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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY BOOKHAMER, a minor,
Individually and as Successor in Interest to
Decedent Victoria DiSilvestro, by and through
his Guardian ad Litem, LENA J. TYRON;
LENA J. TYRON, as Personal Representative
of the Estate of Victoria DiSilvestro;
CHARLES THOMAS MARTIN, JR.,
Individually and as Successor in Interest to
Victoria DiSilvestro; CARL DISILVESTRO, a
minor, Individually and as Successor in Interest
to Decedent Victoria DiSilvestro, by and
through his Guardian ad Litem, MARY
DISILVESTRO,

Plaintiffs,

v.

SUNBEAM PRODUCTS, INC.,

Defendant,

No. 09-CV-06027 MHP

MEMORANDUM & ORDER

**Re: Defendants’ Motion to Dismiss and to
Strike Portions of First Amended Complaint**

Plaintiffs Anthony Bookhamer (“Bookhamer”), Lena J. Tyron, Charles Thomas Martin, Jr.,
Carl DiSilvestro and Mary DiSilvestro (collectively “plaintiffs”) filed this action against defendant
Sunbeam Products, Inc. (“Sunbeam”) seeking recovery for the damages caused by an alleged defect
in a Sunbeam electric blanket¹ product. Now before the court is Sunbeam’s motion to dismiss and
strike portions of the first amended complaint. Having considered the parties’ arguments and
submissions, and for the reasons set forth below, the court enters the following memorandum and
order.

1 BACKGROUND²

2 On January 11, 2009 a Sunbeam electric blanket caught fire or overheated to the point of
3 igniting combustible materials with which it was in contact in the home of Victoria DiSilvestro
4 (“DiSilvestro”), where DiSilvestro lived with her minor son, Bookhamer. As a result of the fire,
5 DiSilvestro suffered personal injuries and was killed, Bookhamer suffered disfiguring and disabling
6 permanent injuries and all of DiSilvestro and Bookhamer’s personal property was destroyed.
7 Plaintiffs claim that at the time of the fire, DiSilvestro was using the blanket in a manner that was or
8 should have been reasonably expected by Sunbeam.

9 As a general matter, plaintiffs allege that the Sunbeam blanket was defective in design, that
10 Sunbeam was aware of the defect and aware that the defect had caused other fires, but that Sunbeam
11 negligently failed to warn the public or eliminate the risk of fire. Of specific relevance to the instant
12 motion, plaintiffs allege, upon information and belief, that Sunbeam made the decision not to report
13 potential product hazards to the United States Consumer Product Safety Commission (“CPSC”), as
14 required by the Consumer Product Safety Act (“CPSA”), 15 U.S.C. § 2064(b), despite having
15 knowledge of flaws in the product’s design and the dangerous conditions they created.

16 Plaintiffs have alleged causes of action for: 1) strict liability for personal injury and wrongful
17 death, Cal. Civ. Proc. Code § 377.60; 2) a survival action for strict liability, Cal. Civ. Proc. Code §
18 377.20; 3) negligence causing personal injury and wrongful death, Cal. Civ. Proc. Code § 377.60; 4)
19 a survival action for negligence, Cal. Civ. Proc. Code § 377.20; 5) breach of implied warranty for
20 personal injuries and wrongful death, Cal. Civ. Proc. Code § 377.60; and 6) a survival action for
21 breach of implied warranty, Cal. Civ. Proc. Code § 377.20. Plaintiffs have asked for attorneys’ fees
22 in connection with the fifth and sixth causes of action in addition to economic and non-economic
23 relief. Plaintiffs further claim that the actions of Sunbeam were “willful, wanton, malicious,
24 oppressive, fraudulent, reckless and with conscious disregard for the safety of the consuming public,
25 including decedent and plaintiff Anthony Bookhamer” and therefore pray for punitive damages.

