UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TROY LAMBERT,

Plaintiff,

v.

NUTRACEUTICAL CORPORATION,

Defendant.

Case No. ED CV 13-05942-AB (SPx)

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING DEFENDANT'S MOTION FOR CLASS DECERTIFICATION

Pending before the Court is Plaintiff Troy Lambert's Motion for Reconsideration, (Motion, Dkt. No. 183), of the Court's order, (Order, Dkt. No. 175), granting Defendant Nutraceutical Corporation's Motion for Class Decertification. Defendant filed an Opposition and Plaintiff filed a Reply. (Dkt. Nos. 189, 192.) The Court took this matter under submission on April 23, 2015. (Dkt. No. 194.) For the reasons discussed more fully below, Plaintiff fails to satisfy the requirements for reconsideration, and the Court **DENIES** the Motion.

I. BACKGROUND

The full factual and procedural history of this litigation is familiar to the Parties. The case centers on a product called Cobra Sexual Energy ("Cobra"), a dietary supplement. Defendant manufactures and markets Cobra. Plaintiff brought a consumer class action suit against Defendants for Violation of the Unfair Competition

Law ("UCL"), Unlawful Prong (Cal. Bus. & Prof. Code § 17200 *et seq.*); Violation of the UCL, Unfair and Fraudulent Prong (Cal. Bus. & Prof. Code § 17200 *et seq.*); Violation of the False Advertising Law ("FAL") (Cal. Bus. & Prof. Code § 17500 *et seq.*); Violation of the Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code § 1750 *et seq.*). (*See* Second Amended Complaint "SAC," Dkt. No. 56.)

In June 2014, the Honorable Audrey B. Collins granted Plaintiff's Motion for Class Certification under Federal Rule of Civil Procedure ("Rule") 23(b)(3). (*See generally* Dkt. No. 80.) The class was certified under Plaintiff's FAL, UCL, and CLRA theories and the theories were to be measured using the full refund damages model theory. (*Id.*) Judge Collins anticipated calculating damages using Defendant's sales data and an average retail price. (*Id.* at pp. 12-13.)

After the completion of discovery, Defendant moved for class decertification based on, *inter alia*, Plaintiff's inability to demonstrate a classwide calculation of damages using his evidence. (*See* Dkt. Nos. 111, 122.) The Court agreed with Defendant and granted its Motion. (*See* Order.) The Order only addressed the inadequacy of Plaintiff's damages model, which was dispositive of the entire question in decertifying class. (*See* Order.) After the Court entered judgment, Plaintiff moved for reconsideration.

II. LEGAL STANDARD

Generally, a motion for reconsideration brought within 28 days of the entry of judgment is treated as a motion under Rule 59(e). *See* Fed. R. Civ. Proc. 59(e) (motions to alter or amend judgment under that rule must be brought within 28 days of entry of judgment); *see also In re Benham*, No. CV 13-00205-VBF, 2013 WL 3872185, at *1 (C.D. Cal. May 29, 2013) ("A motion for reconsideration filed within 28 days of a judgment is typically treated as a motion under Federal Rule of Civil Procedure 59(e)."). "Under Rule 59(e), a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening

change in the controlling law." *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). "For reasons of judicial economy and finality, such motions are disfavored and are rarely granted." *Resolution Trust Corp. v. Aetna Cas. & Sur. Co.*, 873 F. Supp. 1386, 1393 (D. Ariz. 1994)

Reconsideration "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (quotation omitted). A motion to reconsider may not "rehash[] what ha[s] been before the court when it ruled" on the prior motion. *Faysound Ltd. v. United Coconut Chemicals, Inc.*, 878 F.2d 290, 296 (9th Cir. 1989); *accord Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) ("Reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion."). Nor does reconsideration afford a party an opportunity to try out new arguments or evidence that it could have, but did not, discover or advance the first time around. *U.S. v. Westlands Water Dist.*, 134 F.Supp.2d 1111, 1130 (E.D. Cal. 2001); *United States v. Navarro*, 972 F.Supp. 1296, 1299 (E.D. Cal. 1997). Generally, the aim of reconsideration is to accommodate a fundamental change in circumstances going to the heart of a court's original analysis.

