No. 15-

IN THE
Supreme Court of the United States

GOOGLE INC.,
Petitioner,
v.
PULASKI & MIDDLEMAN, LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL G. RHODES
WHITTY SOMVICHIAN
KYLE C. WONG
COOLEY LLP
101 California Street
5th Floor
San Francisco, CA 94111

NEAL KUMAR KATYAL
Counsel of Record
MARY HELEN WIMBERLY
FREDERICK LIU
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

QUESTIONS PRESENTED

A class action may be certified only if the four prerequisites of Federal Rule of Civil Procedure 23(a) are satisfied (numerosity, commonality, typicality, and fair-and-adequate representation), and the class action falls within one of Rule 23(b)'s defined types. The third subpart of Rule 23(b) is at issue here, and it allows certification only if "the court finds 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." Fed. R. Civ. P. 23(b)(3). In addition, class certification "shall not abridge, enlarge or modify any substantive right" under the Rules Enabling Act. 28 U.S.C. § 2072(b).

This case presents two questions about these requirements. They are:

1. Whether individual damage calculations alone can overwhelm questions common to the class, precluding certification under Rule 23(b)(3).

2. Whether plaintiffs may use a formula that relies on a uniform measure of harm derived from the average experience of all class members as common proof of damages.

PARTIES TO THE PROCEEDINGS

1. Google Inc., petitioner on review, was defendant-appellee below.

2. Pulaski & Middleman, LLC; JIT Packaging, Inc.; RK West, Inc.; and Richard Oesterling, respondents on review, were plaintiffs-appellants below.

RULE 29.6 DISCLOSURE STATEMENT

Google Inc. is a wholly owned subsidiary of Alphabet Inc., a publicly traded company. No other company owns 10% or more of Google's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 15-

GOOGLE INC.,
Petitioner,
v.
PULASKI & MIDDLEMAN, LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Google Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 802 F.3d 979. Pet. App. 1a-21a. Its orders denying rehearing en banc, Pet. App. 66a-67a, and staying its mandate pending the filing of this certiorari petition, Pet. App. 65a, are unreported. The opinion of the United States District Court for the Northern District of California denying class certification is not published in the *Federal Supplement*, but is available at 2012 WL 28068. Pet. App. 22a-59a.

JURISDICTION

The judgment of the Ninth Circuit was entered on September 21, 2015, and a timely petition for rehearing was denied on December 8, 2015. Pet. App. 66a-67a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

This case involves the Rules Enabling Act, 28 U.S.C. § 2072, and Federal Rule of Procedure 23, which are reproduced at Pet. App. 68a-76a.

INTRODUCTION

This is a case where the Ninth Circuit has impermissibly diluted Federal Rule of Civil Procedure 23's rigorous requirements for certification of class actions. The court of appeals reversed the district court's refusal to certify a class of Google advertisers claiming violations of California's unfair-competition laws. Its decision departs from the fundamental principles of class certification that this Court laid down in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), joining and creating circuit splits in the process. Google respectfully asks the Court to grant review and reverse.

The first question presented concerns Rule 23(b)(3)'s predominance requirement. To meet that requirement, a plaintiff must show that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). In many cases, although common questions of *liability* exist, there are nonetheless individual questions of *damages*. So the question frequently arises: Can individual damage

calculations alone overwhelm questions common to the class, defeating certification under Rule 23(b)(3)?

The courts of appeals are divided. Five circuits—the Third, Fourth, Fifth, Eleventh, and D.C. Circuits—have answered yes: Individual damage calculations alone *can* defeat certification under Rule 23(b)(3). By contrast, the Ninth Circuit in this case answered no: Individual damage calculations alone *cannot* defeat certification. That decision flies in the face of this Court's decision in *Comcast*, which held that "individual damage calculations" not simply *can*, but sometimes "*will*," "overwhelm questions common to the class." 133 S. Ct. at 1433 (emphasis added). Because this important and recurring issue has divided the circuits, and because the Ninth Circuit plainly erred, this Court should agree to decide the first question presented.

The second question presented challenges the Ninth Circuit's embrace of a general, one-size-fits-all formula to resolve damages for the whole class. The court of appeals approved the formula *because* it did "not turn on individual circumstances." Pet. App. 21a. But that, of course, is precisely the problem. This Court has expressly "disapprove[d]" just that "novel project" of computing class damages by a formula "without further individualized proceedings." *Wal-Mart*, 131 S. Ct. at 2561. *Wal-Mart*'s holding on that point directly follows from the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, which "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)). "Trial by Formula" forecloses individual defenses and sets damages for plaintiffs at amounts divorced from their particular circumstances, thereby giving plaintiffs greater

substantive rights than they would have in individual proceedings. *Id.*

Consistent with the Rules Enabling Act, the Second, Fourth, Fifth, and Seventh Circuits have all held that damages in class actions cannot be computed using an "abstract analysis of 'averages.'" *E.g.*, *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998). The Ninth Circuit's decision erroneously joins the minority view of the Eighth and Tenth Circuits, contrary to *Wal-Mart*'s instruction. The cert-worthiness of this question is already established; it is currently pending before the Court in *Tyson Foods, Inc.* v. *Bouaphakeo*, 135 S. Ct. 2806 (2015) (granting review of Eighth Circuit decision). *See* Pet. at i, *Tyson Foods, Inc.* v. *Bouaphakeo*, No. 14-1146 (Mar. 19, 2015), 2015 WL 1285369 (first question presented).

In short, the Ninth Circuit's decision "conflicts with" *Comcast* and *Wal-Mart*, and it creates and deepens divisions among the circuits regarding class-certification standards. It threatens to turn the Ninth Circuit into a class-action magnet. And, on the merits, this case should not proceed as a class action; the court of appeals was only able to approve that course by bending the substantive law of restitution to fit the needs of class adjudication and robbing Google of its right to present defenses. Procedural rules are supposed to serve substantive law, not the other way around. The decision below would result in an unwieldy class comprised of hundreds of thousands of different advertisers who purchased millions of different ads from Google over the course of several different years. That entire class will demand restitution from Google for alleged violations of California's unfair competition laws—never mind

that some putative class members *benefited* from the alleged misconduct. And it will do so by punching numbers into an abstract formula, even though—as the district court rightly found—determining the proper amount of restitution for each class member requires a "complex and highly individualized analysis." Pet. App. 56a.

This Court should grant review to bring the Ninth Circuit's class-action jurisprudence in line with *Comcast* and *Wal-Mart*, and to resolve the multiple conflicts among the courts of appeals.

STATEMENT

A. Factual Background

Google AdWords is an online advertising service. During the class period, AdWords allowed advertisers to place ads alongside Google search results or on other webpages that were part of Google's advertising network. Pet. App. 23a. The ads generally were matched to Internet users based on the search queries the users entered on Google (or other search engines) or the subject-matter of the websites they viewed. Pet. App. 5a-6a. The ads typically were short strings of text with hyperlinks that, when clicked, took the user to the advertiser's website. *Id*. Advertisers paid Google each time an Internet user clicked on an advertisement link. Pet. App. 5a.

Plaintiffs in this suit all purchased advertising services from Google AdWords. They allege that Google misled them in violation of California law by showing their ads on two types of websites: "parked domains" and "error pages." Pet. App. 6a. A "parked domain" is a webpage with a registered address that is relatively undeveloped and consists primarily of ads or

links. *Id.* "Error pages" act as placeholders when a user enters an address that does not match a registered URL. *Id.* Google generally displayed ads on parked domains and error pages that were matched to terms the user entered into the address bar of a web browser, or searches a user made on the website, so the ads a user saw were typically relevant to what the user was looking for. Pet. App. 5a-6a, 24a.

B. Proceedings Below

Plaintiffs brought this putative class action against Google under California's Unfair Competition and Fair Advertising Laws. They sought restitution for Google's alleged failure to inform them that it would display their ads on two types of purportedly "low quality" sites: "parked domains" and "error pages." Pet. App. 41a. They moved to certify a class—for the purpose of establishing liability *and* damages—which consisted of "[a]ll Google AdWords Customers who, during the [class period], were charged by Google for clicks on their advertisements that Google placed on parked domains or error pages." Pet. App. 38a (citation omitted).

The district court denied Plaintiffs' motion for certification of a Rule 23(b)(3) class. The court found that there was a single common issue: "whether Google's alleged omissions were misleading to a reasonable AdWords customer." Pet. App. 51a. But it was "unconvinced" that "commonalities predominate." Pet. App. 54a. The main obstacle was "the individual nature of the restitutionary relief sought." *Id*. Plaintiffs' theory rested on "what AdWords customers would have paid 'but for' the alleged misstatements or omissions." Pet. App. 55a. Yet, as the district court explained, "any effort to determine what adver-

tisers 'would have paid' * * * requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed." Pet. App. 56a.

Plaintiffs had proposed three methods of calculating restitution, none of which sufficiently took into account the circumstances surrounding the AdWords auctions. Pet. App. 57a. Plaintiffs' primary proposal—which was the only one it defended on appeal, *see* CA9 Appellants' Opening Br. 27-37; CA9 Appellants' Reply Br. 16-20—is called the "Smart Pricing Method." "Smart Pricing" refers to a discount that Google gives advertisers as a business accommodation in certain circumstances. Pet. App. 57a. It involves looking at the aggregate performance of ads on a given webpage, and comparing it to the performance of ads on a benchmark page like google.com. Pet. App. 57a, 62a-63a. Performance is measured by a "conversion rate," which is the rate at which a click on an ad link leads to a particular business result for the advertiser, like a purchase or a sign-up. Pet. App. 5a & n.2. Google uses Smart Pricing in certain contexts to discount the cost-per-click bid on a website with lower performance. *Id.*

Plaintiffs sought to use that Smart Pricing discount as a way to measure restitution. "The amount of restitution owed a class member would be the difference between the amount the advertiser actually paid and the amount paid reduced by the Smart Pricing discount ratio." Pet. App. 7a. As the district court explained, the " 'Smart Pricing Method' would apply a uniform discount on all ads placed on a parked domain—*even if* an individual advertiser's ads on that web page outperformed ads appearing on other types of websites." Pet. App. 57a. Take one of the named

plaintiffs, RK West, as an example. RK West had a *higher* conversion rate on parked domains than on the benchmark site. *Id.* In other words, RK West benefited from Google's practice because its performance was *better* on parked domains. Because of this, the district court correctly concluded that "applying a uniform discount" to all putative class members, regardless of their circumstances, was "too inexact a solution." Pet. App. 63a. It held that "individualized issues of restitution permeate the class claims," and "the proposed class is not 'sufficiently cohesive to warrant adjudication by representation.'" Pet. App. 58a-59a (quoting *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997)); *see also* Pet. App. 60a-64a (denying petition for reconsideration).

A panel of the Ninth Circuit reversed, concluding that the predominance requirement was satisfied. In reaching that conclusion, the court of appeals first held that there were no individual questions regarding "*entitlement* to restitution." Pet. App. 14a (emphasis added). The court thus perceived no individual issues of *liability*. *See* Pet. App. 11a-14a. The court then held that any differences in calculating the *amount* of restitution could not predominate. That is because, the court declared, "damage calculations alone cannot defeat certification." Pet. App. 14a (citation omitted). Applying that categorical rule, the court did not even consider whether, in the particular circumstances of this case, there were any individual issues of damages—much less whether those issues overwhelmed questions common to the class. Finally, the court found that a simple formula based on the Smart Pricing Method was an acceptable way to measure restitution for class members. Pet. App. 21a. "Because restitution * * *

measures what the advertiser would have paid at the outset, rather than accounting for what occurred after the purchase, using a ratio from Google's data that adjusts for web page quality is both targeted to remedying the alleged harm and does not turn on individual circumstances." *Id.* The panel therefore reversed the district court's decision and remanded.

The Ninth Circuit denied rehearing en banc, Pet. App. 66a-67a, but upon Google's motion and over Plaintiffs' objection, the court of appeals stayed its mandate pending the filing of this certiorari petition. Pet. App. 65a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER INDIVIDUAL DAMAGE CALCULATIONS ALONE CAN OVERWHELM QUESTIONS COMMON TO THE CLASS.

The first question presented concerns Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement; it asks whether individual damage calculations alone can overwhelm questions common to the class, precluding certification. This recurring and important question of class-action procedure has divided the federal courts of appeals. And the Ninth Circuit's resolution of that question in this case was plainly wrong. Accordingly, this Court should grant certiorari and reverse.

A. This Important And Recurring Question Has Divided The Circuits.

Review is warranted to resolve a clean split over a fundamental issue: Whether individual damage cal-

culations alone can overwhelm questions common to the class, defeating certification under Rule 23(b)(3).

1. Five courts of appeals—the Third, Fourth, Fifth, Eleventh, and D.C. Circuits—have answered yes: Individual damage calculations alone *can* defeat class certification under Rule 23(b)(3).

As the Third Circuit has held, "there are cases where the question of damages is so central that it can, in some sense, overtake the question of liability." *Chiang* v. *Veneman*, 385 F.3d 256, 273 (3d Cir. 2004), *abrogated on other grounds by In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 n.18 (3d Cir. 2008). That ruling remains the law in the Third Circuit. As one district court explained, the relevant inquiry is "whether the individual proofs of damages predominate over the common liability issues * * * — that is, whether this is []one of those cases ['']where the question of damages is so central that it can, in some sense, overtake the question of liability.'" *Johnson* v. *GEICO Cas. Co.*, 310 F.R.D. 246, 255 (D. Del. 2015) (quoting *Chiang*, 385 F.3d at 273). *Johnson* involved a putative class of insureds who brought suit against their automobile insurer. The plaintiffs alleged that the insurer engaged in bad faith and consumer fraud by using arbitrary rules to determine whether to pay personal injury protection benefits. *Id.* at 248. The district court originally granted Rule 23(b)(3) class certification, but later decertified the class because it concluded individual damages issues predominated. *Id.* at 254-256. The court explained: "Although there are common questions of law and fact as to the substantive liability of [the insurers] for their allegedly deficient processes and misrepresentations, these common questions would consume much less litigation time than the proof of

damages for each individual class member." *Id.* at 255. Accordingly, although "[t]he individualized determinations with respect to the relief to be granted do not undermine Rule 23(a) commonality as to liability issues," they "predominate over them under Rule 23(b)(3)'s more demanding standard." *Id.*

The Fourth Circuit reached the same conclusion in *Lienhart* v. *Dryvit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001). In that case, a putative class of homeowners sued a manufacturer for negligently designing a home siding product. *Id.* at 141. The district court certified a Rule 23(b)(3) class, but the Fourth Circuit vacated that ruling. *Id.* at 151. The court of appeals explained that the "functional equivalent of a full-blown trial on damages causation for each putative class member would be required." *Id.* at 149. And according to the court, that need alone—the need for "individualized proof of damages"—"destroy[ed] predominance." *Id.* at 149; *see also Brown* v. *Nucor Corp.*, 785 F.3d 895, 924 (4th Cir. 2015) (citing *Comcast* as "explaining that individual damage-related questions might destroy predominance"); *Ward* v. *Dixie Nat'l Life Ins. Co.,* 595 F.3d 164, 180 (4th Cir. 2010) ("individualized damage determinations cut against class certification under Rule 23(b)(3)"); *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) (holding that the "damage aspect of [a] case predominate[s]" where "the issue of damages * * * requires separate minitrials" (brackets and citations omitted)); *Martin* v. *Mountain State Univ., Inc.*, No. 5:12-cv-03937, 2014 WL 1333251, at *4 (S.D.W. Va. Mar. 31, 2014) ("the varied and diverse circumstances of the proposed class members indicates that individualized proof of

damages and causation will be required; such individualized proof defeats predominance").