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1 LEGAL STANDARD

2 Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against a
3 defendant for failure to state a claim upon which relief can be granted against that defendant. A
4 motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency of a claim.” *Navarro v. Block*,
5 250 F.3d 729, 732 (9th Cir. 2001). Dismissal may be based on the lack of a cognizable legal theory
6 or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica*
7 *Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1988). A motion to dismiss should be granted if a
8 plaintiff fails to plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
9 *Corp. v. Twombly*, 550 U.S. 544, 569 (2007). “The plausibility standard is not akin to a ‘probability
10 requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”
11 *Ashcroft v. Iqbal*, ___ U.S. ___, ___, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at
12 556). Allegations of material fact are taken as true and construed in the light most favorable to the
13 non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court
14 need not, however, accept as true pleadings that are no more than legal conclusions or the “formulaic
15 recitation of the elements” of a cause of action. *Iqbal*, 129 S. Ct. at 1940; see also *Sprewell v.*
16 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Clegg v. Cult Awareness Network*, 18
17 F.3d 752, 754-55 (9th Cir. 1994). “Determining whether a complaint states a plausible claim for
18 relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial
19 experience and common sense.” *Iqbal*, 129 S. Ct. at 1950.

20 Federal Rule of Civil Procedure 12(f) authorizes a court to strike “any redundant, immaterial,
21 impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). A matter is immaterial if it has no
22 essential or important relationship to the claim for relief pleaded. *See Fantasy, Inc. v. Fogerty*, 984
23 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds*, 510 U.S. 517 (1994). A matter is
24 impertinent if it does not pertain and is not necessary to the issues in question in the case. *See id.*
25 The purposes of a Rule 12(f) motion is to avoid spending time and money litigating spurious issues.
26 *See id.* A district court properly grants a “motion to strike for the purpose of streamlining the
27 resolution of the action and focusing the jury’s attention on the real issues in the case.” *Id.* at 1528
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1 (citing *California ex rel. State Lands Comm'n v. United States*, 512 F. Supp. 36, 38 (N.D.
2 Cal.1981)).

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4 DISCUSSION

5 Sunbeam has moved to strike the following from plaintiffs' complaint pursuant to Rule 12(f)
6 of the Federal Rules of Civil Procedure: the phrase "enduring pain and suffering" in paragraph 18;
7 reference to "Anthony Bookhamer, Charles Thomas Martin Jr. and Carl DiSilvestro as successors in
8 interest of decedent Victoria DiSilvestro" in paragraphs 102, 153, and at page 40, lines 8-9; the
9 phrase "loss of income and earning capacity" in paragraphs 104, 155; the phrase "and plaintiffs
10 suffered the injuries and damages otherwise claimed herein," in paragraphs 126, 177; the phrase
11 "and her successors in interest" in paragraphs 134, 185; the claims for "[l]oss of income and earning
12 capacity" and "[l]oss of income and earning capacity of Victoria DiSilvestro" at page 40, lines 11
13 and 15. Sunbeam has also moved to dismiss counts five and six of the complaint, for breach of
14 implied warranty, as well as plaintiffs' claim for attorneys' fees. In addition, Sunbeam requests that
15 paragraphs 57 through 72; 90(g), (h) and (s); 111; 112; 121; 141(g), (h) and (s); 162; 163; and 172,
16 relating to its alleged non-compliance with the CPSA, 15 U.S.C. § 2051 *et seq.*, be stricken because
17 they allege facts which support a legally untenable theory of liability. Specifically, Sunbeam moves
18 to strike these portions of the complaint on the grounds that there exists no claims that can legally be
19 predicated, directly or indirectly, on the CPSA.

