SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. LOUISE GRUNER GANS Justice

PART 61

People of the State of NY

-v-

General Electric Corp.

INDEX NO. 400927/00

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined for reasons set forth in the annexed decision and order

RECEIVED
APR 04 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/27/02

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

HON. LOUISE GRUNER GANS

[1*]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

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PEOPLE OF THE STATE OF NEW YORK, by ELIOT SPITZER, Attorney General of the State of New York,

Petitioners, Index No.: 400927/00

-against-

GENERAL ELECTRIC COMPANY,

Respondent.

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Louise Gruner Gans, J.:

Motion sequence nos. 004, 005, and 006 are consolidated for disposition. They will be discussed seriatim. In motion sequence no. 004, respondent General Electric Company ("GE") moves, pursuant to CPLR 2221(d) and (e), for leave to renew and reargue this court's July 8, 2001 decision, granting petitioners a permanent injunction. In motion sequence no. 005, GE moves, pursuant to CPLR 2221(d), for leave to reargue this court's January 16, 2001 order, and its July 30, 2001 amended order ("Amended Order"), insofar as those orders set forth a mechanism to identify consumers in New York who have suffered injury as a result of GE's deceptive practices, which are discussed in the January 16, 2001 order, and to provide appropriate restitution to such consumers. In motion sequence no. 006, GE moves, pursuant to CPLR 5519(c), for a stay of the Amended Order, pending the Appellate Division's decision on GE's omnibus appeal, which 'includes an appeal of this court's finding that GE acted deceptively, in violation of General Business Law § 349(a).

The facts underlying this proceeding have been set forth in this court's previous opinions. Familiarity with those facts will be assumed.

Motion Sequence No. 004

This court decided to issue a permanent injunction largely, but not entirely, because, as explained in the July 8, 2001 decision, GE's own papers showed that, while GE was (mis)representing that all consumers who were entitled to a free rewiring of their dishwashers would receive such service, more than 50% of the calls that were made in response to that representation were lost by GE, or by its agents, and failed to reach the GE division that was responsible for providing the service. That branch of GE's motion which seeks leave to renew petitioners' request for permanent injunctive relief rests on four affidavits, that offer various explanations of why large numbers of calls were lost, and that appear to show that fewer calls were lost than this court had earlier concluded. CPLR 2221(e) provides that a motion to renew "3. shall contain reasonable justification for the failure to present such facts on the prior motion." This statutory language is mandatory. Absent compliance therewith, a court may not grant the motion. Delvecchio v Bayside Chrysler Plymouth Jeep Easle, Inc., 271 AD2d *636* (2d Dept 2000). Even prior to the effective date of CPLR 2221(e), July 20, 1999, courts uniformly refused to grant motions for leave to renew, where the movants failed to offer a reasonable explanation of their failure to provide the proposed new facts earlier. See, Matter of Shapiro v.

State of New York, 259 AD2d 753 (2d Dept 1999); Wood v Maggie's Tavern, Inc., 257 AD2d 733 (3d Dept 1999); Neff v Steven Schwartzapfel, P.C., 254 AD2d 137 (1st Dept 1998); Brvan v Swett, 241 AD2d 335 (1st Dept 1997); Forteau v Westchester County, 227 AD2d 245 (1st Dept 1996). However, although, in its earlier papers, GE sought to show that it was assiduously implementing the Supplementary Recall, GE offers no explanation for not having provided, then, the information that it now seeks to place before the court.

Moreover, were this court to grant GE leave to renew, the court would adhere to its earlier conclusion that there was a wide gap between GE's representation that free rewirings were available and the restricted ability of consumers to request such rewiring. GE's current papers acknowledge that more than 10,000 consumer calls were lost. GE also acknowledges that, although it had anticipated some of the problems that developed, it failed to take the measures necessary to avert them.

