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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DEL MONTE FRESH PINEAPPLE CASES.	A126638 (Alameda County Super. Ct. JCCP No. 4446)

Plaintiffs Kathleen Conroy, James Linden, Nancy Linden, Michael Greenspan, Joyce Greenspan, and Jonathan Weiss appeal from an order denying their motion for class certification of their "third amended class action complaint" against defendants Fresh Del Monte Produce, Inc., Del Monte Fresh Produce Company and Del Monte Fresh Produce , N.A., Inc. (hereinafter also referred to as Del Monte). They argue that the trial court applied incorrect legal criteria and made erroneous legal assumptions in denying their request for class certification. We disagree and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In 2004, federal class action litigation was commenced against Del Monte, "on behalf of all those who purchased 'Fresh Del Monte Gold[™]' pineapples . . . in the United States . . . [from] March 1, 1996" forward. (*In re Fresh Del Monte Pineapples Antitrust Litigation* (S.D.N.Y. Feb, 20, 2008, No. 1:04-md-1628 (RMB), 2008 U.S. Dist.

Lexis 18388, pp. *3-4 [nonpub. opn.].)[1] The federal plaintiffs included "both Direct Purchasers, *i.e.*, all those who purchased Fresh Del Monte Gold™ pineapples directly from Del Monte (such as [retail grocery stores]), and Indirect Purchasers, *i.e.*, 'all end-payors,' including 'consumers, the last persons . . . in the chain of distribution' who purchased such pineapples. (*Id.* at p. *5.) It was alleged that "Del Monte 'improperly obtained and maintained a monopoly over the propagation, marketing, and sale of fresh, whole, extra-sweet pineapple . . . by: (i) securing a patent, through the prosecution of a fraudulent patent application with the United States Patent and Trademark Office ("PTO") for a pineapple variety it knew, and has now admitted, was unpatentable . . .; (ii) issuing intentionally false and misleading letters to competitors and others stating that the "Fresh Del Monte Gold ™" pineapple was patented by [Del Monte] and threatening litigation if they engage in the propagation, marketing, or sale of that pineapple . . .; [and] (iii) commencing and pursuing sham patent litigation in order to foreclose competition in the fresh, whole, extra-sweet pineapple market . . . .' " It was further alleged that " 'Del Monte used its unlawfully obtained monopoly power to charge supracompetitive[2] prices for the [Fresh Del Monte Gold ™] pineapples, thereby causing both direct and indirect purchasers of [such] pineapples to sustain injury to their business and property.' [Citation.]" (*Id.* at p. *4.)

After the filing of the federal lawsuit, plaintiffs in this state court litigation (hereinafter referred to as "plaintiffs") filed separate lawsuits, which were consolidated in the state trial court. After the trial court sustained two demurrers, plaintiffs filed a third amended class action complaint, alleging a single cause of action for violation of the

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[1] The named defendants in the federal action were Del Monte Fresh Produce Company and Del Monte Fresh Produce, N.A. (*In re Fresh Del Monte Pineapples Antitrust Litigation, supra,* 2008 U.S. Dist. Lexis 18388, p. *3.)

[2] "Supracompetitive" means artificially high. (*Sanders v. Brown* (9th Cir. 2007) 504 F.3d 903, 909.)

Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.[3]) "on behalf of a putative class of California indirect purchasers [consumers] of Fresh Del Monte Gold™ pineapples." The factual allegations in support of the UCL claim are essentially identical to those in the parallel federal complaint. According to plaintiffs, Del Monte's alleged conduct violates the UCL because "it threatens an incipient violation of an antitrust law (namely the Sherman Act § 2),[4] as well as violates the policy and spirit of both federal and California state antitrust laws because its effects are comparable to or the same as a violation of law, or otherwise significantly threatens or harms competition in the whole, fresh extra-sweet pineapple market. Further, [Del Monte's] conduct constitutes a practice that offends established public policies of not engaging in anti-competitive activity and thwarts fair competition in the marketplace." Plaintiffs also allege that Del Monte's conduct violates the UCL provision that prohibits unfair conduct in violation of the public policy concerns articulated in the Federal Trade Commission Act (15 U.S.C. § 45(a)[5]). Plaintiffs seek declaratory relief, restitution, interest, punitive damages, attorney fees, and costs.

In 2008, the United States District Court for the Southern District of New York certified a nationwide class of direct pineapple purchasers with respect to their "claims of

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[3] "We shall refer to Business and Professions Code section 17200 et seq. as the unfair competition law (UCL) even though this is not a legislatively adopted name for these codes sections. However, our Supreme Court refers to these sections in the same way. [Citation.]" (*Smith v. State Farm Mutual Automobile Ins. Co*. (2001) 93 Cal.App.4th 700, 705, fn. 3; see *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 263.)

