IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

AZALEA SOLO, on behalf of herself and all others similarly situated in California, and MEGHAN EVELAND, on behalf of herself and all others similarly situated in Pennsylvania, Plaintiffs, v. BAUSCH & LOMB INC., Defendant.	MDL No. 1785 C/A No. 2:06-MN-77777-DCN C/A No. 2:06-CV-02716-DCN **ORDER AND OPINION**

This matter is currently before the court on plaintiffs' motion for class certification. Plaintiffs allege they have suffered economic losses as a result of alleged defects in ReNu with MoistureLoc ("MoistureLoc"), a contact lens solution manufactured by defendant. To that end, they have asserted various causes of action under California and Pennsylvania law individually and on behalf of a purported class of MoistureLoc purchasers. The named plaintiffs seek to represent two classes comprised of all California and Pennsylvania consumers who purchased MoistureLoc between September 1, 2004 and April 10, 2006, and who discarded any unused quantity after defendant advised consumers to do so. For the reasons set forth below, the court denies plaintiffs' motion.

I. BACKGROUND

Defendant manufactured MoistureLoc, a multipurpose contact lens solution that

was formulated to clean and disinfect contact lenses. The Food and Drug Administration (FDA) approved MoistureLoc in May 2004, and defendant released the solution for sale to the American public in September 2004. MoistureLoc was released for sale in Asia, including Hong Kong, Singapore, and Malaysia, shortly thereafter.

Plaintiffs allege MoistureLoc was defective because it failed to prevent the growth of fusarium keratitis. Fusarium keratitis is a fungus that causes a serious infection to the cornea, sometimes resulting in significant damage to the eye. Treatment for fusarium keratitis requires a prompt administration of antifungal medication and/or surgery to remove the fungus. Without proper treatment, fusarium keratitis can cause severe vision loss or blindness, sometimes requiring corneal transplants.

Health officials in Asia were the first to link MoistureLoc with fusarium keratitis. In April 2006, Singapore's Ministry of Health issued a press release stating that seventy-five cases of fusarium keratitis had been reported in contact lens wearers between November 1, 2004, and April 12, 2006. This was a marked increase over the January 1, 2004 to October 31, 2004 period, during which only two cases of fusarium keratitis were reported. The press release linked the outbreak to MoistureLoc and encouraged consumers to stop using the solution. Officials in Hong Kong subsequently requested that defendant remove MoistureLoc from stores.

As of March 2006, the Centers for Disease Control (CDC) had noticed an increased number of fusarium keratitis cases in the United States. A CDC study fully investigated thirty cases, and found that twenty-six of twenty-eight patients who wore soft contact lenses also used MoistureLoc. The CDC and FDA issued a joint press

release on April 10, 2006, noting that wearers of soft contact lenses who used MoistureLoc were at an increased risk of being infected with fusarium keratitis. The same day, defendant announced that it was ceasing shipments of MoistureLoc to retailers in the United States. Three days later, on April 13, 2006, defendant asked retailers to stop selling MoistureLoc to consumers and recommended that consumers switch to another solution. The FDA issued a statement supporting defendant's decision to withdraw MoistureLoc. Along with its withdrawal of MoistureLoc from the market, defendant communicated to the public through various media outlets that it would offer either a refund or a coupon applicable to other Bausch & Lomb contact lens solutions.

On August 14, 2006, the Judicial Panel on Multi-District Litigation consolidated cases relating to MoistureLoc for pretrial proceedings and assigned the Multi-District Litigation to this court. The two named plaintiffs—along with former named plaintiff Susan McKay—filed class action claims against defendant in September 2006. (Sept. 27, 2006 Compl.) In that suit, plaintiffs alleged unjust enrichment and statutory consumer fraud claims under twelve states' laws. Plaintiffs filed an amended consolidated class action complaint in January 2007, seeking certification of a nationwide class of MoistureLoc purchasers under New York law, or, in the alternative, certification of California and Pennsylvania-only classes under the laws of those states. (Am. Consol. Class Action Compl., Jan. 31, 2007.) Defendant moved to dismiss the complaint, and the court granted that motion. (Order & Opinion, Oct. 11, 2007.)

