UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-4936-GHK (VBKx)	Date	April 15, 2014
Title	*Lucina Caldera v. The J.M. Smucker Company*		

Presiding: The Honorable	**GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE**	
Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
None	None

Proceedings: **(In Chambers) Order re:** Plaintiff's Motion for Class Certification (Dkt. 108)

This matter is before us on Plaintiff's Motion for Class Certification ("Motion"). We have considered the papers filed in support of and in opposition to the Motion, including the Parties' supplemental briefing, and deem this matter appropriate for resolution without oral argument. *See* L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows:

I. Background

On June 6, 2012, Plaintiff Lucina Caldera filed this consumer class action against Defendant The J.M. Smucker Company on behalf of individuals who purchased Defendant's Uncrustables and Crisco Original and Butter Flavor Shortening products. Plaintiff alleges that the packaging of these products misleads consumers into believing that they are healthful, when in reality they both contain trans fat and Uncrustables also contains high fructose corn syrup. Plaintiff alleges that Crisco's packaging contains the following deceptive and misleading claims: (1) "50% Less Saturated Fat Than Butter"; (2) "USE INSTEAD OF BUTTER OR MARGARINE FOR BAKING"; (3) a saturated fat comparison chart comparing the saturated fat content of butter to Crisco; and (4) "All-vegetable." With respect to Uncrustables, Plaintiff alleges that the product's packaging contains the following deceptive and misleading claims: (1) "wholesome"; (2) "made with homemade goodness"; (3) "Whole Grain 16g or more per serving"; and (4) "Whole Wheat."

Based on these allegations, Plaintiff asserts the following claims: (1) violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.* ("UCL"), unlawful prong; (2) violation of the UCL, fraudulent prong; (3) violation of the UCL, unfair prong; (4) violation of California False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*; (5) violation of California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.*; (6) breach of express warranty under California law; and (7) breach of implied warranty of merchantability under California law.[1]

[1] Plaintiff's Complaint also alleges various claims under Ohio law. On March 25, 2013, we dismissed the Ohio state law claims. (Dkt. 45.)

Plaintiff now seeks to certify the following classes:

(1) Monetary Relief Crisco Class: "All persons who purchased in California, on or after February 1, 2000, for personal or household use and not for resale or distribution, Crisco Original Shortening or Crisco Butter Flavor Shortening in packaging bearing one or more of the following claims or graphics: 'All-vegetable,' '50% Less Saturated Fat Than Butter,' 'USE INSTEAD OF BUTTER OR MARGARINE FOR BAKING,' or a bar chart comparing the saturated fat content of butter to Crisco."

(2) Monetary Relief Uncrustables Class: "All persons who purchased in California between February 1, 2000 and April 30, 2011, for personal or household use and not for resale or distribution, Uncrustables Sandwiches, in packaging bearing one or more of the following claims: 'wholesome,' 'homemade goodness,' 'Whole Wheat,' or 'Whole Grain.'"

(3) Injunctive Relief Crisco Class: "All persons in California who commonly purchase or are in the market for Crisco Original Shortening or Crisco Butter Flavor Shortening for personal or household use and not for resale or distribution, in packaging bearing one or more of the following claims or graphics: 'All-vegetable,' '50% Less Saturated Fat Than Butter,' 'USE INSTEAD OF BUTTER OR MARGARINE FOR BAKING,' or a bar chart comparing the saturated fat content of butter to Crisco."

(4) Injunctive Relief Uncrustables Class: "All persons in California who commonly purchase or are in the market for Uncrustables Sandwiches for personal or household use and not for resale or distribution, in packaging bearing one or more of the following claims: 'wholesome,' 'homemade goodness,' 'Whole Wheat,' or 'Whole Grain.'"

Plaintiff seeks to certify all classes under Rule 23(b)(3) or to certify the monetary relief classes under Rule 23(b)(3) and injunctive relief classes under Rule 23(b)(2).

II. Discussion

A. Class Certification Standard

A motion for class certification is governed by the requirements of Federal Rule of Civil Procedure 23, and the party seeking certification bears the burden of affirmatively demonstrating that the Rule 23 requirements have been met. *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Here, Plaintiff seeks to certify Rule 23(b)(2) and (b)(3) classes. In addition to bearing the burden of establishing the requirements of (b)(2) and (b)(3), Plaintiff must prove the following Rule 23(a) prerequisites:

(1) "the class is so numerous that joinder of all members is impracticable";

(2) "there are questions of law or fact common to the class";
(3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class";
(4) "the representative parties will fairly and adequately protect the interests of the class."

In addition, although not specifically mentioned in Rule 23(a), ascertainability is a threshold prerequisite to class certification. *See Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 163 (C.D. Cal. 2002).

