

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

**MAY MILLER and
TIMOTHY MILLER**

PLAINTIFFS

vs.

CIVIL ACTION NO. 3:14-CV-443-CRS

**COTY, INC. and
COTY US, LLC**

DEFENDANTS

MEMORANDUM OPINION AND ORDER

I. Introduction

This matter is before the Court on Plaintiffs' proffer of consumer complaints in compliance with the Court's December 12, 2018 Order (DN 98). DN 116. The Defendants responded to Plaintiffs' proffer of consumer complaints (DN 120), to which Plaintiffs replied (DN 125). Following an extensive review, the Court will allow Plaintiffs to offer some consumer complaints at trial on the grounds that the complaints are "substantially similar" to the injury in this case, while excluding others.

II. Background

On December 12, 2018, this Court ruled on a motion in limine of Defendants Coty, Inc. and Coty, US, LLC (collectively, "Coty") to exclude evidence concerning prior consumer complaints. In its December 12, 2018 Memorandum Opinion, the Court detailed the Sixth Circuit standard for evaluating the admissibility of consumer complaints:

As a threshold matter, prior accidents must be 'substantially similar' to the one at issue before they will be admitted into evidence. *Koloda v. General Motors Parts Div., General Motors Corp.*, 716 F.2d 373, 376 (6th Cir. 1983). Substantial similarity means that the accidents must have occurred under similar circumstances or share the same cause. See *Brooks v. Chrysler Corp.*, 786 F.2d 1191, 1195 (D.C. Cir.), cert denied, 479 U.S. 853, 107 S.Ct. 185, 93 L.Ed.2d 119 (1986) ("[e]vidence of prior instances is admissible on the issues of the existence of a design defect and

a defendant's knowledge of that defect only if a plaintiff shows that the incidents 'occurred under circumstances substantially similar to those at issue in the case at bar'") (quoting *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981)) ... The Plaintiff has the burden of proving the substantial similarity between prior accidents and his own. *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1109 (8th Cir. 1988).

Rye v. Black & Decker Mfg. Co., 889 F.2d 100, 102 (6th Cir. 1989).

In this case, May Miller sustained an injury while using a "Sally Hansen Extra Strength All-Over Body Wax Kit." DN 68, at 1. Specifically, the injury occurred while Timothy Miller was waxing May's pubic area. *Id.* at 2. The injury occurred while Timothy was waxing a section of hair on May's left labia majora. Timothy explained that he applied the wax to May's left labia majora, held the skin taut, and pulled the strip. DN 53, Ex. 1, 16–18. As he pulled the strip, the skin on May's labia majora tore and May started bleeding. *Id.* at 18; DN 53, Ex. 2, 40. Immediately following the injury, May experienced bruising and swelling around the injury site. DN 53, Ex. 2, 42.

Based on the "substantially similar" standard, the Court excluded consumer complaints a) involving an injury with no reference to the consumer's bikini, vaginal, pubic, or genital area; and b) regarding the Sally Hansen Lavender Wax Kit. DN 98. The Court also held that, without more context, it could not rule on the remaining consumer complaints. Accordingly, the Court ordered Plaintiffs to proffer any of the remaining consumer complaints if they wished to introduce the complaints at trial. However, in keeping with the "substantially similar" standard, the Court provided parameters for the remaining consumer complaints. Thus, the Court's December 12, 2018 Order permitted Plaintiffs to proffer prior complaints from (1) the Sally Hansen Extra Strength All-Over Body Wax Kit, which (2) involved an injury (3) associated with the removal of the product from the consumer's bikini, vaginal, pubic, or genital area. *Id.*

III. Discussion

Plaintiffs' proffer contains individual adverse event reports, in addition to a spreadsheet containing thousands of complaints wherein Plaintiffs highlighted the complaints they wish to admit at trial. Coty has briefed their objections utilizing a table. The Court finds that method is also appropriate to organize its analysis of the complaints. The adverse event reports contain the full names of the complainants, while the spreadsheet contains only first names. The Court will use the complainants' initials instead of the full name to identify the complaint, but will use the first name where only the first name is given.

A. Consumer Complaints from the Lavender Spa Wax Kit

Plaintiffs acknowledge the Court's Order precluding introduction of consumer complaints concerning the Lavender Wax Kit. DN 116. Plaintiffs state that "Coty insufficiently segregates consumer complaints based on wax types," and Plaintiffs "specifically omitted Lavender Wax complaints which were unambiguous based on consumer reference." *Id.* (emphasis added). Purportedly this means Plaintiffs proffered complaints that were ambiguous regarding which product the consumer used.

