CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 17
HEARING DATE: 08/31/17

***Please note:* the Court is in trial, and wishes to have sufficient time to hear contested matters. So the hearing of some of these matters is continued to September 1, 2017. See the individual tentative rulings below for information on whether the hearing in your case will be tomorrow or Friday. Counsel or parties intending to contest the Court's tentative ruling must still give notice to the Court and all affected counsel/parties by 4:00 p.m. on Wednesday, August 30, 2017.**

1. TIME: 8:30 CASE#: MSC08-01470
CASE NAME: EL BEY VS COMCAST CABLE COMMUN
HEARING ON MOTION TO/FOR COMPEL FURTHER RESP TO SPCL INTERROG, SET ONE AND FILED BY JAH RA EL BEY
**** TENTATIVE RULING: ****

With respect to the motion to compel the production of documents: The motion to compel is denied with respect to Requests No. 1, 2, 3, 5, 7, 8, 9, 11, 13, 14, 15, 17, 19, 20, 21, 23, 25, 26, 27, and 29. These requests seek privileged material.

As to Requests No. 4, 6, 10,12, 16, 18, 22 and 24, 28 and 30, the motion is granted to the limited extent, if any, that there is a document that lists those who worked on the case other than a document as to which the motion has been denied. In lieu of producing any such documents, defendant may simply provide a document that lists those who worked on the case and the hourly rate of each. If the rate changed over time, then defendant shall indicate what the rate was during different periods on which the timekeeper worked on the matter.

With respect to the motion to compel responses to interrogatories: The motion to compel is denied in its entirety. CCP § 2030.030 – 2030.050. Even if plaintiff could overcome that objection (which is not addressed in its memorandum of points and authorities in reply to defendant's opposition), the Court would not compel any more information than stated in the previous paragraph, since the interrogatories seek both privileged information and information which is neither relevant nor calculated to lead to the discovery of admissible evidence regarding the amount of attorney fees that were reasonably incurred in the pursuit of this individual plaintiff's claims.

2. TIME: 8:30 CASE#: MSC08-01470
CASE NAME: EL BEY VS COMCAST CABLE COMMUN
SPECIAL SET HEARING ON: TO RE-SET MTN FOR ATTY FEES AND COSTS BY PLT SET BY PER T.R. OF 6-29-17
**** TENTATIVE RULING: ****

The parties shall appear. If no one contests the tentative ruling on line 1, they may appear by CourtCall.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 17
HEARING DATE: 08/31/17

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3. TIME: 8:30 CASE#: MSC08-01470
CASE NAME: EL BEY VS COMCAST CABLE COMMUN
SPECIAL SET HEARING ON: TO RE-SET MTN TO STRIKE PLTS MEMO OF COST BY DEFT SET BY PER T.R OF 6-29-17
**** TENTATIVE RULING: ****

The parties shall appear. If no one contests the tentative ruling on line 1, they may appear by CourtCall.

4. TIME: 8:30 CASE#: MSC14-01937
CASE NAME: GREENE VS. HIGH DEFINITION SOL
HEARING ON MOTION TO/FOR AN AWARD OF ATTORNEYS'' FEES, COSTS, AND INCENTIVE FILED BY EDRIC GREENE
**** TENTATIVE RULING: ****

The parties shall appear.

5. TIME: 8:30 CASE#: MSC14-01937
CASE NAME: GREENE VS. HIGH DEFINITION SOL
SPECIAL SET HEARING ON: 083117 SET BY 0830
**** TENTATIVE RULING: ****

The parties shall appear.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 17
HEARING DATE: 08/31/17

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6. TIME: 8:30 CASE#: MSC14-02068
CASE NAME: DODSON VS. SECURITY OFFICERS
HEARING ON MOTION FOR SUMMARY JUDGMENT FILED BY BERTHA D DODSON
**** TENTATIVE RULING: ****

The plaintiff in this case, Bertha D. Dodson ("Dodson") has filed a motion for summary judgment or adjudication (the "MSJ") seeking summary judgment of her entire case or summary adjudication of portions of her case against defendant Security Officers & Investigations LLC ("SOI").

Before addressing the merits, the Court first strikes the "Additional Objection in Response to Reply" filed by SOI on August 25, 2017. Such a filing is not authorized by statute and was not authorized by the Court. It is improper and the Court declines to consider it.

Legal Standard

Code of Civil Procedure ("CCP") § 437c(p)(1) provides the relevant legal standard for deciding the MSJ:

> A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of fact exists as to the cause of action or a defense thereto.

This means that "a plaintiff bears the burden of persuasion that each element of the cause of action in question has been proved, and hence that there is no defense thereto." *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (quotations omitted). Put another way, Dodson is entitled to summary judgment (or summary adjudication) if and only if she has proved each element of each relevant cause of action. *Id.*

Analysis

Employment Status

Dodson's status as an employee (or not) of SOI presents a threshold issue that potentially controls the outcome of the entire MSJ. All of the causes of action at issue in this case, and implicated by the MSJ, require a finding that Dodson was an employee of SOI. Were the Court to find that the question of Dodson's employment status needs to be answered by a trier of fact, it follows that the remainder of the MSJ would need to be denied.