20 In their opposition and at the hearing on the motion, plaintiffs agreed to strike all but the
21 paragraphs relating to Sunbeam's alleged violation of the CPSA. Plaintiffs have also agreed to
22 dismiss their fifth and sixth causes of action as well as their prayer for attorneys' fees, but request
23 that the dismissal be without prejudice. Accordingly, the phrase "enduring pain and suffering" in
24 paragraph 18; reference to "Anthony Bookhamer, Charles Thomas Martin Jr. and Carl DiSilvestro
25 as successors in interest of decedent Victoria DiSilvestro" in paragraphs 102, 153, and at page 40,
26 lines 8-9; the phrase "loss of income and earning capacity in paragraphs 104, 155; the phrase "and
27 plaintiffs suffered the injuries and damages otherwise claimed herein," in paragraphs 126, 177; the
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1 phrase “and her successors in interest” in paragraphs 134, 185; the claims for “[l]oss of income and
2 earning capacity” and “[l]oss of income and earning capacity of Victoria DiSilvestro” at page 40,
3 lines 11 and 15, are stricken from the first amended complaint. In addition, the fifth and sixth causes
4 of action for breach of implied warranty, as well as the claim to attorneys’ fees are dismissed
5 without prejudice.

6 Given plaintiffs’ concessions, all that remains to be resolved regarding Sunbeam’s motion is
7 whether or not to strike plaintiffs’ allegations related to the CPSA. The CPSA mandates that
8 manufacturers and distributors of consumer products disclose certain incidents to the CPSC.
9 Specifically, under 15 U.S.C. section 2064(b), a manufacturer or distributor who obtains information
10 that reasonably supports the conclusion that a product:

11 (1) fails to comply with an applicable consumer product safety rule or with a
12 voluntary consumer product safety standard upon which the Commission has relied
under [18 U.S.C. § 2058];

13 (2) fails to comply with any other rule, regulation, standard, or ban under this
14 chapter or any other Act enforced by the Commission;

15 (3) contains a defect which could create a substantial product hazard described in
subsection (a)(2) of this section; or

16 (4) creates an unreasonable risk of serious injury or death,

17 must immediately provide the CPSC with the information it needs to determine whether remedial
18 action is necessary to protect the public from harm. 15 U.S.C. § 2064(b).

19 Plaintiffs’ complaint and moving papers are less than clear regarding exactly how they seek
20 to wield the CPSA. The allegations in the complaint suggest that plaintiffs are attempting to state a
21 direct claim under section 2064(b) of the CPSA. Plaintiffs allege that although Sunbeam was aware
22 of the hazards associated with its product, Sunbeam “made the corporate decision not to fully report
23 to the United States Consumer Product Safety Commission, pursuant to 15(b) of the Consumer
24 Product Safety Act, 15 U.S.C. § 2064(b) and 16 C.F.R. § 1115” Compl. ¶ 70. Plaintiffs further
25 allege that “[b]ecause Sunbeam did not properly report to the CPSC, plaintiffs lost the benefit of the
26 protection intended to be provided to her and her family by the CPSA.” *Id.* ¶ 71.

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1 Plaintiffs’ moving papers present a different approach to the CPSA. Plaintiffs concede, as
2 they must, that there exists no private right of action under 15 U.S.C. section 2064(b) of the CPSA.
3 See Docket No. 25 (Opp’n) at 9; see *In Re All Terrain Vehicle Litig. v. Hondo Motor Co. Ltd.*, 979
4 F.2d 755, 756 (9th Cir. 1992) (holding that there is no private right of action under section 2064(b)).
5 Instead, plaintiffs assert that their CPSA-related allegations are pled for three purposes: (1) to
6 support a direct action under 15 U.S.C. section 2072(a), which permits private suits by any person
7 injured “by reason of any knowing (including willful) violation of a consumer product safety rule, or
8 any other rule or order issued by the Commission,” 15 U.S.C. § 2072(a); (2) to state a negligence *per*
9 *se* claim predicated upon a violation of 15 U.S.C. section 2064(b) or 2072(a); and (3) to provide
10 factual support for their claim for punitive damages.

11 At the hearing on the motion, plaintiffs again changed their theory of CPSA-related relief.
12 Plaintiffs conceded that, given the allegations in their complaint, they could not bring a direct action
13 under section 2072(a). And plaintiffs also explained (somewhat confusingly) that they were not
14 seeking to state a claim for negligence *per se* predicated on a violation of the CPSA.

