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Superior Court of California
County of Los Angeles

SEP 1 1 2015

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

SUPERIOR COURT OF CALIFORNIA

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, The DIRECTV Group, Inc., a Delaware corporation, DIRECTV HOLDINGS, LLC, a California Limited Liability Company, and DOES 1 through 100,

Defendants.

LASC Case No: BC540043

COURT'S RULING AND ORDER RE: DEFENDANTS' MOTION TO STRIKE CLASS ALLEGATIONS

Hearing Date: August 13, 2015

I.

BACKGROUND

Plaintiffs, a group of owners of Multi-Dwelling Units ("MDUs"), brought this putative class action against Defendant DirecTV, Inc. and its related entities (collectively, "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 the 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

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[1] Complaint, ¶2.

[2] *Id.*

[3] Complaint, ¶9.

[4] *Id.*

[5] Complaint, ¶11.

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 "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

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[6] Complaint, ¶11.

[7] Complaint, ¶11.

[8] Complaint, ¶12.

[9] Complaint, ¶12.

[10] Complaint, ¶14.

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 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] Plaintiffs also claim that it is reasonable for companies to obtain actual permission from Landlords prior to permanently installing their equipment on a Landlord's MDU, and that 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, Plaintiffs allege claims for violation of Business & Professions Code §§17200 et seq.; negligence (seeking equitable relief); and negligence (seeking damages). Plaintiffs bring the complaint on behalf of the following putative classes:

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[11] *Id.*

[12] Complaint, ¶15.

[13] Complaint, ¶17.

[14] *Id.*

[15] *Id.*

1) All persons or entities ("Landlords") that own or rent or lease residential multiple dwelling units ("MDUs") in the State of California.[16]

2) A subclass of all landlords statewide upon whose MDU properties DirecTV has installed equipment in common or restricted areas.[17]

Defendant DirecTV has moved to strike the class allegations. For the reasons discussed *infra,* the motion to strike is granted in part and denied in part.

II.

REQUEST FOR JUDICIAL NOTICE

Defendants request the Court take judicial notice of the complaint in *Eldee-K Rental Properties, Inc. v. DIRECTV, Inc.,* C 11-02416 CRB, attached as Exhibit B to the Paris Declaration. The request is granted, pursuant to Evidence Code §452(d), as this is a record of the federal court and is subject to judicial notice under this section. The Court does not judicially notice the truth of the allegations within the *Eldee-K Rental Properties* complaint.

III.

DISCUSSION

A. Legal standards on motions to strike class allegations

Class allegations may be challenged by demurrer and/or motion to strike. *Linder v. Thrifty Oil* (2000) 23 Cal.4th 429, 440. The test on demurrer was restated in *Silva v. Block* (1996) 49 Cal.App.4th 345, 349-350:

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[16] FAC, ¶24.

[17] FAC, ¶25.

> [T]rial courts properly and "routinely decide[] the issue of class certification on demurrer, sustaining demurrers without leave to amend where it is clear that there is no reasonable possibility that the plaintiffs could establish a community of interest among the potential class members and that individual issues predominate over common questions of law and fact. [Citations.]" [Citation.] [¶] When a demurrer is sustained without leave to amend, the burden of proving a reasonable possibility that the defect can be cured by amendment is on the plaintiff. [Citation.] [¶] Where the issue resolved on demurrer is whether an action should proceed as a class action, the trial court must determine whether "there is a 'reasonable possibility' plaintiffs can plead a prima facie community of interest among class members . . . ." [Citation.] " 'The ultimate question in every case of this type is whether, given an ascertainable class, the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] If the ability of each member of the class to recover ***clearly*** depends on a separate set of facts applicable only to him, then all of the policy considerations which justify class actions equally compel the dismissal of such inappropriate actions at the pleading stage." [Citation.]

However, "[t]he California Supreme Court has mandated that a candidate complaint for class action consideration, if at all possible, be allowed to survive the pleading stages of litigation…[B]ecause the sustaining of demurrers without leave to amend represents the earliest possible determination of the propriety of class action litigation, it should be looked upon with disfavor. This is not to say that sustaining demurrers to class action complaints without leave to amend is always improper….All that is normally required for a complaint to survive demurrers to the propriety of class litigation is that the complaint allege facts that tend to show: (1) an ascertainable class of plaintiffs, and (2) questions of law and fact which are common to the class." *Beckstead v. Superior Court of Los Angeles County* (1971) 21 Cal.App.3d 780, 783-784.

