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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF ORANGE

COORDINATION PROCEEDING SPECIAL TITLE (CRC 3.550(b)) **IN RE COMPLETE® CASES**	Case No. JCCP 4521 Assigned to the Hon. David C. Velasquez, Dept. CX-101, (714) 568-4802
LEAD CASE: MICHAEL CONNOLLY v. ADVANCED MEDICAL OPTICS, INC.	OCSC Case No. 07 CC 01296
INSTANT CASE: NICOLE LAZAR, et al. v. ADVANCED MEDICAL OPTICS, INC.	~~[PROPOSED]~~ **ORDER GRANTING MOTION FOR CLASS CERTIFICATION**

On Tuesday, November 10, 2009, the Court heard Plaintiffs' Motion for Class Certification. James A. Quadra and Ronald T. Labriola appeared for Plaintiffs Nicole Lazar and Steven Cameron Smith on behalf of themselves and all those similarly situated. David Vendler and Ben D. Whitwell appeared for Defendants. The Court, having considered the papers on file in this matter and the arguments of counsel, and good cause appearing, GRANTS Plaintiffs' Motion for Class Certification.

IT IS ORDERED that the Court adopts the tentative ruling attached hereto and certifies a class as follows:

> "All persons residing in California who purchased Complete MoisturePlus Multipurpose Solution in California and did not resell it during the period from June 8, 2003 through the present. Excluded from the Class are the Defendants and any Judge presiding over this matter and the members of his or her immediate family. Also excluded from this Class are the legal representatives, heirs, successors and attorneys of any excluded person or entity, and any person acting on behalf of any excluded person or entity."

IT IS FURTHER ORDERED that Steven Cameron Smith and Nicole Lazar are appointed as class representatives.

IT IS FURTHER ORDERED that the following law firms are appointed as class counsel: Moore Labriola, LLP; Moscone, Emblidge & Quadra, LLP; Robinson, Calcagnie & Robinson, Inc.; and Lieff, Cabraser, Heimann & Bernstein, LLP. Ronald Labriola of Moore Labriola, LLP and James Quadra of Moscone, Emblidge & Quadra, LLP are appointed as lead counsel.

The Court will issue a ruling as to the parties' objections to evidence separately.

DATED: 11-30, 2009

David C. Velasquez

Judge David Velasquez

Approved as to form:

November 18, 2009

Mark Hellenkamp
MORRIS POLICH & PURDY, LLP
Counsel for Defendants

IN RE COMPLETE© CASES

Plaintiffs' motion to certify the class:

The motion to certify the class is granted.

The court hereby certifies the class defined as:

"All persons residing in California who purchased Complete Moisture Plus Multipurpose Solution in California and did not resell it during the period from June 8, 2003 through the present. Excluded from the Class are the Defendants and any Judge presiding over this matter and the members of his or her immediate family. Also excluded from this Class are the legal representatives, heirs, successors and attorneys of any excluded person or entity, and any person acting on behalf of any excluded person or entity."

I. Discussion

In certifying a class, the court does not look to the merits of the action. The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious. (Citation omitted.)" (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) The court looks to the allegations in the complaint, and considers whether there is evidence available to support the theories alleged. (Carabini v. Superior Court (1994) 26 Cal.App.4th 239, 245.) "A motion to certify is not a trial on the merits, nor does it function as a motion for summary judgment. 'The court may consider the merits of the claim only to determine whether there is a *realistic chance* for recovery.' (Weil & Brown, Civ. Pro. Before Trial, sec. 14:100)." (Id., emphasis in original.) A class action is appropriate when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." (*CCP* § 382.) "In order to maintain a class action, certain prerequisites must be met, specifically, 'the existence of an ascertainable class and a well-defined community of interest among the class members. [Citation.] The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (Citation omitted.)'" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808.) "The burden of such a showing falls on [the moving party] (citation omitted) and the ultimate determination of whether the class action is appropriate turns on the existence and extent of common questions of law and fact. . . [E]ach member [of the purported class] must not be required to individually litigate numerous and substantial questions to determine his right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the

judicial process and to the litigants." (*City of San Jose v. Superior Court* (1974)12 Cal.3d 447, 460.) The moving party has the burden of persuasion to establish "by a preponderance of the evidence that the class action proceeding is superior to alternate means for a fair and efficient adjudication of the litigation." (*Sav-on Drug Stores, Inc., supra,* at 332.)

