IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DENNIS PIERRE BOULET, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

NATIONAL PRESTO INDUSTRIES, INC., a Wisconsin Corporation,

Defendant.

OPINION AND ORDER

11-cv-840-slc

In this consumer fraud action, plaintiff Dennis Boulet alleges that defendant, National Presto Industries, Inc., falsely represented that a certain model of its CoolDaddy® deep fryer remains "cool to the touch" when used as directed, when, in fact, it becomes so hot that it is capable of burning human skin. Before the court is plaintiff's motion for reconsideration of this court's December 21, 2012 order denying his motion to certify his case as a nationwide class action under Fed. R. Civ P. 23. For the reasons stated below, I am granting Boulet's motion.

Boulet contends that newly-discovered evidence warrants reconsideration of this court's finding that Boulet lacked sufficient evidence to meet his burden of showing the existence of a common question of law or fact under Rule 23(a)(2).[1] This evidence consists of (1) a report from Underwriters Laboratories ("UL") issued on May 28, 2004 for the third generation

---

[1] As for this court's findings that class certification was not warranted under Rule 23(b)(2) or (3), Boulet seeks to rectify those concerns by amending his complaint to allege causes of action under the Florida Deceptive Trade Practices Act and for unjust enrichment and by proposing a new class consisting only of individuals who purchased a CoolDaddy® fryer in the state of Florida from November 2007 to the present. Br. in Supp. of Mot. for Reconsideration, dkt. 56, at 13-30; Proposed Amended Complaint, dkt. 60, exh. A. At Presto's request, this court postponed further briefing on the motion to amend the complaint and for certification of a new class until after it ruled on the motion for reconsideration concerning commonality under Fed. R. Civ. P. 23(a)(2). Dkt. 70 (text only order). A briefing schedule on the pending motion to amend and the corresponding motion to certify a Florida-only class, dkt. 62, will be set at a telephonic status conference, which is scheduled at the end of this order.

CoolDaddy® deep fryer that is the subject of this lawsuit, first disclosed to Boulet on December 19, 2012, and (2) an Expert Report and Supplemental Expert Report dated December 10, 2012 and December 22, 2012, respectively, from Harold Ehrlich, Boulet's designated expert on liability. Presto opposes the motion, arguing that the UL report is not material to Boulet's claim of a common design defect and that there is no reason why Boulet could not have adduced Ehrlich's report during the class certification proceedings.

The late-disclosed report from Underwriters Laboratories supports Boulet's allegation that the basket handle on all third-generation CoolDaddies® heats to high, if not unsafe temperatures. Further, a review of Boulet's arguments in support of reconsideration in conjunction with the Supreme Court's recent decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184, 1194 (2013), convinces me that I applied too high a standard on Boulet to show commonality.

Contrary to what this court's original opinion implied, what Boulet must establish for class certification is not that the CoolDaddy® *in fact* suffers from a universal defect, but rather that the *question* whether this universal defect exists can in fact be answered with proof common to all CoolDaddy® purchasers. Whether the basket handle on defendant's third-generation CoolDaddy® becomes so hot during ordinary use that it causes pain or burns when touched with a bare hand is a question capable of proof by evidence that is common to all CoolDaddy® purchasers. Boulet now has some common–if not overwhelming–admissible and material evidence. Whether this evidence actually *proves* a common defect is an issue to be resolved at summary judgment or at trial, not at the class certification stage. Accordingly, upon reconsideration, I find that plaintiff has satisfied Rule 23(a)(2).

OPINION

The background of this case, the parties' evidence and the court's findings with respect to Boulet's motion for class certification all are set out in the December 21, 2012 order and incorporated herein by reference. The sole question before the court at this juncture is whether it should reverse its prior finding that Boulet failed to meet his burden of establishing Rule 23(a)(2)'s requirement that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). If Boulet clears this hurdle, then it remains to be seen whether this court will permit him to file an amended complaint raising claims under Florida law or grant his new motion for certification of a Florida-only class.

As just noted, Boulet contends that two new pieces of evidence establish his claim that all third-generation CoolDaddies® sold suffer from an inherent design defect that defeats the product's claim that the basket handle remains "cool to the touch" and safe to handle with a bare hand. Although the parties devote significant time to arguing about what standard this court should apply to Boulet's motion, *compare* Plts.' Br. in Supp., dkt. 55 at 5 (arguing that under Rule 23(c)(1)(C), court has broad discretion to alter or amend class certification orders) *with* Def.'s Br. in Opp., dkt. 73 at 5 (arguing that court should apply Fed. R. Civ. P. 59(e)), I find it unnecessary to resolve that dispute: even under the more stringent approach advocated by Presto, Boulet prevails.

"To prevail on a motion for reconsideration under Rule 59, the movant must present either newly discovered evidence or establish a manifest error of law or fact." *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). A motion under Rule 59(e) affords a court a wide

range of discretion to correct its own errors, thereby sparing the parties and appellate courts the burden of unnecessary proceedings. *Divane v. Krull Elec. Co.*, 194 F.3d 845, 848 (7th Cir. 1999).