Plaintiffs Eveland and McKay then filed another amended consolidated class action complaint in November 2007, seeking certification of California and

Pennsylvania-only classes. (Second Am. Consol. Class-Action Compl., Nov. 6, 2007.) Defendant also moved to dismiss that complaint. The court granted defendant's motion in part, dismissing plaintiffs' breach of warranty claims, but allowing plaintiffs to proceed with their statutory claims under California law and their unjust enrichment claims under California and Pennsylvania law. (Order & Opinion, Apr. 9, 2008.)

In late 2008, Ms. McKay revealed in her interrogatory responses that, contrary to what she had previously represented, she had not purchased or discarded MoistureLoc in 2006. As a result, plaintiffs voluntarily dismissed her claims and filed the current Third Amended Complaint in March 2009, which named Ms. Solo and Ms. Eveland as the two proposed class representatives. (Third Am. Consol. Class-Action Compl., Mar. 2, 2009.) In that complaint, plaintiffs claim that they and the proposed class members "suffered money damages by paying for Defendant's defective MoistureLoc and discarding it per Defendant's direction because Defendant refuses to fully reimburse Plaintiffs for the defective MoistureLoc that Defendant insisted they (and which they did) discard." (Id. ¶ 34.) Based on these allegations, plaintiff Solo asserts claims under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. (Count I), False Advertising Law, Cal. Bus. & Prof. Code § 17500 et seq. (Count II), and Consumer Legal Remedies Act, Cal. Civ. Code § 1750 et seq. (Count III), as well as common law claims for unjust enrichment (Count IV). Plaintiff Eveland asserts a common law claim for unjust enrichment under Pennsylvania law (Count V). Plaintiffs propose the following two classes:

> California class (alleged by Plaintiff Solo with respect to Counts I-IV)
> All people in California who purchased MoistureLoc, other than for resale, from

> September 1, 2004 through April 10, 2006, who lack full reimbursement for any quantity discarded following Bausch's MoistureLoc recall.
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> Pennsylvania class (alleged by Plaintiff Eveland with respect to Count V)
> All people in Pennsylvania who purchased MoistureLoc, other than for resale, from September 1, 2004 through April 10, 2006, who lack full reimbursement for any quantity discarded following Bausch's MoistureLoc recall.

Plaintiffs contend that this action meets all the requirements of Federal Rule of Civil Procedure 23(a), as well as those of Rule 23(b)(3).

II. DISCUSSION

Federal Rule of Civil Procedure 23(a) provides that one or more members of a class may sue as representative parties on behalf of all only if "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Every class action must satisfy the four requirements of Rule 23(a): numerosity, typicality, commonality, and adequacy of representation, with "the final three requirements . . . 'tend[ing] to merge.'" Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 337 (4th Cir. 1998) (quoting Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982)). Further, to be certified, a proposed class must satisfy not only Rule 23(a), but also one of the three sub-parts of Rule 23(b), as follows: 1) individual actions would risk inconsistent adjudications or adjudications that would be dispositive of non-parties; or 2) class-wide injunctive/declaratory relief is sought and appropriate; or 3) legal/factual questions, common to the proposed class members, predominate over questions affecting individual

members and class action is the superior method for adjudicating the controversy. See Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 423 (4th Cir. 2003). Plaintiffs invoke subsection (b)(3).

At the class certification stage, a district court must take a close look at the facts relevant to the certification question and, if necessary, make specific findings on the propriety of certification; such findings can be necessary even if the issues tend to overlap into the merits of the underlying case. Thorn v. Jefferson-Pilot Life Insurance Co., 445 F.3d 311, 319 (4th Cir. 2006). However, the likelihood of success on the merits is not relevant to the issue of whether certification is proper. Id. In evaluating plaintiffs' motion, the court should accept the putative class representative's allegations as true but should also go beyond the pleadings to the extent necessary to understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues. Falcon, 457 U.S. at 160.

