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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE ABBOTT LABORATORIES NORVIR
ANTI-TRUST LITIGATION

No. C 04-1511 CW
(Consolidated Case)
No. C 04-4203 CW

ORDER GRANTING IN
PART PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION

_____ /

Plaintiffs John Doe 1, John Doe 2 and the Service Employees International Union Health and Welfare Fund (SEIU) move pursuant to Federal Rule of Civil Procedure 23 for certification of a class. Defendant Abbott Laboratories opposes the motion. The matter was heard on April 13, 2007. Having considered the parties' papers and oral arguments, the Court grants in part Plaintiffs' motion for class certification.

BACKGROUND

Protease inhibitors (PIs) are considered the most potent class of drugs to combat HIV. In 1996, Defendant introduced Norvir as a stand-alone PI. After Norvir's release, it was discovered that,

1 when used in a low dose with another PI, Norvir would "boost" the
2 anti-viral properties of that PI.

3 In 2000, Defendant introduced Kaletra, a pill containing the
4 protease inhibitor lopinavir and Norvir. Although effective and
5 widely used, Kaletra had significant side effects for some
6 patients. Studies showed that two new PIs, however, when boosted
7 with Norvir, were as effective as Kaletra, and were more
8 convenient. After these PIs were introduced, Kaletra's market
9 share fell more than Defendant anticipated.

10 On December 3, 2003, after the release of these two new PIs,
11 Defendant raised by 400 percent the wholesale price of Norvir; it
12 did not raise the price of Kaletra. Defendant contends that it
13 raised Norvir's price so that it would be more in line with the
14 drug's enormous clinical value. Plaintiffs contend that the Norvir
15 price increase was an illegal attempt to achieve an anti-
16 competitive purpose in the "boosted market," which Plaintiffs
17 define as the market for those PIs, such as Reyataz, Lexiva and
18 Kaletra, that are prescribed for use with Norvir as a booster.
19 Plaintiffs sued Defendant, alleging violations of section 2 of the
20 Sherman Act and California Business and Professions Code section
21 17200 and unjust enrichment.

22 Plaintiffs now seek to certify the following class: All
23 persons or entities throughout the United States and its
24 territories who purchased or paid for, or who reimbursed another
25 person or entity who purchased or paid for, Norvir as a booster to
26 other protease inhibitors intended for consumption by themselves,
27 their families, or their members, employees, plan participants and
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1 beneficiaries or insureds, and who paid all or part of the cost of
2 Norvir ("the Class") during the period December 3, 2003 through
3 such time in the future as the effects of Defendant's illegal
4 conduct, as alleged, have ceased ("the Class Period"). Excluded
5 from the Class are Defendant and its respective subsidiaries and
6 affiliates, all government entities (except for government-funded
7 employee benefits funds), and all persons or entities that purchase
8 Norvir: (i) for purposes of resale, or (ii) directly from
9 Defendant. Plaintiffs further move the Court to appoint themselves
10 as class representatives and to appoint Labaton Sucharow & Rudoff
11 LLP and Berman DeValerio Pease Tabacco Burt & Pucillo as co-lead
12 class counsel.

13 Defendant opposes the motion for class certification, arguing
14 that the Individual Doe Plaintiffs are not members of the proposed
15 class and, therefore, are not proper class representatives. It
16 further argues that none of the named Plaintiffs is a proper class
17 representative for the Sherman Act claim or for the California
18 state law unfair competition claim, and that certification of the
19 unjust enrichment claim is not appropriate because of the varying
20 laws of fifty States and the predominance of individual issues.

21 DISCUSSION

22 I. Legal Standard for Class Certification

23 Plaintiffs seeking to represent a class must satisfy the
24 threshold requirements of Rule 23(a) as well as the requirements
25 for certification under one of the subsections of Rule 23(b). See
26 Fed. R. Civ. P. 23. The party seeking class certification bears
27 the burden of demonstrating that each element of Rule 23 is

1 satisfied. Doninger v. Pacific Northwest Bell, Inc., 564 F.2d
2 1304, 1308 (9th Cir. 1977).

