O

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ELITE LOGISTICS CORPORATION and on behalf of all others similarly situated, Plaintiff, v. MOL AMERICA, INC., Defendants.	Case No. CV 11-02952 DDP (PLAx) **ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** [Dkt. No. 119]

Presently before the court is Plaintiffs' Motion for Class Certification. Having considered the submissions of the parties and heard oral argument, the court denies the motion and adopts the following order.

I. Background

As described in this court's earlier orders, Defendant MOL (America) Inc. ("MOL") is an international ocean carrier, and transports cargo in shipping containers MOL owns. Independent motor carriers, or truckers, such as Plaintiffs, transport MOL's cargo containers from ports to inland distribution centers, then return the empty containers to MOL at the port. MOL contracts with

the cargo owners, not with the truckers, for the overland transport. The cargo owners, in turn, hire and pay the truckers.

MOL's contracts with cargo owners provide for some period of "free time," during which MOL does not charge customers for the use of its shipping containers. When containers are returned after the expiration of the "free time" period, MOL assesses a "detention charge." In other words, MOL allows its cargo customers to check out, or borrow, the shipping containers containing the cargo owners' property at no charge for a certain time period. Ideally, the container can be delivered to the cargo owner, unloaded, and then returned to MOL within the "free time" period. If the container is returned late, however, MOL charges a late return fee.[1]

Although cargo owners contract with MOL to transport containers to the inland container yard, the independent truckers actually pick up, transport, and return MOL's containers. The truckers are not, however, parties to the transportation service contract between MOL and the cargo owners. Nevertheless, when truckers are late returning MOL's containers, MOL charges late fees to the truckers, not to the contracting cargo owners. The truckers pay the late fees, then in turn bill cargo owners for those fees. If a trucker refuses to pay late fees to MOL, the trucker may be denied access to shipping containers, essentially foreclosing the trucker from doing business.

In 2005, California enacted Business and Professions Code § 2298, which states:

---

[1] The parties refer to this late fee either as a "detention charge" or "per diem."

> (b) An intermodal marine equipment provider or intermodal marine terminal operator shall not impose per diem, detention, or demurrage charges on an intermodal motor carrier relative to transactions involving cargo shipped by intermodal transport under any of the following circumstances:
>
> (1) When the intermodal marine or terminal truck gate is closed during posted normal working hours. No per diem, detention, or demurrage charges shall be imposed on a weekend or holiday, or during a labor disruption period, or during any other period involving an act of God or any other planned or unplanned action that closes the truck gate.

Cal. Bus. & Profs. Code § 2298.

Plaintiffs allege, on behalf of a putative class, that MOL violated California Business and Professions Code § 2298 and breached a contract by charging late fees on weekends and holidays. Plaintiffs now move to certify a Rule 23(b)(3) damages class comprised of all intermodal motor carriers who were charged and paid per diem and demurrage detention charges in California for weekend days and holidays when the ports were closed from April 7, 2007 to the present.

II. Legal Standard

The party seeking class certification bears the burden of showing that each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) are met. See Hanon v. Dataprods. Corp., 976 F.2d 497, 508-09 (9th Cir. 1992). Rule 23(b) defines different types of classes. Leyva v. Medline Indus. Inc., 716 F.3d 510, 512 (9th Cir. 2012). Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over individual questions . . ., and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b). Rule 23(a) sets forth four prerequisites for class certification:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); see also Hanon, 976 F.2d at 508. These four requirements are often referred to as numerosity, commonality, typicality, and adequacy. See Gen. Tel. Co. v. Falcon, 457 U.S. 147, 156 (1982).

In determining the propriety of a class action, the question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974). This court, therefore, considers the merits of the underlying claim to the extent that the merits overlap with the Rule 23(a) requirements, but will not conduct a "mini-trial" or determine at this stage whether Plaintiffs could actually prevail. Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981, 983 n.8 (9th Cir. 2011). Nevertheless, the court must conduct a "rigorous analysis" of the Rule 23 factors. Id. at 980. Because the merits of the claims are "intimately involved" with many class certification questions, the court's rigorous Rule 23 analysis must overlap with merits issues to some extent. Id., citing Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011).

III. Discussion

The central issue presented by MOL's Opposition is the applicability of a "pass-on" defense to Plaintiffs', and in

particular, Elite's, claims. A pass-on defense seeks to eliminate liability by proving that a plaintiff has passed on an overcharge to a subsequent purchaser, and therefore suffered no injury. See Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 766 (2010). Such a defense, if viable, would present serious typicality, adequacy, and predominance problems, and preclude certification of the proposed damages class under Rule 23(b)(3).

As explained above, MOL enters into service contracts with cargo owners, but charges late fees to independent truckers, such as Elite. Elite must pay those fees at pain of being barred from MOL's marine terminal and shut out of the intermodal transportation market. However, Elite can, and apparently does, seek and obtain payment from cargo owners for the late fees assessed by MOL.

As pertinent here, in late 2007, Elite's president and owner, Moon Chul Kang, contested the amount of late fees MOL charged Elite for a shipment to LG Electronics, and sought a discount.[2] MOL acceded to the request and accepted Elite's payment of 60% of the assessed late fees. Elite, however, then invoiced and received from LG approximately 170% of the amount Elite paid to MOL. Thus, although Elite did pay late fees to MOL, including some improperly assessed late fees, Elite was not only reimbursed for those expenses, but ultimately appears to have profited from the exchange.

[2] Elite's representations regarding the reasons for the discount form the basis of MOL's Counterclaim.

MOL contends that, because Elite obtained a windfall from the LG late fee transactions, Elite cannot show that it suffered any damages. Elite, for its part, argues that the amount of money it received from LG is irrelevant because the "pass-on defense is unavailable for determining standing or damages." (Opp. at 14.)

As this court has previously noted, the California Supreme Court has limited the use of a pass-on defense as a barrier to standing in suits under state antitrust law. Clayworth, 49 Cal. 4th at 789 ("That a party may ultimately be unable to prove a right to damages . . . does not demonstrate that it lacks standing to argue for its entitlement to them. . . . [M]itigation, while it might diminish a party's recovery, does not diminish the party's interest in proving it is entitled to recovery."). The California Supreme Court extended that principle to a consumer suit under California's Unfair Competition Law in Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 334 (2011).

Elite, citing Clayworth and Kwikset, asserts that the pass-on defense "is not viable as a matter of law" with respect to either standing or damages. (Opp. at 14.) Neither case, however, stands for such a broad proposition. As an initial matter, neither case addressed class certification issues, and both limited discussion of the pass-on defense to questions of standing. Further, this court is not persuaded by Elite's suggestion that the Kwikset court imposed a general bar on pass-on defenses, or even a bar in all UCL cases. Rather, the court disapproved of the

defense in the context of a consumer claim for false advertising. In Kwikset, a consumer brought suit challenging the veracity of a lockmaker's claim that its products were made in the United States. Kwikset, 51 Cal. 4th at 316. In that context, the pass-on defense was premised on the fact that the locks, regardless of their actual country of origin, were functional and could be re-sold. Id. at 333-336. The Kwikset court rejected that reasoning, however, because it ignored consumers' material valuation of intangibles, such as American manufacture, and the resulting economic harm resulting from purchases based on misrepresentations, including transactional costs associated with resale. Id. at 329, 333-334.

The court is not persuaded, however, that the Kwikset court's logic is applicable here, outside the consumer arena, in a case involving a clear-cut statutory violation, and in the context of class certification to a question of damages rather than standing. Granted, Elite suffered harm when it was charged illegal late fees. Its argument for a pass-on defense bar is premised on the difficulty of apportioning ostensibly resultant damages, such as "the negative competitive effects of charging greater amounts to its customers." But that policy argument is vitiated by the fact that Elite charged "greater amounts" to its customers not merely because Elite itself incurred greater costs, but because Elite wanted to profit by playing LG off against MOL. Insofar as advancement of the UCL's goals underpins proscriptions of the pass-on defense, application of such a

bar under the circumstances here might do more harm than good. Nor is the court persuaded by Elite's contention that, because cargo owners are not charged late fees and therefore do not have standing, no party can possibly recover for illegally charged late fees absent imposition of the bar. Only those parties who were made whole, or who, like Elite, actually profited from the imposition of fees, will face such an obstacle.

In any event, regardless of the general availability of pass-on defenses, the above discussion makes clear that the particularities of Elite's interactions with MOL and with cargo customers render Elite's claims, and the defenses to them, atypical of those of the class. Class certification should not be granted if there is a danger that defenses unique to the putative class representative will become a focus of the litigation. Hanon, 976 F.3d at 508. Here, at the very least, questions regarding Elite's unclean hands would prove a distraction. Accordingly, Elite has failed to satisfy the requirements of Rule 23.

IV. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Class Certification is DENIED.

IT IS SO ORDERED.

Dated: February 2, 2016

DEAN D. PREGERSON
United States District Judge