The decisions of the Fifth Circuit are to the same effect. For example, in *Bell Atlantic Corp.* v. *AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003), a putative class of plaintiffs sued AT&T for monopolizing the market for caller-ID service. *Id.* at 297. In affirming the denial of class certification, the court of appeals held that the plaintiffs' motion "founder[ed] on the issue of the amount of damages." *Id.* at 303. As the court explained, "any adequate estimation of actual damages" would require "individualized inquiries." *Id.* at 304. And given the need for "the calculation of individualized actual economic damages," the court held that the predominance requirement could not be satisfied. *Id.* at 308; *see also id.* at 304 ("In light of the need for such individualized inquiries, we cannot conclude that the plaintiffs have established that the requirements of Rule 23(b)(3) can be satisfied in the present case."). Numerous other Fifth Circuit decisions have denied Rule 23(b)(3) certification on the same basis: the need for individual damage calculations alone. *See, e.g.*, *Steering Comm.* v. *Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) (holding that "individual issues of medical causation and damages" predominate); *O'Sullivan* v. *Countrywide Home Loans, Inc.*, 319 F.3d 732, 744 (5th Cir. 2003) (holding that "individualized calculations of damages predominate"); *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 419 (5th Cir. 1998) (holding that "individual-specific issues relating to the plaintiffs' claims for

compensatory and punitive damages" predominate).[1] And district courts within the Fifth Circuit continue to apply the same rule today. *See, e.g.*, *St. Gregory Cathedral Sch.* v. *LG Elecs., Inc.*, No. 6:12-CV-739, 2015 WL 5604763, at *7 (E.D. Tex. Sept. 23, 2015) (denying class certification in part because of *Steering Committee*; holding that "calculating damages will require individual inquiries that will also predominate over any common issues that may be presented by this case"); *Simms* v. *Jones*, 296 F.R.D. 485, 504-505, 507-508 (N.D. Tex. 2013) (denying class certification based on *Bell Atlantic*), appeal docketed, No. 15-10242 (5th Cir. Mar. 27, 2015); *Haley* v. *Merial, Ltd.*, 292 F.R.D. 339, 360 (N.D. Miss. 2013) ("The Fifth Circuit has held that the necessity of calculating damages on an individual basis, by itself, can be grounds for not certifying a class.").

The Eleventh Circuit is in agreement. In *Sacred Heart Health Systems, Inc.* v. *Humana Military Healthcare Services, Inc.*, 601 F.3d 1159 (11th Cir. 2010), a putative class of hospitals sued a health maintenance organization (HMO), alleging that the

---

[1] *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir.), cert. denied, 135 S. Ct. 754 (2014), addressed a slightly different issue. The court there explained that the absence of "a formula for classwide measurement of damages" will not defeat certification in a case where "predominance [i]s based not on common issues of damages but on the numerous common issues of liability." *Id.* at 815. In other words, the court held that individualized damage issues do not *always* defeat predominance; it did *not* hold that individualized damages can *never* predominate. Rather, the Fifth Circuit simply affirmed the district court's ruling that "even without a common means of measuring damages * * * common issues nonetheless predominated over the issues unique to individual claimants." *Id.* at 816.

HMO "systematically underpaid them for medical services." *Id.* at 1164. The HMO argued that the predominance requirement could not be satisfied in light of its affirmative defenses. *See id.* at 1177-1178 (citation omitted). The district court, however, "minimized the impact of [those] defenses on the outcome of the predominance inquiry, stating that the defenses 'largely involve individualized damages issues, not liability issues.'" *Id.* at 1178. On appeal, the court of appeals reversed the certification of a Rule 23(b)(3) class, "find[ing] no support in the text of Rule 23 or interpretive case law for the district court's rigid distinction between liability and damages." *Id.* Even when the individual issues involve damages, the court explained, the "relevant inquiry" is still the same: "whether common issues predominate over individual ones." *Id.* at 1179. The Eleventh Circuit therefore held that it was "clear error" for the district court to "brush [the HMO's defenses] aside as mere 'damages' issues." *Id.* The upshot is that individual issues *can* defeat predominance, *even when* they involve damages. The Eleventh Circuit reaffirmed that principle in *Little* v. *T-Mobile USA, Inc.*, 691 F.3d 1302 (11th Cir. 2012), upholding the district court's conclusion that "variation in individual damages render[ed] the class unsuitable for certification on predominance grounds." *Id.* at 1308.

The D.C. Circuit is in the same camp. In *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), a putative class of shippers sued a group of freight railroad companies, alleging antitrust violations. *Id.* at 247. The court of appeals held that the plaintiffs could meet the predominance requirement only if they could "offer common evidence of classwide injury." *Id.* at 253. As the court

put it: "No damages model, no predominance, no class certification." *Id.* In other words, without an adequate classwide damages model, individualized damages questions alone would defeat predominance and class certification. Accordingly, the D.C. Circuit vacated certification of the class and ordered the district court to reconsider the adequacy of the plaintiffs' damages model. *Id.* at 255.[2]

2. The Ninth Circuit's decision in this case conflicts with the decisions of the Third, Fourth, Fifth, Eleventh, and D.C. Circuits. As explained above, each of those five circuits has held that individual damage calculations alone *can* overwhelm questions common to the class. The Ninth Circuit, our nation's largest, has now reached the opposite conclusion, holding in this case that "damage calculations alone *cannot* defeat certification." Pet. App. 14a (emphasis added; citation omitted); *see also* Pet. App. 17a ("[D]ifferences in damage calculations do not defeat class certification * * *."). Thus, while courts in other circuits would have asked (1) whether there were any individual issues of damages and (2) whether those issues overwhelmed any questions common to the class, the Ninth Circuit in this case did neither. Instead, having concluded that there were no individual issues of *liability*, *see* Pet. App. 11a-14a, the Ninth Circuit held that it was simply irrelevant whether there were any individual issues of *damag-*

[2] The Tenth Circuit also has generally aligned with the majority view. *See Wallace B. Roderick Revocable Living Trust* v. *XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013) (explaining that "material differences in damages determinations" that "require individualized inquiries" may "destroy[]" predominance).

es, *see* Pet. App. 14a-18a. That categorical holding—that individual damage calculations alone cannot defeat certification under Rule 23(b)(3), *see* Pet. App. 14a, 17a, 18a—cannot be reconciled with the decisions of the Third, Fourth, Fifth, Eleventh, and D.C. Circuits.

3. The time is now to resolve this circuit split. The Ninth Circuit, which denied rehearing en banc in this case, has given no indication of changing its interpretation of Rule 23(b)(3).[3] And as long as the decision below is permitted to stand, plaintiffs across the country will elect to file their putative class actions in the Ninth Circuit, where they know they can satisfy the predominance requirement regardless of the individual damages they seek. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 823 (2013) (explaining that plaintiffs may choose to file in "circuits that are most receptive to class actions"). Indeed, district courts in that circuit have already begun relying on the decision below—and its categorical rule regarding individual damage calculations—in allowing suits to proceed as Rule 23(b)(3) classes. *See, e.g.*, *Robinson* v. *Open Top Sightseeing S.F., LLC*, No. 14-cv-852, 2015 WL 9304041, at *4 (N.D. Cal. Dec. 22, 2015); *O'Connor* v. *Uber Techs., Inc.*, No. 13-cv-03826, 2015 WL 8292006, at *15 (N.D. Cal. Dec. 9, 2015), appeal docketed, No. 15-17420 (9th Cir. Dec. 10, 2015).

---

[3] As previously mentioned, *supra* p. 9, the Ninth Circuit did, however, stay its mandate pending the filing of a certiorari petition in this case. The standard for such a stay is "that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A).

The practical consequences of this split are therefore sweeping. More plaintiffs will file their class actions in the Ninth Circuit, where more motions for class certification will be granted—despite the presence of individual damage questions that would lead those very cases to be denied certification in other circuits. And those class-certification orders will likely dictate the outcome of many of those cases, "set[ting] the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). Indeed, by "increas[ing] the defendant's potential damages liability and litigation costs," class certification often forces a defendant to "abandon" even a "meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).

The question presented thus calls out for this Court's review. The circuits are squarely divided, and the question is important and recurring. This Court should intervene now.

B. The Ninth Circuit's Decision Is Contrary To Supreme Court Precedent.

Review should be granted for an additional reason: The Ninth Circuit's categorical rule that individual damage calculations alone can *never* predominate is wrong. Indeed, it flatly contradicts this Court's decision in *Comcast*, which held that "individual damage calculations" alone *can*—and in fact *did* in that case—"overwhelm questions common to the class." 133 S. Ct. at 1433.

In *Comcast*, a putative class of cable-television subscribers sued their cable provider for alleged antitrust violations. *Id.* at 1430. The plaintiffs proposed

four theories of antitrust liability, but the district court accepted only one—the so-called "overbuilder" theory—"as capable of classwide proof." *Id.* at 1431. The district court further found that the damages resulting from that theory "could be calculated on a classwide basis," using a model developed by the plaintiffs' expert. *Id.* In light of that determination, the district court concluded that the proposed class met Rule 23(b)(3)'s predominance requirement, and the Third Circuit affirmed. *Id.* at 1430-1431.

This Court reversed. The Court concluded that the plaintiffs' model failed to attribute damages to "any one particular theory" of liability. *Id.* at 1434. Instead, the Court explained, the model "assumed the validity of all four theories" advanced by the plaintiffs—not just the overbuilder theory, but also the three theories that had been rejected. *Id.* So while the plaintiffs had presented a classwide theory of liability, they had failed to present a classwide method for measuring damages. And the Court held that absent such a method, the plaintiffs "cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* at 1433. *Comcast* thus holds that "individual damage calculations" alone *can*—and sometimes *will*—"overwhelm questions common to the class." *Id.*

That makes sense. After all, the text of Rule 23(b)(3) does not distinguish between liability and damages. *See Sacred Heart*, 601 F.3d at 1178 (finding "no support in the text of Rule 23" for a "rigid distinction between liability and damages"). It does not say, for example, that class certification is appropriate only if "questions of law or fact common to class members predominate over any questions *of li-*

ability affecting only individual members." Rather, under the plain text of the rule, "*any* questions affecting only individual members" can overwhelm questions common to the class and thus defeat certification. Fed. R. Civ. P. 23(b)(3) (emphasis added). *Comcast*'s holding therefore follows directly from the text of the rule itself: Individual damage calculations—like any other "questions affecting only individual members"—can defeat certification of a Rule 23(b)(3) class.

This is not to say that individual damage calculations will *always* overwhelm questions common to the class. In certain circumstances, certification of a Rule 23(b)(3) class might be appropriate, notwithstanding the presence of individual issues involving damages. But for a court to make that determination, it would have to conduct the "rigorous analysis" that Rule 23 requires. *Comcast*, 133 S. Ct. at 1433 (citation omitted). The Ninth Circuit did not conduct that analysis here. Instead of examining the particular circumstances of this case to determine whether "questions of liability to the class * * * predominate[] over * * * individual issues relating to damages," *Sacred Heart*, 601 F.3d at 1179 (brackets in original; citation omitted), the Ninth Circuit simply declared, as a categorical rule, that "damage calculations alone cannot defeat certification," Pet. App. 14a (citation omitted).[4]

---

[4] The Ninth Circuit cited *Roach* v. *T.L. Cannon Corp.*, 778 F.3d 401 (2d Cir. 2015), in support of its position. *See* Pet. App. 17a-18a. But *Roach* held that individualized damage calculations do not *always* predominate, 778 F.3d at 408; it did *not* hold that individualized damage calculations can *never* predominate. The district court's error in that case was that it "did not

That decision is contrary to the decisions of other circuits, this Court's decision in *Comcast*, and the plain text of Rule 23(b)(3). Accordingly, this Court should grant full-dress review to resolve the circuit split and correct the Ninth Circuit's error. In the alternative, because the Ninth Circuit's decision is so obviously wrong, this Court may wish to summarily reverse.

II. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER PLAINTIFFS MAY USE FORMULAS BASED ON THE AVERAGE CLASS MEMBER'S EXPERIENCE AS COMMON PROOF OF DAMAGES.

The second question presented addresses the Ninth Circuit's approval of a formula-based approach to classwide restitutionary relief. The court of appeals held that restitution could be determined for each class member using an averages-based formula that applied a uniform discount rate. Pet. App. 20a-21a. It was enough that the rate was extrapolated "from Google's data" and purported to serve as a uniform means to "adjust[] for web page quality." Pet. App. 21a. That, according to the panel, was a sufficient indicator of "the value of the service at the time of purchase," which did "not turn on individual circumstances." Pet. App. 20a. The question is whether plaintiffs may rely on a damages model that uses a uniform measure of harm, derived from the aver-

---

evaluate whether the individualized damages questions predominate over the common questions of liability"; instead, the court refused to certify the class "*only* because the district court concluded damages were not capable of measurement on a classwide basis." *Id.* at 408-409.

age experience of class members, as common evidence of damages. *See* Pet. App. 57a.

A. The Courts Of Appeals Are Divided On The Propriety Of Averages-Based Class Damages Models.

The courts of appeals are in conflict over the answer to this question. *See* Pet. 3, 15-21, 24, *Tyson Foods, Inc.* v. *Bouaphakeo*, No. 14-1146 (Mar. 19, 2015), 2015 WL 1285369 (describing split among the courts of appeals on this issue). The Second, Fourth, Fifth, and Seventh Circuits have answered no; plaintiffs may not resort to a statistical-averages-derived model to prove classwide monetary relief. The court below joins the Eighth and Tenth Circuits in answering yes.

1. The four-circuit majority rule is that models for classwide monetary relief cannot use averages to overcome individual calculation disparities. For example, in a state-unfair-competition-law case like this one, the Fourth Circuit disallowed the use of averages-based evidence as a "shortcut" to prove classwide damages. *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998). A class of franchisees alleged that their franchisor had not told them about the large commission rate for expenditures paid out of the franchisees' collective advertising account. *Id.* at 335. The franchisees alleged that they had lost sales as a result of the misallocated funds. *Id.* at 336. At trial, "[p]laintiffs' expert outlined a damages formula, by which he purported to calculate the lost profits damages of all class members on a 'global' basis." *Id.* He opined that the franchisees had all lost a uniform amount of sales with a uniform profit margin. *Id.*

Like in this case, the plaintiffs' recovery model was based "on abstract analysis of 'averages'" such as "the average effect of ads on sales," and "the average profit margin." *Id.* at 343. Unlike the court below, however, the Fourth Circuit rejected this approach. It explained: "That this shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible." *Id.* Because the class was improperly certified, the Fourth Circuit reversed the district court's judgment. *Id.* at 334.

