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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

TARLA MAKAEFF, on Behalf of  
Herself and All Others Similarly  
Situated,  
  
Plaintiffs,  
  
v.  
  
TRUMP UNIVERSITY, LLC, (aka  
Trump Entrepreneur Initiative) a New  
York Limited Liability Company,  
DONALD J. TRUMP, and DOES 1  
through 50, inclusive,  
  
Defendants.

Case No. 10cv0940 GPC (WVG)

**ORDER:**

**GRANTING IN PART AND  
DENYING IN PART MOTION  
TO DECERTIFY CLASSES;**

[ECF No. 380]

**GRANTING PLAINTIFFS'  
UNOPPOSED *EX PARTE*  
APPLICATION FOR  
CLARIFICATION OF THE  
COURT'S CLASS  
CERTIFICATION ORDER**

[ECF No. 410]

On February 19, 2015, Defendants Trump University LLC and Donald J. Trump filed a Motion for Decertification of Class Action. (ECF No. 380.) On May 15, 2015, Plaintiffs filed an Unopposed *Ex Parte* Application for Clarification of the Court's Class Certification Order. (ECF No. 410). The Motion for Decertification has been fully briefed. (ECF Nos. 405 & 409.) Defendant's motion challenges the Plaintiffs' full-recovery model for damages under *Comcast v. Behrend*, \_\_ U.S. \_\_, 133 S. Ct. 1426 (2013). Defendants assert that a full-recovery model is unworkable, unjust and requires decertification. Following careful consideration of the parties' oral arguments, legal briefings and applicable law, and for the reasons set forth below, the Court hereby

1 DENIES the motion for decertification of the class action on the issue of liability;  
2 GRANTS the motion for decertification of the class action on the issue of damages;  
3 and GRANTS the application for clarification of the Court’s class certification order.

#### 4 **BACKGROUND**

5 The relevant facts in this case having been included in several prior orders, the  
6 Court will not reiterate them in depth here. In short, this is a class action lawsuit on  
7 behalf individuals who purchased Trump University, LLC (“TU”) real estate investing  
8 seminars, including the three-day fulfillment seminar and the Trump Elite programs.  
9 (*See* ECF No. 298, at 4.) Plaintiffs allege in their Third Amended Complaint that  
10 Defendants made material misrepresentations in advertisements, mailings, promotions,  
11 and free previews to lead prospective customers to purchase Defendants’ fulfillment  
12 and elite programs. (*See* ECF No. 128.) The named Plaintiffs paid anywhere from  
13 \$1,495 for a three-day fulfillment seminar up to \$35,000 for the “Trump Gold Elite  
14 Program.” (*Id.* ¶ 39.) Plaintiffs allege TU and Donald Trump made the following core  
15 misrepresentations: (1) Trump University was an accredited university; (2) students  
16 would be taught by real estate experts, professors and mentors hand-selected by Mr.  
17 Trump; and (3) students would receive one year of expert support and mentoring. (*See*  
18 ECF No. 298, at 4.)

19 On February 21, 2014, this Court certified the following class and subclasses:

20 All persons who purchased a Trump University three-day live  
21 “Fulfillment” workshop and/or a “Elite” program (“Live Events”) in  
22 California, New York and Florida, and have not received a full refund,  
divided into the following five subclasses:

23 (1) a California UCL/CLRA/Misleading Advertisement subclass of  
24 purchasers of the Trump University Fulfillment and Elite Seminars who  
purchased the program in California within the applicable statute of  
limitations;

25 (2) a California Financial Elder Abuse subclass of purchasers of the  
26 Trump University Fulfillment and Elite Seminars who are over the age of  
65 years of age and purchased the program in California within the  
applicable statute of limitations;

27 (3) a New York General Business Law § 349 subclass of purchasers of the  
28 Trump University Fulfillment and Elite Seminars who purchased the  
program in New York within the applicable statute of limitations;

1 (4) a Florida Misleading Advertising Law subclass of purchasers of the  
 2 Trump University Fulfillment and Elite Seminars who purchased the  
 3 program in Florida within the applicable statute of limitations; and  
 4 (5) a Florida Financial Elder Abuse subclass of purchasers of the Trump  
 University Fulfillment and Elite Seminars who are over the age of 60  
 years of age and purchased the program in Florida within the applicable  
 statute of limitations.

5 Excluded from the class are Defendants, their officers and directors,  
 6 families and legal representatives, heirs, successors, or assigns and any  
 entity in which Defendants have a controlling interest, any Judge assigned  
 to this case and their immediate families.

7 (ECF No. 298 at 35–36.)<sup>1</sup> The Court appointed Tarla Makaeff, Sonny Low, J.R.  
 8 Everett and John Brown as class representatives and appointed Robbins Geller Rudman  
 9 & Dowd LLP and Zeldes Haeggquist & Eck, as class counsel. (*Id.* at 36.)

### 10 LEGAL STANDARD

11 “An order that grants or denies class certification may be altered or amended  
 12 before final judgment.” Fed. R. Civ. P. 23(c)(1)(C); *Rodriguez v. West Publ’g Corp.*,  
 13 563 F.3d 948, 966 (9th Cir. 2009) (“A district court may decertify a class at any time”).  
 14 In deciding whether to decertify a class, a court may consider “subsequent  
 15 developments in the litigation.” *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160  
 16 (1982). However, “actual, not presumed, conformance with Rule 23(a) remains . . .  
 17 indispensable.” *Id.*

### 18 DISCUSSION

#### 19 A. Standard of Proof

20 The standard is the same for class decertification as it is with class certification:  
 21 a district court must be satisfied that the requirements of Rules 23(a) and (b) are met  
 22 to allow plaintiffs to maintain the action on a representative basis. *Marlo v. United*  
 23 *Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011); *see also O’Connor v. Boeing N.*  
 24 *Am., Inc.*, 197 F.R.D. 404, 410 (C.D. Cal. 2000) (in evaluating whether to decertify the  
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26  
 27 <sup>1</sup> While the Court found class certification appropriate as to Florida’s Deceptive and Unfair  
 Trade Practices Act (FDUTPA), the court’s order granting certification inadvertently excluded the  
 28 FDUTPA subclass in the class description. The omission has been noted and will be corrected at the  
 end of this order.