3 A district court may certify a class only if, after "rigorous
4 analysis," it determines that the party seeking certification has
5 borne its burden. General Tel. Co. v. Falcon, 457 U.S. 147, 158-61
6 (1982). In determining whether the plaintiffs have carried their
7 burden, the court may not consider the merits of the plaintiffs'
8 claims. Burkhalter Travel Agency v. MacFarms Intern., Inc., 141
9 F.R.D. 144, 152 (N.D. Cal. 1991). Rather, the court must take the
10 substantive allegations of the complaint as true. Blackie v.
11 Barrack, 524 F.2d 891, 901 (9th Cir. 1975). Nevertheless, the
12 court need not accept conclusory or generic allegations regarding
13 the suitability of the litigation for resolution through class
14 action. Burkhalter, 141 F.R.D. at 152. And the court may consider
15 supplemental evidentiary submissions of the parties. In re
16 Methionine Antitrust Litig., 204 F.R.D. 161, 163 (N.D. Cal. 2001);
17 see also Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th
18 Cir. 1983) (noting that "some inquiry into the substance of a case
19 may be necessary to ascertain satisfaction of the commonality and
20 typicality requirements of Rule 23(a)"; however, "it is improper to
21 advance a decision on the merits at the class certification
22 stage"). Ultimately, it is in the district court's discretion
23 whether a class should be certified. Burkhalter, 141 F.R.D. at
24 152.

25 I. Class Membership and Standing

26 Implicit in Rule 23 is the requirement that the class
27 representatives be members of the class. Westways World Travel,

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1 Inc. v. AMR Corp., 218 F.R.D. 223, 230 (C.D. Cal. 2003); see also
2 General Tel., 457 U.S. at 156 (holding that "a class representative
3 must be part of the class and possess the same interest and suffer
4 the same injury as the class members"). Further, standing "is a
5 jurisdictional element that must be satisfied prior to class
6 certification." Nelsen v. King County, 895 F.2d 1248, 1249-50 (9th
7 Cir. 1990). As the Eleventh Circuit explains, it is "well-settled
8 that prior to the certification of a class, and technically
9 speaking before undertaking any formal typicality or commonality
10 review, the district court must determine that at least one named
11 class representative has Article III standing to raise each class
12 subclaim." Wooden v. Bd. of Regents of Univ. Sys. of Georgia, 247
13 F.3d 1262, 1287-88 (11th Cir. 2001).

14 A. Class Membership

15 Defendant does not dispute that Plaintiff SEIU is a member of
16 the proposed class, but it argues that neither of the Doe
17 Plaintiffs are class members. To qualify as a class
18 representative, a plaintiff must be "part of the class and possess
19 the same interest and suffer the same injury as class members."
20 General Tel., 457 U.S. at 156. Defendant points out that Doe 1, at
21 all relevant times, and Doe 2, since June, 2004, paid flat co-
22 payments for each of their prescription drugs, including Norvir,
23 and, thus, never "paid all or part of the increased cost of
24 Norvir." After the hearing on class certification, however,
25 Plaintiffs revised their class definition and deleted the word
26 "increased."

1 Defendant further points out that, during the proposed class
2 period, Doe 2 took 1,200 milligrams of Norvir a day. It contends
3 that 1,200 milligrams is a stand-alone dose and not a boosting dose
4 and, therefore, Doe 2 did not "pay for Norvir as a booster," as
5 required for class membership. Defendant points to the testimony
6 of Plaintiff's expert Dr. Douglas Greer that "the patient who is
7 using Norvir not as a booster, but as a standalone PI, that -- that
8 would be a person not in the class." Park Dec., Ex. A at 34:20-
9 22; see also id. at 35:22-36:1 (agreeing that a patient taking
10 Norvir at a 1,200 milligram daily dose, and not using Norvir as a
11 low dose booster, would not be a member of the class).

12 Plaintiffs respond that Doe 1 and Doe 2 are class members. In
13 support of their earlier class definition, they argued that, under
14 the collateral source rule, Doe 1 and Doe 2 are entitled to recover
15 the amount of the Norvir price hike paid by them and on their
16 behalf by their insurance companies and, therefore, Doe 1 and Doe 2
17 have legally cognizable injuries falling within the class
18 definition. As Plaintiffs note, courts have applied the collateral
19 source rule in anti-trust class actions involving prescription
20 drugs. For example, in In re Warfarin Sodium Antitrust Litigation,
21 212 F.R.D. 231 (D. Del. 2002), the court approved a proposed
22 settlement in a class action filed by consumers and third-party
23 payors who paid all or some of the purchase price of a drug. The
24 court noted that some class members argued that the consumers who
25 paid a fixed co-payment had not suffered any damages, because they
26 paid the same for warfarin sodium regardless of whether it was a
27 brand name or generic version. 212 F.R.D. at 259. Although the
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1 court stated that "the argument has merit," the court recognized
2 that fixed co-payment consumers "could sue defendant for damages by
3 invoking the 'collateral source' doctrine," and did not exclude
4 those consumers from the class. Id.

5 Plaintiffs argue that this case is directly on point. It is
6 not. In determining that fixed co-payment consumers should be
7 allowed to share in the distribution of the settlement fund, the
8 court relied on numerous factors, including that "to exclude fixed
9 co-pay consumers now would require sending additional notice and a
10 new, more complicated claim form to the consumers who have already
11 filed claims" and "would further delay distribution to the rest of
12 the class and result in additional administrative costs."

13 Nonetheless, this case provides some support to Plaintiffs'
14 argument that, under the collateral doctrine rule, Doe 1 and Doe 2
15 are class members.

16 Goda v. Abbott Labs., 1997 WL 156541 (D.C. Super. Ct.),
17 provides additional support. There, the court found that, although
18 the parties cited no case dealing with collateral contributions in
19 the context of anti-trust injury, the rationale behind the
20 collateral damages rule applied, especially "where the wrong is not
21 mere negligence that usually harms only one person" but deliberate
22 actions that harm many. 1997 WL 156541 at *9. The court certified
23 a class that included consumers with fixed co-payments, so long as
24 those consumers did not have managed care programs "whose brand-
25 name-prescription-drug benefits are such that they negate any pass-
26 on." Id. By certifying the class, "[e]ffective enforcement of the
27 antitrust laws is thus promoted." Id. Not noted by Plaintiffs,
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1 however, is that, in Goda, the court certified the class and
2 subclasses: the first subclass consisted of "consumers who are
3 without collateral source benefits"; the second consisted of "those
4 who have unexcluded collateral source benefits." Id. at *10.

5 Based on these cases, and the underlying policy regarding the
6 important role that class actions play in the enforcement of anti-
7 trust laws, the Court finds that Doe 1 and Doe 2 are not excluded
8 from class membership merely because, under their health care
9 plans, they paid a fixed co-payment for medication. See In re
10 Dynamic Random Access Memory Antitrust Litig., 2006 U.S. Dist.
11 LEXIS 39841 (N.D. Cal. 2006) ("Moreover, in antitrust actions such
12 as this one, it has long been recognized that class actions play an
13 important role in the private enforcement of antitrust laws.
14 Accordingly, when courts are in doubt as to whether certification
15 is warranted, courts tend to favor class certification.") (citation
16 omitted). Further, under Plaintiffs' revised class definition, a
17 class member need only pay all or part of the cost of Norvir. Doe
18 1 and Doe 2 meet that requirement.

19 However, the Court finds that Doe 2 is excluded from class
20 membership because he did not use Norvir as a booster. Rather, he
21 consumed 1,200 milligrams of Norvir a day in combination with
22 Saquinavir. Although Plaintiffs state that this dosage was used to
23 "boost" the Saquinavir, they provide no evidence to support that
24 statement. Doe 2 states that his doctor prescribed him Norvir
25 along with the Saquinavir because they would interact, which would
26 make a "stronger combination." As Defendant notes, this describes
27 a cocktail combination of PIs and not use of Norvir as a "booster."

1 The Court finds that, like SEIU, Doe 1 is a member of the
2 proposed class; Doe 2, however, is not.

3 B. Standing

4 Defendant argues that none of the Plaintiffs has standing to
5 bring claims under California's Unfair Competition Law or under the
6 Sherman Act and, thus, class certification is precluded.¹

7 California's Unfair Competition Law "does not apply to actions
8 occurring outside of California that injure non-residents."

