CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 39
HEARING DATE: 09/30/21

1. TIME: 9:00 CASE#: MS5031
CASE NAME: PARAQUAT CASES
HEARING ON MOTION TO/FOR TRIAL PREFERENCE FILED BY GEORGE ISAAK
**** TENTATIVE RULING: ****

Plaintiff George Isaak moves for trial preference pursuant to Code of Civil Procedure section 36. Defendants oppose the motion. Section 36 grants a trial within 120 days to those falling within its terms, i.e., who are over 70 years of age, have a substantial interest in the action as a whole, and whose health is "such that preference is necessary to prevent prejudicing the party's interest in the litigation." (Code Civ. Proc., § 36(a), (f).) Isaak attests that he falls within the terms of the statute, being 84 years old and in failing health. On its face, section 36 admits no exceptions. It has been strictly construed in ordinary civil cases to require preference even where a variety of circumstances indicate that trial within 120 days is not appropriate. (*Swaithes v. Superior Court* (1989) 212 Cal.App.3d 1082, 1085-1986.) Numerous case cited by the parties concur with this principle, but they do not arise in the context of coordination proceedings.

Defendants and certain of the other plaintiffs respond that section 36 does not apply rigidly in coordination proceedings governed by Code of Civil Procedure section 404 and Rules of Court Rule 3.500, et seq. Of course, Rules of Court cannot supersede statutes. The statute authorizing coordination proceedings, however, deviates from that ordinary rule: it expressly provides that "[n]otwithstanding any other provision of law, the Judicial Council shall provide by rule the practice and procedure for coordination of civil actions inconvenient courts, including provision for giving notice and presenting evidence." (Code of Civil Procedure section 404.7.) This general form of authorization has been approved by the Supreme Court in other contexts. (*In re Marriage of McKim* (1972) 6 Cal.3d 673, 678.) This does not allow the trial court to simply abandon statutes as it deems fit, but only applies where the Judicial Council has so provided by rule.

The applicable Rule of Court provides that the general rule is that all provisions of law applicable to civil actions generally apply in coordination proceedings, unless they conflict with the adopted rules. (CRC, Rule 3.504(a), (b).) The rules go on to provide that "if the prescribed manner of proceeding cannot, with reasonable diligence, be followed in a particular coordination proceeding, the assigned judge may prescribe any suitable manner of proceeding that appears most consistent with those statutes and rules." Ultimately, the combined effect of the statute and the rules of court is that this Court has authority to do something other than strictly follow Code of Civil Procedure section 36, but only where (1) it cannot be followed with "reasonable diligence"; (2) the court prescribes a "suitable" alternative; and (3) the alternative is "most consistent with" section 36.

Rule 3.541 addresses the court's general responsibilities in a coordination proceeding, providing that the "coordination trial judge must assume an active role in managing all steps of the pretrial, discovery, and trial proceedings to expedite the just determination of the coordinated actions without delay."

Section 36 also requires that the party seeking trial preference have "a substantial interest in the action as a whole." Isaak contends that this refers to his individual action, while defendants contend that this refers to the entire coordination proceeding. Simply viewed based on the potential recovery, Isaak's interest in the whole is not substantial, but his individual interest is substantial to him. Moreover, in another respect each plaintiff does have a substantial interest in the action as a whole, because in a case such as this, any individual plaintiff's likelihood of success is affected to a substantial degree by the results obtained in other matters that are tried or otherwise decided first, e.g., general causation, federal preemption. This Court finds that Isaak has a substantial interest in the action as a whole.

The first of these matters was filed in 2019. A coordination petition was filed, and granted on July 25, 2019. Since that time, a number of actions have been "added on" to this proceeding. There are several hundred potential matters, and plaintiff's counsel advises that they may file preference motions in 35 more cases. In addition, the Court has motions for entry of Case Management Orders pending.

Based on the record before the Court, Isaak's case cannot be tried within 120 days, exercising reasonable diligence. Discovery is nowhere near complete. Expert witnesses have not been identified or deposed, and if the matter were set for trial, the Code of Civil Procedure would require that experts be identified and disclosed wither within ten days after the trial is set, or 70 days before the trial date, whichever is closer to the trial date. (Code of Civil Procedure, § 2034.220.) This case involves a substantial issue concerning the causal relationship between exposure to Paraquat and Parkinson's disease. It includes not only "specific" causation (i.e., whether each plaintiff's disease was caused by exposure to the substance), but "general" causation (i.e., whether exposure to the substance causes Parkinson's disease at all). This will require extensive scientific and expert-based evidence beyond that normally expected in a personal injury case.

In this instance, the most suitable alternative, which is also most consistent with section 36, is to proceed with a case management order, which will provide a method for considering preference motions. Proposed Case Management Order Number 2 would establish a "preference protocol," which would provide for a committee of plaintiff's counsel to vet proposed preference motions before they are filed with the court, without precluding any individual plaintiff from filing such a motion, regardless of the views of the committee. This approach is consistent with the goals of the coordination proceeding, which include addressing the contested issues in a way that leads to efficiency and consistent rulings.

Accordingly, based on all of the above considerations, Isaak's motion for trial preference is denied, without prejudice to refiling in compliance with a Case Management Order adopted by the Court.

2. TIME: 9:00 CASE#: MSC19-02292
CASE NAME: JOHNSON VS WINTER CHEVROLET CO
SPECIAL SET HEARING ON: COMPLIANCE HEARING SET BY DEPT. 39
**** TENTATIVE RULING: ****

The Court has received the (late) compliance statement. The cy pres recipient is approved. Pursuant to Code of Civil Procedure section 384(b), plaintiff's counsel shall prepare an amended judgment identifying the recipient and the amount to be paid to it. Once the amended judgment is entered by the Court, the administrator may release the remaining attorney's fees to plaintiff's counsel.

3. TIME: 9:00 CASE#: MSC19-02418
CASE NAME: TAYLOR VS MENDOCINO FARMS
SPECIAL SET HEARING ON: COMPLIANCE HEARING SET BY DEPT. 39
**** TENTATIVE RULING: ****

Continued by request of counsel to October 21, 2021 at 9:00 a.m.

4. TIME: 9:00 CASE#: MSN21-0980
CASE NAME: DISCOVERY BUILDERS, INC. VS CI
HEARING ON DEMURRER TO CIVIL PETITION of DISCOVERY BUILDERS, INC. FILED BY CITY OF BRENTWOOD, CITY COUNCIL OF THE CITY OF
**** TENTATIVE RULING: ****

Continued by the Court to October 7, 2021 at 9:00 a.m.