[4] Section 2 of the Sherman Act (15 U.S.C. § 2), reads: "Every person who shall monopolize, or attempt to monopolize, . . ., shall be deemed guilty of a felony . . . ." "Use of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of § 2 of the Sherman Act. [Citations.]" (*Otter Tail Power Co. v. United States* (1973) 410 U.S. 366, 377.)

[5] 15 United States Code section 45, subdivision (a), reads, in pertinent part: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

monopolization" under Section 2 of the Sherman Act (15 U.S.C. § 2) for which they sought injunctive relief and treble damages. (*In re Fresh Del Monte Pineapples Antitrust Litigation, supra,* 2008 U.S. Dist. Lexis 18388, pp. *5, 14)~ However, the federal district court denied class certification to indirect purchasers (which included California indirect purchasers) on the grounds that class litigation would not be "manageable" for two principal reasons: "(1) [indirect purchaser] Plaintiffs failed to satisfy their burden of 'present[ing] a damages model that can be used on a class-wide basis' . . . and (2) [indirect purchaser] Plaintiffs failed to present a reliable method of distributing any damages to putative Class Members." (*Id*. at pp. *17, 33, 26.) Certification of an "Indirect Purchaser Class seeking only injunctive relief" was also denied because injunctive relief was being pursued by the certified class of direct purchasers, who were "more directly injured by the [alleged] antitrust activit[y] and in a better position to prosecute a claim based upon that activity," and therefore, "[a] ' "significant antitrust violation [would not go] undetected or unremedied." ' [Citations.]" (*Id*. at pp. *42-43.)[6]

Thereafter, in May of 2009, plaintiffs in this state lawsuit moved to certify their third amended complaint as a class action.[7] The motion was opposed by Del Monte.

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[6] According to Del Monte, the federal indirect purchasers sought interlocutory review of the denial of their motion for class certification, pursuant to Federal Rule of Civil Procedure, rule 23(f), and the United States Court of Appeals for the Second Circuit denied their petition.

[7] In their complaint, plaintiffs propose a class defined as: "All persons and entities who currently reside in California and who, at any time prior to May 6, 2003, purchased a pineapple with the 'Gold' designation indirectly from Defendants (the 'Class')." Excluded from the proposed class were "Defendants, their parents, subsidiaries and affiliates." In their motion for class certification, the class period was modified to run "from April 1, 2000, through and including the date of trial, or until the anticompetitive effects of the conduct alleged herein have subsided, whichever is earlier (the 'Class Period')." In its order denying class certification, the trial court stated that plaintiffs propose a class defined as: " 'All persons and entities who resided in California during the period April 1, 2000, through April 1, 2009 (the 'Class Period') and who during the Class Period purchased a pineapple with a 'Gold' designation indirectly from Defendants for their own use and not for resale.' "

After oral argument and the submission of supplemental motion papers, the trial court denied the motion for the following stated reasons: "Despite the common questions that exist, very substantial individual questions must be resolved to establish injury to class members who purchased pineapples from different direct purchasers in different competitive markets throughout the State. Even if liability can be established, Plaintiffs have not sustained their burden of showing how members of the class who may have been injured by defendants' anticompetitive behavior many years ago can be notified and participate in any kind of cost effective claims process. Further, because the anticompetitive conduct ended five years ago and is being pursued in the direct purchaser class action in federal court, defendants and others similarly situated continue to have ample incentives to comply with the federal antitrust law and California's [UCL]." In so ruling, the trial court adopted pertinent portions of the federal district court's decision refusing to certify a federal indirect purchaser class. (*In re Fresh Del Monte Pineapples Antitrust Litigation*, *supra*, 2008 U.S. Dist. Lexis 18388, at pp. *17-21, 26-30, 33-42.)[8]

Plaintiffs filed a timely notice of appeal. (See *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 ["denial of certification to an entire class is an appealable order"] (*Linder*).)

DISCUSSION

" ' "A trial court may certify a UCL claim as a class action when the statutory requirements of section 382 of the Code of Civil Procedure are met." ' [Citation.]" (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313; see *Arias v. Superior Court* (2009) 46

[8] Since this appeal was perfected, the United States Court of Appeals for the Second Circuit dismissed the federal direct purchasers' class action in a summary order on the merits. (*American Banana Co. v. J. Bonafede Co.* (2d Cir., Nov. 3, 2010, No. 09-4561-cv) 2010 U.S. App. Lexis 23022.) The federal circuit court held that direct purchasers' claims failed because, assuming Del Monte possessed monopoly power in a market limited to the Fresh Del Monte Gold™ pineapple, there was no showing that Del Monte's conduct had the requisite anticompetitive effect of delaying its competitors' entry into the market. (*Id*. at pp. *2, 4-5.)

