UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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DELIA WILSON, on behalf of herself and all others similarly situated,

Plaintiffs,

v.

CONAIR CORPORATION,

Defendant.

CIV. NO. 1:14-00894 WBS SAB

MEMORANDUM AND ORDER RE: MOTIONS FOR CLASS CERTIFICATION; EXCLUSION OF EXPERT EVIDENCE; AND SANCTIONS

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Plaintiff Delia Wilson brought this putative class action against Conair Corporation, a health and beauty supply company, asserting that it has allegedly failed to follow standard policies and procedures for protecting consumers from a defective line cord in its styling irons and failed to comply with reporting laws. Presently before the court is plaintiff's motion for class certification. (Docket No. 124.)

I. Factual and Procedural Background

On February 12, 2014, plaintiff suffered injuries to her eye, face, and chest when the power cord on her Conair curling iron began to crackle and emit sparks. (First Am. Compl. ("FAC") at 4 (Docket No. 121).) She was diagnosed with a corneal abrasion that continues to require treatment. (Id.) Plaintiff received this styling iron from defendant in 2010 as a free replacement for her prior styling iron, on which the on/off button had stopped functioning. She used the styling iron three to four times a week for about four years. (Id. at 3; Hurst Decl. Ex. C, Wilson Dep. at 92:10-17, 93:9-12 (Docket No. 124-2).) Plaintiff alleges that the power cords on defendant's styling irons are defective and that, despite having knowledge of this defect, defendant failed to warn consumers of the hazard or to report it to the Consumer Product Safety Commission ("CPSC"). (FAC at 1, 8.)

Plaintiff asserts the following causes of action in her FAC on behalf of herself and the proposed class members: (1) violation of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750-1784; (2) unfair business practices to conceal the power cord defect from consumers and false and misleading advertising in violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200-17210, 17500-17509; and (3) breach of implied warranty, Cal. Com. Code § 2314. Plaintiff also asserts the following individual causes of action: (4) strict products liability due to design or manufacture defect; (5) strict products liability due to failure to warn; and (6)

negligence.[1]

Plaintiff seeks to represent a class that consists of: "All persons who purchased Conair Styling Irons in California." (Id. at 10.) The parties agreed to define styling irons as all curling irons, straightening irons, and curling brushes manufactured by defendant and purchased by consumers in California on or after January 1, 2005 that contain a SPT-1 AWG #20 cord and a LM-81 strain relief. (Hurst Decl. Ex. B, Def.'s Responses to Pl.'s First Set of Interrogs. at 5 (Docket No. 124-4).) The class excludes those who purchased styling irons for resale purposes. (FAC at 10.) Plaintiff believes the class contains "thousands of members" but does not know the precise number. (Id.)[2]

II. Discussion

For a class to be certified, a plaintiff must satisfy each prerequisite of Federal Rule of Civil Procedure 23(a) and must also establish an appropriate ground for maintaining class actions under Rule 23(b). Fed. R. Civ. P. 23. "The party

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[1] Plaintiff voluntarily dismissed her seventh cause of action for negligent infliction of emotional distress. (Docket No. 148.) The parties stipulated that it would be dismissed with prejudice and without an award of attorneys' fees, costs, or disbursements to either party. (Id.)

[2] The court did not consider the additional evidence plaintiff submitted with her reply as it is "improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers" without providing the opposing party an opportunity to respond. Jones v. Balt. Life Ins. Co., Civ. No. S-06-1505 LKK KJM, 2007 WL 1713250, at *9 (E.D. Cal. June 12, 2007). Furthermore, the additional evidence would not alter the court's conclusions. Accordingly, defendant's motions to strike this evidence or to be provided an opportunity to respond, (Docket Nos. 143, 145), are denied as moot.

seeking certification has the burden of affirmatively demonstrating that the class meets the requirements of [Rule 23]." Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 588 (9th Cir. 2012) (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

A. Rule 23(a)

Rule 23(a) restricts class actions to cases where:

> (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). These requirements are more commonly referred to as numerosity, commonality, typicality, and adequacy of representation. The court must conduct a "rigorous analysis" to ensure the prerequisites of 23(a) have been satisfied and this "will entail some overlap with the merits of the plaintiff's underlying claim." Dukes, 131 S. Ct. at 2551 (citation omitted). Because the court finds that plaintiff meets neither the typicality nor adequacy of representation requirements, it does not address the requirements of numerosity or commonality.

1. Typicality

Typicality requires that the named plaintiff have claims "reasonably coextensive with those of absent class members," but their claims do not have to be "substantially identical." Hanlon, 150 F.3d at 1020. The test for typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been

injured by the same course of conduct." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted); see also O'Connor v. Boeing N. Am., Inc., 180 F.R.D. 359, 373-74 (C.D. Cal. 1997) (finding no typicality where the class representatives were focused on treatment of their existing cancer and their individual personal injury claims whereas the non-diseased class members were focused on recovering costs of monitoring latent diseases); Gartin v. S&M NuTec LLC, 245 F.R.D. 429, 434-35 (C.D. Cal. 2007) (finding no typicality when the plaintiff was seeking relief for her dog's existing injuries while other class members would seek costs for monitoring their dogs' health to ensure no injuries occurred in the future).

Class certification is inappropriate "where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." Hanon, 976 F.2d at 508. "To be typical, a class representative . . . must establish that she is not subject to a defense that is not 'typical of the defenses which may be raised against other members of the proposed class.'" In re NJOY, Inc. Consumer Class Action Litig., 120 F. Supp. 3d 1050, 1098 (C.D. Cal. 2015) (citation omitted).

While plaintiff and the proposed class members were all allegedly injured by defendant's misrepresentations about the safety of the styling irons and failure to report the alleged defect to the CPSC, plaintiff is also asserting several individual personal injury claims that are not coextensive with those of the class. In fact, plaintiff's counsel has conceded that the class action portion of this lawsuit would exclude any recovery for personal injuries or even restitution. However,

plaintiff individually contends that she "experienced unreasonably dangerous effects, and/or unnecessary physical injuries, damaged and/or destroyed property, and has incurred financial damage, loss of wages and/or earning capacity, medical expenses and injury, including mental anguish and emotional distress." (FAC at 20.) As in O'Connor and Gartin, plaintiff's claims are therefore atypical as they are based at least in part on injuries different from those suffered by the class members, many of whom have not yet experienced line cord rupture or any physical injuries, and she is seeking individual damages.

Plaintiff will also face unique defenses on the class-wide CLRA and UCL claims that defeat typicality. For example, defendant contends that it will argue at trial that plaintiff, unlike other class members, does not have standing to bring CLRA and UCL claims because she did not purchase her styling iron but rather received it as a free replacement for another product. (Def.'s Opp'n at 31 (Docket No. 130).) "In cases involving safety defects, courts have repeatedly found that allegations that Plaintiffs suffered economic loss because they would not have purchased the product or would have paid less for it had the defect been disclosed are sufficient to establish standing to sue under CLRA and UCL." Corson v. Toyota Motor Sales, U.S.A., Inc., Civ. No. 2:12-08499 JGB VBK, 2013 WL 10068136, at *7 (C.D. Cal. July 18, 2013); see also Backus v. Gen. Mills, 122 F. Supp. 3d 909, 921 (N.D. Cal. 2015) (finding the plaintiff had standing because he lost money from purchasing the defendant's products that were detrimental to his health); Cal. Civ. Code § 1770(a) (proscribing "unfair methods of competition and unfair or

deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer" (emphasis added)).

Because plaintiff received her styling iron for free, defendant will argue, she cannot claim she was deceived into purchasing a styling iron based on defendant's misrepresentations and false advertising or that she was injured by spending money on this dangerous product. While plaintiff purchased her original styling iron, defendant will argue that its on/off switch failure is outside the scope of the proposed class definition and any claims related to this iron are also barred by the three year statute of limitations on CLRA claims. (Def.'s Opp'n at 31 & n.10.) There is a significant danger that plaintiff will be preoccupied with this defense unique to her.[3]

Additionally, because plaintiff seeks to proceed under Rule 23(b)(2), injunctive relief lies at the heart of her class action. Yet, because plaintiff is no longer using a Conair styling iron, she is not typical of class members who continue to use their styling irons and would therefore have standing to seek injunctive relief. To establish standing for prospective injunctive relief, a plaintiff must demonstrate that she "has suffered or is threatened with a 'concrete and particularized' legal harm, coupled with 'a sufficient likelihood that [s]he will

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[3] The court acknowledges that plaintiff's general argument that the statute of limitations was tolled for class members falling outside the CLRA statutory period is not unique to her and does not defeat typicality. (See Pl.'s Reply at 7.) Any tolling argument that might be made with respect to her original styling iron with the malfunctioning on/off switch, however, would be unique to plaintiff.

again be wronged in a similar way." Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007). Plaintiff cannot establish a likelihood of future harm because she no longer uses a Conair styling iron and has expressed no intent to purchase one in the future. See, e.g., In re Yahoo Mail Litig., 308 F.R.D. at 588 ("[T]he 'likelihood of future injury' requirement under Article III may be satisfied where a consumer 'allege[s] that [s]he intends to purchase the products at issue in the future.'" (citation omitted) (alteration original)); Dukes, 131 S. Ct. at 2560 (finding half of the class members were no longer employed by Wal-Mart and therefore lacked standing to seek injunctive or declaratory relief against Wal-Mart's employment practices); Balasanyan v. Nordstrom, Inc., 294 F.R.D. 550, 562 (S.D. Cal. 2013) (finding a subset of plaintiffs had no standing to pursue injunctive relief and their claims were therefore not typical of the proposed class).

Both because of plaintiff's personal injury claims and the unique standing defenses that could be raised against her, the court must find plaintiff fails to satisfy the typicality requirement of Rule 23(a).

2. Adequacy

To resolve the question of adequacy, the court must make two inquiries: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Hanlon, 150 F.3d at 1020. These questions involve consideration of a number of factors, including "the qualifications of counsel for the

representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." Brown v. Ticor Title Ins., 982 F.2d 386, 390 (9th Cir. 1992).

The court does not address the qualifications of counsel. However, as discussed above, plaintiff is not only seeking injunctive relief on behalf of the class but also individual personal injury damages. There is a substantial risk that plaintiff will therefore have different priorities and litigation incentives than the class members. She could, for example, be tempted to accept an inadequate settlement offer on the class claims in exchange for a larger settlement on her personal injury claims or, alternatively, be motivated to proceed to trial when it may be in the best interest of the class to settle. See, e.g., Georgine v. Amchem Prods., Inc., 83 F.3d 610, 630-31 (3rd Cir. 1996) (finding the intra-class conflict between class representatives presently injured by asbestos and possible future plaintiffs who were exposed but not yet injured precluded the class from meeting the adequacy requirement). The court therefore finds there is a potential conflict of interest between plaintiff and the class members due to plaintiff's individual personal injury claims.

Further, the "second adequacy inquiry is directed to the vigor with which the named representatives and their counsel will pursue the common claims." Hanlon, 150 F.3d at 1021. The credibility and honesty of a class representative are relevant "because an untrustworthy plaintiff could reduce the likelihood of prevailing on the class claims." Harris v. Vector Mktg.

Corp., 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010) (citation omitted). "There is 'inadequacy only where the representative's credibility is questioned on issues directly relevant to the litigation or there are confirmed examples of dishonesty, such as a criminal conviction for fraud.'" Id. (citation omitted).

In this case, defendant contends that plaintiff spoliated the cellphone with which she allegedly reported her claim to defendant's customer service department and failed to preserve any evidence related to the phone, such as bills or text messages. (Def.'s Opp'n at 35.) Even if plaintiff destroyed the phone by accident, defendant argues, this demonstrates her lack of appreciation for her responsibilities as class representative. (Id.) Plaintiff, however, denies having destroyed the phone and claims that when she went to look for the old phone she discovered the box was empty. (Pl.'s Reply at 15 (Docket No. 140).) Given that the question of whether plaintiff spoliated the phone is disputed, it would be premature to find plaintiff is not credible on this ground. Nevertheless, plaintiff's credibility regarding preservation of this evidence does have the potential of "jeopardiz[ing] the interests of absent class members." Harris, 753 F. Supp. 2d at 1015.

Due primarily to the potential conflict of interest between plaintiff and the class members because of plaintiff's individual personal injury claims, the court must conclude that plaintiff is an inadequate representative of the class under Rule 23(a).

III. Plaintiff's Evidentiary Objections

Plaintiff objects to and requests that the court

disregard in their entirety the declarations of defendant's experts Kurt Brietenkamp, Mark Sanders, and Richard L. Stern pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Federal Rule of Evidence 702. (Docket Nos. 141, 141-1, 141-2.) The court did not rely on the contested declarations in its analysis and therefore need not rule on plaintiff's evidentiary objections.

IV. Defendant's Motion for Sanctions

Defendant moves for sanctions against plaintiff for alleged spoliation of evidence pursuant to the court's inherent authority. (Docket No. 128.) Defendant contends plaintiff spoliated the Verizon flip phone on which she allegedly called and texted customer service, friends, and family regarding the line cord rupture on her styling iron in February 2014 and failed to preserve any evidence related to the phone, such as bills or text messages. (Def.'s Mot. for Sanctions at 3, 6 (Docket No. 128-1).) Defendant asks that the court issue sanctions preventing plaintiff from presenting testimony regarding the February 2014 phone calls and texts or, at a minimum, that the court provide an adverse inference instruction to the jury.

When asked about the flip phone during her July 16, 2015 deposition, plaintiff stated that she had replaced her flip phone with an Apple iPhone but that she still had the flip phone at home. (Def.'s Mot for Sanctions Ex. C, Wilson Dep. 115:5-24, 116:1-3 (Docket No. 128-6).) Defense counsel advised: "Please do not destroy it or do anything with it, and give it to your counsel." (Id. at 116:4-5.)

In response to a subsequent request for production of

all text messages sent on the phone relating to the styling iron failure, plaintiff's counsel replied: "Following her deposition Ms. Wilson conducted a reasonable and diligent search for her formerly used cell phone and discovered it is no longer in her possession, custody, or control." (Id. Ex. L, Pl.'s Resps. & Objs. to Req. for Produc. of Docs. Set Six at 4 (Docket No. 128-15).) Plaintiff found the box for the flip phone but it was empty. (Pl.'s Reply at 15.) Plaintiff now thinks that she might have donated the phone or left it at the Verizon store when she went in for help transferring service from the flip phone to her iPhone in June 2014. (Pl.'s Opp'n, Wilson Decl. ¶ 9 (Docket No. 147-11).)

It is premature to decide whether to preclude plaintiff's testimony regarding the February 2014 phone calls and texts at this early stage of the proceedings. That decision will more appropriately be made at the time of trial, when the court can weigh the probative value and prejudicial effect of the evidence and consider alternative remedies. Accordingly, defendant's motion to exclude plaintiff's testimony or, at a minimum, provide an adverse inference instruction, will be denied without prejudice to its timely renewal, as appropriate, at trial.

IT IS THEREFORE ORDERED that plaintiff's motion for class certification (Docket No. 124) be, and the same hereby is, DENIED;

IT IS FURTHER ORDERED that plaintiff's evidentiary objections (Docket No. 141) be, and the same hereby are, DISMISSED as moot;

IT IS FURTHER ORDERED that defendant's motions to strike (Docket Nos. 143, 145) be, and the same hereby are, DISMISSED as moot.

IT IS FURTHER ORDERED that defendant's motion to exclude plaintiff's testimony regarding the February 2014 phone calls and texts or, at a minimum, provide an adverse inference instruction (Docket No. 128) be, and the same hereby is, DENIED without prejudice to its timely renewal at trial.

Dated: June 3, 2016

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE