

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 04/30/09

DEPT. 324

HONORABLE VICTORIA CHANEY

JUDGE

E. SABALBURO

DEPUTY CLERK

✓

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

C. PIEDRA, C.A.

Deputy Sheriff

NONE

Reporter

JCCP4247

Plaintiff

Counsel

COORDINATION PROCEEDING SPECIAL
TITLE RULE (1550 (b))

Defendant

Counsel

VIOXX Cases

NO APPEARANCES

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER OF FEBRUARY 19, 2009

The Court hereby makes its ruling pursuant to its "RULING ON MOTION FOR CLASS CERTIFICATION" as signed and filed this date.

Plaintiffs' motion for certification is DENIED.

A copy of the Court's written ruling is sent to counsel listed below.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 4-30-2009 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 4-30-2009

John A. Clarke, Executive Officer/Clerk

<p align="center">MINUTES ENTERED 04/30/09 COUNTY CLERK</p>

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MINUTES ENTERED
04/30/09
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LOS ANGELES SUPERIOR COURT
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JOHN A. CLARKE, CLERK
[Signature]
BY ELMER SABALBURO, DEPUTY

CASE NO. JCCP 4247

IN RE VIOXX CONSOLIDATED CLASS
ACTION

RULING ON MOTION FOR CLASS
CERTIFICATION

Hearing date: 2/19/09
Ruling date: 4/30/09

After considering the moving, opposition and reply papers and the arguments of counsel at the hearing, the court now rules as follows:

Plaintiffs' motion for certification is DENIED.

FACTUAL BACKGROUND

Merck & Co., Inc. (Merck) marketed and sold the prescription drug Vioxx from June 1, 1999 to October 1, 2004. Vioxx is a non-steroidal anti-inflammatory drug (NSAID) used to treat chronic pain. Many NSAIDs cause serious side effects. Vioxx was developed to avoid certain side effects by selectively inhibiting a form of the enzyme cyclooxygenase, COX-2. Vioxx was the second COX-2 inhibitor to be released on the market, after Celebrex, a drug manufactured by a competitor. Other NSAIDs that are not

1 COX-2 inhibitors have always been available to treat chronic pain, as have many
2 analgesics.

3 Plaintiffs allege that during development and testing of Vioxx, Merck learned the
4 drug posed significant cardiovascular risks and was no more effective at relieving pain
5 than aspirin. They allege Merck concealed its safety concerns from the Food and Drug
6 Administration (FDA) to push Vioxx through the FDA approval process. They allege
7 that after Vioxx was approved, Merck made affirmative misrepresentations regarding the
8 drug's cardiac safety profile directly to consumers and physicians and uniformly failed to
9 disclose the cardiac risks. One clinical study, plaintiffs allege, called the VIGOR study,
10 alerted Merck as early as 2000 to the cardiovascular risks posed by Vioxx. Merck
11 withdrew Vioxx from the market in 2004.

12 13 **PROCEDURAL BACKGROUND**

14
15 Plaintiffs allege Merck's deceptive marketing practices violate the unfair
16 competition law (Bus. & Prof. Code, § 17200 et seq.; UCL) and false advertising law
17 (Bus. & Prof. Code, § 17500 et seq.; FAL), constitute deceptive trade practices under the
18 Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.; CLRA), and resulted in
19 unjust enrichment.

20 Plaintiffs do not allege Vioxx itself harmed anyone or was ineffective, only that
21 consumers lost money by purchasing it because it was more expensive than, but no better
22 than less expensive NSAIDs.

23 Plaintiffs seek to certify a class comprising "All individuals or entities in
24 California who, from June 1, 1999 to October 1, 2004, inclusive, paid some or all of the
25 purchase price for" Vioxx. They also seek certification of a subclass of senior citizens.
26 The main class includes third party payors (TPPs), i.e., entities that purchased Vioxx for
27 the end consumers.
28

1 **CONTENTIONS**

2
3 Plaintiffs contend a class should be certified because Merck's widespread
4 campaign of misrepresentations and nondisclosures, and class members' entitlement to
5 restitution and damages, can be proven on common evidence.

6 Defendant contends individual issues of causation and reliance predominate over
7 any common issues because Merck knew different things about Vioxx at different times
8 and class members, physicians and TPPs were exposed to different representations at
9 different times and were influenced by the representations to varying extents. Defendant
10 also contends individual issues predominate as to whether and how much anyone suffered
11 economic injury. Defendants argue plaintiffs are not typical of and cannot adequately
12 represent TPPs and that class adjudication is not superior to other procedures.