Cal.4th 969, 980 (*Arias*) [a representative action under the UCL "must meet the requirements for a class action. [Citation.]"].)[9] Section 382 of the Code of Civil Procedure authorizes certification of a class when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." To obtain certification, "the class proponent must demonstrate that there is an ascertainable, manageable class of plaintiffs and a well-defined *community of interest* among class members, such that litigating the controversy as a class action would be a superior method of resolving the dispute and of substantial benefit to the litigants and the court. [Citations.]" (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450 (*Walsh*).) "The community of interest requirement involves three factors: '(1) predominate common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' [Citation.] Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether

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[9] "Before 2004, any person could assert representative claims under the unfair competition law to obtain restitution or injunctive relief against unfair or unlawful business practices. Such claims did not have to be brought as a class action, and plaintiff had standing to sue even without having personally suffered any injury. [Citations.]" (*Arias, supra*, 46 Cal.4th at p. 977.) However, in 2004, "the electorate passed Proposition 64, an initiative measure," which amended Business and Professions Code 17203 "to provide that a private plaintiff may bring a representative action under this law only if the plaintiff has 'suffered injury in fact and has lost money or property as a result of such unfair competition' and 'complies with Section 382 of the Code of Civil Procedure . . . .' [Fn. omitted.]" (*Arias, supra*, 46 Cal.4th at pp. 977.) "Notably absent from the ballot materials [for Proposition 64] is any indication that the purpose of the initiative was to alter the way in which class actions operate in the context of the UCL. Indeed other than the requirement that the representative plaintiff comply with Code of Civil Procedure section 382, the ballot materials contain no reference whatsoever to class actions, nor is there any indication that Proposition 64 was intended in any way to alter the rules surrounding class action certification." (*In re Tobacco II Cases, supra*, 46 Cal.4th at p. 318.)

the class approach would actually serve to deter and redress alleged wrongdoing. [Citation.]" (*Linder, supra*, 23 Cal.4th at p. 435.) However, "group action also has the potential to create injustice," and therefore, "trial courts are required to ' "carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts." ' [Citation.]" (*Ibid*.)

"Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." (*Linder, supra*, 23 Cal.4th at p. 435.) Thus, "[o]ur task on appeal is . . . to determine . . . whether the trial court has abused its discretion in denying certification." (*Osborne v. Subaru of America, Inc*. (1988) 198 Cal.App.3d 646, 654.) "Absent other error, we will 'not disturb a trial court ruling on class certification which is supported by substantial evidence unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation].' [Citation.] ' "So long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld." [Citations.]' [Citation.]" (*Caro v. Procter & Gamble Co*. (1993) 18 Cal.App.4th 644, 655 (*Caro*).) We conclude that in this case the trial court applied appropriate criteria and did not make erroneous legal assumptions in denying plaintiffs' motion for class certification.

In concluding that a class of indirect purchasers would be neither manageable nor superior to alternative methods of resolving the parties' controversy, the trial court explained: "There is a point where the individual monetary claims are so small in comparison to the costs of administration that even the benefits of a class action do not justify pursuit of the claims. In that circumstance, the interests of the absent class members might no longer be served by collective active. [Citations.] [¶] In this case it appears that class certification will not confer any appreciable monetary benefit on the absent class members. The Court can identify several ways to distribute any monetary recovery, but none would effectively return money to the injured parties. [Fn. omitted.]

[¶] Ideally, the Plaintiffs could locate the actual persons who bought Del Monte extra-sweet pineapples in the class period and distribute the appropriate amounts of any monetary relief to those persons. It will, however, be difficult, if not impossible, to identify the specific persons who purchased Del Monte extra sweet pineapples during the class period, particularly during the early years when Plaintiffs' proof of illegal overcharges to direct purchasers will be strongest. Plaintiffs suggest using retailer data from their loyalty card programs to determine which persons purchase pineapples and then to provide notice directly to them. This approach is seriously flawed because not all retailers collect such data, any collected data likely has not been retained for more than the most recent portion of the class period, and the retailers have no obligation to turn over their data. [Citation.][10] A second approach would be a broad notice program through appropriate publications followed by class member self-identification. This is a potential option, but one that historically has not been particularly effective. People tend not to remember, much less keep records of, what specific groceries they bought last month, much less several years ago. [Citations.][11] Further, given the small amounts involved for any individual class members they would have little incentive to self-identify, particularly if doing so required them to respond to a notice by filling out a claim form and mailing it back. [¶] Even assuming that Plaintiffs could identify the members of the class or a notice program would lead the members of the class to self-identify, it is highly probable that the administrative costs of identifying the class members and returning a few dollars to each would significantly outweigh the value of the distribution itself. Assuming that Plaintiffs prove that Del Monte overcharged by an

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[10] At this point in the order, the trial court cited to portions of the deposition testimony of plaintiffs' expert Melissa Kantor.

