IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

CAMILLE ESTES, individually and on behalf of all others similarly situated, Plaintiff, v. DEAN INNOVATIONS, INC., an Oregon domestic business corporation, Defendant.	)	Case No. 20CV22946 OPINION ON CLASS CERTIFICATION
DEAN INNOVATIONS, INC., an Oregon domestic business corporation, Third-Party Plaintiff, v. ORGANIX, INC., an Oregon domestic business corporation; and YAMHILL COUNTY MUSHROOMS, INC., an Oregon domestic business corporation, Third-Party Defendants.	)	

The parties appeared via Webex in the above captioned case on February 25, 2022, for a hearing on Plaintiff's Motion for Class Certification. David Sugerman and Nadia Dahab appeared for the plaintiff. Chris Carson appeared for defendant and third-party plaintiff Dean Innovations, Inc., Stephanie Grant appeared for third-party defendant Organix, Inc., and Ken Abere and Brandon Thornburg appeared on behalf of third-party defendant Yamhill County Mushrooms. Inc. Defendant and third-party defendants filed responses in opposition to Plaintiff's motion. The Court took the matter under advisement.

A subsequent status hearing was held on April 26, 2022, with the same counsel for their respective parties. The Court announced its tentative decision to grant Plaintiff's Motion for Class Certification regarding the First Claim for Relief in the Second Amended Complaint,

Violation of Unlawful Trade Practice Act ("UTPA"). The Court requested additional briefing on the appropriateness of granting class certification as to the Second Claim for Relief, Strict Products Liability ("SPL"). After hearing further argument, the Court issued an April 28, 2022, letter to parties asking three clarifying questions regarding class certification for the strict products liability claim. The parties filed additional briefing on these questions and on May 20, 2022, the parties appeared via WebEx for a subsequent hearing on class certification. David Sugerman appeared for the plaintiff, Chris Carson appeared for defendant and third-party plaintiff Dean Innovations, Inc., Anna Sortun appeared for third-party defendant Organix, Inc., and Brandon Thornburg appeared on behalf of third-party defendant Yamhill County Mushrooms, Inc.

After considering all the submissions and the arguments of the parties, the Court finds that the prerequisites of ORCP 32A are satisfied and that a class action is superior to other available methods for the fair and efficient adjudication of Claim 1. The Court cannot make these necessary findings as to Claim 2. Therefore, the Court grants Plaintiff's Motion for Class Certification with respect to Claim 1, alleging violation of the UTPA, and denies the motion with respect to Claim 2, alleging strict products liability, for the reasons discussed herein.

Facts

Defendant is a landscaping supply company which sells, among other products, compost material under the labels "White Lightning," "Stinky Bull" and "Fun Guy." Defendant mixes and bags White Lightning which is a planting mix partially composed of materials sourced from Third-Party Defendants Yamhill County Mushrooms and Organix. The White Lightning label describes the product as "formulated for organic gardening." Stinky Bull and Fun Guy are sourced directly from third-party defendants. Prior to Plaintiff and other potential class members raising herbicide contamination issues, Defendant never conducted herbicide or other contaminant testing of its products or sourced material. During the proposed class period, approximately 2635 customers purchased White Lightning compost, 226 customers purchased Stinky Bull and 144 customers purchased Fun Guy. Plaintiff purchased White Lightning in March of 2020. In April and May 2020, Defendant started receiving complaints from customers, including from Plaintiff, who suspected that the products contained an herbicide. Plaintiff asserts that tomatoes and peas planted in the planting mix were damaged in ways suggesting herbicide contamination. Other customers of Defendant made similar complaints. Testing conducted by the Oregon Department of Agriculture indicated that the Stinky Bull and Fun Guy products, both

used as source material for White Lightning, tested positive for detectible levels of clopyralid, a harmful herbicide capable of killing or damaging many plants. Plaintiff obtained an independent test of her soil, which also showed the presence of clopyralid.