13
14 **DISCUSSION**

15
16 Plaintiffs' UCL and FAL claims may be certified under Code of Civil Procedure
17 section 382 (hereafter "section 382"). A CLRA claim must be certified, if at all,
18 pursuant to the terms of Civil Code section 1781 (hereafter "section 1781"). (*Hogya v.*
19 *Superior Court* (1977) 75 Cal.App.3d 122.)

20 Section 382 permits certification "when the question is of a common or general
21 interest, of many persons, or when the parties are numerous, and it is impracticable to
22 bring them all before the court." A plaintiff bears the burden of demonstrating that class
23 certification under section 382 is proper. (*City of San Jose v. Superior Court* (1974) 12
24 Cal.3d 447, 460; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 654 (*Caro*).)
25 To do so, the plaintiff must "establish the existence of both an ascertainable class and a
26 well-defined community of interest among the class members." (*Linder v. Thrifty Oil Co.*
27 (2000) 23 Cal.4th 429, 435 (*Linder*).) The community of interest requirement has three
28 essential elements: "(1) predominant questions of law or fact; (2) class representatives
with claims or defenses typical of the class; and (3) class representatives who can

1 adequately represent the class.” (*Ibid.*) A plaintiff must also demonstrate that the class
2 procedure is superior to other forms of adjudication. (*Reese v. Wal-Mart Stores, Inc.*
3 (1999) 73 Cal.App.4th 1225, 1234.)

4 Section 1781 mandates certification where: “(1) It is impracticable to bring all
5 members of the class before the court”; “(2) The questions of law or fact common to the
6 class are substantially similar and predominate over the questions affecting the individual
7 members”; “(3) The claims or defenses of the representative plaintiffs are typical of the
8 claims or defenses of the class”; and “(4) The representative plaintiffs will fairly and
9 adequately protect the interests of the class.”

10 Though sections 382 and 1781 are substantially similar, there are important
11 differences. To certify a class under section 382 the court must consider whether
12 certification will bring substantial benefit to the litigants and the court. (*Blue Chip*
13 *Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) Section 1781 requires no such
14 inquiry, and the court has no discretion to deny certification of a CLRA claim where the
15 requirements of section 1781 are met. (*Hogya v. Superior Court, supra*, 75 Cal.App.3d at
16 p. 140.)

17 Under either analysis, the court focuses not on whether plaintiff can affirmatively
18 prove claims at trial but on whether the class action ““will splinter into individual
19 trials,”” given the disputed facts and defendants’ due process right to present individual
20 evidence on the triable issues. (*Kennedy v. Baxter Healthcare Corp.* (1996) 43
21 Cal.App.4th 799, 810, citations omitted.) “[I]ssues affecting the merits of a case may be
22 enmeshed with class action requirements, such as whether substantially similar questions
23 are common to the class and predominate over individual questions or whether the claims
24 or defenses of the representative plaintiffs are typical of class claims or defenses.”
25 (*Linder, supra*, 23 Cal.4th at p. 443.)

1 **A. Numerosity and Ascertainability**

2
3 Sections 382 and 1781 both require that a plaintiff seeking certification
4 demonstrate the proposed class members are ascertainable and sufficiently numerous that
5 joinder is impracticable. Defendant does not dispute that plaintiffs have established these
6 elements. The court finds the proposed class and subclass to be ascertainable and
7 sufficiently numerous that joinder is impractical.

8
9 **C. Typicality**

10
11 Typicality turns on whether a sufficient relationship exists between the injury to
12 the named plaintiff and the conduct affecting the class. (1 Newberg on Class Actions (3d
13 ed. 1992) § 3.13, p. 3-76.) A plaintiff's claim is typical if it arises from the same event
14 or practice or course of conduct that gives rise to the claims of other class members, and
15 if his or her claims are based on the same legal theory. (*Ibid.*) A class representative's
16 claims are typical if the individual facts applicable to the representative are very similar,
17 but not necessarily identical, to the facts common to the class. (*Hanlon v. Chrysler Corp.*
18 (9th Cir. 1998) 150 F.3d 1011, 1020 [class representative's claims are typical "if they are
19 reasonably co-extensive with those of absent class members; they need not be
20 substantially identical".])

