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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

AVIVAH KUPFER
Plaintiff

SEPHORA USA, INC.
Defendant

Case No: CV-15-842636

Judge: MICHAEL E JACKSON

JOURNAL ENTRY

CLASS CERTIFICATION AND PLAINTIFF'S STANDING TO SEEK INJUNCTIVE RELIEF FOR PRODUCTS SHE DID NOT PURCHASE. O.S.J.

2/9/16

Judge Signature Date

02/09/2016

IN THE COMMON PLEAS COURT
CUYAHOGA COUNTY, OHIO

AVIVAH KUPFER, individual And On Behalf Of All Others Similarly situated	)	CASE NO.: CV 15 842636
Plaintiff	)	JUDGE MICHAEL E. JACKSON
v.	)	
SEPHORA USA, INC.	)	JOURNAL ENTRY & OPINION: CLASS CERTIFICATION AND PLAINTIFF'S STANDING TO SEEK INJUNCTIVE RELIEF FOR PRODUCTS SHE DID NOT PURCHASE.
Defendant	)	

Plaintiff Avivah Kupfer (Kupfer) seeks to certify a class action law suit and obtain injunctive relief against Defendant Sephora USA, Inc. (Sephora), a leading retail chain of cosmetic products worldwide. In February 2015, Kupfer purchased one 0.8-ounce bottle of Givenchy Teint Counture Longwearing Fluid Foundation for $50 plus tax.

The Court denies in part and grants in part Kupfer's Motion for the reasons stated in this Journal Entry and Opinion. As a result of this ruling, Kupfer may only seek injunctive relief concerning the cosmetic that she purchased, unless barred by law or an affirmative defense not addressed herein, and all other remedies related to the effort that are consistent with and not precluded by this Journal Entry and Opinion and Ohio law.

Kupfer asserts that she bought the makeup because of Sephora's "point-of-sale advertising" that identifies the product as a 15 hour long-wearing facial cosmetic. She wore the makeup but alleges that it did not last more than 5 hours. She settled her claim regarding the purchase of this product, and now seeks a class action and injunctive relief concerning both the

cosmetic that she purchased, and cosmetics subject to Sephora's advertising practices that she did not purchase.

On July 10, 2015, the Court held a case management conference with counsel for all parties. The Court stayed discovery on Kupfer's motion for injunctive relief until the parties briefed two threshold issues:

(1) Whether a class can be certified as a matter of law pursuant to the Supreme Court of Ohio's holding in *Marrone v. Phillip Morris USA Inc.*, 110 Ohio St.3d. 5, 2006-Ohio-2869; and

(2) Whether Kupfer has standing to seek an injunction, broadly restraining Sephora's practice of advertising unsubstantiated long-wearing cosmetic claims, concerning the cosmetics she purchased, and cosmetics that she did not purchase.

Law: Ohio's Consumer Sales Practices Act and Standing

1. Class Certification under the Ohio's Consumer Sales Practices Act.

To bring a Consumer Sales Practices Act (CSPA) class action suit a plaintiff must allege and prove that actual damages were proximately caused by the defendant's conduct. *Felix v. Ganley Chevrolet, Inc.*, 2015-Ohio-2430, ¶ 31 (citation omitted) The Supreme Court of Ohio overturned the Eighth District Appellate Court, and the trial court's class certification when the plaintiff failed to plead and prove actual damages or injuries to all class members; proof of actual damages is required before a court may properly certify a class action. *Id.* (citations omitted).

"[A] consumer may qualify for class action certification if: (1) the violation is an act or practice that was declared to be deceptive or unconscionable by rule adopted by the Attorney General before the consumer transaction on which the action is based, or (2) the violation is an act or practice that was determined by a court to violate the CSPA, and the court's decision was

available for public inspection in accordance with R.C.1345.05 (A)(3) before the consumer transaction." *Marrone v. Phillip Morris USA Inc.*, 110 Ohio St.3d. 5, 2006-Ohio-2869, ¶1. The Supreme Court of Ohio held that a plaintiff must show defendant's alleged conduct is substantially similar to an act or practice that was previously declared deceptive to qualify for class action certification pursuant to R.C. 1345.09 (B), which requires that the defendant has prior notice. *Id.* at ¶31.