Claim 1 – Unlawful Trade Practices

Plaintiff asserts that Defendant violated the UTPA by representing its products had characteristics, ingredients, uses, benefits, or qualities that the product did not have. ORS 646.608(1)(e). Specifically, plaintiff alleges that Defendant represented that the planting mix was of a quality that it may be used for organic gardening when it was not of such quality because some or all of the product was contaminated with clopyralid. Similarly, Plaintiff alleges that Defendant represented that its product was of a particular quality, standard or grade, when it was not. ORS 646.608(g). Finally, Plaintiff alleges that Defendant failed to disclose a known material defect or material nonconformity in its product. ORS 646.608(1)(t).

Plaintiff seeks to represent "a class of all persons who purchased White Lightning planting mix, Stinky Bull compost, or Fun Guy from the Defendant" from March 1, 2020, until June 30, 2020. Plaintiff asserts that she suffered economic damages including the purchase price and the cost of cleanup and remediation. She also asserted during argument that she suffered noneconomic damages for loss of use and enjoyment of land although noneconomic damages appear not to have been specifically alleged in the Second Amended Complaint.[1]

Plaintiff asserts that the action involves common questions of law and fact because the claims of all class members derive from the sale of the same potentially contaminated product. The common questions center around the central issue of whether Defendant violated the UTPA in one or more of the ways alleged. Additionally, a common question of fact would be whether Defendant acted recklessly, a necessary finding for class members to recover $200 in statutory damages even if they could not or choose not to pursue damages for actual loss. ORS 646.638(8). Plaintiff proposes that during the initial phase of trial, the jury would be tasked with determining whether Plaintiff, herself, suffered ascertainable loss as a result of any UTPA violations but that damages of the remaining class members would take place through a stipulated claims process possibly directed by a Special Master or through subsequent individual or group litigation.

[1] The Court inferred from this exchange that Plaintiff will seek to amend her complaint to allege non-economic damages.

Plaintiff argues that the requirements of ORCP 32A are met and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. ORCP 32B. She asserts the numerosity requirement is met as over 2625 individuals purchased the products during the proposed class period. She asserts that several common issues of law and fact exist relating to litigation of the alleged UTPA violations. She further asserts, that as to the liability issues, Plaintiff's claims are typical of the class and that she will fairly and adequately protect the class interests.

Defendant asserts that a class action is not superior and proceeding as Plaintiff proposes will violate its due process rights.[2] Defendant argues that proving property damage on a class wide basis will prove to be "impossible," because Defendant claims that very few purchasers of the planting mix can prove that they received product with a detectible level of clopyralid and that a bioassay of each class member's property would need to occur to prove actual contamination. As such, Defendant argues that individual issues predominate. Furthermore, Defendant argues that any class should preclude purchasers who cannot prove that clopyralid damaged their property. Put another way, Defendant asserts that the commonality requirement is wholly missing. Defendant also asserts that Plaintiff's lawsuit and the issues present are not typical of the vast majority of putative class members because her experience of purchasing tainted planting material is not typical of many class members who presumably will have no such proof. As such, Defendant argues, Plaintiff should not qualify as class representative.

In support of its objection to class certification, Defendant submitted the declaration of plant toxicology expert Professor Allan Felsot who outlined what he considered to be multiple material differences in the individual situations of the putative members. One might conclude from the facts and opinions asserted that this lawsuit can not be fairly litigated without a close examination of each purchaser's circumstances including, among other circumstances, whether they planted in pots or gardens or both, soil type, types of plants involved, gardener experience level, whether detectible levels of clopyralid was discovered, existence and nature of plant damage resulted, and whether remediation will require soil removal or not.

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[2] When reference to "Defendant" is made, the Court is referring to Dean Innovations. Third Party Defendant Yamhill County Mushrooms also filed a Response Opposing Class Certification and Joinder of Dean Innovations, Inc.'s Response Opposing Class Certification. Yamhill County Mushrooms primarily argues that the class should not be certified because individual questions predominate when assessing damages. For reasons discussed herein, the Court finds that any dissimilarity in the nature or proof of damages is not fatal to Plaintiff's motion.

