UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	11-cv-10803-SVW-SHx	Date	February 27, 2014
Title	Leonidas Jovel v. Boiron, Inc. et al.		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER Re:
Plaintiff's Motion for Class Certification [91]
Defendants' Motion for Sanctions and Vexatious Litigation [92]

I. INTRODUCTION

This is a misleading labeling case. Defendant Boiron manufacturers and distributes Oscillococcinum ("Oscillo") and Children's Oscillo. (Compl. ¶ 1). According to the product labels, these products "temporarily relieve[] flu-like symptoms," and their active ingredient reduces "the duration and severity of flu-like symptoms." (Id.). Plaintiff Leonidas Jovel asserts that these labels are misleading because Oscillo's sole active ingredient is not effective; and furthermore, the active ingredient is so diluted that even if it was effective, its concentration is so reduced that it cannot possibly relieve flu symptoms. Jovel seeks to certify a class of California consumers who purchased Oscillo and Children's Oscillo in reliance on the products' misleading labels.[1]

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[1] More specifically, Jovel seeks to certify a class of people who either opted out of a prior class settlement with Boiron, or who purchased Oscillo and Children's Oscillo in California after the prior class period expired, on July 27, 2012. (Dkt. 91). A class settlement was approved in the earlier case on March 6, 2012. See Gallucci v. Boiron, Inc., No. 3:11-cv-2039 (S.D. Cal. filed Sept. 2, 2011). Under the Gallucci settlement, Boiron created a $ 5 million class fund for purchasers of Oscillo and Children's Oscillo between January 1, 2000 and July 27, 2012. (FAC, Ex. A ("Galluci Settlement")). As part of the Gallucci settlement, Boiron also agreed to place two disclaimers on its product labels, stating that
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Boiron argues that class certification should be denied on multiple grounds. The Court finds at least one of Boiron's arguments compelling, and DENIES class certification on that basis. Namely, the Court determines that Jovel is not an adequate class representative under Federal Rule of Civil Procedure 23(a)(4) because he lacks credibility on material issues in dispute. Boiron also contends that Jovel has failed to satisfy the predominance requirement under Rule 23(b)(3). However, because the Court concludes that Jovel is not an adequate representative under Rule 23(a), it does not discuss Boiron's Rule 23(b) arguments.

In addition to Jovel's class certification motion, the Court also addresses Boiron's motion for sanctions and vexatious litigation. (Dkt. 92). For the reasons stated below, the Court DENIES Boiron's motion.

II. MOTION FOR CLASS CERTIFICATION

A. Legal Standard

To obtain class certification, Jovel bears the burden of showing that the proposed class meets each of the four requirements of Federal Rule of Civil Procedure 23(a), together with at least one of the requirements of Rule 23(b). Ellis v. Costco Wholesale Corp., 657 F.3d 970, 979-80 (9th Cir. 2011). The four Rule 23(a) requirements are numerosity, commonality, typicality, and adequacy, i.e., (1) the class is so large that joinder of all members is impracticable; (2) there are one or more questions of law or fact common to the class; (3) the named parties' claims are typical of the class; and (4) the class representatives will fairly and adequately protect the interests of other members of the class. Fed. R. Civ. P. 23(a); Ellis, 657 F.3d at 980. The Court must perform "a rigorous analysis [to ensure] that the prerequisites of Rule 23(a) have been satisfied." Wal–Mart Stores v. Dukes, 131 S. Ct. 2541, 2551 (2011) (citation and internal quotation marks omitted).

The fourth Rule 23(a) requirement is the focus here. Because absent class members will be bound by a judgment, constitutional due process requires that absent members be adequately represented. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998); Fed. R. Civ. P.

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[1](...continued)
Oscillo's uses have not been evaluated by the FDA, and explaining the concept of homeopathic dilutions. Plaintiff Jovel opted out of the Gallucci settlement, and contends that the labeling modifications required by the Gallucci settlement are insufficient to cure Boiron's misrepresentations.

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23(a)(4). A representative is adequate where: (1) there is no conflict of interest between the representative, his counsel, and absent class members; and (2) the representative and his counsel will "pursue the action vigorously on behalf of the class." Id.

B. Jovel's Adequacy as a Class Representative

Boiron argues that Jovel has failed to establish that he is an adequate class representative as required under Rule 23(a)(4). Specifically, Boiron contents that Jovel lacks credibility because of his conflicting deposition testimony on a material issue in the case, and that this lack of credibility could harm the absent class members. As discussed below, this argument has merit.

