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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

DELIA WILSON, on behalf of herself and  
others similarly situated,  
  
  Plaintiffs,  
  
  v.  
  
CONAIR CORPORATION,  
  
  Defendant.

Case No. 1:14-cv-00894-WBS-SAB  
  
ORDER RE INFORMAL DISCOVERY  
DISPUTE  
  
(ECF Nos. 65, 66, 67)

On September 9, 2015, the Court conducted an informal discovery dispute teleconference in this action. Counsel Leslie Hurst appeared for Plaintiff and counsel Ryan Saba and Momo Takahasi appeared for Defendant.

**I.**  
**BACKGROUND**

Plaintiff brings this action on behalf of herself and others similarly situated alleging 1) violation of the Consumers Legal Remedies Act, California Civil Code § 1750, et seq., 2) violation of the Unfair Competition Law, California Business and Professions Code § 17200, et seq., and 3) breach of implied warranty.

Defendant manufactures a variety of curling irons, straightening irons, and curling brushes. (Compl. ¶ 1.) Defendant’s styling irons use a power cord connected to the iron via a

1 “stress relief.” (Compl. ¶ 2.) Plaintiff alleges that Defendant expressly and impliedly represent  
2 that their styling irons are well-designed and safe to use. (Compl. ¶ 4.) Plaintiff alleges that she,  
3 and others similarly situated, purchased Defendant’s styling irons based upon those  
4 representations regarding their safety and suffered injury from using the styling irons. (Compl. ¶  
5 5.)

6 In Plaintiff’s case, Plaintiff alleges that she purchased a Conair Instant Heat 1½” Curling  
7 Iron in early 2010. (Compl. ¶ 9.) Less than a month after it was purchased, the curling iron  
8 malfunctioned and would not turn on. (Compl. ¶ 13.) Plaintiff contacted Conair’s Customer  
9 Service Department and received a replacement curling iron. (Compl. ¶ 13.) On February 12,  
10 2014, the replacement curling iron malfunctioned, and the power cord began to crackle and emit  
11 sparks. (Compl. ¶ 14.) A flash of sparks caused burns on Plaintiff’s face and chest. (Compl. ¶  
12 14.) Plaintiff received a corneal abrasion in her eye. (Compl. ¶ 15.) Plaintiff alleges that the  
13 curling iron failed at the point where the curling iron’s power cord meets the stress relief.  
14 (Compl. ¶ 16.)

15 Plaintiff alleges that Defendant knew or should have known that its styling irons were  
16 defective. (Compl. ¶ 21.) Plaintiff alleges that Defendant received complaints about similar  
17 incidents with the power cord from consumers as early as 2012. (Compl. ¶ 21.) Plaintiff further  
18 alleges that Defendant failed to warn consumers about the defects in its styling irons. (Compl. ¶  
19 24.)

20 Plaintiff seeks to bring this action on behalf of a class defined as “All persons who  
21 purchased Conair Styling Irons in California.” (Compl. ¶ 30.) Plaintiff alleges that Defendant  
22 violated the California Consumers Legal Remedies Act through its misrepresentations regarding  
23 the safety of their styling irons. (Compl. ¶¶ 40-47.) Plaintiff alleges that Defendant violated the  
24 California Unfair Competition Law by its misrepresentations and omissions regarding the safety  
25 of their styling irons. (Compl. ¶¶ 48-58.) Plaintiff alleges that Defendant breached the implied  
26 warranty with respect to their styling irons because of the safety defects inherent in the styling  
27 irons. (Compl. ¶¶ 59-72.)

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1 **II.**

2 **PLAINTIFF’S REQUEST TO COMPEL DOCUMENT PRODUCTION**

3 On December 12, 2014, Plaintiff propounded a request for production of e-mails in this  
4 action. The parties have met and conferred to negotiate an ESI protocol for the production. The  
5 parties have narrowed the e-mail production to two Conair employees, Wayne Dieterle and Vito  
6 Carlucci. They have now agreed on a protocol and the search has been completed. The parties  
7 disagree regarding the number of documents returned by the search. Plaintiff asserts there are  
8 47,199 e-mails and 19,592 documents; while Defendant contends that there are 60,267 e-mails  
9 and 69,307 documents to be reviewed. Defendant argues that, given the document review in a  
10 similar class action, it will take approximately 2,384 hours or 10 weeks with 15 reviewers to  
11 review this material.

12 Plaintiff contends that delaying production until November 20, 2015 will prejudice her  
13 because the motion for class certification is due only six weeks later on January 6, 2015.  
14 Plaintiff will need to depose the two individuals prior to filing the motion for class certification  
15 and needs the e-mails prior to the depositions. Plaintiff seeks an order for Defendant to produce  
16 the e-mails no later than October 5, 2015.

17 Balancing Plaintiff’s need for the information to complete discovery on class certification  
18 and the burden on Defendant due to the amount of information to be reviewed, the Court orders  
19 Defendant to produce responsive documents on a weekly basis with the first production to be in  
20 three weeks. All documents responsive to the request for production shall be produced on or  
21 before October 23, 2015.

22 **III.**

23 **DEFENDANT’S REQUEST FOR DOCUMENT PRODUCTION**

24 Conair does not sell to consumers, but distributes its products through retailers.  
25 Therefore, Plaintiff has subpoenaed records from seven large retailers on the sales and pricing,  
26 complaints, returns, and recalls of styling irons. Defendant has propounded a request for  
27 production of all documents received from retailers in response to the subpoenas and all  
28 communication and documents exchanged with the retailers in connection with the subpoenas.

1           **A.     Production of Documents Responsive to Third Party Subpoenas**

2           Defendant seeks to have Plaintiff produce documents that were received in response to  
3 the subpoenas and states that Plaintiff has refused to produce documents until all documents are  
4 received from all retailers. Defendant contends that Plaintiff has received documents but refuses  
5 to identify which retailers have responded or produce any documents until an undetermined time.

6           Plaintiff contends that it is overly burdensome for her to produce documents on a rolling  
7 basis and she does not want to produce any responsive documents until all production is  
8 complete. Plaintiff states that she will produce each set of documents after the production for  
9 that retailer is complete, i.e. Target will be produced once all documents from Target are  
10 received.

11           The Court shall order Plaintiff to produce documents responsive to each retailer subpoena  
12 once all documents responsive to the subpoena for that retailer have been received.

13           **B.     Production of Communication with Retailers Regarding Subpoenas**

14           Defendant contacted Plaintiff's attorney and requested that Plaintiff provide the  
15 documents responsive to the subpoenas and any communication with the retailers regarding  
16 limiting the scope of the subpoenas. Plaintiff refused the informal request and required  
17 Defendant to serve a request for production of documents. After Defendant served a request for  
18 production of documents, Plaintiff refused to provide communication with the third party  
19 retailers regarding the scope of the subpoenas claiming the information was not relevant and was  
20 privileged. At the telephonic hearing, Plaintiff asserted that the main objection is that the  
21 documents are irrelevant in this action.

22           Defendant seeks production of the communication between Plaintiff and each retailer  
23 limiting the scope of the subpoena. Defendant argues that routine communication and  
24 negotiations with the third party retailer regarding the scope of the subpoenas is not the proper  
25 subject for work product protection; and Defendant is entitled to know the scope of the subpoena  
26 to understand what the documents that are produced represent.

27           The work product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3), and  
28 "protects from discovery documents and tangible things prepared by a party or his representative

1 in anticipation of litigation.” In re Grand Jury Subpoena (Mark Torf/Torf Env'tl. Mgmt.), 357  
2 F.3d 900, 906 (9th Cir. 2004). Rule 26(b)(3) provides that:

3 Ordinarily, a party may not discover documents and tangible things that are  
4 prepared in anticipation of litigation or for trial by or for another party or its  
5 representative (including the other party's attorney, consultant, surety, indemnitor,  
insurer, or agent). But, subject to Rule 26(b)(4), those materials may be  
discovered if:

6 (i) they are otherwise discoverable under Rule 26(b)(1)[.]

7 Documents protected by the work product privilege may only be ordered produced where  
8 the adverse party “shows that it has substantial need for the materials to prepare its case and  
9 cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed. R.  
10 Civ. P. 26(b)(3); Torf, 357 F.3d at 906.

11 [T]he work-product privilege safeguards “written statements, private memoranda  
12 and personal recollections prepared or formed by an adverse party's counsel in the  
13 course of his legal duties.” Hickman v. Taylor, 329 U.S. 495, 510, 67 S.Ct. 385,  
14 91 L.Ed. 451 (1947). Such materials fall “outside the arena of discovery” because  
15 “[p]roper preparation of a client's case demands that [an attorney] assemble  
information, sift what he considers to be the relevant from the irrelevant facts,  
prepare his legal theories and plan his strategy without undue and needless  
interference.” Id. at 510–11, 67 S.Ct. 385.

16 United States v. Reyes, 239 F.R.D. 591, 598 (N.D. Cal. 2006). The party claiming the protection  
17 bears the burden of demonstrating the applicability of the work product doctrine. Phillips v. C.R.  
Bard, Inc., 290 F.R.D. 615, 634 (D. Nev. 2013), reconsideration denied (Aug. 7, 2013).

18 The documents at issue here are communications between Plaintiff's counsel and third  
19 parties regarding compliance with the subpoena's duces tecum that were served upon the third  
20 party. While these documents were prepared for litigation, they document routine negotiations  
21 regarding the scope of production in response to the subpoena. “At its core, the work product  
22 doctrine shelters the mental processes of . . . attorney[s], providing a privileged area within  
23 which [they] can analyze and prepare [their] client's case.” Pac. Gas & Elec. Co. v. United  
24 States, 69 Fed. Cl. 784, 789 (2006) (quoting United States v. Nobles, 422 U.S. 225, 238, 95 S.Ct.  
25 2160, 45 L.Ed.2d 141 (1975)). The Court finds that the communication at issue here, which is  
26 solely regarding the negotiations between Plaintiff and the third party to address the scope of the  
27 subpoenas, does not fall within the work product doctrine.  
28

1 To the extent that the information would be protected by the work product doctrine,  
2 Defendant has a substantial need to understand the scope of the subpoenas to interpret the  
3 responsive documents that were produced. For example, if the subpoena requests production of  
4 documents for a specific time period and the subpoena has been narrowed to a different time  
5 period, Defendant would assume from the subpoena that no documents for the excluded time  
6 period existed. Therefore, the Court finds that Defendant is entitled to information regarding the  
7 actual scope of the subpoena. Finally, requiring Defendant to obtain the information by deposing  
8 each of the retailers on how the scope of the subpoena was narrowed would create an undue  
9 hardship given that Plaintiff can easily provide such information without requiring the additional  
10 expense of third party depositions.

11 The Court shall order Plaintiff to produce documents response to the request for  
12 production.

#### 13 IV.

#### 14 CONCLUSION AND ORDER

15 Based on the foregoing, IT IS HEREBY ORDERED that:

- 16 1. Plaintiff's request for production of e-mails is GRANTED. Defendants shall  
17 produce responsive documents on rolling basis. Defendant's first rolling  
18 production shall occur within three weeks of the date of service of this order and  
19 continue weekly until production is complete. All documents responsive to the  
20 request shall be produced on or before October 23, 2015;
- 21 2. Defendant's request for production of documents received in response to the third  
22 party subpoenas is GRANTED IN PART. Plaintiff shall produce documents  
23 responsive to each retailer subpoena within seven days of receipt of the completed  
24 production for that retailer;
- 25 3. Defendant's request for production of communication with retailers regarding the  
26 subpoenas is GRANTED. Plaintiff shall produce all communication regarding  
27 the subpoenas at the time the documents produced by that retailer are produced to  
28 Defendant; and

1 4. Failure to comply with this order may result in the imposition of sanction.

2  
3 IT IS SO ORDERED.

4 Dated: September 11, 2015



UNITED STATES MAGISTRATE JUDGE

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