The proffered complaints contain three different Item/UPC codes: 1) "Sally Hansen Spa Wax Hair Removal Kit for Body;" 2) "SH Brazilian Extra Strength Wax Hair Removal Kit for Body;" and 3) "SH Brazilian Extra Strength All-Over Body Wax Kit." Compare for example DN 116-1, at PageID# 1168 and DN 116-1, at PageID# 1165 and DN 116-1, at PageID# 1192. Coty objects to admission of any complaint containing the "Sally Hansen Spa Wax Hair Removal Kit for Body" Item/UPC code, asserting that those complaints are from the Lavender Wax Kit and are in violation of the Court's Order. DN 120, at 2 (citing Exhibit 3). In Plaintiffs' Reply, Plaintiffs

“[u]pon further evaluation, and based upon the representations made by the Defendants in their Response” withdraw the ambiguously branded “Lavender Wax” complaints. DN 125, at 1–2.

The following complaints were withdrawn¹ by Plaintiffs as being from the Lavender Wax Kit (i.e., a different product) and will be excluded at trial:

<u>DN 116-1, PageID#</u>	<u>Bates ID</u>	<u>Complainant</u>
1168–69	Coty000306	C.I.
1170–74	Coty000301	J.H.
1175–77	Coty000298	N.Z.
1178–80	Coty000285	S.B.
1181–82	Coty000286	M.H.
1183–84	Coty000273	F.I.
1185–86	Coty000277	M.W.
1187–88	Coty000279	R.K.
1194	Coty000182	Faryn
1195	Coty000183	Maroulia Jane

¹ In Plaintiffs’ Reply, Plaintiffs “reserve the right to revive these consumer complaints at trial pending testimony regarding Defendants’ record keeping practices.” DN 125, at 1.

1195	Coty000183	Nancy
1196	Coty000184	Mary
1196	Coty000184	Christina
1197	Coty000185	Melanie
1197	Coty000185	Lorene
1198	Coty000186	Dorothy
1200	Coty000188	Rose
1201	Coty000189	Colleen
1201	Coty000189	Triscia
1202	Coty000190	Susan
1202	Coty000190	Mary Jane
1203	Coty000191	Name Illegible
1204	Coty000192	Colleen
1208	Coty000196	Michelly
1208	Coty000196	Deb

1209	Coty000197	Stephanie
1210	Coty000198	Darcy
1212	Coty000200	Nazarene
1212	Coty000200	Joy
1212	Coty000200	Stacy

B. Consumer Complaints Referencing Unrelated Injuries

The injury sustained by May was a tear to her labia. Thus, the Court finds any complaint that merely references bruising, irritated skin, rashes, swelling, or blistering without reference to the skin being torn, lacerated, or ripped is not substantially similar to the injury in this case. Further, complaints that the wax was stuck on the vaginal area are not substantially similar to May’s injury. The Court will exclude the following consumer complaints as not being substantially similar:

<u>DN 116-1, PageID#</u>	<u>Bates ID</u>	<u>Complainant</u>	<u>Description</u>
1190	Unavailable	Heather	Irritated vaginal area
1192	Unavailable	Stefanie	Irritated bikini area
1192	Unavailable	Jo Ann	Bruising on the bikini line
1218	Coty002	Krista	Bruised pelvic area

1219	Coty003	Melissa	Bruised bikini area
1220	Coty004	Tracie	Irritation and rash on bikini line
1221	Coty005	Sandra	Irritation to bikini area
1231	Coty015	Marlene	Red and purple marks on bikini area
1232	Coty016	Krista	Bruising and blistering on bikini area
1233	Coty017	Megan	Rash on bikini area
1239	Coty023	Laura	Bruising and oozing skin on bikini area
1252	Coty036	Liz	Inflammation and pain to bikini area
1255	Coty039	Nita	Bruising to bikini area
1255	Coty039	Megan	Wax stuck on vagina
1261	Coty045	Mayura	Bruising and irritation to bikini line
1262	Coty046	Kathryn	Bruising to bikini line
1262	Coty046	Lyn	Black and purple welts to bikini area
1268	Coty052	Kathleen	Red mark on bikini line
1274	Coty058	Evan ²	Burns on genitalia

² Coty objects to this complaint on that grounds that it concerns an unrelated injury: “burns of what appears to be male genitalia, and thus not vaginal area...” DN 122 at 1. Upon review of the complaint, the Court determines that