Jovel's complaint states that he read Oscillo's label prior to purchasing the product. (Compl. ¶ 10). He asserts that he substantially relied on Oscillo's label, and was damaged when he later realized that Oscillo's label was deceptive, and that the product did not in fact relieve flu symptoms. (Id.). At his deposition, however, Jovel began by stating that he did not in fact read Oscillo's label until *after* he purchased the product.

> Q. [Boiron's Counsel]: Did you see [the false statements] when you bought Oscillo?
>
> A. [Jovel]: I don't remember.
>
> Q. How do you know that those statements are on the box?
>
> A. I saw it afterwards.
>
> Q. After you bought it?
>
> A. After using it. . . .
>
> Q. How much longer—how much time after you finished using the product did you see the statements?
>
> A. When I finished the box.
>
> Q. And how long after buying the box was that? . . .

A. Approximately a week.

(Syberson Decl., Ex. 22, Jovel Depo. at 32:16-34:8).

Jovel also explained in his deposition that rather than relying on Oscillo's label, he had purchased the product after speaking with an employee at the GNC store where he purchased Oscillo:

Q. [Boiron's Counsel]: How did you choose Oscillo when you went to the GNC?

A. [Jovel]: I asked the lady at the store what product was good for cold—for the flu. . . . [S]he said "I got different ones," but she chose two, and she said "but this one is better." And I said, "Okay. I trust."

(Id. at 57:15-18, 58:24-59:2).

However, later in the deposition, after a break, Jovel changed his story:

Q. [Jovel's Counsel]: Did you see anything on the label when you purchased the product that confirmed what the store clerk had said about Oscillo?

A. [Jovel]: Yes.

Q. And what was that?

A. Flu relief. Flu. Flu.

(Id. at 166:17-167:1).

Boiron's counsel then asked Jovel why his testimony had changed. (Id. at 167:8-25). In response, Jovel gave conflicting answers. First, Jovel stated that his testimony was not inconsistent. But rather that earlier in the deposition he had said he did not read one part of the label, but did read another part. (See id. at 168:1-2 (A: "I didn't read this part (indicating), but I did read this part (indicating)."). Later, however, Jovel testified that a conversation with his attorney during the break had refreshed his recollection about when he read the label.

Q. [Boiron's Counsel]: Did you have a discussion with your counsel that refreshed

> your recollection about when you read the box?
>
> A. [Jovel]: Yes.
>
> Q. And now you're testifying that you read the front of the box when you purchased the Oscillo; is that right?
>
> A. That's right.

(Id. at 168:9-18). After his deposition, Jovel submitted a declaration where he reiterated that he had read the label on Oscillo before purchasing the product. (Dkt. 91-26, Jovel Decl., ¶ 2).

"The honesty and credibility of a class representative is a relevant consideration when performing the adequacy inquiry because an untrustworthy plaintiff could reduce the likelihood of prevailing on the class claims." Harris v. Vector Marketing Corp., 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010) (quoting Searcy v. eFunds Corp., 2010 WL 1337684, at *4 (N.D. Ill. Mar. 31, 2010)). "[A] plaintiff with credibility problems may be considered to have interests antagonistic to the class." Ross v. RBS Citizens, N.A., 2010 WL 3980113, at *4 (N.D. Ill. Oct. 8, 2010). However, "[c]redibility problems do not automatically render a proposed class representative inadequate." Harris, 753 F. Supp. 2d at 1015 (citation and quotation marks omitted). If the credibility issues are only general in nature and do not relate directly to material issues in the lawsuit, courts will not find a lead plaintiff inadequate.

Harris is a relevant example of a case where general credibility issues were held to be insufficient to warrant a finding that the representative plaintiff was inadequate. Id. There, the plaintiff argued that her employer unlawfully refused to pay employees wages for time spent in a required training course prior to beginning sales positions. Id. at 1000. On a motion for class certification, the employer argued that the plaintiff lacked the credibility necessary to serve as a class representative based on inconsistent deposition testimony she had given related to how her employer treated her. Id. at 1015-16. The court noted that there were credibility issues, but that these credibility problems were not directly relevant to the plaintiff's claims because they concerned the plaintiff's conduct post-training. Id. Therefore, the court declined to find that the plaintiff was an inadequate representative based on credibility. Id.; see also Hua Mui v. Union of Needletrades, Indus. and Textile Employees, AFL–CIO, 1999 WL 4918, at *4 (S.D.N.Y. Jan. 5, 1999) (finding that, despite "general" credibility problems, plaintiff was an adequate lead plaintiff where the credibility issues "[did] not specifically relate to . . . the duty of fair representation central to this lawsuit").