Defendant also relies on the holding in *Pearson v. Philip Morris, Inc.*, 358 Or 88 (2015). Defendant argues that since Plaintiff and class members may be seeking damages for purchase price of the planting mix, they can only prove causation through an individual determination that they relied on the Defendant's marketing statements that the product was suitable for organic gardening. In other words, Defendant argues that each class member must prove reliance because *Pearson* rejects the assumption that ascertainable loss automatically follows under the UTPA when a purchased product is not as represented.

Ultimately, Defendant argues that certifying the class as proposed would prevent Defendant from adequately defending the case because any fair defense necessarily requires an individualized determination of whether each class member relied on representations made by Defendant, whether individual class members can prove they received compost tainted with clopyralid, and whether each member suffered actual damage to their property.

The Court finds that Plaintiff has met the five threshold prerequisites of ORCP 32A when considering the significant issue of whether Defendant violated the UTPA in any of the ways alleged in the complaint. The class is numerous, common questions of law and fact certainly exist, Plaintiff's claims are typical of those held by the proposed class and Plaintiff can fairly and adequately represent the class on the issue of whether the statute was violated as alleged.[3]

As stated above, Defendant's main contention is that ORCP 32B superiority has not been established because of the predominance of individualized issues relating to class member reliance on Defendant's representations and proof issues regarding whether individuals received product tainted with the herbicide and whether class members suffered harm as a result.[4]

The Court rejects the Defendant's arguments regarding the extent to which individualized determinations are necessary in the liability portion of this case. As the Court in *Pearson* pointed out, the predominance criterion in ORCP 32(B)(3) "requires the trial court to predict how the issues will play out at trial by considering whether the adjudication can be resolved with evidence common to the class." *Id.* at 110. It is not necessary that every issue be subject to common proof so that no individual issues exist in the litigation. The Court's discretionary

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[3] There is no issue as to the ORCP 32A(5) prelitigation notice requirement.

[4] Professor Felsot's declaration discusses a myriad of individual issues present in this lawsuit, related to differences in the homogeneity of clopyralid in the compost, its effects on various plants, detectability and testing of soil samples, soil and site conditions, plant species, the nature of plant damage and the complexities of whether remediation is necessary. The Court finds that the vast majority of these individual concerns relate to damages and not liability.

assessment should be driven by the extent to which a "class action will be a fair and efficient means of litigating the case, and thus superior over other available means to resolve the controversy." *Id.* at 111. Put another way, the Court should be swayed by "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* at 110 (citing Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 NYU L. REV. 97, 132 (2009)).

Thus, even though individual issues regarding damages exist, this litigation will be most efficiently handled if the Court and the parties have answers to the common question of whether Defendant is liable under the UTPA as alleged. The Court makes this finding because the Court also concludes that the case can proceed on Plaintiff's theory that anyone who purchased the listed products from Defendant during the period alleged, purchased planting mix potentially contaminated with clopyralid. Class members will not be required to prove that the product they received actually contained detectible levels of clopyralid. The Court resolves this issue in favor of the Plaintiff because a jury can fairly consider whether selling a planting mix or compost advertised as "formulated for organic gardening," violates the UTPA as Plaintiff alleges if it is shown that the product either contained detectable levels of clopyralid, or potentially contained the herbicide because the source material for the planting mix was contaminated. It appears from the evidence that even when clopyralid was detected through scientific testing methods from a sample of compost, other samples taken from the same source material, resulted in an undetectable reading.[5] This is because the herbicide may not be uniformly present at a detectable level throughout the compost source material but instead, may only be present in "pockets" of compost. Decl. Alan Felsot, ¶ 27, *Camille Estes v. Dean Innovations, Inc. et. al*, No. 20CV22946 (Multnomah Co. Cir. Ct. Jan. 18, 2022). Nonetheless, if the source material is contaminated, any compost purchased by any individual consumer is potentially contaminated even if a subsequent test of that material doesn't detect clopyralid.

