UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No.	CV 09-7420 DSF (DTBx)	Date	12/15/11
Title	Laurie M. Montanez, et al. v. Gerber Childrenswear, LLC, et al.		

Present: The Honorable	DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order GRANTING Motion for Class Certification (Docket No. 213)

I. BACKGROUND

Plaintiffs are consumers who purchased infant apparel from Defendant Gerber Childrenswear, LLC. They claim that Defendant sold millions of items of clothing with labels containing excessive amounts of chemical irritants without disclosing the presence of such irritants. These actions allegedly violated the California Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumers Legal Remedies Act ("CLRA"), constituted fraud under California Civil Code § 1709, and breached implied warranties. Plaintiffs now seek to certify a class of:

> All residents of California who purchased Gerber apparel products containing tagless labels on garments manufactured by (1) Jay Jay Mills (India) with "M/S Gokul" labels from October 1, 2005 to August 2008; (2) Jay Jay Mills (India) with redesigned "phthalate free" Gokul labels from August 2008 through September 30, 2009; and (3) Kitex from October 1, 2005 through May 20, 2009.

(Notice of Motion.)

II. LEGAL STANDARD

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Before certifying a class, district courts must determine whether the requirements of Rule 23 of the Federal Rules of Civil Procedure are met. The party seeking class certification bears the burden of establishing that these requirements are met. Rodriguez v. Hayes, 591 F.3d 1105, 1122 (9th Cir. 2010). At this stage of the proceedings, courts must accept the factual allegations in the complaint as true. Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975).

The party seeking class certification must first satisfy the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation. Rodriguez, 591 F.3d at 1122. In addition to the requirements of Rule 23(a), the class must satisfy one of the three provisions of Rule 23(b). Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996).

III. DISCUSSION

A. Standing of Absent Class Members

Defendant argues that the class cannot be certified because many of the absent class members lack standing because they have not suffered an injury-in-fact. Even assuming that the standing of absent class members must be established,[1] this argument is foreclosed by the recent case of Stearns v. Ticketmaster Corp., 655 F.3d 1013, (9th Cir. 2011). Addressing arguments similar to those made here, the Ninth Circuit found that the fact that "[e]ach alleged class member was relieved of money in the transaction" was enough to provide standing to bring a UCL claim. Id. at 1021. No other injury was required. Id.

Here, as in Stearns, the Plaintiffs have been "relieved of money" by Defendant when they purchased a product containing undisclosed skin irritants. Defendant argues that class members whose children did not actually suffer skin irritation were not injured because they received full value from the garments even though those garments (allegedly) contained troublesome levels of skin irritants. In Defendant's view, what the class members did not know about the garments did not hurt them, as they were able to use the garments just as if the garments had no irritants.

But the unnamed class members have sufficient standing because they spent money

[1] Cf. Stearns, 655 F.3d at 1021 (suggesting that standing requirement applies only to named plaintiffs).

on a product that was (allegedly) less valuable than it was represented to be by Defendant. A child's garment that is disclosed to have potentially problematic levels of skin irritants is surely worth less, a priori, than a garment without skin irritants. Indeed, a jury would likely find that no reasonable parents would purchase a garment that posed any credible risk to their child's health or safety. Defendant relies on Birdsong v. Apple, Inc., 590 F.3d 955 (9th Cir. 2009), but that case is distinguishable. In Birdsong, the plaintiffs complained about the potential for the defendant's product to cause consumers harm – a potential that was actually disclosed by the defendant. See id. at 960-62. The harm would only occur if the consumer used the product in an unsafe fashion. Here, Defendant's product is claimed to be defective regardless of how the consumer uses the product and the defect was not disclosed. While the children of some consumers did not suffer actual physical injury, that only means that damages may vary, not that their parents have not been harmed through the purchase of a defective product.

B. Rule 23(a)

1. Numerosity

Under Rule 23, the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." Gen. Tel. Co. of Nw., Inc v. EEOC, 446 U.S. 318, 330 (1980). But, "a conclusory allegation that a class is so numerous that joinder is impracticable is not sufficient to meet the requirements of Rule 23(a)(1)." Valentino v. Howlett, 528 F.2d 975, 978 (7th Cir. 1976).

