SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 02/24/2011 TIME: 11:14:00 AM DEPT: C-71

JUDICIAL OFFICER PRESIDING: Ronald S. Prager
CLERK: Lee Ryan
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **JCCP4042** CASE INIT.DATE: 08/12/1998
CASE TITLE: **JCCP4042 COORDINATION PROCEEDING TOBACCO LITIGATION**
CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Other

EVENT TYPE: Motion Hearing (Civil)

APPEARANCES

The Court rules on defendant Philip Morris USA Inc. et al. (collectively "Defendants") motion for determination that plaintiffs Janel Alvarez ("Alvarez") and Damien Bierly ("Bierly") do not meet the standing, adequacy, and typicality requirements to represent the class as follows:

After taking the matter under submission, the Court affirms its tentative ruling.

As a preliminary matter, defendants Liggett Group LLC and Liggett & Myers Inc. filed a joinder to Defendants' motion.

Defendants' Evidentiary Objections. The Court rules as follows:

Alvarez Declaration. The Court sustains the objection to the entire declaration on the ground that it contradicts evidence in her deposition testimony. (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078 (hereafter "*Whitmire*"); *see also Russell v. Acme-Evans Co.* (7th Cir. 1995) 51 F.3d 64, 67 (hereafter "*Russell*"); *Perma Research & Dev. Co. v. Singer Co.* (2d Cir. 1969) 410 F.2d 572, 578 (hereafter "*Perma*").)

Bierly Declaration. The Court sustains the objection to the entire declaration on the ground that it contradicts evidence in his deposition testimony. (*Whitmire, supra.*; *Russell, supra.*; *Perma, supra.*)

Robinson Declaration. The Court sustains the objections to paragraphs 4-5 and attached Exhibits 3 and 4 for failure to comply with California Rules of Court, rule 3.1116. The Court also sustains the objection to paragraph 8 and attached Exhibits 7-12 for failure to comply with California Rules of Court, rule 3.1113 subd. (k).

Defendants bring this motion pursuant to California Rules of Court, rule 3.764. They contend that Alvarez and Bierly are inadequate, atypical, and lack standing.

Procedural Arguments. The parties raised several procedural arguments in their opposition and reply briefs. Plaintiffs contended that the Court was not required to amend its certification order and that this motion should have been brought as a summary judgment motion.

As to whether the Court was required to amend its certification order, it should be noted that the California Supreme Court in *In re Tobacco Cases II* (2009) 46 Cal.4th 298, 329 (hereafter "*Tobacco II*") specifically stated that it was "remand[ing] the case for further proceedings to determine whether these plaintiffs can establish standing as we have now defined it and, if not, whether amendment should be permitted." Thus, it is clear that this Court was directed to make the determination sought via this motion. The Court also notes that the parties and this Court discussed this issue at an ex parte hearing in which it was determined that a defense motion under the class certification rules was the appropriate vehicle for raising and resolving the adequacy, typicality, and standing of Alvarez and Bierly. (Collins Reply Dec., Exh. B, pp. 12, 16.)

As to whether the issues set forth in this motion should have been brought in a motion for summary judgment, Plaintiffs' position ignores the fact that the issues presented by this motion are procedural in nature and that they have the burden of proof on all class certification issues. (*Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 973-974; *Morgan v. AT&T Wireless Servs., Inc.* (2009) 177 Cal.App.4th 1235, 1253.) Notably, a certification order may be modified at any time prior to trial (*Vasquez v. Super. Ct.* (1971) 4 Cal.3d 800, 821) upon a showing of changed circumstances or new evidence. (*Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal.App.4th 1213, 1226). On the other hand, summary judgment motions test the merits of the claims in an action.

Janel Alvarez

Adequacy and Typicality. These factors are part of the community of interest requirements set forth in Code of Civil Procedure section 382.

In determining the adequacy factor, courts consider, among other things, whether the representative plaintiff possesses the same interest and suffers the same injury as the class members. (*J.P. Morgan & Co., Inc. v. Super. Ct.* (2003) 113 Cal.App.4th 195, 212.)

In determining the typicality factor, courts consider, among other things, whether the representative possesses "factually intensive or legally complex unique defenses that pose a significant risk of diverting attention from class issues." (*See Fireside Bank v. Super. Ct.* (2007) 40 Cal.4th 1069, 1091.) For example, certification was denied in *Hanon v. Dataproducts Corp.* (9th Cir. 1992) 976 F.2d 497, 509, because the evidence showed that the plaintiff in that action did not rely on the market in a class action which alleged fraud on the market.