Marrone involved the cigarette industry. Prior to *Marrone*, the Supreme Court of Ohio had not decided cases involving the cigarette industry or conduct similar in *Marrone's.* The Supreme Court of Ohio determined that prior cases that involved industries and conduct very different from both that industry and conduct of the defendants in *Marrone* did not provide meaningful notice of specific acts or practices that violate the CSPA. *Id.* at ¶ 21. Accordingly, Phillip Morris, the defendant in *Marrone*, did not have meaningful notice based on court decisions that would satisfy R. C. 1345.09 (B). *Id.* at ¶ 21. *Id.* In addition, reliance on Ohio Admin. Code 109:4-3-10, which states "that it is a deceptive act or practice for supplier to make any representation in the absence of a reasonable basis in fact," is insufficient to provide prior notice under R. C. 1345.09 (B); that section does not refer to any particular act or practice." *Id.* at ¶ 23. Therefore, the class certification in *Marrone* was not proper[1]. *Id.* at ¶ 25.

2. Standing

"It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the

[1] The Supreme Court of Ohio discusses in dicta the comprehensive regulation of the cigarette industry by the Federal Trade Commission (FTC). The court recognizes that an absence of prior rules or court decisions may exist in other industries because Ohio's consumer protection laws defer to FTC regulations and pronouncements.

subject matter of the action.[2]" *Eberhard Architects, L.L.C. v. Schottenstein, Zox & Dunn Co., L.P.A.*, 8th Dist. Cuyahoga No. 102088, 2015-Ohio-2519, ¶ 17, citing *State ex rel Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973). To have standing, a plaintiff must have "a personal stake in the outcome of the controversy and have suffered some concrete injury that is capable of resolution by the court." *Fannie Mae v. Walton*, 8th Dist. Cuyahoga No. 101650, 2015-Ohio-2855, ¶ 19 (citations omitted).

"A consumer is a person who engages in a consumer transaction with the supplier." R. C. 1345.01 (D). "Any consumer may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter." R. C. 1345.09 (D).

A "consumer transaction" is "a sale . . . or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 495 F.Supp.2d 1027, 1032 (N.D.Cal.2007) (citations omitted); *Rose-Gulley v. Spitzer Akron, Inc.*, 9th Dist. Summit No. 21778, 2004-Ohio-4063, ¶ 11 (Court denied CSPA relief to a plaintiff who did not qualify as a "consumer" within the meaning of CSPA because she did not "engage in a consumer transaction with a supplier.")

Kupfer's Positions

1. Class Action

Kupfer relies on Ohio Admin. Code 109: 4-3-10 to provide the basis for this Court to certify the class action. She claims this provision afforded Sephora meaningful prior notice that

[2] Section 4(B) of Article IV of the Ohio Constitution provides that "the courts of common pleas and divisions thereof shall have original jurisdiction over all justiciable matters and all powers of review of proceedings of administrative officers and agencies as may be provided by law.

its practice was then and is now deceptive. Kupfer also acknowledges two points. First, the *Marrone* case deals with the tobacco industry which is heavily regulated by the FTC, and that Ohio's consumer protection laws defer to the FTC pronouncements. Second, there are no comparable FTC regulations and policies in this case. Nevertheless, she contends the FTC has consistently required that cosmetic claims be substantiated prior to selling these products.

Kupfer believes the Eighth Appellate District Court supports her position. That court determined another code provision, ORC 109: 4-3-16 (B)(22)[3], provided meaningful notice to Ganley Chevrolet Inc. and upheld the trial court's decision to certify the class action pursuant to R. C. 1345.09 (B). *Felix v. Ganley Chevrolet Inc.*, 2013-Ohio- 3523, ¶ 40 (8th Dist.). (overturned in another assignment of error in *Felix v. Ganley Chevrolet, Inc.*, 2015-Ohio-3430.)

In the alternative, Kupfer states that she will withdraw her certification for a class action in ¶¶ 35-42 of her complaint if the Court determines that she has standing to pursue injunctive relief for all Sephora products, not just the one she purchased.

