

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4

5 MARTIN MURRAY,

No. C 09-5744 CW

6 Plaintiff,

ORDER DENYING
MOTION FOR CLASS
CERTIFICATION
(Docket No. 167)

7 v.

8 SEARS, ROEBUCK AND CO., et al.,

9 Defendants.
10 _____/

11 Plaintiff Martin Murray brought this action against
12 Defendants Sears, Roebuck and Co. and Electrolux Home Products,
13 Inc. alleging violations of California consumer protection law.
14 He now moves for class certification. Defendants oppose the
15 motion. The Court took the matter under submission without oral
16 argument and now denies the motion for the reasons set forth
17 below.

18 BACKGROUND

19 Murray purchased a Kenmore-brand clothes dryer from a Sears
20 store in San Bruno, California in September 2001. After using the
21 dryer for two to three years, he began to notice stains appearing
22 on his clothing. Eventually, when tears and cuts started to
23 appear near the stains, Murray began to suspect that his dryer
24 might be the cause. In 2007, he removed the dryer's door to
25 inspect the inside of the machine and observed that rust had
26 developed on the frontal exterior of the dryer's "drum," the
27 cylindrical part of the machine that holds and rotates the
28 clothes. Docket No. 199, Murray Depo. 141:2-:14. He believed

1 that the stains, tears, and cuts in his clothing were the result
2 of his clothes coming into contact with this rust during the
3 drying process. Id.

4 In November 2009, Murray filed this putative class action in
5 San Mateo County Superior Court on behalf of all California
6 consumers who purchased the same Kenmore-brand dryer that he did.
7 In his complaint, he alleged that Sears and Electrolux, the
8 dryer's manufacturer, had marketed the dryer to consumers by
9 promoting its "stainless steel" drum without disclosing that the
10 drum's front -- the portion of the drum that allegedly rusted --
11 was actually made of a mild steel, which is more susceptible to
12 corrosion and chipping. Based on this alleged omission, Murray
13 asserted claims against Defendants for unjust enrichment, breach
14 of contract, and violations of California's Consumer Legal
15 Remedies Act (CLRA) and Unfair Competition Law (UCL). Defendants
16 removed the action to this Court in December 2009 under the Class
17 Action Fairness Act.

18 On February 8, 2010, Defendants moved to stay this action
19 until the Seventh Circuit resolved a pending appeal in a nearly
20 identical lawsuit that had been filed in the Northern District of
21 Illinois in 2006. The plaintiff in that case, a Tennessee man
22 named Steven Thorogood, had purchased the same dryer model as
23 Murray and -- while being represented by the same counsel as
24 Murray -- asserted a similar set of claims against Sears based on
25 the company's allegedly deceptive marketing practices.
26 Specifically, Thorogood sought to represent a nationwide class to
27 pursue claims based on violations of the Tennessee Consumer
28 Protection Act, Tenn. Code. Ann. §§ 47-18-101 et seq., and

1 analogous statutes in twenty-eight other states. The district
2 court initially certified the class but, in 2008, the Seventh
3 Circuit reversed, holding that the case presented "no common
4 issues of law or fact, so there would be no economies from class
5 action treatment." Thorogood v. Sears, Roebuck & Co., 547 F.3d
6 742, 747 (7th Cir. 2008) (Thorogood I). The Seventh Circuit
7 explained,

8 Since rust stains on clothes do not appear to
9 be one of the hazards of clothes dryers, and
10 since Sears did not advertise its stainless
11 steel dryers as preventing such stains, the
12 proposition that the other half million
13 buyers, apart from Thorogood, shared his
14 understanding of Sears's representations and
15 paid a premium to avoid rust stains is, to put
16 it mildly, implausible, and so would require
17 individual hearings to verify.

14 Id. at 748. After the class was decertified and the case was
15 remanded, the district court dismissed the action for lack of
16 subject matter jurisdiction and denied Thorogood's request for
17 attorneys' fees. On February 12, 2010, less than a week after
18 Defendants moved to stay the proceedings in this Court, the
19 Seventh Circuit affirmed the dismissal of Thorogood's case and the
20 denial of his request for attorneys' fees. Thorogood v. Sears,
21 Roebuck & Co., 595 F.3d 750, 752, 754 (7th Cir. 2010) (Thorogood
22 II) (noting that, even prior to dismissal, the court had
23 "expressed great skepticism of the merits of the plaintiff's
24 individual claim").

25 The Seventh Circuit's decision in Thorogood II, affirming
26 dismissal, resolved the appeal that originally served as the basis
27 for Defendants' motion to stay in this case. However, shortly
28 after that decision was issued, Defendants notified the Court that

1 Sears was planning to pursue a permanent injunction in the
2 Northern District of Illinois under the All Writs Act,¹ 28 U.S.C.
3 § 1651, to preclude other consumers from pursuing class-wide
4 relief against Sears based on the same claims that were dismissed
5 in Thorogood II. Defendants asserted that Sears's pending request
6 for an injunction justified a stay of Murray's case because, if
7 the request was granted, it "would, among other things, enjoin
8 plaintiff Martin Murray and his counsel in this action from
9 prosecuting this action as anything other than an individual
10 action." See Docket No. 63, Defs.' Notice of Pendency of Other
11 Action or Proceeding, at 2. This Court therefore issued a
12 temporary stay of discovery proceedings in this case in May 2010.
13 Docket No. 87, May 11, 2010 Minute Order.

14 One week later, on May 18, 2010, the Northern District of
15 Illinois issued a decision denying Sears's request for a permanent
16 injunction. The court reasoned that injunctive relief was not
17 necessary because Sears could achieve the same result by asserting
18 a defense of collateral estoppel in this action based on the
19 Seventh Circuit's decisions in Thorogood I and Thorogood II.
20 Sears appealed the district court's order to the Seventh Circuit.

21 While that appeal was pending, Defendants in this case case
22 moved to strike the class action allegations in Murray's
23

24 ¹ The All Writs Act provides that the "all courts established by
25 Act of Congress may issue all writs necessary or appropriate in aid of
26 their respective jurisdictions and agreeable to the usages and
27 principles of law." 28 U.S.C. § 1651(a). The Supreme Court has
28 "repeatedly recognized the power of a federal court to issue such
commands under the All Writs Act as may be necessary or appropriate to
effectuate and prevent the frustration of orders it has previously
issued in its exercise of jurisdiction otherwise obtained." United
States v. New York Tel. Co., 434 U.S. 159, 172 (1977).

1 complaint. Heeding the guidance of the Northern District of
2 Illinois's order -- the same order that Sears had just appealed --
3 Defendants argued that Murray was collaterally estopped from
4 bringing his class claims in light of the Thorogood decisions. In
5 July 2010, this Court granted the motion to strike. The Court
6 found that, "although rejection of a multi-state class does not
7 ipso facto foreclose all single-state class actions, the analysis
8 in the Seventh Circuit's decision and the similarities between the
9 factual allegations and legal theories in that case and this case,
10 require the application of collateral estoppel." Docket No. 104,
11 Order Granting Motion to Strike, at 11.²

12 Murray filed an amended class action complaint the following
13 week. In his amended complaint, Murray added new factual
14 allegations that had not been asserted by Thorogood. In
15 particular, he alleged that Sears and Electrolux had specifically
16 marketed certain Kenmore-brand dryer models, including the model
17 he purchased, as having an "all stainless steel drum" and
18 expressly represented that this feature made the dryers more
19 durable and less susceptible to corrosion and chipping than other
20 models. See Docket No. 106, First Amended Complaint (1AC) ¶¶ 50-
21 52. Defendants once again moved to strike the class allegations
22 on the grounds that Murray was collaterally estopped from
23 representing a class. However, based on the new allegations in
24 Murray's complaint, this Court denied the motion to strike and

25
26 ² The order noted, "Because the Court has concluded that Plaintiff
27 cannot proceed on his class allegations, the Court need not wait for a
28 decision by the Seventh Circuit" on Sears's appeal of the Northern
District of Illinois' order denying Sears's motion for a permanent
injunction. Order Granting Motion to Strike at 11-12.

1 allowed Murray to proceed on his class claims. Docket No. 120,
2 Order Denying Motion to Strike, at 7-8 ("Because the allegations
3 in the instant case are sufficiently different from those in
4 Thorogood, the class certification issues necessarily decided in
5 the previous proceeding are not identical to those presently
6 before the Court. Plaintiff is not collaterally estopped from
7 asserting his claims on a class-wide basis.").

8 In November 2010, two months after this Court denied
9 Defendants' second motion to strike, the Seventh Circuit reversed
10 the Northern District of Illinois' order denying Sears's motion
11 for a permanent injunction. Thorogood v. Sears, Roebuck & Co.,
12 624 F.3d 842 (7th Cir. 2010) (Thorogood III). In its opinion, the
13 court expressed disagreement with this Court's order finding that
14 Murray had sufficiently amended his class action allegations to
15 avoid the bar of collateral estoppel. Id. at 852 (concluding that
16 "Murray's suit is barred by collateral estoppel" because the minor
17 differences between his class claims and Thorogood's do not
18 suggest that he will be better able to meet Rule 23(a)'s
19 commonality requirement). The court thus held that Murray should
20 be enjoined from proceeding on his class action claims and,
21 further, that all other putative "members of Thorogood's class
22 must be enjoined as well as the lawyers so that additional Murrays
23 don't start popping up, class action complaint in hand, all over
24 the country, represented by other members of the class action
25 bar." Id. at 853. The Seventh Circuit directed the Northern
26 District of Illinois to enter the injunction and denied
27 Thorogood's requests for rehearing and rehearing en banc in
28 December 2010, 627 F.3d 289 (7th Cir. 2010).