9 Standfacts Credit Servs., Inc. v. Experian Info. Solutions, Inc.,

10 405 F. Supp. 2d 1141, 1148 (C.D. Cal. 2005); see also Norwest

11 Mortgage, Inc. v. Sup. Ct., 72 Cal. App. 4th 214, 226 (1999)

12 (refusing to apply California's Unfair Competition Law to "injuries
13 suffered by non-California residents, caused by conduct occurring
14 outside of California's borders by actors headquartered and
15 operating outside of California"). Plaintiffs make clear that this
16 claim is brought on behalf of class members who are or have been
17 California residents during the class period. Only one named
18 Plaintiff is a California resident: Doe 1.

19 Defendant contends that, because Doe 1 is not a class member,
20 no named Plaintiff has standing to bring this claim. But, as
21 discussed above, the Court determines that Doe 1 is a class member.
22 Defendant further argues that Doe 1 does not have standing because
23 California's Unfair Competition Law requires that an unfair
24 competition claim must be brought by someone who "has suffered

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26 ¹Plaintiffs' claim for unjust enrichment is based on their
27 anti-trust injury; thus, if they have no standing to bring a claim
28 under the Sherman Act, their unjust enrichment claim fails.

1 injury in fact and has lost money or property as a result of such
2 unfair competition." See Cal. Bus. & Prof. Code § 17204. The
3 section Defendant relies upon, however, concerns "Actions for
4 Injunctions by Attorney General, District Attorney, County Counsel,
5 and City Attorneys." Further, the Court finds that Doe 1 has
6 suffered an injury in fact and, therefore, he has standing to bring
7 a claim under California's Unfair Competition Law.

8 Defendant's arguments that Plaintiffs lack standing to bring
9 claims under the Sherman Act similarly fail. To have anti-trust
10 standing, a plaintiff must have an injury that "flows from an
11 anticompetitive aspect or effect of the defendant's behavior."
12 Rebel Oil Co., Inc. v. Atlantic Richfield, 51 F.3d 1421, 1433 (9th
13 Cir. 1995). As Plaintiffs note, this Court has already considered
14 and rejected Defendant's argument that Plaintiffs claim no
15 cognizable anti-trust injury. See October 21, 2004 Order Denying
16 Defendant's Motion to Dismiss First Amended Class Action Complaint;
17 March 2, 2005 Order Denying Defendant's Motion to Dismiss. Indeed,
18 Defendant acknowledges that it raised these arguments before and
19 that, at that time, the Court was unwilling to rule, as a matter of
20 law, that SEIU was not a participant in the boosted market. The
21 Court is still unwilling to so rule. This is a motion for class
22 certification and "it is improper to advance a decision on the
23 merits to the class certification stage." Moore, 708 F.2d at 480.
24 Further, Defendant offers no good cause for the Court to reconsider
25 its prior decisions. Defendant asserts that considerable discovery
26 has been conducted which establishes SEIU's lack of involvement in
27 the Boosted Market, but it provides no support for that assertion

1 and ignores the exception to the market participant requirement for
2 parties whose injuries are "inextricably intertwined" with the
3 injuries of market participants. See Blue Shield v. McCready, 457
4 U.S. 465 (1982); see also Ostrofe v. H.S. Crocker Co., 740 F.2d
5 739, 745-46 (9th Cir. 1984).

6 The Court concludes that Doe 1 has standing to bring claims
7 under California's Unfair Competition Law and that Doe 1 and SEIU
8 have standing to bring claims under the Sherman Act. The Court now
9 examines whether Plaintiffs meet the explicit requirements of Rule
10 23.

11 II. Rule 23(a)

12 Rule 23(a) permits district courts to certify class actions
13 if: (1) the class is so numerous that joinder of all members is
14 impracticable (numerosity); (2) there are questions of law or fact
15 common to the class (commonality); (3) the claims or defenses of
16 the representative parties are typical of the claims or defenses of
17 the class (typicality); and (4) the representative parties will
18 fairly and adequately protect the interests of the class
19 (adequacy). See Fed. R. Civ. P. 23(a).

