SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 04/25/2014 TIME: 04:04:00 PM DEPT: C-71

JUDICIAL OFFICER PRESIDING: Ronald S. Prager
CLERK: Lee Ryan
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2011-00100174-CU-BT-CTL** CASE INIT.DATE: 10/27/2011
CASE TITLE: **Cohen vs. California Delta Mechanical Inc**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

EVENT TYPE: Motion Hearing (Civil)

APPEARANCES

The Court, having taken the above-entitled matter under submission on 04/25/14 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court rules on the Plaintiff Danny Cohen's (hereinafter Plaintiff) Motion for Class Certification and Appointment of Class Counsel as follows:

After taking the matter under submission, **the Court amends its Tentative Ruling but affirms its disposition.**

As an initial matter, the Court SUSTAINS the Plaintiff's objections to the declaration of Suzy Kitchukova to the extent that it contradicts the testimony of Defendant Delta Mechanical's (hereinafter Defendant) PMQ, especially in light of the fact that the PMQ was subject to cross-examination and Ms. Kitchukova was not. Additionally, the objection is SUSTAINED to the extent that it contradicts the testimony of the Defendant's PMQ under Evidence Code Section 352, because the probative value of the declaration is far outweighed by its prejudicial effect.

For the reasons stated below, the Plaintiff's Motion to Certify a Class is GRANTED in-part, and this lawsuit is hereby certified as to the causes of action for unfair, unlawful, and fraudulent business practices under Business and Professions Code Section 17200 and as to the cause of action for violation of Civil Code Section 1770, subdivision (a)(19).

For all of the reasons stated below, the Plaintiff's Motion to Certify a Class is DENIED as to all other causes of action.

For the reasons stated below, Plaintiff Danny Cohen is hereby appointed as class representative of the certified class, and his counsel, Stuart M. Eppsteiner, Andrew P. Fiorica, and Andrew K. Kubiak of Eppsteiner & Fiorica LLP, are hereby appointed as class counsel.

Legal Standard

In order for a class to be certified, Code of Civil Procedure section 382 requires that there be (1) an ascertainable class; and (2) a well-defined community of interest. (See *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.) The plaintiff bears the burden of proof that certification is appropriate. (*Lockheed Martin v. Super. Ct.* (2003) 29 Cal.4th 1096, 1004-05.)

Ascertainable class: Whether a class is "ascertainable" within the meaning of Code of Civil Procedure Section 382 "is determined by examining (1) the class definition; (2) the size of the class; and (3) the means available for identifying the potential class members." (*Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.) "The class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description." (*Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 977 [internal quotes omitted].)

Community of Interest: "The "community of interest" requirement embodies three separate factors: (1) predominant common questions of law or fact; (2) class representatives whose claims or defenses are typical of the class; and (3) class representatives who can adequately represent the class." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2013) ¶ 14:11.5, p. 14-13 (hereinafter Rutter Civil Procedure); *Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1021; *Richmond v. Dart Industries* (1981) 29 Cal.3d 462, 470.)

Predominant Questions of Law or Fact: Predominant common question means that "each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment; 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 to the litigants." (*Washington Mutual Bank, FA v. Super. Ct.* (2001) 24 Cal.4th 906, 913–914 [brackets in original; internal quotations omitted]; *Basurco v. 21st Century Insurance Co.* (2003) 108 Cal.App.4th 110, 117.)

"As a general rule if the defendant's liability can be determined by facts common to all members, a class will be certified even if the members must individually prove their damages." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.) But a class action cannot be maintained where the existence of damage, the cause of damage, and the extent of damage have to be determined on a case-by-case basis, even if there are some common questions. (*Basurco v. 21st Century Insurance Co.* (2003) 108 Cal.App.4th 110, 119.) Additionally, as part of this requirement, courts also consider the manageability of the common issues and, taking into account the available management tools, weigh the common issues against the individual issues to determine which of them predominate. (See *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1432–1433.)

Typicality: Generally, the test for typicality is whether other members have the same or similar injury, whether the action is based on conduct that is not unique to a single class member, and whether other potential class members have been injured by the same conduct. (See *Weinberger v. Thornton* (S.D. Cal. 1986) 114 F.R.D. 599, 603.) It is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all potential class members. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 45.) Thus, it is not necessary that the class representative have personally incurred

all of the damages suffered by each of the other potential class members. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 228.)

Adequate Representation: The plaintiff must show that she can adequately represent the class. (*Lockheed Martin Corp. v. Super. Ct.* (2003) 29 Cal.4th 1096, 1104.) As such, the class representative, through qualified counsel, must be capable of "vigorously and tenaciously" protecting the interests of the potential class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.) Adequate representation requires that (1) the interests of the representative plaintiff coincide with those of the class; (2) the representative plaintiff vigorously prosecute the claims on behalf of the class; and (3) counsel for the representative plaintiff be qualified, experienced and generally able to conduct the litigation. (See *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 159.)