[11] At this point in the order, the trial court cited to portions of the federal district court decision in *In re Fresh Del Monte Pineapples Antitrust Litigation*, *supra*, 2008 U.S. Dist. Lexis 18388, at pp. *26-30, 36-42.

average of $0.20 per pound of pineapples over the class period, that an average of $0.10 per pound overcharge was passed through to consumers, and that a hypothetical consumer filing a claim bought 15 pounds of pineapples each year for 5 years, then the consumer's recovery would be $7.50. [Citations.][12] The time and expense of providing notice, making the claim, processing the claim, and paying the claim could easily outweigh the value of the claim itself." Citing to the declarations of plaintiffs' experts Melissa Kanter and Katherine Kinsella, the trial court concluded that "Plaintiffs' proposals to identify frequent pineapple purchasers or current pineapple purchasers and distribute any monetary relief to them d[id] not appear reasonable on the facts of this case. [Citations.] Plaintiffs have not shown that they can develop evidence showing that those who purchased pineapples during the early years of the class period when Plaintiffs are most likely to be able to establish that monopoly overcharges occurred and those who are currently buying pineapples are the same people. [Citation.]" Finally, the trial court noted that although it "could approve a plan of cy pres distribution under [Code of Civil Procedure section] 384 that would benefit the class indirectly," it did not appear that the statutory provision authorized certification of a class action "when the [c]ourt finds little or no prospect of being able to distribute any significant portion of a damages award to members of the class in a cost effective manner."

We see no merit to plaintiffs' arguments challenging "[t]he trial court's superiority and manageability determinations." As explained by our Supreme Court in *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 386 (*Blue Chip Stamps*): "[W]hen potential recovery to the individual is small and when substantial time and expense would be consumed in distribution, the purported class member is unlikely to receive any

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[12] At this point in the order, the trial court cited to the declaration of plaintiffs' expert Gary L. French, PhD., and supporting tables attached to the declaration, that showed that consumers bought pineapples infrequently, and the alleged overcharges paid by direct purchasers ranged from $0.00 to $0.40 per pound.

appreciable benefit. The damage action being unmanageable and without substantial benefit to class members, it must then be dismissed. (*In re Hotel Telephone Charges* (9th Cir. 1974) 500 F.2d 86, 91-92 (potential recovery of $6 per class member); *Devidian v. Automotive Service Dealers Assn*. (1973) 35 Cal.App.3d 978, 986 (most claims $10 or less); *Stilson v. Reader's Digest Assn., Inc.* (1972) 28 Cal.App.3d 270, 273-274 (millions of class members entitled to nominal damages).)"

By moving for certification of a "smaller, more manageable California-only indirect purchaser class," plaintiffs asserted that they could overcome the manageability concerns raised by the federal district court as to the federal indirect purchaser plaintiffs' failure to offer a meaningful proposal for distributing relief to absent class members.[13] Thus, plaintiffs proffered the affidavits of two experts to demonstrate "a manageability plan for this action that was lacking in" the federal litigation. However, the experts were not asked and did not proffer any estimates of the costs of their proposed methods of identifying and notifying putative class members and the administration of any claims procedure. Rather, plaintiffs merely argued, in a conclusory fashion, that "the costs of administration and notice likely will be negligible in comparison to the total aggregate benefit to the class." Consequently, we conclude that the trial court acted well within its discretion by finding in substance that plaintiffs' evidence did not overcome the manageability issues identified by the federal district court. Contrary to plaintiffs'

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[13] In concluding that the federal plaintiffs' "proposed 'formal claims procedure' [was] also not a reliable method of distributing damages" to a class of indirect purchasers (consumers) of Fresh Del Monte Gold™ pineapples, the federal district court found: "(i) Plaintiffs have not established what percentage of the Indirect Purchaser Class is likely to receive notice of the claims process [citations]; (ii) given the relatively small claims involved in terms of monetary value (and the proposed payment of claims in coupons), only a small percentage of Class Members would likely file claims [citations]; (iii) many filed claims are not likely to be accurate or verifiable [citations]; and (iv) the cost of notice and claims administration (which Plaintiffs failed to estimate) might overwhelm any relatively minimal benefit to the Class [citations]." (*In re Fresh Del Monte Pineapples Antitrust Litigation*, *supra*, 2008 U.S. Dist. Lexis 18388, at pp. *40-41.)