On the other hand, where a representative plaintiff lacks credibility on a matter critical to the litigation, courts have denied motions for class certification based on inadequate representation. See, e.g., Savino v. Computer Credit, Inc., 173 F.R.D. 346 (E.D.N.Y. 1997), aff'd 164 F.3d 81 (2d Cir. 1998). In Savino, the plaintiff filed a class complaint alleging that the defendant had violated the Fair Debt Collection Practices Act ("FDCPA") by mailing letters which contained language contrary to the statute's requirements. Id. at 348. In his complaint, the plaintiff originally maintained that he had received only one letter from the defendant. Id. at 349. However, at his deposition the plaintiff admitted to receiving an earlier letter. Id. at 354-55. Then, after his deposition, the plaintiff submitted corrections to the deposition transcript, which suggested again that he had not received the earlier letter. Id. at 356. If the plaintiff had in fact received an earlier letter it would have impacted whether he could obtain damages under the FDCPA. Id. Thus, the court held that the inconsistencies in the plaintiff's pleadings and deposition testimony went to the "heart of the material issues in [the] case." Id. at 357. Because the inconsistencies would subject the plaintiff to "rigorous cross-examination" on a critical issue, the court held that the plaintiff was an inadequate class representative and denied the motion for class certification. Id.; see also Kline v. Wolf, 702 F.2d 400, 403 (2d Cir. 1983) (district court "reasonably concluded" that class representative status should be denied "[s]ince plaintiffs' testimony on an issue critical to one of their two causes of action was subject to sharp attack").

The instant case is similar to Savino and other cases where courts have found a representative plaintiff to be inadequate because of credibility issues material to a case. Whether Jovel read the Oscillo label before, rather than after, purchasing the product is critical to his claim. Under both California's Unfair Competition Law, Business and Professions Code section 17200, *et seq*. ("UCL"), and the Consumers Legal Remedies Act, Civil Code section 1750, *et seq*., Jovel must establish that he relied on Boiron's misleading label, and that the label caused his injury. See In re Tobacco II Cases, 46 Cal. 4th 298, 313-14 (2009) (holding that under the UCL a class representative must establish injury in fact and causation); Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1022 (9th Cir. 2011) (noting that the CLRA requires each class member to have an actual injury caused by the defendant's unlawful practice).

Jovel's inconsistent deposition testimony places his credibility in issue on whether he actually relied on Oscillo's label in purchasing the product. If a jury concludes that because of Jovel's prior inconsistent testimony he cannot be believed when he states that he relied on Oscillo's label before purchasing the product, Jovel will jeopardize the interests of all of the other class members. See Searcy v. eFunds Corp., 2010 WL 1337684, at *4 (N.D. Ill. Mar.31, 2010) ("The honesty and credibility of a class representative is a relevant consideration when performing the adequacy inquiry 'because an untrustworthy plaintiff could reduce the likelihood of prevailing on the class claims.'" (citation omitted))).

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Not only does Jovel's inconsistent testimony relate to a material issue in the case, but his testimony also amounts to more than a minor inconsistency. Jovel's complaint clearly states that he relied upon Oscillo's label in purchasing the product. (Compl. ¶ 10). Yet early in his deposition, Jovel stated multiple times that he did not read the label until after purchasing the product. At one point during his deposition, Jovel even clarified that not only did he not read the label before purchasing Oscillo, but that he also did not read the label until he actually finished using the product.

> Q. [Boiron's Counsel]: And then you took that product, the box of Oscillo, home and you used it; right?
>
> A. [Jovel]: Yes.
>
> Q. And then you saw the statements on the box; right?
>
> A. Not at that time.
>
> Q. After you were done using the product?
>
> A. Precisely.