Defendants contend that Alvarez is inadequate and atypical with respect to the Non-Lights issues (Issues 1(b), 5, 4, and 6) and Lights issue (Issue 2). The Court agrees for the reasons stated below.

Non-Lights Issues (Issues 1(b), 5, 4, and 6). As to Issues 1(b) and 5 (false statement denying youth targeting and affirming adherence to CAC), Alvarez's testified that this case was about "the false advertising of the light cigarettes" and was a representative only for "the light Marlboro smokers in the state of California." (Collins Dec., Exh. 4 (Alvarez Depo.), pp. 31, 37.) Furthermore, Alvarez's responses before and after the testimony quoted by Plaintiffs in their opposition show that she viewed her claims and representation to be limited to Lights. (*Id.* at Exh. 4, pp. 31, 37.) In addition, she testified that she had not heard of the CAC during the class period. (*Id.* at Exh. 4, p. 257.) Plaintiffs' citation to her declaration, which was created after her deposition, to counter the testimony cited by Defendants does not assist them for the reasons set forth in *Whitmire, Russell,* and *Perma.* Finally, the court in

Daniels stated that "there is no merit to the claim that class members were deceived or misled by misrepresentations that the defendant tobacco companies were not targeting minors with cigarette advertising and promotions" and that "it is implausible that those misrepresentations factored into their decision to smoke." (*In re Tobacco Cases II (Daniels)* (2004) 20 Cal.Rptr.3d 693, 714 fn. 21 (hereafter "*Daniels*").)

As to Issue 4 (false statements concerning additives and nicotine manipulation), Alvarez testified that she did not believe Defendants' alleged representations that cigarettes were not addictive. (Collins Dec., Exh. 4, p. 253.) She also testified that she was addicted to cigarettes by the age of 18 (*Id.* at Exh. 4, p. 235) and knew more than a decade later that nicotine was addictive and that Lights contained nicotine (*Id.* at Exh. 4, pp. 34-35). Plaintiffs only cited to her declaration, which was created after her deposition, to counter the testimony cited by Defendants. This does not assist them for the reasons set forth in *Whitmire, Russell,* and *Perma.*

As to Issue 6 (conspiracy to mislead concerning health risks of smoking), Alvarez testified that she knew that cigarettes were bad for her in 1989 (Collins Dec., Exh. 4, p. 134), quit smoking during her two pregnancies in 1989 and 1991 (*Id.* at Exh. 4, p. 110), and was told by her doctor not to resume smoking after her pregnancy (*Id.* at Exh. 4, pp. 190-193.) The deposition testimony cited by Plaintiffs indicates that she was uncertain about the health effects of smoking prior to the class period. (Robinson Dec., Exh. 4 (Alvarez Depo.), 124:8-19, 126:20-25, 128:4-19, 129:20-130:15, 158:22-159:21.) They did not cite deposition testimony that she harbored those thoughts during the class period.

Lights Issue (Issue 2). Alvarez cannot show that she meets the requirements to show that her claims are not subject to the Immunity Statute which "affords tobacco companies immunity for claims based on conduct that occurred between January 1, 1988 and December 31, 1997, unless the claim is based on some risk not inherent in smoking and tobacco products." (*In re Tobacco Cases II* (Cal.Sup.Ct. JCCP 4042, Aug. 4, 2004) 2004 WL 2445337, *35.) The Court notes that it held that the Immunity Statute applies to this issue. (*Id.* at p. *37.) To show that she suffered injury and lost money or property under the UCL, Alvarez must show that she relied on conduct that occurred during the class period (approximately 1993-2001) but after the Immunity period had expired. Alvarez testified that she came to the conclusion that Defendants' Lights advertising was deceptive during the Immunity period. (Collins Dec., Exh. 4, pp. 19, 21-24.) The deposition testimony cited by Plaintiffs do not assist them since it does not refute her admission that she concluded in 1995 that she had been misled by Marlboro Lights advertising.

In addition, Plaintiffs' argument that the challenged Lights descriptors and advertising amount to health claims that violated the 1964 version of the CAC and thus falls within the Immunity Statute's exception for claims that are akin to express warranties fails because it rests on an outdated version of the CAC. Notably, the 1990 version of the CAC does not contain the language relied on by Plaintiffs. (Collins Reply Dec., Exh. I; *see also id.,* Exh. R, p. 7.)

Standing. Defendants also contend that Alvarez lacks standing. The Court agrees for the reasons stated below.

Under the UCL, a class representative must have suffered an "injury in fact" and a "los[s] of money or property" "as a result of" the alleged misconduct. (Bus. & Prof. Code §17204.) The California Supreme Court in *Tobacco II, supra,* 46 Cal.4th at page 325 stated that that "the phrase 'as a result of' introduced a tort causation element in to UCL actions." It went on to state that the fraud-based nature of the UCL claim requires that a class representative establish actual reliance to show he or she has standing under section 17204. (*Id.* at pp. 326, 328; *see also Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 855 fn. 2.)