In its opposition, SOI argues that Dodson was not its employee, but instead was an independent

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contractor.

Ordinarily, when the existence of employee status is disputed, it is a question of fact to be resolved by the trier of fact. *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations* (1989) 48 Cal.3d 341, 349 ("determination of employee or independent-contractor status is one of fact if dependent upon the resolution of disputed evidence or inferences").

CACI 3704 provides the standard for deciding such a dispute. Relevant to this case, CACI 3704 provides:

> Dodson claims that she was SOI's employee.
>
> In deciding whether Dodson was SOI's employee, you must first decide whether SOI had the right to control how Dodson performed the work, rather than just the right to specify the result. It does not matter whether SOI exercised the right to control. If you decide that the right to control existed, then Dodson was SOI's employee.
>
> If you decide that SOI did not have the right of control, then you must consider all the circumstances in deciding whether Dodson was SOI's employee. The following factors, if true, may show that Dodson was the employee of SOI:
>
> (a) SOI supplied the equipment, tools, and place of work;
>
> (b) Dodson was paid by the hour rather than by the job;
>
> (c) The work being done by Dodson was part of the regular business of SOI;
>
> (d) SOI had an unlimited right to end the relationship with Dodson;
>
> (e) The work being done by Dodson was the only occupation or business of Dodson;
>
> (f) The kind of work performed by Dodson is usually done under the direction of a supervisor rather than by a specialist working without supervision;
>
> (g) The kind of work performed by Dodson does not require specialized or professional skill;
>
> (h) The services performed by Dodson were to be performed over a long period of time; and
>
> (i) SOI and Dodson acted as if they had an employer-employee relationship.

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Thus, under CACI 3704, the Court must first examine the evidence each party has adduced concerning control, and determine whether there is a factual dispute on that issue that needs to be considered by a trier of fact. *See also Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 528 ("[w]hether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved").

Legal Definition of Control Under California Law

Neither party addresses the actual test for control under California law, but it is crucial to determining whether a dispute of fact exists on the issue of Dodson's employment status.

Prevailing authority has characterized control as "the right to control the manner and means of accomplishing the result, that is, the details of the work." *Toyota Motor Sales U.S.A. v. Super. Ct.* (1990) 220 Cal.App.3d 864, 873. *See also Borello, supra*, 48 Cal.3d at p. 350; *Ayala, supra*, 59 Cal.4th at p. 531.

Accordingly, the Court examines the evidence before it to determine if there is a dispute regarding SOI's control (or not) over the manner and means of accomplishing the result; here, Dodson's answering phone calls from SOI's customers.

As part of its opposition, SOI offers the declaration of Sharon Sharma ("Sharma Dec."). It is replete with evidence that could support a finding that SOI did not control the manner and means of accomplishing the end result, *i.e.*, Dodson's answering phone calls from SOI's customers.

Sharma says repeatedly that SOI did not dictate Dodson's physical whereabouts when she answered calls. (*E.g.*, Sharma Dec. ¶¶ 17, 19, 22, 23, 26.) In addition, Sharma says that Dodson was free to answer calls on her own time, concurrently with performing personal tasks. (*E.g.*, Sharma Dec. ¶¶ 4, 10, 18, 22, 25, 26.) And Sharma says that Dodson did in fact engage in personal activities while answering calls for SOI, including traveling to Lake Tahoe with her family. (¶¶ 25, 26.)

Dodson's reply brief appears to concede that Dodson had the freedom to perform her work from any location, but contends that this fact, standing alone, does not compel the conclusion that she was an independent contractor. Even assuming, *arguendo*, that Dodson is correct that geographic freedom is irrelevant to the employee-independent contractor determination, the reply does not address the evidence that suggests Dodson was free to perform personal tasks concurrently with answering telephone calls for SOI.

In terms of actual evidence, Dodson does not really say much directly on this topic. In paragraph 10 of her declaration supporting the MSJ, Dodson says that SOI (through Sharma, its manager) did mandate that she answer all calls and never fail to respond to a call. (Dodson Dec. ¶ 10.) That could indicate that SOI retained some right of control over the manner and means of

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accomplishing the task of answering phone calls.

The Court notes that Dodson also says that she was "taught how to access SOI's software so that [she] could perform [her] tasks on the SOI computer system remotely." (Dodson Dec. ¶ 4.) That statement seems to support the conclusion that Dodson could perform her tasks from any location, to the extent that is relevant.

The employee-independent contractor question becomes a question of law for the Court to resolve only when there can be only one reasonable inference drawn from the evidence before the Court. *See Roman Catholic Archbishop v. Indus. Accident Comm'n* (1924) 194 Cal. 660, 667-668.