Alternatively, reconsideration may also be used as a narrow vehicle to correct a "clear" or "manifest" error of law or fact in a court's earlier ruling. *Roschewski v. Raytheon Co.*, 471 F. App'x 588, 589 (9th Cir. 2012) (citing *School Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc., supra*, 5 F.3d 1255, 1262–63 (9th Cir.1993). Although the Ninth Circuit has not yet articulated what constitutes a "clear" or "manifest" error for the purposes of reconsideration, other circuits have. As the Fifth Circuit has noted, "'clearly erroneous' is a very exacting standard. Mere doubts or

disagreement about the wisdom of a prior decision...will not suffice for this exception. To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must be dead wrong." *Hopwood v. State of Texas*, 236 F.3d 256 (5th Cir. 2000) (internal quotes omitted); *see also Campion v. Old Republic Home Prot. Co.*, No. 09-CV-748-JMA NLS, 2011 WL 1935967, at *1 (S.D. Cal. May 20, 2011) (citing *Hopwood* and applying this standard on motion for reconsideration). Similarly, a "'manifest error' is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000); *see also Mays v. Colvin*, No. 1:13-CV-00904-SKO, 2014 WL 6893825, at *3 (E.D. Cal. Dec. 8, 2014) (citing *Oto* and applying this standard on motion for reconsideration).[1]

III. DISCUSSION

Plaintiff seeks reconsideration on the ground that the Court committed clear and manifest error in not considering Plaintiff's alternative disgorgement model. (*See* Mot.) According to Plaintiff, he properly proposed an alternative damages model to measure restitution and the Court erred in not accepting this alternative.[2]

[1] In moving for reconsideration, Plaintiff seeks to treat this as a renewed motion for class certification under Rule 23. (Mot., p. 5 ("[R]ule that class certification orders are inherently tentative should govern over the general rule for motion for reconsideration.").) At the March 2, 2015 Status Conference, the Court already denied Plaintiff's request to file a renewed motion for class certification. (Dkt. No. 177, 5:6-20 ("[F]eel free to file your motion for reconsideration … [Defendant] will be looking very carefully to make sure that it is not a new motion [for class certification]….").) Consequently, this Motion is discussed under the reconsideration standard and the Court does not conflate this standard with any other the legal standards.

[2] The Parties again focus their arguments on irrelevant issues—the materiality prong of Plaintiff's state law claims and the typicality prong under Rule 23. (Dkt. No. 80; *cf.* Mot., pp. 17-18; Opp., pp. 16-21, Reply, pp. 14-18.) The Court previously disregarded these identical arguments in its Order, and Plaintiff does not assert clear error in not addressing those arguments therein. (Order, p. 4 n. 1.). Consequently, the Court will not address these contentions within this discussion.

A. The Court Did Not Err in Rejecting Plaintiff's Full Refund Model and Did Not Ignore Plaintiff's *Newly* Proposed Disgorgement Model

Plaintiff argues that the Court failed to consider his alternative disgorgement model. (Mot., pp. 7-8, 10-11.) Plaintiff contends that this alternative damages model was proposed during the December 22, 2014 oral argument and was also presented in his Summary Judgment briefing. (Mot., p. 11 ("The Court.. erred in disregarding this model…which Plaintiff's counsel expressly brought to the Court's attention during oral argument[]…."); Gregory Weston Declaration, Dkt. No. 187, ¶ 2.)

The Court stresses that a request to reconsider is not an opportunity to raise arguments or present evidence for the *first time* when one could have reasonably raised these contentions earlier in the litigation. *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 887, 890 (9th Cir. 2000) (citing *389 Orange St.*, 179 F.3d at 665) (emphasis added). Neither should the Court have to search other pleadings in the litigation to ascertain a party's arguments. *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("Judges are not like pigs, hunting for truffles buried in briefs" or oral arguments." (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991))).

As the Parties recall, Defendant moved to decertify class on various grounds, namely that Plaintiff's damages model was insufficient, and Plaintiff opposed the motion contending that his full refund damages model was sufficient using only Defendant's sales data. (Dkt. Nos. 111, 141.) The Court granted Defendant's Motion to decertify class because restitutionary damages could not be calculated using only Defendant's sales data. (Order, pp. 7-11.) Now, Plaintiff no longer rests his measurement of classwide damages on the full refund damages model—a model *he suggested* in certifying the class. (Dkt. No. 65, p. 22 ("Finally, not only is a full refund [model] of the purchase price…consistent with all of Plaintiffs' theories of liability…."); *cf.* Dkt. No. 141, p. 10 ("As further explained below, Plaintiff's full

refund damage model is consistent with his liability theory that Cobra is ineffective and illegal.").) The Court's Order did not address Plaintiff's alternative disgorgement model for the simple reason that Plaintiff did not propose this alternative disgorgement model anywhere in his opposition to decertify class or during oral argument. (*See generally* Dkt. No. 141; *see also* Dkt. No. 147 (the "Hearing").)

