

PERIOR COURT OF CALIFORNI
COUNTY OF SAN DIEGO
CENTRAL
MINUTE ORDER

Date: 06/25/2009

Time: 09:30:00 AM

Dept: C-75

Judicial Officer Presiding: Judge Richard E. L. Strauss
Clerk: Tipin Johnson

Bailiff/Court Attendant: Paul Darvin

ERM:

Reporter: James Partridge

Case Init. Date: 10/11/2008

Case No: 37-2008-00093086-CU-NP-CTL Case Title: In Re: 2007 Wildfire Class Litigation

Case Category: Civil - Unlimited

Case Type: Non-PI/PD/WD tort - Other

Event Type: Motion Hearing (Civil)

Causal Document & Date Filed:

Appearances:

For appearances, please see sign in sheet, attached hereto and incorporated herein.

The Court's tentative ruling is published but not read on the record as follows:

Plaintiffs' Motion for Class Certification (Evacuee Class) is denied.

The standards for class certification under CCP § 382 are well-established. There must be an ascertainable class and a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. (*Linder v. Thrifty Oil* (2000) 23 Cal.4th 429, 435.) For a class to be ascertainable there must be an objective and feasible way of identifying class members. The commonality requirement depends on three factors: "(1) predominant common questions of law or fact; (2) class representatives with claims typical of the class; and (3) class representatives who can adequately represent the class." (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104. Where class certification is sought on the grounds that common questions predominate, plaintiff must also establish that class treatment is superior to alternative methods of adjudication. (*Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 654.) Plaintiffs' burden on moving for class certification "is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues predominate." (*Lockheed Martin Corp.* at 1108.)

The amended class definition is as follows:

All individuals who resided within an advisory or mandatory evacuation zone of the Witch, Guejito and/or Rice Canyon Fires in San Diego County, California, who evacuated at any time between October 21, 2007 and November 5, 2007, and who sustained damages occasioned by such evacuation. Excluded from the Class are (a) all individuals who sustained more than \$7,500.00 (Seven Thousand Five Hundred Dollars) in damages; (b) all individuals who sustained evacuation-related damages other than for loss of use of their residence, additional living expenses, and/or document lost wages; (c) all individuals who sustained any form of physical and/or emotional damage; (d) employees, representatives, officers, or directors of Defendants; (e) Plaintiffs' and Defendants' counsel and their

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families; (f) all current members of the California judiciary, court employees and their families; (g) all federal, state and local governments or municipalities, including subdivisions thereof; (h) all individuals who, prior to the Certification of this proposed class, filed a non-class action civil lawsuit seeking damages from any Defendant listed in the various master complaints on file in this court, which relate to any or all of the Witch, Guejito and/or Rice Canyon Fires; and (i) all individuals who timely "opt-out" of this class using the correct protocol for "opting-out" that will be formally established by this court.

Ascertainable

The amended class definition limits the class to persons who resided in an evacuation zone and were actually evacuated. While the change in definition makes the class more ascertainable than the original definition, it does not remedy all the problems. Plaintiffs assert it will be easy for a putative class member to determine if they are a class member by determining whether they live in an evacuation zone. Plaintiffs contend the San Diego County Emergency Services, 2007 San Diego County Fire Storms After-Action Report ("Action Report") identifies each advisory and mandatory evacuation zone and the fire with which it is connected. However, a review of the Action Report reveals not every evacuation order was associated with a single specific fire. For example, Sunday, October 21, 2007 at 2210, there is a mandatory evacuation of Ramona but does not identify the fire with which the evacuation is associated. This conclusion is also supported by Cox's expert. (See, e.g. Cova Dec. ¶¶14-18.) Plaintiffs also suggest that by looking at the "Approximate Evacuation Zone Maps", putative class members can determine if they are class members. (McGuire Reply Dec., Ex. A.) However, even utilizing these tools, the amended class definition still renders the class unascertainable. These maps are not specific and are only approximate and do not set definitive perimeters by which a putative class member could determine membership. Therefore, there is not an ascertainable class.

Common Questions of Law or Fact Predominate

Common questions of law and fact do not predominate. Similar to the arguments discussed above, there is no way to determine which class member was evacuated because of a specific fire. In addition, the issue of damage, as an element of the cause of action, is not presumed and must be adjudicated on a member by member basis. This lack of commonality prevents class certification. Thus, the amended definition is not appropriate for class certification.

It unclear whether Plaintiffs are abandoning their real property claim of nuisance. Regardless, Plaintiffs are still asserting a cause of action for trespass. (Reply 11:13.) To the extent Plaintiffs continue to pursue nuisance or trespass claims, these claims are not amenable to class treatment. In *San Jose v. Superior Court* (1974) 12 Cal.3d 447, the Supreme Court denied certification of class of plaintiffs seeking diminution in property value due to aircraft noise, dust, vapor and vibration. The Court stated "a class action cannot be maintained where each member's right to recover depends on facts peculiar to his case.... The rule exists because the community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the 'class judgment' determining issues common to the purported class. [Citation.]" (*Id.* at 459.) Class treatment was found to be improper given the individualized inquiries arising from the real properties tort claims. (*Id.* at 461; See also, *Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal.App.4th 29, 41-42.) Similarly, in this case, the issue of establishing the actual elements of nuisance and trespass would be an individualized inquiry.

