Motions, Pleadings and Filings

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United States District Court, E.D. Michigan, Southern Division.

Mario GASPERONI and Eugenia Corry Trumbull, Plaintiffs,
v.
METABOLIFE, INTERNATIONAL INC., Defendant.

No. 00-71255.

Sept. 27, 2000.

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS-CERTIFICATION

COHN, District J.

I. Introduction

***1** This is a products liability case. [FN1] Plaintiffs Mario Gasperoni and Eugenia Corry Trumbull (collectively plaintiffs) are suing Metabolife International, Inc. (Metabolife), on behalf of themselves and as a class under Fed.R.Civ.P. 23, for misrepresentation for failing to warn Michigan consumers that ephedrine, an ingredient in Metabolife's diet product Metabolife 356, is capable of producing adverse health problems. Before the Court is plaintiffs' motion for class certification. For the reasons that follow, the motion will be granted.

FN1. On May 4, 2000, the Court denied defendant's motion to dismiss. *See* Memorandum And Order of May 4, 2000.

II. Background

A.

Metabolife manufactures and distributes the appetite suppressant Metabolife 356, which contains a combination of 18 different ingredients including ephedrine. The product label identifies Metabolife 356 as an "herbal formula to enhance your diet and provide energy," and states that the product is "independently laboratory tested for safety*." ("*Based upon multi-species clinical laboratory testing").

Plaintiffs claim that ephedrine is a potent central nerve stimulant, which can cause adverse health risks such as nervousness, dizziness, tremors, alteration in blood pressure or heart rate, headache, gastrointestinal distress, chest pain, myocardial infarctions, stroke, seizures, psychosis, brain damage, and death. Metabolife's web site, found at <http://www.metabolife.com/shop/index.html>, warns Texas consumers that, "This product has ephedrine groups alkaloids in the form of herbal extracts and may cause serious adverse health effects." However, no such warning is directed to Michigan consumers.

Plaintiffs, who purchased and ingested Metabolife 356, claim that Metabolife's labeling is deceptive and misleading because it fails to warn Michigan consumers of the adverse health effects of ephedrine, it fails to adequately disclose to consumers that use of the product has not been clinically tested or FDA approved, and it fails to warn consumers that possession of a certain amount of ephedrine (the equivalent of 10 bottles of Metabolife 356) is against Michigan law and actually encourages consumers to possess such amounts by giving them a discount for purchases of 10 bottles or more. Through these omissions, and its affirmative statement that Metabolife 356 is "tested for safety," Plaintiffs maintain that Metabolife's labeling constitutes a fraudulent misrepresentation and a breach of warranty.

B.

Plaintiffs seek to represent a class composed of "all persons in the State of Michigan who purchased and/or consumed the appetite suppressant Metabolife 356 and other diet products containing ephedrine manufactured, distributed, marketed and sold by Defendant (the "Class") during the period commencing from February 4, 1994 up to the date of trial (the "Period")." Revised Amended Complaint ¶ 33. [FN2] For each member of the class, plaintiffs seek damages/restitution in the amount of the purchase price of the product. Plaintiffs also seek injunctive relief in the form of an order requiring Metabolife to: (1) post an appropriate form of notice where the diet products have already been sold and are currently being sold, informing consumers of the dangers of consumption of the product; (2) revise its

labeling to warn all future consumers of the serious risks associated with the consumption of the product; and (3) pay for medical examinations and health monitoring for all members of the class.

> FN2. Initially, plaintiffs sought nationwide class certification, but later conceded in their reply brief that certification for a class consisting only of Michigan consumers would be more manageable at this time. Thus, the Court does not address the extensive arguments posed by Metabolife concerning issues involving a nationwide class.

***2** Plaintiffs presently seek class certification solely on the issue of "whether the label on [Metabolife 356] is materially misleading when viewed as a whole." Proposed Order Granting Class Certification.