5. TIME: 9:01 CASE#: MSC19-00462
CASE NAME: HYNDS VS VICI INCORPORATED
HEARING ON MOTION TO/FOR DISQUALIFY DEFENSE COUNSEL FILED BY CHRISTINE HYNDS
**** TENTATIVE RULING: ****

Plaintiff seeks to disqualify defense counsel from this case, based on communications between defendant's HR department and the employees and putative class members. In the alternative, she seeks a corrective notice to the employees.

First, the parties agree that there is no per se rule barring the corporate attorneys from communicating with the employees. (*Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 578.) That is not the end of the matter, however.

A trial court has both the duty and authority to exercise control over communications between the parties and potential class members to prevent unfairness. (*Barriga v. 99 Cents Only Stores LLC* (2020) 51 Cal.App.5th 299, 330.) Courts are especially sensitive to possible coercion in unilateral communications between a class opponent and its current employees who are putative class members. (*Id*. at 326.) An order limiting communications between parties and potential class members should be based on a clear record and specific findings of abuse that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. (*Barriga, supra*, 51 Cal.App.5th 299, 324, citing *Gulf Oil Co. v. Bernard* (1981) 452 U.S. 89, 99-100.) Where such findings are made, there is no First Amendment violation.

In considering whether pre-certification communications between employers and employees are sufficiently deceptive or coercive to warrant relief, courts consider whether the employer adequately informed the employees about: (1) the details underlying the lawsuit, (2) the nature and purpose of the communications, and (3) the fact that any defense attorneys conducting the communications represent the employer and not the employee. Federal courts in California have also found violations of California Rule of Professional Conduct 3-600 (addressing, inter alia, communications between counsel for a corporation and its employees) relevant in deciding whether improper communications have taken place. (*Barriga, supra*, 51 Cal.App.5th at 330, citing cases.)

The parties dispute whether litigation counsel was behind the communication. Ingrid Garcia, defendant's HR director, disclosed at her deposition that an email had been sent by the HR department to the putative class members, largely at the direction of outside counsel. In her deposition, Ms. Garcia did not clearly state that it was different counsel. (Davis Dec, Ex. C, p. 47:8-15: "Q: and who – and who instructed her to do that? A: It was external counsel. Q: And when you say external counsel, are you talking about the attorneys that are here today? A: So, you know, it might have been a combination of them and another counsel that I mentioned earlier.") Thus, she indicated that it "might have been" a combination of current litigation counsel and other litigation counsel. Litigation counsel for defendant, however, relies on the Roxanne Wilson Declaration, which says at Par. 3 "No one at Arent Fox participated in any of the Zoom presentations that VICI held about the settlements. No one at Arent Fox had authority to access VICI's email system or to send or receive emails from VICI's email inbox dedicated to communications with putative class members regarding settlement." (See also Par. 8: "No one at Arent Fox instructed Ms. Garcia to send the March 18, 2021 communication attached to her deposition transcript as Exhibit 10." Thus, defense counsel insist that they did not send the message, or "instruct" Garcia to send the message, but stop short of asserting that they had no involvement in the message. While plaintiff argues that the use of the HR department to send the message in question was an effort to skirt the rules, it is not necessary to address that issue, because the conduct by itself is not sufficient to warrant disqualification.

Plaintiff also relies on various efforts that were made in the context of negotiating individual settlements. As the parties agree, there is nothing inherently unlawful about doing so. (*Chindarah v. Pick Up Stix* (2009) 171 Cal.App.4th 796.) Again, it is not clear whether litigation

counsel participated. Only 88 employees settled. The record discloses very little about the nature of the communications, thus the Court has no record upon which it could take any action. Nor has plaintiff asked that any of the settlements be invalidated.

As to the content of the message, it is before the Court, thus there is no need to dispute its contents. It states that "Ms. Hynds filed her lawsuit as a potential class action and claim that you and other current and former VICI non-exempt employees should be part of her lawsuit[.]" The problematic language is as follows: "However, you probably remember that you signed an arbitration agreement in connection with your employment with VICI, in which you waived your right to be part of a class action lawsuit and also agreed to arbitrate any claims you might have against the company. Therefore you are not part of Ms. Hynds' lawsuit[.]" The unequivocal statement that "you are not part of Ms. Hynds' lawsuit" is not correct. Depending on whether the agreements are found to be enforceable, and depending on whether a class is certified, the employees may be part of the suit, and they may not. An accurate statement would have said "Whether you are bound by the arbitration agreement and whether you will be part of Ms. Hynd's lawsuit will be decided by the court at a later date." Given that only 41 of 602 employees opted out of providing their information, the prejudice from the notice was not substantial. Nonetheless, a corrective message must be sent, indicating that the previous statement that "you are not party to Ms. Hynds' suit" was not correct, and stating the situation correctly.

Defendant points out that plaintiff's counsel sent out their own letter, but this is essentially irrelevant to the issue of whether the defense letter was appropriate. Nor does the Court find anything objectionable in plaintiff's counsel's letter.

Considering all of the circumstances, the motion to disqualify is denied, but the alternative request to send a corrective letter is granted. A letter shall be sent within thirty days, containing the substance identified above, at defendants' expense. The exact provisions of the letter must be approved by the Court as part of the submission of the order after hearing on this motion.

The request for sanctions is denied.

6. TIME: 9:01 CASE#: MSC19-00462
CASE NAME: HYNDS VS VICI INCORPORATED
FURTHER CASE MANAGEMENT CONFERENCE
**** TENTATIVE RULING: ****

Appearances required. The parties dispute whether the notice of related case for an Orange County case (*Conroy v. VICI*) is appropriate. The issue is only whether the matters are related, not whether they should be consolidated or one should be stayed. "Related" means only that the judges can confer about "feasibility and desirability of joint discovery orders and other information or formal means of coordinating proceedings in the cases." (C.R.C. 3.300(h)(2)(A).) While the Orange County case apparently is PAGA only, which creates

significant differences (e.g., arbitrability, class treatment) it must have at least some of the same underlying claimed violations.

7. TIME: 9:01 CASE#: MSC19-00462
CASE NAME: HYNDS VS VICI INCORPORATED
SPECIAL SET HEARING ON: INFORMAL DISCOVERY CONFERENCE SET BY DEPT. 39
**** TENTATIVE RULING: ****

The Court received defendant's letter brief of September 23, 2021. The Court has not received a submission from plaintiff. Plaintiff is directed to file a letter brief no greater than five pages, no later than October 7, 2021. The IDC is continued to October 14, 2021.

8. TIME: 9:01 CASE#: MSC19-00462
CASE NAME: HYNDS VS VICI INCORPORATED
HEARING ON MOTION TO/FOR APPOINT DISCOVERY REFEREE FILED BY VICI INCORPORATED
**** TENTATIVE RULING: ****

Defendant moves that the Court appoint a discovery referee pursuant to Code of Civil Procedure section 639, i.e., in the absence of consent of the parties. Defendant generally describes voluminous discovery, claims that plaintiff reneged on agreements and refused to compromise, and asserts that plaintiff is obstructive about its responses to defense discovery.

Defendant argues that the parties spent a long time negotiating a protective order, that it has supplemented its responses, but that plaintiff keeps motions on calendar. It also asserts that plaintiff still has provided no substantive discovery; and that plaintiff has not produced witnesses for deposition or provided alternative dates.

Defendant further describes a dispute over timing of deposition of Ingrid Garcia, and that plaintiff has not scheduled her deposition. Defendant also asserts that plaintiff represents two potential plaintiffs/former employees, Emma Conroy and Rachel Goland, but will not accept service on their behalf, thus necessitating the issuance of subpoenas directly to them.

Plaintiff asserts that there is no need for a discovery referee and that all of the difficulties are the fault of defendant.

In order for the court to appoint a discovery referee over the objections of a party, it must be necessary, not merely convenient. (*Taggares v. Superior Court* (1998) 62 Cal.App.4th 94, 105-106; *Hood v. Superior Ct. (Sears, Roebuck & Co*) (1999) 72 Cal.App.4th 446, 449. A majority of the following factors must be present: (1) multiple issues; (2) multiple issues to be heard simultaneously; (3) a continuum of many motions; and (4) the documents to be reviewed make the inquiry inordinately time consuming.

When the initial motion for appointment of a discovery referee was filed, there was only one motion to compel further discovery on calendar, but there are now three, and each motion has been largely superseded by supplemental responses. In addition, defendant has served 1,500 plus requests on plaintiff.

The costs of a discovery referee are a significant issue here. Plaintiff asserts that she cannot afford the cost, while defendant insists that counsel can pay the costs as part of their "business model." Code of Civil Procedure section 639(d)(6) provides that in considering ability to pay, "the court shall consider only the ability of the party, not the party's counsel, to pay these fees." Moreover, "[w]hen the issue of economic hardship is raised before the referee begins performing services, the court must determine a fair and reasonable apportionment of reference costs." (CRC, Rule 3-922(f)(3).) Accordingly, if the Court were to order a referee, it would be necessary to make an appropriate apportionment, and neither party has provided sufficient information to enable the Court to do so.

Defendant seeks judicial notice of 44 items, consisting of orders approving class settlements in other cases in which plaintiff's counsel represented the settling plaintiff. The requests are denied as irrelevant. Nor is the assertion that VICI is a "family run business," a substantial factor in determining whether a discovery referee is necessary.

Defense counsel states that in telephone conferences, plaintiff's counsel raises her voice and hangs up. (Dec. of Natalie Kreeger.) The declaration does not identify which individual attorney is the one in question (although it would appear to be Ms. Davis), or the extent to which this behavior impaired the ability to meet and confer. Plaintiff's counsel, however, has not disputed the characterization of counsel's behavior. The Contra Costa County Local rules contain Standards of Professional Courtesy. (Local Rule 2.90-2.124.) Rule 2.122(a) provides that "conflicts with opposing counsel are professional and not personal[.]" The local standards describe the conduct expected "in performing their duties of civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, cooperation and competence." (Rule 2.91(a).) Regardless of the outcome of the pending motions, all counsel are advised of the requirements of the Local Rules and required to follow them.

Defendant has submitted a set of fifteen objections to the Declaration of Heather Davis. While nominally stated as evidentiary objections, in reality they are simply more argument in which defendant disagrees with counsel's argument. The objections are overruled.

This is a close issue. Each party's conduct indicates that in some respects, they require the active supervision of a discovery referee. The matters currently before the Court, however, are largely resolved, and the threshold issues (e.g., the protective confidentiality order) have

been resolved. The parties should be able to return to a more cooperative and efficient discovery practice. The motion is denied.

9. TIME: 9:01 CASE#: MSC19-00462
CASE NAME: HYNDS VS VICI INCORPORATED
HEARING ON MOTION TO/FOR COMPEL FURTHER RESPONSES, FILED BY CHRISTINE HYNDS
**** TENTATIVE RULING: ****

Plaintiff moves to compel further responses to requests for production of documents, set one, requests 11, 18, 22, 29, 30, 32, 35, 45, 47, 49, 50, 51, 52, 53, 59, 60, 63, 65, 69, 72, 73, 74, 75, 76, 79, 80, 81, 82, 83, and 84, and for sanctions in the amount of $13,660.

Several separate individual requests were the original subject of the motion. They all involve relevant issues, such as timekeeping and payroll, complaints, job titles and descriptions, reimbursement policies, surveys, documents sent to covered employees, declarations obtained by defendant. Plaintiff argues that defendant has been relying on arbitration agreements all along, and now objects to producing them, and that defendant has made numerous boiler plate objections on trade secret grounds.

Since the motion was filed defendant has served supplemental responses, and plaintiff no longer seeks an order compelling further responses. (Plaintiff's reply, 1:17, "the motion to compel further responses is moot at this point[.]") Plaintiff continues to seek sanctions, on the ground that the responses were not supplemented until after the motion was filed.

Prior to an Informal Discovery Conference with the Court, the parties engaged in a substantial meet and confer process, although there was great difficulty in agreeing on a schedule. Plaintiff points out that at one point in early 2021, defendant agreed to supplement its responses by March 2, 2021, but then responded only by further objecting on the grounds of the absence of a protective confidentiality order. At an Informal Discovery Conference in May of 2021, the Court indicated its views on an appropriate protective order for confidential documents, and an order was stipulated to by the parties, and signed by the Court on May 20, 2021.

In addition, some of defendant's objections were addressed by the Court in its rulings on other issues, e.g., arbitration, certification, and bifurcation. Until the Court's rulings on those issues, some of the objections were somewhat more justified.