21 Defendant argues plaintiffs claims are not typical of those presentable on behalf of
22 TPPs. The court agrees. Defendant presents persuasive evidence that the
23 decisionmaking that goes into purchasing Vioxx on an individual basis is entirely distinct
24 from the process for putting it into a group formulary. The court finds no individual
25 plaintiffs to be typical of any TPP.

1 **D. Whether Common Questions of Law or Fact Predominate**

2
3 Plaintiffs bear the burden of demonstrating, “with substantial evidence, that
4 common questions of law or fact predominate over questions affecting individual
5 members.” (*Capitol People First v. State Dept. of Developmental Services* (2007) 55
6 Cal. App. 4th 676, 689.) To determine whether common questions of law and fact
7 predominate the court analyzes plaintiffs’ theory of recovery and inquires “whether there
8 are issues common to the class as a whole sufficient in importance so that their
9 adjudication on a class basis will benefit both the litigants and the court.” (*Vasquez v.*
10 *Superior Court* (1971) 4 Cal.3d 800, 811 (*Vasquez*); *Capitol People First, supra*, at p.
11 690.) Common issues predominate when they would be “the principal issues in any
12 individual action, both in terms of time to be expended in their proof and of their
13 importance.” (*Id.*, at p. 810.) A class action “cannot be maintained where each
14 member’s right to recover depends on facts peculiar to his case . . .’ because ‘. . . the
15 community of interest requirement is not satisfied if every member of the alleged class
16 would be required to litigate numerous and substantial questions determining his
17 individual right to recover following the “class judgment” determining issues common to
18 the purported class.” (*Caro, supra*, at pp. 667-668, citations omitted.) Class
19 certification is proper where “the issues which may be jointly tried, when compared to
20 those requiring separate adjudication, are so numerous or substantial that the maintenance
21 of a class action would be advantageous to the judicial process and to the litigants.”
22 (*Brown v. The Regents of the University of California* (1984) 151 Cal.App.3d 982, 989.)

23
24 1. Defendants’ Misrepresentations And Nondisclosures Are Subject To
25 Predominately Common Proof

26 Plaintiffs allege defendants engaged in a uniform marketing scheme that was
27 likely to deceive patients and physicians because it either affirmatively misrepresented
28 the cardiac safety profile of Vioxx or failed to disclose cardiac risks.

1 Defendant argues the marketing scheme was nonuniform because different
2 information about Vioxx was available at different times and Merck made different
3 representations, including a significant label change in 2002, from 1999 to 2004.
4 Defendant's argument is without merit. The court discerns from defendant's evidence
5 only one substantive change in the information available to Merck regarding the cardiac
6 risks posed by Vioxx—the emergence of the VIGOR study in 2000. Even if, as
7 defendant argues, the wrongfulness of its conduct must be judged against different
8 standards based on information existing before and after the VIGOR study, that inquiry is
9 only bifurcated, not splintered. Though bifurcation of an inquiry by definition creates
10 two separate inquiries, they are still only two. No evidence suggests evaluation of
11 Merck's conduct against two different standards will be particularly onerous. Defendant
12 argues later confirmatory studies alleged by plaintiffs somehow changed the state of
13 defendant's knowledge, thus further dividing the inquiry as to what defendant knew at the
14 time Vioxx was prescribed. It is incorrect. A confirmatory study does not change what is
15 known, it confirms it.

16 Defendant argues that over the five-plus years that Vioxx was on the market, the
17 package insert changed sixteen times and the patient package insert changed fifteen
18 times. Most significantly, defendant argues, the packaging changed substantially in 2002
19 after release of the VIGOR study results. Defendant overstates the changes. The court
20 discerns from defendant's evidence only one substantive change in the representations
21 made by Merck—the label change in 2002. Again, at most, this change divides, not
22 splinters, the inquiry.

23 Giving all deference to defendant's arguments about what it knew about the
24 cardiac risks posed by Vioxx and when, and what it disclosed about those risks and when,
25 the court finds evaluation of defendant's misrepresentations will split into, at most, three
26 closely related inquiries. Though the inquiries will not be "common," they will not be so
27 disparate or diversionary, in terms either of time to be expended in their proof or their
28 importance, that their separate adjudication would outweigh the benefit of class treatment
of common issues.

