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Superior Court of California
County of Los Angeles

JAN 25 2018

Sherri R. Carter, Executive Officer/Clerk
By: Roxanne Arraiga, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LBM PROPERTIES, LLC ("LBM"), a California Limited Liability Company, POSAMAR, LLC ("Posamar"), a California Limited Liability Company, AMILA, LLC ("Amila"), a California Limited Liability Company, and GEORGE KEFALAS, an individual, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

DIRECTV, Inc., a Delaware corporation, et al.,

Defendants.

LASC Case No: BC540043

COURT'S RULING AND ORDER RE:

1) PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; AND

2) PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: January 18, 2018

I.

BACKGROUND

Plaintiffs, a group of owners of Multi-Dwelling Units ("MDUs"), brought this putative class action against Defendant DirecTV. Plaintiffs allege that DirecTV "uses an illegal sham process which enables it to violate the rights of the owners of MDUs in, *inter alia*, the State of

California by permanently affixing its satellite dishes and associated equipment to rooftops, external walls and other common or restricted areas without Landlord consent."[1] Plaintiffs bring this action to stop this alleged policy and practice.[2]

Plaintiffs allege that DirecTV delivers its satellite television service to subscribers who reside in MDUs by means of satellite dishes and associated equipment that it installs in, on, or near the MDUs.[3] Because the DirecTV system requires unrestricted "line of sight" access to a satellite, the Equipment is typically affixed permanently to the exterior of the MDU in which the subscriber resides and in which the subscriber's television is to be used.[4] Plaintiffs allege that DirecTV knows that it is, and at all times relevant, was, improper and illegal to permanently affix its Equipment to common or restricted areas of an MDU, such as the MDU's exterior walls or rooftop, without first obtaining the authorization of the Landlord.[5]

The Plaintiffs allege that while the Federal Communications Commission had issued a regulation that limits restrictions by Landlords on attachment of devices (such as DirecTV's equipment) to property "within the exclusive use or control" of a tenant, it did not diminish the ability of Landlords of MDUs to prohibit the installation or use of such equipment in common or restricted access areas not within the tenant's exclusive use or control.[6] DirecTV allegedly knows that it cannot permanently attach its equipment to the exterior wall or roof of an MDU without Landlord consent. However, DirecTV's policy and procedure for obtaining

[1] Complaint, ¶2.

[2] *Id.*

[3] Complaint, ¶9.

[4] *Id.*

[5] Complaint, ¶11.

[6] Complaint, ¶11.

authorization for such attachment purportedly fails to take proper account of the Landlord's rights.[7]

According to the Complaint, DirecTV requests that its *subscribers* submit to it a written authorization form ("the Form"). The Form allegedly acknowledges that installation of the Equipment is improper without prior approval of the Landlord, and purports to release DirecTV from any liability arising from the installation of the Equipment.[8] The Installation Form gives MDU tenants two alternatives: i) either obtain the landlord's written authorization for the installation of the equipment by getting the Landlord to sign and return Part 1 of the installation form to DirecTV; or ii) simply sign the Form themselves and return to DirecTV Part 2 of the Installation Form, which states: "Landlord approval of a DirecTV System installation at [address] has been verbally approved by my landlord (or is not required pursuant to my lease or rental agreement)."[9]

However, the Plaintiffs allege that DirecTV's purpose in allowing customers to obtain "consent" through part 2 of the Form is to help it circumvent the requirement that it obtain the required Landlord consent, thereby enabling DirecTV to sell its services to prospective customers.[10] Part 2 of the Form allegedly enables DirecTV "to document and perpetuate the fiction that it has obtained the required Landlord consent when it knows that it has not."[11] Plaintiffs allege that DirecTV has had and adheres to a uniform sham practice and policy

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[7] Complaint, ¶11.

[8] Complaint, ¶12.

[9] Complaint, ¶12.

[10] Complaint, ¶14.

[11] *Id.*

designed to evidence the fiction that it has obtained consent from the Landlord and thereby justify the wrongful installation of the Equipment – a policy and practice that was conceived by, is directed by, and is implemented under the direction of, the corporate decision-makers in DirecTV's Los Angeles County corporate headquarters.[12]

Plaintiffs allege that DirecTV has a duty to avoid actions which are likely to breach a legal duty and injure a foreseeable class of persons such as Landlords.[13] It is allegedly reasonable for companies to obtain actual permission from Landlords prior to permanently installing their equipment on a Landlord's MDU, and it is unreasonable to have a policy of making installations without Landlord permission.[14] Rather than meet this reasonable standard of care, Plaintiff alleges that DirecTV instead authorized installation of its Equipment "based on nothing more than the representation of tenants by accepting Part 2 of the Installation Form."[15]

Based on these allegations and the other allegations more fully set forth in the operative pleading (and following Defendant's prior motion to strike), Plaintiffs allege a sole claim for violation of Business & Professions Code §§17200 et seq.

Plaintiffs have two (2) motions before the Court. In the first motion, Plaintiffs seek an order certifying the following injunctive relief class:

> All persons or entities ("Landlords") that own and rent or lease residential MDUs in the State of California upon or in common or restricted areas of which Defendant DIRECTV, LLC, or its agents ("DIRECTV") have permanently installed DIRECTV Equipment.

In the second motion, Plaintiffs move for a preliminary injunction, restraining Defendant

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[12] Complaint, ¶15.

[13] Complaint, ¶17.

[14] *Id.*

[15] *Id.*

DirecTV, LLC or its agents during the pendency of this action from entering into common or restricted areas and/or attaching its equipment thereto, of residential multi-dwelling units in the State of California based solely on the representation of a renter who wishes to subscribe to DirecTV's services that the landlord has authorized the installation or that no permission of the landlord is required for the installation.

For the reasons discussed *infra,* the motion for class certification of the injunctive relief class is granted. The motion for a preliminary injunction is denied.

II.

ISSUE WITH DOCUMENTS LODGED UNDER SEAL

Plaintiffs have lodged with the Court copies of unredacted documents in support of the motion for class certification, pursuant to the parties' stipulated protective order. However, where a party wants to use at trial (or on a summary judgment motion) documents that are subject to a confidentiality agreement or protective order, and does *not* want the documents sealed, he or she must:

> — lodge the unredacted documents with the court clerk as required on a motion to seal (¶ *9:417*);
>
> — file redacted copies of the documents (redacted so as to conceal the protected portions); and
>
> — give notice to opposing parties that the documents will become part of the public court file unless they file a timely motion to seal. See California Practice Guide, Civil Procedure Before Trial, ¶9:420 (The Rutter Group 2017) (citing CRC 2.551(b)(3) and *Savaglio v. Wal-Mart Stores, Inc.*, supra, 149 CA4th at 601, 57 CR3d at 224).