The class is sufficiently numerous to support certification. Defendant argues that because it only received a small number of complaints about the garments, the class is not very large. But the class is defined in terms of California residents that bought certain items from Defendant over a several year time period. Defendant does not deny that this is likely to include thousands of consumers. Ascertainability of the class members is not a concern. Defendant admits that if a prospective class member has a garment made by Defendant, class membership can be determined. It is true that there are probably class members who no longer have the garment they purchased, but for those that do, their membership in the class is ascertainable by objective means.

2. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." "The commonality requirement serves chiefly two purposes: (1) ensuring that absentee

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members are fairly and adequately represented; and (2) ensuring practical and efficient case management." Rodriguez, 591 F.3d at 1122 (internal quotation marks omitted). Courts look for "shared legal issues or a common core of facts." Id. It is unnecessary for both to be present. Id. Where diverging facts underlie the individual claims of class members, courts consider whether the issues "at the heart" of those claims are common such that the class vehicle would "facilitate development of a uniform framework for analyzing" each class member's situation. Id. at 1123. The class claims "must depend on a common contention," which "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011). The standard for finding commonality is "permissive[]" and "less rigorous than the companion requirements of Rule 23(b)(3)." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

Defendant raises several issues under the rubric of "commonality." The Court is not entirely convinced that some of the issues relate to the commonality requirement,[2] but will discuss the issues here given that the parties did. As a basic matter, it is clear that there are a large number of issues that can be resolved on common proof as to all of the class members. Defendant's representations (or lack thereof) regarding chemicals in its garments and the actual chemical contents of the garments are entirely based on Defendant's actions, are common to all class members, and are central to the disposition of this case. This is not a case like Dukes where the purported commonality was a lack of common control over a business practice. See 131 S.Ct. 2541, 2554-55 (2011) ("The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal–Mart's 'policy' of *allowing* discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.").

Defendant claims that there are individualized reliance issues that prevent certification. This is incorrect. Under the California UCL and FAL, reliance is not an element of the claim. Stearns, 655 F.3d at 1020. And under the other claims, to the degree that reliance is relevant, it can be proven by the materiality of the representation or omission. See id. at 1022. Materiality is an objective inquiry and is generally subject to classwide proof. Id. (discussing CLRA claim). Defendant also argues that causation

[2] Most of the issues really involve whether common issues predominate over individual ones – part of the Rule 23(b)(3) inquiry.

issues are not subject to common proof. This argument is also unpersuasive because this case revolves around Defendant's omissions and whether Defendant's products contained levels of undisclosed chemical irritants that would be material to an objective consumer. The cause of actual skin irritation suffered by any individual child is not a central aspect of Plaintiffs' claims, although it could be relevant to individual damages or other issues.

3. Typicality

The representative parties' claims or defenses must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of other class members; they need not be substantially identical." Hanlon, 150 F.3d at 1020. "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (internal quotation marks omitted). The inquiry is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Hanon, 976 F.2d at 508 (internal quotation marks omitted). Where the claims of a representative are subject to unique defenses, they may fail the typicality requirement. Id. However, such defenses should defeat typicality "only where they 'threaten to become the focus of the litigation.'" Rodriguez, 591 F.3d at 1124 (quoting Hanon, 976 F.2d at 508). In practice, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge," and both serve to determine whether certifying the class would be "economical" and whether absent class members' interests would be protected. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

Defendant argues that the proposed class representatives cannot represent the class because they are not members of the class or of all of the "subclasses."[3] The Court agrees that Plaintiff Laurie (Montanez) Avila cannot represent the class. She does not appear to be a member of the class as currently defined because she does not appear to have purchased a garment from the manufacturers listed in the class definition.[4] Plaintiff Jehan Hughes purchased garments manufactured by Kitex in India during the relevant period, which would make her part of the class. However, Defendant argues that she cannot

[3] Defendant presents this as an adequacy of representation issue, but the Court sees it as more relevant to typicality.

[4] Plaintiffs do not dispute that Avila did not buy a garment made in one of the specified factories.

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represent the class members who purchased garments manufactured by Jay Jay Mills (India). The Court finds that she is also typical of other class members who purchased garments from Jay Jay Mills (India) because the same or similar course of conduct by Defendant is the basis of the class claims regardless of the particular factory where the individual product was manufactured. The Jay Jay Mills (India) class members and Hughes have "the same or similar injury," based on conduct not unique to Hughes, and have "been injured by the same course of conduct." See Hanon, 976 F.2d at 508. In this respect, consumers who bought products manufactured by Jay Jay Mills (India) and Kitex are not really members of different "subclasses." There is not a substantial difference between the treatment of Jay Jay Mills (India) class members and Kitex class members. The point of naming specific manufacturers is not to suggest a distinction between Jay Jay Mills (India) and Kitex, but between Defendant's customers that bought products from those factories and all of the other customers who are not members of the class at all.

The named Plaintiffs are typical of the absent class members in all other meaningful respects. This case is about omissions of relevant safety information related to Defendant's products. The named Plaintiffs received (or failed to receive) the same representations that any other class member would have. There is no reason to believe that the named Plaintiffs would have paid any more or less attention to representations made by Defendant. While there is evidence that the named Plaintiffs suffered more damages than many other class members because the named Plaintiffs' children allegedly had a physical reaction caused by Defendant's products, differences in damages do not prevent class certification. Blackie, 524 F.2d at 905.

4. Adequacy of Representation

Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." In evaluating the adequacy of representation, courts must resolve two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Hanlon, 150 F.3d at 1020.

The named Plaintiffs and their proposed class counsel facially appear to be well qualified to litigate this case and have served the putative class well up to this point. Defendant argues that both the named Plaintiffs and proposed class counsel are inadequate representatives of the class because they have also alleged that Defendant's competitor, Carter's Inc., sold defective products with excessive skin irritants. This does

not impinge on adequacy of representation (or typicality) because both Defendant and Carter's could have sold defective products. Given that Defendant and Carter's appear to be two of the largest children's clothing producers, it would not be at all unusual for a class member to own garments from both producers.

C. Rule 23(b)(3)

Rule 23(b)(3) certification is "[f]ramed for situations in which 'class-action treatment is not as clearly called for'" as under Rule 23(b)(1) and (b)(2), "but where class suit may nevertheless be convenient and desirable." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) (internal quotation marks omitted). Two requirements must be met: (1) common questions of law or fact must "predominate over any questions affecting only individual members," and (2) a class action must be the "superior" vehicle for litigating the controversy. Fed. R. Civ. P. 23(b)(3). The predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a)(2), Amchem, 521 U.S. at 624, and judicial economy is a "central concern." Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 944 (9th Cir. 2009).

> Courts look to the following factors:
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

However, "[t]he amount of damages is invariably an individual question and does not defeat class action treatment." Blackie, 524 F.2d at 905.

1. Predominance

Defendant makes only the slightest argument relating to predominance under Rule 23(b)(3). In light of the discussion above, the Court finds that common issues substantially predominate over individual ones. The main issue that may require individual determination is damages under the non-UCL claims because it is likely that many of the class members got full use of the purchased garments without experiencing skin irritation and, therefore, were arguably damaged only in a nominal way. However, differences in damages will not prevent class certification. Further, the inclusion of the

UCL claim may mean that the class members can recover restitution without individualized showings of injury other than the purchase of the garment. See Stearns, 655 F.3d at 1020-21.

2. Superiority

Defendant argues that class treatment of the claims is not a superior method of adjudication because Defendant has offered replacement garments to consumers that complain. But there is no evidence that Defendant publicized any recall or that any meaningful number of the proposed class members are aware of the defects in their garments or the ability to receive a replacement. Such a "silent recall" is not superior to a class action because it gives no assurance that harmed class members will be aware of the problem or the offered remedy.

IV. CONCLUSION

The motion to certify the class is GRANTED with Plaintiff Jehan Hughes only as class representative.

IT IS SO ORDERED.