Here, the Court concludes that there is disputed evidence concerning SOI's right to control the details of Dodson's work. It was Dodson's burden on the MSJ to demonstrate that she was SOI's employee. She has not carried that burden. The evidence before the Court does not lead to only one reasonable inference. Under *Borello* and CACI 3704, the resolution of that dispute, and the ultimate decision of whether Dodson was SOI's employee or its independent contractor must be left to the trier of fact. Without a finding that Dodson was SOI's employee, the Court cannot grant summary judgment, or summary adjudication of any of the individual causes of action. The MSJ is denied in its entirety.

Evidentiary Objections

None of the objections raised by SOI as part of its opposition was material to the disposition of the MSJ. As a result, the Court declines to rule on them. CCP § 437c(q).

If any party gives notice that it wishes to argue the tentative, the matter will be heard on September 1, 2017 at 8:30 a.m. rather than on August 31, 2017.

7. TIME: 8:30 CASE#: MSC15-01183
CASE NAME: KOKOB RUSOM VS. TISSUE BANKS I
HEARING ON MOTION TO/FOR APPROVALOF SETTLEMENT OF PAGA CLAIM
FILED BY KOKOB RUSOM
**** TENTATIVE RULING: ****

The parties are to appear. The Court has a number of questions, including:

1) Since there is no PAGA recovery provided for the 63 other employees of defendant, how can it be said that "the relief provided for under the PAGA [is] genuine and meaningful? See *Gutilla v. Aerotek, Inc.* (E.D.Cal. Mar. 21, 2017, No. 1:15-cv-00191-DAD-BAM) 2017

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U.S.Dist.LEXIS 41655, at *2, citing *O'Connor v. Uber Techs., Inc.* (N.D.Cal. 2016) 201 F.Supp.3d 1110, 1113.

2) Similarly, how can it be said that the relief is "consistent with the underlying purpose of the statute to benefit the public"? *Id.*

3) Likewise, how can it be said to be fundamentally fair, reasonable and adequate with reference to the public policies underlying the PAGA? *Id.*

4) The settlement agreement seems to suggest that 60% of the settlement is to be given to counsel and only 40% to the employees. Is that true? If so, how can the Court find that to be fair, reasonable and adequate?

8. TIME: 8:30 CASE#: MSC15-01726
CASE NAME: VALADEZ VS. WEST COAST HOME BU
HEARING ON MOTION TO/FOR CONTINUE TRIAL FILED BY WEST COAST HOME BUILDERS, INC, ALBERT D. SEENO CONSTRUCTION CO., ALBERT D SEENO
**** TENTATIVE RULING: ****

As previously discussed with all counsel, the motion is off-calendar and the trial date is vacated. The case will be re-set for trial at a case management conference on December 19, 2017 at 8:30 a.m. in Department 17

9. TIME: 8:30 CASE#: MSC15-01791
CASE NAME: PARRY VS. WATERS MOVING & STOR
SPECIAL SET HEARING ON: MOTION FOR CLASS CERTIFICATION SET BY PER STIP/ORDER DATED 3-9-17
**** TENTATIVE RULING: ****

Class Plaintiff Matthew Parry ("Plaintiff" or "Parry") seeks to certify a class of "over 333 non-exempt hourly movers ("Movers") who were employed by defendant Waters Moving & Storage, Inc. ("Defendant" or "Waters" or "WMS") in California since October 5, 2011." Motion at 1:3-4.

Defendant Waters opposes certification on several grounds. First, Waters contends that common questions do not predominate over individual questions. Second, Waters argues that Parry's claims are not typical of the class. Third, Waters says that Parry is not an adequate class representative. Finally, Waters avers that litigating this matter

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collectively would not be a superior method of adjudicating the dispute.

Evidentiary Objections

Defendant makes the following objections:

Declaration of Matthew Parry:

Page 2:20-22. Overruled, based on personal knowledge.

Page 3:2. Sustained. Hearsay.

Page 3:3-4. Overruled, based on personal knowledge.

Page 3:7-9. Overruled, based on personal knowledge.

Page 3:14-15. Overruled.

Page 3:15-16. Sustained, lacks foundation.

Page 4:1-2. Overruled, based on personal knowledge.

Page 4:4. Overruled, based on personal knowledge.

Page 4:6-8. Overruled.

Page 4:10-11. Overruled, based on personal knowledge.

Declaration of Melchor Baltazal

Page 2:21-22. Overruled, based on personal knowledge.

Page 2:22. Overruled.

Page 3:4-6. Overruled, based on personal knowledge.

Page 3:7-8. Overruled, party admission.

Page 3:11-12. Overruled, based on personal knowledge.

Page 3:18-19. Overruled, based on personal knowledge.

Declaration of Robert S. Davis

Page 2:12-13. Overruled, personal knowledge.

Page 2:20-21. Overruled, personal knowledge.

Page 2:27-3:1. Overruled, personal knowledge.

Page 2:12-13. Overruled, personal knowledge.

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Page 2:26. Overruled.

Page 3:12-13. Overruled, party admission.