In reviewing Plaintiff's opposition to the motion to decertify class, it is abundantly clear that Plaintiff's newfound disgorgement model and arguments in support of that model were well outside the record before the Court. To the extent Plaintiff thought proposing this alternative model was material to opposing Defendant's motion for class decertification, he was free to make that contention in his opposition. He failed to do so. Only *now* does Plaintiff extensively cites to his papers in support of Summary Judgment. (Mot., pp. 10-11 (citing Dkt. No. 161 [Pl. Reply to Pl. Summ. J. Mot.] at 24-25; Dkt. No. 129 [Pl. Summ. J. Mot.] at 23-24).) First, these citations to his summary judgment motion and the reply brief are not mentioned anywhere in his opposition to decertify class. (*See generally* Dkt. No. 141.) Second, Plaintiff's assertion of clear error because the Court should have considered arguments *outside* of the four corners of his opposition to class decertification lacks legal support.[3] It is unreasonable for Plaintiff to expect the Court to extrapolate this alternative damages model from his Summary Judgment briefing. In effect, Plaintiff seeks to transform the Court into "the lawyer for [Plaintiff], performing the lawyer's duty of setting forth specific [arguments]…." *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) (considering whether a judge must consider materials outside the motion papers). It

[3] Plaintiff has every right to cite to evidence attached to a separate motion for summary judgment. *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1135-36 (9th Cir. 2001) (noting on cross-motions for summary judgment, district court is required to review evidence filed in support of another motion so long as that evidence is "specifically identified in [the] moving papers."). But a party (Plaintiff) opposing a motion who wishes to have the court consider evidence cited in a separate motion for summary judgment must actually *cite* the evidence *in its opposition papers*. *Id.*

would have been "unfair" to the Court and "profoundly unfair" to Defendant to require the Court "to search the entire record for [arguments], even though [Plaintiff] [did] not set [them] out in the opposition papers." *Id.*; *in accord In re E.R. Fegert, Inc.*, 887 F.2d 995, 957 (9th Cir. 1989) (the "argument must be raised sufficiently for the trial court to rule on it.") (citation omitted); *Independent Towers*, 350 F.3d at 929 ("Our adversarial system relies on the advocates to inform the discussion and raise the issues to the Court.").

Plaintiff's next argument is that the Court "disregarded" this alternative damages model despite "Plaintiff's counsel expressly [bringing] [the alternative damages model] to the Court's attention during oral arguments." (Mot., p. 11 ¶ 2.) The Court's review of the hearing transcript reveals not one reference to the word "disgorgement" or "alternative." (*See* Hearing.) Plaintiff's counsel apparently suggests he had somehow proposed an alternative damages model when he cited the summary judgment briefing during oral argument.[4] (Weston Decl., ¶ 2.) Even if it had been proper to propose an alternative damages model at oral argument, the record reflects that Plaintiff did no such thing. Instead Plaintiff made a fleeting reference to his summary judgment papers without any reference to an alternative damages model. (*See generally* Hearing.) The Court's duty during oral argument is not to deduce arguments from implicit statements. *Independent Towers*, 350 F.3d at 929 ("The art of [oral] advocacy is not one of mystery."). To argue otherwise would be unreasonable.

Simply put, this is the *first time* Plaintiff has brought this alternative damages model to the Court's attention, and there is neither a single sentence in his opposition nor any reference made during oral argument regarding an alternative damages model.

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[4] In highlighting a portion of the Hearing, Plaintiff's counsel declares that he "referred the Court to Plaintiff's Motion for Summary Judgment and Reply in Support of Motion for Summary Judgment." (Weston Decl., ¶ 2.) Though it is true that Plaintiff did reference such briefs during oral argument, (Hearing, 7:20-23, 8:1-4, 17:11-25), the statements had nothing to do with any purported alternative damages model.

