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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAJENNIFER K LOVETT,
Plaintiff,

v.

OMNI HOTELS MANAGEMENT
CORPORATION,
Defendant.Case No. [14-cv-02844-RS](#)**ORDER GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO AMEND
THE FIRST AMENDED COMPLAINT****I. INTRODUCTION**

Plaintiff Jennifer K. Lovett has filed tort claims for damages against Defendants Omni Hotels Management Corporation and Case-Dunlap Enterprises LLC. Lovett's claims arise from her stay at Omni's San Francisco hotel, where she was a guest. While staying at the hotel, Lovett took advantage of one of the benefits of Omni's Select Guest Loyalty Program: the Get Fit Kit, a package of fitness equipment for in-room use. Among the items in the Get Fit Kit was a blue Xering resistance band. Not included were instructions or warnings about how to use the Xering. Lovett misused the resistance band and tragically lost her eye as a result. She now seeks to amend her complaint to add strict-liability and negligence claims based on the theory that Omni failed to provide instructions for using the band or to warn her of the risks of misuse. This matter is suitable for disposition without oral argument pursuant to Local Rule 7-1(b).

Omni opposes the Lovett's request, arguing that the amendment is futile because the two additional claims are not viable under California tort law, that Lovett unduly delayed seeking leave to amend the complaint, and that the amendments would prejudice Omni because it has already filed a motion for summary judgment on the claims in the First Amended Complaint (FAC). Because the averments in Lovett's proposed Second Amended Complaint (SAC) state

1 claims upon which relief can be granted, and so the amendment is not futile and Omni has not
2 demonstrated that it will be prejudiced by the proposed amendments, Lovett’s motion for leave to
3 amend is granted. In addition, Omni’s motion for summary judgment is denied without prejudice
4 as moot. Omni may refile its motion for summary judgment if it wishes and address the two
5 additional claims in Lovett’s complaint.

6 **II. FACTS AND PROCEDURAL HISTORY**

7 According to the SAC,¹ Omni developed a program to encourage customer loyalty by
8 introducing the Select Guest Loyalty Program, which gave program members the option to
9 exercise in their rooms by using the Get Fit Kit. SAC ¶ 7. Omni contracted with Case-Dunlap
10 Enterprises LLC (d/b/a Tic Toc the Imagination Company) to assemble, produce, manufacture,
11 distribute, and supply Omni with the Get Fit Kit and all its component parts. Id. ¶ 8. Lovett avers
12 that Omni and Tic Toc placed the Get Fit Kit, which included the Xering resistance band provided
13 by SPRI Products, Inc., into the stream of commerce. Id. ¶¶ 8-9. SPRI created a set of
14 instructions and warnings about how to use the Xering properly, but Omni and Tic Toc did not
15 include those instructions in the Get Fit Kit. Id. ¶¶ 9-10.

16 Lovett was a member of Omni’s Select Guest Loyalty Program when she stayed in Omni’s
17 San Francisco hotel. Before arriving in San Francisco, Lovett completed an online questionnaire
18 to indicate her preferences. One option available to Lovett as a Select Guest was the Get Fit Kit,
19 which included some exercise equipment for in-room use. Included in the Get Fit Kit was a blue
20 resistance band—the Xering. Lovett avers that the Get Fit Kit did not include instructions about
21 how to use the Xering or warnings that users should not pull or stretch the band with their arms.
22 Unaware of this limitation, Lovett put the band on her feet and pulled it toward her in a rowing
23 motion. The band snapped off of Lovett’s feet and struck her in the left eye. Lovett sought
24 medical treatment that resulted in the removal of her left eye. Lovett avers that misuse of the
25 Xering was reasonably foreseeable, and therefore Omni and Tic Toc should have included
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28 ¹ To determine whether Lovett’s additional claims are viable, the facts in her complaint must be
taken as true and construed in her favor. See *Nordyke v. King*, 644 F.3d 776, 788 n.12 (9th Cir.
2011), reversed on other grounds *on reh’g en banc*, 681 F.3d 1041 (9th Cir. 2012).

1 instructions for how to use the Xering in the Get Fit Kit, and therefore the Xering was defective
2 and Omni and Tic Toc are strictly liable and/or negligent for failing to warn or instruct users.

3 On May 5, 2014, Lovett filed her complaint in San Francisco Superior Court, erroneously
4 naming Omni Hotels & Resorts as a defendant. Shortly thereafter, on May 19, 2014, Lovett filed
5 the FAC to add Omni Hotel Management Corporation as a defendant. Omni removed Lovett's
6 claims to federal court and filed a cross-complaint against SPRI. Discovery commenced, and the
7 parties began taking depositions and serving and answering interrogatories. The parties disagreed
8 about the scope of the protective agreement, which limited the number of documents Omni was
9 willing to produce to Lovett. On July 2, 2015, Omni filed a motion for summary judgment based
10 on Lovett's FAC. In the meantime, the parties apparently had difficulty scheduling depositions,
11 but Lovett was able to depose one of Omni's corporate directors in mid-August. Lovett filed this
12 motion for leave to amend the FAC in late August.

