

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



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,	)	
	)	
	)	<b>ORDER GRANTING DEFENDANT'S MOTION</b>
	)	<b>FOR DECERTIFICATION</b>
	)	
	)	
_____	)	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 (9<sup>th</sup> 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.<sup>1</sup> 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.)

26

---

27 <sup>1</sup> 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.<sup>2</sup> 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

---

26  
27 <sup>2</sup> 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.

28



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.<sup>3</sup> This reasoning has some superficial appeal, as  
22

---

23 <sup>3</sup> 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.<sup>4</sup>

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 <sup>4</sup> 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.<sup>5</sup>  
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

26 \_\_\_\_\_

27 <sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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

---

23 <sup>6</sup> 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.

<sup>7</sup> 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.<sup>8</sup> 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

---

26  
27 <sup>8</sup> 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.<sup>9</sup> 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.

13  
14 IT IS SO ORDERED.

15  
16  
17 Dated: March 25, 2014

  
DEAN D. PREGERSON  
United States District Judge

18  
19  
20  
21  
22  
23  
24  
25 \_\_\_\_\_  
26 <sup>9</sup> 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."