II. Common interest

In the present case, the court finds the question framed by the complaint is one of common interest to each member of the putative class. The complaint alleges in part the defendants sold its Complete Moisture Plus ("CMP") in packaging, and through advertising, which represented the product was "an effective contact lens disinfectant [¶] . . . claiming that it 'destroys harmful microorganisms on the surface of the lens.'" (Complaint, ¶¶ 1 and 2.) Plaintiffs further allege, "[h]owever, the Product was ineffective as a disinfectant" in that it failed to kill several types of microorganisms, including the Acanthamoeba." Plaintiffs allege they, and all members of the putative class, "paid their hard-earned money for what the Defendants advertised as an effective disinfectant." Instead of an effective contact lens disinfectant, the plaintiffs allege they and the class received a solution the Defendants knew was an ineffective disinfectant against several serious microorganisms. (Id., ¶4.) With respect to the first and second causes of action (UCL and FAL), plaintiffs on behalf of the class seek, among other relief, disgorgement of all money received by the defendants from the sale of the product, and compensatory damages in connection the CLRA claim, negligent and intentional misrepresentation, and breach of express and implied warranties. The court finds there is a sufficient common question affecting all members of the putative class whether each member received what each bargained for - a product which touted itself as a disinfect – when in reality (as alleged by the plaintiffs) the product killed only some but not all harmful microorganisms.

III. Numerosity

The court finds the size of the putative class is so large that it is impracticable to bring them all before the court.

IV. Ascertainable class

Sufficient characteristics are provided in the proposed class definition that its members and the defendants can easily ascertain and select which individuals are members of the class for the purpose of presenting evidence at trial of the liability of the defendants and the relief sought, and to devise a reasonable means to distribute any monetary relief after the trial if the plaintiffs are successful. The ability of the parties to specifically identify the individual members of the class is not a requirement of whether the class is ascertainable. In a class action, it is enough that the members of the class can identify

themselves as subjects of the class definition to permit them to step forward and either participate as a class member or opt out. The proposed class definition is sufficiently clear to bind each member of the class to any settlement or judgment.

Over breath of the definition

The defendants assert the class definition does not define an ascertainable class because, in part, the definition does not take into consideration the number of consumers who participated in the defendants' voluntary reimbursement program. This argument lacks merit.

This court acknowledges the plaintiffs should not enjoy a double-recovery of any monetary relief they seek. There is no doubt the defendants are entitled to an offset of the amount it paid to reimburse consumers pursuant to the voluntary reimbursement program. However, the fact a small portion of the putative class (0.2%) may have been reimbursed or partially reimbursed should not affect the ability of the parties to discern an ascertainable class, or affect the manageability of the trial, or the manageability of the claims process if the class is successful at trial. This court finds the issue of offsets to the defendants can be handled in several ways. One of such ways is to credit the defendants with the amount of any prior reimbursement to a particular class member at the end of the case through the claims procedure.

According to the declaration of defendants' witness John Smith, and defendants' exhibit U, the defendants may have records containing the identity and addresses of consumers who contacted the defendants requesting a claim form and who in turn were mailed a form by the defendants. It also appears that the defendants have the means to count the number of claims which were reimbursed. (See Ghazaryan v. Diva Limosine (2008) 169 Cal.App.4th 1524, 1532 and 1533, fn. 8 [class members were identifiable by the company through computerized records].) Thus, assuming a judgment in favor of the class, persons who were already reimbursed through the voluntary reimbursement program could be easily identified at the time they submit a claim against any class judgment and their recovery reduced by the amount of offset to which the defendants are entitled.