The Second Circuit follows suit. *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), *abrogated on other grounds by Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). *McLaughlin* was a case dealing with the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, wherein smokers claimed they were deceived into believing that "light" cigarettes were healthier than regular cigarettes. *McLaughlin*, 522 F.3d at 220. The district court allowed classwide damages to be calculated based on an "estimate of the percentage of class members who were defrauded" and "an estimate of the average loss for each plaintiff." *Id.* at 231. The Second Circuit reversed, soundly rejecting this approach as simply "mask[ing] the prevalence of individual issues." *Id.* at 232. "[I]t offends both the Rules Enabling Act and the Due Process Clause" to allow classwide damages to be calculated in a manner "that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants." *Id.* at 231. So too here; yet the Ninth Cir-

cuit went ahead and approved the calculation anyway.

The Seventh Circuit, too, agrees with the majority rule. In *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), that court of appeals reviewed the decertification of a class action brought under state wage-and-hour law (as well as a collective action under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*). *Espenscheid*, 705 F.3d at 771. A putative class of satellite dish technicians brought suit against their employer for wage violations. *Id.* at 772-773. The plaintiffs argued that testimony from 42 representative witnesses would "enable a rational determination of each class member's damages." *Id.* at 776. The court of appeals disagreed. "Essentially they asked the district judge to embark on a shapeless, freewheeling trial that would combine liability and damages and would be virtually evidence-free so far as damages were concerned." *Id.* That prospect should sound familiar—it is exactly what the Ninth Circuit approved in this case: Once a single class representative established liability, recovery at the uniform discount rate followed. *See* Pet. App. 14a, 21a. The Seventh Circuit rejected class certification using that same type of formula; the Ninth Circuit should have done the same.

The Fifth Circuit rounds out the majority courts of appeals' view. That court has held that a class action that paves over individual differences in service of class treatment violates the Rules Enabling Act, the Due Process Clause, and potentially the Seventh Amendment's jury trial guarantee. *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990). The district court in *In re Fibreboard* consolidated over 3,000 asbestos personal-injury cases for trial and directed

that "certain representative cases w[ould] be fully tried and the jury w[ould] decide the total, or 'omnibus' liability to the class." *Id.* The Fifth Circuit took issue with this approach, explaining that the "elements of compensation" in products-liability cases "focus upon individuals, not groups." *Id.* at 711. "To create the requisite commonality for trial, the discrete components of the class members' claims and the asbestos manufacturers' defenses must be submerged." *Id.* at 712. Contrary to the Ninth Circuit's decision below, the Fifth Circuit recognized the "enabling acts prevent" that strategy. *Id.* And it believed the issue important enough to grant mandamus, vacating the district court's order directing a single damages trial. *Id.*

2. Three circuits, including the court below, have held differently. The Eighth Circuit reached the issue in a case where a class of poultry plant workers claimed that they were not paid for all time worked. *Bouaphakeo* v. *Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 2806 (2015). The district court certified the class, and at trial, it allowed the plaintiffs to use "average times calculated from a sample" as evidence of the time the class as a whole spent working on uncompensated activities. *Id.* at 799. The Eighth Circuit affirmed the jury verdict for the plaintiffs. It rejected the defendant's argument that the district court had allowed a prohibited "Trial by Formula." *Id.* at 798-799. Instead, according to the court, the plaintiffs' averages-based calculations were "representative evidence" properly used to determine classwide damages. *Id.* at 798. That decision is currently on review in this Court.

The Tenth Circuit reached a similar result in an antitrust case. *In re Urethane Antitrust Litig.*, 768

F.3d 1245 (10th Cir. 2014), pet. for cert. pending, No. 14-1091 (U.S. filed Mar. 9, 2015), joint motion to hold pet. in abeyance pending approval of settlement filed (U.S. Feb. 25, 2016). It affirmed class certification, and the jury's verdict for the plaintiffs, in a case where the district court had allowed use of exactly the same extrapolating technique that this Court rejected in *Wal-Mart*. *Urethane Antitrust Litig*., 768 F.3d at 1256-1257. *See infra* pp. 26-27. The relevant distinction for the Tenth Circuit was that when *Wal-Mart* discussed "trial by formula," it "used this term to describe a novel method of calculating damages, where the district court determined the *merits of individual claims* by extrapolating from a sample set of class members." *Urethane Antitrust Litig.*, 768 F.3d at 1256 (emphasis added). According to the court, "*Wal-Mart* does not prohibit certification based on the use of extrapolation to calculate *damages*." *Id.* at 1257 (emphasis added). And for that reason, the court of appeals concluded that the class was properly certified. *Id.*

Finally, in the decision below, the Ninth Circuit joined the minority view. It concluded that the plaintiffs needed to establish only a rough approximation of damages, Pet. App. 20a, so a model that did "not turn on individual circumstances" was perfectly permissible, Pet. App. 21a. That decision cannot be reconciled with the Second, Fourth, Fifth, and Seventh Circuits, which all have held that a damages model that lumps together disparate individual class members without any means of differentiation violates the Rules Enabling Act and the Due Process Clause. This Court's review is necessary to resolve the conflict.

3. The cert-worthiness of this question is already established. In *Tyson Foods*, this Court granted certiorari to decide "[w]hether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3) * * * where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample." *See* Pet. at i, *Tyson Foods*, *supra*, 2015 WL 1285369 (first question presented). If this Court in *Tyson Foods* reverses the Eighth Circuit, the Court should grant this petition, decide the merits of the first question presented, and vacate the decision below for reconsideration of the second question presented in light of *Tyson Foods*. If, on the other hand, this Court decides *Tyson Foods* on other grounds, this Court should grant this petition and decide the merits of both questions presented. At a minimum, therefore, this Court should agree to decide the first question presented while holding the second question presented for *Tyson Foods*. And if the Court does not decide the latter question in that case, it should grant plenary review in this one, because the Ninth Circuit's decision perpetuates an entrenched circuit split and, as we next explain, is contrary to existing precedent interpreting Rule 23(b)(3).

B. The Ninth Circuit's Embrace Of "Trial By Formula" Conflicts With The Decisions Of This Court.

1. The decision below cannot be squared with this Court's holding in *Wal-Mart*. The Court there held that courts cannot, under the banner of Rule 23, "replace [individualized] proceedings with Trial by Formula." 131 S. Ct. at 2561. In that case, the

Ninth Circuit had approved certification of a class of "1.5 million * * * current or former Wal-Mart employees who allege[d] that the company discriminated against them on the basis of their sex by denying them equal pay or promotions." *Id.* at 2547. The court of appeals did not view "individualized determinations of each employee's eligibility for backpay" as an impediment to class certification. *Id.* at 2560. Instead, the court "believed that it was possible to replace [individualized] proceedings with Trial by Formula" whereby the district court would identify a sample set of class members, determine "the average backpay award in the sample set," and multiply that number "to arrive at the entire class recovery." *Id.* at 2561.

This Court said no. It expressly "disapprove[d]" the "novel project" of computing class damages by a formula "without further individualized proceedings." *Id.* "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b); a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id*. (citation omitted).

2. The decision below has just that effect. The Ninth Circuit once again has endorsed a "Trial by Formula" approach. It approved, for class-certification purposes, the "Smart Pricing Method" of calculating damages—a method that would allow Plaintiffs to prove the amount allegedly owed to all class members by simply "apply[ing] a uniform discount for all ads" to "measure[] the monetary loss." Pet. App. 21a, 57a. Therein lies the problem. The uniform discount "does not turn on individual circumstances." Pet. App. 21a. It instead is based on

averages: a comparison between the *average* performance of advertisements on parked domains and error pages with the *average* performance of advertisements on a benchmark site. *See generally* Pet. App. 5a. This is precisely the Rules Enabling Act problem that *Wal-Mart* warned against.

First and foremost, the Smart Pricing Method gives class members substantive recovery that would be unavailable to them as individual plaintiffs. Restitution is "the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received." *Cortez* v. *Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 713 (Cal. 2000). Here, it is measured by "the difference between what advertisers actually paid and what they would have paid had Google informed them that their ads were being placed on parked domains and error pages." Pet. App. 7a. That amount cannot be reduced to a single uniform discount applied across the class. As is so often the case for putative Rule 23(b)(3) class actions, individualized damages issues overwhelm any purportedly common recovery questions.

As the district court found, AdWords prices are "determined through an auction process that generates a separate cost for *each* advertiser for *each* ad and for *each* click, with the specific amounts determined by the interplay of the bidding strategies of the participating advertisers in a given auction." Pet. App. 55a. "[T]he ultimate amount Google charges for each ad depends on dozens of factors that are unique to each ad placement," and "there is no 'set' price per click paid by all advertisers that is knowable ahead of time; instead all advertisers pay a different price that is determined based on the interplay between all of the differing maximum cost-per-clicks (i.e.,

'bids') from all of the advertisers participating in the auction." Pet. App. 55a-56a (citation omitted). In short, "any effort to determine what advertisers 'would have paid' under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed." Pet. App. 56a. "Plaintiffs cannot simply assume that a reduction in the demand for advertising on AdWords among some undefined group of advertisers would lead to a lower 'but for' price for all advertisers." *Id.*

The uniform discount rate allows Plaintiffs to do just that: *assume*, rather than prove, that a single, uniform discount rate accurately calculates the prices that all class members would have paid if they had known their advertisements would be displayed on parked domains and error pages. Plaintiffs could not make that assumption in individually litigated cases. In individual litigation, each Plaintiff would have to prove the extent of its economic injury with "substantial evidence." *In re Tobacco Cases II*, 192 Cal. Rptr. 3d 881, 893 (Cal. Ct. App. 2015) (citation omitted). For example, Plaintiffs that "actively sought to have their ads placed on parked domains and error pages" would have to prove that they would have bid *less* for clicks on advertisements that might appear on their *preferred* webpages. Pet. App. 57a. Under the approved class-damages model, however, these Plaintiffs instead can rely on the uniform discount as proof of the appropriate amount of recovery. That consequence enlarges their substantive rights.

Second, the Smart Pricing Method is problematic for yet another reason: It deprives Google of its ability to raise individualized equitable defenses. Cali-

fornia law is quite clear that a trial court exercises complete discretion whether to order restitution for an unfair-competition-law violation. *Cortez*, 999 P.2d at 716-717. And "[i]n deciding whether to grant the remedy or remedies sought by a[n unfair-competition-law] plaintiff, the court must permit the defendant to offer [equitable] considerations" because "consideration of the equities between the parties is necessary to ensure an equitable result." *Id.* at 717. *See also In re Tobacco Cases II*, 192 Cal. Rptr. 3d at 895-896; *Day* v. *AT&T Corp.*, 74 Cal. Rptr. 2d 55, 64-65 (Cal. Ct. App. 1998). *See generally Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.") (quoting *American Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)).

Google is denied its right to present individualized equitable defenses twice over. It cannot argue that the equities *bar* restitutionary recovery for any individual class member because the Ninth Circuit determined that "restitution is available on a classwide basis once the class representative makes the threshold showing of liability." Pet. App. 14a. And it cannot argue that the equities *minimize* restitutionary recovery for any individual class member because the court of appeals approved a formula that "does not turn on individual circumstances." Pet. App. 21a.

Google could do both of these things if it were litigating the case against individual plaintiffs. For example, if it were defending against an individual claim by named Plaintiff RK West, Google could argue that the equities do not support restitution (or they support at most a nominal sum) because RK West achieved *higher* conversion rates on parked

domains and error pages than on the Smart Pricing benchmarks. Pet. App. 57a. It cannot make the same argument here because the Ninth Circuit has approved a class-damages model allowing Plaintiffs to argue that all class members will be entitled to the same discount rate once one representative makes the threshold liability showing. Pet. App. 14a, 21a. "[A] class cannot be certified on the premise that [Google] will not be entitled to litigate" the actual amount of restitution owed to Plaintiffs, and the Ninth Circuit should not have approved certification here. *Wal-Mart*, 131 S. Ct. at 2561. Indeed, to the extent the Smart Pricing Method sweeps into its reach those with no injury, there is also an Article III problem. *See* Pet. at i, *Tyson Foods*, *supra*, 2015 WL 1285369 (second question presented).

Third and finally, the court of appeals' decision ignores variation in appropriate restitutionary recovery in the service of class certification. The panel even saw it as a benefit that its approved measure of restitution did "not turn on individual circumstances," Pet. App. 21a—not because they did not exist, or were irrelevant, but because Plaintiffs had come up with a formula that could gloss over those individual differences. That produces exactly the type of arbitrary results that *Comcast* warned against when the Court rejected a rule providing that "at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide." 133 S. Ct. at 1433. "Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* The Ninth Circuit's contravention of that principle should be corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL G. RHODES
WHITTY SOMVICHIAN
KYLE C. WONG
COOLEY LLP
101 California Street
5th Floor
San Francisco, CA 94111

NEAL KUMAR KATYAL
Counsel of Record
MARY HELEN WIMBERLY
FREDERICK LIU
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

MARCH 2016

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-16752
D.C. No. 5:08-cv-03369-EJD

PULASKI & MIDDLEMAN, LLC; JIT PACKAGING, INC.; RK WEST, INC.; RICHARD OESTERLING,

Plaintiffs-Appellants,

v.

GOOGLE, INC., a Delaware corporation,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted

December 9, 2014—San Francisco, California

Filed September 21, 2015

Before: A. Wallace Tashima and Richard A. Paez Circuit Judges and Gordon J. Quist,[*] Senior District Judge.

Opinion by Judge Paez

---

[*] The Honorable Gordon J. Quist, Senior District Judge for the U.S. District Court for the Western District of Michigan, sitting by designation.

SUMMARY[**]

Class Action / Restitution

The panel reversed the district court's denial of class certification in an action brought by a putative class of internet advertisers under California's Unfair Competition Law and Fair Advertising Law, alleging that Google, Inc. misled them; and remanded for further proceedings.

The plaintiff alleged that Google misled advertisers by failing to disclose the placement of AdWorks [sic] ads on parked domains and error pages; and sought, on behalf of the putative class, restitution of moneys Google wrongfully obtained from the putative class.

The panel held that the district court erred in denying class certification based on its finding that the putative class did not meet the predominance requirement under Fed. R. Civ. P. 23(b)(3). The panel held that the district court erred by conflating restitution calculation with the liability inquiry for Unfair Competition Law and Fair Advertising Law claims, and by failing to follow the rule in *Yokoyama v. Midland National Life Insurance Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) (holding that damages calculations alone cannot defeat class certification). The panel further held that the plaintiff's proposed method for calculating restitution was not "arbitrary" under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Miranda P. Kolbe (argued), Robert C. Schubert, and Willem F. Jonckheer, Schubert Jonckheer & Kolbe LLP, San Francisco, California, for Plaintiffs-Appellants.

Michael G. Rhodes (argued), Whitty Somvichian, and Kyle C. Wong, Cooley LLP, San Francisco, California; Heather Meservy, Cooley LLP, San Diego, California, for Defendant-Appellee.