(*See* Dkt. Nos. 129, 141; *see also* Hearing.) In hindsight, Plaintiff may wish he had proposed an alternative damages model much earlier. *See, e.g., Brown v. Hain Celestial Group, Inc.*, No. C 07-01882 JF (RS), 2010 WL 760433, at *11-12 (N.D. Cal. 2010) (Proposing multiple damages models (dominant-firm and regression models) in a motion to certify class). But reconsideration is not an opportunity to take a second bite at the apple. *Campion v. Old Repub. Home Protection Co., Inc.*, No. 09-CV-00748-JMA(NLS), 2011 WL 1935967, at *1 (S.D. Cal. May 2011). It is an opportunity to correct the Court's error, not Plaintiff's. *FDIC v. Jackson—Shaw Partners, No. 46, Ltd.*, 850 F.Supp. 839, 845 (N.D. Cal. 1994) (motions for reconsideration "are not to be used to test new legal theories that could have been presented when the original motion was pending.").

Accordingly, the Court finds that Plaintiff's failure to explicitly raise this newly proposed alternative damages model arguments in his opposition papers or oral argument amount to a waiver of this argument. *Moreno Roofing*, 99 F.3d at 343 (passing remarks on an issue in opposition to summary judgment were insufficient to avoid waiver); *U.S. v. George*, 291 Fed. App'x. 803, 805 (9th Cir. 2008) (holding party's "failure to adequately develop these arguments in his brief operates as a waiver"); *accord John-Charles v. California*, 646 F.3d 1243, 1247 n.4 (9th Cir. 2011) (the party "failed to develop any argument on this front, and thus has waived it"); *JustMed, Inc. v. Byce*, 580 Fed.Appx. 566, 567 (9th Cir. 2014) ("Because [Defendant] did not properly raise this argument before the district court . . . the argument is waived."); *U.S. v. Kimble*, 107 F.3d 712, 715 n.2 (9th Cir. 1997) (where party fails to "coherently develop[]" an argument on appeal "we deem it to have been abandoned").

But even if Plaintiff had not waived this argument and proposed this alternative disgorgement model within his opposition to class decertification, his alternative damages model still does not undermine the Court's reasoning.

B. The Undisputed Evidence Shows that Plaintiff Still Cannot Present a Viable Damages Model Under His *New* Disgorgement Model

The remainder of Plaintiff's Motion for Reconsideration concerns his alternative disgorgement model. (Mot., pp. 6-17.) Under this disgorgement model, Plaintiff contends that there was sufficient evidence to measure classwide restitutionary damages. (Mot., pp. 11-14.) Plaintiff's contention that the Court's ruling erred rests on several pieces of evidence.

1. Restitution and the Disgorgement Remedy

As a preliminary matter, it is necessary for the Court to address the appropriate standard of law in measuring restitution.

Under Plaintiff's theories of recovery, "[t]he False Advertising Law, the Unfair Competition Law, and the CLRA authorize a trial court to grant restitution to private litigants…." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 694, 38 Cal. Rptr. 3d 36 (Cal. App. 2006) (citations omitted). Restitution is the only form of monetary relief under the UCL. *BizCloud, Inc. v. Computer Sciences Corporation*, Case No. C-14,00162 JCS, C-13-05999 JCS, 2014 WL 1724762, at *3 (N.D. Cal. 2014) (citations omitted). "The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148, 131 Cal. Rptr. 2d 29 (Cal. 2003) (UCL case); *see also In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 130, 103 Cal. Rptr. 3d 83 (Cal. App. 2010) (restitution available under FAL). "The difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution." *Vioxx*, 180 Cal. App. 4th at 131, 103 Cal. Rptr. 3d 83.

In measuring restitution, some courts have utilized the remedy of disgorgement. There are two forms of disgorgement—restitutionary and non-restitutionary—the latter of which is not available under California law. *Korea Supply Company*, 131

Cal. Rptr. 2d 29, 40 (California Supreme Court stating that "[w]hile express authority to order restitution was added to the UCL, courts were not given similar authorization to order nonrestitutionary disgorgement."). Restitutionary disgorgement is limited to (1) money or property once in the plaintiff's possession and (2) money in which the plaintiff has a vested interest. *Korea Supply Company*, 131 Cal. Rptr. 2d 29, 41-42 ("Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest.").

