BRUMBAUGH v. APPALOOSA ROAD CSD

21CV45171

CONTINUED HEARING ON DEFENDANT'S DEMURRER TO THIRD AMENDED PETITION

This is an administrative writ of mandate alleging "Brown Act" violations relating to the imposition of a *de minimus* real property parcel tax increase. Before the Court this day is a defense demurrer to the operative Third Amended Petition. Contrary to moving party's insinuation (see Reply Brief 2:27-3:5), this Court has only addressed the legal sufficiency of petitioner's claim one time (see Minute Order dated 07/02/21), and at that time found "a reasonably possibility that Petitioner can state a good cause of action." However, since that time, an interesting wrinkle has come to light necessitating further briefing.

On 05/07/19, 82% of the qualified electorate approved *Appaloosa Road Community Services District Measure B*, which increased the annual parcel tax in the Appaloosa Zone from $75 to $175. The ballot itself identified the following streets as part of the Appaloosa Zone: Appaloosa Road, Chestnut Court, Chestnut Way, Dunn Road, Filly Road, Hunter Road, Paint Road, Shetland Road and Welsh Road. For reasons not entirely clear, the ballot failed to mention Pinto Road or Morgan Road, both of which are in the Appaloosa Zone.

On 05/04/21, 88% of the qualified electorate approved *Appaloosa Road Community Services District Measure D*, which applied the same $100 increase to Pinto Road and Morgan Road – thereby specifically and equally encumbering every parcel in the Appaloosa Zone.

Petitioner herein contends that the Appaloosa Road Community Services District Board of Directors violated due process provisions regarding notice and access when vetting the decision and resolution to put Measure D on the ballot, but the Board's conduct seems harmless if the issue was properly presented to the public. Petitioner must show prejudice from an alleged Brown Act violation. Does petitioner allege anything amiss or untoward regarding the election process itself? Were the voters actively misled by something the Board did? If not, it seems the matter may now be moot. A case becomes moot when a court ruling can have no practical impact or cannot provide the parties with effective relief. (*In re Stephon L.* (2010) 181 Cal.App.4th 1227, 1231; *Corrales v. Bradstreet* (2007) 153 Cal.App.4th 33, 46-47.) Cases or controversies which have been rendered moot are subject to dismissal because courts generally decide only "actual" or justiciable controversies, that is, cases in which effective relief can be granted, and do not render advisory opinions. (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1178–1179. See *Julian Volunteer Fire Co. Assn. v. Julian-Cuyamaca Fire Protection Dist.* (2021) 62 Cal.App.5th 583, 603-604 [Brown Act

violation moot by virtue of public election on same issue]; *TransparentGov Novato v. City of Novato* (2019) 34 Cal.App.5th 140, 149-153 [Brown Act violation moot]; *City of Palo Alto v. Public Employment Relations Bd.* (2016) 65 Cal.App.5th 1271, 1320 [Brown Act violation not moot].)

The parties were invited to file supplemental briefing on the question of mootness. Defendant took the invitation too far, revisiting the argument that plaintiff failed to state a claim. Plaintiff asked this Court to consider new authority, *Silva v. Humbolt County* (2021) 62 Cal.App.5th 928, and a re-envisioned pleading focused entirely on the legality of the tax (as opposed to a Brown Act violation). *Silva* is unavailing, for in that case the issue involved subsequent amendments to a voter-approved measure and post hoc efforts to moot the issue by reversing direction on some, but not all, of the amendments. The ultimate issue still remained in *Silva*, which is why that effort was not moot. As for plaintiff's new theory that collection of an unlawful special tax is not moot because it recurs, while that is a true statement it nonetheless is irrelevant to the question of alleged Brown Act violations. The Brown Act violation – if one occurred – is moot after the passage by way of a public vote. Whether the resulting tax is illegal can certainly be tested in a legal proceeding, but there is no room in the case at bar.

Demurrer SUSTAINED, Without leave to amend, but without prejudice to any possible future lawsuit limited to the question of the constitutionality of the voter-approved tax.

The Clerk shall provide notice of this Ruling to the parties forthwith. Defendant to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity with this ruling, and a proposed Judgment thereon.

VALLES v. TRICORP GROUP, INC.

21CV45611

PLAINTIFF'S APPLICATION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

This is a putative class action, seeking redress for alleged wage/hour violations in the construction industry. The operative pleading is the original Complaint, which contains eleven (11) causes of action and a single proposed class as follows: "all non-exempt employees who have or continue to work for Defendants in California from May 7, 2017 to the present."