I. Ehrlich Report

Harold Ehrlich is Boulet's designated expert on liability. On December 8, 2012, he tested the CoolDaddy® on which Boulet burned his finger. From this testing, Ehrlich concluded that "the external temperatures produced by the CoolDaddy fryer are hazardous and can produce burns upon contact" when the product is used in its intended and foreseeable manner. Report of Harold Ehrlich, dkt. 57, exh. 2. Ehrlich issued his expert report on December 10, 2012, which was the parties' agreed-upon deadline for disclosing liability experts.[2]

I agree with Presto that Boulet cannot rely on Ehrlich's opinion to get a second bite at the class certification apple. At the parties' request, this court established a deadline for disclosing class certification experts; Boulet's deadline was June 25, 2012. Preliminary Pretrial Conf. Order, dkt. 14. Boulet did not disclose any experts, opting to move for class certification without one. Having intentionally waived his opportunity to use Ehrlich at the class certification stage, Boulet cannot rely on him now, no matter what standard of review this court applies to his motion. "It is not the purpose of allowing motions for reconsideration to enable a party to complete presenting his case after the court has ruled against him. Were such a procedure to be countenanced, some lawsuits really might never end, rather than just seeming endless." *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995). The same is true of class

[2] Presto has filed a motion to strike Ehrlich's opinion under Fed. R. Evid. 902. Dkt. 76. Because I am not considering Ehrlich's reports in connection with the instant motion, I will deny Presto's motion without prejudice, subject to renewal, if necessary, at a later time.

certification proceedings. If Boulet had wanted this court to consider Ehrlich's opinion for deciding the class certification motion, then he could have–and should have–submitted his report at the appropriate time. I will not consider it now.

II. May 28, 2004 Report from Underwriters Laboratories

The UL report is another matter, however. At the time Boulet filed his motion for class certification, Presto had produced reports from UL concerning its testing of the first and second generation CoolDaddy®, but did not produce a copy of the UL report pertaining to the third generation model. Although Boulet specifically requested this report before this court decided his motion for class certification, Presto did not produce it until December 19, 2012, two days before this court issued its order on class certification. In its brief, Presto makes little effort to justify its late disclosure of the report, arguing instead that it is immaterial. I disagree.

According to the UL report, which is dated May 28, 2004, UL did not perform additional testing of the third generation model, deeming it unnecessary because of the similarity between that device and its immediate predecessor, the second-generation CoolDaddy®, which UL had previously tested before that model had been put on the market. As Boulet points out, although he had these second generation test results at the time he filed his motion for class certification, he was not aware that these test results applied to the third generation model until he received this report from Presto.[3]

[3] During class certification briefing, Boulet submitted the UL report from the *first* generation model to support his claim of a common defect, even though he had in his possession the more pertinent results from the second generation model. According to Boulet, this was a mistake on his part: he actually had meant to submit and rely on the testing of the second generation model. In any case, it is undisputed that until December 19, 2012, Boulet did not have any information from UL regarding the *third* generation model that is the subject of this lawsuit.

But Boulet has not submitted a copy of the UL report, dated September 26, 2001, showing results from testing of the second generation model. Boulet asserts that they were attached to an affidavit from his lawyer, dkt. 57, at Exhibit A, but that exhibit consists only of the UL report for the third generation model; it does not show the results of the previously-performed testing on the second generation model. However, Ehrlich referred to an excerpt from the September 2001 report in his supplemental export report dated December 22, 2012, which is in the record at dkt. 57, exh. C. Solely for the purposes of this order I have assumed that the information excerpted in Ehrlich's report is the section of the UL report on which Boulet is relying, and in the absence of any contrary argument by Presto, I also have assumed that Ehrlich's transcription of the test results is accurate. Apart from extracting the UL report information, I have not considered Ehrlich's supplemental report.

The UL report for the second generation model indicates the results of temperature testing performed by UL on the basket handle. There are two sets of test results: "A," which tested a unit with adjustable thermostat model A604; and "B," which tested a unit with adjustable thermostat model A-7. Both tests used peanut oil and french fries. The results of temperature testing of the handle are shown below, with conversions from degrees Celsius (°C) to degrees Fahrenheit (°F):

	Maximum Temperature °C (°F)			
Location of Thermocouple	Preheat A	Cooling A	Preheat B	Cooling B
Basket handle	38°C (100°F)	89°C (192°F)	28°C (82°F)	76°C (169°F)

These maximum temperatures—192° and 169°Fahrenheit, respectively—are very hot. Do they prove Boulet's claim that the third-generation CoolDaddy's® handle "gets too hot to touch

safely?" Br. in Supp. of Mot. for Reconsideration, dkt. 56, at 8-9. On their own, no. The temperatures alone don't tell us where the thermocouple was placed on the basket handle or at what point in time during the cooking process the temperature was taken, whether the basket handle on the third-generation model is configured differently so that the handle does not actually reach these same temperatures, how long the basket handle stays at these temperatures once the cooking process is complete or what temperatures can be tolerated by human skin coming into contact with a plastic handle at these temperatures.[4] Boulet relies on Ehrlich to establish that the temperatures found by UL are beyond the human threshold for pain, but as just noted, Ehrlich's report is not properly before the court in connection with this motion. All we know from the UL report is that some point during the cooking process, some spot on the basket handle on the precursor to the CoolDaddy® at issue in this suit becomes very hot.

Although the newly-disclosed UL report does not prove Boulet's claim of an inherent design defect to any degree of certainty, I am persuaded that it is enough to lift him over the commonality hurdle. Indeed, this court might have erred in the December 21, 2012 order to the extent it considered the merits of Boulet's allegation of a common design defect at all. Although the court's class-certification analysis must be "rigorous" and *may* "entail some overlap with the merits of the plaintiff's underlying claim," *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. ——, ——, 131 S.Ct. 2541, 2551 (2011)(emphasis added), district courts do not have a "license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 133 S.Ct. at 1194. As

[4] Presto also says that the readings have no bearing on Boulet's claim because the purpose of UL's testing was to determine the durability of the plastic, not the comfort level of the user. This argument is not persuasive. As Boulet points out, no matter what the purpose of the testing, the temperatures are the temperatures.

the Supreme Court recently emphasized in *Amgen*, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id*. at 1195. *See also* Advisory Committee's 2003 Note on subd. (c)(1) of Fed. Rule Civ. Proc. 23, 28 U.S.C. App., p. 144 ("[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision.").

In *Dukes*, the Court explained that for proposed class members to satisfy Rule 23(a)(2)'s commonality requirement,

> [t]heir claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Id., 131 S.Ct. at 2551. Put another way, if "the same evidence will suffice for each member to make a prima facie showing, then it [is] a common question." *Messner v. Northshore University HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012).

Here, the proposed class members' claims depend on certain common contentions—that Presto made deceptive or fraudulent statements about how the CoolDaddy® works, namely, that during use, the exterior, including the bail handle, remains cool to the touch, and that Presto made these statements to all CoolDaddy® purchasers by including them in the product name and instruction manual. Whether Presto's statements are in fact false or deceptive depends on objective proof that is the same for everyone in the proposed class: evidence that because of the way it is designed, the CoolDaddy's® handle heats up to temperatures hot enough to burn skin.[5]

[5] As this court noted in its order on Presto's motion to dismiss, no reasonable person would understand the term "cool" to encompass an exterior that becomes hot enough to burn flesh.

Although individual questions of reliance and causation are *not* capable of resolution on a classwide basis–at least as the proposed class is currently defined– *see* Dec. 21, 2012 order, at 17-25, the determination whether these individual issues would predominate the case so as to undermine the efficiencies of class treatment is an inquiry to be made under Rule 23(b)(3). As to the alleged misrepresentation, however, the class, whether nationwide or Florida-only, is "entirely cohesive: It will prevail or fail in unison." *Amgen*, 133 S. Ct. at 1191.

The upshot is that this court probably put the cart before the horse by demanding that Boulet come forth with more than his "own say-so" to prove his allegation that Presto's statements about its product being "cool to the touch" are objectively false or misleading. In any case, the newly-disclosed UL report on the third-generation CoolDaddy® is at least some evidence supporting Boulet's claim that the product's handle heats up to unreasonable temperatures. Keeping in mind that the class certification proceedings are not meant to be "a dress rehearsal for the trial on the merits," *Messner*, 669 F.3d at 811, I am persuaded that Boulet has met his burden of meeting Rule 23(a)(2)'s commonality requirement.

In the initial order on class certification, I did not make findings with respect to the remaining 23(a) factors, concluding that even if they were met, Boulet had failed to satisfy the requirements of Rule 23(b)(2) and (3). In light of Boulet's pending motions to amend his complaint and to certify an amended class limited to individuals who purchased a CoolDaddy® fryer in the state of Florida from November 2007 to the present, it remains unnecessary to make the remaining Rule 23(a) findings or to reconsider my rulings with respect to Rule 23(b). The court will establish a briefing schedule on those motions at the scheduled telephonic status conference.

ORDER

IT IS ORDERED THAT:

1. Plaintiff's motion for reconsideration of the court's December 21, 2012, order with respect to its finding on commonality under Fed. R. Civ. P. 23(a)(2) is GRANTED.

2. Defendant's motion to strike plaintiff's expert, Harold Ehrlich, dkt. 76, is DENIED, without prejudice, as unnecessary.

3. A telephonic status conference is scheduled for May 31, 2013 at 10:00 a.m., with plaintiff's attorney initiating the conference call to chambers. At this conference, we will set a briefing schedule on Boulet's motion to file an amended complaint, dkt. 60, and his motion to certify a class under Rule 23 under the class definition specified in the proposed amended complaint, dkt. 62, and will discuss the impact of all this on the remainder of the current schedule.

Entered this 24th day of May, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge