UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 08-0999-JVS (ANx)	Date	October 25, 2011
Title	Carol Galvan, et al. v. KDI Distribuation Inc.,et al.		

Present: The Honorable	James V. Selna	
Karla J. Tunis		Not Present
Deputy Clerk		Court Reporter
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
Not Present		Not Present

Proceedings: (In Chambers) Order Granting Plaintiff's Motion for Class Certification (Fld 8-26-11)

Plaintiff Lolis Tackwood ("Tackwood")[1] seeks class certification pursuant to Federal Rule of Civil Procedure 23(b)(1), (2), and (3) for violation of (1) California's Unfair Competition Law ("UCL"); (2) California Business and Professional Code section 17200 et seq. and section 1750 et seq.; (3) breach of contract; (4) unjust enrichment; and (5) declaratory relief against Defendant Krossland Communications Inc. ("Krossland"). Krossland opposes this motion. For the following reasons, the Court GRANTS the motion.

I. Background

Krossland is a wholesaler/distributor of prepaid calling cards that distributes calling cards to other wholesalers and retailers in California, Nevada, Washington, and Oregon. (Opp. Br. p. 4, Docket No. 117.) Krossland's business is heavily concentrated in California, as fewer than ten of its 9,000 retail outlets are located outside California. (Alan Mansfield Decl. ¶¶ 7-8, Docket No. 116-2.)

Prepaid phone calling cards are commonly imprinted with a toll-free telephone number and a personal identification number (PIN). (Pl.'s Second Amended Complaint ("SAC") ¶ 27, Docket No. 59.) Tackwood alleges that Krossland keeps records of how much time remains on a phone card using the PIN. (SAC ¶ 28.)

[1] Plaintiff Carol Galvan ("Galvan") withdrew as a prospective class representative in response to the Opposition Motion. (Pl.'s Redacted Reply Br. p. 1 n. 1, Docket No. 125.)

Tackwood's complaint asserts that Krossland creates and distributes advertising, consisting of "point of purchase posters, website advertising, packaging and voice prompts," which "uniformly communicates to consumers that they will receive certain numbers of minutes to a given location for a certain cost" when in fact, Krossland does not provide the number of minutes advertised. (SAC ¶¶ 34-35.) Tackwood alleges that Krossland does not properly disclose "the substantial surcharges imposed on the use of such cards." (Id. at ¶ 35.) Tackwood further alleges that "the minutes actually delivered to consumers . . . are materially less than those represented in the advertising," which results in loss of money or property to its customers. (Id. at ¶ 38.) Tackwood alleges that Krossland engages in a host of unfair and deceptive business practices, such as falsely representing that it provides a "toll-free" access number (id. at ¶ 42), misrepresenting and actively concealing that it charges consumers more for calls using wireless telephones than those on land line telephones (id. at ¶ 43), and imposing bi-weekly service charges without adequately informing consumers of the deduction or amount (id. at ¶ 40). Tackwood further alleges that Krossland "actively targeted" low-income earners and immigrants who frequently made international calls. (Id. at ¶ 32.)

A. Named Plaintiff

Tackwood purchased Krossland's "La Clara" pre-paid calling cards at a liquor store at the corner of First Street and Villa Las Vegas in Los Angeles, California, as well as the SuperStore in Alhambra, up to April 2008. (SAC ¶ 12.) Tackwood alleges that he purchased the calling cards "based in part on representations at the point of sale of the number of minutes of call time the cards would provide." (SAC ¶ 12.) Tackwood alleges that he received "substantially less value in terms of actual call time than was represented would be received." (Id.) He claims to have used the calling cards to make calls to Colorado and Mexico. (Id.) Tackwood alleges that the advertisements for the cards represented that he would receive 500 minutes for a $5.00 calling card for calls within the United States, but that he received only about half that amount of time. (Id.) Tackwood thus alleges he lost money or property and suffered injury in fact as a result of Krossland's business practices. (Id.)

B. Class Definition

Tackwood seeks to certify a class encompassing:

> all persons residing in California and all other states where Krossland distributed and sold pre-paid calling cards who, since August 26, 2004, purchased, other than for purposes of re-sale, pre-paid calling cards that were distributed by Krossland, other than La Victoria and La Buena calling cards and calling cards distributed by AT&T, T-Mobile and Boost.

(Reply Br. p. 16.) Tackwood amended the class to exclude the La Victoria and La Buena, the only two cards manufactured by Locus Telecommunications ("Locus") that Krossland distributed, because Locus recently settled a case arising out of the sale of calling cards where Locus was the service provider, and a term of the settlement released liability for its distributors, including Krossland. (Monday v. Locus Telecomms., Inc., No. 07-CV-2659 (D.N.J.) Docket No. 32, pp. 3, 11.)

At the hearing, Tackwood clarified that the proposed class should exclude any calling card in which the service provider was AT&T, T-Mobile, or Boost, rather than cards that were merely "distributed" by those service providers, as the current class definition states. This clarification is in accord with the Court's analysis, and the class definition shall be amended to reflect this point. Thus, instead of reading "calling cards distributed by AT&T, T-Mobile and Boost," the last phrase in the class definition should be "calling cards in which the service provider was AT&T, T-Mobile, or Boost."

II. Legal Standard

A motion for class certification involves a two-part analysis. First, Plaintiffs must demonstrate that the proposed class satisfies the requirements of Rule 23(a): (1) the members of the proposed class must be so numerous that joinder of all claims would be impracticable; (2) there must be questions of law and fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of absent class members; and (4) the representative parties must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

Second, a plaintiff must meet the requirement for at least one of the three subsections in Rule 23(b). Tackwood asserts that the putative class meets the requirements for all three subsections. Under Rule 23(b)(1), a class may be maintained if there is either a risk of prejudice from separate actions establishing incompatible standards of conduct or judgments in individual lawsuits would adversely affect the rights of other members of the class. Under Rule 23(b)(2), a plaintiff may maintain a class where the defendant has acted in a manner applicable to the entire class, making injunctive or declaratory relief appropriate. Finally, under Rule 23(b)(3), a class may be maintained where common questions of law and fact predominate over questions affecting individual members and where a class action is superior to other means to adjudicate the controversy.

Tackwood bears the burden of demonstrating that Rules 23(a) and (b) are satisfied. See Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001), amended by 273 F.3d 1266 (9th Cir. 2001). The Court must rigorously analyze whether the prerequisites of Rule

23 are met. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982). While the Court's analysis must be rigorous, Rule 23 confers to the district court "broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." Armstrong v. Davis, 275 F.3d 849, 872, n. 28 (9th Cir. 2001).

The district court need only form a "reasonable judgment" on each certification requirement "[b]ecause the early resolution of the class certification question requires some degree of speculation." Gable v. Land Rover N. Am., Inc., 2011 U.S. Dist. LEXIS 90774, at *9 (C.D. Cal. July 2011) (quoting In re Citric Acid Antitrust Litigation, 1996 U.S. Dist. LEXIS 16409 at * 2 (N.D. Cal. Oct. 1996)); see also Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975). The court must take the substantive allegations of the complaint as true, "thus necessarily making the class order speculative in the sense that the plaintiff may be altogether unable to prove his allegations." Gable, 2011 U.S. Dist. LEXIS 90774, *9. Moreover, the court cannot inquire into the merits of a suit to determine whether it may be maintained as a class action. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

Additionally, there are implied prerequisites to class certification that the class must be sufficiently definite and ascertainable. Xavier v. Phillip Morris USA, Inc., No. C 10-02067 WHA, 2011 WL 1464942, at *12 (N.D. Cal. April 18, 2011) (finding that it was impossible to ascertain a class of long-term smokers who smoked only Marlboro cigarettes for "twenty pack years"). The court explained the purpose of the ascertainability requirement as follows:

> Ascertainability is needed for properly enforcing the preclusive effect of final judgment. The class definition must be clear in its applicability so that it will be clear later on whose rights are merged into the judgment, that is, who gets the benefit of any relief and who gets the burden of any loss. . . . Indeed, courts of appeals have found class certification to be inappropriate where ascertaining class membership would require unmanageable individualized inquiry.

Id. (internal citations omitted). Accordingly, this Court may certify the class only if Tackwood demonstrates that the class definition is sufficiently definite and the members of the putative class may be ascertained without "unmanageable individualized inquiry."

III. Discussion

A. Ascertainability

Krossland argues that there is a fatal ascertainability problem in this putative class because many Krossland-distributed calling cards identify only the service carrier and not the

distributor of the card, and thus it is impossible to ascertain which customers purchased a Krossland-distributed calling card. If the customers cannot tell whether they purchased a Krossland card, Krossland argues, there is no way to tell if the customer is part of the putative class. Further, the fact that most customers discard calling cards after use and are likely unable to recall the PIN number on the card further compounds the problem of ascertaining class members. As Krossland noted, Tackwood testified that he purchased 25 to 40 cards and Galvan testified that she purchased 2-3 cards per week for a few years, but between the two of them, they produced a total of six cards in this action. (Lee Decl., Ex. 1 Tackwood Decl. 70:7-13, Docket No. 118-1; Lee Decl. ¶¶ 4-5, Docket No. 118.) Both plaintiffs testified that they discarded the cards after use. (Lee Decl., Ex 1Tackwood Dep. 42:9-15.) Krossland claims that customers likely will not remember where they purchased a card, and likewise, Krossland does not know to whom these cards were sold. (Reply Br. p. 2.)

The class is sufficiently ascertainable, however, for several reasons. First, though Krossland asserts that during the class period it distributed the prepaid cards of "at least 30 service providers" (Opp. p. 4), this is inconsistent with the deposition testimony of Jay Lee, Krossland's representative who was held out as the "person most knowledge of Krossland communications." (Reply Decl. Mansfield, Ex. 9 Lee Decl. 30:22-31:24, Docket No. 125-2.) Lee testified that Krossland had agreements with only eight service providers to distribute calling cards using their services: Locus, Allcom, IDT/UTA, Touchtel, Totalcall, AT&T, T-Mobile, and Boost (a Sprint company). (Id.) Krossland's argument that this case involves at least 30 service providers and approximately 600 different cards is plainly at odds with the evidence presented. Moreover, as Tackwood noted in the hearing, the class definition further narrows the potential service providers because the class definition excludes the only two cards produced by Locus (La Victoria and La Buena), as well as any cards in which the service provider was AT&T, T-Mobile and Boost, thus reducing the possible pool of carriers to four. Additionally, Allcom identifies Krossland as its distributor on some of its phone cards, including the La Clara card used by Tackwood. (Jess Ahn Decl. ¶¶ 30, 33, Docket No. 119.) Accordingly, the universe of potential carriers and different types of cards that are not identified as "Krossland-distributed" cards is not as vast as Krossland contends, and thus the ascertainability problem is overstated.

Second, Krossland can determine to whom it sold calling cards because Krossland maintains a list of cards sold by its sales representatives on order sheets and invoices, as well as daily reports stating exactly which cards were distribute by Krossland's sales representatives. (Mansfield Reply Decl., Ex. 9, Lee Dep. 39:2-14, 45:20-46:7.)[2] Thus, while Krossland cannot

[2] While Krossland alleges that these sales representatives were independently contracted distributors for the company,

directly identify the class members, it can, and according to Tackwood, already has, identified the retailers who sold its cards, and has the documents to establish which retailers sold which cards during which time periods, based on the invoices and daily reports it creates and maintains. (Reply Br. pp. 3-4.) Further, Krossland has not provided evidence that other retailers provide the same cards to the same retailers with whom Krossland deals. Thus, Tackwood may be able to prove at trial that all the phone cards with a specific carrier from a specific store came from Krossland.

Third, once Krossland's records establish which retailers sold Krossland cards during the class period, class notice will further help reveal the class members.[3] Notice can be distributed through the same channels Krossland utilizes to advertise its products: posting class notices at retail stores where the Krossland cards are sold, notifying past purchasers to identify themselves in order to participate.[4]

Finally, Krossland contends that it would be impossible to ascertain who purchased the phone cards that were sold to other wholesalers, as those sellers went on to sell those cards to various retailers unknown to Krossland. At this point, it is unclear whether there is a record of Krossland's sales to other wholesale companies, and Tackwood does not describe a manner for

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Tackwood contends that these "distributors" worked exclusively for Krossland, which controlled them in terms of which cards to provide, the terms on which they sold the cards, the money they collected, and how much they earned. (Reply Br. p. 3.) Reading the facts in the light most favorable to Tackwood, the Court considers these distributors to be Krossland's agents for purposes of analyzing whether Krossland can ascertain the purchasers of these calling cards.

[3] As the Court previously noted in the Order Denying Class Settlement (Docket No. 101), Tackwood's proposed manner of notice for its settlement agreement was the best practicable under the circumstances. The proposed notice plan had five parts: (1) the creation of a settlement website; (2) the publication of a short-form notice in both English and Spanish as a national press release and in the California editions of La Opinion once a week for two weeks; (3) a notice voice prompt on all current calling cards; and (5) the establishment of a toll-free telephone number. (Docket No. 101.) Tackwood could implement some of the proposed settlement notice strategy to notify the putative class members.

[4] Krossland raises the problem of proving class membership in that many customers discard the phone cards after use. This concern, albeit formidable, is premature at the certification stage.

ascertaining the purchasers of these cards. Tackwood alleges that Krossland's sales to wholesale companies are a small part of Krossland's business and involve only approximately five to ten companies located in Southern California that Krossland's corporate designees were not able to recall during deposition. (Reply Br. pp. 3-4.) Whether the purchasers of those cards are unascertainable and thus should be excluded from the class is a matter the Court need not address today. If Tackwood cannot show a workable method for ascertaining the purchasers of those cards, the class will be narrowed accordingly.

To the extent that there are lingering queries regarding ascertainability, they do not foreclose class certification. For example, in a loan fraud case, the defendants argued that individual adjudication was necessary to determine the injury essential to class membership, which, in that case, turned on whether the individual was advised in advance of their loan closing that purchasing insurance was optional. Elliott v. ITT Corp., 150 F.R.D. 569, 574-75 (N.D. Ill. 1992). Defendants asserted that the need for individualized inquiries rendered the class inadequately defined and unascertainable. Id. Rejecting this argument, the court held that the "problem" of determining class membership is "present in many actions": "A class may be certified even though the initial definition includes members who have not been injured or do not wish to pursue claims against the defendant." Id. at 575. The court explained, "[n]ormally, the question of injury to individual members is deferred until after resolution of the common questions . . . If class certification were denied at this early stage on the basis that injury to individual class members would have to [sic] proven on an individual basis, many classes might never be certified." Id. Similarly, in a products liability class action, the fact that the class may have initially included persons who did not have difficulties with their car engines or who do not wish to have these purported problems remedied was inapposite at the class certification stage. Joseph v. General Motors Corp., 109 F.R.D. 635, 637 (D. Colo. 1986). In this case, the class definition may include individuals who did not perceive that they were short changed by the minutes provided on their calling cards, individuals who do not wish to pursue action, and individuals that have inadequate proof to go forward with the class. However, as demonstrated in Elliott and Joseph, these ascertainability issues are not fatal to class certification and may be addressed later in the litigation.[5]

B. Rule 23(a)

The Court consider the basic certification requirements under Rule 23(a).

1. Numerosity

[5] This is particularly so where the Court always has the opportunity to revisit the certification issue.

The parties do not appear to dispute this issue. Tackwood asserts that there are likely "tens of thousands of consumers who were similarly affected by Krossland's conduct." (Pl.'s Br. p. 6.) Tackwood seeks to certify a nationwide class, though he claims that only a "very small percentage of putative class members are located outside California," given that only ten of Krossland's 9,000 stores are located outside of California. (Id.) Tackwood argues that the numerosity and geographic diversity of the claims support the numerosity prong. (Id.) The Court agrees and finds this factor in favor of Tackwood.

2. Commonality

Rule 23(a)(2) requires that questions of law or fact be common to the class. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon v. Chrysler Corp., 140 F.3d 1011, 1019 (9th Cir. 1998). As the Supreme Court recently held, a common question "must be of such a nature that it is capable of classwide resolution – which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

Here, Tackwood argues that a prevailing common issue is "whether the disclosures that were distributed by Krossland from a limited number of carriers . . . comply with California law." (Reply Br. p. 6.) If the disclosures do not conform with California law, Tackwood asserts that the class members are automatically entitled to relief and Krossland must disgorge its profits illegally obtained.[6] (Id.) The validity of the claim regarding disclosures can be determined "in one stroke" irrespective of the individual plaintiffs.