OPINION

PAEZ, Circuit Judge:

Between 2004 and 2008, many online internet advertisers used Google, Inc.'s ("Google") AdWords program, an auction-based program through which advertisers would bid for Google to place their advertisements on websites. Pulaski & Middleman, LLC and several other named plaintiffs ("Pulaski")[1] brought this putative class action under California's Unfair Competition and Fair Advertising Laws, alleging that Google misled them as to the types of websites on which their advertisements could appear. The putative class initially sought injunctive and restitutionary relief. After Google changed certain features of the AdWords program, Pulaski, upon filing a Third Amended Consolidated Class Action Complaint, abandoned the claim for injunctive relief. The only relief the putative class now seeks is the equitable remedy of restitution.

---

[1] Hereafter, "Pulaski" refers collectively to Pulaski & Middleman, LLC and the other named plaintiffs, JIT Packaging Inc., RK West, Inc., and Richard Oesterling.

Pulaski appeals the district court's denial of class certification. The district court held that on the claim for restitution, common questions did not predominate over questions affecting individual class members. In denying certification, the court reasoned that it was not bound by our decision in *Yokoyama v. Midland National Life Insurance Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010). It then explained that determining which class members are entitled to restitution and what amount each class member should receive would require individual inquiries that "permeate the class claims."

Pulaski argues that the district court erred in failing to follow *Yokoyama*. As explained below, we agree. We therefore reverse the denial of class certification and remand for further proceedings.

I. Background

A.

This case concerns Google's AdWords program, an auction-based program through which Google served as an intermediary between website hosts and advertisers. Through AdWords, internet advertisers provided advertisements to Google and its third party website-owner partners. To participate, advertisers entered Google-defined variables into the AdWords interface on Google's website, including the maximum price per ad they would be willing to pay and their overall budget. They also selected which Google-defined categories of websites they wanted to display the ad. Afterwards, using an auction-based algorithm, AdWords determined the online placement and price of the ad. Thus, during the

class period, advertisers did not know in advance exactly where their ads would appear.

Advertisers paid a particular price to Google each time an Internet user "clicked" on their displayed ad. The price of a particular click depended on several factors: the maximum bids of other AdWords customers for clicks based on the same search term, a "quality score" of the advertisement, and a "Smart Pricing" discount applied to the website where the ad had been placed. Google created and instituted Smart Pricing, an internally-calculated price adjustment, to adjust the advertiser's bids to the same levels that a "rational advertiser" would bid if the rational advertiser had sufficient data about the performance of ads on each website. Smart Pricing is a ratio calculated by dividing the conversion rate[2] for the lower-quality website by the conversion rate for the same ad on google.com.

There are several categories of websites in play. During the class period, an advertiser using AdWords could request that its ads appear on Search Feed sites, Content Network sites, or both. Search Feed sites display AdWords ads along with search results after a user searches for information using a particular search term. After entering a particular term, a user would be presented with both ordinary search results and ads related to the search term. Content Network websites, on the other hand, are

---

[2] Using Google's terminology, a "conversion" occurs when a "click" leads to a particular business result defined by the advertiser, like a purchase or a sign-up. A conversion rate is the "number of conversions divided by the number of ad clicks over a defined period of time."

full content sites, like nytimes.com, that publish information independent of search results. Ads would appear on these sites if the ad's keywords matched those of the website.

There are other categories of sites that did not appear in the AdWords registration process: parked domains and error pages. Parked domain pages are undeveloped domains whose pages appear when users type generic terms into a web browser. These are pages of ads without content. Error pages appear when a person inputs an unregistered web address, or something other than a web address, into a web browser's address bar. Typing this information into an address bar used to result in error messages, but during the class period inputting this information resulted in error pages that offered ads. Even though only Search Feed and Content Network websites were listed in the AdWords registration process, AdWords ads appeared on both parked domains and error pages.

B.

Pulaski alleges that Google misled advertisers, violating California's Unfair Competition Law ("UCL"), Cal Bus. & Prof. Code § 17200 *et seq.*,[3] and California's Fair Advertising Law ("FAL"), § 17500 *et seq.*, by failing to disclose the placement of AdWords ads on parked domains and error pages. The putative class consists of "[a]ll persons or entities located within the United States who, from July 11, 2004 through March 31, 2008 . . . had an AdWords

[3] All section references hereafter refer to the California Business and Professions Code.

account with Google and were charged for clicks on advertisements appearing on parked domain and/or error page websites," with exclusions.[4] Pulaski, on behalf of the putative class, seeks restitution of moneys Google wrongfully obtained from the putative class.

Pulaski moved for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") for a Rule 23(b)(3) class. Pulaski proposed three different methods for calculating restitution, all of which were based on a "but for" or "out-of-pocket loss" calculation: the difference between what advertisers actually paid and what they would have paid had Google informed them that their ads were being placed on parked domains and error pages. The first approach is based on Google's Smart Pricing formula as described above. The amount of restitution owed a class member would be the difference between the amount the advertiser actually paid and the amount paid reduced by the Smart Pricing discount ratio. The second method is the Content Pricing approach,[5] which factors in the lower bidding that would have occurred had advertisers been allowed to bid separately on parked domains and error pages. Search Feed clicks were priced higher than Content Network clicks, which in turn were considered more desirable than parked

---

[4] Beginning in March 2008, the AdWords interface allowed advertisers to exclude parked domain and error pages from the set of websites on which their ads could appear.

[5] This method focuses on clicks on parked domains and error pages in Google's Search Feed, not on Content Network websites.

domains and error pages. Accordingly, where the same ad appeared both in the Search Feed and on Content Network websites, those Content Network ad prices could serve as a conservative but-for price for Search Feed clicks on parked domains and error pages. The third method is the Full Refund approach, in which advertisers would receive full refunds for clicks on ads placed on parked domains and error pages. Because some methods may work better than others for certain subsets of class members, Pulaski presented these methods as possibly complementary.

In ruling on the class certification motion, the district court initially found that the proposed class satisfied all of the criteria under Rule 23(a): numerosity, commonality, typicality, and adequate representation. The court next turned to the predominance inquiry under Rule 23(b)(3). On that issue, it found that, even assuming the plaintiff class could prevail on liability, common questions did not predominate on the issues of entitlement to restitution and amount of restitution due each class member.

First, the court expressed concern that individual questions may arise in ascertaining entitlement to restitution. It observed that "the question of which advertisers among the hundreds of thousands of proposed class members are even entitled to restitution would require individual inquiries." In particular, the court was concerned with how to "systematic[ally] . . . identify and exclude from Plaintiffs' proposed class the many advertisers who have no legal claim to restitution because they

derived direct economic benefits from ads placed on parked domains and error pages."

Second, the court identified individual questions that would arise in determining the amount of restitution owed to the class and individual class members. The court explained that our decision in *Yokoyama*, which held that damages calculations alone cannot defeat class certification, did not control the outcome of this issue because *Yokoyama* cited to decisions that mentioned a "workable method for calculating monetary recovery." Here, the court held that the plaintiffs had not proposed a method that was workable. The court explained that different costs for each advertiser, each ad, and each click, overlaid with an auction process, make it "more difficult to calculate what AdWords customers would have paid 'but for' the alleged misstatements or omissions." It concluded that Pulaski's proposed methods were insufficient to account for all of the intricacies involved, including benefits received from parked domain and error pages.

Concluding that individual questions predominated on the issue of restitution, the court denied Pulaski's motion for class certification without addressing whether class treatment was a superior method for resolving the dispute as required by Rule 23(b)(3). Thereafter, Pulaski filed a motion for reconsideration, which the district court denied.

We granted permission to appeal the order denying class action certification as authorized by Rule 23(e) [sic]. We have jurisdiction under 28 U.S.C. § 1292(e).

II. Standard of Review

A district court's class certification ruling is reviewed for abuse of discretion. *See Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). "[W]hen an appellant raises the argument that the district court premised a class certification determination on an error of law, our first task is to evaluate whether such legal error occurred." *Yokoyama*, 594 F.3d at 1091. "If the district court's determination was premised on a legal error, we will find a per se abuse of discretion." *Id.* Otherwise, "we will proceed to review the district court's class certification decision for abuse of discretion as we have always done." *Id.*

III. Discussion

To obtain certification, a putative class must satisfy four 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; and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(a). Additionally, the proposed class must qualify as one of the types of class actions identified

in Rule 23(b). Here, Pulaski sought to certify a class under Rule 23(b)(3). Under Rule 23(b)(3), the court must find that "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."

Pulaski must "affirmatively demonstrate . . . compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The question of certification requires a "rigorous analysis." *Id.* Courts may have to "probe behind the pleadings before coming to rest on the certification question." *Id.*

The district court denied certification because it found that the putative class did not meet the predominance requirement. It explained that questions regarding which advertisers are entitled to restitution in the first instance, and the amount of restitution owed to each advertiser, both defeat predominance. We disagree.

A.

Entitlement to restitution is a separate inquiry from the amount of restitution owed under California's UCL and FAL. To the extent that the district court rested its holding that common questions do not predominate on the putative class's entitlement to restitution, it committed legal error.

The UCL prohibits "any unlawful, unfair, or fraudulent business act or practice." § 17200. The FAL prohibits "untrue or misleading" statements in the course of business. § 17500. This language is

"broad" and "sweeping" to "protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 320 (2011).

To state a claim under the UCL or the FAL "based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived." *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009);[6] *see also Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011) (holding that a district court erred in denying class certification by requiring individualized proof of reliance and causation, and remanding in light of *In re Tobacco II Cases*), *cert. denied*, 132 S. Ct. 1970 (2012). This inquiry does not require "individualized proof of deception, reliance and injury." *In re Tobacco II Cases*, 46 Cal. 4th at 320; *Stearns*, 655 F.3d at 1020 (same). "[I]n effect, California has

---

[6] Since the passage of California's Proposition 64 in 2004, private suits must also allege standing under the UCL and FAL, i.e., that the plaintiff "suffered injury in fact" and "lost money or property as a result of unfair competition." *Kwikset*, 51 Cal. 4th at 320-21 (noting that the proposition "curtailed the universe of those who may enforce" the UCL and FAL, although the laws' "substantive reach . . . remains expansive"). There is a two-part test for standing under the UCL and FAL: the person must "(1) establish a loss or deprivation of money or property sufficient to qualify as an injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Id.* at 322. Here, the district court determined that one of the class representatives had standing to sue, and that the class representative's standing satisfied the standing requirements for the putative class as a whole. Neither party challenges the district court's ruling on statutory standing. We therefore do not address it.

created what amounts to a conclusive presumption that when a defendant puts out tainted bait and a person sees it and bites, the defendant has caused an injury; restitution is the remedy." *Stearns*, 655 F.3d at 1021 n. 13.[7]

---

[7] *Stearns*, which was decided before the district court's ruling here, also noted that predominance may not exist in a UCL case in which different members of the class were "exposed to quite disparate information from various representatives of the defendant." 655 F.3d at 1020. We have elaborated on this concept in two cases that post-date the district court's order. *See Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 596 (9th Cir. 2012) (holding that common questions did not predominate where disparate information exposure undercut presumption of reliance); *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1069 (9th Cir. 2014) (holding that predominance did not exist for a putative UCL class whose members had each been exposed to one of five different contracts, each of which may or may not have alerted customers that a damage waiver was an optional purchase). Google argues that the facts here present an example of disparate exposure under this line of cases. Pulaski responds that Google's deception was pervasive: all AdWords customers could select Search Feed pages, Content Network pages, or both; parked domain and error pages were never mentioned in AdWords's sign-up materials; Google's contracts with advertisers never disclosed that Google would place their ads on parked domains and error pages, regardless of whether they chose Search Feed pages, Content Network pages, or both; and Google's materials answering frequently asked questions did not disclose ad placement on parked domain and error pages. Because Pulaski's claim rests on allegations of deception through omission and falsehoods via the AdWords sign-up materials, all of which were presented to putative class members through the same online portal, Google's argument that disparate information defeats predominance is unpersuasive.

Under the UCL:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

§ 17203. This language, as well as "nearly identical" language under the FAL, *see* § 17535, grants a court discretion to order restitution. *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 173 (2000).

Thus, a court need not make individual determinations regarding entitlement to restitution. Instead, restitution is available on a classwide basis once the class representative makes the threshold showing of liability under the UCL and FAL. Accordingly, the district court erred in holding that such individual questions would predominate.

B.

We held in *Yokoyama* that "damage calculations alone cannot defeat certification." 594 F.3d at 1094. By concluding that it was not bound by *Yokoyama* under the circumstances presented in this case, the district court erred.

Yokoyama concerned the Hawaii Deceptive Practices Act, Haw. Rev. Stat § 480-2. We concluded that the district court erred when it held that this law required individualized showings of reliance because Hawaii courts' caselaw "look[ed] to a reasonable consumer, not the particular consumer." *Id.* at 1092. As we noted, the case, at the liability stage, would "not require the fact-finder to parse what oral representations each broker made to each plaintiff." *Id.* at 1093. Rather, the liability portion would be uniform, as it "will focus on the standardized written material given to all plaintiffs to determine whether those materials are likely to mislead consumers acting reasonably under the circumstances." *Id.* Because it committed legal error, its denial of class certification was a "[p]er [s]e [a]buse of [d]iscretion." *Id.*

The district court in *Yokoyama* also erroneously concluded that the "damages calculation involved highly individualized and fact-specific determinations," a conclusion to which the district court's premise of subjective reliance may have contributed. *Id.* In examining predominance for class certification purposes, the district court had considered factors such as:

> the financial circumstances and objectives of each class member; their ages; the [indexed annuity product ("IAP")] selected; any changes in the fixed interest rate for that particular IAP; the performance of the selected index; any changes in the index margin for that particular IAP; any cap on the indexed interest; the length of the surrender periods; whether the individual had undertaken or

> wanted to undertake an early withdrawal of funds; any benefit the individual policy holder derived from the form of the annuity itself, including the tax-deferral of credited interest; and the actual rate of return on the IAP.

Id. at 1093-94. We held that, even though all these variables impacted damages calculations, the individualized calculations did not defeat predominance. *Id.* at 1093; *see also Stearns*, 655 F.3d at 1026 ("We have held that the mere fact that there might be differences in damage calculations is not sufficient to defeat class certification." (citing *Yokoyama*)).