1276	Coty060	Marta	Irritation to bikini line
1278	Coty062	Sherry	Bruising to bikini area
1279	Coty063	Kristie	Red and irritated bikini area
1285	Coty069	Patty	Bruising to bikini area
1293	Coty077	Maury	Burning, peeling, and swollen vagina
1298	Coty082	Maureen	Bruising to bikini area
1299	Coty083	Michal	Marks on bikini area
1304	Coty088	Heather	Bruising to bikini line
1305	Coty089	Stefanie	Irritated bikini area
1306	Coty090	Jo Ann	Bruising to bikini line
1310	Coty094	Heather	Irritated vaginal area

C. Consumer Complaints with Insufficient Amount of Information

The Court finds that the following consumer complaints, despite referencing bleeding, scarring, or peeling of skin, lack sufficient information to determine substantial similarity. Accordingly, Plaintiffs have failed to satisfy their burden of proving substantial similarity. See

the complaint involved an injury to female genitalia: “I have a patient in the ER with first degree burns on her inner thigh and outside genitalia.” DN 116-1, PageID# 1274 (emphasis added). Nevertheless, the complaint will be excluded as referencing an unrelated injury.

Rye, 889 F.2d at 102. The Court will exclude the following consumer complaints as not being substantially similar:

<u>DN 116-1, PageID#</u>	<u>Bates ID</u>	<u>Complainant</u>	<u>Description</u>
1125-28	Coty000225	B.G.	“I went to use this wax on my bikini line and I am now bleeding.” DN 116-1, PageID# 1125. “On my bikini area, after the wax strip was removed, blood immediately rose to the surface of my skin and a bunch of red spots appeared.” Id. at 1128.
1143-44	Coty000230	M.L.	“Consumer used the product and she says the product has caused scarring on her arms, and bikini area.” Id. at 1143. ³
1145-47	Coty000255	K.N.	“I have permanent scarring on my skin as a result of applying your product...” Id. at 1145.
1193	Unavailable	Talia	“I have some areas on my bikini area where the top layer of skin has been removed.” Id. at 1193.
1228	Coty012	Rachel	“As I went to take off the strip on one arm it did not take the hair off but it took my skin off instead. I also tried it on my bikini line area thinking it would grab longer hair, and then also on one strip of my leg, all with the same results. The next morning the places I tried to wax all developed into a major rash...” Id. at 1228.
1234	Coty018	Tracy	“She applied the wax to her bikini area and when she removed the product, some of her skin was removed.” Id. at 1234.

³ The Court notes that Defendants did not object to this complaint in Defendants’ Response to Plaintiffs’ proffer. The Court nevertheless finds that this complaint contains insufficient information to determine substantial similarity and will exclude it accordingly.

1241	Coty025	Marina	“The wax peeled off layers of my skin all down my thighs, resulting in red welts that are not subsiding and large, dark bruises along my bikini line.” Id. at 1241.
1245	Coty029	Marie	“Consumer used the product on her bikini area and it removed skin instead of hair...” Id. at 1245.
1274	Coty058	Bonnie	“I used Sally Hansen All-Over Body Wax Kit on my bikini area and it caused extreme skin excoriation with bleeding and redness. It took 5 days of applying Neosporin and dressings to alleviate the excoriation and pain.” Id. at 1274
1274	Coty058	Spring	“I used the wax on my pubic area and two days after using it my skin is bruised. The area looks pink and purple. I have scab like sores.” Id. at 1274.
1277	Coty061	Krystle	“I followed your instructions to the t, and trimmed the bikini area 2 days prior..., and not only did it not get all the hair, but I am completely BRUISED and even bleeding in some areas.” Id. at 1277 (emphasis in original).
1286	Coty070	Insanity1972	“Tried in bikini area and it caused painful blood blisters and terrible bruising.” Id. at 1286.
1288	Coty072	Paula	“Now my bikini line is black, red, purple, all colors, with blisters and blood...” Id. at 1288.
1290	Coty074	Kamie	“...I noticed that my bikini area and the back of my knees were blistered and bleeding.” Id. at 1290.
1298	Coty082	Joanne	“I used this product about two months ago; while removing the wax it caused bleeding on legs in bikini area.”