That branch of motion sequence 004 which seeks leave to reargue is based upon GE's contention, vigorously pressed in its earlier papers, that, even if General Business Law ("GBL") § 349(d) does not shield GE from liability for the practices that this court found deceptive, under the initial recall, it does shield GE from liability for its practices under the Supplementary Recall. The underpinning of GE's contention is that the Consumer Product Safety Commission ("CPSC") is actively monitoring the Supplementary Recall. In addition to repeating its earlier argument, GE now

makes certain representations about pertinent reports to, and discussions with, the CPSC. In addition, GE represents that the CPSC requested it to present to the court the letter from Alan H. Schoem, Director of the CPSC Office of Compliance, that is annexed as exhibit 1 to the affidavit of William F. Kuntz, II.[1] Accordingly, GE's motion for leave to reargue is granted.

GBL § 349(d) provides, in relevant part, that:

> ... it shall be a complete defense that the act or practice is ... subject to and complies with the rules and regulations of, and the statutes administered by ... any official ... agency of the United States as such rules, regulations or statutes are interpreted by .... such ... agency or the federal courts.

(Emphasis supplied.)

Lee L. Bishop, Esq., Senior Counsel for Product Safety and Regulatory Compliance of GE Appliances ("GEA"), avers that he has filed with the CPSC monthly reports of the number of telephone calls from consumers who requested a rewiring, that were transferred from West and TeleSight to ASI, which was responsible for performing the rewirings. Mr. Bishop acknowledges that in each of those reports, the number of calls transferred substantially exceeds the number of rewirings that were completed, and, indeed, that the report covering January 2001 "contains essentially the same number[s] of Completed Rewires and [calls transferred] as [were] cited" in this court's opinion. Bishop Aff., at 4. However, Mr. Bishop avers that, throughout the Supplemental Recall,

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[1] A copy of the same letter appears as exhibit A to the affidavit of Joy Feigenbaum.

the **CPSC** has expressed no concern with the disparity between the number of calls transferred and the much smaller number of rewirings performed, except with regard to a number of individual consumers, who had complained directly to the **CPSC** that they had tried to request a rewiring, but that nothing had been done.

Mr. Bishop's averments are contradicted by Mr. Schoem, who states in his letter, which is addressed to GE's counsel, that the **CPSC** official, with whom Mr. Bishop regularly spoke about the monthly reports, repeatedly expressed concern to Mr. Bishop about the disparity between the number of calls transferred to ASI and the (substantially lower) number of rewirings performed by ASI. See, Kuntz, Exh. 1, at 1. Whether, or not, Mr. Bishop's recollection of his conversations with the **CPSC** are correct, Mr. Schoem adds that the **CPSC** compliance attorney, who was assigned to the GE Dishwasher case, twice spoke with GE's counsel (other than Mr. Bishop), expressing concern with the same disparity. Mr. Schoem concludes by saying that, while GE has complied with its monthly reporting requirements, the **CPSC** has not yet reached any conclusions with regard to the repeated disparity between calls made and rewirings performed. Accordingly, although, to be sure, GE's Supplemental Recall is subject to the oversight of the **CPSC**, GE has failed to show that its practices have complied with the requirements set by the **CPSC**. Although the apparent lack of such compliance was not the ground of petitioners' requests for injunctive relief, or of this court's grant of such relief, **GE's** inability to show that it has complied with the CPSC's requirements

excludes GE from the defense that GBL 349(d) would otherwise provide. Consequently, upon rehearing, this court adheres to its initial opinion that a permanent injunction is warranted.

Motion Sequence No. 005

Together with its proposed counterorder, which GE submitted in compliance with this court's January 16, 2001 order, GE made numerous arguments that, this court advised, should more properly be made on a motion to reargue. Accordingly, GE's motion to reargue the Amended Order is granted.

GE tacitly acknowledges that, if this court's finding that GE acted deceptively is upheld on appeal, restitution to injured consumers would be proper. However, GE challenges four aspects of the Amended Order, to wit, the notice requirement that is set forth therein, the criteria for determining eligibility for restitution, the method of identifying those persons who meet the criteria of eligibility, and the amount of restitution that is to be paid to identified eligible consumers.