Google argues that *Comcast Corp. v. Behrend*, — *U.S.* —, 133 S. Ct. 1426 (2013), called *Yokoyama*'s holding into question. There, in analyzing a putative antitrust class, the Court held that the plaintiffs' proposed damages model fell "far short of establishing that damages are capable of measurement on a classwide basis." *Id.* at 1433. The district and circuit courts had failed to inquire into whether the model translated the "legal theory of the harmful event into an analysis of the economic impact of that event." *Id.* at 1435 (emphasis omitted). The Court reasoned that "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* at 1433. In such a situation, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.*

Since *Comcast,* we have continued to apply *Yokoyama*'s central holding. In *Levya v. Medline Industries*, *Inc.*, we reaffirmed that damage calculations alone cannot defeat class certification. 716 F.3d 510, 513-14 (9th Cir. 2013) (citing *Yokoyama*). We explained that *Comcast* stood for the proposition that "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Id.* at 514; *see also Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015) ("*Comcast* held that a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury; but the Court did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance."). The putative class's problem in *Comcast* was that the damages model "did not isolate damages resulting from any one theory of antitrust impact." *Levya*, 715 F.3d at 514 (quoting *Comcast*, 133 S. Ct at 1431). Following this discussion, we reversed a denial of class certification in part because the "damages could feasibly and efficiently be calculated once the common liability questions are adjudicated." *Id.*

We reaffirmed the proposition that differences in damage calculations do not defeat class certification after *Comcast* in *Jimenez v. Allstate Insurance Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014) (quoting *Levya*, including the portion quoting *Yokoyama*). As we explained, our sister circuits have adopted "[s]imilar positions" since *Comcast*. *See id.* at 1167-68 (citing cases from the Sixth, Seventh, and Fifth Circuits); *see also Roach*, 778 F.3d at 407-08 (citing cases from

the First, Tenth, Fifth, Seventh, and Sixth Circuits, as well as *Levya* and *Yokoyama*, to support the proposition that *Comcast* did not hold that Rule 23(b)(3) requires a classwide basis for damages calculation).

In sum, *Yokoyama* remains the law of this court, even after *Comcast*. Because "[d]amages calculations alone . . . cannot defeat certification" under *Yokoyama,* the district court erred in concluding that *Yokoyama* "does not apply to the facts here." Thus, it abused its discretion in denying class certification on this basis. *See Yokoyama*, 594 F.3d at 1090-92.[8]

C.

Google argues that the district court properly denied Pulaski's motion for certification under *Comcast* because the proposed method for calculating restitution was "arbitrary," and thus does not satisfy Rule 23(b)(3)'s predominance requirement. *See Comcast*, 133 S. Ct. at 1433. We disagree.

Restitution is "the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received." *Cortez*, 23 Cal. 4th at 174. Restitution has two purposes: "to restore the

---

[8] Google also argues that the Supreme Court's decision in *Dukes* bars class certification here because, under *Dukes*, certification is inappropriate based on a lone common question. However, this argument is contrary to *Dukes*, which stated that "for the purposes of Rule 23(a)(2), even a single common question will do." 131 S. Ct. at 2556. Further, the plaintiffs in *Dukes* were pursuing a Rule 23(b)(2) class, rather than a (b)(3) class. *Id.* at 2548-49. As the Court made clear, it did not analyze Rule 23(b)(3). *Id.* at 2549 n.2.

defrauded party to the position he would have had absent the fraud," and "to deny the fraudulent party any benefits, whether or not for[e]seeable, which derive from his wrongful act." *Nelson v. Serwold*, 687 F.2d 278, 281 (9th Cir. 1982) (citing the Restatement of Restitution).

Restitution under the UCL and FAL "must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence." *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 698 (2006). Where a defendant has wrongfully obtained a plaintiff's property, "the measure of recovery for the benefit received . . . is the value of the property at the time of its improper acquisition . . . or a higher value if this is required to avoid injustice" where the property has changed in value. *Id.* at 698-99 (quoting the Restatement of Restitution). Where plaintiffs are "deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she *paid more for* than he or she otherwise might have been willing to pay if the product had been labeled accurately." *Kwikset*, 51 Cal. 4th at 329 (emphasis in original). As the California Supreme Court explained while discussing economic harm in the context of standing, this measure "is the same whether or not a court might objectively view the products as functionally equivalent":

> Two wines might to almost any palate taste indistinguishable—but to serious oenophiles, the difference between one year and the next, between grapes from one valley and another

> nearby, might be sufficient to carry with it real economic differences in how much they would pay. Nonkosher meat might taste and in every respect be nutritionally identical to kosher meat, but to an observant Jew who keeps kosher, the former would be worthless.

Id. at 329-30. Applying these concepts to other forms of fraudulent omission, UCL and FAL restitution is based on what a purchaser would have paid at the time of purchase had the purchaser received all the information.

In calculating damages, here restitution, California law "requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 938-39 (9th Cir. 1999). "[T]he fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery." *Id.* at 939.

We conclude that Pulaski's proposed method was not "arbitrary," as Google argues. The calculation need not account for benefits received after purchase because the focus is on the value of the service at the time of purchase. Instead, in calculating restitution under the UCL and FAL, the focus is on the difference between what was paid and what a reasonable consumer would have paid at the time of purchase without the fraudulent or omitted information. *See Kwikset*, 51 Cal. 4th at 329.

Here, the harm alleged is Google's placement of ads on lower-quality web pages without the advertisers' knowledge. Pulaski's principal method for calculating restitution employs Google's Smart Pricing ratio, which directly addresses Google's alleged unfair practice by setting advertisers' bids to the levels a rational advertiser would have bid if it had access to all of Google's data about how ads perform on different websites. Because restitution under the UCL and FAL measures what the advertiser would have paid at the outset, rather than accounting for what occurred after the purchase, using a ratio from Google's data that adjusts for web page quality is both targeted to remedying the alleged harm and does not turn on individual circumstances. Thus, the Smart Pricing method measures the monetary loss "resulting from the particular . . . injury" alleged. *See Comcast*, 133 S. Ct. at 1434.[9]

IV. Conclusion

The district court erred by conflating restitution calculation with the liability inquiry for UCL and FAL claims, and by failing to follow our rule in *Yokoyama*.

Further, the proposed method for calculating restitution was not "arbitrary" under *Comcast*.

REVERSED and REMANDED.

---

[9] Although we do not directly analyze the Content Pricing or the Full Refund approaches, those methods may also be appropriate for calculating restitution. We express no opinion on the merits of any of the proposed methods.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No.: 5: 08-CV-3369 EJD
(Re: Docket Nos. 227, 278)

IN RE GOOGLE, ADWORDS LITIGATION

ORDER[1] DENYING IN PART PLAINTIFFS' MOTION TO STRIKE; DENYING PLAINTIFFS' MOTION TO CERTIFY CLASS

I. INTRODUCTION AND BACKGROUND

Presently before the Court are two matters: (1) a Motion for Class Certification filed by Plaintiffs West Coast Cameras (Richard Oesterling), Pulaski and Middleman (Adam Pulaski), JIT Packaging (Michael Hrbacek), and RK West (collectively, "Plaintiffs"); and (2) Plaintiffs' Motion to Strike.

This case involves Plaintiffs' allegations that Google, Inc. ("Defendant" or "Google") allegedly engaged in deceptive advertising and unfair, deceptive and unlawful business practices regarding

[1] This disposition is not designated for publication in the official reports.

Google AdWords. The named Plaintiffs seek to represent a class of former and current Google AdWords customers who purchased Google AdWords services. In order to place the dispute in context, the Court provides a brief background of the Google AdWords product.

Google AdWords is a program that allows advertisers to create online advertisements and display them through various channels on the Internet. Docket Item No. 272 at 3. These ads are generally short text ads with hyperlinks that, when clicked, take the user to the advertiser's website. Id. Ads placed through the AdWords program are displayed on the Google Network, which includes the Search Network and (during the class period) the Content Network. Id. The Google Network also included the parked domains and error pages that are the subject of this lawsuit. Id.

A parked domain is a webpage that has a registered web address but is relatively undeveloped and consists primarily of ads or links displayed on the page. Docket Item No. 272 at 3. Owners of parked domains can participate in Google's AdSense for domains program (AFD) to display ads placed by advertisers through the Ad Words program. Id. at 4. Parked domains are part of both the Search and Content Networks. Id.

Error pages are web pages that act as placeholders when a user enters terms into the address bar of the web browser that does not link to a registered URL. Id. Rather than returning an error message saying no web site could be found, Google's AdSense for errors program (AFE) may display a webpage that

contains ads or links matching the terms entered by the user, similar to the parked domains sites described above. Id.

Internet users typically arrive at parked domains and error pages (and view ads there) by entering particular terms of interest to them, either in the address bar of a web browser or a search box on a parked domain or error page. Docket Item No. 272 at 5. Google's algorithms then attempt to match an advertiser's ads with the terms the user has entered. Id. The ads that a user sees when he/she lands on a parked domain or error page are therefore the byproduct of the user's own search actions. Id.

Plaintiffs allege that, throughout the Class Period, all AdWords customers were given the choice of advertising in Google's Search or Content Networks, yet Google never disclosed that regardless of which network they chose, Google would place their ads on parked domains or error pages. Docket Item No. 282 at 1. Plaintiffs contend that Google was aware of the negative reputation of parked domains and error pages, and took numerous steps to purposefully conceal its involvement with these sites throughout the Class Period. Id. According to Plaintiffs, Google not only failed to disclose its practice of placing AdWords customers' ads on parked domains and error pages on its AdWords sign-up and Help Center pages, but purposefully published misleading AdSense policies which prohibited publishers from putting ads on pages lacking content, and "rolled up" the URLs of AFD and AFE sites on Google's Placement Performance Reports so that advertisers could not see the actual sites upon which Google had placed their ads. Docket Item No. 282 at 2.

Plaintiffs claim that Google feared the truth being revealed because it would risk losing the substantial revenue that it earned from its AFD and AFE programs, and also would risk damage to its own reputation. Docket Item No. 282 at 1.

Google argues that Plaintiffs and their experts fundamentally misunderstand how Google's AdWords product works. Docket Item No. 262 at 1. For instance, Google contends that Plaintiffs presume that every single ad that appeared on any parked domain or error page was intrinsically worthless and harmful, without accounting for the many instances in which advertisers reaped demonstrable benefits from such ads and without regard to advertisers' actual perceptions of parked domains and error pages. Docket Item No. 272 at 1. Additionally, Google maintains that, throughout the class period, it made specific disclosures regarding the AdWords network and the AdSense for domains program. Id. at 7. Finally, Google argues that it provides a tool that allows advertisers to self-help and exclude their ads from entire categories of web pages, including parked domains and error pages. Id. at 8.

In July 2008, Plaintiffs initiated this lawsuit,[2] alleging that Google engaged in deceptive

---

[2] Plaintiffs filed five separate but related class actions against Defendant. See Levine v. Google, Inc., No. C 08-3369 JW (filed Jul. 11, 2008), RK West, Inc. v. Google, Inc., No. C 08-03452 JW (filed Jul. 14, 2008), Pulaski & Middleman, LLC v. Google, Inc., No. C 08-03888 JW (filed Aug. 14, 2008), JIT Packing, Inc. v. Google, Inc., No. C 08-04701 JW (filed Oct. 10, 2008), Olabode v. Google, Inc., No. C 09-3414 JW (filed July 27, 2009). The first four cases were consolidated by the court on February 25, 2009

advertising and unfair, deceptive and unlawful business practices in violation of the California Business and Profession Code Sections 17200 and 17500 by charging AdWords customers for any clicks on their advertisements that Google placed on parked domains or error pages from July 17, 2004 through March 31, 2008. Docket Item No. 228.

After several amendments to the pleadings, [3] Plaintiffs filed their Motion for Class Certification ("Motion"). Docket Item No. 227. Google opposed the motion, arguing that litigation of Plaintiffs' claims would require individualized and fact-intensive inquiries that make class treatment inappropriate. See Defendant's Opposition to Plaintiff's Motion for Class Certification Pursuant to F.R.C.P. 23 ("Opp'n"), Docket Item No. 272. Plaintiffs replied to the Opposition, submitting expert witness declaration as support. See Reply Memorandum in Support of Plaintiffs' Motion for Class Certification ("Reply"), Docket Item No. 282; Declaration of Dr Stan V. Smith Regarding Plaintiffs' Motion for Class Certification ("Smith Declaration"), Docket Item No. 283. After the close

---

(the "Consolidated Cases"). See Order Granting Motion to Consolidate, Docket Item No. 40. The fifth case, Olabode v. Google, Inc., No. 09-3414 JW, was subsequently filed and consolidated with the Consolidated Cases. See Stipulation and Order Consolidating Olabode v. Google, Inc., No. 09-3414 JW into In Re Google AdWords Litigation, No. 08-3369 JW, Docket Item No. 67.

[3] See Third Amended Consolidated Class Action Complaint for Violation of California Business and Professions Code Sections 17200 et seq. and 17500 et seq., ("Complaint"), Docket Item No. 166.

of briefing on the class certification motion, Google filed an objection pursuant to Civil Local Rule 7-3(d), raising various objections to the Smith Declaration. See Objections to Reply Evidence in Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Class Certification, Docket Item No. 267. Plaintiffs filed a motion to strike certain declarations filed by Google in opposition to the class certification motion. See Motion to Strike ("Mot'n to Strike"), Docket Item No. 278.

On June 24, 2011, the court heard oral arguments in support of and opposition to the Motion for Class Certification and Motion to Strike. Docket Item No. 308. At the court's request following the hearing, the parties submitted supplemental briefs regarding the issue of commonality. See Plaintiff's Supplemental Memorandum in Support of Their Motion for Class Certification ("Plaintiff's Supp'l Mem."), Docket Item No. 307; Google, Inc.'s Supplemental Brief in Support of Its Opposition to Plaintiff's Motion for Class Certification ("Defendant's Supp'l Mem."), Docket Item No. 306.

II. DISCUSSION

Before addressing Plaintiffs' Motion for Class Certification, the Court considers Plaintiffs' Motion to Strike certain declarations submitted by Google.

A. MOTION TO STRIKE

In support of its Opposition, Defendant submitted declarations of three employees: (1) Hal Varian, (2) Jonathan Alferness, and (3) William Kunz. Plaintiffs argue that each of the declarations should be stricken to the extent they contain expert opinions

offered under the guise of lay witness testimony. Defendant responds that the testimony is that of lay witness employees and thus falls outside the scope of the Rule 26 disclosure requirements.

1. Legal Standards

a. Federal Rules of Civil Procedure 26 and 37

Under Federal Rule of Civil Procedure 26(a)(2), a party must "disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence." Fed. R. Civ. P. 26(a)(2)(A). In addition, Rule 26(a)(2)(B) requires:

> [The] disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at

> trial or by deposition within the preceding four years.

Fed. R. Civ. P. 26(a)(2)(B).

Pursuant to Federal Rule of Civil Procedure 37(c)(1), "[a] party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1).

b. Federal Rules of Evidence 701 and 702

Under Federal Rule of Evidence 701, lay witnesses may provide testimony that goes beyond percipient observations and consists of opinions or inferences:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid.701.

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact

> in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

While the text of Rule 701 appears to clearly separate lay opinion testimony from that of experts, the advisory committee note regarding subsection (c) makes the distinction less obvious. For instance, a lay witness may testify to the value of property or expected profits without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. Fed. R. Evid. 701 Advisory Committee Notes to 2000 Amendment; see, e.g., Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993). Such lay opinion testimony is admissible not because of experience, training or specialized knowledge within the realm of an expert, but because of the "particularized knowledge that the witness has by virtue of his or her position in the business." Id.