D. Substantially Similar Consumer Complaints

The Court finds that the following consumer complaints are substantially similar to the injury in this case because the complaints 1) reference torn, ripped, or lacerated skin in the bikini, vaginal, or genital area and 2) are from the use of the Sally Hansen Extra Strength All-Over Body Wax Kit. Accordingly, the Court will allow Plaintiffs to offer the following consumer complaints at trial:

<u>DN 116-1, PageID#</u>	<u>Bates ID</u>	<u>Complainant</u>	<u>Description</u>
1129-32	Coty000251	C.G.	Ripped skin; one inch cut on labia
1133-36	Coty000247	A.S.	Skin tear on bikini area
1137-42	Coty000232	B.H.	Skin removal from clitoris; received fourteen stiches
1148-50	Coty000265	R.W.	Ripped skin on bikini area; bleeding
1151-52	Coty000268	K.M	Cut on bikini area; bleeding
1153-57	Coty000258	S.D.	Torn labia
1158-61	Unavailable	May Miller (Plaintiff)	Tearing of the vaginal area; sixteen stiches
1162-64	Coty000270	C.N.	Ripped skin on bikini area
1165-67	Coty000222	A.M.	Four stiches on labia
1222	Coty006	Patricia	Torn skin on bikini area

E. Duplicates

Coty objects to a number of the proffered consumer complaints on the grounds that the complaints are duplicate complaints (complaints by the same individual and involving the same incident). Where the original was not excluded supra, the Court agrees with Coty that the duplicate should be excluded to avoid jury confusion. Where the original was excluded supra, the duplicate will likewise be excluded. These complaints are addressed as follows:

<u>DN 116-1, PageID#</u>	<u>Bates ID</u>	<u>Complainant</u>	<u>Ruling</u>
1220	Coty 004	Aarin	Excluded as duplicate of DN 116-1, at 1165–67.
1225	Coty009	Keiko	Excluded as duplicate of DN 116-1, at 1151–52.
1226	Coty010	Marian	Duplicate of DN 116-1, at 1143–44. The original was excluded under subsection C for not being substantially similar. The duplicate will likewise be excluded.
1232	Coty016	Krista	Coty objects on the grounds that this complaint is a duplicate of DN 116-1, at 1218. The Court, however, determines that these complaints are not the same because the incidents are described differently, and the consumer locations are different. Regardless, the Court excluded this “duplicate” complaint in subsection B for not being substantially similar.
1238	Coty022	Brittany	Excluded as duplicate of DN 116-1, at 1137–42.
1260	Coty044	Amanda	Excluded as duplicate of DN 116-1, at 1133–36.

1264	Coty048	Rina	Excluded as duplicate of DN 116-1, at 1148–50.
1281	Coty065	Chao	Excluded as duplicate of DN 116-1, at 1129–32.
1291	Coty075	May Miller (Plaintiff)	Excluded as duplicate DN 116-1, at 1158–61.
1299	Coty083	Sara	Excluded as duplicate of DN 116-1, at 1153–57.
1304	Coty088	Heather	Coty objects on the grounds that this complaint is a duplicate of DN 116-1, at 1190. The Court, however, determines that these complaints are not the same because the incidents are described differently, and were submitted on different dates. Regardless, the Court excluded this “duplicate” complaint in subsection B for not being substantially similar.
1305–06	Coty089	Jo Ann	Duplicate of DN 116-1, at 1192. The original was excluded under subsection B for not being substantially similar. The duplicate will likewise be excluded.
1307	Coty091	Talia	Duplicate of DN 116-1, at 1193. The original was excluded under subsection B for not being substantially similar. The duplicate will likewise be excluded.

IV. Order

On December 12, 2018, the Court granted in part and denied in part Defendants’ motion in limine to exclude consumer complaints. DN 98. The Court ordered Plaintiffs to proffer the consumer complaints Plaintiffs wished to introduce at trial. *Id.* For the reasons set forth above, and the Court being otherwise sufficiently advised, the Court further **ORDERS**:

1) Subject to a ruling on foundation at trial, the Plaintiffs may offer the following complaints:

<u>DN 116-1, PageID#</u>	<u>Bates ID</u>	<u>Complainant</u>	<u>Description</u>
1129-32	Coty000251	C.G.	Ripped skin; one inch cut on labia
1133-36	Coty000247	A.S.	Skin tear on bikini area
1137-42	Coty000232	B.H.	Skin removal from clitoris; received fourteen stiches
1148-50	Coty000265	R.W.	Ripped skin on bikini area; bleeding
1151-52	Coty000268	K.M	Cut on bikini area; bleeding
1153-57	Coty000258	S.D.	Torn labia
1158-61	Unavailable	May Miller (Plaintiff)	Tearing of the vaginal area; sixteen stiches
1162-64	Coty000270	C.N.	Ripped skin on bikini area
1165-67	Coty000222	A.M.	Four stitches on labia
1222	Coty006	Patricia	Torn skin on bikini area

2) The remaining consumer complaints are excluded.

IT IS SO ORDERED.

February 20, 2019

**Charles R. Simpson III, Senior Judge
United States District Court**