SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550(b))

BEAR VALLEY SKI COMPANY PROMOTIONAL EVENT CASES

Coordinated actions:

Rava v. Anheuser-Busch, Inc.
Los Angeles County Superior Court
Case No. BC312394

Pizarro v. Anheuser-Busch, Inc.
Alpine County Superior Court
Case No. C0602710

Case No.: JCCP4505

ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

This case came on for hearing on June 18, 2009 in Department 309 of the above-entitled court, the Honorable Anthony J. Mohr, Judge presiding. The court having considered all documents, pleadings, and oral argument in support and in opposition of the petition and in good cause appearing therefor, issues this order.

Code of Civil Procedure section 382 authorizes class actions "when the question 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...." The party seeking certification has the burden to establish the

existence of both an ascertainable class and a well-defined community of interest among class members. *Lockheed Martin Corp. v. Sup. Ct.* (2003) 29 Cal.4th 1096, 1104 (citing *Washington Mutual Bank v. Sup. Ct.* (2001) 24 Cal.4th 906, 913). The "community of interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Lockheed*, 29 Cal.4th at 1104.

The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-40. A trial court ruling on a certification motion determines "whether ... 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." *Collins v. Rocha* (1972) 7 Cal.3d 232, 238.

A. Whether an Ascertainable Class Exists

In determining the existence of an ascertainable class, a court examines three factors: (1) the class definition; (2) the size of the class; and (3) the means of identifying the class members. *Miller v. Woods* (1983) 148 Cal. App.3d 862, 873.

1. Class Definition

The class is defined as "[a]ll males, who, at any time, paid for lift tickets for use at Bear Valley Mountain Resort on March 22, 2003." While this definition is clear enough to put putative class members on notice that they may belong, it is overbroad because it includes all males, irrespective of age, who paid for lift tickets when the only males who potentially paid a lift ticket price different from women were males aged 21 and over. Therefore, the proposed class would confer a windfall on a group of males who paid exactly the same lift ticket price as women. Although Plaintiff could re-define the class to restrict it to all males over the age of 21, the issue is moot for reasons to be discussed in the section dealing with superiority, infra.

2. The Size of the Class

Plaintiff states that discovery to date has revealed that approximately 995 men paid for lift tickets on the day in question. Whether all 995 of them were over the age of 21 is unclear, but even if only one-fourth of them were, the numerosity requirement would be satisfied.

3. The Means of Identifying Class Members

The definition is such that class members can easily identify themselves.

The court finds that the class is ascertainable, with the exception that the class definition would have to be restricted to all males over the age of 21 years on the date of the event.

B. Community of Interest

1. Whether Common Questions of Law or Fact Predominate

In order to establish that common questions of law or fact predominate, the plaintiff must show that 1) "each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment." *Washington Mutual Bank FA v. Superior Court* (2001) 24 Cal.4th 906, 913. The plaintiff must also show that 2) "the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants." *Id.* at 913-14.

On the first issue, Plaintiff argues that there would be no reason for the individual class members to litigate anything with respect to liability after the court issues class judgment because liability under the Unruh Act is essentially automatic for any business or public accommodation that "denies, aids or incites a denial, or makes any discrimination or distinction contrary [thereto]." Civ. Code § 52(a). Plaintiff believes that if he establishes discrimination the class members would have nothing else to prove, other than that they were males over the age of 21 who purchased a lift ticket that day.

On the second issue, Plaintiff argues that the predominant issue is whether Defendants engaged in discriminatory activity, and no individual issues of liability must be tried.

Bear Valley asserts that Unruh Act defendants must be permitted to investigate and assert all available equitable defenses that limit or reduce potential damages. *See Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 179. *Angelucci*, however, was not a class certification case and had nothing

to do with whether common questions of fact and law predominated. Furthermore, the issue in *Angelucci* was to what extent damages could accrue for repeated unannounced visits by a male person to an establishment offering discounts to women. It was in this context that the court noted that "there may be equitable considerations" limiting damages. *Id.* The facts in the case at bar are decidedly different because the complaint hinges on a one day event, which means there are no concerns over repeat visits. Defendant's reliance on *Angelucci* is misplaced.