Discussion

Ascertainable Class

From the Plaintiff's statement of the proposed class, as well as the discovery conducted through the court-appointed expert, it appears a class is readily ascertainable through objective data. A class must be ascertainable primarily to satisfy the due process requirement of providing notice to the potential class members who will be bound by the effect of any judgment. (*Sotelo v. Medianews Group, Inc.* (2012) 207 Cal. App. 4th 639, 647-48.) Regardless of the Defendant's claim that many of the 324 potential class members may not actually fall into the scope of the proposed class, the fact that the addresses of the potential class members are readily known is the salient factor for purposes of this element. It also appears that whether or not a particular individual purchased a water heater permit from the Defendant in addition to purchasing a water heater is a relatively straightforward undertaking that will not render the proposed class so murky as to become undefinable. Accordingly, the proposed class is readily ascertainable.

Community of Interest

Predominant Common Questions of Law or Fact – Unfair & Unlawful Business Practices

There appears to be common questions of law and fact that predominate as to the Plaintiff's non-fraud causes of action under California's unfair competition laws. The Plaintiff alleges in his Operative Complaint that the Defendant's conduct was unfair and unlawful solely because the Defendant sold the permits at $20 over its cost, while simultaneously charging a $20 "processing fee," and by failing to disclose this information to customers. (Plaintiff's Exhibit A, p. 6-8, ¶¶ 25-31.) Therefore, under the Plaintiff's theory which will not be analyzed on the merits, the common questions of law and fact that predominate are whether members of the class purchased a water permit from the Defendant, as they will have been harmed exclusively by and through their purchase, and whether this pricing scheme is unlawful and/or unfair; there will be no need to conduct individualized inquiries of the class members, other than to determine whether members of the class fell prey to the alleged unlawful pricing scheme of the Defendant by purchasing the subject permits.

Contrary to what the Defendant claims, the Plaintiff's Section 17200 claims are most certainly not the same as his Section 17500 claims. Indeed, they are different by their very nature, in that claims under Section 17200 do not require any advertising whatsoever. Therefore, whether or not certain individuals received uniform "advertising" is wholly irrelevant for these cause of action.

Predominant Common Questions of Law or Fact –False Advertising.
In pertinent part, false advertising under Business and Professions Code Section 17500 requires the plaintiff to show that the defendant "publicly disseminated advertising which: (1) contained a statement which was untrue or misleading . . . (3) which concerned the real or personal property or services or their disposition or performance." (William L. Stern, Bus. & Prof. C. § 17200 Practice (The Rutter Group 2008) ¶ 4:3, p. 4-2 (hereinafter Rutter 17200.)) This Court declines to adopt the definition of advertising urged by the Defendant in accord with footnote 9 in *Bank of the West v. Super. Ct.* (1992) 2 Cal.4th 1254, 1276, as the statement made by the *Bank of the West* Court is not only dicta but relies only on out of state decisions. California courts have generally adopted a more expansive view of the term "advertising," which is "virtually any statement made in connection with the sale of a product or service. . ." (Rutter 17200, *supra*, at ¶ 4:19, p. 4-7; see also *Chern v. Bank of America* (1976) 15 Cal.3d 866, 875-76.) Additionally, California courts also give "public dissemination" a broad meaning as well. (See. e.g., *People v. Witzerman* (1972) 29 Cal.App.3d 169, 180 (stating that dissemination under Section 17500 means to "scatter, spread widely, broadcast, or disperse."))

However, even assuming the oral statements made by the Defendant's employees and the invoice the Plaintiff himself received are "publicly disseminated advertisements," an individual inquiry would have to be undertaken to determine what was said or included and what wasn't said or included in any oral or written statements made to the potential class members to determine whether or not the Defendant's advertisements were false advertisements. While the Plaintiff has provided evidence that he received a common and typical written "advertisement" that omits what he claims is material information, other evidence provided by the Defendant's Person Most Qualified shows that Plaintiff's experience was unique and would not be representative of the class. (Defendant's Exhibit 2, p. 20, lines 7-20.) Accordingly, an individualized inquiry of every class member, or nearly every class member, would have to be undertaken to determine what exactly was said or omitted to determine whether the same omissions were made to the class as were made to the Plaintiff. Accordingly, the request to certify this cause of action is denied for lack of a common question of fact or law.