Declaration of Carlos Guevara

Page 2:10. Overruled.

Page 2:18-19. Overruled, based on personal knowledge.

Page 2:24. Sustained.

Page 3:1-2. Overruled, based on personal knowledge.

Declaration of Victor Iniquez

Page 2:12-14. Sustained.

Page 2:18-19. Overruled, based on personal knowledge.

Page 3:13. Overruled.

Page 3:16-18. Sustained, lacks foundation.

Page 3:19-20. Overruled, personal knowledge.

Page 4:1-2. Overruled, personal knowledge.

Page 4:6-8. Sustained, lacks foundation.

Declaration of Bryce Labonte

Page 2:12-13. Overruled, personal knowledge.

Page 2:26. Sustained.

Page 3:10-11. Overruled, personal knowledge.

Page 3:16-17. Overruled, personal knowledge.

Page 3:18-21. Overruled, personal knowledge.

Page 3:26-27. Overruled.

Page 4:7-8. Sustained. Hearsay.

Declaration of Joseph Maier

Page 2:24-25. Overruled.

Page 3:7-8. Overruled.

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Page 3:13-14. Overruled.

Declaration of Joaquin Martinez

Page 2:14-15. Sustained, lacks foundation.

Page 2:16-17. Overruled.

Page 3:15. Overruled.

Page 3:17-18. Sustained.

Page 3:26-27. Overruled, based on personal knowledge.

Page 4:7-8. Overruled, based on personal knowledge.

Declaration of Todd Smith

Page 2:14-15. Overruled, based on personal knowledge.

Page 2:25. Overruled.

Page 3:16-17. Overruled, based on personal knowledge.

Page 3:20-21. Sustained. Hearsay.

The Docket indicates that Plaintiff filed Evidentiary Objections to Defendant's Opposition to Plaintiff's motion for Class Certification; however, the filed document is a duplicate of Plaintiff's Response to Defendant's Evidentiary Objections to Plaintiff's Motion for Class Certification.

Legal Standard

Code of Civil Procedure section 382 authorizes class action suits in California "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." Code Civ. Proc. § 382.

The proper legal criterion for deciding whether to certify a class under Code of Civil Procedure section 382 is whether plaintiff has established by a preponderance of the evidence that a class action is superior to alternative means for a fair and efficient adjudication of the litigation. *Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 332. The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. *Id.* at p. 326; see also *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-40.

The party seeking class certification under section 382 has the burden of establishing (1) the existence of an ascertainable class, (2) a well-defined community of interest among the class members, and (3) that substantial benefit to litigants and the court would result from class certification. *E.g., City of San Jose v. Super. Ct.* (1974) 12 Cal.3d 447, 458.

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The Court must "carefully weigh respective benefits and burdens and allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts." *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 133. The Court should evaluate (1) the interest of each putative class member in controlling his or her case personally; (2) the potential difficulties in managing a class action; (3) the nature and extent of already pending litigation by individual class members involving the same controversy; and (4) desirability of consolidating all claims in a single action before one court. *Id*.

Ascertainable Class

Whether a class is "ascertainable" within the meaning of section 382 is determined by examining (a) the class definition; (b) the size of the class; and (c) the means available for identifying class members. *Reyes v. San Diego County Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.

The class definition: The class definition should identify a group of unnamed plaintiffs by objectively describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on that description. *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1334.

Plaintiff proposes the following class: "All non-exempt Movers employed by Defendant Waters Moving & Storage, Inc. in the State of California from October 5, 2011 to final judgment." Motion at 3:23-25. This definition would appear to be precise, objective, and ascertainable.

The size of the class: The numerosity requirement is satisfied where the class members are so numerous that it is impracticable to bring them all before the court. CCP § 382. There is no predetermined minimum number of class members necessary as a matter of law for the maintenance of a class action. *See Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030.

Here, Plaintiff alleges that Waters employed more than 333 putative class members through June 2016. Motion at 15:18. The class is sufficiently numerous.

Identification of class members: Although the class must be ascertainable, its members need not be identified to bind them by a class action judgment. *See Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 138 (all persons who rented a car from Hertz in California during a 4-year period held an ascertainable class).

Here, Plaintiff contends, and Defendant does not dispute, that the class members are identifiable from Defendant's records. Motion at 15:20-21.

Well-Defined Community of Interest

The community of interest requirement embodies three factors: (1) predominant common

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questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 470.

Predominance of common questions: Each class member must not be required to litigate individually numerous and substantial questions to determine his or her right to recover; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and the litigants. *Washington Mut. Bank, FA v. Super. Ct.* (2001) 24 Cal.4th 906, 913-14.

To determine the predominance question, the Court must consider whether "the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment." *Jaimez v. DAIOHS, USA* (2010) 181 Cal.App.4th 1286, 1298. The Court must "examine the plaintiff's theory of recovery" and "assess the nature of the legal and factual disputes likely to be presented." *Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1025. "The affirmative defenses of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues." *Knapp v. AT&T Wireless Services, Inc*. (2011) 195 Cal.App.4th 932, 941 (quoting *Walsh v. IKON Office Solutions, Inc*. (2007) 148 Cal.App.4th 1440, 1450 ("*IKON*")) (internal quotation marks omitted).

