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Ulta Shoppers Say Risk Of Buying Used Makeup Justifies Suit

By **Diana Novak Jones**

Law360 (September 17, 2018, 6:41 PM EDT) -- A proposed class of Ulta Beauty Inc. customers told an Illinois federal judge to reject the makeup retailer's bid to dismiss their claims the company sold used products, arguing in part that misleading customers about what they were buying is enough to establish standing.

The customers, who claim Ulta repackaged returned, used products to sell them as new ones, told U.S. District Judge Jorge Alonso on Friday that Ulta's claim they don't have standing because they didn't buy the used makeup doesn't fly. The customers were injured because they believed they were buying new products, and they would not have shopped at Ulta if they knew that they could have ended up with used goods, the proposed class said.

"Ulta should not be permitted to create a dangerous and unsanitary situation and then use this artificial distinction between new and used products to avoid liability for its deceptive acts," the class told Judge Alonso in response to Ulta's motion to dismiss. "Ulta's actions reduced the value of all its products, whether new or used, and plaintiffs did not get what they bargained for — products which were not subject to comingling."

Ulta has been hit with three suits over the allegations, which were consolidated in April before Judge Alonso, according to court records.

The suits claim that Ulta had a practice of repackaging used products that other customers had returned and putting them on the shelves as if they were new. The suits were filed after an Ulta worker claimed the company was reselling used products in a tweet — an allegation that was later confirmed by many more Ulta workers, the suit claimed.

But in August, Ulta **moved to dismiss** the proposed class action, claiming the customers were trying to bring vague claims on behalf of too broad a group. For one, the customers who only bought new products do not have standing, Ulta said.

"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," Ulta said in its motion.

The company also criticized the sufficiency of the complaint and challenged the named plaintiffs' efforts to bring a suit on behalf of all Ulta shoppers, saying they can't represent anyone from any state who bought any product.

In its response on Friday, the proposed class said the injury happened when the customer was misled into believing that when they shopped at Ulta they would receive only new products.

The suit alleges a financial injury that courts like the Seventh Circuit have repeatedly said was enough to establish standing, the proposed class said. The alleged deception is true for all products Ulta sold, so the products the plaintiffs bought don't matter, they added.

Ulta's challenge to the proposed class's breach-of-warranty and unjust enrichment claims argues that the plaintiffs can only bring those claims under the state laws where they live. But that's an issue for class certification, the customers said in Friday's motion.

The customers also struck back at Ulta's argument that their suit doesn't have enough detail about the alleged fraud. The suit includes "copious detail" about how products are restored and put back on the shelf after they are returned, and attaches five declarations from former Ulta employees about the whole process, the customers said.

"It is hard to conceive of any additional detail defendants could plausibly need to put them on notice of plaintiffs' claims," the customers said.

In a statement Monday, Ulta attorney Craig Martin of Jenner & Block LLP said Ulta's reply brief would "speak for itself."

The consumer plaintiffs are represented by Carl Malmstrom and Janine Pollack of Wolf Haldenstein Adler Freeman & Herz LLP, 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.

--Additional reporting by Lauraann Wood. Editing by Jack Karp.

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