15 In light of plaintiffs’ concessions, the court need not resolve the statutory interpretation³ and
16 preemption⁴ questions raised by defendant’s motion. The court notes, however, that even if a direct
17 action under section 2072(a) or a negligence *per se* claim were legally viable, plaintiffs have failed
18 entirely to aver how Sunbeam’s failure to comply with the CPSA was the proximate cause of
19 plaintiffs’ injuries, as would be required for either type of claim. See 15 U.S.C. § 2072(a) (“A]ny
20 person *who shall sustain injury by reason of* any knowing (including willful) violation of a
21 consumer product safety rule, or any other rule or order issued by the Commission may sue any
22 person who knowingly (including willfully) violated any such rule or order. . . .”) (emphasis added);
23 Cal. Evid. Code § 669 (specifying that the second element of a negligence *per se* claim is that “the
24 violation [of a statute, ordinance, or regulation of a public entity] *proximately caused* death or injury
25 to person or property”) (emphasis added); see *Williams v. Hilb, Rogal & Hobbs Ins. Services of Cal.,*
26 *Inc.*, 177 Cal. App. 4th 624 (2009) (Under [Evidence Code section 669], a person’s negligence is
27 presumed if he violated a statute and the violation “proximately caused death or injury to person or
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1 property,” *and* the death or injury resulted from an occurrence “of the nature which the statute ...
2 was designed to prevent,” *and* the person suffering the death or injury was one of the class of
3 persons for whose protection the statute was adopted.) (quoting Cal. Evid. Code § 669) (emphasis in
4 original); *see also Silver v. Nat’l Presto Indus., Inc.*, 884 F.3d 1383 (6th Cir. 1989) (noting, upon
5 review of a motion for summary judgment, the importance of a causal connection between the
6 conduct and the injury; “Even if [defendant] was negligent in failing to report the injuries to the
7 CPSC, there was no evidence that [defendant’s] negligence proximately caused the accident and
8 resultant injuries here.”). Accordingly, to the extent that the complaint could be read to state a direct
9 cause of action under any provision of the CPSA or a negligence *per se* claim predicated on alleged
10 violations of the CPSA, such claims are dismissed.

11 The court declines, with one exception, to strike plaintiffs’ factual allegations regarding
12 Sunbeam’s failure to comply with the CPSA. Such allegations directly relate to plaintiffs’ prayer for
13 punitive damages. Specifically, these allegations support plaintiffs’ claim that Sunbeam’s conduct
14 “was with malice in that it was despicable, with a willful and conscious disregard for the rights and
15 safety of others.” *See* Compl. ¶¶ 90(s); 141(s); 121; *see also Lackner v. North*, 135 Cal. App. 4th
16 1188, 1211 (2006) (finding that following legislative amendment to California definition of “malice”
17 in 1987, conscious disregard of the plaintiff’s rights requires proof that the defendant’s conduct is
18 “despicable” and “willful” and that the amendment represents a “new substantive limitation on
19 punitive damage awards”). Accordingly, Sunbeam’s motion to strike paragraphs 57 through 70; 72;
20 90(g), (h) and (s); 111; 112; 121; 141(g), (h) and (s); 162; 163; and 172 is DENIED. Paragraph 71,
21 however, is stricken in its entirety because the causal nexus that appears to be alleged cannot be a
22 separate basis for liability.

1 CONCLUSION

2 For the foregoing reasons, defendant’s motion to dismiss and strike is GRANTED in part,
3 and DENIED in part.

4 The phrase “enduring pain and suffering” in paragraph 18; reference to “Anthony
5 Bookhamer, Charles Thomas Martin Jr. and Carl DiSilvestro as successors in interest of decedent
6 Victoria DiSilvestro” in paragraphs 102, 153, and at page 40, lines 8-9; the phrase “loss of income
7 and earning capacity in paragraphs 104, 155; the phrase “and plaintiffs suffered the injuries and
8 damages otherwise claimed herein,” in paragraphs 126, 177; the phrase “and her successors in
9 interest” in paragraphs 134, 185; the phrases “[l]oss of income and earning capacity” and “[l]oss of
10 income and earning capacity of Victoria DiSilvestro” at page 40, lines 11 and 15; and the entirety of
11 paragraph 71 shall be stricken.