Additionally, there are common issues of fact and law regarding the UCL and CLRA claims because the trier of fact will have to determine (1) whether Krossland made misleading misrepresentations in its advertisements and (2) whether Krossland's conduct violated the UCL and CLRA. These issues are at the core of all the putative class members' claims and can be largely resolved by analyzing Krossland's conduct rather than looking at the conduct of the individual plaintiffs.

Accordingly, the common nucleus of factual and legal questions in this case satisfies the commonality requirement.

3. Typicality

[6] This assertion is discussed at greater depth infra Part C.1.a.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Under the "permissive standards" of this Rule, "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon, 150 F.3d at 1020.

Krossland argues that Tackwood is not a "typical class member" because he speaks English, is a U.S. born citizen, and used the cards to make domestic calls whereas the class action purports to protect non-English speaking immigrants who use phone cards to make international calls. (Opp. Br. p. 11.) While Tackwood alleges that phone cards are marketed to immigrants who may not speak or read English as their first language, a customer's origin, primary language, and usage of the cards for domestic or international calls are not factors incorporated in the class definition. The differences Krossland raises obfuscate the real inquiry under Rule 23(a)(3), which is whether the "claims or defenses" of the representative are typical.

Here, Tackwood's claims are typical of those in the class because he alleges that he relied on the representations on the front of the Krossland-distributed calling cards and their advertisements in deciding to purchase calling cards. (Mansfield Reply Decl., Ex. 19 Tackwood Dep. 48:12-20, 72: 19-24.) Tackwood alleges that he received only about half the calling time promised in the advertisement, and thus he was mislead and suffered an injury from the misrepresentation. (SAC ¶ 12.) Tackwood asserts that his claims are based on the same legal theories as those of the absent class members: violation of the UCL, the CLRA, and breach of contract. (Pl's Br. p. 8.) Moreover, if successful, Tackwood would be entitled to the same remedies as the absent class members: damages, declaratory relief, or restitution. (Id.) Finally, Tackwood alleges that he used the Krossland-distributed calling cards during the class period. (Reply Br. p. 7.)

Because Tackwood's claims and potential remedies are the same as the absent class members, the typicality prong is satisfied.

4. Adequacy of Representation

Rule 23(a)(4) requires that the representative party "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "This requirement is grounded in constitutional due process concerns: 'absent class members must be afforded adequate representation before entry of a judgment which binds them.'" Evans v. IAC/Interactive Corp., 244 F.R.D. 568, 578 (C.D. Cal. 2007) (quoting Hanlon, 150 F.3d at 1020). Representation is adequate if (1) the named plaintiffs and their counsel are able to prosecute the action vigorously and (2) the named plaintiffs do not have conflicting interests with the unnamed class members. Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978). The named plaintiffs and their counsel

must have "the zeal and competence" necessary to prosecute the action. Fendler v. Westgate-California Corp., 527 F.2d 1168, 1170 (9th Cir. 1975).

The Court is not aware of any evidence that suggests a material conflict between the interests of the named plaintiff and the absent parties.[7] As Tackwood argues, all putative class members share an interest "in establishing Krossland's liability, in having Krossland remedy its practices of misrepresenting the number of minutes available on calling cards, and ensuring the disclosures Krossland disseminated comport with California law." (Pl.'s Br. p. 9.)

Krossland argues that Tackwood cannot be an adequate representative because he admits that he did not read the disclosures on the phone cards. (Opp. Br. p. 11.) This fact, however, is not fatal to Tackwood's fitness as a representative because the only claim hinging on the substance of Krossland's disclosures is the UCL claim based on a violation of section 17538.9 of the California Business and Profession Code. This claim, however, does not require a showing of reliance, because, as discussed infra, it is a strict liability offense. Thus, Tackwood need not show that he read this disclosure to prove that Krossland violated this statute. Further, Tackwood can still show causation if he proves that Krossland's failure to place the disclosure in a clear and conspicuous position, as required by law, caused his injury. Here, Tackwood has made assertions to that effect, claiming the disclosure is deficient in that the front of the card states that calls are "toll-free" and the back of the card states that they are not "toll-free." Therefore, with respect to the UCL claim predicated on a violation of section 17538.9, Tackwood can represent the class. The remaining claims require a showing of reliance but, as discussed infra, they relate to Krossland's allegedly misleading advertisements, on which Tackwood claims he relied to his detriment. Accordingly, Tackwood has standing to bring the claims of the absent class members and he can vigorously prosecute the action against Krossland.

Finally, Tackwood has been an active participant in the litigation. He has responded to discovery, provided documents, and appeared for deposition. (Reply Br. p. 8.) Contrary to Krossland's claims, there is no evidence to suggest that Tackwood has merely lent his name to a case controlled by counsel. (Opp. Br. p. 10.) Thus, the Court finds that Tackwood is an

[7] As the Court noted in the Order Denying the Preliminary Approval of Class Settlement (Docket No. 101), a conflict of interest could arise between members of the class who could recall their PIN numbers and members who could not (Tackwood being in the latter group), if the division of damages were predicated on one's recollection of the PIN numbers on the cards used. Because Tackwood does not propose that the damages award be divided in this manner, no conflict presently exists.

adequate class representative.

Because Tackwood has demonstrated the numerosity, commonality, typicality, and adequacy requirements, he has satisfied the Rule 23(a) analysis. The Court now proceeds to the Rule 23(b) query.

C. Rule 23(b)

The Court finds that the class action may be certified under Rule 23(b)(3). Because Tackwood need only meet the requirements of one of the three subsections in Rule 23(b), the Court need not address the remaining subsections.