1 The following month, January 2011, this Court stayed all
2 discovery proceedings in light of Thorogood III and scheduled a
3 case management conference to address how this case should proceed
4 once the Northern District of Illinois issued its injunction
5 barring Murray from pursuing his class claims against Defendants.
6 Before that case management conference was held, however,
7 Thorogood filed a petition for a writ of certiorari, which the
8 Supreme Court granted in June 2011. 131 S. Ct. 3060, 361 (2011).
9 In its three-sentence order, the Supreme Court vacated the Seventh
10 Circuit's opinion in Thorogood III and remanded the case for
11 further consideration in light of its recent decision in Smith v.
12 Bayer Corp., 131 S. Ct. 2368 (2011), which addressed the
13 preclusive effect of one court's class certification decision on
14 subsequent motions for class certification in other courts.³

15 In May 2012, the Seventh Circuit instructed the Northern
16 District of Illinois to vacate its injunction barring Murray from
17 pursuing his class claims in this action.⁴ Thorogood v. Sears,
18 Roebuck & Co., 678 F.3d 546, 552 (7th Cir. 2012) (Thorogood IV).
19 One month later, in June 2012, this Court lifted the stay of
20 discovery in Murray's case and set a briefing schedule for his
21 class certification motion. Murray now moves for class
22
23
24

25 ³ Both Murray and Thorogood participated in Smith as amici curiae
26 at the briefing stage. This order discusses Smith in further depth
below.

27 ⁴ The Northern District of Illinois had entered the injunction in
28 April 2011, before the Supreme Court had granted Thorogood's petition
for certiorari and vacated the Seventh Circuit's opinion in Thorogood
III. See Docket No. 139-2, N.D. Ill. Injunction in Thorogood.

1 certification under Federal Rules of Civil Procedure 23(b)(2) and
2 23(b)(3).⁵

3 LEGAL STANDARD

4 Plaintiffs seeking to represent a class must satisfy the
5 threshold requirements of Rule 23(a) as well as the requirements
6 for certification under one of the subsections of Rule 23(b).
7 Rule 23(a) provides that a case is appropriate for certification
8 as a class action if

- 9 (1) the class is so numerous that joinder of all members is
10 impracticable;
- 11 (2) there are questions of law or fact common to the class;
- 12 (3) the claims or defenses of the representative parties are
13 typical of the claims or defenses of the class; and
- 14 (4) the representative parties will fairly and adequately
15 protect the interests of the class.

16 Fed. R. Civ. P. 23(a).

17 Plaintiffs must also establish that one of the subsections of
18 Rule 23(b) is met. In the instant case, Plaintiffs seek
19 certification under subsections (b)(2) and (b)(3).

20 Rule 23(b)(2) applies where "the party opposing the class has
21 acted or refused to act on grounds generally applicable to the
22 class, thereby making appropriate final injunctive relief or

23 ⁵ Although Murray asserts that he is also moving for class
24 certification "pursuant to Cal. Code of Civil Procedure § 1781," Docket
25 No. 167, Class Cert. Mot. ii, that provision is inapplicable for two
26 reasons. First, "federal procedural rules govern a case that has been
27 removed to federal court." Smith, 131 S. Ct. at 2374 n.2 (explaining
28 that federal courts apply Federal Rule of Civil Procedure 23 to class
certification decisions rather than analogous state rules of procedure).
Second, section 1781 of the California Code of Civil Procedure was
repealed in 2000. Murray most likely intended to cite section 1781 of
the California Civil Code, which governs consumer class actions brought
in state court.

1 corresponding declaratory relief with respect to the class as a
2 whole." Fed. R. Civ. Proc. 23(b)(2).

3 Rule 23(b)(3) permits certification where common questions of
4 law and fact "predominate over any questions affecting only
5 individual members" and class resolution is "superior to other
6 available methods for the fair and efficient adjudication of the
7 controversy." Fed. R. Civ. P. 23(b)(3). These requirements are
8 intended "to cover cases 'in which a class action would achieve
9 economies of time, effort, and expense . . . without sacrificing
10 procedural fairness or bringing about other undesirable results.'"

11 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) (quoting
12 Fed. R. Civ. P. 23(b)(3) Adv. Comm. Notes to 1966 Amendment).

13 Regardless of what type of class the plaintiff seeks to
14 certify, it must demonstrate that each element of Rule 23 is
15 satisfied; a district court may certify a class only if it
16 determines that the plaintiff has borne this burden. Gen. Tel.
17 Co. of Sw. v. Falcon, 457 U.S. 147, 158-61 (1982); Doninger v.
18 Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). In
19 general, the court must take the substantive allegations of the
20 complaint as true. Blackie v. Barrack, 524 F.2d 891, 901 (9th
21 Cir. 1975). However, the court must conduct a "'rigorous
22 analysis,'" which may require it "'to probe behind the pleadings
23 before coming to rest on the certification question.'" Wal-Mart
24 Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (quoting
25 Falcon, 457 U.S. at 160-61). "Frequently that 'rigorous analysis'
26 will entail some overlap with the merits of the plaintiff's
27 underlying claim. That cannot be helped." Dukes, 131 S. Ct. at
28 2551. To satisfy itself that class certification is proper, the

1 court may consider material beyond the pleadings and require
2 supplemental evidentiary submissions by the parties. Blackie, 524
3 F.2d at 901 n.17. "When resolving such factual disputes in the
4 context of a motion for class certification, district courts must
5 consider 'the persuasiveness of the evidence presented.'" Aburto
6 v. Verizon Cal., Inc., 2012 WL 10381, at *2 (C.D. Cal.) (quoting
7 Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir.
8 2011)). Ultimately, it is in the district court's discretion
9 whether a class should be certified. Molski v. Gleich, 318 F.3d
10 937, 946 (9th Cir. 2003); Burkhalter Travel Agency v. MacFarms
11 Int'l, Inc., 141 F.R.D. 144, 152 (N.D. Cal. 1991).