In *Tobacco II, supra,* at pages 311-312, the California Supreme Court also stressed that this case concerned "the third prong of the statute-an allegation of a fraudulent business act or practice, specifically claims of deceptive advertisements and misrepresentations by the tobacco industry about its products." (*See also id.* at p. 328.) Importantly, it noted that Plaintiffs' youth targeting claim was preempted by federal law (*Id.* at p. 310, fn. 5) and that "[P]laintiffs abandoned the only other unfair or unlawful business practice claim they made-regarding the alleged manipulation of the chemical constituents of cigarettes to enhance their addictiveness-except to the extent that defendants made false or misleading statements on this subject." (*Id.* at p. 312, fn. 7). Thus, it held that Plaintiffs' claims are governed by the legal standards applicable under the fraud prong of the UCL and that the causation required to establish standing is reliance. (*Id.* at pp. 312-314, 324-329.) The construction of Plaintiffs' claims adopted by the California Supreme Court in *Tobacco II* is also reflected in this Court's own rulings in this case. (*In re Tobacco Cases II, supra,* 2004 WL 2445337 at pp. *24-26; Collins Reply Dec., Exh. D, at p. 7.) Furthermore, the Court notes that Plaintiffs argued that the UCL fraud prong governed this case. (Collins Reply Dec., Exh. C, pp. 1, 8, 12-13, 19, 29-30, 58, 66-68, Exh. E, p. 2, 10, 17, 21, 25, 29, Exh. F, p. 2-4; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) Therefore, Plaintiffs' contention that their claims also arise under the unfair or unlawful prongs of the UCL is inconsistent with their prior representations in this case and the view of the case by the courts of this state. In addition, the court in *Kwikset Corp. v. Super. Ct.* (Cal., Jan. 27, 2011) 2011 WL 240278, pp. *27-28 stated that where the "theory of the case is that [the defendant] engaged in misrepresentations and deceived consumers," the other prongs of the UCL make only a redundant contribution to the fraud prong's standards, and the applicable standing requirements entail a showing of reliance.

Finally, as to Plaintiffs' contention that they may satisfy their burden to show standing by invoking a presumption of reliance, the deposition testimony of Alvarez cited by Defendants supports a finding of the nonexistence of reliance as to her, which is all that is needed to rebut the presumption. (Evid. Code §604; *see also Bonzer v. City of Huntington Park* (1993) 20 Cal.App.4th 1474, 1481.) Again, Plaintiffs only cited to her declaration, which was created after her deposition, to counter the testimony cited by Defendants. This does not assist them for the reasons set forth in *Whitmire, Russell,* and *Perma.*

As to the argument that she is merely lending her name to the action, Defendants cited to deposition testimony where she stated that she discussed the case for only an hour before deciding to become a class representative (Collins Dec., Exh. 4 (Alvarez Depo.), p. 18), allowed her attorneys to prepare nearly 300 pages of her interrogatory responses which did not review (*Id.* at Exh. 4, p. 96) only reviewed the remainder for 15 minutes on her work computer (*Ibid.*), did not know it was her duty to review her responses at her deposition (*Id.* at Exh. 4, p. 97), admitted the responses contained errors (*Id.* at Exh. 4, pp. 87-88), and only reviewed the first two or three written responses to Plaintiffs' Request for Production. (*Id.* at Exh. 4, p. 99.) In response, Plaintiffs only cited to her declaration, which was created after her deposition, to counter the testimony cited by Defendants. This does not assist them for the reasons set forth in *Whitmire, Russell,* and *Perma.*

As to the argument that Alvarez cannot represent class members with respect to brands she did not smoke, Defendants note that Alvarez only smoked Marlboro Lights during the class period. Notably, the rule set forth in *Baltimore Football Club, Inc. v. Superior Court* (1985) 171 Cal.App.3d 352, 359 that "a class action may only be maintained against defendants as to whom the class representative has a cause of action" only applies "[i]n the absence of a conspiracy between all of the defendants." Where, as here, the plaintiffs have alleged the existence of a conspiracy, the "crucial inquiry is...whether each plaintiff has sufficient incentive to present evidence that will establish the existence of the alleged conspiracy." *Id.* The court also stated that "a strong similarity of legal theories will satisfy the typicality

requirement despite substantial factual differences" between their respective claims." (*Rivera v. Bio-Engineered Supplements & Nutrition, Inc.* (C.D. Cal., Nov. 13, 2008) 2008 WL 4906433, p. *7.)

Damien Bierly

Adequacy and Typicality. Defendants contend that Bierly is inadequate and atypical with respect to the Non-Lights issues (Issues 1(b), 5, 4, and 6) and the Lights issue (Issue 2). The Court agrees for the reasons stated below.

Non-Lights Issues (Issues 1(b), 5, 4, and 6). As to Issues 1(b) and 5 (false statement denying youth actionable under the Immunity Statute and Civil Code section 1, subd. (b). (*Daniels, supra,* 20 Cal.Rptr.3d at p. 716 fn. 25.) In addition, he specifically testified that believed that Defendants were marketing and advertising to youth by the age of 18. (*Id.* at Exh. 5, p. 263.) Moreover, the court in *Daniels* held that such a theory of reliance was implausible as a matter of law. (*Daniels, supra,* 20 Cal.Rptr.3d at p. 714 fn. 21.) The deposition testimony cited by Plaintiffs does not assist them because representations about Lights do not violate the 1990 version of the CAC for the reasons stated above. Finally, Plaintiffs' citation to his declaration does not assist them for the reasons set forth in *Whitmire, Russell,* and *Perma.*

As to Issue 4 (false statements concerning additives and nicotine manipulation), Bierly's testimony indicates that he was not exposed to any cigarette advertisements that contained denials of nicotine manipulation of that contained denials of using additives to increase addiction. He also testified that he believed that Defendants were controlling nicotine levels by 1994. (Collins Dec., Exh. 5, pp. 162-163, 198.) Plaintiffs only cited to his declaration, which was created after his deposition, to counter the testimony cited by Defendants. This does not assist them for the reasons set forth in *Whitmire, Russell,* and *Perma.*

As to Issue 6 (conspiracy to mislead concerning health risks of smoking), Bierly's testimony indicates that he was aware that cigarettes were harmful to health in general and his own health in particular by 1997. (Collins Dec., Exh. 5, pp. 77, 81, 84, 86, 115-116, 154, 201-202, 215, 231-232, 263.) The evidence shows that he knew that cigarettes posed a health risk, had been warned by doctors that cigarette smoking was dangerous and was experiencing adverse health consequences he attributed to smoking before the end of the Immunity period. Plaintiffs only cited to his declaration, which was created after his deposition, to counter the testimony cited by Defendants. This does not assist them for the reasons set forth in *Whitmire, Russell,* and *Perma.*

Lights Issue (Issue 2). Bierly expressly testified that he did not come to believe that Lights were less harmful from Defendants' statements or advertising campaign. (Collins Dec., Exh. 5, p. 154.) He also stated that tar and nicotine information was irrelevant to him (*Id.* at Exh. 5, pp. 198-199) and did not want to know what the heath risks of smoking Lights might be (*Id.* at Exh. 5, pp. 166-167). In response, Plaintiffs point out conflicting deposition testimony in which he indicates that the descriptors on the packs influenced his decision to smoke. However, his express admission that he did not come to believe that Lights cigarettes were less harmful to his health from Defendants coupled with his knowledge that cigarettes were harmful to health by 1997, leads to the conclusion that his claim is barred the Immunity Statute.

Standing. Defendants also contend that Bierly lacks standing. The Court agrees for the reasons stated below.

Plaintiffs' contention that their claims also arise under the unfair or unlawful prongs of the UCL fails for the reasons stated above. As to Plaintiffs' contention that they may satisfy their burden to show standing by invoking a presumption of reliance, the deposition testimony of Bierly cited by Defendants supports a finding of the nonexistence of reliance as to him, which is all that is needed to rebut the presumption. (Evid. Code §604; *see also Bonzer, supra.*) In response, Plaintiffs only cited to his declaration, which was created after his deposition, to counter the testimony cited by Defendants. This does not assist them for the reasons set forth in *Whitmire, Russell,* and *Perma.*

Res Judicata. This argument fails for the reasons set forth in the Court's December 14, 2010 ruling on this issue.

As to the argument that Bierly cannot represent class members with respect to brands he did not smoke, it fails for the reasons stated above.

Based on the foregoing, the Court finds that Alvarez and Bierly are inadequate, atypical, and lack standing to pursue the claims in this action.

IT IS SO ORDERED.

Plaintiffs' Motion for Leave to Amend and Defendants' Motion to Dismiss are scheduled as follows:
File 4/25/11
Opposition 5/24/11
Reply to Opposition 6/7/11
Hearing 6/21/11 10:00 am

All other dates are vacated.

Ronald S. Prager

Judge Ronald S. Prager