1. Predominance and Superiority under Rule 23(b)(3)

"'Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" Kamm v. Cal. City Dev. Co., 509 F.2d 205, 211 (9th Cir. 1975) (quoting Committee notes). A class may be certified under this subdivision where common questions of law and fact predominate over questions affecting individual members, and where a class action is superior to other means to adjudicate the controversy. Fed. R. Civ. Proc. 23(b)(3).

a. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997) (citation omitted). The Court must rest its examination on the legal or factual questions of the individual class members. Hanlon, 150 F.3d at 1022. "To determine whether common issues predominate, this Court must first examine the substantive issues raised by Plaintiffs and second inquiry into the proof relevant to each issue." Jimenez v. Domino's Pizza, Inc., 238 F.R.D. 241, 251 (C.D. Cal. 2006) (citation omitted).

"There is no definitive test for determining whether common issues predominate, however, in general, predominance is met when there exists generalized evidence which proves or disproves an [issue or] element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position." Withers v. eHarmony, Inc., CV 09-2266-GHK (RCx), Order Denying Mot. to Cert. Class, Docket No. 13, June 2, 2010 (quoting In re Vitamins Antitrust Litig., 209 F.R.D. 251, 262 (D.D.C. 2002) (internal quotation marks omitted). Tackwood argues that the breach of contract, UCL, and CLRA claims are each susceptible to common proof because each claim focuses on Krossland's marketing of the

calling cards. (Pls.' Br. pp. 10-12.) Each of the claims do not require individualized showings from the plaintiffs; the inquiries under each claim look almost exclusively at Krossland's conduct. (Id.)

i. Common Issues Predominate on the UCL and CLRA Claims

The UCL prohibits any "unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code" [hereinafter "Chapter One"]." Cal. Bus. & Prof. Code § 17200. Tackwood argues that Krossland violated the UCL by (1) committing an unlawful act prohibited by Chapter One and (2) engaging in fraudulent business acts.

The UCL "borrows violations of other laws and treats them as unlawful practices that the UCL makes independently actionable." Hale v. Sharp Healthcare, 108 Cal. Rptr. 3d 669, 676-77 (Ct. App. 2010). A Chapter One violation is an "unlawful" act under the UCL. Id. Section 17538.9(b)(18), a subsection in Chapter One, states that a "distributor[8] that sells directly to a retail vendor is required to provide the retail vendor with the current information required by paragraph (3) in a form that may be displayed by the retail vendor as provided in pararaph (3)." Paragraph (3) provides:

> The company[9] shall print legibly on the card or packaging, so that it may be read without having to open any packaging, and the retail vendor shall make available clearly and conspicuously in a prominent area immediately proximate to the point of sale of the prepaid calling card or prepaid calling services the following information, which shall be current at the time of printing and for as long as it is displayed:
>
> (A) The value of the card and all ancillary charges.

[8] "Distributor" is defined in the statute as "any person who offers or sells a card or services to a retail vendor or to any other person for ultimate resale to a retail vendor." Cal. Bus. & Prof. Code § 17538.9(a)(4). Accordingly, Krossland is a "distributor" for purposes of this statute.

[9] "Company" is defined in the statute as "any entity providing prepaid calling services to the public using its own or a resold telecommunications network." Cal. Bus. & Prof. Code § 17538.9(a)(3).

> (B) Ancillary charges for international calls to each country for which the card may be used or, in lieu of disclosing ancillary charges for each country, the highest ancillary charges for any international calls applicable on that card and any additional or different prices, rates, or unit values applicable to international usage of the prepaid calling card or prepaid calling services.

Cal. Bus & Prof. Code § 17538.9(b)(3) (emphasis supplied). The statute defines "ancillary charges" as "all surcharges, taxes, fees, connection charges, maintenance fees, monthly or other periodic fees, per-call access fees, or other assessments or charges of any kind, however denominated, that may be imposed in connection with the use of a card . . . ." Id. at § 17538.9(a)(1).

From the statute it is clear that Krossland, as a distributor, was required to provide information regarding the ancillary charges related to each calling card it distributed "in a form that may be displayed" by each of the retail vendors. Whether Krossland fulfilled this obligation is a question common to all putative plaintiffs' UCL claims and does not necessitate any individualized inquiry into the circumstances of each plaintiff.

A UCL violation that is not based on a "fraud theory involving false advertising and misrepresentations to consumers" does not require a showing of reliance or causation. See In re Tobacco II Cases, 46 Cal. 4th 298, 326 n. 17 (2009) (clarifying that the discussion of standing under the UCL as amended by Proposition 64 relates only to cases in which a UCL action is based on a fraud theory involving false advertising and misrepresentation to consumers and affirming that there are "doubtless many types of unfair business practices" in which reliance is not required). Section 17538.9 is not an action for fraud; there is no language suggesting a customer need rely on the inaccurate packaging or labeling information or that the distributor must intend to deceive the customer. Rather, on its face, it is a strict liability action. See Prata v. Superior Court, 111 Cal. Rptr. 2d 296, 302 (Ct. App. 2001) (describing UCL violations as strict liability offenses where plaintiff need not show defendant intended to injury anyone). In Hale, a putative class action brought under a UCL claim based on a Chapter One violation required the representative plaintiff to show reliance because the defendant has allegedly violated section 17204, which required a plaintiff to show he "suffered injury in fact . . . as a result of the unfair competition." 108 Cal. Rptr. 3d at 679. Because there was a reliance requirement implied in the statute by the phrase "as a result of" and because the predicate unlawful conduct was misrepresentation, the UCL claim required a showing of the representative plaintiff's reliance. Id. Unlike Hale, here the Chapter One violation has no built-in reliance requirement and the predicate unlawful conduct is not misrepresentation. Rather, the unlawful conduct is a failure to properly label and package the calling cards in compliance with the statute. Accordingly, a UCL claim predicated on a section 17538.9 violation does not

require a showing of the class representative's reliance.