1 2. Information Available To Physicians Is Subject To Predominately Common Proof

2
3 Defendant also argues class members' physicians had a constantly changing mix
4 of information about Vioxx's safety profile, as different studies produced progressively
5 more information from 1999 to 2004. (The argument goes to the issue of reliance, which
6 the court discusses at greater length below.) Defendant argues, for example, that reports
7 issued in 2000, 2001 and 2002 publicized the potential cardiac risks posed by Vioxx.
8 Therefore, defendant argues, physicians had different information at different times.

9 The court is not satisfied that the nature of prescription pharmaceutical litigation
10 need materially change with the advent of each new confirmatory pharmaceutical study.
11 Later studies that reinforce earlier ones do not create a constantly evolving mix of
12 information. (Later studies that contradict earlier ones, finding for example that Vioxx
13 does not increase cardiac risks, would not be pertinent because they would not further
14 defendant's thesis—that physicians were apprised of the risks.) At best, the information
15 available to members' physicians materially changed once, in 2000. Assuming that pre-
16 and post-2000 inquiries will be different, again, they will not be so disparate or
17 diversionary, in terms either of time to be expended in their proof or their importance,
18 that their separate adjudication would outweigh the benefit of class treatment of common
19 issues.

20
21 3. Plaintiffs' And Their Physicians' Reliance Is Not Subject To Common Proof

22
23 A CLRA plaintiff must prove damage suffered "as a result of" a deceptive practice
24 (Civ. Code, § 1780, subd. (a)), i.e., "not only that a defendant's conduct was deceptive
25 but that the deception caused" the alleged harm. (*Massachusetts Mutual* (2002) 97
26 Cal.App.4th 1282, 1292, 1293.) Similarly, under the UCL and FAL, restitution may be
27 granted only "as may be necessary to restore to any person . . . any money or property,
28 real or personal, which may have been acquired by means of such unfair competition."
(Bus. & Prof. Code, § 17203, italics added; see *Fletcher v. Security Pacific National*

1 *Bank* (1979) 23 Cal.3d 442, 452; *Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th
2 1094, 1103 [individual claim for restitution requires showing of reliance and causation].)
3 A cause of action for unjust enrichment is a claim for restitution. (*Melchior v. New Line*
4 *Productions, Inc.* (2003) 106 Cal.App.4th 779, 793 [unjust enrichment is “synonymous
5 with restitution”].) The cause of action requires “receipt of a benefit and unjust retention
6 of the benefit at the expense of another.” (*Lectrodryer v. SeoulBank* (2000) 77
7 Cal.App.4th 723, 726.) (Plaintiffs seek not only restitution but also injunctive relief. To
8 the extent they do so, a showing of reliance is arguably unnecessary. However, to that
9 same extent, so is class treatment unnecessary.)

10 Under all of plaintiffs’ causes of action, a central issue will be whether defendant’s
11 alleged misrepresentations or nondisclosures were material to those who purchased
12 Vioxx. ““A misrepresentation of fact is material if it induced the plaintiff to alter his
13 position to his detriment. Stated in terms of reliance, materiality means that without the
14 misrepresentation, the plaintiff would not have acted as he did.”” (*Caro, supra*, 18
15 Cal.App.4th at p. 668, citations omitted.) To recover, therefore, each class member must
16 demonstrate, or it must be inferable classwide, that the misrepresentation or
17 nondisclosure influenced each class member’s prescription decisionmaking.

18 Plaintiffs argue they need not establish class members relied on any
19 misrepresentation or nondisclosure, they need establish only that the misrepresentation or
20 nondisclosure was objectively and reasonably likely to deceive. To an extent, the court
21 agrees. In 2004, Proposition 64 made changes to the UCL and FAL. These changes
22 affected the standing of representative plaintiffs but did not change the underlying
23 elements of the causes of action. In that sense, to state a deception claim under the UCL
24 or FAL “one [still] need only show that members of the public are likely to be deceived.”
25 (See *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1136; see also *Cel-Tech*
26 *Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180;
27 *Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197,
28 210.)

1 But stating a violation of the UCL or FAL does not suffice. Plaintiffs must also
2 establish class members are entitled to the remedy of restitution (as opposed only to
3 injunctive relief). Here, reliance is key, because restitution may be granted only “as may
4 be necessary to restore . . . any money . . . acquired *by means of* such unfair competition.”
5 (Bus. & Prof. Code, § 17203, italics added.) To demonstrate class members lost money
6 by means of defendants’ misrepresentations or nondisclosures, plaintiffs will have to
7 show the misrepresentations or nondisclosures were material, i.e., that they relied on
8 them.