On May 26, 2021, defense counsel agreed to supplement its responses and to extend the deadline to file a motion to compel further discovery until 30 days after the supplement was provided. Defendant committed to providing the supplemental responses "over the next 30 days." (Hart Dec., Ex. 6.) Although the commitment identified each request that would be supplemented, it did not indicate the nature of the supplementation. (It appears that the primary stumbling block had been the confidentiality order, which was resolved when the Court signed an order on May 20, 2021.) Plaintiff, in reply, states that defendant in fact did not provide the supplemental responses until July 16, 2021. This is well after 30 days from May 26. The decision point, however, was just before June 4, 2021, the date the motion was filed. At that point, plaintiff had in hand defendant's commitment to supplement responses and extend the motion filing deadline. Despite plaintiff's frustration with the time and difficulty it had taken to get to that point, when the motion was filed, defendant had committed to an extensive supplemental response. Plaintiff's view is that, given what it viewed as a bad faith response on March 2, 2021, they were no longer obligated to rely on the representation of a supplemental response, and indeed, defendant did not comply with its own thirty-day deadline.

In reply, plaintiff states that "the motion to compel further responses is moot at this point," apparently based on the supplemental responses. She still seeks sanctions, however. Responses were after the motion to compel, and even after the date initially set for hearing on the motion. Initially, the delay may have been justified by absence of a confidentiality order, but even after the order was entered, there was further delay.

Various authorities address the availability of sanctions in discovery disputes.

Rule of Court 3.1348(a) provides that "The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed." Failure to oppose or filing of a supplemental response "shall not be deemed an admission that the motion was proper or that sanction should be awarded." (CRC 3.1348(b).)

Code of Civil Procedure sections 2031.300(c) (production of documents) and 2030.290(c) (interrogatories) require sanctions, under specified circumstances, against a party "who unsuccessfully makes or opposes a motion to compel[.]" Under Code of Civil Procedure section 2023.030(a), however, the court has *separate* authority to impose a monetary sanction against a party engaging "in the misuse of the discovery process," which is defined to include "making, without substantial justification, an unmeritorious objection to discovery[.]" (CCP § 2023.010(e).) That section does not require opposition to a motion to compel.

The evident purpose of the provisions of the statute and Rules of Court is to assure that a party cannot unjustifiably refuse to respond to discovery, put the propounding party to the time and expense of filing a motion to compel, and then avoid any accountability by subsequently supplementing the discovery responses.

On this motion, plaintiff no longer seeks any further order compelling responses. As to sanctions, there is nothing wrong with negotiating the threshold issue of the need for a

protective confidentiality order at the outset of discovery, but the issue should have been raised earlier, not in the March 2, 2021 response. This delayed matters. On the other hand, by the time plaintiff filed the motion to compel, it had resolved the protective confidentiality order and had a commitment to provide supplemental responses. Neither party is in a position to complain that the other is the sole, or even primary, cause of the problem. Each side's request for sanctions is denied.

10. TIME: 9:01 CASE#: MSC19-00462
CASE NAME: HYNDS VS VICI INCORPORATED
HEARING ON MOTION TO/FOR TO COMPELD TO PROVIDE FRTHR RESP SET TWO, FILED BY CHRISTINE HYNDS
**** TENTATIVE RULING: ****

Plaintiff moves to compel further responses to Special Interrogatories, set two, numbers 3, 4, 5, 6, and 29, and requests sanctions of $8,860.

For a description of the history of the discovery disputes in this case and the governing authorities, the parties are referred to the discussion in Line 9.

These requests concerned dates of employment, rates of pay, and methods, policies and procedures regarding reimbursement of necessary business-related expenses. They are directly relevant to the subject of the litigation. Some may be somewhat vague, but where a request is only vague in some respects, it should be answered in part. (Code of Civil Procedure, § 2030.220(b) ["If an interrogatory cannot be answered completely, it shall be answered to the extent possible."]; § 2030.240(a) "If only part of an interrogatory is objectionable, the remainder of the interrogatory shall be answered.") In addition, as to objections related to whether or not class certification is appropriate, such issues are not defenses to discovery. (*Union Mut. Life Ins. Co. v. Sup. Ct.* (1978) 80 Cal.App.3d 1, 11-13.)

Defendant argues that on May 26, 2021, it agreed to supplement interrogatories set two, numbers 1, 2, 3, 4, 8, 16, 17, and 29, as well as others (but apparently not number 5), and agreed to extend motion to compel deadline until 30 days after supplementation. In reply, plaintiff says that the motion to compel further responses is moot. (Reply, 1:16.)

On this motion, plaintiff no longer seeks any further order compelling responses. As to sanctions, there is nothing wrong with negotiating the threshold issue of the need for a protective confidentiality order at the outset of discovery, but the issue should have been raised earlier, not in the March 2, 2021 response. This delayed matters. On the other hand, by the time plaintiff filed the motion to compel, it had resolved the protective confidentiality order and had a commitment to provide supplemental responses. Neither party is in a position to complain that the other is the sole, or even primary, cause of the problem. Each side's request for sanctions is denied.

11. TIME: 9:01 CASE#: MSC19-00462
CASE NAME: HYNDS VS VICI INCORPORATED
HEARING ON MOTION TO/FOR CMPL COMPLIANCE PROD OF DOCS SET ONE, FILED BY CHRISTINE HYNDS
**** TENTATIVE RULING: ****

Plaintiff moves to compel compliance with Requests for Production of Documents, set one, requests 1-10, 12-17, 19-21, 23-25, 31, 37, 39-44, 54, 56, 58, 62, 64, 66, 70-71, and 78, and for sanctions in the amount of $7,260.

For a description of the history of the discovery disputes in this case and the governing authorities, the parties are referred to the discussion in Line 9.

In opposition, defendant asserts that it has supplemented the response for every request at issue in the motion to compel, or continues to search for the documents in question. As to the substance of the requests, defendant primarily argues that it was not required to produce documents until the protective confidentiality order was entered.

In reply, plaintiff states that the motion is moot as to "some" of the requests (Reply, 1:16-18.) (See also Reply 2:17-18 ; asserting that no responsive documents have been provide to requests 1-4, 6-10, 12, 15, 17, 19, 21, 23, 24, 25, 31, 39-44, 54, 64, and 78.) Plaintiff does not provide any description of the particular requests for which responses are outstanding, or how they are different from the others. Neither party has addressed the substance of the objections. Indeed, one would think that the parties would at least be able to agree on which responses have been supplemented and which have not, but apparently, even that is not possible.

The circumstances concerning this motion are not materially different from those of the matter on line 9. If the parties still have material disputes concerning the supplemental responses as to which there is still no response, they may raise this at the hearing, and the Court will consider a continuance to allow supplemental briefing.