12 DISCUSSION

13 I. Principles of Comity

14 Defendants urge this Court to show comity toward the Seventh
15 Circuit's denial of class certification in Thorogood I, 547 F.3d
16 at 748. They argue that, under the Supreme Court's decision in
17 Smith, a federal court must defer to any prior federal class
18 certification decision addressing the same claims and issues. To
19 support this claim, they cite language from Smith encouraging
20 federal courts "to apply principles of comity to each other's
21 class certification decisions when addressing a common dispute."
22 131 S. Ct. at 2382.

23 While Smith requires federal courts to show respect for prior
24 class certification rulings, it does not require that they
25 mechanically adopt those prior rulings whenever they are presented
26 with a motion to certify a class in a copycat lawsuit. This is
27 especially true where, as here, a class was never certified in the
28 earlier action and the plaintiff in the subsequent lawsuit never

1 joined the earlier action. As Smith explained, "Neither a
2 proposed class action nor a rejected class action may bind
3 nonparties." Id. at 2380. The Smith Court acknowledged that this
4 rule could lead to abuses by "class counsel [who] repeatedly try
5 to certify the same class" with different plaintiffs in different
6 jurisdictions but it concluded that this concern did not justify
7 "departing from the usual rules of preclusion." Id. at 2381-82
8 ("[O]ur legal system generally relies on principles of stare
9 decisis and comity among courts to mitigate the sometimes
10 substantial costs of similar litigation brought by different
11 plaintiffs. We have not thought that the right approach . . .
12 lies in binding nonparties to a judgment.").

13 The Seventh Circuit has relied on this aspect of Smith in
14 rejecting the same argument that Defendants advance here. Smentek
15 v. Dart, 683 F.3d 373, 377 (7th Cir. 2012) ("[T]he defendants'
16 argument that Smith v. Bayer Corp. adopted a rule of comity in
17 class action suits that precludes granting class certification in
18 a copycat class action must be rejected." (emphasis in original)).
19 Although the court recognized that the prospect of duplicative
20 litigation by multiple class action plaintiffs raises legitimate
21 policy concerns,⁶ it nevertheless held that federal courts are not
22 bound to adopt other courts' prior class certification rulings.
23 The court explained,

24
25
26 ⁶ In describing this problem, the Smentek court specifically
27 singled out Murray's counsel in the present case. See 683 F.3d at 376-
28 77 ("Without a rule of preclusion, class action lawyers can do what the
lawyer here (and the lawyer in Thorogood) did: keep bringing identical
class actions with new class representatives until they draw a judge who
is willing to certify the class.").

1 How are courts or legislatures to prevent
2 class action litigation from metastasizing?
3 The rule urged by the defendants in this case
4 that the denial of class certification bars
5 the certification of the same or a similar
6 class in a suit by a member of the same class
7 as the previous suit might do the trick, but
8 it would contradict the holding of Smith v.
9 Bayer Corp., which is that a class member who
10 did not become a party to the previous
11 parallel class action is not precluded from
12 seeking class certification in his class
13 action.

14 Id. (citations omitted). Based on this reasoning, the court
15 concluded, "We are left with the weak notion of 'comity' as
16 requiring a court to pay respectful attention to the decision of
17 another judge in a materially identical case, but no more than
18 that even if it is a judge of the same court or a judge of a
19 different court within the same judiciary." Id. at 377. A court
20 in this district subsequently cited Smentek in concluding that
21 "consideration of previous decisions on an identical class action
22 is not mandatory but discretionary." Williams v. Foods, 2013 WL
23 4067594, at *1 (N.D. Cal.). These decisions, along with Smith
24 itself, make clear that Thorogood I does not preclude Murray from
25 moving for class certification in this case.

26 Nevertheless, even if Thorogood I is not dispositive here, it
27 remains persuasive. Murray's factual allegations and supporting
28 evidence are nearly identical to the allegations and evidence that
29 Thorogood submitted in his failed bid for class certification and,
30 as explained further below, they contain many of the same
31 deficiencies. Thus, while Thorogood I does not compel a denial of
32 class certification here, as Defendants contend, it provides
33 strong guidance in deciding Murray's motion and must be afforded
34 "respectful attention." Smentek, 683 F.3d at 377.

1 II. Rule 23(a)

2 Murray moves to certify the following class:

3 all persons in the state of California who
4 purchased from Sears, through a Sears retail
5 store or on the Sears website at www.sears.com
6 within the applicable statute of limitations
7 period for each claim, a Kenmore or Frigidaire
8 laundry dryer classified with a stainless
9 steel drum and the drum front was not made of
10 stainless steel that was manufactured by
11 Electrolux.

12 Class Cert. Mot. 11. Murray asserts that there are at least forty
13 Kenmore-brand dryer models and at least ten Frigidaire-brand dryer
14 models which are sold by Sears, manufactured by Electrolux, and
15 contain a stainless steel drum with a non-stainless steel drum
16 front. Docket No. 167-2, Boling Decl. ¶ 13.