Plaintiffs have the burden of establishing that each of the requirements for a class action is satisfied. Gariety v. Grant Thornton, LLP, 368 F.3d 356, 362 (4th Cir. 2004) ("The plaintiffs who propose to represent the class bear the burden of demonstrating that the requirements of Rule 23 are satisfied."); Lienhart v. Dryvit Systems, Inc., 255 F.3d 138, 146 (4th Cir. 2001) ("The party seeking class certification bears the burden of proof.").

In addition to the explicit Rule 23(a) requirements, there are also implicit requirements for class certification. "Although not specifically mentioned in the rule, the definition of the class is an essential prerequisite to maintaining a class action." Roman

v. ESB, Inc., 550 F.2d 1343, 1348 (4th Cir. 1976). Thus, as a preliminary matter, the court must consider the definition of the class when determining the appropriateness of class certification. Kirkman v. North Carolina R. Co., 220 F.R.D. 49, 53 (M.D.N.C. 2004). The court should not certify a class unless the class description is "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1760. "The proposed class definition must not depend on subjective criteria or the merits of the case or require an extensive factual inquiry to determine who is a class member." Cuming v. South Carolina Lottery Comm'n, 2008 WL 906705, at *1 (D.S.C. 2008) (citing In re Copper Antitrust Litig., 196 F.R.D. 348, 353 (W.D. Wis. 2000)). "Where the practical issue of identifying class members is overly problematic, the court should consider that the administrative burdens of certification may outweigh the efficiencies expected in a class action." Cuming, 2008 WL 906705, at *1 (citing Sanneman v. Chrysler Corp., 191 F.R.D. 441, 445 (E.D. Pa. 2000)).

Plaintiffs seek certification of classes in Pennsylvania and California who purchased MoistureLoc between September 1, 2004, and April 10, 2006, and "lack full reimbursement for any quantity discarded following Bausch's MoistureLoc recall." Defendant argues that plaintiffs' proposed class is unascertainable because it would be virtually impossible to determine class membership. The court agrees.

To be ascertainable, a class must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a

member." Cuming, 2008 WL 906705, at *1 (citation omitted); see Clay v. Am. Tobacco Co., 188 F.R.D. 483, 490 (S.D. Ill. 1999) ("It is absolutely necessary that for a class action to be certified . . . the class description must be sufficiently definite so that it is administratively feasible for the Court to determine whether a particular individual is a member of the proposed class."). Where determining membership in the class would require fact-intensive mini-trials, the class is not ascertainable, and the court should deny certification. Cuming, 2008 WL 906705, at *1; see Sanneman v. Chrysler Corp., 191 F.R.D. 441, 446 (E.D. Pa. 2000) (determining class membership would have created "serious administrative burdens that are incongruous with the efficiencies expected in a class action").

In In re Phenylpropanolamine (PPA) Products Liability Litigation, 214 F.R.D. 614 (W.D. Wash. 2003), Judge Barbara Rothstein denied a renewed motion for class certification, in part because it would be too difficult to identify the proposed class. The plaintiffs in PPA were purchasers of a variety of over-the-counter cold medicines. Id. at 614. These products were withdrawn from the market following a November 6, 2000 FDA health advisory and request for voluntary removal of PPA-containing products from the market. Id. The plaintiffs primarily sought economic damages based on their continued possession of PPA-containing products as of November 6, 2000. Id. at 615.

In rejecting the class, the court conducted a superiority analysis under Rule 23(b)(3) and found that, among other factors, the manageability component counseled against certification because "individualized factual inquiries required for identification

of the proposed class would render this case unmanageable."[1] Id. at 616. The court explained that "individuals would be required to show some proof of injury—in this case purchase and possession of a non-expired PPA-containing product as of November 6, 2000—in order to qualify for membership in the proposed class." Id. at 617. The court rejected the plaintiffs' argument that the only relevant question was whether sufficient checks for fraud existed at the claims stage. Id. Instead, the court noted it was "equally, if not more, concerned with the vagaries of memory." Id. Not only would class members have to remember that they purchased a qualifying product during the relevant timeframe, but they would also "have to recall how much, if any, of the product remained" at the time of withdrawal, as well as the product's expiration date. Id. at 618. The court was skeptical that class members would be able to remember such details, noting that even some of the named plaintiffs were unable to provide those details about their own claims. Id. at 619. In the end, the court concluded, "the process of simply identifying who rightfully belongs within the proposed class would entail a host of mini-trials," and would therefore "defy the court's ability to effectively and efficiently manage the litigation." Id. at 619-20.

