Superior Court of California

County of Placer

Wallace, et al

Plaintiff,

vs.

Monier, LLC, et al

Defendant.

Case No.: S-CV-0016410

RULING ON ALL SUBMITTED MOTIONS

This is a class action jury trial alleging violations of the Consumer Legal Remedies Act (CLRA) and the Unfair Competition Law (UCL). Trial commenced on October 22, 2012 and extensive motions-in-limine were filed with the court. Due to a number of considerations (including the availability of witnesses necessary to hear and resolve the motions-in-limine) the court proceeded to select and empanel a jury on November 1, 2012. A two day combined "Kelly" and Evidence Code sec. 402 hearing was held on November 16 and 28, 2012. Testimony was taken from both plaintiff and defense experts on the use of a particular statistical sampling methodology proposed for the case. After lengthy argument the matters were taken under submission. The Plaintiff rested its case-in-chief on December 3, 2012 and the Defendant moved for nonsuit and decertification. Oral argument was heard on these latter motions on December 7, 2012 and they were also taken under submission. The defense presented its case

and a jury verdict subsequently given in favor of plaintiff.

Thus, the motions addressed in this ruling are: a challenge to the plaintiff's expert testimony under People v. Kelly (1976) 17 Cal.3d 24 and Evidence Code sec. 402; a motion for nonsuit under C.C.P. 581c (as to the CLRA cause of action) and judgment under C.C.P. 631.8 (on the UCL cause of action), and a separate request for class decertification. After full and due consideration of all relevant papers, oral argument and the applicable law the court now rules as follows:

A. BACKGROUND

This case involves what is called "slurry coated" concrete roof tiles used in residential buildings. Plaintiff alleges that defendant affirmatively misrepresented to California consumers certain qualities and characteristics of the tiles and that it knowingly failed to disclose that its slurry coated tiles erode to bare concrete substantially before their represented 50 year life. The defendant had several manufacturing plants in California and the tiles were sold throughout most of the state. The issue is solely one of aesthetics; the tile color (the "slurry coat") gradually wears off due to precipitation and other factors while the underlying concrete tile continues to function as effective roof protection. The complaint was filed on November 14, 2003. The trial court originally denied certification and the matter was appealed to both the Court of Appeal and the Supreme Court. The appellate court eventually determined certification was appropriate (McAdams v. Monier (2010) 182 Cal.App. 4th 174) and the trial court formally certified the class on August 11, 2010.

The class is defined as:

> "All individuals in the State of California who own, for personal, family or household use, structures with slurry-coated roof tiles sold by Monier Company, Monier Roof Tile, Inc., or Monier Inc. between January 1, 1978, and August 14, 1997; and
>
> All California individuals who owned such homes for personal, family or household use

and who paid to replace or repair such Tiles. Membership in the Class is limited to those who, prior to purchasing or obtaining their Monier roof tiles product, were exposed to a statement along the lines that the Tiles would have a 50 year life, permanent color, or would be maintenance free. The class excludes the trial judge and his family, and defendant and its counsel."

The case was vigorously litigated by experienced and knowledgeable counsel. Although counsel was professional and courteous at all times, there have been very few litigation issues or matters on which they agreed (e.g. no joint experts or trial stipulations of any significant weight.) Numerous discovery disputes occurred and Defendant filed Motions for Summary Adjudication and Decertification and Plaintiff filed a Motion to Augment Expert Testimony, all of which were denied. Plaintiff filed its Trial Plan on October 26, 2012 (four days after trial had commenced.) The Trial Plan set forth the basic elements of the CLRA and UCL causes of action and indicated that, in addition to expert testimony regarding the roof tiles' performance "the Plaintiff Class will present class member testimony regarding their experiences with premature erosion of their slurry coated roof tiles". The Plan did not discuss in any detail the particular methodology that is at issue in the present motions. The Plan was not approved or endorsed by the Court. The Plaintiff Class seeks compensatory and punitive damages, restitution, and attorneys fees.