20 A. Numerosity

21 "The prerequisite of numerosity is discharged if 'the class is
22 so large that joinder of all members is impracticable.'" Hanlon v.
23 Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998) (quoting Fed.
24 R. Civ. P. 23(a)(1)). Where "the exact size of the class is
25 unknown, but general knowledge and common sense indicate that it is
26 large, the numerosity requirement is satisfied." 1 Alba Cone &
27 Herbert B. Newberg, Newberg on Class Actions § 3.3 (4th ed. 2002).

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1 Defendant does not deny the numerosity of the class and the Court
2 finds that this prerequisite is satisfied.

3 B. Commonality

4 "A class has sufficient commonality 'if there are questions of
5 fact and law which are common to the class.'" Hanlon, 150 F.3d at
6 1019 (quoting Fed. R. Civ. P. 23(a)(2)). "All questions of fact
7 and law need not be common to satisfy this rule. The existence of
8 shared legal issues with divergent factual predicates is
9 sufficient, as is a common core of salient facts coupled with
10 disparate legal remedies within the class." Id. Here, the claims
11 of all class members "stem from the same source," id. at 1019-20,
12 namely, Defendant's alleged anti-competitive conduct in the pricing
13 of Norvir in order to obtain an unlawful advantage in the boosted
14 PI drug market. The Court finds that the allegations against
15 Defendant are sufficient to satisfy the commonality prerequisite of
16 Rule 23(a)(2).

17 C. Typicality

18 "The typicality prerequisite of Rule 23(a) is fulfilled if
19 'the claims or defenses of the representative parties are typical
20 of the claims or defenses of the class.'" Id. at 1020 (quoting
21 Fed. R. Civ. P. 23(a)(3)). The test for typicality is "whether
22 other members have the same or similar injury, whether the action
23 is based on conduct which is not unique to the named plaintiffs,
24 and whether other class members have been injured by the same
25 course of conduct." Hanon v. Dataproducts Corp., 976 F.2d 497, 508
26 (9th Cir. 1992) (quoting Schwartz v. Harp, 108 F.R.D. 279, 282
27 (C.D. Cal. 1985)). "[R]epresentative claims are 'typical' if they
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1 are reasonably co-extensive with those of absent class members;
2 they need not be substantially identical." Hanlon, 150 F.3d at
3 1020. However, "a named plaintiff's motion for class certification
4 should not be granted if 'there is a danger that absent class
5 members will suffer if their representative is preoccupied with
6 defenses unique to it.'" Hanon, 976 F.2d at 508 (quoting Gary
7 Plastic Packaging Corp. v. Merrill Lynch, 903 F.2d 176, 180 (2d
8 Cir. 1990)).

9 Defendant's arguments that the named Plaintiffs' claims are
10 not typical because Doe 1 is not a class member and because all
11 Plaintiffs lack standing fail for the reasons discussed above. The
12 Court finds that the named Plaintiffs' claims and the absent class
13 members' claims arise out of the same alleged anti-trust
14 violations. The named Plaintiffs and the class members have
15 allegedly been injured by the same course of conduct. Therefore,
16 this prerequisite is also satisfied.

17 D. Adequacy

18 "The final hurdle interposed by Rule 23(a) is that 'the
19 representative parties will fairly and adequately protect the
20 interests of the class.'" Hanlon, 150 F.3d at 1020 (quoting Fed.
21 R. Civ. P. 23(a)(4)). "Resolution of two questions determines
22 legal adequacy: (1) do the named plaintiffs and their counsel have
23 any conflicts of interest with other class members and (2) will the
24 named plaintiffs and their counsel prosecute the action vigorously
25 on behalf of the class?" Id.

26 Defendant does not dispute that Plaintiffs' counsel will
27 prosecute this action vigorously on behalf of the class, but it

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1 argues that SEIU is not an adequate class representative because it
2 has inherently conflicting interests with individual class members.
3 According to Defendant, SEIU and other third-party payors have an
4 interest in paying less and, thus, prefer that their members use
5 the lower-cost Kaletra, whereas the individual class members would
6 prefer using the higher-priced combination of Norvir plus a
7 competing PI. Defendant also contends that the possible remedies
8 for the anti-trust claim are antagonistic.