The distinction between restitutionary and non-restitutionary disgorgement turns on whether the money the plaintiff seeks is money that was originally obtained by the defendant from the plaintiff. *See, e.g.*, *Kraus v. Trinity Mgmt. Servs. Inc.*, 23 Cal. 4th 116, 126–27, 96 Cal. Rptr. 2d 485 (Cal. 2000) *superseded on other grounds, as recognized in Arias v. Superior Court*, 46 Cal. 4th 969, 95 Cal. Rptr. 3d 588 (Cal. 2009). If that is the case, the disgorgement is restitutionary in nature. *Id*. To the extent the plaintiff seeks to disgorge monies that were not taken from the plaintiff, such monetarily relief is nonrestitutionary and unavailable under the UCL. *Korea Supply Company*, 131 Cal. Rptr. 2d 29, 36-46.

2. Using Plaintiff's Methodology In Calculating the Average Retail Price Produces a Nonrestitutionary Disgorgement Model Which Is Impermissible Under California Law

Here, Plaintiff disputes the Court's underlying conclusion that failing to present an average retail price was fatal to his full refund damages model. (Mot., pp. 6-7.) Now, Plaintiff presents evidence to calculate an average retail price. (*Id*.) According to Plaintiff, a jury could determine the average retail price of Cobra using his suggested retail prices. (*Id*.) The suggested retail prices derive from (1) Defendant's product guides that are distributed to its retailers, (2) Plaintiff's deposition, and (3) Defendant's website where it sells Cobra directly to consumers. (*Id*.) Plaintiff claims that a quantifiable sum can be calculated using any of these retail prices. (*Id*. at pp.

14-15 (citing to Pl. Summ. J. Briefing).) Although the retail prices have fluctuated over time, Plaintiff contends that the prices have continued to stay consistent with one another. (*Id*. at p. 6 ¶¶ 4-5, Weston Decl. Exs. 1-4 (since 2009, the suggested retail prices from Defendant's product guides vary from $13.79 for a 30 count bottle, between $23.79 to $24.29 for a 60 count bottle, and between $35.39 to $ 36.19 for a 120 count bottle).)[5] According to Plaintiff, the prices need not be exact and are in fact adequate for a jury to ascertain an average retail price. (*Id*. at p. 7 ¶ 1.) Although a quantifiable sum can be calculated using these prices and restitution need not be precisely measured at this stage, the *newly* presented evidence is unreliable and renders the alternative disgorgement model nonrestitutionary in nature.

First, in examining the suggested retail prices in Defendant's product guides, (Weston Decl., Exs. 1-4.), the Court finds such evidence to be unreliable in determining the average retail price. As the Court discussed in its prior ruling, the prices wholesalers suggest to its retailers are not the prices at which retailers sell the product. (*See* Order, p. 10 (citing *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 32 80 S.Ct. 503, 506 4 L.Ed.2d 505 (1960) ("[D]rug retailers in the two cities advertised and sold several [] vitamin products at prices substantially below the suggested minimum retail prices.").) In his Reply, Plaintiff appears to challenge the assertion that retailers set their own pricing for the products they receive from wholesalers. (Reply, pp. 5-6.) Because there is no evidence of an example where a vendor marked Cobra's suggested retail price up or down, Plaintiff seeks to move forward under the

[5] Again, this evidence Plaintiff relies on for this proposition is nowhere to be found in any of his opposition to decertify class. (*See generally*, Dkt. No. 141.) Plaintiff does not claim that this evidence is newly discovered. Therefore, such evidence should have been presented to the Court in those previous opposition papers, not a motion for reconsideration. Local Rule 7-9 (The opposing party shall file "the evidence upon which the opposing party will rely in opposition to the motion and a brief but complete memorandum which shall contain a statement of all the reasons in opposition thereto and the points and authorities upon which the opposing party will rely…."); *cf.* Local Rule 7-18 ("A motion for reconsideration of the decision on any motion may be made only on the grounds…(c) a manifest showing of a failure to consider material facts presented to the Court *before* such decision.").

assumption that vendors accept the price suggestions within the product guides and do not make any price adjustments whatsoever. (*Id.*) Plaintiff's logic is flawed. Retailers have the ability to set their own prices (mark-up or mark-down) for the products they buy from the wholesalers because that is how retailers make a profit. *F.T.C. v. Figgie Intern., Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) ("[Defendant] sells heat detectors for cash to distributors, who apparently have complete discretion to set their own mark-ups."). The same can be said about Defendant and the vendors who sell Cobra. (*See* Dkt. No. 111, Ex. H., 144:17-21, Jeffery A. Hinrich's Transcript ("The retailer sets their own pricing. [Defendant has] a price that [Defendant sells] to the retailer [at]. [Defendant does] not know what [the retailer] will do with that price . . . what [the retailer] will put as a markup once [the retailer receives] the product.").); *in accord Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097, at *12-13 (N.D. Cal. Jan. 7, 2014) (denying class certification because, *inter alia*, plaintiff provided no evidence to account for the "prices in the retail market [that] are affected by the nature and location of the outlet in which [the product] [is] sold.") (citation omitted). Plaintiff's use of these suggested retail prices fails to take into account the retailer's discretion which is why the Court expected Plaintiff to collect data and present an average retail price.