suggestion, the trial court did not have an obligation "to create . . . cost-effective and meaningful notice and fund distribution programs." Instead, "plaintiffs' failure to propose . . . how the litigation of individualized damages could be handled in a manageable fashion as part of its proposed class action bars plaintiffs' claim that the trial court failed ' "to consider the use of . . . innovative procedural tools *proposed by a party* to certify a manageable class." ' " (*Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1429, fn. 6 (*Evans*), quoting *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339 (*Sav-On Drug Stores*), italics added in *Evans*.) Nor do we see any merit to plaintiffs' assertion that the trial court "simply assumed, without relying on any record evidence, that administrative costs would outweigh the value of the distribution itself [citation]." The trial court's example of a hypothetical consumer's recovery was based on evidence proffered by plaintiffs' expert. Given that plaintiffs do not challenge the court's example that a putative class member's monetary recovery could be as low as $7.50, we see no error in the trial court's finding that "[t]he time and expense of providing notice, making the claim, processing the claim, and paying the claim could easily outweigh the value of the claim itself."

Plaintiffs also argue that the trial court misinterpreted the concept of a "cy pres" or "fluid recovery" as described in Code of Civil Procedure section 384.[14] "The term 'fluid recovery' refers to the application of the equitable doctrine of *cy près* in the context of a modern class action." (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 750, fn. 7.) It "developed as a means by which to distribute the residue of a favorable class action judgment remaining after payment to those class members who have sufficient interest in obtaining recovery and can produce the documentation necessary to file individual

[14] Code of Civil Procedure section 384 reads, in pertinent part: "(a) It is the intent of the Legislature in enacting this section to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Californians."

claims." (*Kraus v. Trinity Management Services, Inc*. (2000) 23 Cal.4th 116, 127-128 (*Kraus*).) Contrary to plaintiffs' contentions, "[w]e do not read the trial court's comments as necessarily denying the existence of the remedy of [fluid recovery] in a properly certified class action, but as a determination that plaintiffs here failed to carry their burden of establishing the prerequisites for a certifiable class. [Citation.] The court was saying that by itself," plaintiffs' desire to distribute any restitutionary relief by a fluid recovery mechanism was not sufficient to demonstrate that certification of a class was appropriate in this case. (*Frieman v. San Rafael Rock Quarry, Inc*. (2004) 116 Cal.App.4th 29, 35 (*Frieman*).) We see no abuse of discretion in the trial court's finding.

Plaintiffs' reliance on *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649 (*Corbett*), and *In re Vitamin Cases* (2003) 107 Cal.App.4th 820, both cases decided by Division Two of this court, and *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120 (*Bruno*), decided by Division Two of the Fourth District Court of Appeal, is misplaced. "The court in *Corbett* specified: '*Where a class has properly been certified*, a plaintiff in a UCL action may seek disgorgement of unlawful profits into a fluid recovery fund.' (*Corbett, supra*, 101 Cal.App.4th at p. 655, italics added.) Even according to *Corbett*, a desire for a particular remedy is not itself a reason for certification." (*Frieman, supra*, 116 Cal.App.4th at pp. 35-36.) Similarly, the court in *Bruno* held only that a fluid class recovery was not prohibited in Cartwright Act[15] class actions. (*Bruno, supra*, 127 Cal.App.3d at p. 135.) The *Bruno* court specifically commented that "damages distribution" was to be addressed in the first instance by the trial court "when it

[15] The Cartwright Act (Bus. & Prof. Code, § 16700 et. seq.) is our state law that governs certain forms of antitrust conduct. As the trial court noted in its order: "Because no Cartwright Act claim is presented, but only a [Business and Professions Code section] 17200 claim based upon [a] violation of the Sherman Act, an important question not addressed on this motion is whether the federal doctrine precluding actions by indirect purchasers for violation of the Sherman Act is part of [p]laintiffs' claim in this case. [Citation.] That issue would be a common one and the Court has not addressed it in ruling on this motion."