13 III. LEGAL STANDARD

14 When a party seeks leave to amend a pleading, "[t]he court should freely give leave when
15 justice so requires." Fed. R. Civ. P. 15(a)(2). Denial of a motion for leave to amend a pleading is
16 proper only when "there is strong evidence of undue delay, bad faith or dilatory motive on the part
17 of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue
18 prejudice to the opposing party by virtue of allowance of the amendment, or futility of
19 amendment, etc." *Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117
20 (9th Cir. 2013) (internal quotation marks and alterations omitted). "[P]rejudice to the opposing
21 party carries the greatest weight," d. (internal quotation marks omitted), and is the "touchstone of
22 the inquiry under [R]ule 15(a)," *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th
23 Cir. 2003) (internal quotation marks omitted). A proposed amendment is futile if the facts as
24 pleaded in the SAC fail to state a claim upon which relief can be granted under Federal Rule of
25 Civil Procedure 12(b)(6). *Nordyke v. King*, 644 F.3d 776, 788 n.12 (9th Cir. 2011), *rev'd on other*
26 *grounds on reh'g en banc*, 681 F.3d 1041 (9th Cir. 2012).

27 IV. DISCUSSION

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1 **A. Prejudice and Undue Delay**

2 Omni complains that granting Lovett leave to amend her complaint would subject it to
3 unfair prejudice and unwarranted delay as it has already filed its motion for summary judgment.
4 This is not sufficient to establish prejudice. Although this case has been pending for fifteen
5 months, the parties have only recently begun discovery and have yet to set a trial date. Omni’s
6 primary concern is that its pending motion for summary judgment will be moot if Lovett receives
7 permission to file the SAC, thereby precluding it from addressing all of Lovett’s claims in a single
8 hearing on a motion for summary judgment. Since Lovett filed her motion for leave to amend,
9 however, the parties have agreed to continue the hearing on the motion for leave to amend and
10 motion for summary judgment to December 17, 2015. A single hearing being preferable and the
11 better practice, Omni has not identified any reason why it cannot refile its motion for summary
12 judgment addressing Lovett’s new claims in time for a hearing on December 17.

13 Moreover, Omni was apparently aware of the possible arguments for a strict-liability
14 theory because it referenced strict liability in its pending motion for summary judgment. In
15 addition, Omni’s arguments against Lovett’s proposed failure-to-warn negligence claim cuts
16 against its claims of prejudice. Omni claims that Lovett’s proposed new claims fail “for the same
17 reasons set out in the summary judgment motion,” Opp’n to Mot. for Leave to Amend at 14,
18 which suggests that Omni should have little difficulty filing a new, updated motion for summary
19 judgment to address Lovett’s new claims in short order. Omni simply has not demonstrated that it
20 will be unfairly prejudiced if Lovett files her SAC.

21 **B. Futility**

22 1. The Strict-Liability Claim

23 Omni advances two reasons in support of its argument that Lovett’s strict-liability claim is
24 futile. First, Omni contends that it is not subject to strict-liability for the products, such as the
25 Xering, it offers to guests because the California Supreme Court has held that hotels are not
26 “strictly liable on the basis of products liability for injuries to a guest caused by a defect in the
27 premises,” Peterson v. Superior Court, 210 Cal. 4th 1185, 1210 (1995). In Peterson, the court
28 rejected the plaintiff’s contention that hotels or landlords are strictly liable for bathtubs that are too

1 slippery. Id. 1199. To reach this conclusion, the court relied on the premise that a hotel “guest
2 cannot reasonably expect that the owner [of the hotel] will correct any defects of which the owner
3 is unaware and that cannot be discerned by a reasonable inspection.” Id. at 1206.

4 Peterson does not establish that Lovett cannot succeed on her strict-liability claim.
5 Unlike the plaintiff in Peterson, Lovett has not alleged that defects in the premises, like a bathtub,
6 shower, ceiling lamp, or carpet, which would have existed prior to the hotelier’s acquisition of the
7 building. Instead, Lovett avers that Omni was part of the chain of distribution that placed the
8 defective Xering into the stream of commerce and had the ability to identify defects in the process
9 before doing so. Compl. ¶ 29. The California Supreme Court expressly did not address “whether
10 different considerations would apply in the event the landlord or hotel owner had participated in
11 the construction of the building.” Id. at 1200. Instead, the court noted that if attached in that
12 circumstance, the hotel owner would be strictly liable owing to its “status as a builder who
13 engaged in the business of constructing (i.e. manufacturing) rental properties.” Id. at 1200. Lovett
14 has averred sufficient facts to establish that Omni distributed the defective Xering to its guests;
15 that it had an ongoing business relationship with the manufacturer of the Xering; and that Omni
16 had the opportunity to inspect the Xering, identify potential risks, and encourage SPRI and Tic
17 Toc to manufacture a safer ring. Each of these facts distinguishes Lovett’s case from Peterson.

18 Strict products liability potentially may be appropriate in the circumstances of Lovett’s
19 case. Under California tort law, “a retailer of manufactured goods is also strictly liable.” Id. at
20 1198. “Retailors like manufacturers are engaged in the business of distributing goods to the
21 public” and “are an integral part of the overall producing and marketing enterprise that should bear
22 the cost of injuries resulting from defective products.” Id. (internal quotation marks omitted).
23 “[W]hether to apply strict liability in a new setting is largely determined by the policies underlying
24 the doctrine.” *O’Neil v. Crane Co.*, 53 Cal. 4th 335, 362 (2012). Only those entities “in the chain
25 of distribution of the defective product” who are “responsible for placing an injury-producing
26 product into the stream of commerce” have a duty to warn users of potential risks. Id. at 354.
27 Whether the defendant and the manufacturer have a “continuing business relationship” with one
28 another such that the defendant can “exert pressure on other manufacturers to make their products

1 safe, whether the defendant derives economic benefit from the sale of the products, and whether
2 the defendant can share in the cost of making the product safe are three factors courts have
3 considered to determine whether strict liability applies. *Id.* at 363 (internal quotation marks
4 omitted); *Shields v. Hennessy Indus., Inc.*, 205 Cal. App. 4th 782, 793 (2012), as modified (May 3,
5 2012). Courts also consider whether the defendant “can be expected to possess expert knowledge
6 concerning the product being produced or sold.” *Peterson*, 10 Cal. 4th at 1209.

7 Lovett has averred facts that establish Omni had an ongoing business relationship with the
8 manufacturer of the Xering and the Get Fit Kit. Omni commissioned the Get Fit Kit, which
9 included the Xering from Tic Toc and SPRI, assembled the kits, and distributed the kits to hotel
10 guests. *Id.* ¶¶ 8-9. These alleged facts support the reasonable inference that Omni had an ongoing
11 business relationship with the manufacturer of the Xering, enabling Omni to “exert pressure upon
12 the manufacturer to make the product safe” because Omni could always contract with a different
13 manufacturer of a safer resistance band. *Id.* at 1200. Omni had the opportunity to inspect and test
14 the Xering to identify any safety concerns before deciding to include it in the Get Fit Kit. In
15 addition, Lovett has averred that Omni derived economic benefit by distributing the Get Fit Kit to
16 the members of its loyalty program in the form of a consistent customer base. *Compl.* ¶ 7.
17 Although Lovett’s proposed SAC does not aver that Omni possessed superior knowledge about
18 the risks and benefits of resistance-band designs, she has asserted sufficient facts, which if proven,
19 establish that Omni was a distributor of the Get Fit Kit and the Xering.

20 Second, Omni contends that Lovett’s attempt to add a strict-products-liability claim is
21 futile because Omni is a service provider, not a distributor or retailer, and therefore strict liability
22 is inapplicable to the products used in furtherance of the service. “The doctrine of strict liability in
23 tort applies to producing and marketing enterprises responsible for placing products in the stream
24 of commerce.” *Pierson v. Sharp Mem’l Hosp., Inc.*, 216 Cal. App. 3d 340, 344 (1989). Strict
25 liability attaches to “transactions whose primary objective is obtaining services,” but not “where
26 the transaction’s service aspect predominates and any product sale is merely incidental to the
27 provision of the service.” *Id.*

28 Recently, the California Courts of Appeal have addressed whether gyms are strictly liable

1 for defective exercise equipment. See Grebing v. 24 Hour Fitness USA, Inc., 234 Cal. App. 4th
2 631 (2015); Ontiveros v. 24 Hour Fitness Corp., 169 Cal. App. 4th 424 (2008). In both cases,
3 however, the plaintiffs had signed service agreements, which established that primary objective of
4 the membership was to provide and to receive fitness services. Grebing, 234 Cal. App. 4th at
5 429-30; Ontiveros, 169 Cal. App. 4th at 434. The SAC does not include any averments to
6 establish whether Lovett and Omni entered into a service agreement or, if they did, whether the
7 predominant purpose of the agreement was to provide a service. There is therefore nothing in the
8 SAC that suggests her strict-liability claim is futile. Of course, Omni may revisit the legal issues
9 with the benefit of an evidentiary record if it wishes.

10 2. The Negligence Claim

11 Omni opposes the addition of a new negligence claim on the basis that it is duplicative of
12 the comparable claim in the FAC and futile for the reasons expressed in its motions for summary
13 judgment. Lovett's negligence claims are not, in fact, identical; she offers two distinct negligence
14 theories of liability. Omni, if it so elects, may challenge the viability of Lovett's negligence
15 claims in a renewed motion for summary judgment.

16 **V. CONCLUSION**

17 Omni has not demonstrated that it will be prejudiced if Lovett's motion for leave to amend
18 the FAC is granted or that the claims she seeks to add are futile. Accordingly, Lovett's motion for
19 leave to amend is granted. Because the FAC is no longer operative, Omni's motion for summary
20 judgment is denied without prejudice as moot. There remains plenty of time for Omni to answer
21 the SAC and to renew its motion for summary judgment and address all of the claims in the SAC.

22
23 **IT IS SO ORDERED.**

24 Dated: October 8, 2015

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26 
27 RICHARD SEEBORG
28 United States District Judge