The Amended Order requires GE to have a number of advertisements published in newspapers, to advise eligible consumers that they are entitled to restitution, and to advise such consumers on how to obtain restitution. GE describes this requirement as imposing a "public flogging," and argues that publication notice is unnecessary, because GE can communicate with all eligible consumers by mail. However, while GE has the names and addresses of those persons to whom it sent the letters that this court found to be deceptive, GE has acknowledged that it does

not have records of all those consumers who called to ask about repairs to their dishwashers. Where restitution is statutorily authorized, a court may order a respondent to undertake affirmative action to give consumers notice of their right to such restitution (State of New York v Princess Prestige Co., 42 NY2d 104 [1977]), and where the identity of all the consumers who are entitled to restitution is not known, such affirmative action may include notice by publication. Matter of State of New York v Ford Motor Co., 136 AD2d 154 (3d Dept 1988), affd, 74 NY2d 495 (1989); People of the State of New York v Life Science Church, 113 Misc 2d 952 (Sup Ct, NY County 1982), afd as modified, 93 AD2d 774 (1st Dept 1983), lv denied, 61 NY2d 604, cert denied, 469 US 822 (1984). Clearly, restitution should not be limited to consumers already known to have been injured. Matter of the State of New York v Scottish-American Assn., 52 AD2d 528 (1st Dept), appeal dismissed, 39 NY2d 1057 (1976).

With regard to the criteria of eligibility, GE argues that only consumers who directly contacted GE in relation to the recall, and who were misled as to the availability of a repair, should be entitled to restitution. This argument is contained in a footnote, and it makes no principled distinction between such consumers and consumers who were misled by statements that GE made on television and in the press, or 'consumers who were misled by (accurate) reports of GE's misrepresentations, made by consumers who had contacted GE.

With regard to the identification of those consumers who are

entitled to restitution, GE argues that the mere tender of sworn statements to the third-party administrator, who is to be appointed pursuant to the Amended Order, does not provide GE with the right to question, or to contest, whether any such consumer is actually entitled to restitution. Accordingly, GE contends that it is entitled to discovery and an adversarial hearing, with regard to each consumer who makes a claim for restitution.

CPLR 409(b) provides:

> [t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment.

Accordingly, the standards of summary judgment that apply to actions also apply to summary proceedings brought under Article 4. Matter of Port of New York Auth. (62 Cortland St. Realty Co.), 18 NY2d **250** (1966), cert denied sub nom McInnes v Port of New York Auth., 385 US 1006 (1967); Matter of Friends World College v Nicklin, 249 AD2d **393** (2d Dept 1998). Discovery is discouraged in special proceedings, People of the State of New York v Bestline Prods., Inc., 41 NY2d 887 (1977), and it is not to be permitted **absent a showing of good cause** therefore. Matter of Shore (Pappalardo), 109 AD2d 842 (2d Dept 1985). Indeed, with particular reference to restitution, pursuant to Executive law § 63(12), the Appellate Division, First Department, has observed that the accelerated provisions of a special proceeding are superior to a class action. Matter of the State of New York v Intercounty Mortsasee Corp., 87 AD2d 748 (1st Dept), app dismissed, 57 NY2d 954

(1982), lv denied 61 NY2d 601 (1983). It appears to this court that, in the unusual case where, as here, the implementation of the relief that a petitioner has requested may raise contested issues of fact, the summary features of a special proceeding should apply to the remedial phase of such a proceeding, as well as to the proceeding-in-chief.

The Amended Order provides that, in order to be eligible for restitution, a consumer must submit a sworn, notarized complaint, stating, inter alia, whether he or she "would not have purchased a new dishwasher but for GE's statements that the recalled dishwashers could not be repaired or rewired." GE's failure to show any reason for the discovery that it seeks, other than its speculation that certain consumers will perjure themselves in order to obtain restitution to which they are not entitled. is an insufficient basis for allowing such discovery.