"[I]t is only in *mass tort actions* (or other actions equally unsuited to class action treatment) that class suitability can and should be determined at the pleading stage. In other cases, particularly those involving wage and hour claims, class suitability should not be determined by demurrer." *Prince v. CLS Transportation* (2004) 118 Cal.App.4th 1320, 1325 (emphasis added).

1 **B. Discussion**

2 With these standards in mind, Defendant DirecTV seeks an order striking the class
3 allegations set forth in the First Amended Complaint.

4 **1. Overbreadth and Ascertainability**

5 DirecTV's first challenge to the class definitions is based on overbreadth. Namely,
6 DirecTV contends that the classes are overbroad and not ascertainable as defined.

7 "Ascertainability requires a class definition that is 'precise, objective and *presently*
8 ascertainable.' Otherwise, it is not possible to give adequate notice to class members or to
9 determine after the litigation has concluded who is barred from relitigating." California Practice
10 Guide, Civil Procedure Before Trial, ¶14:23 (The Rutter Group 2015) (citing *Global Minerals &*
11 *Metals Corp. v. Sup.Ct. (National Metals, Inc.)* (2003) 113 Cal.App.4th 836, 858 (emphasis
12 added)). The class should be defined in terms of objective characteristics and common
13 transactional facts that will enable identification of the class members when such identification
14 becomes necessary. *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915.

15 The goal is to use terminology that will convey sufficient meaning "to enable persons
16 hearing it to determine whether they are members of the class plaintiffs wish to represent."
17 *Global Minerals & Metals Corp. v. Sup.Ct.* (*National Metals, Inc.*), *supra,* 113 Cal.App.4th at
18 858. Importantly, a class may be ascertainable *even if the definition includes ultimate facts or*
19 *conclusions of law*. *Hicks, supra,* 89 Cal.App.4th at 915-916. "Class members are
20 'ascertainable' where they may be readily identified without unreasonable expense or time by
21 reference to official records." *Thompson v. Automobile Club of Southern California* (2013) 217
22 Cal.App.4th 719, 728 (internal citations omitted); *see also Bridgeford v. PacificHealth Corp.*
23 (2012) 202 Cal.App.4th 1034, 1041.

24 "Class certification is properly denied for lack of ascertainability when the proposed
25 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." *Miller v. Bank of Am., N.A.* (2013) 213 Cal.App.4th 1, 7.

As noted *supra,* the two proposed classes are defined as follows:

> 1) All persons or entities ("Landlords") that own or rent or lease residential multiple dwelling units ("MDUs") in the State of California.[18]
>
> 2) A subclass of all landlords statewide upon whose MDU properties DirecTV has installed equipment in common or restricted areas.[19]

Here, as defined, subclass 1 is overinclusive as to all three causes of action. Class definition "1" above includes landlords who have no dealings with DirecTV. This class definition encompasses landlords whose MDUs are completely free of DirecTV equipment and on whose property DirecTV never set foot. In other words, persons who never suffered damages or loss of money or property as a result of DirecTV's alleged actions are included in this putative class definition. These persons could not be included in the proposed putative class. *Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1661-1662.

Subclass 2 is also overinclusive with respect to the two negligence claims. This subclass includes those landlords who *consented* to installation of the DirecTV equipment in common or restricted areas. Those who consented would not be injured.

However, at the pleading stage, the Court determines that subclass 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

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[18] FAC, ¶24.

[19] FAC, ¶25.

1 injury in fact pursuant to the UCL's standing requirements, as articulated in *In re Tobacco II*
2 *Cases* (2009) 46 Cal.4th 98 and its progeny (holding that only the class representatives in a UCL
3 claim must meet the standing requirements of injury and causation). In the Court's view,
4 subclass 2 is ascertainable, insofar as it seeks relief pursuant to the UCL.

5 **2. Commonality**

6 In deciding whether the common questions "predominate," the courts must identify the
7 common and individual issues; consider the manageability of those issues; and, taking into
8 account the available management tools, weigh the common issues against the individual issues
9 to determine which of them predominate. California Practice Guide, Civil Procedure Before
10 Trial, ¶14:16 (The Rutter Group 2015) (referencing *Dunbar v. Albertson's, Inc.* (2006) 141
11 Cal.App.4th 1422, 1432-1433).

12 Additionally, a class action is not inappropriate simply because each member of the class
13 may at some point be required to make an individual showing as to his or her eligibility for
14 recovery or as to the amount of his or her damages. *Vasquez v. Superior Court* (1971) 4 Cal.3d
15 800, 815-816. However, a class action "will not be permitted...where there are diverse factual
16 issues to be resolved, even though there may be many common questions of law." *Brown v.*
17 *Regents of Univ. of Calif.* (1984) 151 Cal. App. 3d 982, 988-89. "[E]ach member must not be
18 required to individually litigate numerous and substantial questions to determine his right to
19 recover following the class judgment." *City of San Jose, supra,* at 460. Classes may be certified
20 on the ground of "predominant common questions" of law or fact where each class member's
21 claims are based on the same allegedly unlawful employer practice with respect to wages paid to
22 each class member. California Practice Guide, Employment Litigation, ¶19:795.1 (The Rutter
23 Group 2014) (citing *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 746).

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

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> 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. [Citations.] Thus, the existence of ***some*** common issues of law and fact ***does not dispose of the class certification issue***. [Citations.] 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.

With these standards in mind, the classes, as defined, would be impractical from a commonality standpoint, insofar as they seek relief under the two negligence causes of action. Again, the gravamen of the claims is that the landlords did not provide their consent to DirecTV to install the satellite dish equipment on their MDU building. However, there can be no common evidence that consent by the landlords was not obtained. With respect to the negligence claims, the Court would be required to ultimately conduct individualized assessments of the consent issue, and the Court would have to examine whether, in fact, such landlords did not provide consent (and whether those landlords were actually damaged). The First Amended Complaint alleges that DirecTV's practice is an illegal trespass because it installs satellite dishes "without permission."[20] Such determinations would render the class mechanism impracticable as to the negligence claims. In other words, the classes which seek relief under the negligence causes of action are essentially "mass tort claims" unsuitable for class treatment. *See Prince v. CLS Transportation, supra,* 118 Cal.App.4th at 1325. In sum, *whether* a given class member suffered damages under the negligence claim would require the Court to conduct highly individualized liability determinations.

Moreover, the Court is not persuaded by Plaintiffs' reliance on *Vestal v. Young* (1905) 147 Cal.715, *Odd Fellows' Cemetery Ass'n. v. City and County of San Francisco* (1903) 140 Cal.226, and *Uptown Enterprises v. Strand* (1961) 195 Cal.App.2d 45 for the proposition that

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[20] FAC, ¶¶39, 41.

injunctions may issue for a negligent act. None of these cases held as much. "'An injunction is a writ or order requiring a person to refrain from a particular act.' [Citation to CCP §525.] Thus, 'the general rule is that an injunction may not issue unless the alleged misconduct is ongoing or likely to recur.'[Citation.]" *City of Colton v. Singletary* (2012) 206 Cal. App. 4th 751, 771. Thus, under a "negligence" theory, there can also be no commonality under the operative complaint, insofar as the claim seeks injunctive relief.

As the Northern District of California stated in *Eldee-K Rental Properties, Inc. v. DIRECTV, Inc.,* C 11-02416 CRB, 2011 WL 5600507 (N.D. Cal. Nov. 17, 2011) at *4, "the trespass question ***precedes any liability*** relating to DIRECTV's business practice...the principle determinant of liability here (was a particular entry onto property authorized) requires *individualized inquiry* into the circumstances of the alleged trespass[.]" (Emphasis added.). Here again, in order to impose liability on DirecTV by the MUD Landlords on the negligence claims, the Court would have to assess whether DirecTV "trespassed" on their property. The validity of the consent forms, in other words, was not uniform.

Again, however, with respect to the UCL claim, the Court is not prepared to find, as a matter of law, that there is no reasonable possibility of Plaintiffs establishing a community of interest. To reiterate, pursuant to *In re Tobacco II,* the Court determines that the allegations of injury in fact incurred by named Plaintiffs are sufficient to preserve the class allegations. There is otherwise nothing which would defeat commonality as to the UCL class at the pleading stage. To the extent that Defendants have allegedly employed a practice or policy of depending on the tenant to provide consent for installation of the equipment, such a policy or practice may present a predominant common issue for which injunctive relief and/or restitution may be available. Such a determination will ultimately be made at the time of class certification upon a developed record.

IV.

RULING AND ORDER

For the foregoing reasons, the motion to strike the class allegations is granted as to subclass 1, with twenty (20) days leave to amend, with respect to all three causes of action. The motion to strike the class allegations, as they relate to subclass 2's negligence claims, is granted, with twenty (20) days leave to amend. The motion to strike the class allegations, as they relate to subclass 2's UCL claim, is denied. If Plaintiffs cannot amend or do not wish to amend and make that intention known, Defendants will have twenty (20) days from that notification to answer the remainder of the complaint.

Dated: September 11, 2015

KENNETH R. FREEMAN

Kenneth Freeman
Judge of the Superior Court