Since the 2000 amendment to Rule 701, courts have continued to allow lay opinion testimony based upon particularized knowledge obtained by virtue of the witness's position in the business. For example, several courts have admitted fact and opinion testimony from lay witnesses on a broad range of "technical" or "specialized" subjects without considering those witnesses "experts" under Federal

Rule of Evidence 702. See Minority Television Project, Inc. v. FCC, 649 F. Supp. 2d 1025, 1032 (N.D. Cal. 2009) (allowed Vice President of large broadcasting station to hypothesize about impact that commercial advertising might have on the operations of other public radio stations because "[m]ost, if not all of [the witness's] testimony" [was] based upon his particularized knowledge gained by virtue of his position in the business); Hynix Semiconductor, Inc. v. Rambus, Inc., No. CV-00-20905 RMW, 2008 WL 504098, at *5 (N.D. Cal. Feb. 19, 2008) (noting that the business owner/employee exception has survived the 2000 amendments to Rule 701); United States v. Munoz-Franco, 487 F.3d 25, 35-36 (1st Cir. 2007) (allowing bank employee to explain a bank's internal loan procedures and to provide lay opinions on whether the disputed loan classifications were appropriate even though employee was not part of that loan department and had no firsthand knowledge of the loans at issue); Medforms, Inc. v. Healthcare Management Solutions, Inc., 290 F.3d 98, 110-11 (2d Cir. 2002) (permitted testimony of computer programmer regarding terms contained in copyright registration because programmer had personal knowledge of their meaning, based on his everyday experience as a computer programmer).[4]

---

[4] The Ninth Circuit has not addressed the advisory committee note in this specific context. It has, however, favorably relied on a related paragraph of the note regarding admission of lay opinion testimony based upon personal knowledge and familiarity with narcotics. See United States v. Durham, 464 F.3d 976, 982 (9th Cir. 2006).

The Court finds these cases "persuasive only in the limited context described in the advisory committee note regarding testimony about one's business," and "does not believe they can be read to support a broader 'particularized knowledge' exception to the expert disclosure rules." Hynix Semiconductor, No. CV-00-20905 RMW, 2008 WL 504098, at *4. Although, generally, "lay opinion testimony is admissible only to help the jury or the court to understand the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events,"[5] the rules of evidence "have long permitted a person to testify to opinions about their own business based on their personal knowledge of their business," as illustrated in the cases discussed above. The Court does not believe that the revisions to Rule 701 were intended to exclude that form of personal testimony.

2. The Proffered Testimony of Google's Employees

a. Declaration of Hal Varian

Hal Varian is Google's Chief Economist. Opp'n to Mot'n to Strike at 2. The majority of Dr. Varian's declaration provides a factual description of how the AdWords pricing system works, based directly from Dr. Varian's personal knowledge and experience. See Declaration of Hal Varian in support of Google's Opposition to Class Certification ("Varian Decl."),

---

[5] United States v. Conn, 297 F.3d 548, 553-54 (7th Cir. 2002) (quoting United States v. Peoples, 250 F.3d 630, 641 (8th Cir. 2001)).

¶¶ 1-4; 7-23. These facts are relevant and necessary for the Court to have a basic understanding of a key issue posed in Plaintiffs Motion for Class Certification as to how the cost of advertising is determined in the AdWords System. Opp'n to Mot'n to Strike at 2. Plaintiffs do not contend that Dr. Varian lacks the personal knowledge or experience to testify about these underlying facts. Mot'n to Strike at 7-11. In fact, Plaintiffs counsel conceded at oral argument that the factual testimony of Google's employees is admissible. See Transcript of Proceedings Held on June 24, 2011 ("Hearing Transcript") at 19:24-20:5; 21:24-25; 27:14-18.

Plaintiffs contend, however, that Dr. Varian's declaration also contains opinions that should be stricken as expert testimony in violation of Rule 26 disclosures. Mot'n to Strike at 8-11. According to Plaintiffs, Dr. Varian should not be permitted to opine, among other things, that there is "no 'overall' or 'set price' that could be applied uniformly across hundreds of thousands of advertisers in the class." Varian Decl. at ¶ 16. Plaintiffs argue that this and similar assertions constitute expert rebuttal testimony on the viability of determining class-wide restitution. Mot'n to Strike at 7.

Defendant responds that the primary purpose of Varian's Declaration is to explain to the Court how advertisers are charged for the advertisements placed through Google AdWords, the subject matter of this litigation. Id. Additionally, Defendants argue that Dr. Varian's personal knowledge and experience permits him to make certain assertions as a lay witness under Rule 701. Opp'n to Mot'n to Strike at 4.

The Court will admit Dr. Varian's testimony regarding his knowledge of how the AdWords system works and his experience in applying economic modeling to study the AdWords System. As Google's Chief Economist, Dr. Varian is qualified to explain, as a lay witness, what Google's AdWords system does, how it behaves, and what it does when certain variables are changed. Here, just because the underlying facts and data are technical in nature does not transform the information into "expert testimony" when those facts are within the personal knowledge and experience of the company's employee. Dr. Varian may offer lay witness opinions regarding Google's business, so long as those opinions are based on his own personal, particularized knowledge and experience relating to his employment at Google. See Lightning Lube, Inc., 4 F.3d 1153 (3d Cir. 1993); Minority Television Project, Inc., 649 F. Supp. 2d at 1032 (N.D. Cal. 2009); Hynix Semiconductor, Inc., 2008 WL 504098, at *5 (N.D. Cal. Feb. 19, 2008); Munoz-Franco, 487 F.3d at 35-36 (1st Cir. 2007; Medforms, Inc., 290 F.3d at 110-11 (2d Cir. 2002). To the extent that Dr. Varian opines on the merits of the case, such as the viability of classwide restitution, his testimony will be disregarded. Accordingly, the Court DENIES IN PART Plaintiffs' motion to strike the Declaration of Hal Varian.

b. Declaration of Jonathan Alferness

Jonathan Alferness is a senior Google employee who has worked extensively on AdWords for nearly seven years. Opp'n to Mot'n to Strike at 4. During Plaintiffs' proposed class period, Mr. Alferness had primary responsibility for Google's AdSense for

search and AdSense for errors program. Id. Mr. Alferness has extensive personal knowledge of and experience in how Google's AdWord program operates, including the data that is created in the process. Id.

Plaintiffs do not contend that Dr. Varian lacks the personal knowledge or experience to testify about facts underlying Google's AdWords or AdSense programs. Mot'n to Strike at 11-13; see Transcript of Proceedings Held on June 24, 2011 at 19:24-20:5; 21:24-25; 27:14-18. Instead, Plaintiffs rely on Funai Elec. Co. v. Daewoo Elecs. Corp., No. C 04-1830 CRB, 2007 WL 1089702 (N.D. Cal. Apr. 11, 2007) and move to strike the Alferness Declaration on the basis that he reviewed and analyzed data of a named plaintiff "for the purpose of assisting Google in this litigation." Mot'n to Strike at 11. Plaintiffs' reliance is misplaced. In Funai, the court focused on whether an already disclosed expert, who was an employee of the defendant, had to draft a written report. There, the court determined that the employee had to disclose expert testimony on "matters that are outside the scope of his employment." Id at 1. Here, in contrast, the Alferness Declaration sets forth facts that are within the scope of Mr. Alferness' employment and concern data analysis with which he is personally familiar. The fact that he reviewed the data after Plaintiffs' lawsuit was filed does not preclude his testimony under Rule 701. See Lightening Lube, Inc., 4 F.3d at 1174-75 (allowing business owner to provide lay opinion testimony that relied on facts developed for purposes of litigation).

Additionally, Plaintiffs argue that Mr. Alferness's testimony should be excluded because the underlying

facts in the Alferness Declaration overlap with certain facts contained in the report of an expert previously retained by Defendant. Mot'n to Strike at 11-13. The Court is not persuaded by this argument and finds that Mr. Alferness personal knowledge of and day-to-day experience with AdWords are sufficient to allow his testimony independent of any previous factual recitation by Defendant's prior expert.[6] Accordingly, the Court DENIES Plaintiffs' motion to strike the Declaration of Jonathan Alferness.

c. Declaration of William Kunz

William Kunz is a manager in Goolge's Partners Solutions Organization, which serves as a technical/engineering arm of the "publisher" side of Google's business. As part of Mr. Kunz's daily job responsibilities, he routinely pulls and analyzes data related to the AdWords and AdSense products and reports these matters to fellow Google employees. Opp'n to Mot'n to Strike at 6.

Plaintiffs do not contest that Mr. Kunz has the personal knowledge and experience to testify about

---

[6] Mr. Alferness may offer lay witness opinions regarding Google's business, so long as those opinions are based on his own personal, particularized knowledge and experience relating to his employment at Google. See Lightning Lube, Inc., 4 F.3d 1153 (3d Cir. 1993); Minority Television Project, Inc., 649 F. Supp. 2d at 1032 (N.D. Cal. 2009); Hynix Semiconductor, Inc., 2008 WL 504098, at *5 (N.D. Cal. Feb. 19, 2008); Munoz-Franco, 487 F.3d at 35-36 (1st Cir. 2007; Medforms, Inc., 290 F.3d at 110-11 (2d Cir. 2002). The Court will disregard Mr. Alferness' testimony to the extent that he opines on the merits of the case.

the data described in his declaration. Motion to Strike at 14; see Hearing Transcript at 19:24-20:5; 21:24-25; 27:14-18. Rather, Plaintiffs argue that Mr. Kunz did not review the data until after the instant lawsuit was filed and contend they are "prejudiced" by Defendant's presentation of the data analysis testimony at this point in the litigation. Mot'n to Strike at 14.

As previously discussed, the fact that Mr. Kunz reviewed the data after Plaintiffs' lawsuit was filed does not preclude his testimony under Rule 701. See Lightening Lube, Inc., 4 F.3d at 1174-75 (allowing business owner to provide lay opinion testimony that relied on facts developed for purposes of litigation). Mr. Kunz routinely runs data pulls related to Google's AdWords and AdSense programs as part of his daily job responsibilities. See Declaration of William Kunz in support of Google's Opposition to Class Certification ("Kunz Decl."), ¶ 2. Given this day-to-day experience, Mr. Kunz is permitted to explain, in the form of lay witness testimony, the data that he pulled relating to the number of advertisers who "opted out" of placing their ads on parked domains and error pages through those programs. Additionally, Mr. Kunz may offer lay witness opinions regarding Google's business, so long as those opinions are based on his own personal, particularized knowledge and experience relating to his employment at Google. See Lightning Lube, Inc., 4 F.3d 1153 (3d Cir. 1993); Minority Television Project, Inc., 649 F. Supp. 2d at 1032 (N.D. Cal. 2009); Hynix Semiconductor, Inc., 2008 WL 504098, at *5 (N.D. Cal. Feb. 19, 2008); Munoz-Franco, 487 F.3d at 35-36 (1st Cir. 2007); Medforms, Inc.,

290 F.3d at 110-11 (2d Cir. 2002). Mr. Kunz may not, however, opine on the merits of the case, and any such testimony will be disregarded by the Court.

Plaintiffs lack support for their allegation of prejudice due to Mr. Kunz's opt-out data analysis. First, Mr. Kunz is not an expert witness and the Court will not permit him to testify as one. See supra. Second, Defendant contends that Plaintiffs failed to serve written discovery or ask deposition questions about opt-out rates during class certification discovery. Any prejudice Plaintiffs suffer as a result is not grounds for excluding Mr. Kunz's lay witness testimony that is based on personal, particularized knowledge and experience relating to his employment at Google. Accordingly, the Court DENIES Plaintiffs' motion to strike the Declaration of William Kunz.

B. MOTION TO CERTIFY CLASS

Plaintiffs move to certify the following class:

> All Google AdWords Customers who, during the period July 17, 2004 through March 31, 2008 (the "Class Period"), were charged by Google for clicks on their advertisements that Google placed on parked domains or error pages.

Docket Item No. 228. Plaintiffs assert the proposed class satisfies the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(3). Defendant questions whether the class includes plaintiffs who lack Article III standing, and disputes that Plaintiffs have met the requirements for class certification.

1. Defendant's Objections to Reply Evidence

As a threshold matter, the Court addresses Defendant's "Objections to Reply Evidence" pursuant to Civil Local Rule 7-3(d), which was filed after the close of briefing on Plaintiffs' Motion for Class Certification. See Objections to Reply Evidence ("Objection"), Docket Item No. 267. In the Objection, Defendant asks the Court to strike the Smith Declaration on the basis that the declaration constitutes "new evidence," a previously undisclosed expert opinion, and a regurgitation of prior reports. Objection at 2. Plaintiffs argue that the Smith Declaration simply responds to and rebuts the opinions asserted by Defendant's witnesses in the Opposition. See Plaintiff's Response to Google's Objections to Reply Evidence, Docket Item No. 290-1.

Having read the parties' arguments, the Court finds that the Smith Declaration does not contain additional expert opinions or evidence, but instead responds to the criticisms and evidence presented by Defendant's Opposition, drawing upon Dr. Smith's previously disclosed expert reports and documents that Defendant produced during discovery. Accordingly, the Court DENIES Defendant's request to strike the Smith Declaration and any references to it in the Reply Brief.

2. Standing

Before considering whether Plaintiffs' proposed classes meet the requirements of Federal Rule of Civil Procedure 23, the Court will determine whether Plaintiffs and members of the proposed class have Article III standing. See Easter v. Am. West Fin.,

381 F.3d 948, 962 (9th Cir. 2004). Defendant expresses doubts as to whether some of the named Plaintiffs have standing, Opp'n at 11, and challenges the standing of the potential members of the proposed class. Opp'n at 13-15.

a. Standing of Class Representatives

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. California's FAL also prohibits any "unfair, deceptive, untrue, or misleading advertising." Cal. Bus. & Prof. Code § 17500. "Any violation of the false advertising law" necessarily violates the UCL. Williams v. Gerber Products Company, 552 F.3d 934 (9th Cir. 2008).

In 2004, Proposition 64 amended the standing requirements under the UCL and FAL so that a private plaintiff has standing to bring a UCL or FAL action if the plaintiff "has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof.Code §§ 17204, 17535. The California Supreme Court has held that the phrase "['as a result'] of imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." In re Tobacco II Cases, 46 Cal. 4th 298, 326 (2009). A plaintiff can prove reliance "by showing that the defendant's misrepresentation or nondisclosure was an immediate cause of the plaintiffs injury-producing conduct." Id. (internal quotation marks and citation omitted). One way for a plaintiff to prove that the omission was "an immediate cause" of the plaintiffs injury-producing conduct is by showing that, in the absence of the omission, the named plaintiff "in all

reasonable probability would not have engaged in the injury-producing conduct." Id. (internal quotation marks and citation omitted). "Moreover, a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material." Id. at 326-327 (citation omitted). Under California law, a misrepresentation is considered material "if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question . . . ." Id. (internal quotation marks and citation omitted).