B. DISCUSSION

The defendant sold the subject roof tiles to developers, roofing supply distributors and contractors. The Defendant did not operate any retail outlets; a homeowner interested in installation of the color coated tiles on his or her residence would have to go through one of the above-described middlemen. Thus, the Defendant did not have records that showed where or on how many homes the tiles had been installed during the almost 20 year class period. The Plaintiff's method for determining the number of California homes with the subject tiles was to

was to have an expert Certified Public Accountant statistically analyze the gross production and sales records for the Defendant's California tile manufacturing plants over the time in question. These records were not complete and the expert made adjustments and assumptions for such things as waste, market share and individual plant production to eventually arrive at a figure at trial of 127,746 homes. The accuracy of this figure, of course, was strenuously challenged by defendant but the court finds the method used by plaintiff for this issue as being within the range of acceptable means to determine the number of homes with qualifying tiles and the corresponding number of "potential class members." Likewise, the court finds that the method used to establish a $3705 cost to recoat the tiles on an average home to be acceptable.

The 127,746 number reflects the homes that plaintiff contended had the slurry-coated Monier tiles installed. This number, in and of itself, did not necessarily reflect the actual class size. The class definition set out above includes what has been called "the proviso"; specifically, the requirement that a class member "had to have been exposed to a statement along the lines that the roof tile would last 50 years, or would have a permanent color, or would be maintenance free". The methodology Plaintiff seeks to use to prove the size of the class was to have 22 individual homeowners randomly selected from the potential class (again, the 127,746 homes with slurry-coated roof tiles). These 22 homeowners (the "sample group") had their depositions taken and, ultimately, 16 testified at trial. Plaintiff contends it is the role of the fact-finder (judge or jury) to make the final determination as to whether or not any of these 16 potential class members actually satisfy the proviso. The plaintiff submits that simple statistical extrapolation allows the fact-finder to determine not only the size of the class but also establish liability and damages as well.

In this regard, Plaintiff relied upon its expert, Dr. Gary Lorden. Dr. Lorden is a retired statistics professor from the California Institute of Technology with considerable experience as a forensics statistician in construction defect litigation and, to a lesser degree, class action cases.

Dr. Lorden testified that he was familiar with the standard references and treatises pertaining to the collection and analysis of data for use in class action cases including, but not limited to, "Reference Guide on Survey Research" by Dr. Shari Diamond and the Federal Judicial Center's "Reference Manual for Scientific Evidence", 3rd ed.,2011) and the concepts and practices discussed therein. He described in detail the methodology offered for use in this case to determine the size of the class, the liability of the Defendant and the amount of damages. Dr. Lorden explained that this particular methodology is not a traditional survey approach often used in class actions but is based upon a process known as statistical sampling.

Dr. Lorden's particular methodology is essentially a three step-process: first, a sample group of individual homeowners are randomly selected from the much larger group of potential class members; second, the sample homeowners testify as to the facts and circumstances about their purchase or acquisition of the tiles on their residence and their subsequent performance in order to demonstrate satisfaction of the requirements of the "proviso". Lastly, the jury then uses simple statistical extrapolation to determine the actual size of the class and the amount of aggregate damages. Dr. Lorden did not opine as to whether or not any member of the sample group actually met the proviso. He emphatically asserted that this determination was best left to the jury. In essence, he testified that the proviso requirements were of such a nature or type that it would be would be too difficult, expensive or time-consuming to use traditional survey methods.

Dr. Kent Van Lier, defendant's expert, testified at the combined Kelly/402 hearing and before the jury about specific defects he contends exist in Dr. Lorden's methodology. He asserts that the means by which Dr. Lorden selected the 22 deponents in the sample group fails to meet generally accepted standards among statisticians and social scientists who conduct surveys and polls used in litigation. Dr. Van Lier relied heavily on the tenets and principles set out in the above-referenced treatises and authorities (i.e. Prof. Diamond's "Reference Guide on

Survey Research" and the "Reference Manual on Scientific Evidence".) He opined that Dr. Lorden had failed to adequately address selection bias. Dr. Van Lier pointed to the fact that Plaintiff attorneys had been involved in the sample group selection process (e.g sending a letter to prospective deponents asking for their assistance in the case and requesting information; evaluating or "coding" responses to the questionnaire sent to prospective deponents; meeting with or otherwise communicating with sample group members) as evidence of a substantial potential for selection bias which would render the results suspect and professionally unreliable. Dr. Van Lier pointed out a number of other concerns with Dr. Lorden's methodology including what he contends is an unacceptable margin of error in determining potential damages.

The designated class representative, Mr. McAdams, testified that he received an misleading advertising brochure from Defendant that promised "permanent color", that it was material to his decision and that he relied upon this representation in making a decision to purchase the slurry coated concrete roof tiles for his home. Mr. McAdams testified that had he known that the tiles on his home would lose their color coat and erode to bare concrete he would not have bought them. Plaintiff argues that the jury is entitled to infer that all other class members likewise relied upon a similar material and misleading misrepresentation and that they suffered a similar economic loss. In addition, Plaintiff contends the jury may also consider the testimony of the sample group members who testified in this regard.