17 A. Numerosity

18 The parties have stipulated that thousands of California
19 consumers purchased the Kenmore-brand dryer models identified in
20 Murray's proposed class definition. See Docket No. 198-1, Oliss
21 Decl., Ex. A, Stipulated Facts ¶¶ 3-4. Murray has not
22 specifically identified how many of these consumers purchased
23 dryers "within the applicable limitations period" or how many
24 purchased Frigidaire-brand dryers. Nonetheless, because
25 Defendants do not deny that these numbers would satisfy Rule
26 23(a)'s numerosity requirement, the Court assumes that this
27 requirement has been met.

28 B. Commonality

Rule 23 contains two related commonality provisions. Rule
23(a)(2) requires that there be "questions of law or fact common
to the class." Rule 23(b)(3), in turn, requires that these common

1 questions predominate over individual ones. This section
2 addresses only whether Murray has satisfied Rule 23(a)(2)'s
3 requirements, which are "less rigorous than the companion
4 requirements of Rule 23(b)(3)." Hanlon v. Chrysler Corp., 150
5 F.3d 1011, 1019 (9th Cir. 1998) ("Rule 23(a)(2) has been construed
6 permissively."). The Ninth Circuit has made clear that Rule
7 23(a)(2) may be satisfied even if fewer than all legal and factual
8 questions are common to the class. Meyer v. Portfolio Recovery
9 Associates, LLC, 707 F.3d 1036, 1041 (9th Cir. 2012) ("All
10 questions of fact and law need not be common to satisfy the
11 [commonality requirement].'" (citations omitted; alterations in
12 original)), cert. denied, 133 S. Ct. 2361 (2013).

13 As noted above, the Seventh Circuit held that class
14 certification was inappropriate in Thorogood I because "there
15 [were] no common issues of law or fact" in that case. 547 F.3d at
16 747. The court reasoned that commonality was lacking because
17 Thorogood failed to present evidence that "Sears advertised the
18 dryers as eliminating a problem of rust stains by having a
19 stainless steel drum." Id. ("Advertisements for clothes dryers
20 advertise a host of features that might matter to consumers, such
21 as price, size, electrical usage, appearance, speed, and controls,
22 but not, as far as anyone in this litigation has suggested except
23 the plaintiff, avoidance of clothing stains due to rust.").
24 Without this evidence, the court concluded, "Each class member who
25 wants to pursue relief against Sears [would] have to testify to
26 what he understands to be the meaning of a label or advertisement
27 that identifies a clothes dryer as containing a stainless steel
28 drum." Id. Although the court noted other problems with the

1 proposed class, it explained that the "deal breaker [was] the
2 absence of any reason to believe that there is a single
3 understanding of the significance of labeling or advertising
4 clothes dryers as containing a 'stainless steel drum.'" Id.

5 Murray's motion for class certification suffers from the same
6 fatal defect. Like Thorogood, he has failed to present any
7 evidence that Defendants represented on a class-wide basis that
8 the dryer's drum front was made of stainless steel (rather than
9 mild steel) and that this feature would prevent its user's clothes
10 from developing rust stains or tears. Although Murray points out
11 that some of Sears's sales managers acknowledged during their
12 depositions that the company promoted the stainless steel drums in
13 advertisements, none of these managers testified that Sears
14 marketed the drums as preventing rust stains or tearing. One
15 product manager testified that he did not know why the company
16 chose to promote the stainless steel drum. Pigatto Depo. 223:22-
17 224:7 ("I don't really know [the benefits of a stainless steel
18 drum]. I'm not an engineer. I guess at this point, the
19 perception and my understanding is, the more you use, the smoother
20 it gets.").⁷ Another testified that she believed the stainless
21

22 ⁷ Rather than citing to the relevant page-and-line numbers of the
23 deposition transcripts he submitted as evidence, Murray instead cites to
24 a series of "Deposition Statements" which purport to summarize the
25 deposition testimony on which he wishes to rely. See Docket Nos. 170-
26 71. Defendants object to these deposition summaries -- which total over
27 one hundred pages in length -- because Murray prepared them himself.
28 This objection is sustained. "The Court bases its decisions on what the
evidence shows, not on how a party has characterized the evidence."
eForce Global, Inc. v. Bank of America, 2010 WL 2573976, at *2 (N.D.
Cal.); see also Harris v. City of Seattle, 152 Fed. Appx. 565, 568 (9th
Cir. 2005) (unpublished opinion) (noting that the plaintiff's
"characterization of [a witness]'s deposition testimony does not
represent probative evidence"). The Court relies in this order only on

1 steel drum was marketed as an aesthetic feature. Christensen
2 Depo. 32:9-:10. A third Sears employee simply referred Murray to
3 Sears's marketing team when asked about the company's advertising
4 practices. Wood Depo. 57:4-:13, 60:6-:17. None of this testimony
5 supports Murray's claim that California consumers, as a class,
6 were likely to be confused by Sears's marketing claims.