Because Plaintiff's theory of liability is not entirely clear to the Court, this question is considered in conjunction with Manageability/Superiority, further below.

Typicality of Parry's Claim: Typicality does not require that the class representative have identical interests with the class members. The class representative need only be similarly situated to the other class members. *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46. The class representative's interests must align with the interests of the class. It "refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375.

As stated above, Parry's claim must be typical but not necessarily identical to the claims of other class members, and Parry must be similarly situated to other class members such that Parry will have the motive to litigate on behalf of all class members. *Classen, supra,* 145 Cal.App.3d at 45.

It may be true that Parry does not possess precisely the same claims as any particular individual class member, but under the above cases, that is not the test. The evidence before the Court demonstrates that Parry's claim is substantially similar to those of the proposed class, and that the claim possessed by Parry typifies those claims.

Adequacy of Parry to Represent the Class: To meet the adequacy requirement, Parry must be

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capable, through qualified counsel, of vigorously and tenaciously protecting the interests of the class members. *Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.

Adequacy requires that the interests of Parry, as named plaintiff, not be antagonistic to the interests of the class, and that he will vigorously prosecute the action. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 487. Defendant presents no evidence that the Parry is antagonistic to the interests of the class. Parry has vigorously prosecuted this action thus far, and there is nothing before the Court that suggests he will not continue to do so.

Manageability/Superiority

The key questions for the Court are manageability and superiority. The starting point for that is an understanding of how Plaintiff proposes to litigate the case. Unfortunately, Plaintiff's theory of liability and its amenability to class treatment is not entirely clear. Indeed, it does not appear to be consistent from (i) the initial moving papers to (ii) the reply to (iii) the trial plan.

Consider the wage and hour claims first. At times, Plaintiff appears to focus on the claim that Movers were required to show up at the warehouse each morning and remain there to await an assignment to a moving truck and help prepare the truck and load it with supplies for the jobs that day. If Plaintiff's case turns on the sole question of whether Defendant had a policy that required Movers to arrive at the warehouse before each job, then it would appear that all of the subsequent Labor Code violations (and derivative 17200 and PAGA claims) would flow from that practice; e.g., liability for failure to provide required meal and rest periods would be calculated back to the time at which Movers were required to be at the warehouse, rather than the time that Drivers determined a job began. Litigation of that question would not seem to require sampling or statistical analysis.

But at other places, Plaintiff seems to have a more complicated approach to the case. For example, in his moving papers Plaintiff describes representative testimony and statistical sampling as the means by which he intends to show Defendant's uniform policies pertaining to Defendant's practice of requiring Movers to arrive at the warehouse before each job. See Declaration of Kevin R. Allen in Support of Motion for Class Certification ("Allen Decl.") at ¶ 17. Specifically, Plaintiff states that he will "introduce testimonial evidence from the class representative and a randomized sampling of class members to further support the uniform application of Waters' policies and practices." *Id.* Plaintiff states that "[a] statistical sampling expert will likely be needed to determine the number of class members that need to testify," but does not proffer a methodology, stating that it would require meet and confer efforts with Defendant. *Id*.

It is difficult to see how either of those squares with the trial plan in which Plaintiff suggests a trifurcated set of jury proceedings: determination of class wide liability on unpaid wage and uniform expense claims, determination of class wide liability on meal and rest break claims, and

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determination of aggregate amount of damages and reductions for individualized proof. Plaintiff proposes that this set of jury proceedings be bracketed by bench trials on first "resolution of outstanding legal issues" and finally determination of Labor Code and PAGA penalties. (In places, the Trial Plan does seem to suggest that the case can be tried manageably by focusing on the issue of whether the Movers were required to report to the warehouse. But it is not at all clear how that fits into a trifurcated scheme.)

It is even more unclear what common issue underlies the Defendant's pay practices with respect to the Movers' uniforms. Plaintiff contends in his Motion that Defendant charged Movers and deducted from their paychecks the cost of the shirts/sweatshirts that they were required to wear. Mot. at 2:4-9. The written Policy described this cost as a deposit which would be returned when the uniform was returned. Mot. at 13:15-16. Defendant contends that the practice is not consistent in charging the employee at all. Opposition at 8:21-22.

Given all this, Plaintiff should come to the hearing prepared to explain, among other things, the following with respect to the wage and hour claims: Does he have an overarching theory of liability susceptible to common proof that would result in a manageable case? How does he propose to prove that case at trial? Does he plan to use statistical evidence and if so, in what regard? How would that statistical evidence resolve (or substantially resolve) the claims of all the class members? How will the statistical evidence be structured to provide due process to Defendant and useful information to a jury? If Plaintiff does not intend to use statistical evidence, what issue(s) do(es) he propose to try that would result in a decision applicable to all class members? What individual issue(s) would then remain?