Second, using Plaintiff's deposition as a basis to calculate an average retail price is not only unreliable but illogical. Defendant contends that Plaintiff's deposition is unreliable because of the inconsistency in Plaintiff's statements. In his complaint, Plaintiff states that he bought Cobra at a local Rite-Aid for about "$16-$17" which is inconsistent with Plaintiff's deposition where he recalls buying Cobra for about "$16-$18." (Dkt. No. 189 ("Pl. Depo."), 40:25; *cf.* Dkt. No. 56 (Second Amended Complaint), ¶ 18.) Plaintiff's inconsistencies are evident, but the Court is more concerned with the illogical request Plaintiff asks of the jury. For Plaintiff to ask a juror to determine the average retail price based on one particular value a vendor (Rite-Aid) used in selling Cobra makes no sense. As mentioned earlier, retailers have

discretion in setting prices for their products which is why a product's price varies from vendor to vendor. Plaintiff's recollection of *one* price at Rite-Aid in 2012 represents only *one* piece of the puzzle in formulating an *average* retail price. The Court expects an *average* retail price, not *one* retail price.[6]

Third, using Defendant's website where it sells Cobra directly to consumers is, as Defendant argues, rife with problems. (Opp., pp. 5-7.) This is the price Defendant (not the retailers) utilizes in selling Cobra to consumers. Defendant has already stated that it rarely sells Cobra through its website. (Hinrichs Decl., Dkt. No. 189-5, ¶ 3 (stating that since 2009, 44 bottles of Cobra have been sold through Defendant's website).) More importantly, Plaintiff does not seek to disgorge profits from Defendant's direct sales to consumers. If Plaintiff sought to disgorge those profits, then an average retail price would be unnecessary because Defendant's direct sales to consumers are profits that Plaintiff and class members have an ownership interest in. But, Plaintiff does not seek to disgorge profits from Defendant's direct sales to consumers. Instead, Plaintiff seeks to disgorge profits from Defendant's sales to the retailers. This is inappropriate under California law because Plaintiff and the class members do not have an ownership interest in Defendant's sales to third party vendors.[7] *Madrid v. Perot Systems Corp.*, 130 Cal. App. 4th 440, 455–462, 30 Cal.

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[6] To the extent Plaintiff simply seeks to use Plaintiff's deposition as evidence of the consistency in value between these three sets of prices, the Court still is not persuaded. There is a clear inconsistency between Plaintiff's testimony and his complaint. (Pl. Depo. 40:25; *cf.* Second Amended Complaint, ¶ 18.) Plaintiff has not produced a receipt or any other concrete documentation to support his statements, (Pl. Depo., 41:6-7.), yet he seeks to use this price he remembers (from purchasing Cobra in 2012) as evidence within his damages model. Because of the inconsistences and lack of evidentiary proof regarding this price, the Court does not consider such evidence as being consistent with the other suggested retail prices.

[7] The Court agrees with Plaintiff on one point. (Reply, p. 8 ¶ 2.) Defendant does not walk away free from liability because it never sold Cobra directly to consumers. Nor is Plaintiff required to sue all of the retailers who sold Cobra directly to consumers. What the Court is saying is that Plaintiff needs both pieces of evidence under this model—Defendant's sales to its retailers and the average retail price used in selling Cobra—to bridge the gap between Defendant's gains and Plaintiff's ownership interest within those gains. *Johns v. Bayer Corp.*, Civil No. 09-CV-1935-AJB (DHB), 2012 WL 1520030, at *4 (S.D. Cal. 2012) ("because [Defendant's] profits for its Men's Vitamins

Rptr. 3d 210 (Cal. App. 2005) ("Plaintiff's generalization fails to acknowledge the specific limitation applicable in the UCL context—that restitution means the return of money to those persons from whom it was taken or who had an ownership interest in it.") (citation omitted). Rather, the class members have an ownership interest in the retail sales, *i.e.*, amounts they paid directly to the retailer. (*See* Order, p. 8.) This is why an average retail price is so essential because it is the sole variable to which Plaintiff and the class members have an ownership interest in. Defendant's website prices do not reflect the ownership interest class members have in Cobra's retail profits and to allow Plaintiff to use this data as a means to calculate an average retail price would be improper. *Lee Myles Assoc. Corp. v. Paul Rubke Enter., Inc.*, 557 F.Supp.2d 1134, 1144 (S.D. Cal. 2008) ("Disgorgement of profits earned by defendants as a result of allegedly unfair practices, where the money sought to be disgorged was not taken from the plaintiff and the plaintiff did not have an ownership interest in the money, is not authorized.").

Ultimately, Plaintiff's alternative disgorgement model and the accompanying retail price suggestions do not address the previously highlighted impasse—the inability to calculate restitution.[8] (Order, p. 11.) For the reasons stated above, the

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would seemingly have originated from the class members' purchases of the products, Plaintiffs contention that they are seeking restitutionary disgorgement of Bayer's profits is arguably accurate." But "it is for the District Judge to determine which measure of restitution is appropriate in this case…" and Plaintiffs' duty is to obtain "the evidence which supports a theory of restitutionary disgorgement….").

[8] Even assuming *arguendo* that such retail prices are appropriate in measuring restitution, Plaintiff leaps to the conclusion that a jury could somehow determine an average retail price using these set of numbers. (Mot., pp. 6-7; *cf*. Opp., p. 9.) In his Reply, Plaintiff states that the jury would weigh the evidence (the suggested retail prices) and then determine for itself what it believes the actual retail price is. (Reply, pp. 6-7 n.1.) Plaintiff continues to claim that the calculations will not be difficult, simply multiply the average retail price by the number of bottles sold using Defendant's sales data. (*Id*.) But Plaintiff ignores the question of how picking one suggested retail price (one price for each bottle count) automatically configures an *average*.

Judge Collins and this Court expected Plaintiff to produce an *average* retail price under this damages model, but Plaintiff's evidence does not reflect a set of retail values of Cobra that typify a set of

Court concludes that Plaintiff's *new* evidence is insufficient. And since the discovery deadline has lapsed, Plaintiff must again solely rely on Defendant's sales data, which the Court has already considered and found insufficient in calculating restitution. (*See* Order (citing *Caldera v. J.M. Smucker Co.*, CV 12-4936-GHK VBKX, 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014) ("[C]lasswide damages cannot accurately be measured based on Defendant's sales data alone.").) Using the sales data alone, Plaintiff seeks to disgorge Defendant of what Defendant received from its wholesale sales, but as previously mentioned, Plaintiff and his class members do not have an ownership interest in those sales. To move forward with only one of these variables (Defendant's sales data) undermines the purpose of restitution and the requirement of having an ownership interest in the disgorged profits. *Shersher v. Superior Court*, 154 Cal. App. 4th 1491, 1499, 65 Cal. Rptr. 3d 634 (2007) (*Korea Supply* only requires "that the plaintiff must be a 'person in interest' (that is, the plaintiff must have had an ownership interest in the money or property sought to be recovered).") (citing *Korea Supply*, 131 Cal. Rptr. 2d at 41).

Plaintiff continues to argue that the Court is being too restrictive in applying restitution. (Mot., pp. 12-13.) The definition of restitution is clear-cut, and courts will only award class-wide restitution when it "serves to provide what the class members lost, not what the [d]fendant gained" unless the class members have an ownership interest in defendant's gains. (*See* Order, p. 8 (citing *Astiana*, 2014 WL 60097, at *12-13); *see also Korea Supply Company*, 131 Cal. Rptr. 2d 29, 35-46. Plaintiff is attempting to evade the requirements under this definition. The problem with

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various vendors. For example, the prices within Defendant's product guides are in fact *suggestions* made to retailers. No evidence demonstrates that these suggested prices match the prices various retailers set for Cobra. The Court recognizes that calculating damages need not be exact or "mathematically precise" at this stage, but the Court will not ignore Plaintiff's speculative approach in relying on price suggestions within a product guide as a basis to determine an average retail price. *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) (the law "requires only that damages be capable of measurement based upon reliable factors without *undue speculation*.") (emphasis added).