Tackwood's UCL claim for an alleged violation of section 17538.9 does not necessitate burdensome individualized inquiries because the allegation does not require any evidence of the individual plaintiffs' states of mind or Krossland's intent in distributing the marketing materials related to the phone cards. Whether Krossland violated section 17538.9 is a common question among the plaintiffs and the only question necessary to determine this UCL violation. Accordingly, Tackwood has satisfied its burden with respect to this claim.

Tackwood also alleges that Krossland violated the UCL by engaging in fraudulent business acts. Namely, Tackwood alleges that Krossland made material misrepresentations on the calling cards themselves and the accompanying point-of-sale advertising that Krossland distributed to retailers to display in their stores. Where a "UCL action is based on a fraud theory involving false advertising and misrepresentations to consumers," the class representative must demonstrate "actual reliance." In re Tobacco II Cases, 46 Cal. 4th 298, 325 n. 17, 326 (2009). To establish "actual reliance," Tackwood must show that the misrepresentation was a "substantial factor" influencing his decision; however, "the plaintiff need not demonstrate it was the only cause." Hale, 108 Cal. Rptr. 3d at 678. Moreover, "a presumption, or at least an inference, of reliance arises wherever there is a showing that the misrepresentation was material." Id. Once "actual reliance" is established with respect to the class representative, the UCL does not require individualized proof of causation and injury for absent class members. In re Tobacco II Cases, 46 Cal. 4th at 320-21.

Taking the facts alleged in the complaint as true, Tackwood can demonstrate actual reliance on Krossland's misrepresentations. Tackwood alleges that he purchased La Clara calling cards from a liquor store on the corner of First Street and Villa Las Vegas in Los Angeles, as well as the SuperStore in Alahambra, throughout 2008. (SAC.) The La Clara calling cards are inscribed with Krossland's name on the front of the card. (See Opp. Br., Ex. 3 1-1.) Tackwood purchased the cards "based in part on the representations at the point of sale of the number of minutes of call time the cards would provide." (Id.) The advertisements for such cards represented that he would receive 500 minutes for a $5.00 calling card for calls within the United States, but Tackwood received about half that amount making calls from Los Angeles to Colorado. (Id.) Tackwood thus alleges that he relied on Krossland's representations and suffered damages as a result of that reliance. Moreover, the representations regarding price are material to a purchase, and thus, if Krossland misrepresented the price term by concealing the toll charges, there is a presumption of reliance. Hale, 108 Cal. Rptr. 3d at 678. Because Tackwood alleges all the elements of actual reliance, the Court need not inquire into the reliance of the putative class members, thus obviating an individualized inquiry that could make the class unmanageable.

Similarly, Tackwood's CLRA claim requires no individualized showing of reliance for each plaintiff so long as Tackwood can show his actual reliance. The CLRA makes it unlawful to use "unfair methods of competition and unfair or deceptive acts or practices" in the sale of goods or services to a consumer. Cal. Civ. Code § 1770(a). With respect to Tackwood's CLRA claim, the primary issue is whether Krossland engaged in an "unfair or deceptive act or practice" by misrepresenting the number of calling time minutes available through use of the calling cards and advertising posters Krossland distributed. Such acts, if established, would show that Krossland violated CLRA sections 1770(a)(9) ("advertising services with the intent not to sell them as advertised") and (a)(16) ("representing that the subject of a transaction has been supplied in accordance with previous representation when it has not"). Akin to the inference of common reliance in the UCL claim under a fraud theory, a showing that Krossland's conduct was deceptive and that the deception caused the class representative harm gives rise to "the inference of common reliance" as to absent class members in a CLRA claim. Mass. Mut. Life Ins. Co. v. Superior Court, 97 Cal. App. 4th 1282, 1292-93 (2002).

ii. Common Issues Predominate on the Breach of Contract Claim

Tackwood has made a sufficient showing that common issues predominate on the breach of contract claim because the putative class comprises customers who, in purchasing Krossland's calling cards, accepted Krossland's offer of a specific amount of calling time, within a specific area, for a specific price. Furthermore, express warranties can be created by advertisement. Anthony v. General Motors Corp., Cal. Rptr. 254, 259 (Ct. App. 1973). At trial, Tackwood may be able to show that Krossland made express warranties to the putative class by producing a widespread, misleading advertisement campaign. See id. (reasoning that the class may have been able to show later in the proceedings that defendant's advertising amounted to express warranties and holding that the trial court erred in foreclosing that claim before trial). If Tackwood proved that the advertisements were materially misleading, a presumption of reliance would arise, thus negating the need for an individualized inquiry into the state of mind of each plaintiff. Hale, 108 Cal. Rptr. 3d at 678.

Tackwood also asserts a claim for unjust enrichment; however, this is not a proper cause of action under California law. "The phrase 'unjust enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." Melchoir v. New Line Prod., Inc., 106 Cal. App. 4th 779, 793 (2003) (quoting Lauriedale Assoc., Ltd. v. Wilson, 7 Cal. App. 4th 1439, 1448 (1992)). "Unjust enrichment is a general principle, underlying various legal doctrines and remedies, rather than a remedy itself." Id. (quoting Dinosaur Dev., Inc. v. White, 216 Cal. App. 3d 1310, 1315 (1989) (quotation marks omitted)). Tackwood, however, may pursue recovery under a theory of unjust enrichment for violations of the CRLA and UCL, which, as discussed above, involve a common

nucleus of issues among the class members. 10 Witkin Ch. I, § 1013 (2005) (stating that restitution is an available remedy for statutory violations); see People v. Beaumont Inv., Ltd., 3 Cal. Rptr. 429 (Ct. App. 2003).

b. Superiority

Second under the Rule 23(b)(3) analysis, the Court considers whether a class action would be superior to individual suits. Amchem, 521 U.S. at 615. "A class action is the superior method for managing litigation if no realistic alternative exists." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234-35 (9th Cir. 1996). This superiority inquiry requires a comparative evaluation of alternative mechanisms of dispute resolution. Hanlon, 150 F.3d at 1023.