Under CRC 2.551(b)(3)(B), if the party that produced the documents and was served with the notice under (A)(iii) fails to file a motion or an application to seal the records within 10 days or to obtain a court order extending the time to file such a motion or an application, the clerk

must promptly transfer all the unredacted records subject to the confidentiality agreement or protective order and any pleadings, memorandums, declarations, and other documents that disclose the contents of the records from the envelope, container, or secure electronic file to the public file. If the party files a motion or an application to seal within 10 days or such later time as the court has ordered, these documents are to remain conditionally under seal until the court rules on the motion or application and thereafter are to be filed as ordered by the court. See CRC 2.551(b)(3)(B).

Thus, the Court can and has considered the lodged, unredacted documents. In doing so, however, the Court notes that either party may file an application to seal the documents within 10 days of this order. The application must include an appropriate proposed order for the Court's signature. Unless a non-filing party objects, no hearing will be required for the application. The application must state clearly on the first page that, pursuant to today's Ruling and Order, no hearing date was required by the Court or requested by any non-filing party. If no application to seal is made within 10 days, the lodged documents will be publicly filed.

III.

MOTION FOR CLASS CERTIFICATION

A. Standards governing motions for class certification

CCP § 382 allows the Court to certify a class action "when the question is one of a common interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court..." Additionally, "[t]here must be questions of law or fact common to the class that are substantially similar and predominate over the questions affecting the individual members; the claims of the representatives must be typical of the claims or

defenses of the class; and the class representatives must be able to fairly and adequately protect the interests of the class." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App. 4th 224, 237-238.

Stated differently, there are two broad requirements for a class action: 1) an ascertainable class; and 2) a well-defined community of interest. *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal. App. 4th 908, 913. *See also Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1021 (a plaintiff seeking certification "must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives").

In determining whether the class is ascertainable, courts consider the size of the class, the class definition, and the means to identify class members. *Reyes v. San Diego County Board of Supervisors* (1987) 89 Cal. App. 3d 1263, 1274. The community of interest factor is established by showing: (1) predominant common 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. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435.

Further, under California law, a class action is not "superior" where there are numerous and substantial questions affecting each class member's right to recover, following determination of liability to the class as a whole. *City of San Jose v. Superior Court (Lands Unlimited)* (1974) 12 Cal.3d 447, 459.

California follows the procedures set forth under Federal Rules of Civil Procedure 23 for class actions, whenever California authority is lacking. *City of San Jose v. Superior Court, supra*, 12 Cal. 3d at 453.

The potentially mandatory and discretionary factors applicable to class certification

include:

- whether there is an ascertainable class (mandatory);
- whether there is a well-defined community of interest as to common questions of law or fact that predominate (mandatory);
- whether the class is so numerous that joinder of all members is impractical;
- whether the claims of the representative plaintiff are typical of the class;
- whether substantial benefits accrue to the litigants and courts;
- whether the proposed class is manageable;
- whether the person representing the class is able to fairly and adequately protect the interests of the class; and
- whether a class action is superior (including whether individual plaintiffs would bring claims for small sums).

E.g., Feitelberg v. Credit Suisse First Boston, LLC (2005) 134 Cal.App.4th 997, 1014; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; *Prince v. CLS Transp., Inc.* (2004) 118 Cal.App.4th 1320, 1324; *In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402, 409.

The burden of proof on a motion for class certification is on the party seeking certification. *Washington Mutual Bank, N.A. v. Superior Court (Briseno)* (2001) 24 Cal. 4th 906, 922; *Soderstedt v. CBIZ S. California, LLC* (2011) 197 Cal.App.4th 133, 154. This usually requires demonstration of predominance of common issues of law and fact, and manageability of the proposed class. *Lockheed Martin Corp. v. Sup.Ct. (Carrillo)* (2003) 29 Cal.4th 1096, 1103-1104; California Practice Guide, Civil Procedure Before Trial, ¶14:99.2 (The Rutter Group 2017). In making the determination as to whether the requirements for a class action have been met, the court may consider not only the parties' pleadings but also extrinsic evidence, including declarations and discovery responses. California Practice Guide, Civil Procedure Before Trial, ¶14:99 (The Rutter Group 2017). The court must examine together *all* of the evidence presented by the moving and opposing parties "under the prism of plaintiff's theory of recovery." *Department of Fish & Game v. Sup.Ct. (Adams)* (2011) 197 Cal.App.4th 1323, 1349

The burden is on the party seeking class certification to establish each of the class

prerequisites through substantial evidence. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. In weighing the evidence, the Court does not evaluate whether the claims asserted are legally or factually meritorious. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440.

B. CCP §382 controls, not the Federal Rules of Civil Procedure, for the putative injunctive relief class

Plaintiffs argue that the standards of Federal Rule of Civil Procedure 23(b)(1)(A) and 23(b)(2) govern the motion for certification of this injunctive relief class. Recently, however, the Court of Appeal for the Fourth District stated:

> [T]here is no gap in California precedent to be filled by reference to Federal Rules of Civil Procedure, rule 23(b)(1)(A) or (b)(2)(28 U.S.C.) on the issue of what class certification standards must be met when a plaintiff seeks only declaratory or injunctive relief on behalf of a class. *Even when the plaintiff seeks solely declaratory or injunctive relief*, California case law follows the well-established requirements that our Supreme Court has consistently stated, namely, (as relevant here) that the plaintiff must establish that (1) the class is ascertainable; (2) common questions predominate; and (3) a class action would provide substantial benefits, making it superior to other procedures for resolving the controversy. *Hefczyc v. Rady Children's Hospital-San Diego* (2017) 17 Cal.App.5th 518, 535–536 (emphasis added).

In light of this authority, Plaintiffs' reliance on Federal Rule 23(b)(2) for the notion that "the party seeking certification must show that 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole'"[16] is not persuasive. Nor is the Plaintiffs' argument that "[f]or a class to be certified under these sections, '[i]t is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole,' even if not all class members have been injured by the challenged practice."[17]

[16] Motion at 11:14-17 (citing FRCivPro 23(b)(2)).

[17] Motion at 11:17-20 (citing *Walters v. Reno* (9th Cir. 1998) 145 F.3d 1032, 1047).

Accordingly, Plaintiffs must demonstrate that the class certification requirements as set forth under California law (referenced *supra*) are satisfied.