9 To determine whether the cardiac risks posed by Vioxx were material to any given
10 class member requires an examination of the member’s medical needs and history.
11 Plaintiffs adduce no evidence indicating the inquiry can be conducted on a classwide
12 basis. Defendant adduces overwhelming evidence, particularly the declaration of Dr.
13 David Silver, that it cannot be.

14 First, “The process by which a physician decides whether and what to prescribe
15 for a pain patient requires an individualized approach that applies a physician’s clinical
16 judgment to each patient’s unique situation. This decision requires a physician to assess
17 a number of factors which vary from patient to patient, including, among others: a) The
18 condition being treated, including the nature, location, and extent of the pain; b) The risks
19 and benefits associated with the drug; c) The anticipated dose and duration of the
20 prescription; d) The patient’s medical history, including any past gastrointestinal
21 problems or drug reactions or allergies; e) The potential for adverse interactions with a
22 patient’s other medications; f) The anticipated degree of patient compliance; g) The
23 drug’s cost and the patient’s insurance coverage; and h) The patient’s concerns regarding
24 treatment and his or her perception of the severity of the pain.” (Silver decl., ¶ 10) Dr.
25 Silver’s declaration on this point is definitive.

26 An additional individual-specific inquiry would be required to determine the
27 patient’s desires. Defendant’s adduce anecdotal, persuasive evidence that some class
28 members would rather assume the known risk of taking Vioxx in exchange for pain
relief. (E.g. Voelz decl., Exh. 22.) Plaintiffs’ own histories indicate Vioxx was

1 prescribed to them for several different, non-interchangeable reasons. Their evidence
2 only confirms the need for individualized inquiry into the prescription decision. No
3 evidence suggests prescription decisions are made uniformly on the basis of advertising.

4 Any class member who did or would have purchased Vioxx despite defendant's
5 misrepresentations or nondisclosures was not deprived of money "by means of" unfair
6 competition. The law has no interest in awarding a windfall to persons to whom the
7 misrepresentations or nondisclosures were immaterial. Plaintiffs adduce no evidence that
8 will distinguish between class members to whom the cardiac risks posed by Vioxx were
9 material and those to whom they were not.

10 The court finds plaintiffs' and their physicians' reliance on defendant's
11 misrepresentations or nondisclosures are not subject to common proof.

12 13 4. TPP Reliance Is Not Subject To Common Proof

14
15 Given the court's finding that plaintiffs are not typical of TPPs and the finding
16 immediately above that physician and patient reliance requires an individualized inquiry,
17 an in-depth discussion of the reliance inquiry as it pertains to TPPs is unnecessary.
18 Briefly, the court is well satisfied that TPP decisionmaking is almost as variegated as is
19 individual physician/patient decisionmaking. Some TPPs used an open formulary,
20 basically deferring risk assessment to physicians. Others used closed formularies. Even
21 those that used closed formularies sometimes include cardio-risk drugs. Whether any
22 particular TPP would have included Vioxx in its formulary is thus an individual question.

23 24 5. No Inference of Reliance Can Be Made

25
26 Plaintiffs argue that even if they must establish reliance to recover, they can do so
27 presumptively by making a classwide inference of reliance. The argument is without
28 merit. True, "The fact of reliance upon alleged false representations may be inferred
from the circumstances attending the transaction which oftentimes afford much stronger

1 and more satisfactory evidence of the inducement which prompted the party defrauded to
2 enter into the contract than his direct testimony to the same effect.” (*Vasquez, supra*, 4
3 Cal.3d at p. 814, citations omitted.) However, to permit a classwide presumption of
4 reliance on uniform representations the representations must indeed be uniform and must
5 “have been made in regard to a material matter.” (*Ibid.*) Here, there is little if any
6 common evidence as to what consumers perceived or what they would find material.
7 Therefore, the issue of causation (i.e., whether defendants’ nondisclosures induced
8 consumers to purchase Vioxx) “would vary from consumer to consumer.” (*Caro, supra*,
9 18 Cal.App.4th at p. 668.) Because materiality of the representation is not uniform,
10 reliance on it cannot be inferred classwide.