With regard to the claim pertaining to the cost of the uniform: What, exactly, is Plaintiff's theory? What question(s) can be tried in common that will result in a verdict applicable to all class members? What individual issue(s) will remain after that?

As to manageability and superiority, it should be clear that the Court's focus is rooted in practicality. What can be tried in common and how will it advance determination of the case? How can that (whatever it is) be tried in a manageable fashion? Why is that a superior method of proceeding here?

The court is in trial and wishes to have sufficient time to hear argument on these matters. Therefore, the hearing is continued to September 1, 2017 at 8:30 a.m.

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10. TIME: 8:30 CASE#: MSC15-01791
CASE NAME: PARRY VS. WATERS MOVING & STOR
FURTHER CASE MANAGEMENT CONFERENCE
**** TENTATIVE RULING: ****

The parties are to appear at 8:30 a.m. on September 1, 2017.

11. TIME: 8:30 CASE#: MSC16-00806
CASE NAME: TORRES VS. SAGE CENTERS
SPECIAL SET HEARING ON: FINAL APPROVAL SET BY COURT
**** TENTATIVE RULING: ****

The parties are to appear.

12. TIME: 8:30 CASE#: MSC17-00723
CASE NAME: LORENZO VS BLACK DIAMOND LAND
HEARING ON DEMURRER TO COMPLAINT of LORENZO FILED BY BLACK DIAMOND LAND INVESTORS, LLC, DISCOVERY BUILDERS, INC
**** TENTATIVE RULING: ****

The demurrer is unopposed, and appears directed at all plaintiffs in this case.

There originally were eleven (11) plaintiffs in this case.

On July 12, 2017, the following nine (9) plaintiffs were dismissed without prejudice: Jocelyn Lorenzo, Dorothy Coleman, Erlinda Haris-Rick, Angela Joyner, Wendell Joyner, Sierra Palmer, Gregory Palmer, Janeea Rodriguez, and Miguel Rodriguez. Thus, only Aileen Vicente and Robert Salinas remain as plaintiffs in this matter.

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As to the nine dismissed plaintiffs, the demurrer is overruled as moot. However, this ruling is without prejudice to defendant's ability to assert the same substantive arguments with respect to the nine dismissed plaintiffs in the future, should defendant wish to do so.

As to the remaining two plaintiffs, the demurrer is sustained without leave to amend.

Black Diamond shall prepare a judgment of dismissal, separate from any order on the demurrer, and submit it to the Court in accordance with the local rules.

13. TIME: 8:30 CASE#: MSL16-02943
CASE NAME: ASSET CAPITAL RECOVERY VS. LIB
HEARING ON MOTION TO/FOR ORDER TO DEEM MATTERS ADMITTED FILED BY ASSET CAPITAL RECOVERY GROUP, LLC
**** TENTATIVE RULING: ****

The motion is unopposed and appears to be meritorious. It is, therefore, granted.

14. TIME: 8:30 CASE#: MSN15-0301
CASE NAME: COMMUNITIES FOR BETTER VS. CON
HEARING ON MOTION TO/FOR AWARD OF ATTORNEYS'' FEES FILED BY COMMUNITIES FOR A BETTER ENVIROMENT
**** TENTATIVE RULING: ****

Only two of the three petitioners have filed fee applications - yet make the argument that all three petitioners contributed to substantial portions of the briefing. In addition, the matter is on appeal and the Court cannot know what will be the final result – and therefore, what benefit petitioners brought about.
Those conditions suggest the Court does not have the whole picture before it when being asked to make some important decisions. It is, therefore, inclined to defer the matter until the end of the litigation.

If petitioners believe there is sufficient reason to rule on these applications now, either or both may give notice in the usual fashion, appear, and argue why the Court should decide the matter at this time. If the Court is persuaded to do so, it will set a further hearing date.

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If no one calls to argue the tentative, the Court will set a case management conference at which the timing of a hearing on all fee applications will be discussed.

If any party gives notice that it wishes to argue the tentative, the matter will be heard on September 1, 2017 at 8:30 a.m. rather than on August 31, 2017.

15. TIME: 8:30 CASE#: MSN16-2322
CASE NAME: FOWLER VS CITYOF LAFAYETTE
HEARING ON DEMURRER TO 1st Amended CIVIL PETITION of FOWLER
FILED BY CITY OF LAFAYETTE
**** TENTATIVE RULING: ****

Respondent City of Lafayette's demurrer to the Amended Verified Petition for Writ of Mandate, and Injunctive and Declaratory Relief, for Violation of the Ralph M. Brown Act Open Meeting Law is overruled in part and sustained in part without leave to amend. (CCP ¶ 430.10 (e).)

Plaintiff's Request for Judicial Notice filed 8/17/17

The court grants the request and takes judicial notice of the existence and contents of Exhibit 2. It denies the request as to Exhibits 1, 3, 4, 5, 6, and 7. (As to Exhibit 7, *see Del E. Webb Corp. v. Structural Materials Co*. (1981) 123 Cal.App.3d 593, 605 (at best, discovery responses can be considered on a demurer when they reflect admissions of the plaintiff that contradict his pleadings, not when they reflect admissions of the defendant.)