Defendants also argue that the instant class is not ascertainable for the reason "Plaintiffs' claims are not plausible because the CMP label claims are true and not materially likely to mislead a reasonable consumer." The court finds only for purposes of this motion that the plaintiffs have presented sufficient evidence to carry their burden to prove they have a realistic chance for recovery on the theory the alleged representations on the packaging and in advertisements were false. The plaintiffs have proffered a plausible theory that the representations are false or likely to deceive, i.e., a product description in the marketing materials and packaging that it "disinfects" is not

true and may be misleading to the average consumer if the product kills some but not all harmful microorganisms, infection by one of which causes an extreme medical condition. For purposes of the certification determination, plaintiffs' plausible and realistic theory is sufficient.

This court is not persuaded by the rationale explained in the Wendling case, cited by the defendants. Firstly, the opinion is not binding upon this court. The court in New Jersey decided that case in the context of New Jersey law, not set forth by the instant defendants for the court to compare to the provisions of California's UCL or FAL.

Secondly, the facts in the Wendling case are distinguishable from the allegations in the present matter. This court accepts the proposition in the Wendling case that the phrase "prevents and controls parasites" in that product's description does not suggest that the product will be effective against "all" parasites – only the "several" parasites listed on the package. In Wendling, the plaintiff admitted that the packaging material contained a list of parasites the product purported to kill. The alleged organism which harmed Wendling's horse was not among those listed on the package. Thus, the New Jersey court understandably found that Wendling could not reasonably infer from the product representations that the product killed "all" parasites.

The court finds the phrase "prevents and controls parasites" in the Wendling case is not the equivalent of the terms "disinfectant" or "disinfects" as alleged by the instant plaintiffs. One can reasonably argue in the Wendling case that the phrase "prevents and controls" suggests the product maintains parasites at an acceptable level but does not entirely eliminate parasites. However, in the instant case, the court finds the words "disinfectant" or "disinfects" can reasonably be interpreted to mean, among other things, that CMP elliminates "all" harmful microorganisms. The terms "disinfectant" or "disinfects" can mean "to cleanse of infection; destroy disease germs in." (Webster's College Dictionary.) It is plausible, therefore, that the terms "disinfectant" or "disinfects" suggest an item is made completely free of contamination if it has been disinfected by the product.

There is no requirement in the law that all members of the class must prove their entitlement to damages before the class may be certified. Although the defendants cite the cases of Daar and Blue Chip Stamps in support of the argument, defendants do not make reference to any particular passage from either of those cases.

V. Community of interest

A. Predominant common questions of law or fact

"In order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes

of action alleged." (*Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, citing *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 810-811.)

The issue of whether the product packaging and advertising plan was deceptive or false, and the issue of damages to the entire class will likely predominate over issues specific to the individual class members. The plaintiffs have presented a theory of liability by common proof that does not require evidence peculiar to each individual class member. Except for the named-plaintiffs, under the UCL and FAL, there is no requirement to show each absent class member actually relied on the alleged deceptive representations. Rather, a product is deceptive if members of the consumer group are likely to be deceived by the packaging and advertisements. With many mass-produced products, representations on the product's packaging are likely to be standard or substantially standard. Representations in advertising campaigns are likely to be uniform and the placement of advertising ubiquitous throughout the course of the advertising campaign. (See In re Tobacco II.)

With respect to the CLRA, and the fraud and misrepresentation claims, reliance by class members upon the alleged misrepresentations can also be proved also by common proof. (See Vasquez v. Superior Court (1971) 4 Cal.3d 800, 809 [individual testimony of the absent class members is not required to prove actual reliance where there is evidence the alleged misrepresentations were conveyed through standard statements].) "If plaintiffs can prove their allegations at the trial, an inference that the representations were made to *each* class member would arise, in which case it would be unnecessary to elicit the testimony of each [class member] as to whether the representations were in fact made to him." (Vasquez, 4 Cal.3d, at 812, fn. 7, emphasis added. See also *Carabini v. Superior Court*, 26 Cal.App.4th, *supra*, at 244 [class action proper where fraudulent communications based on essentially standard scripts repeated to all prospective customers].)