III. Analysis

A. Standard for Class Certification

Under Fed.R.Civ.P. 23(a), a case may be brought as a class action 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 class.

In addition to these requirements, the proposed class representatives must also demonstrate that common questions of law or fact predominate over individual questions and that a class action is superior to other available methods of adjudication. Fed.R.Civ.P. 23(b)(3).

In evaluating a case for certification, the Court has broad discretion. *In re Jackson National Life Ins. Co. Premium Litigation*, 183 F.R.D. 217 (W.D.Mich.1998). The Court must conduct a "rigorous analysis" to determine if the Rule 23 requirements are met and it may, but is not required to, go beyond the pleadings. *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1078-79 (6th Cir.1996).

Here, Metabolife opposes class certification mainly on the grounds that individual issues of fact and law predominate. Specifically, Metabolife contends that its product is not sold in a uniform manner, issues of reliance, causation, and injury must be proved individually, and plaintiffs' claim for medical monitoring transforms this case into a personal injury case, so as to preclude a class action. Metabolife also says that the named plaintiffs are neither typical nor adequate representatives of the class.

B. Bringing a Class Action Case (Fed.R.Civ.P. 23(a))

1. Numerosity

The numerosity requirement is not in dispute here. Metabolife 356 has admittedly been sold to thousands of consumers in Michigan over the past several years. The class, therefore, is sufficiently numerous to make joinder impracticable. *See Smith v. General Motors Corp.,* 14 FEP (BNA) Cases 987 (E.D.Mich.1977) (stating that thirty-five is often the standard).

2. Commonality

Class members must have either a question of law or fact in common, not necessarily both. *See* Fed.R.Civ.P. 23(a); *Ballan v. Upjohn Co.,* 159 F.R.D. 473 (W.D.Mich.1994). Here, plaintiffs contend that there are several common questions of law and fact, including, *inter alia:*

> (1) whether Metabolife's labeling is misleading for failing to disclose health risks,
> (2) whether Metabolife knew of the risk of injury from Metabolife 356, and
> (3) whether Metabolife failed to adequately warn of the adverse effects in consuming Metabolife 356. [FN3]

> FN3. Plaintiffs originally claimed also that Metabolife breached the warranty of safety appearing on the bottle. However, at oral argument, plaintiffs represented that they wished to proceed on the misrepresentation claim only. Therefore, the Court does not address the parties arguments on breach of warranty.

Metabolife does not seem to dispute that there exists common questions of law and fact, but rather, as will be discussed *infra,* argues that the individual issues predominate over the common questions. Indeed, every

bottle of Metabolife 356, sold during the relevant period, carries (and omits) the same language and information that plaintiffs contend is false and misleading. Thus, there are common questions of law or fact present, as required by Fed.R.Civ.P. 23(a).

3. Typicality

***3** The purpose of the typicality requirement is to assure that the named representatives' interests align with those of the class. *Hanon v. Dataproducts Corp.,* 976 F.2d 497, 508 (9th Cir.1992). The inquiry focuses special attention on "differences between class representative claims and class claims that would defeat the representative nature of the class action." *Van Vels v. Premier Athletic Center of Plainfield, Inc.,* 182 F.R.D. 500, 510 (W.D.Mich.1998). Generally, the typicality requirement is met if the representative shares a common element of fact or law with the class. *Senter v. General Motors Corp.,* 532 F.2d 511, 525 (6th Cir.1976). Here, plaintiffs assert that the typicality requirement is met because their claims, like the entire class's claims, are based on Metabolife's marketing, sales, and labeling of its product. *See Van Vels, supra.* Since both Gasperoni and Trumbull purchased bottles containing the same misleading labels, they say their claims are typical of the class.

Metabolife, however, argues that the typicality requirement is not met because Metabolife has individual defenses to the named plaintiffs' claims which destroys typicality. Specifically, Metabolife contends that Gasperoni's intentional failure to consult a physician, and Trumbull's receipt of bad medical advice after she did consult a physician, were the causes of their injuries--not Metabolife's product. [FN4] Metabolife relies upon *Ballan v. Upjohn Co., supra,* a fraud-on-the-market securities case in which the plaintiff was found to be atypical of the class he sought to represent because he purchased the stock after curative disclosures had been made. The court in *Ballan* found that the plaintiff's "interest in the case will be different with regard to the materiality of the curative disclosure than the interest of class members who purchased prior to the curative disclosures." *Id.* at 480.

FN4. This is also the essence of Metabolife's motion for summary judgment.

In contrast to *Ballan,* there is no evidence here indicating that either named plaintiffs received curative disclosures prior to their purchase or consumption of the product. Indeed, this is the whole point of this case-- plaintiffs charge that Metabolife's label does not sufficiently disclose the risks associated with its product and fail to place plaintiffs on notice as to the potential harm that they are incurring. Since both plaintiffs purchased and/or used Metabolife 356 without an adequate warning on the label, their claims are typical of the class they are seeking to represent.

Also, the fact that Trumbull has already received a refund for her purchase of Metabolife 356 is not dispositive because plaintiffs are seeking an injunction as well as money damages in the form of a refund of the purchase price.

4. Adequacy

The adequacy of class representation is measured by (1) the qualifications of the named plaintiffs' attorneys and (2) the extend to which the plaintiff's interests may be antagonistic to those of the class. *Senter, supra* at 524- 25. Here, there is no challenge to the qualification of plaintiffs' attorneys, E. Powell Miller and Gerald Mantese, nor to their firm, Mantese Miller and Mantese, P.L.L .C.

***4** Metabolife instead argues that the named plaintiffs' interests are antagonistic to the class in that (1) they are proposing to waive available claims and elements of damages for absent class members, and (2) treating this case as a class action may preclude class members from later bringing personal injury claims for pain and suffering. *See Feinstein v. Firestone Tire & Rubber Co.,* 535 F.Supp. 595, 606-07 (S.D.N.Y.1982) (holding class representatives inadequate where they were "presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action.") Thus, Metabolife argues that Gasperoni and Trumbull are inadequate because they are creating a res judicata risk for the class members. [FN5]

FN5. In Michigan, the doctrine of res judicata is

> applied to bar claims that were not only actually litigated, but also unasserted claims arising out of the same transaction that might have been raised in the previous suit. *See VanDeventer v. Michigan Nat'l Bank*, 172 Mich.App. 456, 464 (1988).

Plaintiffs deny any such conflict, and question the validity of *Feinstein* in light of *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984) (holding that judgment in a class action where employer was found not to have engaged in a general pattern or practice of race discrimination against employees did not preclude class members from later maintaining individual race discrimination claims against the employer). *See also* NEWBERG ON CLASS ACTIONS § 1.7 (3d. ed.1992) at p. 17-20 ("*Cooper* modified the rule barring a splitting of the cause of action in separate litigation in particular circumstances.") Alternatively, plaintiffs suggest that the class be defined to specifically exclude persons bringing individual personal injury claims.

Notwithstanding the academic discourse of the impact of *Cooper* regarding class action and res judicata, adopting the plaintiffs' alternative suggestion to define the class so as to exclude persons who bring individual personal injury claims will alleviate most of Metabolife's res judicata "concerns." *See Eggleston v. Chicago Journeyman Plumbers Local Union No. 130*, 657 F.2d 890, 895 (7th Cir.1981) ("It is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether 'the representative parties will fairly and adequately protect the interest of the class,'... it is a bit like permitting a fox, although with pious countenance, to take charge of the chicken house.") If those people with individual personal injury claims can opt out of the class, or are specifically excluded from the definition of the class, there is no danger of the class waiving any individual claims of its members. Moreover, the only legal issue to be certified is simply whether the label is materially misleading. Any personal injuries that develop in class members after the present suit, will not be subject to res judicata because their claim will not have been actually litigated, nor will it be one that "might have been raised" in the previous suit. This compromise solution seems to be the most equitable, allowing common issues to be litigated without waiving any individual claims. *See In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, Nos. 1203,99-20593, 2000 WL 1222042 (E.D.Pa. Aug. 28, 2000). Accordingly, the named representatives are adequate.