Background

This case concerns a dispute over defendant's approval of an application (the "Application") for construction of an 1100 square-foot building on the front yard of 831 Las Trampas Road in Lafayette, California opening on an existing tennis court.

The Application was originally approved by the Lafayette Planning Commission. Petitioners appealed that decision to the Lafayette City Council. On October 11, 2016, the

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Lafayette City Council denied the appeal and approved the Application.

On December 20, 2016, petitioners filed their original petition to nullify respondent City of Lafayette's October 11, 2016 decision. Petitioners' core claim was that they were entitled to nullification because the City lacked justification to hold any closed sessions in connection with the appeal or failed sufficiently to disclose the facts and circumstances that provided the justification.

On May 17, 2017, following its tentative ruling on April 19, 2017, this court sustained the City's demurrer with leave to amend, ruling that, as pleaded, the Petition showed (1) the City had given proper notice under Government Code section 54956.9 (d)(2) and (e)(5) of the closed sessions to confer with legal counsel because, under the facts as alleged in the petition, oral statements were made threatening litigation outside an open and public meeting and the required record of the threats was made and was publicly available; (2) petitioners' request on July 6, 2016 for all materials that were submitted relevant to the Application did not request the record; and (3) a person seeking to nullify an action of a local agency under the Brown Act must plead prejudice and petitioners had not done so.

Petitioners filed an Amended Petition on May 11, 2017, expanding their petition to request not just nullification under section 54960.1 (Second Cause of Action), but also declaratory and injunctive relief under section 54960 (First Cause of Action). However, petitioners did not materially change their petition in other respects.

Petitioners seek all their requested relief under California's open meeting law, the Brown Act, Government Code sections 54950, et. seq. (All references herein to code sections are to sections of the Government Code unless otherwise stated.)

The City now demurs again.

Discussion

First Cause of Action

The Amended Petition alleges the following. The City held closed sessions in connection with the Application on July 25, September 26, and October 11, 2016, (and possibly on July 11 as well). (Amended Petition ("AP"), ¶ 24, 27, 29, 31, 32.) Petitioners believe that the hearing and discussion in these closed sessions went beyond the matters that may be discussed in closed session pursuant to section 54956.9. (¶ 32, 39.) They have tried to find out

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what occurred during the closed sessions, but the City refuses to disclose this information. (¶ 2, 32, 34, 36, 40.) They seek a determination of "the applicability of the . . . Brown Act to the closed sessions, and a determination . . . whether the nature and extent of the closed sessions were overbroad, and improperly included facts and circumstances that required public hearing, or public statement or announcement, or whether issues and grounds asserted by petitioners on their appeal . . . were secretly discussed or deliberated upon in violation of the Brown Act." (AP at 20:6-11; *see also* ¶ 1, 41.)

In pertinent part, Government Code section 54960 states, "any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of *stopping or preventing violations or threatened violations* of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to *ongoing actions* or threatened *future* actions of the legislative body, or to determine the applicability of this chapter to *past* actions of the legislative body, subject to Section 54960.2 . . . or to compel the legislative body to audio record its closed sessions as hereinafter provided." (Gov't. C. § 54960.) Section 54960 was first enacted in 1961 and was last amended in 2012 (effective January 1, 2013). The 2012 amendment added the language, "to determine the applicability of this chapter to *past* actions of the legislative body, subject to Section 54960.2." (Emphasis added.)

The Digest for the 2012 amendment explains, "This bill would prohibit . . . an interested person from filing an action for an alleged violation of the Brown Act for *past actions* of a legislative body, unless certain conditions are met, including, but not limited to, a requirement that the . . .interested person submit a cease and desist letter to the legislative body being accused of the violation setting forth the alleged violation, and the legislative body has failed to issue an unconditional commitment to cease and desist from the alleged past action within 30 days of receiving the letter." (Emphasis added.) Presumably, the Digest reads this way because the right to file an action regarding past actions violating the Brown Act had previously been established by case law, at least to some extent. (*See Shapiro v. San Diego City* Council (2005) 96 Cal.App.4th 904, 916.)

Section 54960.2 sets forth the requirements concerning the cease and desist letter.

"The purpose of the Brown Act is to facilitate public participation in local government decisions and to curb misuse of democratic process by secret legislation by public bodies. [Citations.] To these ends, the Brown Act imposes an 'open meeting' requirement on local legislative bodies. [citations]." (*Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1116.)

The Brown Act provides a statutory exception to this open meeting requirement for

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closed sessions to confer with counsel regarding pending litigation. (Gov't. C. § 54956.9). Litigation is pending when it has already been initiated or when "[a] point has been reached where, in the opinion of the legislative body of the local agency on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency." (Gov't C. § 54956.9 (d)(2).)