11
12 6. Class Injuries Are Probably Subject to Common Proof

13
14 Plaintiffs’ theory is that they and class members would not have purchased Vioxx,
15 or would not have paid so much for it, had they known of the cardiac risks Vioxx posed.
16 They term this a “benefit of the bargain” theory, while defendant styles it as a “fraud on
17 the market” theory. Defendant further argues plaintiffs present no metric by which a
18 monetary value can be placed on the risk posed by Vioxx.

19 The court is satisfied the injury alleged would be subject to classwide proof.
20 While the court is not satisfied that comparison to other NSAIDs is particularly
21 appropriate or helpful, it can imagine a scenario where a jury is permitted to place a value
22 on the indignity an individual suffers when he or she is exposed to false advertising. The
23 court is unwilling to wave such an injury away and does not believe the advent of
24 Proposition 64 requires it to do so. (See *Kwikset Corp. v. Superior Court* (2009) 171
25 Cal.App.4th 645, 656 [subjection to misrepresentation constitutes injury in fact].)

1 7. Class Damages Are Not Subject to Common Proof
2

3 Plaintiffs propose to measure the monetary value (or detriment) of cardiac risk by
4 comparing Vioxx to safer NSAIDs. Insofar as the inquiry is patient specific, it fails the
5 community of interest test, as discussed above. Furthermore, there appears to be no
6 uniformity among even the named plaintiffs as to how much they paid for Vioxx, and no
7 greater uniformity appears to exist among class members, different individuals having
8 paid different amounts at different times. Overarchingly, no evidence indicates any
9 particular safer NSAID would be a proper comparator for each class member (though the
10 court is confident plaintiffs could come up with an appropriate damages metric
11 eventually).

12 Inability to commonly value each class member's loss does not weigh too heavily
13 against finding that a community of interest exists, as the plaintiffs' bar has become adept
14 at using matrices and statistical models to assess individual damages in a way that does
15 not infringe on the due process rights of culpable defendants. But for what it is worth,
16 the court finds the amount of money lost as a result of defendant's alleged wrongdoing is
17 not subject to common proof.

18
19 **E. Adequacy of representation**
20

21 Adequacy of representation depends on whether plaintiff's attorney is qualified to
22 conduct the litigation and whether the named plaintiff's interests are not antagonistic to,
23 or in conflict with, the interests of the other class members. (*McGhee v. Bank of America*
24 (1976) 60 Cal.App.3d 442, 450.) "Only a conflict that goes to the very subject matter of
25 the litigation will defeat a party's claim of representative status." (*Richmond v. Dart*
26 *Industries, Inc.* (1981) 29 Cal.3d 462, 470.) "Most differences in situation or interest
27 among class members . . . should not bar class suit." (*Id.* at p. 473.)

28 Defendant argue plaintiffs' counsel cannot adequately represent the class because
plaintiffs are individuals, while some class members are TPPs. This is a typicality

1 argument, not an adequacy argument. The court is satisfied that plaintiffs' counsel is
2 very experienced and highly capable in litigating class actions and would adequately
3 represent the class, and that no plaintiff has interests antithetical to those of any TPP.
4

5 **F. Superiority of the Class Action Vehicle**
6

7 Finally, courts are required to carefully weigh respective benefits and burdens of
8 class treatment and to allow maintenance of the class action only where substantial
9 benefits accrue both to litigants and the courts. (*Linder v. Thrifty Oil Co.*, supra, 23
10 Cal.4th at p. 435.)

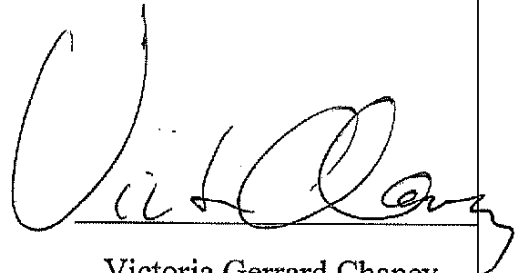
11 Given the above reasoning, the court is not satisfied substantial benefits would
12 accrue to the litigants or court from class treatment here.
13

14 **In sum:**
15

16 **Plaintiffs' motion for certification is DENIED.**
17

18 **IT IS SO ORDERED.**

19 Dated: 4/30/09
20



21 Victoria Gerrard Chaney

22 Judge
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