Similarly, in Cuming, Judge Margaret Seymour denied certification of a class after concluding that it would be administratively infeasible to determine its membership. The Cuming plaintiffs brought a class action against the state lottery commission,

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[1] The PPA court included its manageability analysis under a broader superiority analysis pursuant to Rule 23(b)(3). This court analyzes the same considerations in this case under the rubric of class definition and ascertainability, similar to the way the Cuming court addressed the issue. The concerns under either analysis are the same, as is the result in this case: class certification is not appropriate.

alleging that it misled them into purchasing instant-win lottery tickets by advertising "top prizes" when those prizes had already been awarded. The proposed class included consumers who purchased tickets "offering a chance to win top prizes that at the time of sale were no longer available." Cuming, 2008 WL 906705, at *1. In rejecting the proposed class, the court reasoned that determining class membership would pose an immense administrative burden:

> [T]he court would have to conduct potentially thousands of individualized inquiries to determine whether the ticket had been purchased after the top prize had been awarded. This is exactly the type of extensive factual inquiry that courts have held to be too administratively burdensome to warrant class certification. Therefore, the court concludes that the class definition is not sufficiently definite so as to allow the court to determine whether a particular individual is a member. Furthermore, the administrative burden of certification outweighs the efficacy of a class action.

Id. at *3 (internal citations and quotation marks omitted).

Plaintiffs' proposed class here has the same problems as the proposed classes in PPA and Cuming. In order to ascertain who falls within the class, the court would have to make thousands of fact-intensive inquiries. For example, not only would the court need to determine whether an individual purchased MoistureLoc between September 1, 2004 and April 10, 2006, but it would also have to determine how much was purchased and at what price, whether the individual discarded the solution, when it was discarded, and how much was discarded. Moreover, the court would also have to determine whether each proposed class member "lack[s] full reimbursement" for whatever quantity that individual discarded. Thus, long before this case ever went to trial, the court would need to consider numerous individualized factual scenarios to determine class membership. The court notes the following examples provided by defendant that show

the potential class membership quagmire it would be obliged to enter should it certify the class:

> • Would a consumer who purchased a 12-ounce bottle of MoistureLoc for $7.99, used most of it and received an $8 coupon for replacement solution be included in the class?
> • Would a consumer who received an $8 coupon for replacement product but failed to use it be included in the class?
> • Would a consumer who threw out a two-ounce bottle of MoistureLoc that cost only $1.99 and received a coupon for $2.50 off the cost of a replacement solution – rather than the $8 coupon received by other MoistureLoc consumers – be included in the class?
> • Would a consumer who threw away a two-ounce bottle of MoistureLoc but never bothered to participate in the refund program because he or she only had a few drops left at the time of the recall be included in the class?

(Def. Br. 17.)

Moreover, like the plaintiffs in PPA, the named plaintiffs' own testimony in this case demonstrates that determining which consumers fall into which categories would be virtually impossible. Plaintiffs Solo and Eveland have each offered inconsistent testimony about the basic facts of their claims, such as when they purchased MoistureLoc, when they discarded the remaining solution, and how much was discarded. At her deposition, plaintiff Solo initially testified that she purchased MoistureLoc "probably a week before" she discarded it in late May 2006, long after the product was recalled on April 13, 2006. (Solo Dep. 70:8-12, Feb. 25, 2009.) Later in the deposition, after returning from a break, plaintiff Solo reworked her testimony and said she had purchased the MoistureLoc during "the first week in April" and did not throw it away until more than a month later. (Id. 75:20-76:17.)