The Court finds that examination of the relevant 23(b)(3) factors favor class certification. Rule 23(b)(3)'s non exclusive factors are: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

i. Factors (A) and (C): Interest of Members and Desirability of Concentrating the Litigation

In this case, there is no indication that the class members would have a strong interest in individual litigation. In fact, because each class member's expenditure on calling cards will be relatively small, given that the cards range from five to ten dollars in cost, any individual recovery would be small, thus giving plaintiffs little incentive to pursue their claims individually. In re Universal Serv. Funding Tel. Billing Practices Litig., 219 F.R.D. 661, 679 (D. Kan. 2004) (holding that a class action was superior to individual claims because the claims involved "relatively insubstantial amounts of money such that a class action is perhaps the only feasible way for plaintiffs to pursue those claims").

Further, because common issues predominate on the claims in this case, presentation of the evidence in one consolidated action will reduce unnecessarily duplicative litigation and promote judicial economy. The determination of liability under the claims asserted requires evidence of Krossland's conduct and few individualized inquiries into the plaintiffs' conduct. While the determination of damages will necessitate some individualized inquiries, this alone does not render the class action unmanageable or inferior to individual actions. Eliot v. ITT Corp., 150 F.R.D. at 575.

ii. Factor (D): Case Management and a Workable Trial Plan

Tackwood has presented a workable trial plan that proposes methods for reducing individualized inquiries among the class members.[10] Tackwood's counsel, Mr. Alan Mansfield ("Mansfield"), represents that he will prove the claims relying "almost exclusively on the documents and testimony that have been and will be provided by Krossland." (Mansfield Decl. ¶ 13.) Mansfield asserts that he will demonstrate how fees are automatically deducted through the providers' automated platform systems, which he will then compare to the disclosures made on Krossland's cards and the advertising materials Krossland distributes to its retailer customers, much of which Krossland has already produced through discovery. (Id.) Mansfield argues that this comparison will reveal that Krossland's cards do not provide the represented minutes that are advertised on Krossland's posters. (Id.) Next, Mansfield proposes that he will present expert testimony to show how Krossland's fees and charges disclosures do not comply with California's requirements, thus proving the first violation of the UCL. (Id.) Mansfield claims that the same evidence with be relevant to the breach of contract claim. (Id.) With respect to the UCL fraud theory claim and the CLRA claim, Mansfield intends to show that the misrepresentations in Krossland's packaging and advertisements were per se material and thus give rise to a presumption of reliance across the class. (See id. at ¶ 14.) Mansfield also asserts that he will offer expert testimony to demonstrate that Krossland's illegal acts resulted in a material loss of value relative to the total dollar value of the cards to the putative class members, "based on average amount of undisclosed fees and surcharges that reduce the advertised talk time." (Id. at ¶ 16.) Furthermore, Mansfield suggests that damages and restitution can be established with limited individualized inquiries, as Krossland's records on revenue collected and sales of the cards to retailers can assist in calculating the proper award. (Id.)

Because the witness testimony and evidence put forth in this trial plan applies to each of the individual plaintiffs' claims, it would be duplicative and a waste of judicial resources to try these claims individually. Moreover, the limited number of individualized inquiries required to determine Krossland's liability with respect to each of the individual plaintiffs further supports trying this case as a class action.

[10] Krossland correctly notes that Tackwood bears the burden of presenting a workable trial plan. While Tackwood presents case law suggesting that a proposal of a trial plan is optional in a class certification motion, that is not the rule in the Ninth Circuit. See e.g., Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1190 (9th Cir. 2001); In re Paxil Litig., 212 F.R.D. 539, 548 (C.D. Cal. 2003); Lee v. ITT Corp., 275 F.R.D. 318, 324 (W.D. Wash. 2011).

iii. Factor B: Pending Litigation

The Court is not aware of any pending litigation concerning the claims of the putative class. Krossland points out three lawsuits settled or pending against carriers whose cards Krossland distributed; however, those lawsuits do not address the present claims against Krossland and would not produce double recovery for the putative claims. First, there was a class action suit against calling card carrier Epana Networks, Ramirez v. Epana Networks, Inc., D.N.J., 08-04040-PGS, which was settled on September 13, 2010. (Docket No. 23.) The court certified a class of "[a]ll persons who, at any time during the period of January 1, 2002 through the date of entry of this Court's May 5, 2010 Order Granting Motion for Preliminary Approval of Class Action Settlement . . . purchased an Epana Calling Card in the United States." (Docket No. 23, p. 2.) Neither the Complaint nor the Settlement Order made any mention of Krossland. (See Docket No. 1, 23.) Moreover, when Krossland representative Jay Lee listed the names of carriers Krossland dealt with during the class period, he did not include Epana Networks, which leads this Court to believe that the Epana settlement is irrelevant to this case.[11] A showing that Krossland distributed Epana calling cards during the class period may necessitate narrowing the class definition, but absent that showing, the Epana settlement is inconsequential.