considered whether the lawsuit might be maintained as a class action," and was "but one of several factors that must be weighed and balanced to determine the correctness of maintaining a class action." (*Id*. at p. 135, fn. 10; see *Kraus, supra,* 23 Cal.4th at p. 135 ["fluid recovery might be appropriate in a consumer *class* action"].) In *In re Vitamin Cases,* the appellate court's discussion of the appropriateness of a fluid recovery distribution was made in the context of approving a class action settlement. (107 Cal.App.4th a pp. 826-832.) Contrary to plaintiff's argument, the *In re Vitamin Cases* court did not focus or otherwise discuss in general the potential use of fluid recovery in deciding the appropriateness of certifying a class. (*Ibid.*)

Plaintiffs also challenge the trial court's reliance on the then pending federal direct purchasers class action. As explained by the trial court, a state class action was not necessary to deter defendant's allegedly anti-competitive action "[b]ecause the federal court has certified a class action on behalf of direct purchasers such as grocery stores." "[I]f plaintiffs prevail in that case defendants will be liable for treble damages based on the total overcharge" paid by direct purchasers, and Del Monte "will not be able to mitigate [its] damages by asserting that the federal plaintiffs passed the overcharge down through the chain of distribution. [Citations.]" Thus, "[a] plaintiffs' victory in the federal action [would] subject Del Monte to damages that [would] provide an effective deterrent to unlawful behavior. Although brought by private parties, the federal action is equivalent in its deterrent effect to an enforcement action by public prosecutors. [Citation.]"

Contrary to plaintiff's contention, a trial court may take into consideration " ' "the advantages of alternative procedures for handling the total controversy" ' " in determining whether litigation may be maintained as a class action. (*Caro, supra,* 18 Cal.App.4th at p. 661.) The fact that plaintiffs' state lawsuit asserts a UCL cause of action, while the federal direct purchasers class action asserted causes of action based on federal antitrust law, did not preclude the trial court from looking at the federal

proceeding as both actions involved the same alleged misconduct by Del Monte. (*Ibid*.; see also *In re Fresh Del Monte Pineapples Antitrust Litigation, supra,* 2008 U.S. Dist. Lexis 18388, at p. *31 ["[t]he existence of relevant pending litigation may not favor certification [of an indirect purchaser class action], because 'to the extent plaintiffs pursue a class vehicle as a means of punishing defendants, preventing their retention of "ill gotten gains," or deterring future behavior, the existing [Direct Purchaser Class Action] may well serve those purposes' "].)

In their reply brief, plaintiffs argue that the trial court's reliance on the federal class action no longer supports its denial of class certification because the federal direct purchasers class action has now been dismissed.[16] However, "it would be eminently unfair to assess a trial court's exercise of discretion based on matters not before it at the time of decision." (*Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1237.) Additionally, dismissal of the federal litigation does not, by itself, warrant reversal. In assessing the appropriateness of class certification, the trial court properly considered and concluded the then-pending federal litigation would provide a better method of both adjudicating the parties' controversy and deterring any future antitrust violations by Del Monte. Concededly, dismissal of the federal class action now eliminates any potential monetary benefits that might have accrued to the benefit of California citizens. Nevertheless, the fact that the federal litigation has resulted in a favorable outcome to Del Monte does not support plaintiffs' argument that the trial court's denial of class certification now results in an *unjust* advantage to Del Monte.

Plaintiffs also raise several arguments challenging the trial court's finding that certification was not appropriate because individual questions would predominate over common questions regarding the impact of Del Monte's allegedly anti-competitive conduct on putative class members. After examining whether substantial evidence

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[16] See footnote 8, *ante*.

supports "the trial court's finding on predominance and draw[ing] inferences from the evidence in favor of the order" (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 144), we conclude that plaintiffs' arguments are unavailing.

When, as here, the putative class members are indirect purchasers, a two-step analysis is necessary to determine the adverse impact caused by Del Monte's alleged anti-competitive conduct. (*Somers v. Apple, Inc*. (N.D. Cal. 2009) 258 F.R.D. 354, 358.) Plaintiffs must first show that direct purchasers (retailers) paid a supracompetitive cost for Fresh Del Monte Gold™ pineapples, and then plaintiffs must show that the direct purchasers, in turn, passed through some or all of the supracompetitive cost in the nature of supracompetitive prices to indirect purchasers (consumers). (*Ibid*.) Consequently, the fact that the trial court found plaintiffs had shown that common issues of law and fact would predominate in determining the aggregate amount Del Monte allegedly overcharged direct purchasers does not affect the trial court's ruling regarding the predominance factor as applied to the pass through of overcharges from direct purchasers to indirect purchasers, as plaintiffs suggest.