The Court must also consider whether proof of causation for ascertainable losses related to purchase price refund damages requires proof of reliance on Defendant's representations. ORS 646.638(1). As the Supreme Court noted, "(a)lthough reliance is not, in and of itself, an element of a UTPA claim, it is a natural theory to establish the causation of the loss (*i.e.* the "injury" in a UTPA claim) for a purchaser seeking a refund based on having purchased a product believing it

[5] In Camille Estes first sample, ODA did not detect clopyralid; a subsequent test conducted by Montana State University did detect clopyralid in a second sample.

had a represented characteristic that it did not have." *Pearson* 358 Or. at 126. But as the Court notes, reliance is not always an element requiring individualized proof. "For at least some commodities, the only logical explanation for a consumer's purchase may be that the product has --- or is represented to have –an essential quality, without which it would be worthless." *Id.* at 133 (see e.g Garner v. Healy, 184 F.R.D 598 (N.D. Ill. 1999)(consumers purchased "car wax" and allegedly received worthless "non-wax" product)).

If this case were about purchasers of a tomato that was marked as organically grown when it was not, then reliance must be proven because a purchaser may only have wanted to purchase a tomato and did not care whether it was organically grown. But the purchase of the planting mix that is to be spread around the tomato plant is a very different matter. A jury could reasonably infer that purchasers would not put a planting mix into a garden if it potentially contained detectible levels of an herbicide that would kill the tomato plant. As such, it is not necessary for Plaintiffs to prove that each member of the proposed class relied on the representation that the mix was suitable for organic gardening. Such reliance may be inferred by circumstantial evidence.

The Court certifies the class as proposed even though individual issues exist if class members seek non-economic damages for loss of use and enjoyment of property and economic damages for remediation and cleanup of contaminated soil. That damages may vary among members of a class is not a reason to deny class certification. If the jury finds that the Defendant violated the UTPA in Phase 1 of the trial, it is anticipated that many members of the class will accept the $200 statutory damages. For others, the Court will devise a method to determine damages in Phase 2 through group trials, with the assistance of a special master, or through a stipulated claims process.

Claim 2 – Strict Products Liability

The Court denies Plaintiff's motion to certify a class on Claim 2. As Plaintiff acknowledges in her Supplemental Memorandum, to prevail on the liability issue on Claim 2, class members must establish that products they received from Defendant "were defective, and that the defective condition in which the products were sold was "unreasonably dangerous." Pl.'s Supplemental Mem. in Support of Mot. For Class. Certification, 2, *Camille Estes v. Dean Innovations, Inc. et. al*, No. 20CV22946 (Multnomah Co. Cir. Ct. May 6, 2022); *Restatement (Second) of Torts* §402A (1965); ORS 30.920. Plaintiff further acknowledged during argument on the supplemental filings, that class members, through expert testimony, would be required to

prove that they received defective soil.[6] The Plaintiff has not indicated how many potential sub-class members would be able to meet their burden of establishing that they received defective soil. Regardless, it is very unlikely that common questions of fact would predominate over questions affecting only individual members.[7] ORCP 32B(3).

Conclusion

For the reasons stated herein, the Court grants Plaintiff's motion for Class Certification as to Claim 1 and denies the motion as to Claim 2. Defendant is requesting that the Court make the findings necessary to authorize interlocutory review as provided in ORS 19.225. The Court requests further briefing on this subject. The Court understands that Defense counsel is out of the country through June 27, 2022. Defendant's brief on the issue of whether the Court should conclude that an immediate appeal from the Order may materially advance the ultimate termination of the litigation is due on July 8, 2022. Plaintiff's response is due on July 22, 2022.

Counsel for Plaintiff shall eventually prepare an appropriate form of Order referencing this opinion, but not until the Court resolves the interlocutory review issue.

DATED this 13th day of June, 2022.

Michael A. Greenlick
Circuit Court Judge

[6] During argument on the supplemental filings, Plaintiff's counsel indicated that Claim 2 was included in the complaint because at least one purchaser was a commercial customer who could not proceed under the UTPA. It is apparent that a subclass of one or two commercial customers would not be appropriate.

[7] The Court reaches a different conclusion as to class certification regarding Claim 1 because the liability issues in the UTPA claim relate primarily to whether an alleged sales representation violates the act. The issue of whether an assertion that that compost was suitable for organic gardening is actionable, is one in which common issues of law and fact do predominate. Common issues of fact and law do not predominate when each class member must prove through expert testimony that they actually received a defective product as would be required in Claim 2.