Before certifying Plaintiff's classes, we must conduct a "rigorous analysis" to ensure Plaintiff has met the prerequisites of Rule 23. *Zinser*, 253 F.3d at 1186. While we may generally accept the allegations in the complaint as true in determining class certification, we must consider the merits of the claims to the extent they overlap with the Rule 23 requirements, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011), as "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)).

B. Certification of Monetary Relief Classes Under Rule 23(b)(3)

Under Rule 23(b)(3), a plaintiff must show that "the questions of law or fact common to class members predominate over any questions affecting only individual members," and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). It focuses on the relationship between the common and individual issues, requiring that the common issues be qualitatively substantial in relation to the issues peculiar to individual class members. *See Hanlon v Chrysler Corp.,* 150 F.3d 1011, 1022 (9th Cir. 1998); *Edwards v. The First Am. Corp.,* 251 F.R.D. 454, 458 (C.D. Cal. 2008) ("Predominance is determined not by counting the number of common issues, but by weighing their significance."). The predominance standard is "far more demanding" than Rule 23(a)'s commonality requirement. *Amchem*, 521 U.S. at 623. Where dissimilarities among class members do not impede the generation of common answers, the post-*Dukes* predominance inquiry requires us to consider whether other issues unique to individual class members are likely to render adjudication by representation impractical. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011).

Defendant argues that Plaintiff has failed to satisfy the predominance requirement because she has not identified any method of proving damages on a classwide basis, and thus determining damages will involve individualized inquiries that predominate over common questions. (Opp'n 23-24.) In response, Plaintiff contends that individual damage issues do not predominate because "Plaintiff's methodology of calculating damages is susceptible to classwide proof based on California sales data

Smucker has provided." (Reply 23.)

"At class certification, [P]laintiff must present a likely method for determining class damages, though it is not necessary to show that [this] method will work with certainty at this time." *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010). The predominance requirement is satisfied only if Plaintiff is "able to show that [class] damages stemmed from the defendant's actions that created the legal liability." *Leyva v. Medline Industries, Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (interpreting the holding of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1435 (2013)); *see also Forrand v. FedEx Corp.*, 2013 WL 1793951, at *3 (C.D. Cal. Apr. 25, 2013) ("As the Supreme Court reemphasized in *Comcast*, in order for Rule 23(b)(3)'s predominance requirement to be satisfied, a plaintiff must bring forth a measurement that can be applied classwide *and* that ties the plaintiff's legal theory to the impact of the defendant's allegedly illegal conduct."). Thus, after *Comcast*, the question is "whether [a] plaintiff has met its burden of establishing that damages can be proven on a classwide basis." *In re Diamond Foods, Inc., Sec. Litig.*, 2013 WL 1891382, at *252 (N.D. Cal. May 6, 2013). Here, Plaintiff has failed to meet this burden.

In this action, Plaintiff seeks restitutionary damages. Restitution is available as a form of relief under Plaintiff's FAL, UCL, and CLRA claims. *See Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 694 (2006). The proper measure of restitution is "[t]he difference between what the plaintiff paid and the value of what the plaintiff received." *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009).[2] In granting restitution, "[a] court of equity may exercise its full range of powers in order to accomplish complete justice between the parties." *Colgan*, 135 Cal. App. 4th at 698. Nonetheless, the restitution awarded must be a "quantifiable sum," and the award must be supported by "substantial evidence." *Id.* at 700. "Thus, the restitution awarded to class members must correspond to a measurable amount representing the money that the defendant has acquired from each class member by virtue of its unlawful conduct." *Guido v. L'Oreal, USA, Inc.*, 2013 WL 3353857, at *14 (C.D. Cal. July 1, 2013).

Plaintiff does not offer any method of proving damages on a classwide basis. Plaintiff merely states that damages can be proven on a classwide basis based on Defendant's California sales data. However, this is not a case where class members would necessarily be entitled to a full refund of their purchase price. Thus, Defendant's sales data alone would not provide sufficient information to measure classwide damages. Restitution based on a full refund would only be appropriate if not a single class member received any benefit from the products. *See In re POM Wonderful LLC*, 2014 WL 1225184, at *3 & n.2 (C.D. Cal. Mar. 25, 2014) ("[T]he Full Refund model depends upon the assumption that not a single consumer received a single benefit . . . from Defendant's juices."); *Red v. Kraft Foods, Inc.*, 2012 WL 8019257, at *11 (C.D. Cal. Apr. 12, 2012) ("The Court thus cannot approve Plaintiffs' proposal that Kraft disgorge the full profits earned from sales of the Products within the class period, as Plaintiffs

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[2] Similarly, under Plaintiff's breach of warranty claims, the proper measure of damages is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." Cal. Com. Code § 2714(2).

undeniably received some benefit from the Products and thus awarding class members full refunds on their purchases would constitute nonrestitutionary disgorgement."). As evidenced by Plaintiff's own deposition testimony, class members undeniably received some benefit from the products. Awarding class members a full refund would not account for these benefits conferred upon class members. Accordingly, classwide damages cannot accurately be measured based on Defendant's sales data alone.

This is not to say that damages can never be determined on a classwide basis under California's consumer protection statutes. In many cases, restitution may be proven on a classwide basis by computing the effect of unlawful conduct on the market price of the product purchased by the class. *Colgan*, 135 Cal. App. 4th at 698-99. This measure of restitution, however, requires the plaintiff to produce evidence that "attaches a dollar value to the 'consumer impact or advantage' [to defendant] caused by the unlawful business practices." *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at * 12 (N.D. Cal. Jan. 7, 2014) (quoting *Colgan*, 135 Cal. App. 4th at 700). "Expert testimony may be necessary to determine the amount of price inflation attributable to the challenged practice." *Id.*; *see also POM Wonderful*, 2014 WL 1225184, at *5 (finding predominance requirement not satisfied because plaintiffs' damages expert failed to "answer the critical question why the price difference existed, or to what extent is was a result of Pom's actions"). Here, Plaintiff has failed to offer any evidence, let alone expert testimony, that damages can be calculated based on the difference between the market price and true value of the products. Without such evidence, Plaintiff has failed to satisfy her burden of proving that damages may be proven on a classwide basis. *See Comcast*, 133 S. Ct. at 1342; *POM Wonderful*, 2014 WL 1225184, at *1-5 (decertifying class because plaintiffs' damages models did not properly tie classwide damages to plaintiffs' theory of defendant's liability); *Astiana*, 2014 WL 60097, at *11-13 (denying certification of a (b)(3) class because plaintiff failed to offer a model capable of measuring damages across the entire class); *Guido*, 2013 WL 3353837, at *13-15 (same). In reality, the true value of the products to consumers likely varies depending on individual consumer's motivation for purchasing the products at issue. Accordingly, because Plaintiff has failed to satisfy the predominance requirement, Plaintiff's Motion to certify the monetary relief classes is **DENIED**.[3, 4]

C. Certification of Injunctive Relief Classes Under 23(b)(2)

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[3] *Leyva*, which Plaintiff relies on in her Motion, does not compel a different result. In *Leyva*, a wage-and-hour class action, the calculation of awarding damages was a "purely mechanical process." 716 F.3d at 514. If putative class members proved the defendants' liability, damages could be calculated based on each employee's lost wages as reflected in the defendant's records. *Id.* Thus, *Comcast*'s requirement that plaintiffs be able to tie their damages to their theory of defendant's liability was satisfied. *Id.* Here, however, "awarding relief . . . is not comparably straightforward because . . . [a] finding of liability by itself . . . does not give rise to a mechanical method of awarding classwide relief." *Guido*, 2013 WL 3353857, at *16 n.5.

[4] In light of this ruling, we do not reach the question of whether Plaintiff has met the Rule 23(a) or other Rule 23(b)(3) criteria.

Under Rule 23(b)(2), class certification may be appropriate where a defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Here, it is not clear whether Plaintiff seeks certification of the injunctive relief classes should we deny certification of the monetary relief classes under 23(b)(3). Rather, Plaintiff merely states that she is giving us the "option" to certify her monetary classes under (b)(3) *and* injunctive classes under 23(b)(2). Further, Plaintiff does not explain why certification of her injunctive claims under Rule 23(b)(2) would be appropriate. It appears that the injunctive relief Plaintiff seeks could be pursued in her individual action, and that there is no need to utilize the class action mechanism. Accordingly, Plaintiff's Motion to certify the injunctive relief classes is **DENIED without prejudice**. If Plaintiff believes that certification of her injunctive relief classes is nonetheless appropriate under Rule 23(b)(2), Plaintiff is **ORDERED TO SHOW CAUSE**, in writing, within **14 days hereof**, why certification of her injunctive relief classes is warranted or even necessary inasmuch as any injunctive relief she may be able to obtain in her individual action can be fashioned to direct Defendant's conduct so that it would necessarily affect any class of consumers who are either in the market for or commonly purchase the products at issue. Plaintiff need not readdress the Rule 23(a) requirements.

III. Conclusion

Based on the foregoing, Plaintiff's Motion is **DENIED** in its entirety. Plaintiff's Motion to certify the monetary relief classes is **DENIED with prejudice**. Plaintiff's Motion to certify the injunctive relief classes is **DENIED without prejudice**. This action shall proceed as Plaintiff's individual action only with respect to her claims for monetary relief. Plaintiff's failure to show cause, as required above, will be deemed her abandonment of her request to certify her injunctive relief classes, in which case this action will proceed as Plaintiff's individual action only with respect to her claims for injunctive relief as well.

IT IS SO ORDERED.

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