As to sanctions, the Court denies each request, for the reasons stated in the matter on Line 9.

12. TIME: 9:04 CASE#: MSC20-01670
CASE NAME: DIAZ VS DOS COYOTES DEVELOPMENT
HEARING ON DEMURRER TO 2nd Amended COMPLAINT of DIAZ FILED BY MICHAEL TOPF, EAST BAY COYOTES, INC., JASON WOLENIK
**** TENTATIVE RULING: ****

Before the Court are two demurrers and a motion to strike filed with respect to plaintiffs' Second Amended Complaint, which alleges various wage and hour claims on behalf of plaintiffs individually and other similarly situated employees.

The demurrer filed by defendants East Bay Coyotes, Inc., Jason Wolenik, and Michael Topf (collectively, "EBC Defendants"), is **overruled**.

The demurrer filed by defendants Dos Coyotes Development Company, LLC, Dos Coyotes Sunrise, Inc., Robert H. Davidson, Trumax, LLC, Colmax, LLC, Coltam, Inc., Dos Coyotes Concord, Inc., Coyote Sunshine, LLC and Coyote R15, Inc. (collectively, "DCDC Defendants"), is **sustained with respect to the seventh cause of action as it pertains to Coltam, Inc., Colmax, LLC, Trumax, LLC, Coyote Sunshine, LLC, and Coyote R15, Inc., and otherwise overruled**.

The motion to strike is **denied**.

Plaintiffs have offered to make certain revisions, the necessity of which is clarified below. **Leave to amend is granted**. The amended complaint shall be filed and served on or before October 12, 2021.

I. Background

Plaintiffs, Ruffo Pastor Diaz ("Pastor"), Jaime Torres ("Torres"), and Edgar Gomez ("Gomez") (collectively "plaintiffs") are three former employees of defendants who worked at Dos Coyotes Border Café restaurants, allegedly owned and operated by defendants.

Plaintiff Pastor originally filed this putative class action on August 26, 2020. (See Declaration of Nicole Clowdsley in Support of EBC Defendants' Demurrer, Ex. A.) Following meet and confer efforts with counsel for defendants, plaintiff Pastor agreed to file a First Amended Complaint ("FAC"), which he did on February 24, 2021. The FAC joined Torres and Gomez as additional plaintiffs. (See Declaration of Nicole Clowdsley in Support of EBC Defendants' Demurrer, Ex. F.)

Defendants again met and conferred with plaintiffs, but as no agreement could be reached, they filed demurrers. Instead of opposing, plaintiffs opted to again amend their complaint, which they announced via a notice in lieu of an opposition. On June 25, 2021, plaintiffs filed the operative Second Amended Complaint ("SAC").

The SAC alleges (1) failure to pay all hours worked, (2) failure to pay all overtime hours worked, (3) failure to permit meal periods, (4) failure to permit rest periods, (5) failure to furnish accurate wage statements, (6) waiting time penalties, (7) Private Attorneys General Act ("PAGA"), and (8) unfair competition in violation of California Business and Professions Code § 17200 et seq. Other than the second (overtime) and seventh (PAGA) causes of action, which do not include Gomez, all three plaintiffs join in each cause of action. The SAC attaches the PAGA notice Pastor served on the Labor and Workforce Development Agency ("LWDA") on April 7, 2020 (SAC, ¶106, Ex. A) as well as Torres' PAGA notice (SAC, ¶107, Ex. B).

Both sets of defendants demur, contending there is no reasonable possibility plaintiffs will satisfy class action requirements, that plaintiffs have failed to sufficiently exhaust remedies for a PAGA claim, and because the PAGA cause of action is unmanageable. EBC Defendants also demur to each cause of action on the basis of uncertainty. Both demurrers are supported by a declaration from respective counsel discussing the meet and confer efforts in anticipation of

filing. DCDC Defendants assert that the meet and confer history shows plaintiffs' bad faith tactics.

DCDC Defendants also move to strike certain allegations from the SAC.

Plaintiffs have filed opposition briefs to both demurrers and to the motion to strike.

II. Analysis - Demurrers

A demurrer lies where "the pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc, § 430.10 (e).) For purposes of ruling on a demurrer, material facts properly pleaded in the complaint must be taken as true. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 491.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) A demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047.)

A. Uncertainty (by ECB Defendants Only)

The EBC Defendants' demurrer for uncertainty is based on the SAC's collective reference to "Defendants" instead of specifically connecting the individual defendants, Michael Topf and Jason Wolenik, to acts by them as individuals.

Plaintiffs respond that they have alleged all defendants are joint employers, and this is sufficient to apprise the EBC defendants of the claims against them. (SAC ¶¶21-25). The SAC states several positions allegedly held by Wolenik (Secretary of Dos Coyotes Concord, Inc., and agent for service of process, Secretary, and Director of East Bay Coyotes Inc.) and Topf (CFO of Dos Coyotes Concord, Inc., and CEO, CFO and Director of East Bay Coyotes Inc.). The SAC alleges Wolenik and Topf are individually liable pursuant to Labor Code §§ 558 and 558.1. (SAC, ¶¶19-20.) It is not apparent from the demurrer why the individual acts must be separately alleged from the rest of the alleged "integrated enterprise." (See SAC, ¶23.)

Uncertainty is a disfavored ground for sustaining a demurrer, and a demurrer for uncertainty will be sustained only when the pleading is such that the responding party cannot even discern what it must respond to. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139.) The SAC here meets that low bar. The Court expects that any lingering issues can be illuminated through discovery. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616 ["demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures"].)

Because each reference to "Defendants" can be read to include Wolenik and Topf, the Court must take plaintiffs at their word. While legal conclusions do not enjoy the same acceptance on demurrer as factual allegations, there are numerous factual allegations that refer to "Defendants" collectively. Presumably, each of these allegations are also against Wolenik and Topf. For example, they are alleged to own and operate restaurants (SAC, ¶¶21-23), to have misclassified Pastor and accordingly, underpaid him (see SAC, ¶¶30-31). Torres and Wolenik should be able to admit or deny the allegations as currently set forth; they do not explain how the allegations are so uncertain that they cannot respond.

On this ground, the EBC Defendants' demurrer is overruled.

B. Plaintiffs' Ability to Meet Class Action Requirements

Both sets of defendants demur based on their assertion that this case is incapable of meeting the community of interest requirement, because common questions of law or fact do not predominate. They specifically take issue with Pastor's claim that he was misclassified as an exempt employee, in light of the putative class being comprised of non-exempt employees.