Correlatively, however, and as a matter of due process, this court agrees with GE that, if GE presents evidence in admissible form that suffices to raise a triable issue as to a particular consumer's entitlement to restitution, then GE will be entitled to a hearing as to that particular consumer.[2]

Finally, GE attacks the formula that this court adopted for calculating the amount of restitution that is due to injured

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[2] Such evidence could show, for example, that GE had sent a claiming consumer a "correcting letter," stating that (contrary to GE's earlier misrepresentations) the recalled dishwashers could be safely rewired, prior to the date that that consumer claims to have purchased a new dishwasher from GE.

consumers. Principally, GE argues that the cost of the new dishwashers that consumers purchased cannot be the starting point of the calculation, both because consumers received the new dishwashers, and because consumers would, in any case, have bought new dishwashers at a somewhat later time. Thus, GE contends, the starting point, for a formula to calculate the amount of restitution, must be the time-value of the money that a consumer spent on the new dishwasher, calculated over the remaining useful life of the old dishwasher. However, the consumers' receipt of the new dishwashers is largely irrelevant. Consumers who purchased new dishwashers, only because they were falsely persuaded that their old, and unsafe dishwashers could not be repaired, and who now will recoup a portion of the expense that they incurred in purchasing those dishwashers, will not receive a windfall. Those consumers were induced to discard their old dishwashers.

Thus, GE's argument comes down to the contention that the old dishwashers were at the end of their useful lives. This contention is speculative, however, inasmuch as it fails to take into account variations in the upkeep and the rate of use of those dishwashers, and it is largely refuted by the fact that, at the time of the recall, GE was still advertising service contracts to cover the machines that it now claims were near the end of their useful lives. Where, as here, there is an inherent margin of uncertainty as to the precise measure of restitution that would be proper, the risk of that uncertainty should fall on a deceptive respondent, rather than upon an innocent petitioner.

Motion Seauence No. 006

Petitioners do not object to **GE's** request for a stay of the order directing restitution, but they urge that such a stay be limited to the ultimate payments that **GE** would be required to make, rather than to the preliminary restitutionary mechanism that was ordered, including certain newspaper advertisements that **GE** would be required to have published. In addition, petitioners request that **GE** be required to post a substantial bond, as the condition of a stay.

Petitioners do not contend that a postponement of the preliminary restitutionary mechanism will allow further injury to consumers, but only that such a postponement will delay the ultimate payment of restitution. On the other hand, if GE is required to take the preliminary steps set forth in the Amended Order, and if this court's finding of liability, or its order requiring restitution, is reversed on appeal, **GE** will incur both unnecessary expense, and additional adverse publicity. Accordingly, all parts of the Amended Order will be stayed.

Petitioners request that, as a condition for a stay, GE be required to post a bond of $ 4,640,000, to cover its potential liability for restitution and penalties. **GE** counters that it should not have to post a bond, inasmuch as it will indisputably have the funds necessary to pay restitution and penalties, in the event that the Amended Order is upheld on appeal. Upon reflection, this court has determined that **GE** should be required to post a bond of $2,000,000. The mere fact that **GE** has ample funds to satisfy

a judgment should not exempt it from posting a bond. Courts generally require a defendant to post a bond pending appeal, that is measured by the defendant's possible liability, rather than by the defendant's financial resources.

Accordingly, it is hereby

ORDERED that GE's motion to renew this court's July 8, 2001 order is denied; and it is further

ORDERED that GE's motions to reargue this court's orders dated July 8, 2001, January 16, 2001, and July 30, 2001 orders are granted and, upon reargument, the court adheres to its July 8, 2001 order, and to the orders dated January 16, 2001 and July 30, 2001, except that it is further

ORDERED that GE may move this court to hold a hearing as to the eligibility of any individual consumer for restitution, as provided for in the order dated July 30, 2001, upon presentation of proof in admissible form sufficient to raise a triable issue as to such consumer's eligibility for restitution; and it is further

ORDERED that this court's order dated July 30, 2001, is stayed, pending the decision of the Appellate Division, First Department, on GE's appeal of that order, on condition that GE post a bond of $2,000,000; and it is further

ORDERED that GE and/or the Attorney General submit a copy of this decision and orde'r in connection with the pending appeals, within 3 days of its entry.

Dated: 3/27/02

ENTER:

JSC

HON. LOUISE GRUNER GANS