IN THE UNITED STATES DISTRICT COURT

FOR THE DISTICT OF ARIZONA

IN RE: Arizona THERANOS, INC., Litigation	No. CV-16-02138-PHX-DGC (Consolidated) **ORDER**

On March 6, 2020, Judge Russel Holland entered an order in this case granting Plaintiffs' motion for class certification. Doc. 369. Defendant Walgreens now challenges one of the subclasses he certified, known as the Edison Subclass. The Edison Subclass is defined as follows:

> All purchasers of Theranos testing services who were subject to "tiny" blood draws between September 2013 and June 2016. The Edison Subclass is limited to pursuing battery and medical battery claims against Defendants Theranos and Walgreens and is precluded from seeking damages for emotional distress, retesting and/or subsequent medical care.

Doc. 369 at 25.

On appeal, the Ninth Circuit held that battery and medical battery claims could not be asserted against Walgreens on the basis of a blood draw by a Theranos employee. As a result, the Court of Appeals reversed certification of the Edison Subclass and remanded "to the district court to limit this class to plaintiffs who had blood drawn by Walgreens employees, such that no claims impute liability for battery or medical battery on one defendant for a touching conducted by another defendant's employee." Doc. 398-1 at 6.

Walgreens argues that the Court instead should decertify the Edison Subclass entirely. Given the evidence Plaintiffs rely on to show which Defendants drew blood from which class members, Walgreens contends that individual issues will predominate over common issues and the subclass will be unmanageable, making certification inappropriate under Rule 23(b)(3).

Briefing on this issue is now complete (Docs. 410, 419, 427), and the Court heard oral arguments on December 20, 2021. For reasons stated below, the Court will not decertify the Edison Subclass, but will limit it as instructed by the Ninth Circuit and shorten the subclass period.

In response to Walgreens' concern about their ability to show which members of the subclass received blood draws from Walgreens employees, Plaintiffs have submitted an actual list of members of a Walgreens-only Edison Subclass. Doc. 420, Ex. 1. Plaintiffs support this list with a 29-page declaration from Melissa Gardner explaining how the list was derived. *See* Doc. 420. The Gardner Declaration explains that Plaintiffs relied on spreadsheets generated from an information system used by both Walgreens and Theranos to document blood draws. The spreadsheets include the following information for each draw: patient mailing address, date of birth, gender, accession number, date of visit, and type of draw, and the first and last name of the technician who drew the patient's blood. *See* Gardner Decl. ¶¶ 6-60. Plaintiffs used a roster of Walgreens personnel authorized to perform blood draws to ensure that technicians shown on the spreadsheets were in fact Walgreens employees. *Id*. ¶¶ 46-51. From these sources, each subclass member was identified by gender, date of birth, and address, and more than 85% were identified by first and last name. *Id*. ¶¶ 53-61. Plaintiffs believe the names of the remaining 15% can easily be obtained with the other available information.

In its reply memorandum, Walgreens provides an important clarification of the basis for its request for decertification:

> [T]his issue is not about class member identification; it is about whether Walgreens' touching of a subclass member – "the primary element" of the battery claim – can be proven with classwide evidence. The Court will need

> to ask each class member whether the technician that administered the blood draw was a Walgreens or a Theranos employee. This individualized question will predominate over any questions common to the class, creating an unmanageable process.

Doc. 427 at 10 (citations omitted).

Walgreens also argues that the information relied on by Plaintiffs is unreliable. It asserts that the spreadsheets used by Plaintiffs have never been authenticated, their source is not clearly known, and they contain internal inconsistencies showing that the identities of the blood drawers are not reliably indicated. Walgreens also argues that the time periods covered by Plaintiffs' data fall short of the time period embraced in Judge Holland's original Edison Subclass.[1]

The Court does not find Walgreens' arguments persuasive. During the trial in this case, Plaintiffs will not be required to prove who administered the blood draw to each of the approximately 8,500 members of the Edison Subclass. The absent class members' cases will not be presented at trial. Rather, Rule 23 contemplates that the claims of the class representatives will be tried. Because those claims are typical of and adequately represent the members of the class, the judgment on the class representatives' claims will bind the absent class members. Thus, although it will be necessary for the class representatives to prove that *their* blood was drawn by Walgreens employees, the same proof will not be presented during trial for the absent class members. As one respected treatise has explained:

> The defining characteristic of a class action is that it is representative litigation. In the usual plaintiff class action context, a named plaintiff asserts

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[1] Walgreens argues that Plaintiffs' subclass evidence has been a moving target. They assert that Plaintiffs relied on only two spreadsheets at the time of original class certification, but have now expanded their argument to more than nineteen spreadsheets. The Court is not persuaded. In the original motion for class certification, Plaintiffs specifically stated, as an "*example*" of the kind of evidence they could use to identify class members, that "*numerous spreadsheets* . . . identify patients by name or code along with a date, location, and identity of the person that performed the blood draws[.]" Doc. 318 at 20 (emphasis added). It is true that Plaintiffs cited only two spreadsheets, but these were cited as examples. *See id.* at 20 n.8 ("Plaintiffs specifically note that documents available to all parties *such as* THER-AZ-05070611 and THER-AZ-05070585 contain hundreds of thousands of relevant data points.") (emphasis added).

> claims on his own behalf and as a representative for a defined group of similarly situated persons. If the court certifies the case as a class action, these other persons – referred to as absent class members – become parties to the suit in the sense that, unless they opt out, the class action will resolve their rights and they will be bound by the outcome. But even after class certification they are not named litigants and do not actively participate in the suit.