We also see no significance to plaintiffs' argument that "whether tracing is required and, if so, how it may be accomplished, are themselves questions common to the Class." In addressing plaintiff's motion for certification, the trial court properly considered " 'how a trial on the merits would be conducted if a class were certified.' [Citations.] This, in turn, 'entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class,' a process that ultimately 'prevents the class from degenerating into a series of individual trials.' [Citation.]" (*Bell Atlantic Corp. v. AT&T Corp*. (5th Cir. 2003) 339 F.3d 294, 302.) Plaintiffs assert that Del Monte sold millions of Fresh Del Monte Gold™ pineapples to thousands of customers. If the litigation proceeded as a class action, the trial court found that it would be faced with the complex task of evaluating "the pricing decisions of each California" direct purchaser "in each of

the separate California markets" in which the direct purchasers sold pineapples in order to ascertain the impact of Del Monte's conduct on indirect purchasers, namely, whether any overcharges were passed through from retailers to putative class members. (See also *Keating v. Philip Morris, Inc.* (Minn. App. 1987) 417 N.W.2d 132, 137-138 ["lawsuit would remain unmanageable" even if liability and damages issues were bifurcated because it "would still leave the problem of determining the fact . . . of damage for each" indirect purchaser].)

Plaintiffs argue, however, that the impact of Del Monte's alleged anti-competitive conduct can be demonstrated without a showing of individual injury to putative class members, citing to *B.W.I Custom Kitchen v. Owens-Illinois, Inc*. (1987) 191 Cal.App.3d 1341 (*B.W.I Custom Kitchen)* and *Rosack v. Volvo of America Corp*. (1982) 131 Cal.App.3d 741 (*Rosack*). However, in those cases concerning price fixing—a per se violation of both federal and state antitrust laws—the courts have held that when a conspiracy to fix prices has been established and plaintiffs have established that they purchased the affected goods or services, the fact of injury or impact on a consumer can be treated as a common question for class certification because "a jury can *infer* the fact of injury," thereby "eliminat[ing] the need for each class member to prove individually the consequences of the defendants' actions to him or her." (*Rosack, supra*, 131 Cal.App.3d at p. 753; see *B.W.I Custom Kitchen, supra,* 191 Cal.App.3d at p. 1348.) In this case, we are not concerned with price fixing, but only allegations that Del Monte's purported market monopolization constituted unfair competition. The injury to consumers caused by Del Monte's allegedly wrongful conduct must be shown, and not inferred, as the UCL does not authorize " 'an award of . . . restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice.' " (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 945.)

We are also not persuaded by plaintiffs' argument that "[g]iven that the putative Class may be restored in the amount of Del Monte's ill-gotten gain realized as a result of

its wrongful conduct (see, e.g., *Juarez v. Arcadia Financial, Ltd*. (2007) 152 Cal.App.4th 889, 913 [(*Juarez*)]), . . . 'tracing' monies paid by pineapple purchasers through the chain of distribution back to Del Monte is not an element of proof of their UCL claim." The UCL does not authorize disgorgement of " 'all profits to a plaintiff who does not have an ownership interest in those profits.' " (*Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1147). Thus, even if plaintiffs could show the existence of a vested interest in any profits Del Monte may have received as a result of collecting moneys pursuant to their alleged wrongful business practices, plaintiffs would still have to establish that Del Monte's profits "can be traced directly to the ill-gotten funds" acquired from putative class members. (*Juarez, supra* 152 Cal.App.4th at p. 917 & fn. 16.) Indeed, plaintiffs concede as much in their third amended class action complaint in which they allege that they "can trace the overcharge they and all other members of the class paid in connection with their pineapple purchases through the retailers to Del Monte." Consequently, we conclude the trial court correctly considered that "[t]o prove causation/fact of injury on a classwide basis," plaintiffs would have to demonstrate a class-wide method of tracing the alleged supracompetitive prices through the chain of distribution from Del Monte to putative class members.

We also reject plaintiffs' contention that the trial court impermissibly treated their class certification motion as one for summary judgment by assessing the credibility of the parties' conflicting expert testimony as to whether and how to determine "the pass-through of overcharges (from retailers to consumers) resulting from Defendants' [alleged] anticompetitive conduct," and then adopting the opinion of defendants' expert on the merits. Plaintiffs' expert opined that proof defendant's conduct caused harm to consumers could be demonstrated on a class-wide basis because a trier of fact could presume that one hundred percent of Del Monte's alleged unlawful supracompetitive prices was passed through from retailers to consumers. The plaintiffs' expert's opinion was based on the following factors: Del Monte charged the same prices to grocery stores

without regard to store size or geography, grocery stores had thin profit margins, and consumers were not price sensitive when shopping for pineapples. In rejecting the opinion of plaintiffs' expert, the trial court found in substance that the declaration of defendants' expert persuasively demonstrated that a presumption of a one hundred percent pass-through of overcharges from retailers to consumers was not supported by either economic theory or an empirical analysis of the available data between wholesale price changes and retail price changes across time and location.[17]