C. KELLY/EVIDENCE CODE Sec. 402 MOTIONS

A Kelly hearing determines the basis and reliability of new scientific methodology. (People v. Kelly (1976) 17 Cal.3d 24, 31; People v. Bolden (2002) 29 Cal.4th 515, 544-545.) The hearing is limited to expert testimony based on new techniques, processes, or theories. (People v. Leahy (1994) 8 Cal.4th 587, 605.) The purpose is "to protect the jury from techniques which ... convey a 'misleading aura of certainty.' " (Id. at p. 606.) The methodology must meet a three-pronged test in order to establish its

scientific basis and reliability. (Ibid.) The first prong requires a showing that the reliability of the methodology must be generally accepted by recognized authorities in the related scientific field. (Ibid.) Under the second prong, it is necessary to show that the testimony must be given by an expert on the subject matter. (Ibid.) The final prong is that there must be a showing that the correct scientific procedures were used in administering the methodology. (Ibid.)

The purpose of an Evidence Code §402 hearing is to decide preliminary questions of fact upon which the admissibility of evidence depends. (Evid C§§400, 401, 402.) The party offering the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact. (Evid. C§403(a).) "The proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: (1) The relevance of the proffered evidence depends on the existence of the preliminary fact; (2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony; (3) The preliminary fact is the authenticity of the a writing; or (4) The proffered evidence is of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

The preliminary issue of admissibility of evidence is decided by the trial judge. (Evid. C§310(a).) This includes the admissibility of expert witness testimony. (Evid C§801(b).) The preliminary determination of the trial court as to whether an expert opinion is founded on sound logic is determined by examining whether the matter relied on can provide a reasonable basis for the opinion or whether the opinion is based upon a leap of logic or conjecture.

1. THE METHODOLOGY IN QUESTION

(a) The use of statistics and sampling has received a lot of attention and discussion in state and federal class action cases in recent years. There has been a gradual trend of sorts towards

the use and acceptance of statistics as a method of proof. At the risk of oversimplification, the use of statistics has been determined to be appropriate in certain class action cases for the purpose of determining aggregate damages and, in very limited situations, some aspect of liability (see Bell v. Farmers Ins. Exchange, 2004, 115 Cal.App.4th 715). The vast majority of class action cases that involve surveys and statistics as methods of proof arise out of employment and labor disputes (e.g. wages, overtime, classifications, etc). In these cases courts have allowed the use of certain statistical tools and methods to address the unique problems of proof, strong public policies, and specific state and federal statutes associated with labor employment issues. These factors are simply not present or relevant to the instant litigation.

Upon direct inquiry from the court, Plaintiff counsel was unable to cite any state or federal reported case in which this particular methodology (statistical sampling using testimony from individual potential class members) was approved or endorsed as an acceptable means of proof for either determination of actual class size or liability, or both. Likewise, after extensive and exhaustive research, this court was unable to discover any such reported case or even a favorable reference to the particular (or substantially similar) methodology at issue in any of the standard guides or reference materials. Indeed, the court's conclusion is that this is a methodology of first impression.

A very similar concept which addressed liability and damages only (i.e. not including the determination of class membership size) was heavily criticized by the U.S. Supreme Court in Wal-Mart v. Dukes (2011) 131 S. Ct. 2541, 2561):

> "The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the back pay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid

would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery— without further individualized proceedings. [internal citation omitted]. We disapprove that novel project."

(Part III of Justice Scalia's majority opinion, all nine justices concurred)

Although this court may not necessarily be bound by the foregoing language arising out of a federal class action certification case involving questions of alleged gender discrimination and related issues, it finds the language resonates with some of the misgivings and concerns this court holds about the methodology in this case. The use of multiple "mini-trials" and statistical extrapolation to determine all of the essential components of a large class action litigation may be expedient and efficient but such outcomes must be balanced against the due process rights afforded a defendant.

In response to the language in Wal-Mart cited above, Plaintiff argues that the use of statistical sampling in class actions remains appropriate under California law. In support of this argument, Plaintiffs rely on existing California case law and, specifically, Justice Werdegar's concurrence in *Brinker Restaurant v. Superior Court,* 165 Cal. 4th 1004 (2012) which noted that statistical sampling could be used in certain situations for proof of liability. A concurring opinion, however, is not the law. The Brinker concurrence also recognized (Brinker, supra, 53 Cal.4th at p. 1055 [Werdegar, J., concurring]), that a trial Court may engage in a balancing of the disadvantages and advantages of a statistical sampling methodology and exercise its discretion accordingly.

(b) In addition, the essential element of the methodology in question (the use of live testimony to prove or disprove satisfaction of the proviso) was not developed or created by Dr. Lorden or even based on any prior studies or research by experts in the relevant fields of statistics or surveys. Dr. Lorden adopted the concept after initial discussions with Plaintiff's counsel. He was told by counsel that they wanted to use depositions of potential class members to address

the proviso questions. Dr. Lorden testified "That was the big advantage of this thing that the lawyers said to me about 'we want to do depositions, have actual witnesses.' And I hadn't seen that before" (Trial transcript, Day 19, November 29, 2012, 125:15-18). Dr. Lorden's statistical expertise was directly involved in the selection process used to obtain the plaintiff sample group of 22 homeowners and in the proper use of statistical concepts and exhibits regarding damages. His enthusiasm for the new methodology is centered on his personal belief that the civil justice system, with the adversarial roles of counsel and the opportunity for direct and cross examination of witnesses, is a more effective way of determining the primary fact at issue in this case; namely, whether the elements of the proviso has been met as to the class as a whole.

(c) As noted above, the statistical sampling process in this case employs a series of 16 minitrials. The sixteen potential class members are ostensibly testifying to prove their individual membership in the class but, under the extrapolation provisions of the methodology at issue, also for 5,806 other homeowners. Their credibility, veracity and ability to recollect events and facts from many years earlier is placed directly at issue. In no small measure, each of these sixteen potential class members are de facto class representatives for their own class of 5,806 other homeowners (to a certain degree, the role and testimony of the nominal class representative, Mr. McAdams, thus becomes somewhat superfluous.) The nature of their role and their testimony makes them highly interested parties in the outcome of the case. The potential is great that their testimony may be influenced, intentionally or unintentionally, by the fact that they have to persuade the jury that they meet the class definition. Plaintiff noted that it is not unusual to have actual class members testify at trial. Perhaps, but in such cases the class has already been established and this distinction makes such a large difference. Research has failed to uncover a single state or federal reported case where non-class members testified to prove their own membership in the class (let alone used as a basis to extrapolate to a larger number).

Further, if the jury were to decide that none of the sixteen met the proviso requirements then, by definition and pursuant to the methodology used by Plaintiff, there was no class to begin with. As a matter of public policy, judicial efficiency and economy it would appear highly undesirable to hold a class action trial without first determining the size of the actual class. Typically, it is done through one or more of the survey methods discussed in the standard guides, manuals and treatises mentioned above or through other well-established and accepted means but, in any event, it is accomplished other than by direct testimony from potential class members. Dr. Lorden's primary reason for endorsing the use of testimony from potential class members to demonstrate their exposure to the proviso is that he believes that that the court system and its processes (e.g. examination and cross-examination under oath) is a "better way" than the use of surveys. He stated that it would have been too difficult to develop a survey questionnaire that would adequately allow reasonable interpretations as to the proviso question (Trial Transcript,Day 19, November 29, 2012, 150:20-151:18). According to Dr. Lorden, the use of a survey to address the requirements of the proviso would have been "messy". The problem with this, of course, is that Dr. Lorden, by his own admission, is an expert in the field of statistics, not surveys, and there is no particular legal reason to believe that a well-designed and administered survey process could not have addressed the proviso issue. Indeed, Dr. Van Lier, an expert in the field of surveys, testified that such a approach could have been taken. Nonetheless, it is not the role of this court to determine whether or not the use of a survey would have been better, easier or more accurate but whether Dr. Lorden's opinion is based on speculation or conjecture. Other than his assertion, he was unable to cite the court to any study, article or discussion by any generally recognized authority in either the field of statistics or surveys that would support this underlying premise that the use of testimony is a superior method of determining a particular fact. His confidence in the court system ignores some of the problems associated with having questions of this nature determined by a judge or a jury. People don't

always tell or recall events accurately, intentionally or unintentionally, when their own personal pecuniary interests are at stake (this is aggravated in the present case by the fact that the class period {1978-1997} is a significant time in the past). Tools and techniques used in survey methodologies, such as double-blind interviews and neutral questionnaires, are designed to minimize bias and influence. Dr. Lorden's opinion that statistical sampling is a superior means of determining exposure to the terms of the proviso is without any factual support. It is entirely subjective and reflects his professional and personal background in numbers and statistics. The court finds that Dr. Lorden's opinion in this regard is indeed based on conjecture and speculation.