C. Discussion

With the above standards in mind, Plaintiffs seek an order certifying the following injunctive relief class:

> All persons or entities ("Landlords") that own and rent or lease residential MDUs in the State of California upon or in common or restricted areas of which Defendant DIRECTV, LLC, or its agents ("DIRECTV") have permanently installed DIRECTV Equipment.

As the party moving for class certification, the evidentiary burden to demonstrate the class elements are satisfied falls on Plaintiffs.

Ascertainability/Numerosity

"Ascertainability requires a class definition that is 'precise, objective and *presently* ascertainable.' Otherwise, it is not possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating." California Practice Guide, Civil Procedure Before Trial, ¶14:23 (The Rutter Group 2017) (citing *Global Minerals & Metals Corp. v. Sup.Ct. (National Metals, Inc.)* (2003) 113 Cal.App.4th 836, 858 (emphasis added)). The class should be defined in terms of objective characteristics and common transactional facts that will enable identification of the class members when such identification becomes necessary. *Hicks v. Kaufman & Broad Home Corp., supra,* 89 Cal.App.4th at 915.

The goal is to use terminology that will convey sufficient meaning "to enable persons hearing it to determine whether they are members of the class plaintiffs wish to represent." *Global Minerals & Metals Corp. v. Sup.Ct. (National Metals, Inc.), supra,* 113 Cal.App.4th at 858. Importantly, a class may be ascertainable even if the definition includes ultimate facts or conclusions of law. *Hicks, supra,* 89 Cal.App.4th at 915-916. "Class members are

'ascertainable' *where they may be readily identified without unreasonable expense or time by reference to official records*." *Thompson v. Automobile Club of Southern California, supra,* 217 Cal.App.4th 719, 728 (internal citations omitted; emphasis added); *see also Bridgeford v. PacificHealth Corp.* (2012) 202 Cal.App.4th 1034, 1041. "In determining whether a class is ascertainable, the trial court examines the class definition, the size of the class and the means of identifying class members. [Citation.]" *Lee v. Dynamax, Inc.* (2008) 166 Cal.App.4th 1325, 1334.

"Courts have recognized that 'class certification can be denied for lack of ascertainability when the proposed definition is overbroad and the plaintiff offers no means by which only those class members who have claims can be identified from those who should not be included in the class.' [Citation.]" *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 921.

Further, no set number is required as a matter of law for the maintenance of a class action. *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030. California case law indicates that as few as ten (10) or twenty-eight (28) members satisfies numerosity. *Bowles v. Superior Court* (1955) 44 Cal.2d 574; *Hebbard,* 28 Cal.App.3d at 1030.

Numerosity

In support of numerosity, Plaintiffs reference the deposition of DirecTV's Person Most Knowledgeable ("PMK"), Adrian Dimech. Dimech testified that DirecTV installs over one million systems per year.[18] Plaintiffs also reference the 38,000 electronic signatures appearing on Part 2 of its consent form, which DirecTV produced in discovery.[19]

This evidence establishes that the putative class is sufficiently numerous.

[18] Dimech Depo. at 26:7-8 (Exh. 2 to Rosenberg Decl.).

[19] A portion of these forms for Orange County DirecTV installations from October 18, 2013 through October 27, 2013 is attached as Exhibit 7 to the Rosenberg Declaration.

Ascertainability

With respect to ascertainability, the Court previously determined in its earlier motion to strike that the class was ascertainable. The Court's September 11, 2015 Ruling and Order Re: Defendants' Motion to Strike Class Allegations stated:

> [A]t the pleading stage, the Court determines that class 2 is ascertainable, with respect to the UCL claim. The Court recognizes that the UCL does not "authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice." *Davis-Miller v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 106, 121. However, in the Court's view, subclass 2 would not necessarily be overbroad as to the UCL class. The named Plaintiffs themselves have alleged injury in fact pursuant to the UCL's standing requirements, as articulated in *In re Tobacco II Cases* (2009) 46 Cal.4th 98 and its progeny (holding that only the class representatives in a UCL claim must meet the standing requirements of injury and causation). In the Court's view, subclass 2 is ascertainable, insofar as it seeks relief pursuant to the UCL.[20]

Here, the class is defined in a straightforward manner. Persons who hear the class definition would know whether they are landlords that own and rent or lease residential multi-dwelling units where DirecTV has installed equipment in common or restricted areas. Further, the class is defined in terms of objective characteristics.

As alleged in the complaint, DirecTV requests that its subscribers submit to it a written authorization form ("the Form"). The Form allegedly acknowledges that installation of the Equipment is improper without prior approval of the Landlord, and purports to release DirecTV from any liability arising from the installation of the Equipment.[21] The Installation Form gives MDU tenants two alternatives: i) either obtain the landlord's written authorization for the installation of the equipment by getting the Landlord to sign and return Part 1 of the installation form to DirecTV; or ii) simply sign the Form themselves and return to DirecTV Part 2 of the Installation Form, which states: "Landlord approval of a DirecTV System installation at

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[20] September 11, 2015 Ruling and Order re: Defendants' Motion to Strike Class Allegations at 8:17-9:4.

[21] Complaint, ¶12.

[address] has been verbally approved by my landlord (or is not required pursuant to my lease or rental agreement)."[22]

In the Court's view, actual consent by certain landlords would not be relevant in assessing whether, on a going-forward basis, DirecTV continues to implement a policy that would allow installations to occur potentially *without* a landlord's consent.

For these reasons, ascertainability is satisfied at the class certification stage.

Do common questions predominate?

a. General standards on the "commonality" element

In deciding whether the common questions "predominate," the courts must identify the common and individual issues; consider the manageability of those issues; and, taking into account the available management tools, weigh the common issues against the individual issues to determine which of them predominate. California Practice Guide, Civil Procedure Before Trial, ¶14:16 (The Rutter Group 2017) (referencing *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1432-1433).

Additionally, a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages. *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 815-816. However, a class action "will not be permitted...where there are diverse factual issues to be resolved, even though there may be many common questions of law." *Brown v. Regents of Univ. of Calif.* (1984) 151 Cal. App. 3d 982, 988-89. "[E]ach member must not be required to individually litigate numerous and substantial questions to determine his right to recover following the class judgment." *City of San Jose, supra,* at 460.

[22] Complaint, ¶12.

In *Arenas v. El Torito, Inc.* (2010) 183 Cal.App.4th 723, the Court of Appeal observed:

> The focus in a class certification dispute is not entirely on the merits but on the procedural issue of what types of questions are likely to arise in the litigation—common or individual. Thus, the existence of some common issues of law and fact does not dispose of the class certification issue. (Rather, in order to justify class certification, the Supreme Court held, "[T]he proponent of certification must show … that questions of law or fact common to the class predominate over the questions affecting the individual members … ." *Arenas v. El Torito, Inc.*, 183 Cal.App.4th at 732 (citations omitted).

Critically, the court in *Jaimez v. Daiohs USA, Inc.* (2009) 181 Cal.App.4th 1286, 1298 recognized that that "'the trial court must evaluate whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment … .'" (citing *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1531) (emphasis added).

However, "when the merits of the claim are enmeshed with class action requirements, the trial court must consider evidence bearing on the factual elements necessary to determine whether to certify the class." *Bartold v. Glendale Fed'l Bank* (2000) 81 Cal.App.4th 816, 829; *Brinker Restaurant Corp. v. Sup. Ct. (Hohnbaum), supra,* 53 Cal.4th at 1023-1024; *J.P. Morgan & Co., Inc. v. Sup.Ct. (Heliotrope Gen., Inc.)* (2003) 113 Cal.App.4th 195, 222; see *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, 2551—class determination will "(f)requently . . . entail some overlap with the merits of the plaintiff's underlying claim"]

Such issues include, e.g., "whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses." *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 443; see *Brinker Restaurant Corp. v. Sup. Ct.* (*Hohnbaum*), *supra*, 53 Cal.4th at 1024 ("whether common or individual questions predominate will often depend upon resolution of issues closely tied to the merits"); *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, 1358.

"Predominance is a comparative concept, and 'the necessity for class members to individually establish *eligibility* does not mean individual fact questions predominate.' [Citation.]" *Medrazo v. Honda of North Hollywood, supra,* 166 Cal.App.4th at 99-100 (emphasis added). Common issues are predominant when such issues would be primary to each individual action. *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644,447-48.

b. Discussion on commonality

According to Plaintiffs, DirecTV employs a policy of depending on the tenant to provide consent for installation of the equipment. Specifically, Plaintiffs reference the Demich Deposition, where he testified that DirecTV employs such a policy.[23] Demich confirms that DirecTV accepts a dwelling occupant's representation that an owner or authorized agent of the owner has consented to the installation of DirecTV equipment in common areas of an MDU as sufficient authorization to go ahead with the installation.[24] Demich confirmed that it is DirecTV's general policy that if a customer who provides a signature in §2 of the consent form, DirecTV does not independently verify the installation has actually been approved by the landlord.[25]

DirecTV's training manual sets forth its policy with obtaining permission for installation. The manual states in applicable part as follows:

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[23] Demich Depo., Exh. 2 to Rosenberg Decl. at 20:9-20:25, 17:21-18:2, and 22:24-24:7.

[24] Denich Depo., Exh. 2 to Rosenberg Decl. at 17:21-18:2.

[25] Demich Depo. at 20:18-25.

Landlord Permission Form
This form is only required if the customer is renting the property where you will be installing DIRECTV service. Because you are modifying the property…, it is important that the customer has received permission from their landlord to do so.

The form is signed by the customer, not the landlord. The form states that the customer has, in fact, received permission from the landlord to install DIRECTV equipment. You do not need to speak with or receive a signature from the landlord. The customer is responsible for getting this permission.[26]

Michael Kefalas, one of the managers of Plaintiff LBM Properties, states that he has never succeeded in having DirecTV remove an unauthorized satellite dish, and is unable to identify which dish on a roof belongs to which tenant (and DirecTV has never assisted him in doing so).[27]

Frederick Nichols, another putative class member, testified that in 2013, he and his wife discovered that DirecTV, without having sought or obtained permission, and without his prior knowledge, had installed a satellite dish on the roofs of two of his multi-unit rental properties in Torrance.[28] He says that the installations damaged the roofs.[29] Nichols said that had he been asked, he would not have agreed to the installation of these dishes on the roofs of his properties.[30]

Mark Sanger states that two DirecTV satellite dishes were installed on the rooftop of his building without his prior knowledge or consent.[31] He states that in November 2014, he contacted DirecTV and demanded the dishes be removed; however, DirecTV did not remove

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[26] See Exh. 5 to Rosenberg Decl. at DTVPROD0005886.

[27] Kefalas Decl., ¶4.

[28] Nichols Decl., ¶3.

[29] Nichols Decl., ¶6.

[30] Nichols Decl., ¶8.

[31] Sanger Decl., ¶3.

them.[32]

Ken Wayte states that in December 2014, following installation of a new roof, he was surprised to discover that DirecTV had installed a satellite dish on the roof of the Property.[33] He says he did not consent to the installation of that dish, and that nobody ever contacted him to ask permission to make the installation.[34] Wayte says that had he been asked, he *would not* have agreed to the installation of a dish on the roof of the property.[35]

William Risconsin similarly states that in August 2016, he discovered that a new DirecTV satellite dish had been improperly installed directly onto his roof without his knowledge or consent, with wires attached to the newly refurbished building exterior.[36] He also became aware that a second DirecTV satellite dish had earlier been improperly installed directly onto the roof without his knowledge or consent.[37] A third older DirecTV satellite dish installation that he had been aware of was properly mounted onto a vertical faux chimney, but for some unknown reason was not being used.[38] Risconsin states that he did not agree to the installation of these two satellite dishes, and DirecTV never asked him for permission to install them.[39] Risoncon says that had he been asked, he would not have agreed to installation of these

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[32] *Id.*

[33] Wayte Decl., ¶3.

[34] Wayte Decl., ¶4.

[35] *Id.*

[36] Risconsin Decl., ¶3.

[37] *Id.*

[38] *Id.*

[39] Risconsin Decl., ¶5.

dishes on the roof of the property.[40]

John Landsberger says that in March 2015, he discovered that about nine new DirecTV satellite dishes had been improperly installed directly onto the roof of his building.[41] He says that DirecTV told him that of the nine satellite dishes that had been installed on the property, there were only three signed authorization documents in its records.[42] The others had been installed by subcontractors or retailers who sold DirecTV service.[43] Landsberger states that he did not agree to the installation of any of these satellite dishes, and DirecTV never asked him for permission to install them.[44] Had he been asked, he would not have agreed to the installation of these dishes on the roof of the property.[45]

Katharine Beckwith states that in 2014 or earlier, she discovered that DirecTV, without having sought or obtained her permission, and without her prior knowledge, had installed a satellite dish on the roof of the property.[46]

The evidence before the Court indicates that DirecTV has a uniform policy with respect to its authorization form. DirecTV's company-wide policy is that it accepts a tenant's representation that the landlord has authorized the installation of the equipment in common areas (in the event that the landlord has not provided written authorization for the installation). This is a common question which predominates among the class. Even if individual landlords provide

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[40] *Id.*

[41] Landsberger Decl., ¶3.

[42] *Id.*, ¶5.

[43] *Id.*

[44] Landsberger Decl., ¶7.

[45] *Id.*

[46] Beckwith Decl., ¶3.

written authorization, this same policy would have applied equally to them, as well. The question is whether this policy constitutes an unfair business practice in violation of the UCL. Such a question would be suitable on a class-wide basis for this putative class seeking injunctive relief.

The Court is not persuaded that it would be required to conduct individualized determinations with respect to consent (including examining individual leases to determine if a tenant had a lawful right to have a satellite dish installed) and whether an individual class member's rights were violated by DirecTV. While this argument may be persuasive in assessing whether a given tenant suffered damages (or otherwise is entitled to restitution under the UCL), Plaintiffs here solely seek certification of an injunctive relief class. If unlawful, the Court would be empowered to issue an injunction to prohibit the policy on a going-forward basis.

For these reasons, the Court finds that Plaintiffs have submitted substantial evidence supporting the notion that common questions predominate over individualized assessments.

Typicality

The purported class representative's claim must be "typical" but not necessarily identical to the claims of other class members. It is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all 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 class members. *Wershba v. Apple Computer, Inc., supra,* 91 Cal.App.4th at 228.

"Typicality 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. The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is

not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.

Here, Plaintiffs' claims are typical. Mr. Kefalas, the managing agent for each of the Plaintiffs, has testified about Plaintiffs' experiences with the installations of DirecTV equipment on the properties. Kefalas claims that the Plaintiffs did not authorize the installation of the equipment, and that DirecTV has refused to remove the equipment when asked to do so. The Plaintiffs' experience is similar to those of the other putative class members who have submitted declarations (as set forth above).

DirecTV raises a number of arguments in opposition to typicality. First, Defendant attacks the notion that there is no evidence that the putative class of landlords was subjected to similar unauthorized attachments. Again, however, it is the allegedly unlawful policy, on a going-forward basis, which Plaintiffs seek to enjoin. They were all subjected to the same policy; whether a given landlord suffered damages does not detract from typicality for purposes of the injunctive relief class.

DirecTV also argues that Plaintiffs do not satisfy typicality because they are subject to unique defenses, including that their claim for injunctive relief is moot. Specifically, DirecTV says it has formulated a Restricted Address List, meaning that its satellite dishes no longer will be installed on the properties of those on the list (including Plaintiffs). This, according to DirecTV, renders the Plaintiffs' claim moot and renders their claim atypical.

The argument, however, is not persuasive. As Plaintiffs note in the reply, DirecTV's mootness argument is based on its unilateral placement of Plaintiffs' properties on the "Resident Address List." There was no voluntary settlement with the Plaintiffs (which, if this was the case, would likely be grounds for a finding that Plaintiffs lack typicality). If DirecTV's argument was

followed to its logical conclusion, any time it was sued by a putative class member challenging the authorization policy, it could simply place that person or entity on its "Resident Address List" and avoid litigation of the allegedly unlawful policy. Absent a court order prohibiting an allegedly unlawful policy, a defendant could resume its practice in the future.

For these reasons, the Court determines Plaintiffs have satisfied the typicality requirement.

Adequacy of Representation

"The primary criterion in determining adequacy of representation is whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class." *Simons v. Horowitz* (1984) 151 Cal. App. 3d 834, 846. Additionally, the class representative must "raise claims reasonably expected to be raised by the members of the class." *City of San Jose, supra,* 12 Cal. 3d at 464. The fiduciary duty must be undertaken free of demonstrable conflicts of interest with other class members. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997). The "adequacy of representation" requirement has not been precisely differentiated from the typicality requirement. *Caro v. Procter & Gamble, supra*, 18 Cal. App. 4th at 670. Other cases have stated that "adequacy of representation" depends on whether plaintiff's attorney is qualified to conduct the proposed litigation and plaintiff's interests are not antagonistic to the interests of the class. *McGhee v. Bank of America* (1976) 60 Cal. App. 3d 442, 450.

Here, since typicality has not been "precisely differentiated" from the adequacy requirement, and since Plaintiffs have claims typical of those of the class, they are adequate class representatives. The Court is not persuaded by DirecTV's arguments in opposition that the Plaintiffs' interests are in conflict with those of the putative class members because "the issuance

of Plaintiffs' requested injunction would narrow landlords' choices and impose additional administrative costs and burdens upon them."[47] Again, the injunctive relief class seeks a remedy on a prospective basis. In any event, there is nothing which indicates that there would in fact be administrative costs or burdens to landlords if the injunction were to issue.

Mr. Kefalas, for his part, states that he has reviewed the complaint and written discovery in this action; has assisted in responding to said discovery on behalf of all Plaintiffs; has searched Plaintiffs' files to retrieve documents to produce; has acted as designee to testify on behalf of Plaintiff (and spent a day testifying in that capacity); has spent hours in in-person meetings and conferring by telephone with counsel; and continues to act on behalf of Plaintiffs and the class.[48]

DirecTV does not challenge the qualifications of class counsel. Class counsel Rosenberg notes that her firm, Bramson, Plutzik, Mahler & Birkhaeuser, prosecutes class actions, derivative suits, and other complex litigation nationwide.[49] These cases include consumer protection, business torts, securities, antitrust, and communications, with particular emphasis on class actions, in both state and federal courts. The firm, Ms. Rosenberg represents, has been appointed lead or co-lead counsel or a member of a litigation executive committee dozens of times, and in those capacities has recovered millions of dollars for class members.[50] Ms. Rosenberg attaches as Exhibit 10 a copy of the firm's resume.

Similarly, co-counsel Mark Kindall of Izard, Kindall & Raabe, states that his firm has been appointed, or has acted, as lead counsel or co-led counsel in over 60 cases throughout the

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[47] Opposition at 7:26-27.

[48] Kefalas Decl., ¶3.

[49] Rosenberg Decl., ¶13.

[50] Rosenberg Decl., ¶13.

country.[51] Plainly, class counsel is qualified.

For these reasons, Plaintiffs have demonstrated they are adequate class representatives, and that their counsel is adequate.

Superiority

In deciding whether a class action would be "superior" to individual lawsuits, the Court will usually consider:

1) The interest of each member in controlling his or her own case personally;

2) The difficulties, if any, that are likely to be encountered in managing a class action;

3) The nature and extent of any litigation by individual class members already in progress involving the same controversy; and

4) The desirability of consolidating all claims in a single action before a single court.

California Practice Guide, Civil Procedure Before Trial, ¶14:16 (The Rutter Group 2017) (citing FRCivPro 23(b)(3)); *see also Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 120 and *Newell v. State Farm Gen. Ins. Co.* (2004) 118 Cal.App.4th 1094, 1101.

Further, under California law, a class action is not "superior" where there are numerous and substantial questions affecting each class member's right to recover, following determination of liability to the class as a whole. *City of San Jose v. Superior Ct., supra,* 12 Cal.3d 447, 459.

Here, each member of the class would not have an interest in controlling his or her own case personally, given the fact that the Plaintiffs, by virtue of the instant motion, seek only injunctive relief. Obtaining such individual relief would not justify the costs of individually bringing such an action. There are not significant difficulties which are apparent, and which are likely to be encountered in a class of this nature (given the fact that the Court will be assessing

[51] Kindall Decl., ¶2.

the legality of DirecTV's use of the authorization form). It would be desirable to consolidate all such claims before a single court. As discussed *supra,* individualized issues would not outweigh the common issues, and thus, the case would be manageable, overall – given what appears to be a uniform policy of DirecTV not verifying a landlord's consent when Part 2 of the installation form is selected. There also does not appear to be any similar litigation already in progress involving the same controversy between Plaintiffs and Defendant DirecTV. On balance, it would be desirable to consolidate the injunctive relief claim under the UCL in a single action.

Accordingly, the Court finds that the superiority factor is satisfied.

Conclusion

The Court determines that Plaintiffs have demonstrated, by substantial evidence, that the criteria supporting class certification are satisfied. For these reasons, the motion for certification of the injunctive relief class is granted.

IV.

MOTION FOR PRELIMINARY INJUNCTION

A. General standards on preliminary injunctions

CCP §526 provides the basis for which the Court may issue (or deny issuance of) an injunction. CCP §527(a) authorizes issuance of injunctions before trial "if sufficient grounds exist therefor."

Injunctions will rarely be granted (absent specific statutory authority) where a suit for damages provides a clear remedy. *Thayer Plymouth Center, Inc. v. Chrysler Motors* (1967) 255 Cal.App.2d 300, 307; *Pacific Designs Sciences Corp. v. Sup.Ct. (Maudlin)* (2004) 121 Cal.App.4th 1100, 1110. Conversely, injunctive relief is more likely to be granted where a

damages remedy is precluded by law. *Department of Fish & Game v. Anderson-Cottonwood Irrig. Dist.* (1992) 8 Cal.App.4th 1554, 1564.

Further, CCP §526(a)(2) lists the traditional consideration of "irreparable harm." Irreparable harm is often related to the "inadequate legal remedy" (i.e., the damages remedy is inadequate *because* some immeasurable harm is threatened). But it is also a separate consideration. Courts look for more than a mere dispute. Relief is unlikely unless someone will be badly hurt in a way which cannot be later repaired. California Practice Guide, Civil Procedure Before Trial, ¶9:522 (The Rutter Group 2017) (referencing *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater* (1981) 118 Cal.App.3d 863, 870-871.

Moreover, the threat of irreparable harm must be imminent, as opposed to a mere possibility of harm some time in the future: "An injunction cannot issue in a vacuum based on the proponents' fears about something that may happen in the future. It must be supported by actual evidence that there is a realistic prospect that the party enjoined intends to engage in the prohibited activity." California Practice Guide, Civil Procedure Before Trial, ¶9:522 (The Rutter Group 2017) (referencing *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084).

While the statute makes no reference to the traditional equitable concern of "balancing equities," it is a crucial factor in the judge's determination: i.e., the court must exercise its discretion "in favor of the party most likely to be injured….If denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." *Robbins v. Sup. Ct.* (1985) 38 Cal.3d 199, 205.

While the Court has broad discretion in ruling on an application for preliminary

injunction, such discretion must be exercised in light of the following interrelated factors:

> 1) Are the plaintiffs likely to suffer greater injury from denial of the injunction than defendants are likely to suffer if it is granted? *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 633.
>
> 2) Is there a reasonable probability that plaintiffs will prevail on the merits? *Robbins, supra,* 38 Cal.3d at 206.

The Court's determination must be guided by a "mix" of the potential-merit and interim-harm factors: the greater plaintiff's showing on one, the less must be shown on the other to support an injunction. *Butt v. State of California* (1992) 4 Cal.4th 668, 678; *Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.* (2001) 91 Cla.App.4th 678, 696.

Importantly, the avowed purpose of a preliminary injunction is to preserve the status quo pending a trial on the merits. *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528. See also California Practice Guide, Civil Procedure Before Trial, ¶9:558 (The Rutter Group 2017) (referencing *White v. Davis* (2003) 30 Cal.4th 528, 554; *Costa Mesa City Employees' Ass'n. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 305). It is not an adjudication of the ultimate rights in controversy; it merely represents the trial court's discretionary decision whether the defendant should be restrained from exercising a claimed right pending trial. California Practice Guide, Civil Procedure Before Trial, ¶9:639 (The Rutter Group 2017); *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286. For "affirmative" or "mandatory" injunctions that *alter* the status quo, rather than simply preserve it, many courts hold the party seeking the injunction to the higher standard of showing a "clear" or "substantial" likelihood of success. *Dahl v. HEM Pharmaceuticals Corp.,* 7 F.3d 1399, 1403 (9th Cir.1993); *Daniels Cablevision, Inc. v. San Elijo Ranch, Inc.* (S.D. Cal. 2001) 158 F.Supp.2d 1178, 1180.

The burden is on the plaintiff to show all elements necessary to support issuance of a preliminary injunction. California Practice Guide, Civil Procedure Before Trial, ¶9:632.1 (The

Rutter Group 2017); *O'Connell v. Sup.Ct. (Valenzuela)* (2006) 141 Cal.App.4th 1452, 1481.

B. Discussion

Plaintiffs have moved for a preliminary injunction restraining Defendant DirecTV, LLC or its agents during the pendency of this action from entering into common or restricted areas and/or attaching its equipment thereto, of residential multi-dwelling units in the State of California based solely on the representation of a renter who wishes to subscribe to DirecTV's services that the landlord has authorized the installation or that no permission of the landlord is required for the installation

As noted above, the Court must weigh two interrelated factors in assessing whether to impose an injunction: whether there is a reasonable probability that Plaintiffs will prevail on the merits at trial; and whether plaintiffs are likely to suffer greater injury from denial of the injunction than defendants are likely to suffer if it is granted. The Court must also consider whether Plaintiffs have an adequate remedy at law.

