UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ABC DISTRIBUTING, INC., et al.,

Plaintiffs,

v.

LIVING ESSENTIALS LLC, et al.,

Defendants.

Case No. 15-cv-02064 NC

ORDER DENYING MOTION FOR CLASS CERTIFICATION; DENYING MOTION TO STRIKE EXPERT REPORT

Re: Dkt. Nos. 151, 156

In this price discrimination case under the Robinson-Patman Act, plaintiffs allege that defendants sell 5-Hour Energy to wholesalers for different prices, to the disadvantage of small wholesalers. Plaintiffs seek to certify two classes of small wholesalers, defined by their competition with the large wholesaler, Costco. In response, defendants move to strike plaintiffs' class certification expert report.

The Court finds that Dr. McDuff's expert report is admissible at this stage, but rejects its recommendations and conclusions. Thus, the Court DENIES defendants' motion to strike the expert report. The Court also DENIES the motion for class certification because individual claims predominate over class-wide claims in a Robinson-Patman case. In addition, the classes are impermissibly vague because it is defined by proximity to Costco, a party neither in this case nor accused of any wrongdoing.

//

I. BACKGROUND

Named plaintiffs ABC Distributing, Inc., Elite Wholesale, Inc., and Tonic Wholesale, Inc. are small wholesale food and sundry good distribution companies in California that supply products to local, independent businesses, such as grocery stores, convenience stories, and gas stations. SAC ¶ 7. Defendants Living Essentials, LLC and Innovation Ventures, LLC are Michigan companies, with their principal place of business in Michigan. Defendants manufacture 5-Hour Energy, a popular dietary supplement. SAC ¶¶ 18, 32. For its sales to California-based wholesalers, defendants use a broker, Paramount, to negotiate sales. SAC ¶ 40.

5-Hour Energy is sold as a liquid 1.93-ounce bottle, and all bottles that defendants sell are of like grade and quality. SAC ¶¶ 32, 34. Defendants sell 5-Hour Energy to wholesalers in a package of twelve bottles, and master cases of eighteen twelve-packs. SAC ¶ 36. From 2011 to 2015, plaintiffs ordered 5-Hour Energy from defendants through Paramount. SAC ¶ 43. In 2011, plaintiffs Elite and ABC noticed that other wholesalers were consistently undercutting their prices for the sale of twelve-packs of 5-Hour Energy to retailers. SAC ¶ 45. Elice and ABC requested that Paramount provide a lower price, and Paramount agreed to give them an "everyday" discount of seven cents per bottle. SAC ¶ 49.

On June 30, 2015, ABC executives learned that Costco was selling 5-Hour Energy to other wholesalers for less than the price that ABC was purchasing 5-Hour Energy from defendants. SAC ¶ 65. ABC's longtime customer, El Cajon Cash n Carry, purchased 5-Hour Energy at such a favorable price from Costco that it offered to resell 5-Hour Energy to ABC. SAC ¶ 67.

Plaintiffs sue defendants for unlawful price discrimination under the Robinson-Patman Act and California state law. The Court denied a motion to dismiss in this case, finding that plaintiffs sufficiently alleged an antitrust injury. Dkt. No. 67. After limited discovery, plaintiffs now move for class certification. Dkt. No. 151. In support of their motion, plaintiffs present the expert report and testimony of Dr. DeForest McDuff. In

opposition, defendants present the expert report and testimony of Dr. Darrell Williams.

All parties have consented to the jurisdiction of a magistrate judge. Dkt. Nos. 14, 15.

II. DAUBERT MOTION

Federal Rule of Evidence 702 provides that an expert witness may testify in the form of an opinion if "the testimony is the product of reliable principles and methods." "The duty falls squarely upon the district court to 'act as a gatekeeper to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards.'" *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011)). Rule 702 "assign[s] to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrel Dow Pharm.*, 509 U.S. 579, 597 (1993).

The Court's duty is to evaluate the soundness of the expert's methodology, not the correctness of the expert's conclusions. *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010). "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Id.* The Court has broad discretion and flexibility in assessing an expert's reliability. *Estate of Barbarin*, 740 F.3d at 463.

Here, defendants move to strike plaintiffs' expert, Dr. McDuff, on the basis that his report and testimony fail to establish both actual competition between proposed class members and antitrust injury. Dkt. No. 156. Defendants argue, "Dr. McDuff fails to make the necessary showings that would allow a single plaintiff under the Robinson-Patman Act to prove its claims at trial, let alone an entire class of wholesalers in California to prove their claims with common proof, on a class-wide basis." Dkt. No. 156 at 6.

The Court finds that these concerns are aimed at Dr. McDuff's conclusions. Typically, the Court acts as a gatekeeper to excise methodologically unsound opinions because otherwise, there is a risk the jury could over rely on an unfounded opinion. *See*

Daubert, 509 U.S. at 595 ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it"). Here, the motion is before the Court, and the parties have provided the Court with the expert reports and deposition testimony from both sides. As the Court is capable of reviewing the materials presented, identifying discrepancies, and evaluating the rigor of the expert's analysis, the Court finds that the evidence is permissible at this stage. The motion to strike is DENIED.

III. CLASS CERTIFICATION

Plaintiffs claim defendants violated (1) the Robinson-Patman Act, § 13(a); (2) the Robinson-Patman Act, § 13(d); (3) California Business and Professions Code § 17045; (4) California Business and Professions Code § 17200; and (5) benefitted from unjust enrichment.

Plaintiffs seek to certify two classes. First, under Rule 23(b)(3), plaintiffs seek certification of "All California wholesale businesses that purchased for re-sale, during the applicable limitations period, 5-Hour Energy through Living Essentials' broker Paramount Ventures, Inc., where such wholesaler received Living Essentials' $0.07/bottle 'Everyday Discount,' and is located in a zip code to which Costco Business Centers offered delivery." Plaintiffs refer to this as the CBC Competitor Class. Dr. McDuff estimates that there are 82 members in this class.

Second, plaintiffs seek to certify the Costco Competitor Class under Rule 23(b)(2) defined as: "All California wholesale businesses that purchased for re-sale, during the applicable limitations period, 5-Hour Energy through Living Essentials' broker Paramount Ventures, Inc., where such wholesaler received Living Essentials' $0.07/bottle 'Everyday Discount.'" Dr. McDuff estimates that there are 114 members of this class.

A. Legal Standard

Class certification requires that: (1) the class be so numerous that joinder of all members individually is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representative must be typical of the claims or defenses of the class; and (4) the person representing the class must be able to

fairly and adequately protect the interests of all members of the class. Fed. R. Civ. P. 23(a); *Staton v. Boeing*, 327 F.3d 938, 953 (9th Cir. 2003). Additionally, the requirements of at least one subsection of Rule 23(b) must be satisfied.

"Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Instead, a plaintiff seeking class certification must demonstrate that there are sufficient facts to support his contention that class certification is appropriate. *Id.* "[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 150 (1982).

B. Rule 23 Analysis

For both proposed classes, the Court finds that the first requirement under Rule 23(a) is satisfied. Each proposed class has enough proposed members that the joinder is impracticable.

The second element requires questions of law or fact common to the class. "In *Wal-Mart v. Dukes*, the Supreme Court announced that this provision requires plaintiffs to demonstrate that the class members have suffered the same injury not merely violations of the same provision of law." *Parsons v. Ryan*, 754 F.3d 657, 674-75 (9th Cir. 2014) (citing *Dukes*, 564 U.S. at 349). Here, plaintiffs' proposed classes both suffer from the same fatal flaw— a Robinson-Patman case is not well suited for class certification because its analysis is "singularly individualistic." *See Mad Rhino, Inc. v. Best Buy Co.*, No. 03-cv-5604 GPS, 2008 WL 8760854, at *4 (C.D. Cal. Jan. 14, 2008). In order to evaluate whether there are common questions of law or fact, the Court briefly summarizes the applicable law.

As to a secondary-line Robinson-Patman claim, plaintiffs must prove that (1) the relevant 5-Hour Energy sales were made in interstate commerce; (2) 5-Hour Energy sold to favored and disfavored customers is of "like grade and quality"; (3) defendants "discriminated in price between" plaintiffs and other purchasers of 5-Hour Energy; and (4) "the effect of such discrimination may be . . . to injure, destroy, or prevent competition" to

the advantage of the favored purchaser. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006); 15 U.S.C. § 13(a).

The third element requires plaintiffs to prove that defendants discriminated in price between favored and disfavored purchasers of 5-Hour Energy. *Volvo*, 546 U.S. at 176. "A hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser." *Id.* at 177.

Plaintiffs' state law price discrimination claim requires proof that (1) there is a "secret" allowance of an "unearned" discount; (2) injury to a competitor; and (3) the allowance must tend to destroy competition. Cal. Bus. & Prof. Code § 17045; *Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc.*, 20 Cal. Rptr. 2d 62, 67 (2012).

As applied to class certification, the Court finds Judge Schiavelli's analysis in *Mad Rhino, Inc. v. Best Buy Co.* to be insightful and persuasive. 2008 WL 8760854. Judge Schiavelli noted that in order for a plaintiff to prove actual injury and damages in a Robinson-Patman claim, "the plaintiff must show that there was actual competition between the favored and disfavored customers and that defendants' discriminatory practices likely had a harmful effect on the competition. By its very nature, such proof is singularly individualistic." 2008 WL 8760854, at *4. (citations omitted).

The undersigned agrees with this analysis and finds that class certification is impractical for two reasons. First, the economic proof required to demonstrate that a class is typical and ascertainable in a price discrimination class creates a class definition that is impermissibly vague and confusing. Plaintiffs must define a class that is both disfavored and competes with the same favored purchaser(s). This requires not one but two relationships to exist: (1) a disfavored relationship between plaintiffs and defendants, and (2) a competitive relationship between plaintiffs and a single or multiple third-party favored competitors. The classes proposed by plaintiffs attempt to do all of these things, but the result is a class that apparently only Dr. McDuff and possibly Living Essentials are capable of identifying. From the proposed class definitions, it would not be readily apparent to a plaintiff if it qualified for the class.

Plaintiffs try to ameliorate this necessarily vague class definition by pointing to internal documents from Living Essentials, suggesting that Living Essentials treated the two categories of wholesalers differently. Perhaps if plaintiffs could point to an internal pricing document where defendants clearly distinguished between two categories of wholesale customers, the class definition could take on a clearer shape. However, plaintiffs' evidence of internal emails confirming that Costco was receiving a price advantage is not the smoking gun that can cure the above-identified deficiency.

Second, as noted by Judge Schiavelli, the Robinson-Patman Act and plaintiffs' state law claim require particularized showings of injury, discrimination, and damages. Here, plaintiffs will need to demonstrate that each class member received a lower price than Costco during the class period, and that they in fact competed with Costco for customers. *Volvo*, 546 U.S. at 177. Dr. McDuff's damages theory for class certification is that if a putative class member operates within a zip code to which a Costco Business Center delivers, then the class member and Costco are in competition. Even assuming the economic and methodological soundness of Dr. McDuff's opinion, the Court is concerned that the zip code theory is an oversimplification of the applicable law and burden of proof in a Robinson-Patman case. *See Bel Air Markets v. Foremost Dairies, Inc.*, 55 F.R.D. 538, 541 (N.D. Cal. 1972) ("The question whether a disfavored Foremost purchaser competed with a Lucky store will have to be individually proved since none of the disfavored customers can be assumed to have competed with a Lucky store"). Because this case requires individualized proof of harm, class certification is inappropriate.

Likewise, as the state law claims of unlawful competition under California Business and Professions Code § 17200 and unjust enrichment are dependent on the price discrimination claims, the Court finds class certification of the state law claims similarly inappropriate.

IV. CONCLUSION

The Court DENIES the defendants' motion to strike the expert testimony of Dr. McDuff at this stage. Considering the arguments and evidence presented, the Court finds

that a price discrimination case such as this one is an ill-fit for class certification. Ultimately, there are not common questions of law and fact, as price discrimination cases require an individualized showing of competition and injury. Plaintiffs' motion to certify a class is DENIED.

The parties have a pending discovery dispute which will be heard on April 26, 2017, at 1:00 p.m. At that time, the Court will hold a case management conference to discuss any changes to the case schedule and the scope of future discovery.

IT IS SO ORDERED.

Dated: April 7, 2017

NATHANAEL M. COUSINS
United States Magistrate Judge

United States District Court
Northern District of California