9 Plaintiffs respond with a supplemental declaration from their
10 expert, who opines that SEIU's interests are the same as those of
11 the individual Plaintiffs and that possible remedies are not
12 antagonistic. They point to In re Warfarin Sodium Antitrust
13 Litigation, where the court rejected the argument "that the
14 interests of the class members were in conflict in such a way that
15 the District Court abused its discretion in certifying a single
16 class including several types of injured plaintiffs." 391 F.3d at
17 532. That class included the named parties, both consumers and
18 third-party payors, who "all shared the same goal of establishing
19 the liability of [the defendant], suffered the same injury
20 resulting from the overpayment for warfarin sodium, and sought
21 essentially the same damages by way of compensation for
22 overpayment." Id. There, "any potential for conflicts of
23 interest" between and among the consumers and third-party payors
24 that may have arisen "were adequately represented by the presence
25 of separate counsel for consumers and TPPs [third-party payors]."
26 Id. (finding that the existence of separate counsel "provided
27 adequate structural protections to assure that differently situated
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1 plaintiffs negotiate for their own unique interests") (inner
2 quotations omitted). Here, too, there is separate counsel for the
3 individual Plaintiffs and for SEIU. Further, as in Warfarin,
4 Defendant has "only asserted, rather than established, an inherent
5 conflict among consumers and between consumers and TTPs." Id. at
6 533.

7 Because separate counsel for the different types of class
8 members is present, the Court concludes that Doe 1 and SEIU will
9 fairly and adequately protect the interests of the class, as will
10 their counsel. In an abundance of caution, however, the Court
11 creates subclasses for individual class members and for
12 institutional class members. Id. at 533 n.14 (noting that
13 subclasses have been usefully employed in anti-trust cases). Doe 1
14 shall be the class representative of the individual class members;
15 SEIU shall be the class representative of the institutional class
16 members.

17 III. Rule 23(b)

18 Having met the prerequisites of Federal Rule of Civil
19 Procedure 23(a) for class certification, Plaintiffs are entitled to
20 proceed on a class basis if they meet the requirements of one of
21 the subsections of Federal Rule of Civil Procedure 23(b).

22 Plaintiffs move for certification under both subsection (b)(2) and
23 (b)(3).

24 A. Rule 23(b)(2)

25 As noted above, Plaintiffs allege that Defendant's conduct
26 violates section 2 of the Sherman Act. Plaintiffs seek class
27 certification under Rule 23(b)(2) of their anti-trust claim for
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1 injunctive relief. Rule 23(b)(2) requires that "the party opposing
2 the class has acted or refused to act on grounds generally
3 applicable to the class, thereby making appropriate final
4 injunctive relief or corresponding declaratory relief with respect
5 to the class as a whole." Fed. R. Civ. P. 23(b)(2). As Plaintiffs
6 note, Defendant does not dispute that a nation-wide class for
7 injunctive relief is appropriate. And the Court finds that
8 Defendant allegedly "has acted or refused to act on grounds
9 generally applicable to the class." Id. Therefore, a nation-wide
10 class for injunctive relief for Plaintiffs' section 2 Sherman Act
11 claim is appropriate.

12 B. Rule 23(b)(3)

13 Plaintiffs seek class certification under Rule 23(b)(3) of
14 their claims under the common law of unjust enrichment and under
15 California's Unfair Competition Law.² See Cal. Bus. and Prof. Code
16 § 17200, et seq.

17 Rule 23(b)(3) requires that questions of law or fact common to
18 the members of the class predominate over any questions affecting
19 only individual members and that a class action is the superior
20 method for litigating the claims. "The Rule 23(b)(3) predominance
21 inquiry tests whether proposed classes are sufficiently cohesive to
22 warrant adjudication by representation." Amchem Prod., Inc. v.
23 Windsor, 521 U.S. 591, 623 (1997). "When common questions present
24 a significant aspect of the case and they can be resolved for all
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26 ²As noted above, the unfair competition claim is brought on
27 behalf of those class members who are or were California residents
28 during the class period.