Plaintiff Solo's allegations and testimony regarding the amount of MoistureLoc that she supposedly discarded were also inconsistent. In her current complaint, plaintiff

Solo alleges that she discarded one bottle of MoistureLoc as the result of the recall. (Third Am. Consol. Class-Action Compl. ¶ 32, Mar. 2, 2009.) Likewise, at her deposition, she initially claimed to have discarded "[a]lmost [an] entire bottle" of MoistureLoc. (Solo Dep. 69:13-20, Feb. 25, 2009.) However, after a bathroom break, she changed her testimony and said that she actually threw away one and a half bottles of MoistureLoc after hearing about the recall, thus contradicting her complaint. (Id. 76:11-23.)

The facts needed to establish plaintiff Eveland's class membership are similarly muddled. It appears that plaintiff Eveland has provided three inconsistent versions of when she purchased MoistureLoc and when she discarded it. In her current complaint, plaintiff Eveland alleges that she was using MoistureLoc in March 2006, when she bought two bottles of solution. (Third Am. Consol. Class-Action Compl. ¶ 33, Mar. 2, 2009.) She also states that she discarded one and three-quarters of those bottles in May of that same year. (Id.) Next, in her interrogatory responses, plaintiff Eveland stated that she bought MoistureLoc in April 2006, and last used it in June 2006, which was two months after the recall occurred and was publicized in the print and television media. (Eveland Resp. to Interog. 3.) Finally, at her deposition, she offered yet another account of the facts, stating that she began using MoistureLoc on April 5, 2006, heard about the recall of MoistureLoc approximately two weeks later, and discarded the product one or two days after that, which would be late April 2006. (Eveland Dep. 33:17-35:11, Feb. 19, 2009.)

The inconsistencies in the two named plaintiffs' testimony demonstrate how

difficult it would be to verify facts about the other putative class members.[2] In all likelihood, plaintiffs Eveland and Solo provided information regarding their claims for their original complaint, which was filed shortly after the recall. Plaintiff Eveland later provided additional information for the second amended complaint, filed in November 2007. Later, the proposed class representatives provided discovery responses. Plaintiffs eventually filed a third amended complaint. However, plaintiffs' recollections of the basic facts of their claims changed over time. The court notes that memories generally do not improve with time, yet plaintiffs now take the position that their 2009 deposition testimony is the most accurate recitation of the facts related to their claims, despite the fact that they gave this testimony approximately three years after the events at issue took place.

With the named plaintiffs' documented memory difficulties in mind, the court finds that determining the membership of plaintiffs' proposed class would require countless factual inquiries into the individual circumstances of potential class members, most of whom will have long ago forgotten the details relevant to plaintiffs' allegations. Moreover, it is hard to fathom how thousands of unnamed putative class members could possibly provide credible testimony about their class membership more than three years after the fact when the proposed class representatives themselves have presented

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[2] Former class representative Susan McKay's statements regarding the facts of her claims also changed over time. Ms. McKay stated in the second amended complaint that she purchased MoistureLoc in January 2006 and discarded it in May 2006. (Second Am. Consol. Class-Action Compl. ¶ 32, Nov. 6, 2007.) However, in her October 2008 discovery responses, she admitted that she had last used MoistureLoc in 2004. (McKay Resp. to Interog. 3(g).)

conflicting testimony that changed over time.[3] It is abundantly clear that the administrative burdens of certification greatly outweigh any efficiencies to be gained by treating these claims as a class action. While the court realizes it is likely that many individuals incurred some monetary loss as a result of the MoistureLoc recall, plaintiffs must still meet the requirements for class certification. Plaintiffs have not met their burden in that regard, and their motion for class certification must be denied.

III. CONCLUSION

For the foregoing reasons, plaintiffs' motion for class certification is **DENIED**.[4]

AND IT IS SO ORDERED.

DAVID C. NORTON
CHIEF UNITED STATES DISTRICT JUDGE

September 25, 2009
Charleston, South Carolina

[3] According to plaintiffs, defendant's documents show millions of bottles in MoistureLoc sales to thousands of consumers across California and Pennsylvania during the class period.

[4] Because the court finds the class ascertainability issue dispositive as to the certification question, it does not address the remaining Rule 23 factors.