1. Likelihood of success on the merits

The first consideration is whether Plaintiffs have demonstrated a likelihood of success on the merits on the sole remaining claim in the case, violation of the UCL.

a. Standing Issue

At the outset, Defendant DirecTV contends that Plaintiffs do not have standing to sue under the UCL because they are neither consumers nor competitors.

Under Business and Professions Code ("B&P Code") § 17200, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." B&P Code §17203 provides:

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others *only if the claimant meets the standing requirements of Section 17204* and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state. (Emphasis added.)

In turn, B&P Code §17204, which was amended by Proposition 64, allows a private person to bring an action for violation of the UCL when he "*has suffered injury in fact* and has lost money or property *as a result of* such unfair competition." *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1359 (emphasis added).

In *Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394, 1403, the Court applied the following test for an "unfair" UCL claim by a consumer: (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided. *See also Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1376 (citing *Camacho*). Whether a practice is unfair is generally a question of fact which requires consideration and weighing of evidence from both sides. *Klein, supra,* 202 Cal.App.4th at 1376 (citing *Camacho, supra,* at 1403).

Defendants cite *Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115 for the proposition that Plaintiffs do not have standing because they are neither business competitors or consumers. However, *Linear Technology Corp.* was distinguished by the Central District in *In re Yahoo! Litigation* (2008) 251 F.R.D. 459. The district court noted:

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Defendants argue that because the UCL "was enacted to protect consumers and competitors," *O'Brien v. Camisasca Automotive Mfg., Inc.*, 161 Cal.App.4th 388, 73 Cal.Rptr.3d 911, 918 (2008), plaintiffs, which are neither consumers nor defendants' competitors, lack standing under the UCL. Defendants rely on the following language in *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal.App.4th 115, 135, 61 Cal.Rptr.3d 221 (2007): "where a UCL action is based on contracts not involving either the public in general or individual consumers who are parties to the contracts, a corporate plaintiff may not rely on the UCL for the relief it seeks."

The foregoing language in *Linear Tech.*, which was decided after the enactment of Proposition 64, appears not to have recognized the apparent change in the UCL's standing requirement that the Court recognized in its October 30, 2006 Order. The *Linear Tech.* court relied on the discussion in *Rosenbluth Int'l, Inc. v. Super. Ct.*, 101 Cal.App.4th 1073, 124 Cal.Rptr.2d 844 (2002), regarding standing under the UCL pre-Proposition 64. However, even if this is the case, *Linear Tech.* and *Rosenbluth* do not preclude plaintiffs' claims under the UCL.

Read in context, the above-quoted language from *Linear Tech.* does not necessarily prevent *any* corporate plaintiff from proceeding under the UCL in a case arising from a contract that does not involve either the public or individual consumers. The holdings of both *Linear Tech.* and *Rosenbluth* turn less on the fact that the alleged victims in those cases were businesses, and more on the fact that these entities were sophisticated and individually capable of seeking relief for their injuries. The alleged victims in *Linear Tech.* were Silicon Valley corporations—as distinct from "powerless, unwary consumers"—each of which "presumably [had] the resources to seek damages or other relief should it choose to do so." *Linear Tech.*, 152 Cal.App.4th at 135, 61 Cal.Rptr.3d 221 (quoting *Rosenbluth*, 101 Cal.App.4th at 1078, 124 Cal.Rptr.2d 844) (ellipses omitted). The potential UCL plaintiffs in *Rosenbluth* were "sophisticated corporations, most in the Fortune 1000 ..." *Rosenbluth*, 101 Cal.App.4th at 1078, 124 Cal.Rptr.2d 844.

See In re Yahoo! Litigation (C.D. Cal. 2008) 251 F.R.D. 459, 474–475 (emphasis in original).

Thus, under *In re Yahoo!*, the focus is on the sophistication of the plaintiffs, rather than whether the plaintiffs were businesses or not. Here, as in *In re Yahoo!*, the Court cannot make a finding that the proposed class is "so uniformly sophisticated and capable of seeking relief against defendants." *In re: Yahoo!* at 475. Accordingly, Plaintiffs would have standing to prosecute the UCL claim.

(2) Mootness of individual claims

DirecTV also argues that Plaintiffs cannot demonstrate a likelihood of success because their individual claims are moot. DirecTV raises the mootness issue in opposing the class

certification motion, arguing Plaintiffs' claims are atypical. As discussed *supra*, Defendants have not shown the claims are moot.

(3) Substantive discussion of likelihood of success

Separately, the Court must assess whether Plaintiffs have demonstrated a likelihood of success on the merits of their UCL claim. The claim is premised on the assertion that DirecTV's failure to seek or obtain permission from landlords before installing its equipment in common or restricted areas of MDUs is an unfair business practice under the UCL.

Plaintiffs' theory of the case is that DirecTV does not seek such permission in advance of installation on the putative class members' property. Plaintiffs have referenced the three tests determining whether a business practice is "unfair" under the UCL – the "Traditional Test," the "FTC Act Test," and the "Tethering Test."

The "traditional test" deems a business practice "unfair" where it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *West v. JPMorgan Chase Bank, N.A.*, 214 Cal.App.4th 780, 806 (2013). The determination of whether a practice is unfair under the statute "necessarily involves an examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *Motors, Inc., supra*, 102 Cal.App.3d at 740; *accord Progressive West Ins. Co. v. Superior Court*, 135 Cal.App.4th 263, 286 (2005).

As noted above, in *Camacho v. Automobile Club of Southern California, supra,* 142 Cal. App. 4th 1394, the Court held that in determining whether or not a practice is "unfair" in a consumer context, courts should apply the test employed in assessing alleged violations of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a), under which a business practice is deemed unfair if it (1) causes substantial harm (2) that is not outweighed by countervailing

benefits to consumers or competition, and (3) consumers could not reasonably have avoided the harm.

Finally, in *Cel-Tech Communications v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 186 (1999), the Supreme Court held that in cases involving anticompetitive conduct by a competitor, conduct is "unfair" if it "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." As Plaintiffs note, some lower courts have extrapolated that test beyond claims between direct competitors, holding that a business practice is "unfair" where the public policy which is a predicate to the action is "tethered" to specific constitutional, statutory or regulatory provisions" that are or are threatened to be violated either in letter or spirit. E.g., *Scripps Clinic v. Superior Court*, 108 Cal.App.4th 917, 940 (2003).