Second, there was a settlement in a class action suit against Locus, Monday v. Locus Telecommunications, Inc., No. 07-CV02659 (D.N.J.), which is no longer relevant to the case at hand because Tackwood has modified the class definition to exclude any customers who purchased Krossland-distributed cards where Locus was the service provider.[12]

Third, there is Galvez v. Touch-Tel U.S.A., CV 08-5642 RGK (JCx), in which class certification was denied for a class asserting claims against calling card service provider Touch-Tel in December 2009. (CV 08-5642, Docket No. 109.) There will likely be some overlap in the proposed class in that case and the putative class in this case because Krossland distributed Touch-Tel calling cards during the class period. However, because the court in that case denied class certification, there is no risk of conflicting litigation.

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[11] Krossland argued in its Opposition Brief that it distributed Epana calling cards, but this statement is inconsistent with the deposition testimony of Krossland representative Jay Lee. (Opp. Br. p. 4, n. 4.)

[12] The settlement in Monday v. Locus Telecommunications, Inc. expressly released Krossland from liability with respect to distribution of Locus calling cards, referring to the case before this Court by name in the settlement agreement. (07-CV02659, Docket No. 32, pp. 3, 11.)

The Court is not aware of any other pending litigation that could interfere with the claims in this case. This is the only action presently proceeding with claims against Krossland's disclosure and advertising practices with respect to prepaid calling cards.

In sum, the requirements under Rule 23(b)(3) are satisfied.

D. Nationwide Class

Tackwood urges the Court to apply California law to the claims of all putative class members in this nationwide class action. (Pl.'s Br. p. 13.) Certifying a nationwide class for alleged violations of state law is proper, so long as the application of state law to out-of-state class members comports with due process. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). Once plaintiffs make this showing, the burden shifts to the non-movant to show that the laws of another state apply. Wash. Mut. Bank, FA v. Superior Court, 24 Cal. 4th 906, 921 (2001).

To show that the application of California law to out-of-state class members comports with due process, a plaintiff must show that California has a significant contact or aggregation of contacts to the claims of the class members to ensure that California law is not being applied arbitrarily. See Wershba v. Apple Computer, Inc., 110 Cal. Rptr. 2d 145, 161 (Ct. App. 2001); Clothesrigger, Inc. v. GTE Corp., 236 Cal. Rptr. 605, 617 (Ct. App. 1987). In this case, Krossland has a substantial presence in California because it is based here, and California is Krossland's largest market for distributing calling cards. (Mansfield Decl. ¶¶ 7-10.) In fact, of the 9,000 retail outlets Krossland supplies with calling cards, fewer than ten are located outside California. (Pl.'s Mot. Br. p. 6.) Krossland also disseminates posters and advertising materials from its California base throughout the country. Because Krossland conducts the majority of its business in California and its largest client base is located here, Krossland's contacts with California satisfy the due process requirement.

Because Tackwood can identify significant contacts, the burden shifts to Krossland to show that the law of another state applies. This burden is "substantial" when defendant is located in California and the alleged misconduct occurred in or emanated from California. See In re Activision Sec. Litig., 621 F. Supp. 415, 430 (N.D. Cal. 1985). In California, a three-step "governmental interest" test is used to determine choice of law questions. Under the "governmental interest" test, the Court first determines whether the laws of each potentially affected state are different from those of California. Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 107 (2006). The Court then "examines each jurisdiction's interest in the application of its own law." Id. If the non-forum state laws differ from those of the forum state and the non-forum states have an interest in applying their laws in the action, the Court will select the law of

the state whose interests would be most impaired. Id. at 107-08.

The existence and extensiveness of state statutes regulating prepaid calling cards varies throughout the country. Ramirez v. Dollar Phone Corp., 668 F. Supp. 2d 448, 462-63 (E.D.N.Y. 2009). Some state rely solely on their general consumer protection statutes to govern prepaid calling cards, while others have industry-specific rules and requirements. Id. "In most states, there is little or no regulation of prepaid telephone cards." Id. (internal quotations omitted). Those states that rely solely on the general consumer protection statutes provide thin protection to victims of calling card fraud, as the general statutes are rarely applied to cards. See id. California's prepaid calling card statutes are highly detailed, consumer-protective, and comprehensive with respect to the requirements for disclosures and advertising. The California statutes are more detailed and afford more consumer protection than nearly any other state, but they do not seem to conflict with other state laws on the issues presented in this case.[13] Id. To the extent that California laws conflict with any other state's law implicated in this matter, there is no evidence that a non-forum state has any interest in applying their laws over California's with respect to a California-based company, where the California law will likely afford the out-of-state customers greater protection. Moreover, because Krossland is a California-based company, it would be equitable to hold Krossland to the more stringent laws of California than the laws of another forum that may have scant or ill-defined prepaid calling card statutes.

Regarding Tackwood's false advertising claims, the laws in Nevada, Oregon, and Washington–the other states in which Krossland's retail outlets are located–do not conflict with California law. Like California, false advertising is prohibited in each of these states. See Nev. Rev. Stat. § 598.0915; Oregon Rev. Stat. § 646.608; Rev. Code Wash. § 19.86.020.

Accordingly, the factors in the "governmental interest" test weigh in favor of applying California law to the claims of all the class members.

IV. Conclusion

For the foregoing reasons, the Motion to Certify the Class is GRANTED.

IT IS SO ORDERED

[13] Texas and California law conflict in that Texas requires a voice prompt at least one minute before the balance of the card is depleted, while California does not. Id. This difference in law, however, is not relevant in the case at hand.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 08-0999-JVS (ANx)	Date	October 25, 2011
Title	Carol Galvan, et al. v. KDI Distribuation Inc.,et al.		

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