C. Maintaining a Class Action (Fed.R.Civ.P. 23(b)(3))

1. Predominance

***5** The bulk of Metabolife's opposition to class certification rests upon its contention that individual issues of fact and law predominate in this case. Specifically, it argues that: (1) liability for misrepresentation necessarily turns on the details of any pre-sale communication and sales of Metabolife 356 are materially different from one customer to the next, (2) reliance, causation, and injury must be proven individually and cannot be presumed, and (3) medical monitoring presents issues requiring individualized proof. Each will be addressed in turn.

a. Differences in Pre-sale Communication

Metabolife has submitted extensive documentation, in the form of declarations and exhibits, showing the various methods, beyond simply the bottle's label, by which information about Metabolife 356 is conveyed to customers. For example, in addition to receiving information through Metabolife's marketing and advertisements efforts via the radio, the Internet, newspapers, and television, customers can ask health-related and product usage questions by e-mail and by calling a toll-free telephone health-line. There are also direct sales representatives which provide different information to different customers, depending upon the circumstances each customer presents. Due to the variety of information provided to customers, Metabolife argues that plaintiffs' claim that customers were "lulled into a false sense of safety" by the label, is actually an individual question requiring a careful review of the total information that a particular customer received before any determination can be made on liability for misrepresentation. Presumably, the thrust of Metabolife's argument is that any potential misrepresentation that might arise from the label can be cured by additional information from external sources and,

therefore, any claim of misrepresentation must be analyzed individually in light of all the information received by that particular person.

In support, Metabolife relies on the Sixth Circuit case, *In re American Medical Systems*, *supra*, (class action against penile implant manufacturer), which, in reversing the district court's grant of class certification on the grounds that individualized issues predominated, reasoned that:

> Each plaintiff has a unique complaint and each receives different information and assurances from his treating physician... In this situation, the economies of scale achieved by class treatment are more than offset by the individualization of numerous issues relevant only to a particular plaintiff... Thus, even assuming common questions of law or fact, it cannot be said that those issues predominate...

Id. at 1085. Metabolife likewise argues that individual issues predominate here as well, such as "why a consumer bought the product, what information the consumer considered, and whether the consumer used the product as directed and in accord with cautions given prior to initial use all must be considered." Metabolife's Response Brief at 15.

***6** Metabolife's arguments, however, ring hollow. The only legal issue to be decided here is whether the label, taken as a whole, is materially misleading. Regardless of what other information a consumer may consider or rely on, every purchaser is exposed to the information on the label. If such information is shown to be false and misleading, it is not enough to say that truthful information is available somewhere else. Also, the essence of plaintiffs' case is that the *bottle label* is deficient and incomplete. Simply because a customer can find additional information from an external source does not sanitize the label. Moreover, plaintiffs' use (or misuse) of the product is irrelevant to the current claims, which are for consumer fraud and misrepresentation and not for personal injuries sustained as a result of use of the product.

Here, all the plaintiffs allege a common method of misrepresentation, and all allege the same legal claim. *See Dix v. American Bankers Life Assurance Co.*, 492 Mich. 410, 416 (1987); *see also In re Diet Drugs*, *supra*, at *42-43 (holding that common issues involving "a common product, defendant and course of conduct" predominated over any individual issues between class members). Thus, the present case is distinguishable from the situation in *American Medical Systems* where the plaintiffs could not establish any common defect among the ten different models of implants. It is also distinguishable in that here, plaintiffs are not claiming that *use* of Metabolife 356 itself harmed them, but rather that the *label* is defective and incomplete, resulting in a material misrepresentation at the time of purchase.