Predominant Common Questions of Law or Fact - Fraudulent Business Practices
As an initial matter, it must be pointed out that the Defendant is wrong when it states that each individual member of the putative class would have to prove reliance or causation to support this cause of action. (See *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 325.) The case cited by the Defendant for this proposition, *Kavruck v. Blue Cross of California* (2003) 108 Cal.App.773 (hereinafter *Kavruck*), does not support the Defendant's argument. In *Kavruck*, the plaintiff's request to certify a class was denied because the plaintiff relied on oral misrepresentations made by the defendant and failed to show that the misrepresentations themselves would be common among the proposed class, not because the plaintiff couldn't show uniform reliance or causation. (*Id.* at p. 776.)

All that is required for a fraud cause of action under Section 17200 is that the defendant engaged in a business practice that is likely to deceive the public and that the representative class member was injured in-fact by the deceptive business practice. (Rutter 17200, *supra*, at p. 3-49, ¶ 3:155; *In re Tobacco II Cases*, *supra*, 46 Cal.4th at p. 325-26) In other words, the representative class member does not have to show complete reliance on specific omissions or misrepresentations, but he or she does have to show that the omission or misrepresentation was *a cause* in bringing about the injury. (*Id.* at 328 ("[A] plaintiff must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct, the plaintiff is not required to allege that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct.")) This is exactly what the Plaintiff has done when he alleges he was never informed of the true cost of the permit and he was injured by paying $20

above-and-beyond the true cost of the permit.

When the Plaintiff provided his credit card to the Defendant and agreed to purchase the permit and have the water heater installed he did not know the true price of the permit, just like the . The fact that the Plaintiff may have known about the overcharge at the time he actually paid his bill does not change the fact that, in the first instance, the Plaintiff claims he relied on a material omission of the Defendant simply by agreeing to purchase the permit at an inflated price. (*Ibid.* ("[A]n allegation of reliance is not defeated merely because there was alternative information available to the consumer-plaintiff.")) This claim is a sufficient allegation of the requisite reliance for purposes of claims under the UCL. Therefore, at least for causes of action under the Unfair Competition Law, whether individual class members relied on or were injured as a result of the Defendant's conduct is not as important as whether the conduct the Defendant engaged in as a whole violates the Unfair Competition Law. (*Id.* at p. 324.)

There is most likely a difference between what was disclosed to the Plaintiff at the point-of-sale and what is typically disclosed to other consumers, but that difference is immaterial at this stage due to the nature of the allegations in the Complaint. Whether the Defendant regularly offers its products and services as a flat-rate package or whether they provide customers with an itemized breakdown does not change the allegation that at no point in time did the Defendant ever disclose the true cost of the permit to any consumer. As far as the Court can tell, the Defendant's general argument on this point is that a complete omission of the cost of the permit couldn't mislead a consumer in the way the Plaintiff alleges he was misled, because the cost of the permit is almost never disclosed at the point-of-sale like it was to the Plaintiff. But that argument goes to the merits of this cause of action and whether the practice as a whole is likely to mislead, not whether the class is appropriate to be certified under the Plaintiff's claims. Indeed, the potential class members do not have to have been misled in the exact way the Plaintiff was and they do not have to show causation or reliance. If the Plaintiff shows he was injured as a result of a business practice that is likely to mislead the public, then he is an appropriate representative for consumers who suffered a similar injury as a result of that business practice.

With all of that being said, it appears there exist common questions of fact and law: did the Defendant engage in the business practice of universally omitting the true cost of the water permit and is that practice likely to deceive the public? The Plaintiff's experience in failing to be informed of the true cost of the permit appears to be uniform across the class, regardless of what other information was or was not affirmatively disclosed. Therefore, if the practice of failing to inform consumers of the true cost of the permit is found "likely to mislead the public," then it would follow that all members of the class could appropriately maintain this cause of action without undertaking an individualized inquiry.

However, if it comes to light at a later date that the Plaintiff's experiences in regard to this cause of action are materially different from the class as a whole such that the Plaintiff's claims under this cause of action are not truly representative of the class, the Court has discretion to create sub-classes and appoint an additional or different representative class member.

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Predominant Common Questions of Law or Fact - Violation of the Consumers Legal Remedies Act

Plaintiff's claims under this section include violations of Civil Code Section 1770, subds. (a)(9) (false advertising), (a)(14) (misrepresentation), and (a)(19) (unconscionable contractual provisions.) For the same reasons as stated above, the Plaintiff cannot certify a class for false advertising.

Similar to false advertising, the Plaintiff has failed to show that any misrepresentations that occurred prior to the purchase and issuance of the permit were common to all of the potential class members.