Here, named Plaintiff Pulaski & Middleman, LLC ("Pulaski & Middleman") alleges that (1) it viewed parked domain and error pages as "low quality" websites upon which it did not want to advertise, and (2) Google knew Pulaski & Middleman was likely to regard its placement of its ads on parked domains and error pages "as important in determining [its] chose of action." Motion at 4-5, 17. Pulaski & Middleman further assert that it was misled by Google's omissions, and that Google's omissions caused it to purchase advertising that it would not otherwise have bought and to overpay for clicks on ads on parked domains and error pages. Motion at 18. Additionally, Pulaski & Middleman contends that, "in all reasonable probability," had Google adequately disclosed the truth, it would not have acted as it did. Motion at 18; Tobacco II, 46 Cal. 4th at 326. In other words, Pulaski & Middleman alleges that Defendant's omissions concerning its AdWords system were material. The Court finds that these allegations are sufficient to establish reliance.

To establish standing under Article III, a plaintiff must also demonstrate "concrete and particularized" injury. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The injury here meets both of those requirements. Pulaski & Middleman has submitted evidence in support of its allegation that, as a result of Google's deception and unfair business practices, it purchased advertising that it otherwise would not have. Motion at 4-5; see Ex. 20, Pulaski Second Suppl. Resp. to Interrog. No. 7; see Ex.12, Pulaski Suppl. Resp. to Interrog. No. 8. By this evidence, Pulaski & Middleman has sufficiently shown that it has "lost money or property" so as to confer standing. See e.g., Tobacco II, 46 Cal. 4th 298; Kwikset v. Superior Court, 51 Cal. 4th 310, 319-325 (in UCL action, one of the "innumerable ways" in which economic injury can be shown is purchasing more products or services than the plaintiff otherwise would have purchased). For the foregoing reasons, the court finds that the named Plaintiff Pulaski & Middleman has met the injury-in-fact requirement for standing under the UCL and FAL, and under Article III.

In UCL and FAL class actions, Article III standing is satisfied if at least one of the named plaintiffs meets the requirements. Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1021 (9th Cir. 2011) (citing Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007) (en banc); Fleming v. Pickard, 581 F.3d 922, 924 n. 3 (9th Cir. 2009); and Casey v. Lewis, 4 F.3d 1516 (9th Cir. 1993)). Thus, the court need not examine whether the other named Plaintiffs satisfy the requirements of Article III.

b. Standing of Unnamed Class Members

Defendant argues that even in UCL cases, absent class members must satisfy Article III standing, and, as a result, the question of whether each member has suffered a concrete injury requires a fact intensive individualized inquiry. Opp'n at 13-15. Plaintiffs disagree, arguing that only the named class representatives must meet standing requirements after the California Supreme Court's decision in In re Tobacco II Cases, 46 Cal. 4th 298. Reply at 3-5.

The requirements of Article III turn on the nature of the claim that is asserted. See Warth v. Seldin, 422 U.S. 490, 500 (1975). In California, relief under the UCL and FAL [7] "is available without individualized proof of deception, reliance, and injury." In re Tobacco II Cases, 46 Cal. 4th at 320. Claims under the UCL and FAL are subject to an objective test that requires a plaintiff only "show that members of the public are likely to be deceived" by a defendant's representations about its product. Stearns, 655 F.3d at 1020 (quoting In re Tobacco II Cases, 46 Cal. 4th at 320). However, as noted above in Section II.B.2.a., the UCL and FAL still require that plaintiffs suffer injury in fact. Cal. Bus. & Prof. Code §§ 17204, 17535. The requirement of concrete injury is satisfied when the Plaintiffs and class members in UCL and FAL actions suffer an economic loss caused by the defendant, namely the purchase of defendant's product containing misrepresentations. Bruno v. Quten Research

[7] Claims under the FAL and UCL rely on the same objective test, In re Tobacco II Cases, 46 Cal. 4th at 312, and thus the court addresses them together in this analysis.

Institute, LLC, ---F.R.D. ---, No. SACV 11-00173 DOC(Ex), 2011 WL 5592880, at *4 (C.D. Cal. Nov. 14, 2011); Stearns, 655 F.3d at 1020-21. Moreover, a showing of concrete injury under the UCL and FAL is sufficient to establish Article III standing. Bruno, ---F.R.D. ---, 2011 WL 5592880, at *4; Stearns, 655 F.3d at 1020-21. Thus, any inquiry into whether the unnamed class members satisfy Article III standing depends upon an objective test, not a fact-intensive inquiry as Defendants contend.

Here, the court need not analyze unnamed class members' Article III standing because Pulaski & Middleman's Article III standing has already been established. "[T]he majority of authority indicates that it is improper for [the court] to analyze unnamed class members' Article III standing where . . . Defendants do not successfully challenge the putative class representative's standing." Bruno v. Quten Research Institute, LLC, ---F.R.D. ---, No. SACV 11-00173 DOC(Ex), 2011 WL 5592880, at *5 (C.D. Cal. Nov. 14, 2011) (citing Lewis v. Casey, 518 U.S. 343, 395 (1996) (Souter, J., concurring) (class certification "does not require a demonstration that some or all of the unnamed class could themselves satisfy the standing requirements for named plaintiffs.")). As the Ninth Circuit observed in Stearns, this Circuit has repeatedly held that "[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements . . . . Thus, we consider only whether at least one named plaintiff satisfies the standing requirements." Id. (citing Stearns 655 F.3d at 1021). Numerous district courts in California have reached the same conclusion, that standing "is assessed solely with

respect to class representatives, not unnamed members of the class." [8] There are, however, numerous district courts in California that have found just the opposite: that even absent class members must establish Article III standing.[9] The Central District of California recently examined this paradox and concluded that, in UCL or FAL cases, the court need not analyze the standing of unnamed class members where Article III standing has been established for at least one named plaintiff. Bruno,

---

[8] See Aho v. AmeriCredit Financial Services, Inc., — F.R.D. —, Case No. 10-CV-1373 DMS (BLM), 2011 WL 5401799, at *9 (S.D. Cal. Nov. 8, 2011) (limiting the court's inquiry to the representative party, who met the standing requirements of Article III); Zeisel v. Diamond Foods, Inc., Case No. No. C 10-01192 JSW, 2011 WL 2221113, at *4 (N.D. Cal. June 7, 2011) ("in general, standing in a class action is assessed solely with respect to class representatives, not unnamed members of the class") (internal citation omitted); Greenwood v. Compucredit Corp., Case No. 08-04878 CW, 2010 WL 4807095, at * 3 (N.D. Cal. Nov. 19, 2010) (holding that "Plaintiffs are not required to establish absent class members' individual reliance and personal standing"); Chavez v. Blue Sky Natural Bev. Co., 268 F.R.D. 365, 376 (N.D. Cal. 2010) ("unnamed class members in an action under the [California] Unfair Competition Law ("UCL") . . . are not required to establish standing.").

[9] See O'Shea v. Epson Am., Inc., 2011 U.S. Dist. LEXIS 105504, at *28-31 (C.D. Cal. Sept. 19, 2011) (holding that absent class members must satisfy the requirements of Article III); Sanders v. Apple Inc., 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) (Fogel, J.) (same); Webb v. Carter's Inc., 272 F.R.D. 489 (C.D. Cal. 2011) (holding absent class members in UCL action must satisfy Article III standing requirements); In re Light Cigarettes Mktg. Sales Practices Litig., 271 F.R.D. 402, 416-20 (D. Me. 2010) (same); Burdick v. Union Sec. Ins. Co., No. CV 07-4028 ABC, 2009 WL 4798873, at *3 (C.D. Cal. Dec. 9, 2009) (same).

---F.R.D. ---, 2011 WL 5592880, at *4-5. The court in Bruno also adopted a rule that, "where the class representative has established standing and defendants argue that class certification is inappropriate because unnamed class members' claims would require individualized analysis of injury or differ too greatly from the plaintiffs, a court should analyze these arguments through Rule 23 and not by examining the Article III standing of the class representative or unnamed class members." Id. This court is persuaded by the well-reasoned analysis in Bruno and concludes that where one class representative in a UCL or FAL class action has already established Article III standing, the court need not analyze the standing of unnamed class members.[10] Additionally, this court finds it more appropriate to address Defendants' argument regarding the fact-intensive, highly individualized analysis of injury under Rule 23(b) in section II.B.3.c., below.

3. Legal Standard for Class Action Certification

A party seeking class certification must provide facts sufficient to satisfy the requirements of Federal Rule of Civil Procedure 23. Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1308-09 (9th Cir. 1977). Under Rule 23(a), a class may only be

[10] In any event, the proposed class here meets the standing requirements of Article III. Consumers who purchased the Google AdWords product have Article III standing, as they were relieved of money in the transactions. See, e.g., Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 329 (2011); Stearns, 655 F.3d at 1021.

certified if (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; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). In addition, the party seeking certification must show that the action falls within one of the three subsections of Rule 23(b).

In this case, Plaintiffs seek certification pursuant to 23(b)(3), which permits certification of cases where "the court finds 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." Fed. R. Civ. P. 23(b)(3). Plaintiffs bear the burden of demonstrating that they have met the four requirements of Rule 23(a) as well as the predominance and superiority requirements of Rule 23(b)(3). See Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001), amended by 273 F.3d 1266 (9th Cir. 2001).

A trial court has broad discretion in making the decision to grant or deny a motion for class certification. Bateman v. American Multi-Cinema, Inc., 623 F.3d 708, 712 (9th Cir. 2010). A party seeking class certification must affirmatively demonstrate compliance with Rule 23 and be prepared to prove that the requirements of Rule 23 are met. Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2550-51 (2011). This requires a district court to conduct a "rigorous analysis" that frequently "will

entail some overlap with the merits of the plaintiffs underlying claim." Id.

a. Ascertainability

Defendant argues that this case presents a problem of whether the class is ascertainable. According to Defendant, even if the court would approve a class of AdWords customers entitled to restitution, Plaintiffs have not offered an appropriate mechanism for determining who those customers might be. As explained below, in Section II.B.3.c., there is no systematic way to identify and exclude from Plaintiffs' proposed class the many advertisers who have no legal claim to restitution because they derived direct economic benefits from ads placed on parked domains and error pages.[11] See Opp'n at 6. However, given the class definition proposed by Plaintiffs, the court views this as an issue regarding entitlement to restitution, not ascertainability.

[11] Defendant contends that ascertainability of all class members who are not entitled to restitution is impossible. The vast majority of advertisers in the proposed class did not elect to use Google's tool to calculate conversion rates. Varian Decl. at ¶ 21. As such, there is no class-wide method to determine the benefits that advertisers may have received from sales or other conversion events. Even if all AdWords accounts were opted into conversion tracking, conversion rates alone may not be a satisfactory measure of the overall benefits achieved from ads placed on parked domains and error pages. See Bucklin Expert Report (Docket Item No. 281-1) and Rebuttal Expert Rpt. of Randolph E. Bucklin (Docket Item No. 281-2).

b. Rule 23(a) Requirements

1. Numerosity

Numerosity is satisfied where "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "'[G]enerally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40,' the numerosity requirement is satisfied." Miletak v. Allstate Ins. Co., 2010 WL 809579, at *10 (N.D. Cal. Mar. 5, 2010) (citation omitted); see also O'Shea, 2011 WL 4352458 at *2. Plaintiffs seek to certify a class consisting of hundreds of thousands of Google AdWords customers. Mot'n at 19. Although Defendant contests other Rule 23 requirements, it does not dispute that Plaintiffs' proposed class satisfies the numerosity requirement. See Hearing Transcript at 48:17-19. Thus, the numerosity requirement is met here.

2. Commonality

To prevail under Rule 23(a)(2)'s commonality standard, the plaintiff must establish common questions of law and fact among class members. This requirement is met through the existence of a "common contention" that is of "such a nature that it is capable of classwide resolution[.]" Walmart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011). As the Supreme Court explained in Dukes, the key consideration in assessing commonality is "not the raising of common questions—even in droves—but, rather, the capacity of a classwide proceeding to generate common answers apt to drive the resolution

of the litigation." Id. (internal citations and quotation omitted).

Not surprisingly, the parties in this case ask different questions, and thus disagree about whether class proceedings will generate common answers. Plaintiffs present the following question which they claim is a capable of classwide resolution: "whether Google's alleged omissions were misleading to a reasonable AdWords customer." Plaintiffs Supp'l Mem. at 5-6. Defendant, in contrast, characterizes the question as "whether the advertiser is entitled to restitution." Defendant's Supp'l Mem. at 5.

In the court's opinion, both parties' proposed questions are central to and will drive the litigation. Plaintiffs' question focuses on liability; Defendant's question focuses on restitution. Defendant may be correct that the question of "whether the advertiser is entitled to restitution" will generate individual answers. But because Plaintiffs present a valid common question, the commonality requirement is satisfied. See Dukes, 131 S.Ct. at 2556 ("We quite agree that for purposes of Rule 23(a)(2) '[e]ven a single [common] question' will do.") (internal quotations and citations omitted); see also Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998) ("All questions of fact and law need not be common to satisfy [Rule 23].").

As previously noted, Plaintiffs assert a claim under the UCL's "fraudulent" prong and a claim under California's FAL. For liability to attach under either of these statutes based on false or deceptive advertising, it is necessary only to show that members of the public are "likely to be deceived" by

the omissions. See O'Shea, 2011 WL 4352458 at *3; In re Tobacco II Cases, 46 Cal. 4th at 312 n. 8, ("A violation of the UCL's fraud prong is also a violation of the false advertising law")). Accordingly, a central inquiry in this case is "whether Google's alleged omissions were misleading to a reasonable AdWords customer." This question is common to all members of the putative class and, when answered, will be dispositive of the issue of liability. See, e.g., O'Shea, 2011 WL 4352458 at *3. The Court therefore holds that the commonality requirement set forth in Rule 23(a)(2) is met. See Dukes, 131 S.Ct. at 2556.

3. Typicality

Plaintiffs' claims are sufficiently typical to satisfy Rule 23(a)(3). Under the requirement's "permissive standards," claims are typical if they are "reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). Here, Plaintiffs' claims arise out of the same alleged omissions as do the claims of all class members: Google failed to disclose that, regardless of whether a particular AdWords customer chose to be placed in Google's "Search" or "Content" network, Google would place their ads on parked domains and error pages, and charge them for clicks on those sites. Because Plaintiffs' claims involve the same legal claim based upon the same course of events as do the claims of all class members, the typicality requirement is met here.

4. Adequacy

Under Rule 23(a)(4)'s adequacy requirement, Plaintiffs must establish that they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In determining whether a proposed class representative will fairly and adequately protect the interests of the class, the Court asks two questions. First, do the proposed class representatives and their counsel "have any conflicts of interest with other class members"? Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003) (citing Hanlon, 150 F.3d at 1020). Second, will the proposed class representatives and their counsel "prosecute the action vigorously on behalf of the class?" Id.

