11 inexpensive product for a variety of reasons, and are unlikely to
12 retain receipts or other transaction records, class actions may
13 present such daunting administrative challenges that class
14 treatment is not feasible.⁸ See, e.g., In re Phenylpropanolamine
15 Prods., 214 F.R.D. 614, 620 (W.D. Wash. 2003) (describing critical
16 manageability problems concerning sales of a three dollar
17 medication, despite possibility of fluid recovery); Sethavanish v.
18 ZonePerfect Nutrition Co., No. 12-2907-SC, 2014 WL 580696 at *5
19 (N.D. Cal. Feb. 13, 2014) (describing intra-circuit split and
20 denying certification because proposed class of nutrition bar
21 purchasers would not be ascertainable).

22 Here, Plaintiffs acknowledge that, based on the volume of
23 product sold, every adult in the United States is a potential class
24 member. Realistically, the class includes ten to fifteen million
25 purchasers. These millions of consumers paid only a few dollars

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27 ⁸ As the Red court noted, these administrative difficulties
28 implicate not only the threshold ascertainability question, but
also manageability and superiority concerns under Rule 23(b)(3).
Red, 2012 WL 8019257 at * 4.

1 per bottle, and likely made their purchases for a variety of
2 reasons.⁹ No bottle, label, or package included any of the alleged
3 misrepresentations. Few, if any, consumers are likely to have
4 retained receipts during the class period, which closed years
5 before the filing of this action. This case therefore falls well
6 toward the unascertainable end of the spectrum. Here, at the close
7 of discovery and despite Plaintiffs' best efforts, there is no way
8 to reliably determine who purchased Defendant's products or when
9 they did so.

10 **IV. Conclusion**

11 For the reasons stated above, Defendant's Motion to Decertify
12 Class is GRANTED.

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14 IT IS SO ORDERED.

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17 Dated: March 25, 2014


DEAN D. PREGERSON
United States District Judge

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25 _____
26 ⁹ Plaintiffs do not dispute that consumer motivations in this
27 case likely vary greatly, and could include a wide array of
28 sentiments such as "I was thirsty," "I wanted to try something
new," "I like the color," "It mixes well with other beverages," or
even, "I like the taste," or, as Plaintiffs contend, "It prevents
prostate cancer."