"A demurrer to class allegations may be sustained without leave to amend only if it is clear 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." (*Gutierrez v. California Commerce Club, Inc.* (2010) 187 Cal.App.4th 969, 975, citations omitted.) The Legislature has allowed class actions where the question in a case is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 215, citing Code Civ. Proc., § 382.) While trial courts *may* decide the issue of class certification on demurrer, this is only justified where, as a matter of law, and assuming the truth of the factual allegations in the complaint, there is no reasonable possibility that the requirements for class certification will be satisfied. (*Id.* at 210-211, emphasis added.) Generally, and especially in wage and hour disputes, a demurrer is not the best method of challenging class allegations. (*Gutierrez*, supra, at p. 975; *Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1325-1329.)

Defendant's arguments in this regard are premature. Plaintiffs have stated the required elements for a class action (SAC ¶¶51-66) and there is some possibility that class requirements could be satisfied. Even if Pastor is determined not to be a suitable representative based on his claims that he was misclassified (see DCDC Defendants' MPA in Support of Demurrer, 11:12-13), it does not follow that, as a matter of law, no common questions predominate. Pastor has alleged misclassification, but he also alleges injury to other primary rights such as the right to take meal breaks. A determination that Pastor has no overlapping claims with the non-exempt class members would not be construing SAC's factual allegations as true, or the SAC liberally, as we must on demurrer. In any case, the other two plaintiffs have not alleged any misclassification issues. As defendants have pointed out, plaintiffs will eventually bear the burden of showing predominance, but that burden, which is evidentiary in nature, accompanies class certification motions, not demurrers.

The demurrers on the basis that there is no reasonable possibility of class certification are overruled.

C. PAGA Exhaustion

Both sets of defendants argue insufficient notice to the LWDA causes the Seventh Cause of Action (PAGA) to fail. Specifically, they argue the notices do not adequately describe the necessary "facts and theories."

Before filing a PAGA action, plaintiffs are required to exhaust administrative remedies by giving written notice to the LWDA and the employer "of the specific provisions of [the California

Labor Code] alleged to have been violated, including the facts and theories to support the alleged violation." (Labor Code § 2699.3(a)(1)(A).) In *Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, the trial court concluded a notice was deficient because it did not sufficiently support the violations claimed. The appellate court affirmed, describing the notice at issue in that case as "a string of legal conclusions that parroted the allegedly violated Labor Code provisions." (*Id*. at 837-838.)

The California Supreme Court has offered the following regarding the PAGA notice requirement: "Nothing in Labor Code section 2699.3, subdivision (a)(1)(A), indicates the 'facts and theories' provided in support of 'alleged' violations must satisfy a particular threshold of weightiness, beyond the requirements of nonfrivolousness generally applicable to any civil filing. (See Code Civ. Proc., § 128.7.) The evident purpose of the notice requirement is to afford the relevant state agency, the Labor and Workforce Development Agency, the opportunity to decide whether to allocate scarce resources to an investigation, a decision better made with knowledge of the allegations an aggrieved employee is making and any basis for those allegations." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545-546.)

In *Rojas-Cifuentes v. Superior Court* (2020) 58 Cal.App.5th 1051, 1060, the court addressed the sufficiency of a PAGA notice that contained very little information about the plaintiff's own position and status. Still, the notice was sufficient as its evidentiary and ultimate facts sufficed to notify the employer and the LWDA of the general basis for plaintiffs claim. The court stated, "nothing in section 2699.3 suggest[s] that factual allegations in PAGA notices must exceed those normally found sufficient in complaints." (*Id.* at p. 1059.)

1) Pastor

Here, like in *Rojas-Cifuentes,* the allegations in Pastor's notice include both evidentiary and ultimate facts. He contends he worked for defendants in multiple Dos Coyotes Border Café restaurants since 1991, for which he provides the location information. In April 2017, Pastor was transferred to the San Ramon restaurant where he worked 10-15 hours per day, seven days a week at first and later worked approximately nine to ten hours per day, six days per week. Occasionally he worked 12-13 hours a day. Pastor's "meal breaks were regularly interrupted in order to process food orders." Until sometime in 2018, Pastor was not permitted to track his hours and defendants "failed to keep any information as to Plaintiff's hours worked during this time." These evidentiary facts support the ultimate facts in the notice. For example, Pastor was not paid for all hours worked, or for overtime, not provided accurate wage statements, and not paid premiums for missed meal and rest breaks.

The notice by Pastor was not merely a "string of legal conclusions that parroted the allegedly violated Labor Code provisions." (*Brown, supra,* 28 Cal.App.5th at 837.) Pastor's multiple-page single-spaced notice describes practices specific to defendants, as well as his own status and experience. Pastor also claims to be "aware of other employees" who suffered similar wrongs. This is sufficient to serve the purposes of administrative exhaustion, which involves affording the Labor and Workforce Development Agency an opportunity to decide whether to allocate scarce resources to an investigation. (See *Khan v. Dunn-Edwards Corp.* (2018) 19 Cal.App.5th 804, 809.)

However, Pastor concedes that he did not name certain defendants in his PAGA notice. A representative can only commence a PAGA action against an "employer" properly noticed

under Lab C §2699.3. (See discussion in *Pena v. Taylor Farms Pac., Inc.* (E.D.Cal. Apr. 22, 2014, No. 2:13-CV-01282-KJM-AC) 2014 U.S.Dist.LEXIS 56792, at *13.) Pastor's lack of exhaustion requires an examination as to whether any other plaintiff sufficiently exhausted with respect to those defendants.

2) Torres

Defendants contend Torres failed to exhaust under PAGA because he did not allege sufficient facts and theories, and because he failed to wait the requisite time.

Before commencing a civil action pursuant to PAGA, an employee must allow 65 days to elapse after providing his PAGA notice to the LWDA. (Lab. Code,§ 2699.3(a)(2)(A).) Failure to comply with this procedure prevents an employee from bringing the claim.

Torres provided notice to the LWDA on May 6, 2021. The SAC was filed on June 25, 2021, approximately two weeks prior to the date when such filing would have been permissible. Plaintiffs concede Torres failed to wait the necessary time before filing the SAC, but argue the error is not "moot" and suggest that "the formal filing date be adjusted to reflect the 65 days." (Opposition to EBC Defendants' Demurrer, 12:21-23.)

The Court cannot amend the filing date of a complaint. Torres cites no authorities permitting the Court to overlook the problem that Torres has no right to bring the SAC at the time it was filed. The failure to exhaust is generally regarded as fatal to PAGA causes of action. (See *Avilez v. Pinkerton Gov't Servs.* (C.D.Cal. Dec. 29, 2015, No. SA CV 11-0493-DOC (RZx)) 2015 U.S.Dist.LEXIS 172700, at *57 ["allowing an amended notice to be submitted after the civil action has already been filed defeats the very purpose of the exhaustion requirement" and "A later amendment cannot retroactively bestow administrative compliance that did not exist when the plaintiff filed the initial complaint."]) While Torres might otherwise be able to submit a new notice letter to the LWDA, prior to filing an amended complaint, his employment ended in June 2020. The PAGA statute of limitations has now passed.

3) Gomez

The DCDC Defendants demur to the PAGA cause of action based on plaintiff Gomez's failure to exhaust his remedies. Plaintiffs respond that Gomez is not a PAGA representative. While the first few paragraphs in the SAC create some lack of clarity in this regard by defining "PLAINTIFFS" to include all three individuals, and later stating "PLAINTIFFS also bring this action under the Private Attorneys General Act […]," that ambiguity is later clarified in the Seventh Cause of Action itself (SAC, ¶¶102-111.) The SAC is not defective on this basis.

4) Conclusion re Exhaustion

Because no plaintiff has successfully exhausted PAGA remedies as to defendants Coltam, Inc., Colmax, LLC, Trumax, LLC, Coyote Sunshine, LLC, and Coyote R15, Inc., the demurrer to the 7th Cause of Action is sustained with respect to those defendants. Because the employment of both Pastor and Torres ended over a year ago, it seems they cannot resubmit their notices. Plaintiffs shall have leave to amend consistent with their suggestions in the Opposition briefs (at pages 16 and 18, respectively).

D. Manageability

Both sides here cite the recent decision in *Wesson*, wherein the Second District Court of Appeal held that trial judges have inherent authority to limit, and even strike, unmanageable PAGA claims. That opinion concludes with the following paragraph:

> We do not hold that a PAGA misclassification case can never be managed through common-proof methods. However, Wesson's lack of cooperation with the trial court's inquiry in this regard stymied the court's efforts to devise a plan that would allow the action to proceed, in whole or in part. On the record before us, the trial court's determination that Wesson's PAGA claim was unmanageable was eminently reasonable. Accordingly, we find no abuse of discretion in the court's decision to strike Wesson's PAGA claim.

(*Wesson v. Staples the Office Superstore, LLC* (Sep. 9, 2021, No. B302988) ___Cal.App.5th___ [2021 Cal. App. LEXIS 743, at *38-39].)

No lack of cooperation is present here and, as plaintiffs further point out, the PAGA cause of action in *Wesson* was only stricken *after* the court denied class certification. The demurrer to the PAGA Cause of Action is overruled on the grounds that it unmanageable.

E. Alleged Bad Faith Tactics

The Court has reviewed the history counsel recounts in describing plaintiffs' alleged bad faith and disagrees with the DCDC Defendants that plaintiffs' strategy was in bad faith, or that plaintiffs were attempting to "unnecessarily delay" ruling on the demurrers. (See DCDC Defendants' Reply, 6:15-16.) The Court is unaware of any authority that would prevent joinder of a new PAGA representative, especially if the joinder could result in bolstering the PAGA cause of action against demurrer. Any timing concerns here primarily affected the rights of plaintiffs.

III. Analysis - Motion to Strike

DCDC Defendants seek to strike the following allegations from the SAC:

- "Davidson is a manager of Coyote Sunshine" (SAC, 3:28-4:1)
- "Davidson is a Director and stockholder of Coyote R15" (SAC, 4:17-18)
- "Defendants are an integrated enterprise and integrated employer of Plaintiffs in that Defendants share common management, interrelationship between operations, centralized control of labor relations, and common and/or financial control. Davidson is a common officer and owner of Defendants. Defendants have a common principal office address, which serves as a common corporate office and human resources office for Defendants. Defendants share common management of business operations and employee-employer relations." (SAC, 6:22-28.)

The motion contends these statements are false, the falsity of which can be verified through judicially noticeable records. In support of the motion, DCDC Defendants request judicial notice of various corporate documents on file with the Secretary of State. (See RJN filed July 27, 2021 and Notice of Errata filed Sept. 22, 2021.)

Plaintiffs oppose the request and argue it improperly requests notice of the truth of matters assert in out-of-court documents.

The Court may, in its discretion and upon a motion to strike by defendant: (a) strike out any irrelevant, false, or improper matter inserted in any pleading, or (b) strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., §§ 435-436.) The matter must appear on the face of the complaint, or be subject to judicial notice. (Code Civ. Proc., § 437.)

Judicial notice is not for settling the truth of disputed factual matters. A court's ability to take notice regarding the existence of certain documents is not equivalent to taking notice of the truth of the document's contents. (See, e.g., *Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 21-22 [affirming the denial of plaintiffs' motion to strike answer where motion sought judicial notice of truth of matters asserted in deposition transcripts, albeit within court records, which were subject to judicial notice].)

While the existence of the documents found on the Secretary of State's website may be judicially noticeable, they could not establish the truth or falsity of plaintiffs' allegations unless the allegations were, hypothetically, about what is reported on the website. Details regarding which person actually holds which position within an entity, or whether various defendants constitute an integrated enterprise and integrated employer of plaintiffs, are evidentiary matters properly addressed through discovery or at a later stage in this litigation. The Court **denies** judicial notice for the purposes requested by DCDC Defendants.

Accordingly, the motion to strike is **denied**.

13. TIME: 9:04 CASE#: MSC20-01670
CASE NAME: DIAZ VS DOS COYOTES DEVELOPMEN
HEARING ON MOTION TO/FOR STRIKE PLTF DIAZ 2ND AMND CMPLNT FILED BY DOS COYOTES DEVELOPMENT COMPANY, LLC, COLMAX LLC, TRUMAX,
**** TENTATIVE RULING: ****

Please see Line 12

14. TIME: 9:04 CASE#: MSC20-01670
CASE NAME: DIAZ VS DOS COYOTES DEVELOPMEN
HEARING ON DEMURRER TO 2nd Amended COMPLAINT of DIAZ FILED BY DOS COYOTES DEVELOPMENT COMPANY, LLC, COLMAX LLC, TRUMAX, LLC,
**** TENTATIVE RULING: ****

Please see Line 12

15. TIME: 9:05 CASE#: MS5031
CASE NAME: PARAQUAT CASES
HEARING ON MOTION TO/FOR ENTER CMO NO. 1 FILED BY PLAINTIFFS
**** TENTATIVE RULING: ****

The moving and opposing papers may characterize the motions in different ways, but the Court will address Proposed Case Management Order Number 1 (as amended) as one matter, and Proposed Case Management Order Number 2 (Preference Protocol) as a separate matter.