Defendant briefly argues that named Plaintiff Pulaski & Middleman has a professional relationship with plaintiffs counsel, Foote Meyers, which creates a financial entanglement that renders Pulaski & Middleman an inappropriate class representative. Opp'n at 10. However, a close examination of Adam Pulaski's deposition testimony reveals that the nature of the relationship was purely professional, involving shared work on two cases, as well as a few referrals which did not involve referral fees. This relationship is quite different from the long-standing personal friendship *and* financial ties that the Eleventh Circuit found inappropriate in London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 (11th Cir. 2003) (plaintiff and class counsel had a very close friendship, class counsel had been plaintiffs stock broker for many years, and plaintiffs recovery would vastly exceed what any of the class members would receive). As such, the court finds no evidence that

Plaintiffs or their counsel have any conflicts of interest with proposed class members.

Plaintiffs' claims, as explained with respect to the typicality requirement, are aligned with the claims of proposed class members. Moreover, Plaintiffs are represented by attorneys that have significant class action experience–including class action experience, including experience in UCL actions–that are capable of fairly and adequately representing Plaintiffs and the proposed class. Accordingly, the adequacy requirement is also met here.

c. Rule 23(b)(3) Requirements

In this case, Plaintiffs seek certification pursuant to 23(b)(3). Thus, to certify a class action, Plaintiffs must also satisfy the predominance and superiority requirements of that rule. The test under Rule 23(b)(3) evaluates whether "adjudication of common issues will help achieve judicial economy." Aho, 2011 WL 5401799 at *9 (quoting Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 944 (9th Cir. 2009) (internal citation omitted)). To this end, it requires courts to determine whether "the actual interests of the parties can be served best by settling their differences in a single action." Hanlon, 150 F.3d at 1022 (internal quotations omitted). A plaintiff must show more than the mere existence of a common question of law or fact to satisfy the predominance inquiry under Rule 23(b)(3); he or she must show that the common question of law or fact predominates. Dukes, 131 S.Ct. at 2556. For the reasons explained below, Plaintiffs do not meet this requirement.

In this case, there is a common question to resolve the issue of liability: whether Google's alleged omissions were misleading to a reasonable AdWords customer.[12] See supra at 18-19. While this question may weigh in Plaintiffs' favor, the court is unconvinced that such commonalities predominate over questions affecting individual members of the putative class. Indeed, as mentioned above in Section II.B.3.a., the question of which advertisers among the hundreds of thousands of proposed class members are even entitled to restitution would require individual inquiries. See Mazur, 257 F.R.D. at 567 (refusing to certify a class that included "non-harmed" members); In re Flash Memory Antitrust Litig., No. C 07-0086 SBA, 2010 WL 2332081, at *12 (N.D. Cal. June 9, 2010) (denying certification where damages methodology "would . . . sweep in an unacceptable number of uninjured plaintiffs").

Another obstacle to a finding that common issues predominate is the individual nature of the restitutionary relief sought, as class members each paid different sums for each particular ad campaign and for each instance in which an ad was clicked. Varian Decl. at ¶ 6. While it is often true that "[d]amages calculations alone . . . cannot defeat certification," Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010), that

---

[12] The court rejects Defendant's argument that individualized questions of reliance and materiality must be proved here. Opp'n at 14-17. As previously explained, Plaintiffs' UCL and FAL claims are governed by the "reasonable consumer" test, which requires Plaintiffs to "show that members of the public are likely to be deceived." Williams v. Gerber Products Co., 523 F.3d 934, 938 (9th Cir. 2008) (internal citations omitted).

principle does not apply to the facts here.[13] The amount that advertisers pay to use AdWords is determined through an auction process that generates a separate cost for *each* advertiser for *each* ad and for *each* click, with the specific amounts determined by the interplay of the bidding strategies of the participating advertisers in a given auction. See Opposition at 24-25. These intricacies make it more difficult to calculate what AdWords customers would have paid "but for" the alleged misstatements or omissions. For instance, "every ad placed on AdWords is priced differently, and the ultimate amount Google charges for each ad depends on dozens of factors that are unique to each ad placement, unique to each individual advertiser, and dependent on the unique attributes of each of the other advertisers who also wished to place ads on the particular web page at issue." Varian Decl. at ¶ 6. Furthermore, under the AdWords auction system, "there is no 'set' price per click paid by all advertisers that is knowable ahead of time; instead all advertisers pay a different price that is determined based on the interplay between all of the differing

---

[13] In Yokoyama, the Ninth Circuit based its statement on two decisions that confirm that certification is inappropriate where plaintiffs cannot demonstrate a workable method for calculating monetary recovery. See Smilow v. Sw. Bell Mobile Sys., 323 F.3d 32, 40 n.8 (1st Cir. 2003) (noting in its discussion of damages that "[c]ourts have denied class certification where these individual issues are especially complex or burdensome" (citing 5 J.W. Moore, Moore's Federal Prac. § 23.46[2][b] at 23-209 & n. 17)); Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975) (affirming certification but noting that given the particular facts of that case, "the process of computing individual damages will be virtually a mechanical task").

maximum cost-per-clicks (i.e., 'bids') from all of the advertisers participating in the auction." Id. This suggests that Plaintiffs cannot simply assume that a reduction in the demand for advertising on AdWords among some undefined group of advertisers would lead to a lower "but for" price for all advertisers. See Rebuttal Expert Report of Randolph E. Bucklin. Thus, any effort to determine what advertisers "would have paid" under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed. See Bucklin Expert Report and Rebuttal Expert Rpt. of Randolph E. Bucklin.

To further complicate matters, advertisers have widely varying goals, which makes it difficult to calculate the actual value of what advertisers received for their payments to Google.[14] See Bucklin Expert Report at TR 81-82. While the advertiser account data maintained by Google tracks the cost of advertising on parked domain and error pages, it

---

[14] One way to measure the performance of an online ad is based on "conversions." Opp'n at 5; Alferness Decl. at ¶19. A conversion occurs when a user clicks on an ad, arrives at the advertiser's designated web page, and completes some further action to the benefit of the advertiser. Id. In 2009, only a small percentage of active AdWords accounts were opted in to conversion tracking. Opp'n at 6 (citing Bucklin Expert Report (Docket Item No. 281-1) at 38). Even if all AdWords accounts were opted into conversion tracking, conversion rates alone may not be a satisfactory measure of the overall benefits achieved from ads placed on parked domains and error pages. See Bucklin Expert Report (Docket Item No. 281-1) and Rebuttal Expert Rpt. of Randolph E. Bucklin (Docket Item No. 281-2) ("Bucklin Rebuttal Report").

provides limited information on the value advertisers receive as a result of that advertising. Id. at 83.

Although it is true that restitution need not be determined with exact precision, it "must be based on a specific amount found owing, and this measureable amount of restitution due must be supported by substantial evidence." Ewert v. eBay, Inc., Case Nos. C-07-02198 RMW, C-07-04487 RMW, 2010 WL 4269259, at *11 (N.D. Cal. Oct. 25, 2010) (internal citation omitted). The court is not persuaded that, in this case, with these parties and facts, restitution can be reliably measured using common methods. Plaintiffs' Full Refund Approach, Smart Pricing Approach, and the Content Pricing Approach do not sufficiently take into account the unique circumstances surrounding the AdWords auctions. For example, the "Full Refund Method" would award full restitution of all fees paid to Google, without taking into account the benefits those members received or the fact that some actively sought to have their ads placed on parked domains and error pages. See Expert Report of Stan V. Smith, Docket Item No. 228, ("Smith Report") at 10; See Bucklin Rebuttal Report,¶¶ 58-61. Similarly, the "Smart Pricing Method" would apply a uniform discount for all ads placed on a parked domain — *even if* an individual advertiser's ads on that web page outperformed ads appearing on other types of websites (as was the case for named Plaintiff RK West). See Bucklin Rebuttal Report, ¶¶ 35-40. Along the same lines, the Content Pricing Method would award restitution to advertisers based on a blanket assumption that all ads in Google's Search Network outperform ads on the Content Network,

despite evidence that the opposite is true in many cases, including the named Plaintiffs' own experiences.[15] See Smith Report at 63; see Bucklin Rebuttal Report at ¶¶ 44-57.

Since the purpose of restitution is to return class members to status quo, the amount of restitution due must account for the benefits received from ads placed on parked domains and error pages. Here, in many instances, individual proof would show that advertisers received significant revenues and other benefits from ads placed on parked domains and error pages – benefits that would need to be individually accounted for in any restitution calculation.

Plaintiffs have not "affirmatively demonstrated" that restitution can be calculated by methods of common proof. See Dukes, at 10. While Plaintiffs present a hypothetical "but for" price for advertising on parked domains and error pages absent Google's alleged "deception," they overlook the reality of how advertising costs are actually determined in the AdWords system. Where, as here, proof of restitution due each class member cannot be proved with relative ease, the court finds good reason to deny class certification.

Based on the foregoing, the court finds that individualized issues of restitution permeate the class claims. In light of such, it concludes that the

---

[15] For example, named Plaintiff RK West experienced an average conversion rate on the Search Network (5%) that exceeded its performance on the Content Network (.7%). Bucklin Rebuttal Report ¶ 52.

proposed class is not "sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997). Plaintiff therefore fails to satisfy Rule 23(b)(3)'s requirement that common issues predominate.[16]

III. CONCLUSION

Thus, for the foregoing reasons, the Court DENIES Plaintiffs' motion for class certification. The Court sets this matter for a Case Management Conference to be held on **February 17, 2012 at 10:00 a.m.** The parties shall file a Joint Case Management Statement on or before **February 10, 2012.**

IT IS SO ORDERED.

Dated: January 5, 2012

/s/ Edward J. Davila
EDWARD J. DAVILA
United States District Judge

[16] Because the Court finds that individualized issues of restitution preclude satisfaction of the predominance requirement set forth in Rule 23(b)(3), it does not reach the remaining inquiry of whether the proposed class action is "superior" to the other methods available for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
SAN JOSE DIVISION

Case No.: 5: 08-CV-03369 EJD
[Re: Docket Item No. 316]

IN RE GOOGLE, ADWORDS LITIGATION

ORDER DENYING MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

On January 19, 2012, Plaintiffs requested leave to file a motion for reconsideration of the court's Order Denying Plaintiffs' Motion to Certify Class. For the reasons set forth below, Plaintiff's motion is denied.

Civil L.R. 7-9 authorizes a request to file a motion for reconsideration of an interlocutory order when the requesting party can specifically show:

> (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for

> reconsideration did not know such fact or law at the time of the interlocutory order; or
>
> (2) The emergence of new material facts or a change of law occurring after the time of such order; or
>
> (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Civil L.R. 7-9(b). The rule specifically prohibits the repetition of any oral or written argument made in support of or in opposition to the order which the party now seeks to have reconsidered. The purpose of a motion for reconsideration is to provide a vehicle for a district court to correct a manifest error without the need for an appeal. It is not an opportunity to relitigate issues that have already been thoughtfully decided.

Plaintiffs here attempt to show a "manifest failure" by the court to consider their arguments that (1) restitution awards can be calculated on a common basis without burdensome individualized inquiries in this case, (2) individual issues in calculating relief should not defeat class certification as a matter of law in any event, and (3) in the alternative, the court should certify a class for liability purposes only.

The court considered and rejected both the factual argument that restitution could be calculated without individualized inquiries and the legal argument that a class should be certified anyway. See Order Denying Pls.' Mot. Certify Class ("Order") at 22-25, Jan. 5, 2012, ECF No. 315 (distinguishing

Yokoyama and Ewert based on the evidence submitted about the AdWords auction system). The instant request for leave to file a motion for reconsideration is based upon an understandable misreading of the order denying class certification, so the court takes this opportunity to clarify any ambiguity.

In the Order, the court considered whether restitution could be calculated on a common basis for all members of the proposed class. In doing so the court analyzed each of Plaintiffs' proposed methodologies: the "Full Refund Method," the "Smart Pricing Method," and the "Content Pricing Method." The court observed that "the 'Smart Pricing Method' would apply a uniform discount for all ads placed on a parked domain — *even if* an individual advertiser's ads on that web page outperformed ads appearing on other types of websites (as was the case for named Plaintiff RK West)." Order at 24:14-17 (emphasis in original). Plaintiffs argue that this statement shows that the denial of class certification was based on the erroneous conclusion that calculating restitution requires each individual advertiser's award to be offset by the amount of benefit that advertiser reaped from the placement of its ads.

Plaintiffs read too much into the Order. Plaintiffs are correct that the appropriate restitution recovery is the market value of the advertisements *at the time of purchase* (appropriately discounted for the allegedly undisclosed possibility of their appearance on error pages or parked domains) subtracted from the price actually paid. But this restitution calculation depends on the existence of a reliable and

common method for calculating the discount. The denial of the class certification motion was based on the court's determination that none of Plaintiffs' proposed methods is sufficiently reliable on a class-wide basis. The problem with the Smart Pricing Method's uniform discount is not that it would allow recovery by some individual advertisers—like RK West—for whom the parked-domain/error-page placements turned out to be profitable. Rather, the real problem is that there are so many advertisers like RK West that applying a uniform discount is too inexact a solution. See Bucklin Rebuttal Report ¶¶ 35-40. In coming to its conclusion, the court considered Google's "admissions" about Smart Pricing as well as both parties' expert reports.

Finally, Plaintiffs' fallback position—that a class should be certified for liability purposes only—is entirely new. It was never raised in the memoranda in support of the motion for class certification, so it does not meet the requirement of Civil L.R. 7-9(b)(3) that the argument have been "presented to the Court before [the] interlocutory order." Deciding an issue for the first time on a motion for reconsideration would be procedurally improper.

Plaintiffs' motion for leave to file a motion for reconsideration is DENIED.

The parties shall meet, confer, and file an updated Joint Case Management Statement on or before May 9, 2012. The case management conference set for May 11, 2012, will proceed as scheduled.

IT IS SO ORDERED.

Dated: May 4, 2012

/s/ Edward J. Davila
EDWARD J. DAVILA
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.: 12-16752

D.C. No. 5:08-cv-03369-EJD
Northern District of California, San Jose

PULASKI & MIDDLEMAN, LLC; et al.,

Plaintiffs – Appellants,

v.

GOOGLE, INC., a Delaware corporation,

Defendant – Appellee.

ORDER

Before: TASHIMA and PAEZ, Circuit Judges and QUIST,[*] Senior District Judge.

Google, Inc.'s motion to stay the mandate pending the filing of a petition for a writ of certiorari is GRANTED. *See* Fed. R. App. P. 41(d)(2).

[FILED DECEMBER 21, 2015]

[*] The Honorable Gordon J. Quist, Senior District Judge for the U.S. District Court for the Western District of Michigan, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.: 12-16752

D.C. No. 5:08-cv-03369-EJD
Northern District of California, San Jose

PULASKI & MIDDLEMAN, LLC; et al.,

Plaintiffs – Appellants,

v.

GOOGLE, INC., a Delaware corporation,

Defendant – Appellee.

ORDER

Before: TASHIMA and PAEZ, Circuit Judges and QUIST,[*] Senior District Judge.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote

---

[*] The Honorable Gordon J. Quist, Senior District Judge for the U.S. District Court for the Western District of Michigan, sitting by designation.

on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

[FILED DECEMBER 8, 2015]

APPENDIX F

STATUTE AND RULE INVOLVED

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Fed. R. Civ. P. 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(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; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class 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; or

(3) the court finds 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. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation

fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).