"[T]he Brown Act should be interpreted liberally in favor of its open meeting requirements, while the exceptions to its general provisions must be strictly, or narrowly, construed." (*Shapiro v. San Diego City Council*, *supra*, 96 Cal.App.4th at 920.) "Further, . . . the Brown Act open meeting requirements encompass not only actions taken, but also factfinding meetings and deliberations leading up to those actions." (*Page v. MiraCosta Community College Dist*. (2009) 180 Cal.App.4th 471, 502.)

Petitioners cite several cases where the court granted precisely the type of relief they are requesting here. (*Shapiro, supra; Page, supra*; *Los Angeles Times Communications v. Los Angeles County, etc*. (2004) 112 Cal.App.4th 1313.) The court sees no material distinction between those cases and this one. Furthermore, petitioners do not need to prove a violation in order to seek a determination whether there was a violation. Petitioners are entitled to seek a declaration from the court, even if the end result is a determination that there was no violation. (*See* 5 Witkin, California Procedure (5th Ed. 2008) Pleading, § 877, p. 294 ("the rule [regarding declaratory relief actions] is now established that the defendant cannot, on demurrer, attack the merits of the plaintiff's claim. The complaint is sufficient if it shows an actual controversy; it need not show that plaintiff is in the right.") If there was any doubt about whether an interested person may seek a declaration that a past action violated the Brown Act (*see Shapiro, supra*, 96 Cal.App.4th at 916) it was removed by the 2012 amendment to the Act. Therefore, the court overrules the City's demurer to the First Cause of Action.

The City argues the court should not open the door to a declaratory relief action because it is a door that leads nowhere: petitioners will never be able to prove what occurred in the closed sessions because that information is confidential. The court does not decide that now, since petitioners have adequately pleaded entitlement to a determination of their rights, and the sufficiency of their allegations is all that concerns the court on this demurrer. Whether they can prove their allegations is for another day.

Second Cause of Action

In this cause of action, petitioners do not merely seek a declaration that the City violated the Brown Act, but an order nullifying the City's approval of the Application.

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Citing several cases, the court's order on the previous demurrer stated that to obtain nullification under the Brown Act, a party must plead prejudice and that petitioners had failed to do so. (*See Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 556; *Galbiso v. Orosi Public Utility Dist*. (2010) 182 Cal.App.4th 652, 671.)

Petitioners continue to argue that prejudice is not required. They are essentially asking the court to reconsider its prior ruling about the need to allege prejudice. However, they do this without citing any new authority. Since no new law is offered, the court finds no reason change its prior decision in this regard. While it is true that the first case to impose a requirement of prejudice (*Cohan, supra*, 34 Cal.App.4th 547, 556) cited no authority and contained no discussion in support of that conclusion, by now the requirement is oft-repeated and well entrenched in the case law. (*See Galbiso v. Orosi Public Utility Dist*., *supra*, 182 Cal.App.4th 652, 671.) Even if this court agreed with petitioners' critiques of the cases requiring prejudice, it is not free to ignore the pronouncements of the Courts of Appeal. (*See* 9 Witkin, California Procedure (5th Ed. 2008), Appeal, §497, p. 558.) The City has cited several cases explicitly stating prejudice is required to obtain nullification. Petitioners have not cited any cases explicitly stating it is not required. If petitioners believe that the City's cases are not well-reasoned, their remedy is with a higher court, not with this one.

Also, petitioners still have not alleged prejudice. The Amended Petition contains paragraph 43, which expands upon the allegations of its forerunner, paragraph 29 in the original petition. Paragraph 43 alleges, "A failure by City to comply with the Brown Act . . . would serve to prejudice petitioners by depriving petitioners of their . . . right under the Brown Act to observe the deliberations of the City on petitioners' appeal and the Sayles Application, to be informed of the facts and circumstances on which the City Council based its deliberations, to have an opportunity to respond, testify, submit written materials, and rebut any inappropriate or incorrect information and argument, and to obtain a just hearing and outcome consistent with the Brown Act . . ."

However, as defined by the cases, prejudice means more than the lost opportunity to present better evidence and argument. It means a probable change in the agency's decision. (*See Cohan, supra*, 30 Cal.App.4th at 556.)

Petitioners' paragraph 43 alleges only the former, not the latter. Therefore the court sustains the demurrer to the Second Cause of Action. (CCP § 430.10 (e). It does so without leave to amend because petitioners have not shown how they could successfully amend the petition. (*See McMartin v. Children's Institute International* (1989) 212 Cal.App.3d 1393, 1408.)

If any party gives notice that it wishes to argue the tentative, the matter will be heard on

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September 1, 2017 at 8:30 a.m. rather than on August 31, 2017.

16. TIME: 8:30 CASE#: MSN16-2322
CASE NAME: FOWLER VS CITYOF LAFAYETTE
CASE MANAGEMENT CONFERENCE
**** TENTATIVE RULING: ****

The parties are to appear. If no one calls to argue the tentative ruling, they may appear by CourtCall.