1 members of the class in a single adjudication, there is clear
2 justification for handling the dispute on a representative rather
3 than an individual basis." Hanlon, 150 F.3d at 1022 (internal
4 quotation marks omitted). "The policy at the very core of the
5 class action mechanism is to overcome the problem that small
6 recoveries do not provide the incentive for any individual to bring
7 a solo action prosecuting his or her rights." Amchem, 521 U.S. at
8 617.

9 1. Unjust Enrichment

10 Plaintiffs argue that a nation-wide unjust enrichment class
11 should be certified. They contend that, because "common proof" can
12 be used to measure the restitution to which the class members would
13 be entitled, common questions of law and fact predominate over
14 questions affecting class members individually. According to
15 Defendant, however, the laws of the fifty States vary and the
16 individual issues predominate and therefore class certification of
17 a nation-wide unjust enrichment class is inappropriate.

18 Defendant is correct in part. Although many States, including
19 California, follow the Restatement's definition of unjust
20 enrichment, not all do. See In re Terazosin Hydrochloride, 220
21 F.R.D. 672, 697 (S.D. Fla. 2004). Laws concerning unjust
22 enrichment do vary from State to State. After the hearing, the
23 parties submitted a letter to the Court in which they agreed that
24 two States, Indiana and Ohio, preclude indirect purchasers from
25 asserting claims for unjust enrichment and that there is no
26 authority in twenty-six States expressly prohibiting indirect
27 purchasers from obtaining unjust enrichment for violations of state

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1 anti-trust statutes. They disagree whether the law of twenty-four
2 other States precludes indirect purchasers from recovering unjust
3 enrichment.

4 Differences in state law claims can outweigh the similarities,
5 precluding class certification as to those claims. See Schumacher
6 v. Tyson Fresh Meats, Inc., 221 F.R.D. 605, 612-613 (D. S.D. 2004).
7 But differences do not always outweigh the similarities, especially
8 in cases concerning unjust enrichment claims. See, e.g., Westways
9 World Travel, 218 F.R.D. at 240 (certifying nation-wide class of
10 unjust enrichment claimants). As noted in Schumacher,

11 Where federal claims and common law claims are predicated on
12 the same factual allegations and proof will be essentially the
13 same, even if the law of different states might ultimately
14 govern the common law claims -- an issue that need not and is
15 not decided at this juncture -- certification of the class for
16 the whole action is appropriate. The spectre of having to
17 apply different substantive laws does not warrant refusing to
18 certify a class on the common-law claims.

19 221 F.R.D. at 612 (quotations and alteration omitted); see also
20 Hanlon, 150 F.3d at 1022 ("Variations in state law do not
21 necessarily preclude a 23(b)(3) action.").

22 Here, the variations among some States' unjust enrichment laws
23 do not significantly alter the central issue or the manner of
24 proof. Common to all class members and provable on a class-wide
25 basis is whether Defendant unjustly acquired additional revenue or
26 profits by virtue of an anti-competitive premium on the price of
27 Norvir. See Schumacher, 221 F.R.D. at 612 ("In looking at claims
28 for unjust enrichment, we must keep in mind that the very nature of
such claims requires a focus on the gains of the defendants, not
the losses of the plaintiffs. That is a universal thread

1 throughout all common law causes of action for unjust
2 enrichment."). The "idiosyncratic differences" between state
3 unjust enrichment laws "are not sufficiently substantive to
4 predominate over the shared claims." See Hanlon, 150 F.3d at 1022.

5 Defendant also argues that certification of Plaintiffs' unjust
6 enrichment claim should be denied because issues relating to
7 causation and injury will require a tremendous amount of
8 individualized proof. It notes that, to obtain certification,
9 "plaintiffs must establish, with generalized proof, that all
10 members of the class suffered damage as a result of defendants'
11 alleged [anti-competitive conduct]." Dynamic Random Access Memory,
12 2006 U.S. Dist. LEXIS 39841, *40 (N.D. Cal.). It argues that
13 Plaintiffs cannot make that showing here.