The fact that the Defendant conveys to its customers that it charges $30 for the permit is not, on its own, evidence of a misrepresentation; in order for it to be a misrepresentation, the statement must necessarily must be false or misleading. Indeed, the Plaintiff has provided no evidence indicating that all potential class members were told or led to believe that the $30 was the same price the city charges. In order to prove such misrepresentations took place, an individualized undertaking similar to the false advertising inquiry would need to be conducted in order to determine what the Defendant actually told to the many customers that only receive this information initially via telephone.

The only evidence the Plaintiff has provided as to a uniform practice of "misrepresentation" appears to be the Defendant's practice of sending its customers an invoice for its services and products. And while the Plaintiff states that, through the invoice, he believed the $30 was the price the city charged for the permit, the Plaintiff's belief in this regard occurred *after* the purchase of the permit and installation of the water heater took place. There is simply no way he, or anyone else, could have relied on any "misrepresentations" made via the invoice, as the invoice necessarily followed the alleged harm of purchasing the permits.

As to the unconscionable contractual provision, the Court finds there are common questions of fact and law. Under the Plaintiff's theory, the contracts at issue are merely the transactions that took place between the potential class members and the Defendant for the purchase and receipt of the permit for $30 and the additional $20 processing fee. Therefore, the other individualized contractual "provisions" that may have applied to the potential class members depending on what products or services they received from the Defendant are irrelevant. By its very terms, Civil Code Section 1770 applies to "any transaction intended to result or which results in the sale or lease of goods or services to any consumer." (Civ. Code § 1770, subd. (a).) The transaction here was the exchange of money by consumers for the purchase of the water permits. Therefore, the common questions of fact and law are (1) whether the Defendant charged $30 for every permit, (2) whether the Defendant charged an additional $20 processing fee in connection with the permit, and (3) whether those charges are unconscionable; no additional inquiry will be required.

Typicality

As the only causes of action that remain are those that do not require the Plaintiff to show reliance on any affirmative misrepresentations or advertisements, all of the Plaintiff's claims are typical of those of the potential class. All of the Plaintiff's claims result from the fact that the Defendant allegedly unlawfully, unfairly, or unconscionably charged $30 for the water permit and an additional $20 service fee, as well as engaged in the fraudulent practice of failing to disclose the true cost of the permits. Therefore, each and every potential class member will have been exposed to the same harmful conduct with the same, or nearly the same, financial loss. Nothing on the record indicates the Plaintiff's experience was materially any different from any other potential class members vis-à-vis the causes of action that remain.

Adequacy of Representation

Despite the character attacks that the Defendant makes in its papers, the Court has no reason to believe the Plaintiff and his counsel will not adequately and zealously represent the class. The fact that the Plaintiff and one member of his counsel went to law school together has no bearing on their ability to represent the class. And as already addressed, the Plaintiff's claims are substantially similar to those of the potential class, so his ability to adequately present representative claims cannot truly be in question. Additionally, proposed class counsel have significant experience with large, complex cases, including class actions, and the Court has no reason to doubt they will not appropriately and effectively represent the proposed class.

For all of the reasons stated above, the Plaintiff's Motion to Certify a Class is GRANTED and this lawsuit is hereby certified as to the causes of action for unfair, unlawful, and fraudulent business practices under Business and Professions Code Section 17200 and Civil Code Section 1770, subdivision (a)(19).

For all of the foregoing reasons, Plaintiff Danny Cohen is hereby appointed class representative of the class.

For all of the reasons stated above, Stuart M. Eppsteiner, Andrew P. Fiorica, and Andrew K. Kubiak of Eppsteiner & Fiorica LLP are hereby appointed as class counsel.

The class that is certified in accordance with this Order is defined as:

All persons and entities in the City of San Marcos, California, whom Delta Mechanical, Inc. charged more than the actual cost of a water heater permit and which persons or entities also paid California Delta Mechanical, Inc. separate permit processing fees, from October 27, 2007, through the date of class notice.

Specifically excluded from the certified Class are:
1. California Delta Mechanical, Inc. and any entity in which California Delta Mechanical, Inc. has a controlling interest or which has a controlling interest in California Delta Mechanical, Inc. and California Delta Mechanical, Inc.'s representatives, predecessors, successors, and assigns;
2. Governmental entities;
3. California Delta Mechanical, Inc.'s employees, officers, directors, agents, and representatives and their family members; and
4. The Judge and staff to whom this case is assigned, and any member of the Judge's immediate family.

IT IS SO ORDERED

Ronald S. Prager

Judge Ronald S. Prager

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Cohen vs. California Delta Mechanical Inc

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2011-00100174-CU-BT-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the Minute Order dated 4/25/14 was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 04/28/2014.

Clerk of the Court, by: L Ryan L. Ryan , Deputy

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☐ Additional names and address attached.