(d) For the reasons set forth above, jointly and severally, this court finds that the opinion testimony of Dr. Lorden fails the first and third prong of the Kelly test and must be excluded. The proposed methodology has not been generally accepted by recognized authorities in the field(s) of statistics or surveys. In addition, the Plaintiff has failed to show that the correct scientific procedures were used in administering the methodology; specifically, the use of testimony from potential class members to establish the overall size of the class by extrapolation.

Likewise, as a separate and distinct ground, under the provisions of Evidence Code sec. 402 and 801, Dr. Lorden's expert opinions and methodology must be excluded. This court finds that the reasons given for the development and use of the methodology at issue; namely, that it is a better and more accurate way to determine questions of fact, fails to provide a reasonable basis for Dr. Lorden's opinion in this regard and is based upon a leap of logic or conjecture.

The court does NOT find, as a matter of law, that all statistical sampling methodologies are inappropriate as a means of proof for liability purposes. That proposition would be for other courts to consider. Nonetheless, in the present case the particular statistical sampling methodology proposed by Plaintiff is inappropriate.

2. THE METHODOLOGY "AS APPLIED"

In addition to the above statements regarding the problem with the concept of statistical sampling as a comprehensive methodology to establish class membership, liability and damages, the court has also considered the concept as applied (to borrow a term from constitutional law).

(a) Dr. Lorden testified the he used the following method to obtain the 22 members of the sample group. There were twenty-nine "clusters" or groups of homes contained in two separate databases; 16 clusters totaling 3,054 homes from what was referred to as the Freeman Sullivan Group ("FSG", a survey conducted in 2005 by defendant) and 13 clusters totaling 1,670 homes which were prepared by Plaintiff's attorneys ("TBS", Townsley Brain and Stephens). From each of the 29 clusters a random list of up to 12 homeowners received a form letter and questionnaire from the TBS law firm (eventually, a total of 444 such letters were sent to homeowners). The homeowners to whom letters were sent (including some of those from whom no response was received) were contacted and specific responses and comments noted.

Dr. Lorden had strongly criticized the FSG survey when class certification was at issue in 2005. His explanation as to why it was appropriate for him to use it in 2011 appeared almost a waiver argument (i.e. it was good enough for the defense use in 2005 so they can't complain now) and that his subsequent analysis of the responses from the homeowners in 2011 eliminated earlier concerns. However, such an explanation does not, in and of itself, resolve the initial concerns he raised that questioned whether "correct scientific methods were used in administering the methodology". The court is not persuaded that the FSG survey was conducted in 2005 in a sufficiently valid manner to justify its later use by Dr. Lorden for the purpose of selecting the sample group of 22 homeowners.

Dr. Lorden's reliance on merely reviewing the notes regarding the contacts made with the 444 homeowners for anecdotal evidence that there was any non-response or "self-select" bias

is problematic. He is correct that the authorities in the field (e.g. Dr. Diamond's "Reference Guide on Survey Research" and the Federal Judicial Center's "Reference Manual on Scientific Evidence") indicate only that an "evaluation" of such possible bias be done and that, in his opinion, he did such an evaluation by reviewing the notes. On the other hand, given the totality of circumstances and factors present in this case (including but not limited to the admittedly small sample size), the court finds that a more extensive "check" or evaluation should have been conducted. It may have required more effort, time and expense but the end result would have been greater confidence that the defects present in 2005 had been addressed.

(b) The purpose of the TBS letter to the targeted homeowners was to solicit information about their roof tiles and to "seek their assistance" in making the Plaintiff's case at trial (at the time the letter was sent the trial was scheduled to start in approximately 3 -4 months, November, 2011). Although perhaps the letter and questionnaire would have been appropriate in a different type of case using a statistical sampling process (e.g. calculation of damages in an employment case) in the instant case it placed Plaintiff counsel directly into the administration and implementation of the methodology. The authoritative "Reference Guide on Survey Research" addresses in detail the problems associated with the involvement of counsel in surveys and the potentially negative effects on the reliability and credibility of the results. It was admitted at trial that these particular principles of survey research are also generally applicable to statistical sampling. The knowledge of ongoing litigation in which one or more prospective witnesses had an identifiable and direct interest in the outcome may have had an effect on their testimony at their depositions and at trial. Such advance knowledge and active participation in the litigation process raises serious concerns about the existence of actual bias. The court is not persuaded that any such bias was not present.

(c) The small sample size used by Dr. Lorden also is of concern. A sample group of 22 out of 127,746 equates to .00017 (17/10,000th). Dr. Lorden testified in detail as to the confidence

level associated with such a small number but the fact remains that each member of the sample group who testified represented 5806 other potential class members and each of the sixteen witnesses found to have met (or not met) the terms of the proviso represented approximately $21,500,000 in damages. On its face this is simply an unacceptable margin of error. This margin of error could have been significantly reduced by taking more depositions and, again, although it would have involved more time and expense it would resulted in a more acceptable level of potential error (e.g. Dr. Lorden testified taking 88 depositions would have reduced the margin of error by 50%). In Yorktown Medical Laboratory v Perales, 2d Cir. 1991, 948 F.2d 84, a case involving the application of statistical sampling and an argument that its use violated due process, the court said that the amount of process due depends on various circumstances and factors and that given the low risk of error presented by the methodology used in that case, the balancing of interests favored the defendant. In contrast, the extremely high risk of error in our case supports the conclusion that it would violate the Defendant's due process rights to allow the use of the proposed statistical sampling methodology.

Thus, as a separate and distinct basis for excluding the testimony and opinions of Dr. Lorden, the court finds that the proposed methodology, as it was administered and applied in this particular case, did not meet well-established legal standards and practices.

D. SUMMARY

The court recognizes the inherent and substantial problems Plaintiff and Defendant faced in preparing to prosecute and defend this case and which are discussed in part above. The large size of the potential class (estimated at 160,000 homeowners a relatively short time before trial) and corresponding potential damages (in excess of $500,000,000, not including punitives) argued for the use of a methodology on the issues of actual class size, liability and damages that was as accurate as possible. The particular methodology Plaintiff designed for this case is inconsistent with long-established principles regarding the use of surveys and statistics and is

without any legal authority.

Dr. Lorden is a very experienced educator and statistics expert with extensive experience in litigation. But, as he admitted during trial, his methodology was created after he was told by counsel of their intent to use depositions. His reliance on the adversarial process and the role of witness testimony as an appropriate means to determine the issues in this case is unsupported by any literature or studies in the field of either statistics or surveys or prior case state or federal law. It is, truly, a "novel concept". Dr. Lorden is an enthusiastic proponent of his newly developed methodology which is, of course, understandable and to a degree commendable. But, in and of itself, this fact does not add any weight to be given to the proposed methodology. The court finds that, for the purposes of explaining and supporting a methodology that uses statistical sampling to establish the overall size of the class, the defendant's liability and an aggregate amount of damages, his testimony is legally irrelevant and must be excluded.

E. MOTIONS GRANTED

Accordingly, for the reasons set forth in this ruling and under its "gatekeeper responsibility" (*Sargon Enterprises Inc. v. University of Southern California*, __ P.3d __, 2012 WL 5897314 (Cal. Nov. 26, 2012) to exclude speculative or irrelevant expert opinion, the court exercises its discretion and grants the motion brought under People v. Kelly and Evidence Code sec. 402.

F. NONSUIT on the CLRA and JUDGMENT on the UCL CAUSES of ACTION

The plaintiff's case rests upon the methodology and expert opinion of Dr. Lorden. For the reasons set forth above, his opinions are excluded. Therefore, there is no legally relevant evidence before the fact-finder as to the size of the class, the liability of defendant or the amount of damages. Defendant's motion for nonsuit as to the CLRA cause of action is granted. Defendant's motion for judgment on the UCL cause of action is granted.

E. DECERTIFICATION

The court has excluded the opinion evidence offered in support of Plaintiff's methodology used to establish the size of the class, defendant's liability and damages. The motion for decertification is thus moot and is DENIED WITHOUT PREJUDICE.

Roger Picquet
Judge of the Superior Court,
assigned

The court has excluded the opinion evidence offered in support of Plaintiff's methodology used to establish the size of the class, defendant's liability and damages. The motion for decertification is thus moot and is DENIED WITHOUT PREJUDICE.

1-28-13

Roger Picquet
Judge of the Superior Court,
assigned