Despite plaintiffs' arguments to the contrary, we conclude that "the trial court was within its discretion to credit [Del Monte's] evidence . . . over [plaintiffs'], and we have no authority to substitute our judgment for the trial court's respecting this or any other conflict in the evidence. [Citation.]" (*Sav-On Drug Stores, supra,* 34 Cal.4th at p. 331; *Walsh, supra*, 148 Cal.App.4th at p. 1462.) "The trial court was not deciding—nor are we—the merits of plaintiffs' case. . . . We need not conclude that [defendant's] evidence is compelling, or even that the trial court would have abused its discretion if it had credited [plaintiffs'] evidence instead. '[I]t is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' [Citations.]" (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 331; see *Caro, supra*, 18 Cal.App.4th at p. 656.) Instead, we conclude only that a reasonable court could find, as did the trial court in this case, that the "causation/ fact of injury" element of liability was not capable of proof on a class-wide basis, and "would essentially result in 'thousands of minitrials, rendering [the] case unmanageable and unsuitable for class action treatment.' [Citation.]" (*In re Graphics Processing Units Antitrust Litig*. (N.D. Cal. 2008) 253 F.R.D. 478, 505; see also, *In re Fresh Del Monte Pineapples Antitrust*

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[17] Plaintiffs' expert conceded that he did not devise a retail level model or propose an empirical methodology for measuring pass-through rates for indirect purchasers of Fresh Del Monte Gold™ pineapples because such methodologies could not be implemented without reasonably good and representative data, which was not made available to him.

Litigation, supra, 2008 U.S. Dist. Lexis 18388, at pp. *19, 21 [court rejected opinion of plaintiffs' expert that "[b]y assuming a 100% pass-through rate [of monopoly overcharges from direct purchasers to indirect purchasers] throughout the entire Class Period, . . . total damages [could] be calculated based upon aggregate data, thus avoiding the 'difficulties' in 'find[ing] data for the actual transaction prices paid by consumers and the quantities of pineapples purchased by consumers over the relevant time period' "].)

Plaintiffs' reliance on *In re Cipro Cases I & II* (2004) 121 Cal.App.4th 402 (*Cipro Cases*) is misplaced. The *Cipro Cases* court "did *not* hold a trial court abuses its discretion when it declines to certify a class on the grounds that individual showings of damages predominate over common issues merely because the class proponent offered a formula to calculate classwide damages, which formula the trial court rejected. To the contrary, the *Cipro Cases* court *upheld* the trial court's discretionary determination because it recognized '[t]he trial court is in the best position to weigh the advantages of class treatment against its disadvantages' (*Cipro Cases, supra,* 121 Cal.App.4th at p. 416), and specifically stated it was not an abuse of discretion to adopt a formula to calculate damages in that case because it was 'within the trial court's discretion to weigh the inherent imperfections of such approximations against the vindication of important statutory policies and the burden to the courts of proving damages on a strictly individual basis.' (*Id.* at p. 418.)" (*Evans, supra,* 178 Cal.App.4th at p. 1432.) Indeed, in this case, the only reason that proving the monetary harm suffered by consumers "with exactitude presents difficulty . . . is that it would prove unwieldy in a class action setting to prove each member's right to recovery and the amount. However, that latter factor *supports,* rather than undermines, the determination that individual issues predominated over common issues." (*Id*. at p. 1432, fn. 9.)

Finally, we reject plaintiffs' argument that an affirmance of the trial court's order "would recast California's long-standing practice of protecting its citizens from the wrongful conduct of those, like [d]efendants, who illegally obtain small amounts from

large numbers of consumers, in favor of a policy that: (a) presumes that small individual claims militate **against** class certification, and (b) permits a trial court to look to other jurisdictions or parties to protect the interests of California citizens in advance of any benefit being obtained for the proposed class." By affirming the trial court order, we conclude only that on this record the trial court did not abuse its discretion in ruling that certification of a class of indirect purchasers was not shown to be appropriate. "Perhaps another trial judge considering the matter in the first instance would have allowed class treatment, but that does not merit reversal. 'A record presenting facts on which reasonable minds may differ is not a record establishing an abuse of discretion.' [Citation.] The ruling here does not exceed the bounds of reason or result in a miscarriage of justice." (*Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1351-1352.)

DISPOSITION

The order is affirmed. Defendants are awarded costs on appeal.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Jenkins, J.