1 class, the court applies the same standard used in deciding whether to certify the class  
2 in the first place). A motion to decertify a class is not governed by the standard applied  
3 to motions for reconsideration. *Ballard v. Equifax Check Serv., Inc.*, 186 F.R.D. 589,  
4 593 n. 6 (E.D. Cal.1999) (“Because the court has the power to alter or amend the  
5 previous class certification order under Rule 23(c)(1), the court need not consider  
6 whether ‘reconsideration’ is also warranted under Fed. R. Civ. P. 60(b) or [local rules  
7 governing reconsideration].”). In deciding whether to decertify, the Court will consider  
8 “subsequent developments in the litigation,” *Gen. Tel. Co. of Southwest v. Falcon*, 457  
9 U.S. 147, 160 (1982), and “the nature and range of proof necessary to establish the  
10 class-wide allegations,” *Marlo v. UPS*, 251 F.R.D. 476, 479 (C.D. Cal. 2008).

11 Given the subsequent developments in this litigation and applicable law, the  
12 Court finds it appropriate to consider whether Plaintiffs’ full-recovery (also referred  
13 to as “full-refund”) measure of damages may be applied in the instant case.

#### 14 **B. Compliance with *Comcast***

15 In their trial plan, Plaintiffs proposed a total, single monetary sum based on a  
16 full-recovery theory of damages (i.e., the amount Plaintiffs and other class members  
17 paid, plus interest). (ECF No 122-7, at 1.) In its order approving class certification,  
18 the Court found that Plaintiffs proposed full-recovery model did not “defeat  
19 predominance or render the case unmanageable.” (ECF No. 298, at 27.) Following the  
20 filing of Defendants’ opposition to the motion for class certification, the U.S. Supreme  
21 Court decided *Comcast v. Behrend*, \_\_ U.S. \_\_, 133 S. Ct. 1426 (2013). In *Comcast*’s  
22 terms: “The first step in a damages study is the translation of the legal theory of the  
23 harmful event into an analysis of the economic impact of that event.” *Comcast*, 133  
24 S.Ct. at 1435 (quoting Federal Judicial Center, Reference Manual on Scientific  
25 Evidence 432 (3d ed. 2011)). Defendants argue that Plaintiffs’ damages theory is  
26 flawed as a matter of law because it fails to satisfy the standard set forth in *Comcast*.

27 In *Comcast*, the plaintiffs alleged four antitrust violations against the provider  
28 of cable television services. *Comcast*, 133 S. Ct. at 1430-31. The plaintiffs’ damages

1 expert had devised a method for calculating what the competitive prices would have  
2 been but for the four antitrust violations so that damages could be calculated by  
3 comparing that baseline to the actual charges incurred. *Id.* at 1434. However, when  
4 the district court certified only one of the antitrust violations for class treatment, the  
5 plaintiffs did not revise their damages calculation. *Id.* The district and appellate courts  
6 found no error with the plaintiffs’ failure to tie each antitrust theory to a specific  
7 damages calculation. *Id.* As the appellate court explained, because the plaintiffs had  
8 “‘provided a method to measure and quantify damages on a classwide basis,’ [] it [was]  
9 unnecessary to decide ‘whether the methodology [was] a just and reasonable inference  
10 or speculative.’” *Id.* (quoting *Behrend v. Comcast Corp.*, 655 F.3d 182, 206 (3rd Cir.  
11 2011)). The Supreme Court disagreed, concluding that “[u]nder that logic, at the class-  
12 certification stage any method of measurement is acceptable so long as it can be  
13 applied classwide, no matter how arbitrary the measurements may be. Such a  
14 proposition would reduce Rule 23(b)(3)’s predominance requirement to a nullity.” *Id.*  
15 The Court concluded that the district court must conduct a “rigorous analysis” to ensure  
16 that the plaintiffs’ damages case is consistent with its liability case. *Id.* at 1433  
17 (quoting *Wal-Mart Stores, Inc. v. Dukes*, \_\_ U.S. \_\_, 131 S. Ct. 2541, 2551–52 (2011)  
18 (internal quotation marks omitted).

19 In the aftermath of *Comcast*, a number of California district court decisions have  
20 rejected the full-recovery model in product misbranding cases. *See In re POM*  
21 *Wonderful, LLC*, No. ML 10-02199 DDP (Rzx), 2014 WL 1225184, at \*1 (C.D. Cal.  
22 Mar. 25, 2014); *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-02724 LHK, 2014  
23 WL 7148923, at \*8 (N.D. Cal. Dec. 15, 2014); *Caldera v. The J.M. Smucker Co.*, 2014  
24 WL 1477400, at \*4 (C.D. Cal. April 15, 2014). Armed with these cases, Defendants  
25 assert that a full-recovery model is unworkable, unjust and requires decertification.  
26 (ECF No. 380-1, at 6.)

27 Here, Defendants argue that Plaintiffs’ full-refund damages model does not  
28 comport with the substantive law governing their claims. (ECF No. 380-1, at 2.)

1 Specifically, they take issue with the full-refund model’s failure to provide any offset  
2 for any value received by the TU student. (*Id.* at 3.) Plaintiffs counter that what  
3 Defendants provided was worthless, and thus the full-refund theory is consistent with  
4 their theory of liability—namely, that the “student-victims got *none* of what they paid  
5 for: not Trump, not his ‘secrets,’ not his ‘hand-picked’ professors, not a yearlong  
6 mentorships with a Trump ‘certified’ expert, and certainly not anything approaching  
7 a university.” (ECF No. 405, at 7.) (emphasis in original). For this reason, Plaintiffs  
8 contend that their damages theory is in keeping with *Comcast*. (*Id.*)

## 9 1. The California Claims

### 10 a. General Principles

11 The California Unfair Competition Law (“UCL”), California False Advertising  
12 Law (“FAL”), and California Consumer Legal Remedies Act (“CLRA”) all authorize  
13 courts to award restitution, and the standards are the same under all three statutes.<sup>2</sup> *See*  
14 Cal. Bus. & Prof. Code §§ 17203, 17535; Cal. Civ. Code § 1780(a)(3); *In re Vioxx*  
15 *Class Cases*, 103 Cal. Rptr. 3d 83, 96 n.15 (Cal. Ct. App. 2009); *Colgan v. Leatherman*  
16 *Tool Grp.*, 38 Cal. Rptr. 3d 36, 58 & n.22 (Cal. Ct. App. 2006). “The word ‘restitution’  
17 means the return of money or other property obtained through an improper means to  
18 the person from whom the property was taken.” *Clark v. Superior Court*, 235 P.3d  
19 171, 176 (Cal. 2010). Restitutionary relief is an equitable remedy, and its purpose is  
20 “to restore the status quo by returning to the plaintiff funds in which he or she has an  
21 ownership interest.” *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 947  
22 (Cal. 2003).