(Syberson Decl., Ex. 22, Jovel Depo. at 33:12-19).[2]

Further, later in the deposition Jovel not only changed his testimony, but also relied on different justifications for why he changed his testimony. First stating that his earlier testimony had been misunderstood (id. at 168:1-2 (A: "I didn't read this part (indicating), but I did read this part (indicating))."), and then later stating that his recollection about when he viewed the label had been refreshed by a discussion with his counsel. (Id. at 168:9-13 (Q: "Did you have a discussion with your counsel that refreshed your recollection about when you read the box? A: Yes. . . . Q: Did you have a discussion with your attorney about when you first saw—when you first read the box? . . . . A: Yes.")).

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[2] Both sides acknowledge that English is Jovel's second language. However, a Spanish-interpreter was present at the deposition, and Jovel's counsel does not contend that Jovel misunderstood any of the questions excerpted above. Further, the fact that Jovel stated multiple times during his deposition that he did not read Oscillo's label until after he had purchased the product is strong evidence that he understood the questions.

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Because Jovel's inconsistent statements were both significant and related to a material issue, if he serves as a representative plaintiff he will reduce the likelihood of prevailing on the class claims. As such, Plaintiffs have not satisfied their burden of demonstrating that Jovel will "fairly and adequately protect the interests of the class" as required under Federal Rule of Civil Procedure 23(a)(4). Therefore, the Court DENIES the motion for class certification.

III. MOTION FOR SANCTIONS AND VEXATIOUS LITIGATION

Boiron has also filed a motion for sanctions and vexatious litigation. (Dkt. 92).

Federal courts have the inherent power to levy sanctions where counsel has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Fink v. Gomez, 239 F.3d 989, 991 (9th Cir. 2001) (internal quotation marks omitted). A finding of bad faith under the court's inherent power requires more than mere recklessness. Id. at 993. Rather, sanctions are only available for either willful conduct, or recklessness "when combined with an additional factor such as frivolousness, harassment, or an improper purpose." Id. at 994.

Here, Boiron contends that sanctions are warranted based on the following allegations: (1) Jovel's counsel acted in bad faith by filing inaccurate discovery-related documents. Specifically, Jovel's complaint and discovery responses state that Jovel relied on Oscillo's label. Yet at his deposition, Jovel stated that he relied on the store's sales agent and did not read Oscillo's label until after purchasing the product. (2) Jovel's counsel has made no effort to include Jovel in the litigation; (3) Jovel's counsel did not disclose that she was also representing Jovel's daughter in a separate class action; and (4) Jovel's counsel has acted in bad faith and vexatiously by filing this lawsuit and others against Boiron. (Dkt. 92-1, Def's Mot., at 9-16). For the reasons stated below, the Court determines that none of these arguments has merit.

First, there is insufficient evidence that Jovel's counsel had knowledge at the time she filed the complaint and submitted answers to discovery that Jovel did not read the label prior to purchasing Oscillo. True, Jovel's deposition testimony was internally inconsistent, and significantly reduces his credibility. Further, the fact that Jovel did not change his testimony until after a discussion with his attorney does raise some suspicion of misconduct. But by itself, this evidence does not show that Jovel's counsel acted willfully or recklessly in asserting in the complaint and discovery materials that Jovel read the label before purchasing Oscillo, much less that Jovel's counsel did this for the purpose of harassment or another improper purpose. Cf. Englebrick, 944 F. Supp. 2d at 908 (imposing sanctions

because of false deposition testimony where, at trial, the plaintiffs *admitted* to testifying falsely in earlier depositions).

Next, Boiron's argument that Jovel's counsel made no effort to include him in the litigation goes more to the adequacy of Jovel's representation rather than an analysis of whether sanctions are warranted. See Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 61 (2d Cir. 2000) ("[C]lass representative status may properly be denied where the class representatives have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys.").

However, even if properly considered on a motion for sanctions, the evidence is not sufficient to show that Jovel's counsel did not involve him in the litigation. While some of Jovel's deposition testimony does support Boiron's argument, see, e.g., Jovel Dep. at 109:9-13; 113:12-17; 116:6-8; 117:13-23 (suggesting counsel did not review all of the terms of the Gallucci settlement with Jovel); id. at 135:19-136:24; 171:21-172:11; 138:11-18 (that despite his poor English, Jovel had received documents from his counsel that were not translated into Spanish); id. at 21:2-6 (that Jovel had only met with his attorneys twice (the day before the deposition and the day of the deposition)), there is contrary evidence suggesting that Jovel was reasonably involved in the litigation. See, e.g., Jovel Dep. at 48:11-14; 100-101 (Jovel had a reasonable understanding of his role as a representative plaintiff: "representing the other people who have bought [Oscillo]," and "speaking for them"); id. at 104:14-15 (Jovel opted out of the Gallucci settlement in part because the settlement did not require Boiron to make material changes to their labels); id. 21:12-24; 22:10-12; 42:23-24 (prior to his deposition, Jovel had exchanged written correspondences with his attorneys "about four [or] five times," and "lots of times [he had] been on the telephone, speaking from 10 or 15 minutes"). Therefore, sanctions are not warranted on this ground.