The parties expressing views on these matters, either through submission of their own proposal or objections to other proposals, are as follows:

The Walkup Firm, which identifies itself as "Proposed Leadership Counsel," has proposed an initial and now an amended Case Management Order Number 1. It is joined by the Fears Nachawati firm, the Schneider Wallace firm, the Pulaski Kerkher firm, and the Watts Guerra firm.

Defendants Chevron U.S.A. Inc. and, separately, Syngenta AG and Syngenta Crop Protection, LLC.

The "Isaak Plaintiffs," i.e., the Isaaks, Kevin Harker, and Steven Dela Vega, represented by Brady Law Group, the Miller Firm, and the Wagstaff Law Firm

Another plaintiff, David Aguiar, represented by the Miller Firm, the Wagstaff Law Firm, and Motley Rice.

Rather than address the issues related to Case Management Order Number 1 in terms of the positions of the respective parties, the Court will address the issues based on their substance: (1) appointment as co-lead counsel; (2) fact sheets; (3) Scheduling; (4) coordination with the federal MDL; and (5) coordination of settlement negotiations;

(1) Appointment as Co-Lead Counsel

The Walkup firm, specifically Mr. Kelly is well-qualified by any measure. While some parties assert that the Walkup firm has a conflict of interest based on the fact that they have reached tentative settlements on behalf of their clients, the objections fail to provide any explanation of how this fact, in and of itself, creates a conflict of interest. Mr. Nachawati is well qualified to participate in the committee, and Ms. Eskin is well-qualified to serve as Liaison Counsel between the JCCP and the MDL.

Objectors seek the appointment of Steven J. Brady as plaintiff's co-lead counsel along with his co-counsel Majed Nachawati. Mr. Brady is clearly qualified to participate in the committee, and represents a large number of plaintiffs in paraquat matters in other states. The presence of Mr. Nachawati on the committee should be sufficient to represent the interests of his clients in the matter. Mr. Brady's request is denied.

(2) Fact Sheets

The determinations as to the form and content of fact sheets should be made by the duly constituted Interim Co-Lead Counsel once the Case Management Order is entered.

(3) Schedule

Defendants have proposed a Case Management Order containing a number of specific deadlines. The Court does not believe that such a detailed schedule should be set at this time. This should be determined by the duly constituted Interim co-Lead Counsel, in negotiation with defendants, once the Case Management Order is entered.

(4) Coordination of schedule with federal MDL

Defendants have urged that the schedule in this matter automatically track the schedule in the federal MDL. While relatively new, the MDL currently has a schedule that includes the first trial. The Court believes that coordination and tracking with the MDL is likely to be in the best interests of all concerned, and expects the schedules to be similar in most respects. Nonetheless, it would not be an appropriate exercise of this Court's authority to automatically in every instance track the provisions of the MDL schedule. The Co-Lead Counsel, in conjunction with MDL Liaison Counsel, should endeavor to coordinate the schedule, but ultimately should make recommendations to this Court for the schedule in this matter.

(5) Coordination of Settlement Negotiations

The Interim Co-Lead Counsel shall have the authorities and duties of Liaison counsel as set forth in CRC rules 3.506 and 3.501(12). Proposed Case Management Order Number 1 also sets out additional duties, listed in items II.B.a-m. Subparagraph (d) specifically provides that they are assigned the duty of "conducting settlement negotiations on behalf of Plaintiffs, but under no circumstances entering into binding agreements unless and to the extent expressly authorized[.]" Some parties raise the issue of the extent to which Co-Lead Counsel would control settlement negotiations, and object to the provision as interfering with their right to settle individual cases. Such a provision is common in cases of this nature, including cases in which the objecting parties have participated. It also is essential to any potential to reach a large-scale settlement. If a point is reached at which it appears to the Court that no such settlement is possible, the provision can be revisited.

Proposed Interim Co-Lead Counsel are directed to prepare a Case Management Order Number 1 consistent with the terms of this order.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 39
HEARING DATE: 09/30/21

16. TIME: 9:06 CASE#: MS5031
CASE NAME: PARAQUAT CASES
HEARING ON JOINDER IN MTN FOR ENTRY OF PROPOSED CMO 1 & 2 (FILED BY PLATIFFS)
**** TENTATIVE RULING: ****

The Walkup firm (joined by others) has proposed an order, called the "Preference Protocol," which would govern the vetting of motions for trial preference. A number of parties oppose the proposed order, essentially reprising their arguments from the motion for preference.

The existence and terms of this order are a critical component of the Court's ruling on Mr. Isaak's motion for trial preference. Under this order, the preference committee would review the preference request, but "any unresolved disputes amongst the parties regarding preferential trial settings will be decided by the Court upon the filing and hearing of a Motion for Preferential Trial Setting pursuant to Code of Civil Procedure § 36." (Proposed CMO No. 2, Par. 8.) In other words, the proposed order would not keep any individual plaintiff from filing their preference motion. (See also Par. 10.) The fact that the potential moving party would have to go through the consultation process is not a substantial barrier to their right to file a motion for preference. Even under ordinary circumstances, the Court requires the parties to engage in a meet and confer process before filing many types of motions, and the proposed process does not significantly impede the ability to file a motion over and above that ordinary requirement.

The proposed protocol, however, does not specifically address the extent to which the selection of preference cases should be coordinated with the process for determining bellwether cases. In the Court's view, the two should be coordinated, and whether a potential preference case also would serve as an appropriate bellwether trial matter.

Mr. Brady, while not a member of the Interim Co-Lead Counsel, would be a member of the Preference Committee. Other members would be Michael Kelly, Amy Eskin, Majed Nachawati, and Alicia O'Neill.

For the reasons set forth in the ruling on the motion for preference, the Court believes that any plaintiff with a substantial damages claim has "a substantial interest in the action as a whole." Accordingly, that factor should not be considered as a part of the vetting process, unless the individual plaintiff's individual claim for damages is so small as to be insubstantial.

The motion for entry of Case Management Order Number 2 (Preference Protocol) is approved with the modifications indicated above. Proposed Co-Lead Counsel are directed to prepare a Case Management Order Number 2 consistent with the terms of this order.