23 Defendants assert that “[t]he proper measure of restitution is the ‘difference  
24 between what the plaintiff paid and the value of what the plaintiff received.’” (ECF  
25 No. 380-1 at 3 (quoting *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009)).

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27  
28 <sup>2</sup> The CLRA also provides for actual and punitive damages and allows the prevailing plaintiff  
to recover costs and attorneys’ fees. Cal. Civ. Code § 1780(a), (e).



1 Under this standard, Defendants contend that any calculation of restitutionary damages  
2 must include a deduction for any benefits or “value” the class members received from  
3 their TU courses. *Id.* at 4. In support of their position, Defendants quote deposition  
4 testimony from class members who expressed some satisfaction with the TU programs  
5 and felt they learned valuable information in the classes. *Id.* at 7–9.

6 Plaintiffs counter that the goal of restitution is to return the victims to the  
7 position they were in before the violation occurred. (ECF No. 405 at 8–9.) Plaintiffs  
8 assert that unlike *Vioxx*, they have not placed valuation at issue and, instead, claim the  
9 Trump University education was worthless. *Cf. In re Steroid Hormone Prod. Cases*,  
10 104 Cal. Rptr. 3d 329, 341 (2010) (*Vioxx* did not apply where plaintiff did not put  
11 valuation at issue when he alleged that he bought product that was illegal to sell).  
12 Plaintiffs argue that only a full refund will return the students to the position they were  
13 in before the violation occurred because what they paid for was Trump and what they  
14 received was nothing of what was promised. (ECF No. 405 at 7–23.)

15 The Court finds that Defendants’ interpretation of *Vioxx* is overly restrictive. In  
16 *Vioxx*, on which Defendants rely, the plaintiffs put valuation at issue by alleging that  
17 due to the alleged misrepresentations they paid more for a medication than it was worth.  
18 Consequently, the court held that “[t]he difference between what the plaintiff paid and  
19 the value of what the plaintiff received is a proper measure of restitution.” *Vioxx*, 103  
20 Cal. Rptr. 3d at 96 (emphasis added); *see also Astiana v. Ben & Jerry’s Homemade,*  
21 *Inc.*, No. 10-cv-4387-PJH, 2014 WL 60097, at \*12 (N.D. Cal. 2014) (“One method of  
22 quantifying the amount of restitution to be awarded is computing the effect of unlawful  
23 conduct on the market price of a product purchased by the class.” (emphasis added)).  
24 If this measure will not effectively return the plaintiff to the status quo, the court may  
25 exercise its broad discretion to craft a restitutionary remedy that will. *See Colgan*, 38  
26 Cal. Rptr. 3d at 59.

27 Here, Plaintiffs’ theory of liability is premised on the core misrepresentations of  
28 Trump University being a university whose students would learn Donald Trump’s

1 unique secrets to success. Plaintiff asserts that absent Donald Trump's secrets, the  
2 “university” education was worthless. (ECF. No. 405 at 15.) Plaintiffs' damage model  
3 seeks full recovery of all funds paid for the alleged worthless program. According to  
4 Plaintiffs, only a full-refund will return them to the position that they were in before  
5 being ensnared in Defendants’ scam. *Id.* at 17. In theory, the damages model measures  
6 restitutionary damages attributable to their theory. In addition, the damages are capable  
7 of being measured on a classwide basis. However, *Comcast* rejected the logic that “at  
8 the class-certification stage any method of measurement is acceptable so long as it can  
9 be applied classwide, no matter how arbitrary the measurements may be.” 133 S. Ct.  
10 at 1433. As a result, the question posed here is whether a full-refund model of  
11 restitutionary damages is unacceptable as an arbitrary measurement.

12 **b. Consumer Cases Approving Full-Refunds**

13 Defendants rely on cases involving food and tangible items to argue that the full-  
14 refund model is unacceptable. Plaintiffs rely on cases involving illegal and ineffective  
15 medications to support their full-refund model. However, the Court finds that both of  
16 these sets of cases provide only limited support in the instant case, for reasons  
17 discussed below in sections c. and d.

18 The Court finds that claims filed under the FTC Act are most analogous to the  
19 instant case. Plaintiffs rely on *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595 (9th Cir. 1993)  
20 (per curiam) to support a full-refund model. *Figgie* was brought by the FTC under the  
21 FTC Act, 15 U.S.C. § 57b. While it does not purport to interpret California law, both  
22 the FTC Act and California law on restitution provide for the “return of property”  
23 resulting from unfair or deceptive acts. *Clark v. Superior Court*, 235 P.3d at 176; 15  
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1 U.S.C. § 57b(b).<sup>3</sup> In addition, the *Figgie* court analyzed the full-refund under general  
2 restitutionary principles. 994 F.2d at 606–607.