b. Reliance, Causation, and Injury

Metabolife also argues that the elements of reliance, causation, and injury cannot be presumed here, and as such, individualized inquiries into each customer's reliance, causation, and injury are necessary. Metabolife contends that the presumption of reliance and causation given in securities cases is inapposite in this case. They argue that "it would be illogical... to presume reliance where the effect, if any, of various materials, including the label, on each class member's purchase are uncertain--and where the record evidence on the two Plaintiffs shows that one did, and one did not, act in accordance with the label directions." Metabolife Response Brief at 18-19.

Each of plaintiffs' claims must be analyzed separately.

(i) Common Law Fraud

To state a claim for misrepresentation or omission, plaintiffs must allege the following: (1) defendant made a material representation; (2) the representation was false; (3) defendant either knew the representation was false, or acted with reckless disregard for truth or falsity; (4) defendant intended plaintiff to rely; (5) plaintiff acted in reliance; (6) plaintiff suffered harm/injury. *Hi-way Motor Co. v. International Harvester Co.*, 398 Mich. 330, 336 (1976). Here, actual reliance is a required element of the claim of common law fraud. Plaintiffs have proffered no case which holds that reliance can be presumed in the context of a common law fraud case. As such, an individualized inquiry would be necessary for each class member and the claim for common law fraud is not fit for class action.

***7** However, under Michigan law, a fraudulent omission (silent fraud) [FN6] occurs when there is: "(1) a material omission, (2) an affirmative duty by the defendant to disclose the fact, (3) a failure by defendant to speak when the duty to do so requires it, and (4) an intent to induce reliance on nondisclosure." *Clemente-Rowe v. Michigan Health Care Corp.*, 212 Mich.App. 503 (1995), Unlike a claim for an affirmative representation, a claim for fraudulent omission does not require any proof of actual reliance. *Id.* Rather, it merely requires an intent, on the part of the defendant, to induce reliance on nondisclosure. *Id.* This would require only an inquiry into the intent of Metabolife, not each class member. As such, it is amenable to class treatment.

> FN6. Neither party addresses silent fraud in their papers. However it was mentioned in Metabolife's previous motion to dismiss.

(ii) Michigan Consumer Protection Act

Plaintiffs also claim misrepresentation under the Michigan Consumer Protection Act, M.C.L. § 445.901 *et seq.* Under this statute, reliance and causation are satisfied by proof that plaintiffs purchased and consumed the product. *See Dix v. American Bankers Life Assurance Co. of Florida*, 429 Mich. 410 (1987). In *Dix*, the Michigan Supreme Court specifically held that:

> members of a class proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentation. It is sufficient if the class can establish that a reasonable person would have relied on the representation. Further, a defendant's intent to deceive through a pattern of misrepresentations can be shown on a representative basis under the Consumer Protection Act.

Id. at 418.

Metabolife's attempts to distinguish *Dix* are unpersuasive. Contrary to Metabolife's assertions, *Dix* is not limited to securities cases--it has subsequently been held to apply in non-securities cases as well. *See e.g., Van Vels v. Premier Athletic Center of Plainfield, Inc.*, 182 F.R.D. 500, 508 (W.D.Mich.1998) (consumer class action against chain of health clubs; "Unlike common law fraud, misrepresentation claims under the MCPA do not require proof of individual reliance.")(citing *Dix*).

Additionally, it is important to remember that the purpose of the Michigan Consumer Protection Act is to "provide an enlarged remedy for consumers who are muicted by deceptive business practices" and that it "should be construed liberally to broaden the consumers' remedy, especially in situations involving consumer frauds affecting a large number of persons." *Dix, supra*, at 417-18. Accordingly, plaintiffs are entitled to class certification on their claim of misrepresentation under the Michigan Consumer Protection Act.

c. Medical Monitoring

Metabolife additionally argues that despite plaintiffs' assertions to the contrary, plaintiffs' claims for medical monitoring, which require Metabolife to pay for past and future treatment of injured class members as well as damages for "past and future risk of serious latent disease," invoke individual personal injury-type damages and consequently render this a personal injury case. Plaintiffs respond that Metabolife's argument is baseless--they are only seeking medical monitoring to allow consumers who ingested Metabolife 356 to find out whether they have physical damage attributable to the product. Plaintiffs say that although this medical monitoring may lead to personal injury suits after such examinations, it does not create individualized issues in the present case. The Court agrees, especially in light of the modification of the class to specifically exclude those persons with a personal injury claim. Thus, common issues predominate and allow for class certification.

2. Superiority

***8** Metabolife finally argues that plaintiffs' trial plan is seriously flawed because it fails to show how the individual issues of reliance, causation, and damages can be handled in a way that would not create overwhelming manageability problems. *See In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 219-21 (E.D. La 1998) (rejecting plaintiffs' propose trial plan where plan did not alleviate manageability problems concerning causation, reliance, and affirmative defenses.) Indeed, the court in *In re Ford Paint Litig.*

expressly stated that courts are "explicitly prohibit[ed] from... certifying a class now and worrying about how to try it later. *Id.* at 225. Plaintiffs respond that Metabolife's "obstacles" are disingenuous and easily correctable. *See* NEWBERG, *supra* § 9.12 ("Class suits should rarely be denied or decertified solely because class management problems are complex.")

Given that plaintiffs seek only class certification on the discrete, common issue of whether the label taken as a whole is materially misleading, the case would be entirely manageable as a class action. In addition to significantly advancing the litigation, maintaining this case as a class action is also desirable so as to prevent inconsistent rulings. *See* Fed.R.Civ.P. 23(b)(1). As a class action, the adequacy of Metabolife's labels will be decided by only one fact-finder. If plaintiffs lose on the common issue of whether the label is misleading or not, than any subsequent case relying upon the label would be barred.

Finally, and most importantly, it should be emphasized that in general, any doubts concerning the propriety of a class certification should be resolved in favor of upholding the class. *See Esplin v. Hirschi*, 402 F.2d 94, 101 (2d Cir.1968) ("[T]he interests of justice require that in a doubtful case... any error, if there is to be one, should be committed in favor of allowing the class action.") This is especially so in a case such as here, where the individual damage claims are so small that denial of class certification would effectively eliminate the litigation. In such circumstances, courts should be liberal in granting class certification. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (noting that " '[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." ') (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.1997)).

Although Metabolife is technically correct that the named plaintiffs can still obtain their main objectives, i.e., a refund of the purchase price, a change in the labels and attorney fees, through an individual suit under the Michigan Consumer Protection Act., MCLA § 445.911(1)(a) and § 445.911(2), it misses the point--which is that it is highly unlikely that the members of the class would ever file suit individually to recover only the small purchase price of the product. Thus, denying certification would seriously inhibit an avenue of legal redress for the members of the class, assuming that plaintiffs' claims have merit. *See Paley v. Coca-Cola Co.*, 389 Mich. 583, 595 (1973) ("The class action... has been particularly helpful for one of today's most beleagured and disaffected groups--the consumer. It is a kind of better slingshot for the modern David to tackle Goliath with." Accordingly, a class action is the superior method of adjudication.

D.

***9** In summary, the labels on the bottles of Metabolife 356 create common questions of law and fact under the Michigan Consumer Protection Act. The description of the class is limited to exclude class members who have individual personal injury claims and the legal issue is limited to whether the labels are materially misleading. The Court will not certify the common law fraud claim because it depends upon the resolution of individual questions of law and fact.

IV. Conclusion

For the reasons stated above, plaintiffs' motion for class certification is GRANTED. An order will be entered upon notice of presentation and opportunity to respond.

SO ORDERED.

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