With these standards in mind, as Plaintiffs note, "the landowner's right to exclude [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 (citing *Kaiser Aetna v. United States* (1979) 444 U.S. 164, 176). *Loretto* invalidated a New York statute that provided a landlord must permit a cable television company to install its cable facilities upon his property and may not demand payment from the company in excess of an amount determined by a state commission to be reasonable. The Court held that the New York statute operated as a taking of a portion of the plaintiff's property for which she was entitled to just compensation under the Fifth Amendment (as made applicable to the States by the Fourteenth Amendment). The Court noted that the installation "of plates, boxes, wires, bolts, and screws to the building" or of wires and outlets in particular units constitutes a physical invasion of the property. *Loretto*

at 438; *see also Gulf Power Co. v. United States* (N.D. Fla. 1998) 998 F.Supp. 1386, 1391-92 (holding that *Loretto* established a *per se* takings rule, in that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve); affirmed at 187 F.3d 1324 (11th Cir. 1999).

Other courts have applied the *Loretto* rule to non-governmental actors. For instance, the U.S. District Court in *Daniels Cablevision, Inc. v. San Elijo Ranch, Inc.* (S.D. Cal. 2001) 158 F.Supp.2d 1178 denied a cable company's motion for preliminary injunction in its suit against a real estate developer, claiming entitlement to lay cable in a utility trench without paying the fee demanded by the developer. *See also Century Sw. Cable Television, Inc. v. CIIF Assocs.* (9th Cir. 1994) 33 F.3d 1068, 1071.

The question is whether DirecTV's admitted practice of relying on the word of tenants to obtain a landlord's consent is one which, consistent with the traditional UCL "unfair" test set forth above (which is the test the Court determines is appropriate to apply here), is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. Here, while this process is not immoral, unethical, oppressive, or unscrupulous, it could be substantially injurious to consumers (i.e., the members of the putative class of MDU owners) for DirecTV to rely solely on the word of tenants in installing the satellite dishes and related equipment on the MDU owners' property. While DirecTV argues that a tenant, and not DirecTV, has a preexisting relationship with his or her landlord (and is thus in the best position to obtain any needed consent), and that it is perfectly legal to install equipment with consent (*citing Church of Christ in Hollywood v. Sup. Ct.* (2002) 99 Cal.App.4th 1244, 1252), the alleged practice may actually result in an end-run around the consent requirement.

Indeed, the Declarations of the putative class members submitted in support of the motion

for class certification (the declarations are also submitted in support of the motion for preliminary injunction) all state that the dishes were installed without their prior knowledge or consent.[52] Without verifying that the MDU owner has provided consent, there is a significant risk that the practice could be injurious to consumers.

In sum, Plaintiffs have demonstrated a reasonable likelihood of success on the merits to support issuance of the preliminary injunction.

2. Whether Plaintiffs are likely to suffer greater injury from denial of the injunction than defendants are likely to suffer if it is granted

The next consideration is whether Plaintiffs are likely to suffer greater injury from denial of the injunction than defendants are likely to suffer if it is granted. It is here where issuance of the injunction would be problematic.

If the Court were to grant the motion for *preliminary* injunction, without litigating the ultimate issue in the case, it would be changing DirecTV's long-standing nationwide policy.[53] DirecTV represents that if its current practice is blocked pending trial, untold numbers of installations will necessarily be delayed or cancelled. This assuredly would result in significant injury to DirecTV. Further, as DirecTV states, changing the policy would require DirecTV to rewrite all training materials and consumer forms, and retraining all employees and contractors engaged in this type of work.[54] On the other hand, if the injunction is denied pending trial, it would preserve the current status quo and would keep DirecTV's policy in place. While Plaintiffs may in fact suffer some injury from denial of the preliminary injunction, this is outweighed by the injury DirecTV would suffer if the motion is granted at the present time, in

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[52] See, e.g., Nichols Decl., ¶3; Sanger Decl., ¶3; Wayte Del., ¶4; Risconsin Decl., ¶3; Landsberger Decl., ¶7.

[53] Edelstein Decl., Exh. A (Dimech Tr. At 50:9-55:18.

[54] Opposition at 5:25-27.

advance of trial.

Related to the "balance of harms" inquiry is whether Plaintiffs have shown DirecTV's conduct threatens irreparable injury. According to Plaintiffs, unless enjoined, DirecTV's installation practices will lead to continued abuse of the property rights of Plaintiffs and other landlords – more unconsented entry, more unauthorized permanent installations of dishes and other hardware, and more damage to roofs and walls.[55] However, Plaintiffs have not demonstrated at this time that, pending an actual trial on the UCL claim, the harm would be "irreparable."

Plaintiffs argue that the harm is irreparable because DirecTV, as a matter of policy, refuses to remove these dishes.[56] Plaintiffs further contend that suing for damages would be infeasible, as "they are too difficult to assess and uneconomical to obtain."[57] At the present time, however, without having tried these issues, the Court is not in a position to determine that, in fact, Plaintiffs would suffer irreparable harm if the injunction were denied.

For these reasons, Defendant has shown that it is likely to suffer greater injury from granting the injunction than Plaintiffs would suffer from denial of the injunction

3. Adequacy of Remedy at Law

Another consideration for the Court in assessing whether to issue the preliminary injunction is whether Plaintiffs have an adequate remedy at law. Injunctions will rarely be granted (absent specific statutory authority) where a suit for damages provides a clear remedy. *Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp.* (1967) 255 Cal.App.2d 300, 307; *Pacific*

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[55] Motion at 14:26-29.

[56] Reply at 9:26-27.

[57] Reply at 10:1-2.

Decision Sciences Corp. v. Sup. Ct. (Maudlin) (2004) 121 Cal.App.4th 1100, 1110.

Here, it is unclear whether the Plaintiffs' remedy at law is adequate. DirecTV denies causing any damage when it installs a satellite dish, but even so, DirecTV claims that any damages could be remedied by removal of the dish and/or repairs compensable in money damages (and putative class members have testified to the same).[58] At this time, and without having conducted a trial on the matter, Plaintiffs have not made the requisite showing that their remedy at law is inadequate.

V.

RULING AND ORDER

For the foregoing reasons, the motion for certification of the injunctive relief class is granted. The motion for preliminary injunction is denied. The Court sets a further status conference in this matter for March 21, 2018 at 2 p.m. The parties shall submit a joint statement by March 15, 2018, outlining their proposals for proceeding with the subsequent phases of the litigation.

Dated: January 25, 2018

KENNETH R. FREEMAN

Kenneth Freeman
Judge of the Superior Court

[58] Edelstein Decl., Exhs. B-E, Risconsin Tr. At 26:3-27:19; Landsberger Tr. At 37:21-38:15; Sanger Tr. At 12:20-13:14, 21:2-15; Nichols Tr. At 14:10-15:9, 20:5-22:11, 34:22-36:16, 41:25-42:11.