3 In *Figgie*, the Federal Trade Commission sought consumer redress for Figgie’s  
4 dishonest and fraudulent practices in selling heat detectors. The trial court awarded the  
5 consumers a full-refund for redress even though the FTC had previously found that the  
6 heat detectors had some value. The defendant challenged the full-refund award and the  
7 denial of an offset equal to the value of the heat detectors. *Id.* at 606. The Ninth  
8 Circuit upheld the full-recovery award because the injury the restitution sought to  
9 redress was “the amount consumers spent on the heat detectors that would not have  
10 been spent absent Figgie’s dishonest practices.” *Id.* The court explained its reasoning  
11 by analogizing to a counterfeit diamond case:

12 To understand why, we return to the hypothetical dishonest rhinestone  
13 merchant. Customers who purchased rhinestones sold as diamonds  
14 should have the opportunity to get all of their money back. We would not  
15 limit their recovery to the difference between what they paid and a fair  
16 price for rhinestones. The seller's misrepresentations tainted the  
17 customers' purchasing decisions. If they had been told the truth, perhaps  
18 they would not have bought rhinestones at all or only some. The district  
19 court implied this notion of a tainted purchasing decision with its  
20 qualification “given the misrepresentations recommended by Figgie and  
21 made by distributors to consumers.” The fraud in the selling, not the  
22 value of the thing sold, is what entitles consumers in this case to full  
23 refunds or to refunds for each detector that is not useful to them.

19 *Id.*

20 As in *Figgie*, Plaintiffs assert the fraud was in the selling by TU, not in the value  
21 of the thing sold. That is, students paid for TU programs because they believed the  
22 misleading representations that Trump had hand-picked the instructors and would share  
23 his secrets to his success. *Cf. United States v. Kennedy*, 726 F.3d 968, 974 (7th Cir.  
24 2013) (full-recovery of what was paid for victim who received counterfeit art that

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25 <sup>3</sup> 15 U.S.C. § 57b(b) permits a court to “grant such relief as the court finds necessary to redress  
26 injury to consumers or other persons, partnerships, and corporations resulting from the rule violation  
27 or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not  
28 be limited to, rescission or reformation of contracts, the refund of money or return of property, the  
payment of damages, and public notification respecting the rule violation or the unfair and deceptive  
act or practice, as the case may be.”

1 possessed intrinsic beauty and value). According to Plaintiffs, the issue is not the value  
2 or appeal of the classes they did not sign up for (i.e., the rhinestones) — the issue is  
3 that they did not receive what they thought they were buying (i.e., the diamonds).

4 Defendants argue that *Figgie* is distinguishable because the consumers were  
5 eligible for a full refund only if they returned their heat detectors, whereas TU students  
6 cannot return the knowledge and experience they obtained at TU. (ECF No. 409, at 8.)  
7 Allowing them to retain this knowledge *and* obtain a full refund would be an undue  
8 windfall in Defendants’ view. (ECF No. 409, at 9–10.) However, in approving full-  
9 refunds, the *Figgie* court did not condition it upon a return of the heat detectors.  
10 Instead, the court focused on the fraud in the selling, not the value of the product, in  
11 upholding full refunds.

12 Similarly, *FTC v. Ivy Capital, Inc.*, No. 2:11-CV-283 JCM (GWF), 2013 WL  
13 1224613 (D. Nev. 2013), supports Plaintiffs’ position. *Ivy Capital* involved deceptive  
14 marketing of a business coaching program designed to help students develop on-line  
15 businesses. Among the deceptive practices were misrepresentations as to the quality  
16 of the coaches and what the coaches could provide. The *Ivy Capital* court permitted  
17 full-recovery and held that where consumers suffer economic injury resulting from the  
18 defendants’ violations of the FTC Act, equity required monetary relief in the full  
19 amount lost by consumers. *Id.* at \*17 (citing *FTC v. Stefanichik*, 559 F.3d 924, 931 (9th  
20 Cir. 2009)).

21 Thus, the Court finds that Plaintiffs’ proposed method of calculating  
22 restitutionary damages is not an arbitrary measurement and is consistent with the  
23 Plaintiffs’ theory of liability. The method provides a baseline for the “return of money  
24 obtained through an improper means to the person from whom the property was taken”  
25 *Clark v. Superior Court*, 235 P.3d 171, 176 (Cal. 2010), and aims “to restore the status  
26 quo by returning to the plaintiff funds in which he or she has an ownership interest.”  
27 *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d at 947.

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1                   **c. Defendants’ Analogies to Food and Intangible Items Cases**

2           As noted, a number of cases cited by Defendants have addressed whether a full-  
3 refund model is plausible in the context of products such as food and tangible items.  
4 For example, in *In re POM Wonderful, LLC*, 2014 WL 1225184, at \*1, the plaintiffs  
5 contended that POMWonderful LLC (“POM”) falsely and misleadingly advertised its  
6 juices as having various scientifically proven health benefits. (See ECF No. 380-1, at  
7 4–9; ECF No. 409, at 10–11.) In decertifying the class, the court concluded that a full-  
8 refund model failed to account for other value consumers received from POM juices,  
9 including hydration, vitamins, flavor, energy, or anything else of value. *POM*  
10 *Wonderful*, 2014 WL 1225184, at \*3 & n.2.

11           Plaintiffs respond that whereas the juice in *POM Wonderful* was, in fact, 100%  
12 pomegranate juice (even if it lacked the additional claimed health benefits), the  
13 experiences Plaintiffs received in this case did not include any of the core elements (an  
14 accredited university, instructors hand-picked by Trump, one year of expert support  
15 and mentoring) they purchased. (See ECF No. 405 at 18.)

16           Meanwhile, in *Werdebaugh v. Blue Diamond Growers*, 2014 U.S. Dist. LEXIS  
17 71575, another case Defendants cite, Plaintiffs alleged the maker of almond milk  
18 products misleadingly listed the sweetener “not as ‘sugar,’ . . . but as ‘evaporated cane  
19 juice,’” and said the products were “All Natural,” despite containing some trace  
20 amounts of potassium citrate. *See id.* at \*3, \*7. Plaintiffs respond that there were no  
21 allegations that plaintiffs were deprived of the essence of what they were promised  
22 (i.e., almond milk); that the alleged imperfection rendered the almond milk worthless;  
23 or that there was no comparable product. (ECF No. 405 at 19.)

24           The Court finds that the food misbranding cases are distinguishable. Food  
25 cases involve a tangible product obtained for sustenance. *Cf. Allen v. Hyland’s*  
26 *Inc.*, 300 F.R.D. 643, 671 n.25 (C.D. Cal. 2014) (food products are readily  
27 distinguishable because they have some inherent nutritional value, and thus, are not  
28 worthless). Moreover, there is no question that food products have intrinsic value

1 even when stripped of some advertised quality such as being “all natural.” On the  
2 other hand, TU essentially marketed intellectual property based upon the singular  
3 experiences of Donald Trump. While the food products may have been missing a  
4 particular premium quality, Plaintiffs contend that TU was missing its reason for  
5 existing, i.e., Donald Trump’s knowledge and experience. According to Plaintiffs,  
6 TU's promotional and Live Event materials focused on learning Trump's real estate  
7 techniques from a university with which he was integrally involved, not  
8 a generic, no-name real estate education course such as “learn creative financing” or  
9 “lease wholesaling classes.” In fact, students allegedly received none of the  
10 advertised benefits of TU — instead of being educated on Trump’s real estate  
11 secrets and techniques from his closest advisors, plaintiffs received generic sales  
12 pitches. (ECF No. 405 at 13.)

13 The Defendants also rely on the holding in *Colgan*, 38 Cal. Rptr. 3d at 58 &  
14 n.22 (Cal. Ct. App. 2006) where Plaintiffs sought restitution from a manufacturer of  
15 tools that were misrepresented to be “Made in U.S.A.” At trial, Plaintiffs offered  
16 two damages models based upon recovery of retail prices paid and gross profits  
17 realized. After trial, the trial court found it would be “inequitable” to return to  
18 consumers the entire purchase price paid for the tools or the entire gross profit  
19 Leatherman received from the tools because, “although the purchasers did not  
20 receive entirely what they bargained for, which was a tool made in the USA,  
21 Plaintiffs and these Class members did benefit from the quality, usefulness, and  
22 safety of these multi-purpose tools.” *Id.* at 44. *Colgan* is distinguishable in that it  
23 involved a tangible product and a determination following trial. While the trier of  
24 fact in this case may ultimately conclude that the TU programs possessed value, the  
25 Court merely finds that Plaintiff’s theory that they did not receive any of what they  
26 bargained for is plausible.

27 **d. Plaintiffs’ Analogies to Illegal Substance and Ineffective**  
28 **Medication Cases**

1 First, to support a full-refund theory, Plaintiffs rely on *In re Steroid Hormone*  
2 *Prod. Cases*, 104 Cal. Rptr. 3d 329 (2010), where the court upheld a full-refund  
3 model of recovery in a supplement/drug case. In *In re Steroid*, the defendant sold a  
4 banned and illegal substance without a prescription. The court approved a full-  
5 refund to customers finding that to permit an offset in such a case would  
6 legitimize the illegal sale. *Ortega v. Natural Balance, Inc.*, 300 F.R.D. 422, 430  
7 (C.D. Cal. 2014) (full-refund model was sufficient where dietary supplement “was  
8 valueless because it provided none of the advertised benefits and was illegal”).

9 In the present case, Plaintiffs asserts that TU was illegal based upon evidence  
10 that in 2005, the New York State Education Department (“NYSED”) wrote to  
11 Trump personally and warned him it was illegal to: (i) call his business a  
12 “university,” as it was unqualified to do so; and (ii) operate without a license.  
13 Afterwards, in October 2014, a New York state court reportedly determined that  
14 Trump was operating TU without a license. *See Matter of People of the State of*  
15 *N.Y. v. Trump Entrepreneur Initiative LLC*, No. 451463/13, 2014 N.Y. Misc.  
16 LEXIS 4533, at \*26-\*27 (N.Y. Sup. Ct. Oct. 8, 2014). There is no suggestion that it  
17 was illegal for TU to call itself a university or to operate without a license in  
18 California. Accordingly, the Court finds that the reasoning of *Ortega* does not  
19 apply to the California and Florida causes of action where TU was not illegally  
20 operated in California or Florida based upon its claim of being a university.

21 Second, Plaintiffs argue that California federal courts have also approved a  
22 full-refund in cases involving drugs that were ineffective. *Allen v. Hyland’s Inc.*,  
23 300 F.R.D at 671 n.25 (where homeopathic drugs marketed as remedies for various  
24 ailments but were completely ineffective, a full-refund model was appropriate). In  
25 *Hyland*, Plaintiffs sought full restitution claiming that the products they paid for  
26 were worthless because they did not provide any of the advertised benefits, and that  
27 any incidental benefits were the product of a “placebo effect.” 300 F.R.D. at 671.

28

1 Plaintiffs claim the TU program was worthless because they were not  
2 provided with the advertised benefits of Donald Trump’s experience and any  
3 incidental benefits amount to a “placebo effect.” A number of class members have  
4 testified to being satisfied with their TU investment and to having obtained some  
5 value from their education, despite the alleged absence of the promised Trump  
6 benefits. (ECF No. 380-1 at 6–9; ECF No. 409 at 8–9.) Plaintiffs assert that  
7 statements of such satisfaction represent a placebo effect.<sup>4</sup> In addition, Plaintiffs  
8 argue that like the placebo effect identified in *Allen*, to the extent a handful of  
9 students (e.g., Meena Mohan) may have made some money in real estate, any such  
10 “benefit” was simply the by-product of pushing people into the real estate sphere at  
11 the height of the housing market crisis when foreclosures were at an all time high,  
12 and not due to any “inherent value” actually provided by TU.

13 The Court finds that cases addressing the “placebo effect” of medications  
14 provide limited support in cases involving promised educational experiences.  
15 While the “placebo effect” involves a subjective response to an inert substance, it is  
16 easier to establish the actual ineffectiveness of a drug than a real estate program.

### 17 e. Conclusion

18 Under *Comcast*, the Court finds that Plaintiffs’ proposed method of  
19 calculating restitutionary damages is not an arbitrary measurement and is consistent  
20 with the Plaintiffs’ theory of liability. However, *Wal-Mart* also requires that a  
21 defendant is allowed to litigate its statutory defenses to individual claims. *Wal-*  
22 *Mart*, 131 S. Ct. at 2561. This issue is addressed below in section 3.

## 23 2. The Florida and New York Claims

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25 <sup>4</sup> Class member Art Cohen stated that he was initially satisfied with the three-day program but  
26 reported his dissatisfaction when he later learned he was not actually taught Trump's techniques. ECF  
27 No. 405, Ex. 15 (Cohen Tr.) at 37:13-22, 72:23-73:8 (“At the time I thought I got value. . . . [T]oday  
28 I feel I was — I was misled, I was cheated, because the information that was provided was not directly  
from Donald Trump, you know. He had nothing to do with the program . . . yet he said that he did.”),  
75:18-24.



1 Unlike the restitutionary remedy available in California, which focuses on  
2 what is required to return the plaintiff to the status quo before the misrepresentation  
3 was made, the Florida Misleading Advertising Law, the Florida Deceptive and  
4 Unfair Trade Practices Act (“FDUTPA”) and the New York deceptive practices  
5 statute provide for recovery of actual damages. *See* Fla. Stat. Ann. § 817.41(6)  
6 (West, Westlaw through 1st Reg. Sess.) (“Any person prevailing in a civil action for  
7 violation of this section shall be awarded costs, including reasonable attorney's fees,  
8 and may be awarded punitive damages in addition to actual damages proven.”); Fla.  
9 Stat. Ann. § 501.211(2) (West, Westlaw through 2015 1st. Reg. Sess.) (“In any  
10 action brought by a person who has suffered a loss as a result of a violation of this  
11 part, such person may recover actual damages, plus attorney's fees and court costs . .  
12 . . .”); N.Y. Gen. Bus. Law § 349(h) (McKinney, Westlaw through L.2015) (“[A]ny  
13 person who has been injured by reason of any violation of this section may bring an  
14 action in his own name to enjoin such unlawful act or practice, an action to recover  
15 his actual damages or fifty dollars, whichever is greater, or both such actions. The  
16 court may, in its discretion, increase the award of damages to an amount not to  
17 exceed three times the actual damages up to one thousand dollars, if the court finds  
18 the defendant willfully or knowingly violated this section. The court may award  
19 reasonable attorneys’ fees to a prevailing plaintiff.”). In so doing, the statutes  
20 clearly put valuation of the good or service at issue. For instance, in a FDUTPA  
21 action, Florida law holds that:

22 [T]he measure of actual damages is the difference in the market value  
23 of the product or service in the condition in which it was delivered and  
24 its market value in the condition in which it should have been delivered  
25 according to the contract of the parties. A notable exception to the rule  
may exist when the product is rendered valueless as a result of the  
defect-then the purchase price is the appropriate measure of actual  
damages.

26 *H & J Paving of Florida, Inc. v. Nextel, Inc.*, 849 So. 2d 1099, 1101 (Fla. Dist. Ct.  
27 App. 2003) (quoting *Rollins, Inc. v. Heller*, 454 So. 2d 580, 585 (Fla. Dist. Ct. App.  
28 1984)); *see also Foster v. Chattem, Inc.*, No. 6:14-CV-346-ORL-37, 2014 WL

1 3687129, at \*2 (M.D. Fla. July 24, 2014) (claim that product that falsely promised  
2 to rebuild enamel was valueless due to misbranding was plausible).

3 Likewise, New York law holds that “[w]ith respect to injury, it is well-settled  
4 that a consumer is not entitled to a refund of the price of a good or service whose  
5 purchase was allegedly procured through deception under Sections 349 and 350 of  
6 the New York General Business Law.” *Dash v. Seagate Tech. (U.S.) Holdings, Inc.*,  
7 27 F. Supp. 3d 357, 361-62 (E.D.N.Y. 2014). “The rationale for this is that  
8 ‘deceived consumers may nevertheless receive — and retain the benefits of —  
9 something of value, even if it is not precisely what they believed they were  
10 buying.’” *Id.* (citations omitted). “A plaintiff under section 349 must prove three  
11 elements: first, that the challenged act or practice was consumer-oriented; second,  
12 that it was misleading in a material way; and third, that the plaintiff suffered injury  
13 as a result of the deceptive act.” *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000)  
14 (citations omitted); *accord Maurizio v. Goldsmith*, 230 F.3d 518, 521–22 (2d Cir.  
15 2000). “In addition, a plaintiff must prove ‘actual’ injury to recover under the  
16 statute, though not necessarily pecuniary harm.” *Stutman*, 95 N.Y.2d at 29.

17 Defendants argue the Florida and New York claims must also be decertified  
18 for lack of a viable damages model where Plaintiffs cannot argue that TU’s products  
19 were valueless. (ECF No. 381-1 at 13.) Plaintiffs respond that they are entitled to  
20 recover a full refund in both states because the products they received from TU  
21 were worthless or of *de minimis* value. (ECF No. 405, at 20–22.)

22 For its FDUTPA claim, Plaintiffs rely on the holding in *H & J Paving of*  
23 *Florida*, 849 So. 2d at 1101, that allows for refund of the purchase price “when the  
24 product is rendered valueless as a result of the defect.” For its New York claim,  
25 Plaintiffs rely on *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 41 A.D.3d 4, 9  
26 (2007), wherein the court explained:

27 Consumers have been entitled to a full refund when they purchase a  
28 product or service which they do not ultimately receive or which  
cannot be used to the extent or for the purpose purchased (*see Matter of*

1 *People v Telehublink Corp.*, 301 AD2d 1006, 1007 [2003]). However,  
2 a consumer is required to show some injury apart from and connected  
3 to that initial deception (*see Small v Lorillard Tobacco Co.*, supra at  
4 56; *see also Federal Trade Commn. v Peoples Credit First, LLC*, 2005  
5 WL 3468588, \*8, 2005 US Dist LEXIS 38545, \*30 [MD F1 2005];  
6 *Federal Trade Commn. v Figgie Intl., Inc.*, 994 F2d 595, 606 [1993],  
cert denied 510 US 1110 [1994]). Acknowledging that there may be  
some value in a credit card with a low limit which is subject to a large  
initial fee, these consumers acquired *de minimis* value in the credit card  
they received, when compared to the limit advertised. Moreover, they  
incurred substantial charges in connection with that deception.

7 Defendants point out that New York class representative John Brown testified that  
8 while he did not feel that TU's three-day course was worth \$1,500, "[he] would  
9 have paid \$199 for it maybe or \$200." (ECF No. 380-1, at 12; ECF No. 380-6  
10 (Brown Tr.), Ex. 10 at 460:24-25.)<sup>5</sup> Plaintiffs argue that the "value" Brown  
11 received was *de minimis*, at best. Plaintiffs highlight that Brown described the  
12 information from the three-day course as "minimal" and "basic or less." (ECF No.  
13 405 at 23; ECF No. 405-3 (Brown Tr.), Ex. 7 at 67:24.)

14 As with the California causes of action, the Court finds that Plaintiffs'  
15 damages model is aligned with the theory of liability under New York and Florida  
16 law. In addition, the damages model is plausible by providing a baseline for a  
17 damages determination. What remains is the defense of offset which is addressed in  
18 the next section.

### 19 **3. Due Process Right to Raise Available Defenses**

20 The fact that Plaintiff's theory of liability and damages model are consistent  
21 does not end the inquiry regarding the suitability of class certification. It merely  
22 permits Plaintiffs to proceed with their case-in-chief with a plausible damages  
23 model. Meanwhile, issues regarding valuation and offset relate to available  
24 defenses and raise due process concerns.

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28 <sup>5</sup> Page number citations such as this one are to the page numbers reflected on the Court's  
CM/ECF system and not to page numbers assigned by the parties.

1 Defendants assert that the Court should consider the value of the information  
2 actually imparted and the materials provided to the students. Plaintiffs respond that  
3 the information and materials were generic and were worthless or of speculative  
4 value because it was publicly available for free and did not contain Trump's real  
5 estate investing secrets, which is what students paid for and thought they would  
6 receive.

7 Plaintiffs may be right, or Defendants may be correct. Ultimately, to comport  
8 with due process, the court must "preserve" the defendant's right "to raise any  
9 individual defenses it might have at the damages phase." *Jimenez v. Allstate Ins.*  
10 *Co.*, 765 F.3d 1161, 1168 (9th Cir. 2014); *see also Wal-Mart*, 131 S. Ct. at 2561  
11 (holding that "a class cannot be certified on the premise that [the defendant] will not  
12 be entitled to litigate its statutory defenses to individual claims").

13 As recognized by *FTC v. Kuykendall*, a baseline of full-recovery is the  
14 starting point in the damages analysis because, to accurately calculate actual loss,  
15 the defendants must be allowed to put forth evidence supporting an offset. *FTC v.*  
16 *Kuykendall*, 371 F.3d 745, 765–66 (10th Cir. 2004), *citing FTC v. Febre*, 128 F.3d  
17 530, 535 (7th Cir. 1997). Defendants will be afforded the right to support an offset.  
18 *Cf. Mahoney v. Farmers Ins. Exch.*, No. 4:09–cv–2327, 2011 WL 4458513, at \*9  
19 (S.D. Tex. Sept. 23, 2011) (damages concern over the extent to which each plaintiff  
20 may have been paid for overtime hours can be resolved through bifurcation of the  
21 trial into a liability stage and a damages stage).

22 Bifurcation will permit available defenses to be litigated and economies of  
23 class certification to be realized. In *Jimenez*, the court approved class certification  
24 on liability issues, which were bifurcated from the damages issue because it  
25 preserved defendant's right to present its damages defenses on an individual basis.  
26 The *Jimenez* court approvingly cited *Butler v. Sears, Roebuck and Co.*, 727 F.3d  
27 796, 801–02 (7th Cir. 2013), where the Seventh Circuit affirmed class certification  
28

1 for a group of plaintiffs whose damages were different. In *Butler*, Judge Posner  
2 observed that:

3 It would drive a stake through the heart of the class action device, in cases in  
4 which damages were sought . . . to require that every member of the class  
5 have identical damages. If the issues of liability are genuinely common  
6 issues, and the damages of individual class members can be readily  
7 determined in individual hearings, in settlement negotiations, or by creation  
8 of subclasses, the fact that damages are not identical across all class members  
9 should not preclude class certification. Otherwise defendants would be able  
10 to escape liability for tortious harms of enormous aggregate magnitude but so  
11 widely distributed as not to be remediable in individual suits.

12 *Id.*

13 In the instant case, the Court has found that issues of liability are common  
14 and can be decided based on common proof. In addition, Plaintiffs have a theory of  
15 damages which aligns with their theory of liability and provides a baseline for  
16 damages. In the event that Plaintiffs prevail at trial on liability issues, Defendants  
17 will be afforded the right to support an offset at the damages phase.

18 Therefore, the Court **DENIES** Defendants' motion to decertify the California,  
19 New York, and Florida subclasses on the issue of liability, and **GRANTS** the  
20 motion to decertify the subclasses on the issue of damages.<sup>6</sup> The Court will  
21 bifurcate the liability and damages issues and proceed with the liability phase of the  
22 class trial first.

### 23 **C. Elder Abuse Sub-Classes**

24 Plaintiffs note in a footnote to their opposition that Defendants did not  
25 challenge certification of the California Financial Elder Abuse subclass. (ECF No.  
26 405 at 8 n.8.) Defendants respond in a footnote that they seek to decertify all of the  
27 classes. (ECF No. 10 n.8.) Neither party provides any argument or citation in  
28 regard to the California and Florida elder classes. Given the lack of any argument

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<sup>6</sup> In light of the Court's finding, the Court need not further address Defendants' argument that Plaintiffs' lack of expert testimony on damages is fatal to Plaintiffs claims because even Defendants concede that an expert is not required to calculate full-refund amounts. (*See* ECF No. 409, at 12 ("Defendants certainly do not contest that the fact finder is able to do basic math . . . ."))

1 on this issue the Court will limit its consideration of the motion to decertify to the  
2 issues addressed in this order.

3 **D. Adequacy of Counsel**

4 Defendants' initial basis for moving to decertify the classes based on the  
5 inadequacy of Plaintiffs' counsel was that counsel had invited violation of the one-  
6 way intervention rule. (ECF No. 380-1 at 14-15.) "'One-way intervention' occurs  
7 when the potential members of a class action are allowed to 'await . . . final  
8 judgment on the merits in order to determine whether participation [in the class]  
9 would be favorable to their interests.'" *London v. Wal-Mart Stores, Inc.*, 340 F.3d  
10 1246, 1252 (11th Cir. 2003) (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S.  
11 538, 547 (1974)). However, because this Court postponed the hearing on the  
12 parties' motions for summary judgment (ECF No. 403), the parties acknowledge  
13 that this issue is no longer a concern (ECF No. 405, at 25; ECF No. 409, at 14 n.11).

14 Defendants' next grounds for arguing that Plaintiffs' counsel are inadequate  
15 is that they delayed in providing class notice for a year after the class was certified,  
16 resulting in the Court having to delay ruling on the pending summary judgment  
17 motions. (ECF No. 380-1, at 14; ECF No. 409, at 14.) In support of their argument  
18 that the class should be decertified because of counsel's delay in providing notice,  
19 Defendants cite to *Steinberg v. Sorensen*, 2007 WL 496872, at \*3 (D.N.J. Feb. 8,  
20 2007).

21 In *Steinberg*, the court only decertified the class after counsel waited almost  
22 *five* years to send notice and *ignored* the court's repeated directions to notify the  
23 class. *Steinberg*, 2007 WL 496872, at \*2-4. Such is not the case here. Further, as  
24 Plaintiffs point out, in distinguishing *Steinberg*, the court in *Mendez v. The Radec*  
25 *Corp.*, 260 F.R.D. 38, 50 (W.D.N.Y. 2009), highlighted that cases where the court  
26 decertified based on failure to send notice generally "involve[d] counsel's failure to  
27 carry out the court's order directing the issuance of notice, rather than counsel's  
28 failure to move for such an order." *Mendez*, 260 F.R.D. at 50 (denying motion to



1 decertify despite several years delay in serving notice, where “[c]ounsel have  
2 otherwise been diligent in prosecuting this action, and the interests of the class  
3 would not be served in any way by decertification”). Here, the Court has not  
4 expressly ordered service and only one year has passed since the Court certified the  
5 class. During that year, Plaintiffs’ counsel have diligently litigated numerous  
6 issues, obtained certification of the class in the related case of *Cohen v. Trump*,<sup>7</sup> and  
7 filed a motion for approval of class notice in this case. The Court finds that  
8 counsel’s representation has been adequate under the authority cited and Rule  
9 23(a)(4) and, therefore, declines to decertify the class on this basis.

### 10 CONCLUSION

11 For the foregoing reasons, the Court hereby:

- 12 1. **DENIES** Defendants’ motion to decertify the class action on liability  
13 issues as to all causes of action;
- 14 2. **GRANTS** Defendants’ motion to decertify on damages issues as to all  
15 causes of action and bifurcates the damage issues to follow trial on the liability  
16 phase; and
- 17 3. **GRANTS** Plaintiffs’ application for clarification of the Court’s class  
18 certification order, and clarifies that the class definition going forward shall be:

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21 <sup>7</sup> Defendants argue that the decision by Plaintiffs’ counsel to postpone notice in this case until  
22 the Court certified the *Cohen* class (so that a joint notice could be sent) demonstrates that Plaintiffs  
23 are willing to sacrifice one class for the other. (ECF No. 409 at 14.) For this reason, Defendants  
24 contend that Plaintiffs’ counsel has a conflict of interest and may not represent two classes against the  
25 same defendants. (*Id.* (citing *Sullivan v. Chase Inv. Services of Boston, Inc.*, 79 F.R.D. 246, 258 (N.D.  
26 Cal. 1978) (conditioning finding of adequacy of class counsel on counsel withdrawing from  
27 representing plaintiffs in a related case)). However, the *Sullivan* case involved two cases against one  
28 company that was likely to have insufficient assets and insurance to cover its liability in both cases.  
*Sullivan*, 79 F.R.D. at 258. Because the plaintiffs in each case had conflicting interests (namely, in  
being first to obtain a judgment against those assets), attorney professional responsibility rules barred  
counsel from representing plaintiffs in both cases. *Id.* Here, Plaintiffs’ counsel made a strategy  
decision to serve joint notice so as to save money and avoid confusion in both cases. (*See* ECF No.  
405 at 24.) While the Court declines at this time to pass judgment on the advisability of that decision,  
the Court finds that counsel’s reasoned strategy decision is not tantamount to a conflict of interest.

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All persons who purchased a Trump University three-day live “Fulfillment” workshop and/or a “Elite” program (“Live Events”) in California, New York and Florida, and have not received a full refund, divided into the following five subclasses:

- (1) a California UCL/CLRA/Misleading Advertisement subclass of purchasers of the Trump University Fulfillment and Elite Seminars who purchased the program in California within the applicable statute of limitations;
- (2) a California Financial Elder Abuse subclass of purchasers of the Trump University Fulfillment and Elite Seminars who were over the age of 65 years of age when they purchased the program in California within the applicable statute of limitations;
- (3) a New York General Business Law § 349 subclass of purchasers of the Trump University Fulfillment and Elite Seminars who purchased the program in New York within the applicable statute of limitations;
- (4) a Florida Deceptive and Unfair Trade Practices Act (FDUTPA)/Misleading Advertising Law subclass of purchasers of the Trump University Fulfillment and Elite Seminars who purchased the program in Florida within the applicable statute of limitations; and
- (5) a Florida Financial Elder Abuse subclass of purchasers of the Trump University Fulfillment and Elite Seminars who were over the age of 60 years of age when they purchased the program in Florida within the applicable statute of limitations.

Excluded from the class are Defendants, their officers and directors, families and legal representatives, heirs, successors, or assigns and any entity in which Defendants have a controlling interest, any Judge assigned to this case and their immediate families.

**IT IS SO ORDERED.**

DATED: September 18, 2015

  
HON. GONZALO P. CURIEL  
United States District Judge