Boiron also makes much of the fact that Jovel's counsel not only represents Jovel in the instant action, but also represents his daughter in a separate labeling class action. (Def.'s Mot., at 14-15). Boiron contends that neither Jovel nor his counsel ever disclosed this ongoing client relationship with Jovel's daughter. (Id.). Boiron, however, fails to explain why this fact is relevant to the instant case. Boiron has not cited to any affirmative obligation that would require Jovel's counsel to disclose this information. Also, Ms. Jovel's litigation concerns a dietary supplement that is not in any way related to Boiron's product. (Dkt. 109, Pl.'s Opp., Ex. 1).

Next, the other lawsuits filed by Jovel's counsel against Boiron do not support sanctions or a

finding of vexatious litigation.[3] Besides the instant case, Boiron only cites to a handful of cases filed by Jovel's counsel against Boiron, none of which appears to have been filed in bad faith. Two are class actions filed in Illinois, and include class members that are not part of either the Gallucci class or the proposed class in the instant case. See Bohn v. Boiron, Inc., No. 1-11-cv-80704 (N.D. Ill. filed Dec. 7, 2011); Conrad v. Boiron, No. 1:13-cv-07903 (N.D. Ill. filed Nov. 4, 2013). Another case cited by Boiron is Jovel's individual state-court case for injunctive relief, which was filed after this Court dismissed Jovel's claim for injunctive relief. And the last is a class action related to an entirely different product manufactured by Boiron, called Chestal. Fermandez v. Boiron, Inc., No. SACV 11-1867-JST (C.D. Cal. filed Dec. 2, 2011). These cases fall short of demonstrating that Jovel's counsel has unreasonably and vexatiously multiplied the proceedings against Boiron.

And finally, the instant case, by itself, does not support a finding of vexatious litigation. Boiron notes that under the Gallucci settlement, it provided any consumer who purchased Oscillo within 24 months of the settlement (or up until Boiron made the labeling changes required by the settlement, if earlier than 24 months) a money-back guarantee. (Galluci Settlement ¶¶ 1.34, 4.1.6). Boiron argues that because of this guarantee, most members of the proposed class already have a remedy for their alleged reliance on Boiron's misleading labels.

Although the money-back guarantee does provide an alternative remedy for many members of the proposed class, it only covers the 24 month period after the Galluci settlement. Jovel's proposed class includes all California purchasers of Oscillo after July 27, 2012 (the cut-off date in Gallucci). This class includes: (a) persons who purchased Oscillo after July 27, 2012, but before the Gallucci settlement's disclaimers were implemented; and (b) persons who purchased Oscillo after July 27, 2012, but after the disclaimers were added. (FAC ¶ 52). The money-back guarantee only applies to group (a). Thus, this case is distinguishable from In re Aqua Dots Products Liability Litigation, 654 F.3d 748, 752 (7th Cir. 2011) in which the court held that the "[p]laintiffs want relief that duplicates a remedy that most buyers already have received, and that remains available to *all* members of the putative class." Id.

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[3] In addition to the Court's inherent power to issue sanctions, 28 U.S.C. § 1927 states that "[a]ny attorney . . . who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorney's fees reasonably incurred because of such conduct." Attorney's fees under § 1927 requires a finding that "the attorney's conduct is in bad faith," although "recklessness satisfies this standard." Belliveau v. Thomson Financial Inc., 313 Fed. Appx. 49, 50 (9th Cir. 2009).

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In totality, Boiron's allegations fail to show that Jovel, or Jovel's counsel, have acted in bad faith in pursuing their claims in this case. Thus, the motion for sanctions and vexatious litigation is DENIED.

IV. ORDER

For the foregoing reasons:

(1) The Court DENIES Jovel's motion for class certification.

(2) The Court DENIES Boiron's motion for sanctions and vexatious litigation.

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