2. <u>Standing for Injunctive Relief</u>

Kupfer acknowledges that although she purchased a single cosmetic product from Sephora and obtained relief for that purchase, she nevertheless contends that she is entitled to seek broad injunctive relief against Sephora for its advertising practices for the product she purchased, and products that she did not purchase.

[3] ORC 109: 4-3-16 (B)(22) provides that: it shall be a deceptive and unfair act or practice for a dealer, manufacture, advertising association, or amortizing group, in connection with the advertisement or sale of a motor vehicle, to ***fail to integrate into any written sales contract, all material statements, representations or promises, oral or written, made prior to obtaining the consumer's signature on the written contract with the dealer.

She requests this Court to look to the FTC for guidance that is applicable to the Attorney General in Ohio R. C. 1345.07 (A)(2)(a). She asserts that she will continue to purchases products from Sephora, and is entitled to purchases products without fear of misrepresentation.

Because Kupfer claims standing to sue for damages regarding the product she purchased, she believes R. C. 1345.09 (D) entitles her, as a consumer, to numerous forms of relief against all the unfair/misleading advertising practices of Sephora. She seeks a declaratory judgment, injunction, or other appropriate relief against an act or practice that violates this chapter, and permits her to bring suit for equitable relief. In particular, Kupfer alleges the Sephora engages in the practice of falsely advertising unsubstantiated longwearing claims for numerous cosmetic products.

According to her view, the plain language of this statute does not suggest that she lacks standing to seek an injunction concerning Sephora's alleged violation of R. C. 1345.02 (A) in combination with the Ohio Admin. Code 109: 4-3-10. She contends that the terms, "act" and "practice," are embedded, singularly, in combination, selectively and repeatedly, throughout the CSPA.

Kupfer argues that the breath of the Attorney General's injunctive authorization is coextensive with that of a "private attorney general" because the terms used, "act or practice" and "injunction" are the same for both public and private enforcement. Kupfer urges this Court should construe "practice" expansively rather than narrowly.

For these reasons, Kupfer asserts that she has statutory standing to seek an injunction against Sephora's practice of advertising unsubstantiated long wearing claims even for products she has not purchased. Statutory standing means that she may present evidence and urge, upon

the basis of such evidence, that this Court exercise its equitable authority to restrain Sephora's advertising practices. Kupfer relies extensively on foreign case law which this Court discusses later in its Opinion.

Sephora's Positions

1. Class Action

The Supreme Court of Ohio determined that Ohio Admin. Code 109:4-3-10 "is insufficient to provide prior notice under R. C. 1345.09 (B) because it does not refer to any particular act or practices. *Marrone* at ¶ 23. Kupfer does not direct the Court to any rule adopted by the Attorney General, or court decision involving facts or industries "substantially similar" to those at issue in this case. *Id.* at ¶ 9. Because Kupfer cannot demonstrate that Sephora had prior notice that its conduct was deceptive or unconscionable, Kupfer's request for class certification must be denied.

2. Standing for Injunctive Relief

Kupfer has not suffered a concrete harm that the Court may redress. Kupfer has admitted that she did not purchase the products that she refers to in count two seeking injunctive relief. Kupfer's attorney acknowledged this fact to the Court during the July 10, 2015 case management conference. These statements constitute a judicial admission. Because Kupfer did not engage in a consumer transaction for these additional products, she is not a consumer under the CSPA. Therefore, she has no personal stake in the outcome of her injunction claim, and she has suffered no concrete injury capable of judicial redress. Granting her the relief she seeks will have no direct and immediate impact on her.

The term "private attorney general" appears nowhere within the CSPA, nor, for that matter in the Ohio Revised Code. Kupfer would have this Court believe that merely invoking this phrase suffices to confer her with standing, but no authority supports that result.

Court's Opinion

1. Class Action

Kupfer's argument for class certification lacks merit and is denied; Sephora's arguments and reasoning are correct. Also, Kupfer's reliance on the Eighth Appellate District Court case, which considered a provision that relates to car dealerships, Ohio Admin. Code 109: 4-3-16 (B) (22), is misplaced. *Felix v. Ganley Chevrolet Inc.*, 2013-Ohio-3523. The trial court and appellate court relied on two other opinions that addressed the conduct of other defendants engaged in the same industry - auto sales, auto sales agreement, and the dealer's omission of allegedly material information from an automobile sales agreement - to support the proposition that Ganley Chevrolet was on notice that its conduct violated Ohio CSPA. *Id.* at ¶ 40. Kupfer did not cite any prior court decisions to support her position that Sephora was on notice.

2. Standing for Injunctive Relief

The parties assert that this is uncharted territory for Ohio courts concerning one aspect of Kupfer's claims for injunctive relief. She wants this Court to infer that because she has standing to sue Sephora regarding one product that she purchased, that she has standing to sue Sephora for advertising practices of all of its products. That is a very liberal interpretation of the statute. This Court disagrees with that interpretation.

Kupfer relies almost extensively on federal case law for the proposition that Ohio courts liberally allow "private attorney generals" to pursue private actions against suppliers. However,

none of these cases support the position that courts allow a plaintiff that has not experienced, in fact, a concrete harm to have redress in that court. She cites to a Northern District case where that court reconsidered a motion to strike an Ohio CSPA claim. *Midland Funding LLC v. Brent*, N.D. Ohio No. 3:08 CV 1434, 2009 U.S. Dist. LEXIS 87266 (Sep. 23, 2009) The court clarified that it was not applying Fed.R.Civ.P. 65, the federal test for injunctive relief. *Id.* at 4. The court decided the issue of injunctive relief by applying Ohio law. *Id.* It reasoned that R.C. 1345.09 (D) merely requires a showing that the Ohio CSPA has been violated, and that ordinary principles of equity such as irreparable injury or the absence of an adequate remedy at law do not apply. *Id.* at 6. The court relied on an Ohio consumer law publication to stand for the proposition that Ohio "courts have issued broad injunctions, usually enjoining the suppliers from engaging in the acts or practices the court has determined violated the CSPA. *Id.*; *contra Mick v. Level Propane Gases, Inc.*, 168 F.Supp.2d 804, 811 (S.D.Ohio 2001) (the court concluded that that injunctive relief under R.C. 1345.09 (D) is governed by the same equitable principles that apply to injunctions generally even though the injunctive relief was created by statute.)

According to traditional interpretations of standing, Kupfer's argument fails, and this Court has determined that Kupfer does not have standing to bring any action for consumer relief when she is not a consumer of those products. The Supreme Court of Ohio requires that a plaintiff, or member of a class action suit, must experience actual harm that can be redressed by the court. *Felix* at ¶ 31. While the Supreme Court of Ohio considered standing in the context of actual damages, its analysis clearly requires the party to demonstrate actual harm, an essential element of injunctive relief. Likewise, at least one federal court and one other Ohio court hold that the moving party actually be a consumer to pursue the action, i.e. actually experience

concrete harm in fact. *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig,* N.D.Ohio No. 3:08 CV 1434; *Rose-Gullery*, 2004-Ohio-4063.

These rulings, and the ruling from the Southern District of Ohio are persuasive. This Court requires Kupfer to demonstrate an actual harm to seek redress by injunctive relief. Kupfer has not demonstrated that she is a consumer of all of the products for which she seeks injunctive relief. Therefore, she does not have standing to bring an action regarding consumer transactions for relief from products that she did not engage in a consumer transaction.

Accordingly, and until challenged by Sephora because this aspect of Kupfer's claim was not addressed by either party in their briefing, Kupfer may seek, as stated in Part 5 of her Prayer for Relief. That requested relief seeks "[a]n order (a) enjoining Sephora from propagating (or again propagating) in Ohio a 15 hour claim as to the long wearing properties of the product..." that she purchased. Kupfer is permitted to seek such other remedies which are consistent with this Order and Ohio law regarding her request for injunctive relief regarding the product that she purchased.

IT IS SO ORDERED.

DATED: 2/9/16

JUDGE MICHAEL E. JACKSON

THE CLERK OF COURT SHALL SERVE A COPY OF THE FOREGOING JOURNAL ENTRY AND OPINION ON ALL COUNSEL OF RECORD AT THE ADDRESS LISTED ON THE COURT DOCKET.