In the Sur-Reply, Plaintiffs provide second amended definition. This definition suffers from the same problems as Plaintiffs original proposed definitions. By not limiting the damages to living expenses, the scope of damages defeats commonality by including extra cell phone minutes, diapers, extra meals, meals bought for others, air filters for cars, car rentals, car washes and dog food. (See, e.g. SDG&E's Oppo., P11-13.) When the determination of each class members' damage is increasingly diverse, it defies common questions of law and fact. (*Altman v. Manhattan Savings Bank* (1978) 83 Cal.App.3d 761, 766; *Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 990.) This is going to be an individualized inquiry, especially as to whether those damages were actually caused by Defendants.

Typicality and Adequate Representation

Based upon the above discussion, no class representative will have a typical claim because it is unclear what constitutes a typical claim. Further, all of the class representatives are claiming damages beyond the scope of the amended definition of "other than for loss of use of their residence, additional living expenses, and/or documented lost wages". Leasum claims new air filters and pet food. (Leasum Depo:

38:10-13, 77:25-78:9.) Cortez claims damages from added cell phone minutes. (Cortez Depo: 75:19-20.) Hays claims she sustained damage from overdraft fees. (Ex. Q, Interrogatories Nos. 44, 45.) In addition, Leasum is claiming emotional distress damages which would exclude her from the class. (Pltfs. Ex. A-4, Leasum FAC 8:19-20.) In the Sur-reply, Plaintiffs contend Leasum's claims would not rise to the level of emotional distress, but that is irrelevant. Leasum is still claiming emotional distress damages.

Superiority/Manageability

Class action is not a superior or more manageable method of litigation. Plaintiffs propose using a statistical analysis via telephone survey to determine the class and damages. Plaintiffs' expert, Dr. Gibson, relies on statistical methodology in support of his conclusion the class is manageable. However, Dr. Gibson's opinions rely on Plaintiffs' original class definitions which had a pool of persons who resided in the evacuation zone. The problem with this basis is the population of putative class members in the evacuation zone is not known. (Pollner Dec. ¶14.) This problem is exacerbated with the amended definition which limits the pool to persons in the evacuation zones who were evacuated and had additional living expenses and/or lost wages. In addition, there are a number of persons excluded from the pool. Dr. Gibson does not explain how this pool will be determined other than by conclusorily stating he would use stratified random sampling. (Gibson Dec. ¶17.)

Furthermore, with regard to the damage analysis, Plaintiffs' experts are relying on speculative, unsubstantiated and unsworn information as the basis for a judgment against Defendants. Plaintiffs propose determining the amount of damage with this information and then requiring proof of injury after judgment is entered is unfair. The Second Circuit discussed similar issues in *McLaughlin v. Am. Tobacco Co.* (2008) 522 F.3d 214. The court found that using statistical analysis to estimate damages and then requiring proof of damage would result in an exorbitantly high damage award and violate defendants' due process rights. (*Id.* at 232-233.) While the opinion is not binding, the reasoning is persuasive and applicable the current motion. Further, Plaintiffs have provided no authority this type of information can serve as the basis for a damage award against Defendants.

In addition, the evacuee plaintiffs have viable alternatives for recovery other than filing a claim in small claims court. Evacuee Plaintiffs could join individual plaintiffs in the current litigation. (See, e.g. *Emervy v. Pacific Employers Ins. Co.* (1937) 8 Cal.2d 663.)

Plaintiffs suggest the certification should be granted on the discrete issue of determining whether Defendants caused the fires. Limiting class certification to the issue of fire origin does not make class litigation a more viable option. That is the same question being asked by each Plaintiff in each of their respective cases. Further, for the reasons set forth in the discussion on the motion for class certification of a liability only class, this is not a superior method to adjudicate these claims. These Plaintiffs provide no plan or strategy describing how to deal with hundreds of thousands of individual determinations on damages even if the class were certified as to the issue of causation of the fires.

Defendant Cox's Request for Judicial Notice is granted.

Defendants SDG&E and Cox's Motions to Strike the Miller Declaration are denied. Regardless, the court did not rely on Miller's opinions regarding the law.

Defendant SDG&E's evidentiary objections are overruled.

Defendant Cox's evidentiary objection to the Declaration of James Gibson is overruled.

Defendant Cox's evidentiary objections Nos. 2, 7-21 to the Declaration of Geoffrey Miller are sustained for lack of personal knowledge and lack of expert qualifications. The remainder are overruled.

The Court hears oral argument and confirms its tentative ruling.

-tjt-

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CASE TITLE IN RE: WILDFIRE CLASS LITIGATION

ATTORNEYS' NAME - PRINT	ATTORNEYS' SIGNATURE	CLIENTS' NAME
Mickey McGuinn		Hays / Cortez
ER WITT		HF / PE / SIC
CRAIG JOHNSON		Hays / Cortez
Ken Royce		AAA et al
Alex Schack		Letson et al
Don Watson		OWB
John Johnson		Travelers
Jon Schofield		Curtis / Watson
Kenn Simpson		Cox
DAVID BOND		Cox Comp Fire and Cox Comm
Michael Wolskin		Cox Comp Fire and Cox Comm Fire
Gary Hulbert		E Williams
Bruce Dale		City of S.D.
Kathryn Megli		Cal Fire / Parks + Rec
Alan Jaky		AAA of So Cal
Harry Olivar		SDGE / Empire
Ryan Landes		SDGE / Empire
Jack Wzrostek		FE
MITCH WAGNER		Melmo
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Jerry Ramsey		Payne
JIM FORTY		Clark
JEFF NEER		PAYNE
CHRISTEN BIRD		SDGE
John Gardner		Cisco
Steve Hill		Network