S. Gensler and L Mulligan, Federal Rules of Civil Procedure, Rules and Commentary, at 616-17 (Thomson Reuters 2021); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 979, 810 (1985) ("[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are adequate safeguards provided for his protection.").

At the close of the trial the jury will be asked to determine something like the following: whether it finds that the Theranos blood tests were unreliable; if so, whether Walgreens knew the tests were unreliable; if so, whether the class representatives' consent to a blood draw was invalidated by Walgreens' misrepresentation about the reliability of the tests; if so, whether Walgreens committed battery or medical battery when it drew blood from the class representatives; and if so, what amount of damages the jury awards the class representatives. The verdict, whether for or against the class representatives, will bind all absent class members who have not opted out. If the jury finds in favor of Plaintiffs and awards damages, then individual class members will be able to file a claim for the same damages during the class claims administration process. At that point their membership in the class will be determined. Plaintiffs have shown by a preponderance of the evidence that this can be done on a class-wide basis using the spreadsheets and other information identified, but even if some member-by-member examinations must be undertaken by the claims administrator, that is not uncommon in class action administration. *See* Doc. 369 at 22 (Judge Holland: "If plaintiffs prevail and recover general damages for battery . . . the individual allocation of such recoveries is a matter for claims administration and will not render a trial unmanageable."); *see also Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016) (no predominance or manageability barrier to certification where "the district court can 'winnow out' uninjured plaintiffs at the damages phase of litigation");

Norton v. LVNV Funding, LLC, No. 18-05051, 2020 WL 5910077, at *11 (N.D. Cal. Oct. 6, 2020) ("[t]here are a variety of procedural tools courts can use to manage the administrative burdens of class litigation, including the use of claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court.") (quotation marks and citations omitted). Issues raised and resolved during the claims administration process will not arise at trial, much less overwhelm common issues there.[2]

Second, the Court is not persuaded that Walgreens' arguments significantly undercut the proof provided by Plaintiffs. The evidentiary standard to be applied at the class certification stage is a preponderance of the evidence. *Smilovits v. First Solar Inc.*, 295 F.R.D. 423, 427 (D. Ariz. 2013). The Court concludes that Plaintiffs have presented enough evidence to show, by a preponderance of the evidence, that class members exist in the thousands and can be identified and verified during the claims administration process with the kinds of proof Plaintiffs present. Although Defendants contend that the sources and reliability of the spreadsheets have not been established, Plaintiffs have presented testimony and documentary evidence showing that Theranos and Walgreens maintained a database with the information contained in the spreadsheets, that spreadsheets were printed from time to time to reflect this information, that the compensation of Walgreens' blood drawers depended in part on the number of draws they performed (and therefore needed to be recorded accurately), and that the spreadsheets were produced by Theranos in this litigation. Walgreens has presented no contrary evidence to show that blood draws were not done by the Walgreens employees shown on the spreadsheets or that any specific entry on any specific spreadsheet is incorrect and not clarified by other notes on the spreadsheet. Given the supporting information Plaintiffs have provided and the general context in which the data was created and preserved, the Court concludes that Plaintiffs have met the preponderance of the evidence standard at this stage of the litigation.

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[2] Nor will the claims administration process involve complex minitrials for each claimant as was likely in *Valenzuela v. Union Pacific Railroad Co.*, No. CV-15-01092-PHX-DGC, 2017 WL 679095 (D. Ariz. Feb. 21, 2017).

The Court also concludes, however, that the period for the Edison Subclass must be shortened. During the hearing on this issue, Plaintiffs' counsel agreed that Walgreens employees did not perform blood draws until November 2013 and that their draws ended after March 2015. As a result, the Court will limit the Edison Subclass to the period of November 2013 to March 2015.

The Court adopts the following definitions of the Edison Subclass:

> Walgreens Edison Subclass: All purchasers of Theranos testing services who were subjected to "tiny" blood draws by a Walgreens employee between November 2013 and March 2015. The Walgreens Edison Subclass is limited to pursuing battery and medical battery claims against Defendant Walgreens and is precluded from seeking damages for emotional distress, retesting, or subsequent medical care.

Plaintiffs also propose a Theranos Edison Subclass, although the reason is not clear given that Theranos is now defunct. The Court will adopt the following definition, but Plaintiffs should explain why this subclass should be included in this case when they submit information on class notice, as discussed below.

> Theranos Edison Subclass: All purchasers of Theranos testing services who were subject to "tiny" blood draws by a Theranos employee between September 2013 and June 2016. The Theranos Edison Subclass is limited to pursuing battery and medical battery claims against defendant Theranos and is precluded from seeking damages for emotional distress, retesting, or subsequent medical care.

By **January 28, 2022**, Plaintiffs shall submit to the Court a plan for class notice. The plan shall address all classes and the requirements of Rule 23(c)(2)(B), and shall explain why the proposed notice is the best practicable. Plaintiffs shall propose a schedule and procedures for class members to opt out, and explain how the class notice and class administration features will be financed. Defendants may, on **January 28, 2022**, file any objections or concerns they have regarding the proposed class notice.[3] The Court will hold

[3] The parties should confer about the class notice plan before it is submitted. To make this possible, Plaintiffs should share their proposed plan with Defendants no later than **January 19, 2022**.

a hearing on **February 11, 2022 at 2:00 p.m.** to discuss the proposed class notice with the parties.

Dated this 23rd day of December, 2021.

David G. Campbell
Senior United States District Judge