7 While some of Sears's promotional materials state that the
8 Kenmore-brand dryers feature an "exclusive, all stainless-steel
9 drum that provides lasting durability," King Depo. 133:11-:13,
10 this hardly qualifies as a material misrepresentation. As the
11 Seventh Circuit explained when it examined this same evidence in
12 Thorogood III,

13 It's true that stainless steel does not rust
14 or chip, and therefore a dryer that is made,
15 even if only in part (the drum), of stainless
16 steel should indeed provide "lasting
17 durability." But the claim is not falsified
18 if a small part of the drum is made of "mild"
19 steel coated with ceramic. And a dryer's
20 durability has nothing to do with rust stains
21 in clothing, Thorogood's contention and
22 Murray's as well.

23 624 F.3d at 851; see also Thorogood IV, 678 F.3d at 549 ("Some of
24 Sears' ads do point out that stainless steel doesn't rust, but no
25 one likes rust, whether or not the rust rubs off on clothes.").

26 The only evidence Murray has presented to suggest that Sears
27 specifically represented that the stainless steel drum would
28 protect clothes from rust stains is his own interaction with a
salesperson at Sears's San Bruno store. Murray stated in his
declaration that the salesperson "represented that the Product

the actual deposition transcripts attached to Murray's deposition
summaries, even though Murray himself neglected to cite to them.

1 consisted of a stainless steel drum, which affected the
2 performance, quality, benefit and value of the dryer, in that the
3 stainless steel drum could not chip, rust or stain clothing placed
4 inside it for drying." See Docket No. 167-4, Murray Decl. ¶ 4.
5 But Murray's account of his personal experience at a single Sears
6 store does not suggest that Sears made this representation about
7 the Kenmore-brand dryers on a class-wide basis. Nor does it
8 suggest that Sears ever made such a representation about the
9 Frigidaire-brand dryers nor that Electrolux ever made similar
10 representations about either brand of dryers. If anything, this
11 isolated (and uncorroborated) incident of allegedly deceptive
12 marketing suggests that Murray's claims, much like Thorogood's,
13 are highly "idiosyncratic" and, thus, not amenable to class-wide
14 proof. Thorogood I, 547 F.3d at 747.

15 Indeed, Murray's failure to identify any other class member
16 whose clothes were stained by rust only reaffirms that his claimed
17 injury here is unique. He has not offered any evidence to suggest
18 that other California consumers' clothes were ever damaged by
19 Kenmore or Frigidaire dryers. In fact, when he was asked during
20 his deposition whether he knew of "any other person who has had
21 the same failure that [he] had in a Kenmore stainless steel drum,"
22 he responded, "Other than Mr. Thorogood, no." Murray Depo.
23 173:18-:21. This response is consistent with the testimony
24 offered by a Sears service technician and a customer service
25 specialist who, collectively, could only recall receiving two
26 complaints -- one of which came from Thorogood -- about rust
27 developing on the front of a stainless steel dryer drum. See
28 Docket No. 198, Hess Depo. 16:5-:22; Daley Depo. 20:14-:18.

1 Despite this lack of evidence of any common misrepresentation
2 or injury, Murray contends that his claims raise common questions
3 of law. He argues that common questions must be resolved as to
4 whether Defendants' alleged misrepresentations regarding the
5 dryer's drum were material and whether they were likely to mislead
6 a reasonable consumer. See generally Gustavson v. Wrigley Sales
7 Co., 2013 WL 5201190, at *19 (N.D. Cal.) ("The standard for
8 establishing a violation of California's UCL, FAL, and CLRA is the
9 'reasonable consumer' test, which requires a plaintiff to 'show
10 that members of the public are likely to be deceived' by the
11 business practice or advertising at issue." (citations omitted)).
12 These questions, however, would only be relevant to all putative
13 class members if Murray had adduced some evidence to suggest that
14 Defendants had actually made misrepresentations on a class-wide
15 basis. As explained above, Murray's evidence suggests, at most,
16 that Sears engaged in an isolated instance of deception in
17 California when Murray went to purchase his own dryer in 2001.
18 This evidence is not sufficient to give rise to any relevant
19 questions of law that are common to all potential class members.
20 Accordingly, because he has not identified any common questions of
21 fact or law that pertain to every class member, Murray has failed
22 to meet the commonality prerequisite.

23 C. Typicality

24 Rule 23(a)(3) requires that the "claims or defenses of the
25 representative parties [be] typical of the claims or defenses of
26 the class." Thus, every "class representative must be part of the
27 class and possess the same interest and suffer the same injury as
28 the class members." Falcon, 457 U.S. at 156 (quoting E. Tex.

1 Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977))
2 (internal quotation marks omitted). This requirement is usually
3 satisfied if the named plaintiffs have suffered the same or
4 similar injuries as the unnamed class members, the action is based
5 on conduct which is not unique to the named plaintiffs, and other
6 class members were injured by the same course of conduct. Hanon
7 v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992).
8 Typicality is not met, however, "where a putative class
9 representative is subject to unique defenses which threaten to
10 become the focus of the litigation." Id. (quoting Gary Plastic
11 Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
12 903 F.2d 176, 180 (2d Cir. 1990).

13 Murray has failed to satisfy the typicality requirement here
14 for the same reasons he has failed to satisfy the commonality
15 requirement: specifically, he has not presented evidence of any
16 class-wide misrepresentations or class-wide injury. As explained
17 above, the only evidence here that Defendants ever specifically
18 represented that their dryers' stainless steel drums protect
19 clothes from rust stains comes from Murray's own isolated
20 experience at the San Bruno Sears store. Murray has not presented
21 any evidence to suggest that either Defendant ever made the same
22 representations to other California consumers. Nor has he
23 presented any evidence to suggest that other California consumers
24 ever had the same problems with the Kenmore-brand dryers that he
25 had. On this record, Murray's experience is not representative of
26 that of the proposed class.

27 Murray is atypical in other ways, as well. For instance, he
28 stated repeatedly during his deposition that when he first

1 inspected the interior of his dryer in 2007, he noticed that the
2 entire drum was loose. Murray Depo. 143:6--:10, 144:24-145:1,
3 154:23--:25 ("I could feel that the drum was loose, that it was
4 actually moving and not firmly in contact with whatever was
5 supposed to hold it in."). In fact, he testified that the loose
6 drum was most likely what caused his clothes to become exposed to
7 the rust in the first place because the rust had only developed on
8 the exterior portion of the drum front -- a part of the dryer that
9 would not normally come into contact with any clothes. Id.
10 142:22--:24, 143:15--:16, 154:17-155:5. This admission -- that
11 other problems with Murray's dryer may have contributed to the
12 rust stains he experienced -- leaves him vulnerable to fact-based
13 defenses that could not be raised against other class members.
14 Hanon, 976 F.2d at 508 (recognizing that typicality is not met
15 where a plaintiff's "unique background and factual situation
16 require him to prepare to meet defenses that are not typical of
17 the defenses which may be raised against other members of the
18 proposed class"). This is especially true here, where the
19 evidence shows that Electrolux changed the way that it installed
20 its dryer drums in 2002, shortly after Murray purchased his dryer.
21 Docket No. 197-1, King Decl. ¶¶ 12-15 (describing how "beginning
22 around 2002, Electrolux redesigned the suspension system of the
23 Kenmore dryers" by changing the way that the drum was attached to
24 the rest of the machine).

25 In addition to these unique fact-based defenses, Murray is
26 also subject to unique legal defenses based on the statute of
27 limitations for each of the claims he asserts. The relevant
28 limitations periods here are four years for Murray's contract

1 claim, Cal. Code Civ. Proc. § 337; four years for his UCL claim,
2 Cal. Bus. & Prof. Code § 17208; three years for his CLRA claim,
3 Cal. Civ. Code § 1783; and three years for his unjust enrichment
4 claim, Cal. Code Civ. Proc. § 338(d). Thus, because Murray
5 purchased his dryer in September 2001, all of his claims would
6 have expired in September 2004 or September 2005, absent equitable
7 tolling or some other rule of delayed accrual. Murray contends
8 that his claims -- which he did not file until November 2009 --
9 are not time-barred because they are subject to equitable tolling
10 and the delayed-discovery rule. These arguments, however, rest on
11 two highly dubious premises. The first is that Murray could not
12 have discovered that his dryer was damaging his clothes until
13 after the limitations period elapsed. Given Murray's admission
14 that he began to notice rust stains on his clothes within three
15 years of purchasing the dryer, this claim will be difficult to
16 establish. The second questionable premise is that Murray's
17 claims are sufficiently similar to Thorogood's claims to justify
18 tolling the limitations period during the pendency of Thorogood's
19 lawsuit. This, too, will be difficult to establish in light of
20 Murray's efforts to distinguish his case from Thorogood's
21 throughout this litigation (including in the instant motion). In
22 any case, Defendants need not establish conclusively at this stage
23 that Murray's delayed-discovery and equitable tolling arguments
24 are entirely without merit. For the purposes of Rule 23(a), it is
25 enough for them to establish that their limitations defense
26 against Murray could "threaten to become the focus of the
27 litigation." Hanon, 976 F.2d at 508. Because Murray purchased
28 his dryer more than eight years before he filed this action --

1 twice the length of the longest applicable limitations period
2 here -- and his delayed-discovery and equitable tolling arguments
3 appear particularly weak, Defendants have met this burden.

4 Finally, Murray has not presented sufficient evidence to
5 establish that his experience purchasing and operating a Kenmore
6 dryer accurately represents the experiences of consumers who
7 purchased and purchased Frigidaire dryers. Courts in this
8 district have generally held that plaintiffs lack standing to
9 bring CLRA claims based on the marketing of products that they
10 never purchased. See, e.g., Granfield v. NVIDIA Corp., 2012 WL
11 2847575, at *6 (N.D. Cal.) ("A plaintiff has standing to assert
12 injury based on a defective product or false advertising only if
13 the plaintiff experienced injury stemming from the purchase of
14 that product."); Carrea v. Dreyer's Grand Ice Cream, Inc., 2011 WL
15 159380, at *3 (N.D. Cal.) (dismissing plaintiff's CLRA claims
16 related to products that he never purchased because he never
17 "suffered any injury or lost money or property with respect to
18 those products"). A plaintiff therefore may not represent a class
19 in bringing CLRA claims based on products that he or she never
20 purchased. Mazur v. eBay Inc., 257 F.R.D. 563, 569 (N.D. Cal.
21 2009) (finding that a plaintiff failed to satisfy the typicality
22 prerequisite "because of her non-consumer status under the CLRA
23 and her atypicality with respect to possible unique defenses").

24 For all of these reasons, Murray has not satisfied Rule
25 23(a)'s typicality requirement.

26 D. Adequacy

27 Rule 23(a)(4) establishes as a prerequisite for class
28 certification that "the representative parties will fairly and

1 adequately protect the interests of the class." Fed. R. Civ. P.
2 23(a)(4). Rule 23(g)(2) imposes a similar adequacy requirement on
3 class counsel.

4 Murray is not an adequate class representative because, as
5 previously explained, his claims are not typical of those he seeks
6 to represent. A&J Deutscher Family Fund v. Bullard, 1986 WL 14903
7 (C.D. Cal.) (recognizing "considerable overlap between the
8 typical[ity] prerequisite of Rule 23(a)(3) and the adequate
9 representation requirement of Rule 23(a)(4)"). Because Murray has
10 not satisfied this requirement, there is no need to address the
11 adequacy of class counsel.

12 III. Rule 23(b)

13 As explained above, Murray's motion for class certification
14 must be denied because he has failed to satisfy the requirements
15 of Rule 23(a). This section briefly explains why he has also
16 failed to satisfy the requirements of Rule 23(b).

17 A. Rule 23(b)(2)

18 A court may grant certification under Rule 23(b)(2) "if class
19 members complain of a pattern or practice that is generally
20 applicable to the class as a whole. Even if some class members
21 have not been injured by the challenged practice, a class may
22 nevertheless be appropriate." Walters v. Reno, 145 F.3d 1032,
23 1047 (9th Cir. 1998); see also 7A Wright, Miller & Kane, Federal
24 Practice & Procedure § 1775 (2d ed. 1986) ("All the class members
25 need not be aggrieved by or desire to challenge the defendant's
26 conduct in order for some of them to seek relief under Rule
27 23(b)(2).").

28

1 Murray has not clearly defined the scope of the injunctive
2 relief he seeks nor has he explained why he is seeking injunctive
3 relief in the first place. He asserts that he is seeking "an
4 injunction, inter alia, for Sears' deceptive practice of failing
5 to substantiate the performance features of major appliances as
6 directed by the [Federal Trade Commission]⁸ so he can rely upon
7 the future disclosures of such features by Sears." Docket No.
8 210, Pl.'s Reply 9. This request for relief essentially amounts
9 to a request for an order directing Sears (but, curiously, not
10 Electrolux) to comply generally with existing federal consumer
11 protection regulations -- an obligation that would exist even in
12 the absence of an injunction. It is not clear how this proposed
13 injunction would redress Murray's alleged injuries or those of the
14 class he seeks to represent. See Betts v. Univ. of Nebraska Med.
15 Ctr., 1998 WL 34345518, at *11 (D. Neb.) ("Ordering [the
16 defendant] to generally comply with existing law is, if not
17 redundant, broader than necessary to remedy the underlying
18 wrong.").

19 In any event, Murray has not established that the conduct he
20 complains of -- namely, deceptive representations about the
21 ability of stainless steel dryer drums to prevent rust stains on
22 clothing -- is applicable to the class as a whole. As noted
23 above, the only plausibly deceptive representations he has
24 identified are the isolated statements of a single salesperson he
25

26
27 ⁸ Although Murray cites a Federal Trade Commission regulation in a
28 footnote of his reply brief, he fails to explain how the agency and its
regulations are relevant to his present claims, all of which arise under
state law.

1 met more than ten years ago. This is not sufficient to establish
2 the need for class-wide injunctive relief.

3 B. Rule 23(b)(3)

4 To qualify for certification under Rule 23(b)(3), "a class
5 must satisfy two conditions in addition to the Rule 23(a)
6 prerequisites: common questions must 'predominate over any
7 questions affecting only individual members,' and class resolution
8 must be 'superior to other available methods for the fair and
9 efficient adjudication of the controversy.'" Hanlon, 150 F.3d at
10 1022 (quoting Fed. R. Civ. P. 23(b)(3)).

11 As explained above, Murray has not identified any relevant
12 legal or factual questions that are common to all putative class
13 members. As such, he cannot satisfy the predominance or
14 superiority requirements of Rule 23(b)(3).

15 CONCLUSION

16 For the reasons set forth above, Plaintiff's motion for class
17 certification (Docket No. 167) is DENIED. In addition,
18 Plaintiff's motion for leave to file supplemental briefing on
19 class certification (Docket No. 225) is DENIED. Plaintiff filed a
20 brief on April 9, 2013, without leave of the Court and in
21 violation of the local rules, responding to Defendants' statement
22 of recent decision. See Docket No. 223. Further briefing on this
23 issue is not necessary, especially as the Court does not rely on
24 Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), in this order.
25 Defendants' objections to Plaintiff's reply evidence are OVERRULED
26 as moot.

27 A case management conference shall be held at 2:00 p.m. on
28 Wednesday, March 12, 2014, to set a case management schedule for

1 Murray's individual claims. The parties shall file a joint case
2 management statement on or before March 5, 2014.

3 IT IS SO ORDERED.

4
5 Dated: 2/12/2014

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7 CLAUDIA WILKEN
8 United States District Judge
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