14 Plaintiffs' expert disagrees and criticizes the analysis upon
15 which Defendant relies. The Court, however, "cannot weigh in on
16 the merits of plaintiffs' substantive arguments, and must avoid
17 engaging in a battle of expert testimony." Id. at *45. Indeed,
18 the court in Dynamic Random Access Memory explained that, "during
19 the class certification stage, the court must simply determine
20 whether plaintiffs have made a sufficient showing that the evidence
21 they intend to present concerning antitrust impact will be made
22 using generalized proof common to the class and that these common
23 issues will predominate." Id. at *44-5 (inner quotations omitted).
24 Plaintiffs have made such a showing.

25 The Court finds that common questions do predominate over any
26 questions affecting only individual members. The Court similarly
27 finds that class resolution of this claim is superior to other

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1 available methods. In anti-trust cases such as this, the damages
2 of individual consumers are likely to be too small to justify
3 litigation, but a class action would offer those with small claims
4 the opportunity for meaningful redress. Further, failure to
5 certify the unjust enrichment claims could result in class members
6 having to file thousands of individual suits in which the discovery
7 and factual issues would be nearly identical. And, if necessary,
8 sub-classes can be identified to group residents of various States
9 with identical common law requirements. These problems are
10 manageable and, therefore, a class action is the superior method of
11 resolving the unjust enrichment claims. The class, however, will
12 not include any indirect purchasers who were citizens of Indiana
13 and Ohio at the relevant time.

14 2. Unfair Competition

15 As Plaintiffs note, claims brought under the California Unfair
16 Competition Law are commonly certified for class treatment. See,
17 e.g., Corbett v. Super. Ct., 101 Cal. App. 4th 649 (2002). Here,
18 the Court finds that Defendant's alleged illegal conduct presents
19 common questions of fact and law that will be subject to common
20 proof and that a class action is the superior method of resolving
21 Plaintiffs' unfair competition claim. Indeed, Defendant does not
22 dispute that Plaintiffs' unfair competition claim meets the
23 requirements of Rule 23(b)(3); rather, as addressed above, it only
24 argues that no named Plaintiff has standing to bring this claim, an
25 argument the Court rejected. Therefore, the Court finds that
26 Plaintiffs have met their burden under Rule 23(b).

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CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART Plaintiffs' Motion for Class Certification (Docket No. 287), and certifies the class as follows:

All persons or entities throughout the United States and its territories who purchased or paid for, or who reimbursed another person or entity who purchased or paid for, Norvir as a booster to other protease inhibitors intended for consumption by themselves, their families, or their members, employees, plan participants and beneficiaries or insureds, and who paid all or part of the cost of Norvir during the period December 3, 2003 through such time in the future as the effects of Defendant's illegal conduct, as alleged, have ceased. Excluded from the Class is Defendant and its subsidiaries and affiliates, all government entities (except for government-funded employee benefits funds), and all persons or entities that purchase Norvir: (i) for purposes of resale, or (ii) directly from Defendant.

Within this class, the Court creates a subclass for individual class members and another subclass for institutional class members. Doe 1 shall be the class representative of the individual class members; SEIU shall be the class representative of the institutional class members. If necessary, the Court will create subclasses for those who paid a fixed co-payment for Norvir and those who did not and for the unjust enrichment claims. Indirect purchasers from Ohio and Indiana, however, will be precluded from recovering for unjust enrichment and thus shall not be part of any unjust enrichment subclass.

1 The Court appoints Plaintiffs Doe 1 and SEIU as class
2 representatives. The law firm of Berman DeValerio Pease Tabacco
3 Burt & Pucillo is appointed as counsel for the class and for the
4 subclass of individual class members; the law firm of Labaton
5 Sucharow & Rudoff LLP is appointed as counsel for the class and for
6 the subclass of the institutional class members.³

7 IT IS SO ORDERED.

8 Dated: 6/11/07



9 Dated: _____

CLAUDIA WILKEN
United States District Judge

United States District Court
For the Northern District of California

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³Defendant's Motion for Leave to File Supplementary Authority (Doc. 344) is DENIED.