12 Counts five and six of the complaint for breach of implied warranty, as well as plaintiffs’
13 related claim for attorneys’ fees, are dismissed without prejudice.

14 In addition, to the extent plaintiffs seek to assert either a direct action under 15 U.S.C.
15 section 2064(b) or 2072(a) or a negligence *per se* claim predicated upon defendant’s failure to
16 comply with the CPSA, such claims are dismissed.

17 Defendant’s motion to strike paragraphs 57 through 70; 72; 90(g), (h) and (s); 111; 112; 121;
18 141(g), (h) and (s); 162; 163; and 172 is DENIED.

19 Within thirty (30) days of the date of this order, plaintiffs shall file a second amended
20 complaint in compliance with this order. Defendant shall file an answer within thirty (30) days of
21 the filing of the amended complaint.

22 IT IS SO ORDERED.

25 Dated: August 25, 2010



MARILYN HALL PATEL
United States District Court Judge
Northern District of California

ENDNOTES

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2 1. Sunbeam states upon information and belief that the product is actually a mattress pad rather than
3 an electric blanket. Whether the product was an electric blanket or a mattress pad is a dispute of fact
4 not appropriate for resolution on a motion to dismiss. Moreover, whether the product was a blanket or
5 a mattress pad is irrelevant to the resolution of the instant motion.

6 2. All facts are taken from the complaint, unless otherwise stated. *See* Docket No. 1 (Complaint).

7 3. The “product safety rule, or any other rule or order issued by the Commission” upon which plaintiffs
8 attempt to base their section 2072(a) claim, 16 C.F.R. § 1115, merely provides an interpretation of 15
9 U.S.C. section 2064(b). 16 C.F.R. § 1115.1 (“The purpose of this part 1115 is to set forth the Consumer
10 Product Safety Commission’s interpretation of the reporting requirements imposed on manufacturers
11 . . . by section 15(b) of the Consumer Product Safety Act, as amended (CPSA) (15 U.S.C. 2064(b)).”).
12 While the Ninth Circuit has not yet ruled on the matter, several circuits have held that 16 C.F.R. section
13 1115 is not the type of consumer product safety rule or order issued by the CPSC upon which a plaintiff
14 can establish a private right of action under 15 U.S.C. section 2072(a). *See Drake v. Honeywell, Inc.*,
15 797 F.2d 603, 607-09 (8th Cir. 1986) ; *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936, 940-44 (7th Cir.
16 1988); *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 35 (1st Cir. 1988), *cert. denied*,
17 489 U.S. 1018 (1989); *Kloepfer v. Honda Motor Corp., Ltd.*, 898 F.2d 1452, 1457-58 (10th Cir. 1990).
18 As represented by the holding in *Drake*, these court have held that,

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Because the reporting rules, as interpretive rules, merely present the Commission’s
interpretation of the statute, but are not themselves law, [plaintiff’s] claim that
[defendant] violated 16 C.F.R. Part 1115 when it failed to report really amounts to a
claim that [defendant] violated section 15(b) [later amended as 15 U.S.C. 2064(b)] of the
Act. . . . Congress made clear, however, that no private action may flow from a violation
of the Act.

Drake, 797 F.2d at 609. That said, some court have held that a violation of the Commission’s
interpretations of section 2064(b) can serve as a predicate for an action under section 2072(a). *See, e.g.*,
Brown v. Daisy Mfg. Co., 724 F. Supp. 44, 46 (N.D.N.Y. 1989); *Wilson v. Robertshaw Controls Co.*,
600 F. Supp. 671, 675 (N.D. Ind.1985).

4. Sunbeam argues vociferously that the CPSA preempts any negligence *per se* claim predicated upon
a violation of the CPSA.