Individual proof of damages is unnecessary. Damages need not be proved with any degree of precision. Especially in class actions, proof of damage tends to be approximate. Some members of the class may be overcompensated, while other class members are undercompensated. In the instant case, the amount of restitution could plausibly be determined from the defendants' records and based upon the number of units sold and the average retail price paid by the consumers. Class members may have to be satisfied sharing in a pro rata distribution of any judgment rather than compensation based upon the actual number of units of product purchased by the particular class member.

B. Typicality

The claims of the named plaintiffs are typical of the class. Even if subject to impeachment, the plaintiffs have submitted sufficient evidence they have suffered the

same type of loss or injury suffered by the absent class members and in substantially the same way in purchasing CMP.

C. Adequacy

The court finds that plaintiffs are adequate class representatives. A party is generally thought to be an adequate class representative if (1) the representative party is interested enough to be a forceful advocate and his chosen attorney is qualified, experienced and generally able to conduct the litigation, and (2) the representative party has personal interests in the litigation which are compatible with and not antagonistic to those whom he would represent. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462 472.) The former requirement is generally satisfied where the claims of the representative are typical of the class. The latter requirement is not satisfied if there is a conflict of interest between the representative and the rest of the class even if the plaintiff is otherwise qualified. (*Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253. 1265.) The class representative must be "informed and independent." (Id.) The instant class representatives satisfy those requirements.

Counsel are adequate if they are experienced and qualified to adequately represent the interest of the class. Here, there is no reasonable doubt that the plaintiffs' attorneys are highly qualified and experienced to represent the class.

VI. Superiority

The court finds that proceeding with this action as a class action is superior to alternative means of litigation and trial. The court and the parties will benefit from a single trial involving the aggregate damages to the class rather than the burden of litigating perhaps thousands of individual claims seeking to recover relatively small amounts of restitution or damage.

VII. Standing under the first cause of action (UCL and FAL)

The plaintiffs have presented prima facie evidence they suffered actual injury and parted with money as a result of the misrepresentations by alleging and presenting evidence they, in reliance upon the alleged misrepresentations on packaging and in advertisements, purchased CMP, where the product allegedly does not rid contact lens of all harmful microorganisms as allegedly advertised.

VIII. Claims against Allergan

Class certification will not be denied by this court on grounds "Allergan was not involved in the sale or marketing of CMP." Whether Allergan is "involved" in the alleged wrongdoing in this case is a merits issue which this court cannot address in this motion

as long as the plaintiffs have articulate a plausible theory of liability against Allergan - which they have.

IX. Other action pending

The court will not stay these proceedings in favor of the federal Degelman action. The instant case was filed almost 2 years ago. The court finds a stay at this late time would be unduly prejudicial to the state class. The defendants have waited too long to seek a stay from either his court or the District Court, or to attempt removal to the federal court if federal jurisdiction exists.

Electronic Proof of Service

JCCP Case No. 4521 – In Re Complete® Cases

STATE OF CALIFORNIA } ss.:
COUNTY OF ORANGE }

JCCP Case No. 4521 – In Re Complete® Cases

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to this action. My business address is 620 Newport Center Drive, Suite 1100, Newport Beach, California 92660.

On November 19, 2009, pursuant to the Court's Electronic Case Management Order dated March 12, 2008, I instituted service of the foregoing document(s) described as:

[Proposed] Order Granting Motion for Class Certification

on the interested submitting an electronic version of the document(s) via file transfer protocol ("FTP") to CaseHomePage through the upload feature at www.casehomepage.com.

Service will be deemed effective as provided for in the Electronic Case Management Order.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 19, 2009, at Newport Beach, California.

Lee Maxwell
(Type or print name)

(Signature)