Plaintiff's evidence and his reoccurring arguments is that he seeks an award of monies that exceed his ownership interest. Moreover, Plaintiff's arguments that equitable principles favor his disgorgement model are equally unpersuasive. (Mot., pp. 15-16.) For Plaintiff to argue in favor of equitable principles on one hand but then request the Court to compromise on such equitable requirements on the other hand is inconsistent. In any case, such a contention is ineffective because Plaintiff's model fails to restore class members back to the status quo. *Korea Supply*, 131 Cal. Rptr. 2d at 41. Amidst his equitable policy considerations and other unpersuasive contentions, Plaintiff cannot avoid what is clear—his measurement of restitution does not meet the *Korea Supply* threshold. *Johns*, 2012 WL 1520030 at *4 ("[D]isgorgement is available to the extent it is restitutionary.") (citations omitted).

Plaintiff's continued attempt to manipulate his evidence to satisfy a restitutionary measurement is obvious. If Plaintiff's goal is to move forward with an adequate damages model, Plaintiff could have achieved that goal any time since June 2014 when Judge Collins certified this class action. (Dkt. No. 80.) From the moment the class was certified, Plaintiff was well aware of Judge Collins's expectation (an expectation of an average retail price). (*Id*.) As discovery proceeded, the responsibility of obtaining evidence to "readily calculate[] [classwide restitution] using Defendant's sales numbers and an average retail price" rested squarely on Plaintiff. (Dkt. No. 80, p. 13.) He choose not to gather the data to formulate an average retail price and has since (until now) failed to propose an alternative damages model.

Accordingly, Plaintiff's arguments (new and old) have not changed the Court's stance, thus, the Court will not disturb its previous ruling.

C. Class Notice

Finally, Plaintiff argues that the Court's Order is defective because it did not address the issue of class notice upon decertifying class. (Mot., pp. 19-20.) Again, this is an argument that Plaintiff failed to set forth in his opposition to class

decertification. That is sufficient grounds to disregard this contention under the reconsideration standards. *Independent Towers*, 350 F.3d at 929.

Irrespective of that standard, Plaintiff is correct that class members must receive notice following class decertification, but it is Plaintiff's duty to address and bear the cost of class notice, not the Court. *See Culver v. City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002) (recognizing that the plaintiff bears the cost of class notice following decertification); *see also Radmanovich v. Combined Ins. Co. of America*, 271 F.Supp.2d 1075, 1078 (N.D. Ill. 2003) (plaintiff bringing forth a motion for class notice under Rule 23(e) following a denial of class certification) (citing *Culver*, 277 F.3d 908); *Barner v. City of Harvery*, No. 95 C 3316, 2004 WL 20920009, at *7 (N.D. Ill. 2004) (granting plaintiff's request for class notice following a class decertification) (citing *Culver*, 277 F.3d 908). The Court's duty is to oversee the dissemination of class notice. Furthermore, Plaintiff argues that Defendant's decertification motion was defective for not providing a plan for class notice, but Plaintiff fails to recognize that this is *his* class action and he is responsible for bearing the costs of class notice when class is certified and decertified. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 178, 94 S. Ct. 2140 (1974) ("The usual rule is that a plaintiff must initially bear the cost of notice to the class."). Class notice is the responsibility of Class Counsel.

Accordingly, the Court disagrees with Plaintiff and does not reconsider its ruling based on his final argument.

IV. CONCLUSION

In light of the foregoing, the Court **DENIES** Plaintiff's Motion for Reconsideration. Plaintiff does not identify any new evidence or law that it could not have, with reasonable diligence, presented to the Court in his opposition papers. Nor does Plaintiff identify any material evidence or authorities cited in his opposition papers that the Court ignored or disregarded such that the Court can be said to have committed clear or manifest error.

Furthermore, the Court **ORDERS** Plaintiff to file a proposed notice with

respect to class decertification no later than twenty-one (21) days following the issuance of this Order. Plaintiff will bear the cost of class notice. *Culver*, 277 F.3d at 915.

This case shall move forward with Summary Judgement and Trial. Because the Court previously vacated all dates, (Dkt. No. 178), a status conference is scheduled for July 27, 2015 at 10:00 am to reset dates and discuss the possibility of supplemental Summary Judgment briefing considering this ruling.

IT IS SO ORDERED.

Dated: June 24, 2015

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE