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Cosmetics Co. Asks Judge To Nix Used-Makeup Class Action

By **Lauraann Wood**

Law360 (August 7, 2018, 8:37 PM EDT) -- Ulta Beauty Inc. asked an Illinois federal judge late Monday night to toss a putative class action over its alleged sale of used, repackaged products, saying the suit lobs too vague claims on behalf of too broad a class.

Ulta told U.S. District Judge Jorge Alonso that Kimberly Smith-Brown's lawsuit must be tossed because its named plaintiffs cannot assert nationwide claims based on "products they did not purchase that arise under the laws of states in which they do not live."

The plaintiffs live in specific states, Ulta noted. So, it claimed, they should not be able to represent a nationwide class of consumers "who purchased ... beauty products from Ulta Beauty retail locations" because they don't cite a specific product purchased and have not shown how their purchased product is "substantially similar" to the tens of thousands of products sold in more than 1,000 locations.

"It is not enough for plaintiffs merely to assert that the alleged misrepresentation is 'substantially similar' and ignore the obvious physical dissimilarities among the tens of thousands of products included in their putative class," Ulta said, using the differences between nail polish and hairspray as an example.

Smith-Brown's January lawsuit, which was consolidated with two others in April, claims Ulta has for years been repackaging consumers' returned products and selling them as new to unsuspecting customers. She filed suit after an employee exposed the company's alleged practice in social media posts that same month.

The employee claimed in her posts that workers were trained to "restore" products and prepare them for re-sale, such as cleaning eye shadow palettes and letting them dry overnight for next-day repackaging, according to the lawsuit. The worker's story also prompted online responses from Ulta employees in other locations who said the same practice happens in their stores, Smith-Brown claimed.

But taking social media's word for it is part of the lawsuit's problem, Ulta told Judge Alonso. Basing the lawsuit's claims on "anonymous social media allegations and a handful of declarations" does nothing to show the court evidence of a widespread scheme to misrepresent Ulta's products, it said.

"At most, the anonymous social-media posts and alleged-former-employee declarations allege varying practices at a handful of specific stores at specific times," the pleading said.

Plus, the consumers' lawsuit isn't limited to purchases of used, returned and repackaged products since it also asks to recover for "products that they concede were new at the time they were purchased," Ulta noted. That can't survive because "someone who alleges mere exposure to a risk of potential injury that never materialized, or who complains about an alleged business practice that did not cause them harm, does not have standing to sue under Article III of the United States Constitution," the beauty chain argued.

Thomas Zimmerman Jr. of Zimmerman Law Offices, who represents consumer Tammy Walker in the

suit, told Law360 on Tuesday that he is not worried about Ulta's motion because he's confident the complaint lobs sufficient claims to beat it.

He also blasted the legal authority Ulta says supports its position, saying the motion's cited cases don't match up because the challenged business practice in those suits, such as failing to protect a customer's personal information, was separate from the product consumers purchased.

"Here, the business practice is part-and-parcel of the product they're purchasing," he said.

And he blasted Ulta's contention that consumers who purchased new products couldn't pursue relief against the company, saying those customers have a claim for facing the risk at all that they'd buy a used and repackaged product from its shelves.

"It's like Russian roulette," he said. "You have a chance of picking a product that was used and you don't know, which goes into the theory of damages."

Counsel for Ulta told Law360 in a written statement Tuesday that its pleading speaks for itself and the company "intends to continue its vigorous defense in this matter."

The consumer plaintiffs are represented by Carl Malmstrom and Janine Pollack of Wolf Haldenstein Adler Freeman & Herz LLC, Lee Shalov, Jason Giaimo and Wade Wilkinson of McLaughlin & Stern LLP, Thomas Zimmerman Jr., Matthew De Re and Sharon Harris of Zimmerman Law Offices, and Theodore Bell.

Ulta is represented by Craig Martin, Matt Basil and Paul Rietema of Jenner & Block LLP.

The case is Kimberly Smith-Brown v. Ulta Beauty Inc. et al., case number 1:18-cv-00610, in the U.S. District Court for the Northern District of Illinois.

--Editing by Jack Karp.