Before the Court this day is the initial hearing on plaintiff's application for provisional certification of a class, preliminary approval of class settlement, and approval of a PAGA settlement. The gross settlement amount ("GSA") is $170,000.00, which is intended to cover an unknown number of non-exempt hourly employees' claims of at least one of many wage/hour violations. This is a non-reversionary settlement (meaning nothing goes back to the defendant). The proposed deductions/allocations from the GSA are as follows:

Attorney Fees:	$ 59,500.00 (35%)
Litigation Costs:	$ 10,000.00
Administrator Costs:	$ 6,500.00
Service Enhancement:	$ 7,500.00
LWDA share of PAGA:	$ 15,000.00

Based on the proposed deductions/allocations, there should be an average payout per class member of $480.00.

For the reasons which follow, the motion must be continued briefly.

The PAGA Portion – Clarification Required

On a proposed PAGA settlement, the trial court must review and approve the settlement, making sure it is fair to both the LWDA, as well as the employees subjected to one or more of the alleged Labor Code violations. Courts generally look to whether the settlement is genuine, meaningful, and consistent with the underlying purpose of PAGA, to wit: protecting employees, augmenting the state's enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance. Some of the factors to consider, subject to a sliding scale, include (1) the LWDA's views, or lack thereof, on the settlement; (2) the likelihood of any discretionary reduction

of PAGA penalties under §2699(e)(2); (3) the value of any nonmonetary relief (such as changes in company policies); and (4) whether the same employees entitled to PAGA penalties are already recovering monetary relief as part of a class settlement. (See, *e.g.*, *Williams v. Superior Court* (2017) 3 Cal.5th 531, 548-549; *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382; *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742-744; *Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 865-866; in accord, *Haralson v. U.S. Aviation Services Corp.*, 383 F.Supp.3d 959, 971-974 (N.D. Cal. 2019); *Flores v. Starwood Hotels & Resorts Worldwide, Inc.*, 253 F.Supp.3d 1074, 1075 (C.D. Cal. 2017); *O'Connor v. Uber Techs., Inc.*, 201 F.Supp.3d 1110, 1133 (N.D. Cal. 2016).)

Here, plaintiffs set aside $20,000 for the PAGA claim. This is a deduction for the myriad of alleged violations relating to hourly rates, overtime rates, business expenses, and meal/rest periods for those entitled. However, so long as counsel confirms that the PAGA funds for aggrieved employees will pour over into the NSA for all class members, the deduction is acceptable. In other words, are ALL class members also aggrieved employees?

Provisional Certification of the Class – Clarification Required

After parties to a putative class action settle the dispute, they must present that settlement to the trial court for approval. If the class has not yet been certified, part of the motion will include a request for provisional certification for purposes of settlement only. (See CRC 3.769.) Although the provisional process is less demanding than a traditional motion for class certification, a trial court reviewing an application for preliminary approval of a settlement must still find that the normal class prerequisites have been met. (See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-627 (1997); in accord, Carter v. City of Los Angeles (2014) 224 Cal.App.4th 808, 826.)

The moving party must establish by admissible evidence: (1) the existence of an ascertainable and sufficiently numerous class; (2) a well-defined community of interest; and (3) substantial benefits from certification that render proceeding as a class superior to the alternatives. These elements are typically referred to as ascertainability, numerosity, commonality, typicality, adequacy, and superiority. A class is ascertainable when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible, and that is sufficient to allow a member of the class to identify himself or herself as having a right to recover. In other words, a class is ascertainable if it is relatively easy to see who is in the class, and who has viable claims. A community of interest exists there if predominant common question of law or fact which will impact all class members, if the proposed class representative has similar individual claims to the class, and if the proposed class representative and counsel will adequately represent the class. (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980-986; *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 28-29; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.)

Here, the proposed class of "all non-exempt employees who have or continue to work for Defendants in California from May 7, 2017 to the present" is unclear since it appears that there is only one defendant, and for clarity that employer must be named by both the legal name, and trade name if any. There is also a question regarding the size of the class. Otherwise, the class appears to be is ascertainable, numerous, common and typical after the corrections are made.

The Class Settlement – Clarifications and Revisions Required

At the preliminary approval stage, the proponent of the settlement bears the burden of showing that the settlement is within the reasonable range such that a trial court will likely be able to approve it at a final hearing, taking into consideration these four factors: (1) have putative class members been adequately represented by experienced counsel and a vested representative; (2) was the settlement a result of a serious, informed, non-collusive, arm's length negotiation; (3) whether the relief obtained has any real value to class members when compared to what those claims might yield; and (4) are certain segments of the class entitled to preferential treatment. Because this is not the final approval hearing, the level of scrutiny at this stage is often described as something less than a "finding" of fairness and more of a "feeling" of fairness. See *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1166.

Despite what may appear to be a rather amorphous standard at this juncture, it is in the best interests of all involved to have some real scrutiny. Thus, even at the preliminary hearing stage, courts should still keep the fairness elements in mind, to wit (1) the strength of plaintiffs' case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in settlement when compared to the potential recovery; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) any evidence of collusion, fraud or overreaching by the negotiating parties; and (8) due regard to what is otherwise a private consensual agreement. See *Jones v. Farmers Insurance Exchange* (2013) 221 Cal.App.4th 986, 998; *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 581; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409.

The GSA appears to be in the reasonable range provided that counsel inform this Court clearly the number of class members. However, there are additional factors this Court would like clarification on before preliminary approval can be granted:

1. What is the class size? It is not feasible to evaluate the reasonableness without that information, and if it is in the papers, it needs to be highlighted. (See *Hendershot v. Ready to Roll Transp., Inc.* (2014) 228 Cal.App.4th 1213, 1223.)
2. Does plaintiff anticipate a PAGA sub-class, or are all class members also treated as aggrieved employees?
3. Although the proposed attorney fee allocation is within the customary range, this will still expect to see at the final approval hearing detailed records for a proper lodestar cross-check. Counsel is approved to proceed as class counsel.

4. This Court did not easily discern from the papers the out-of-pocket litigation expenses counsel intends to seek reimbursement for. While it seems counsel will be requesting reimbursement of up to $15,000.00, detailed invoices and records permitting an adequate analysis akin to a CCP §1033.5 review will be required at the final hearing.
5. The proposed administrator fee allocation appears to be reasonable. The appointment hereof is approved.
6. The proposed representative enhancement is on the high side (at 5% of the GSA), so plaintiff will be required to support that request with a detailed declaration at the final approval hearing. He is approved to proceed as the class representative.
7. Paras 14.c.i and 14.c.ix. It is not acceptable for the claims administrator to have "final and non-appealable" decision-making authority over workweek disputes. Any dispute which cannot be resolved between counsel, class member and claims administrator must be submitted to this Court for resolution. This includes both the basic calculation, as well as the workweek data relied upon by the claims administrator.
8. Para 14.e. It is acceptable for the parties to condition the right to recission upon the number of opt-outs, but since this Court treats undeliverables akin to opt-outs for purposes of individualized allocations, this issue should be considered.
9. Para 18.b. In the case of actual undeliverables after skip tracing efforts – meaning an affirmative representation that the putative class member did not get notice – those class members are not part of the settlement class. (See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985); *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 826. Their share shall pour into the NSA for allocation amongst the notified class members.)
10. Para 20. Rather than send uncashed checks to the State Controller for safekeeping, the parties prefer to treat uncashed checks as reverting to Koinonia Family Services and Capital Pro Bono, Inc. as co-equal *cy pres* recipients. The use of a cy pres is ordinarily reserved for those instances when there are more funds remaining than class members, and the parties do not want a defensive reverter. (*State of Calif. v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472; *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 716.) The use proposed here effectuates a forfeiture against the class member who has been put on notice of the claim, declined to opt-out, and yet is delayed in depositing a settlement check. That is not consistent with the purpose behind the settlement. (See CCP §384(b).)
11. Paras 21 and 22. This Court prefers the use of opt-out and objection forms to promote continuity, and for ease of resolution. The class administrator and counsel must report to this Court all opt-outs and objections, regardless of any perceived irregularity therein. Disputes about the effectiveness thereof shall be resolved by this Court, erring on the side of the class member.
12. Claim Form. The process employed is confusing. The requirement that class members complete and submit a "required claim form" in order to be eligible for

any recovery is akin to an opt-in, which is not permissible. (*Los Angeles Gay & Lesbian Ctr. v. Superior Court* (2011) 194 Cal.App.4th 288, 304-305.) The class members received notice, and the claims administrator advises how much.

13. With all the changes in the settlement agreement carried over into the claim notice, this Court's only concern is whether notice must be provided in any language other than English. Parties to address.

Hearing continued to February 25, 2022 at 9:00 a.m. in Department 2. All filings responsive hereto must be filed and served at least 10 calendar days prior to the next hearing date.

The Clerk shall provide notice of this Ruling to the parties forthwith. No further formal order is required.