Bear Valley next conflates the issues in two distinct cases to argue that individual issues regarding damages and liability predominate. In *Surrey v. Truebeginnings, Inc.* (2008) 168 Cal.App.4th 414, 416 the court stated that "a bright-line rule [in Unruh Act cases is] that a person must tender the purchase price for a business's services or products in order to have standing to sue for alleged discriminatory practices relating thereto." The issue in that case was "whether someone who presents him or herself to a business with the intent of purchasing its services or products, but becomes aware of that business's practice of charging different amounts for such services or products based on gender and thereafter does not purchase those services or products, is aggrieved by that practice so as to have standing to sue for violations of the Unruh Civil Rights Act." *Id.*

The facts in the case at bar differ from *Surrey*, since the class only includes those male patrons who actually purchased a ticket. *Surrey* did not address whether individual proof that the ticket had been purchased was an obstacle to a finding common questions of law and fact.

Bear Valley then turns to *Bartlett v. Hawaiian Village, Inc* (1978) 87 Cal.App.3d 435, 438, 438 n.6, to argue that individual issues predominate where "each plaintiff [would] be required to litigate a number of distinct factual issues unique to his own claim" including such distinct facts as whether each individual "presented himself [for admission] … [and] tendered the [purchase price]…. Moreover, each must litigate his own actual damages beyond the statutory minimum."

Defendant's reliance on *Bartlett* is misplaced. The plaintiffs sought to maintain a class action on behalf of nine distinct subclasses against an establishment refusing them entry. *Id.* at 437. The subclasses included groups defined by unique characteristics, including those who were excluded because of their "(1) effeminacy, (2) association with effeminate men, (3) race, (4) overage, (5) physical handicap, (6) prior permanent exclusion, (7) failure to produce adequate identification, (8) other

arbitrary reasons, and (9) obesity." *Id.* at 437 n.1. Individual issues predominated because members of particular subclasses would have had to prove on an individual basis that the establishment found them, in particular, to be too effeminate or too obese. They would also have to establish on an individual basis that there was no other good reason for their exclusion.

The facts are different here. One reason existed for the price differential between men and women that day: gender. The class members do not have to show on an individual basis that Defendant thought they were too manly to receive the free lift ticket. Whether an individual is a man or a woman is (usually) readily apparent. Furthermore, proof that class members tendered the purchase price is no obstacle to certification. If class members retained their lift ticket or have credit card records, they will have sufficient proof to submit a claim for recovery.

Plaintiff has shown that common questions of law and fact predominate over individual issues.

2. Typicality

Plaintiff argues that his claims are not only typical of the class, but identical. He is a male, just as the rest of the class is. He purchased a lift ticket, just as every other class member did. He paid the full purchase price, as opposed to receiving a free lift ticket, as the remainder of the class did.

Defendants counter that he is not typical because his "injuries" were self-generated. Defendants first rely on *Cohn v. Corinthian Colleges, Inc.* (2008) 169 Cal.App.4th 523, which noted that "[plaintiff], his friends, and his counsel have been involved in numerous of what have been characterized as '"shake down"' lawsuits. [Citation.] They proclaim themselves equal rights activists, yet repeatedly attempted to glean money from the Angels through the threat of suit." However, *Corinthian Colleges* never discussed whether the plaintiff's involvement in such "shakedown" suits made his claims atypical of other class members. In fact, *Corinthian Colleges* never discussed typicality at all. Therefore, the opinion provides no support for Defendants' argument.

Defendants cite *Angelucci, supra*, to argue that "[w]ell-instructed professional plaintiffs" who purposefully patronize facilities to generate litigation are subject to equitable defenses such as the doctrines of unclean hands and "avoidable consequences." 41 Cal.4th 179. *Angelucci* provides no support for Defendants' position. First, the court's discussion of "[w]ell-instructed professional plaintiffs" had to do with whether such plaintiffs knew that they had to actually "demand equal

treatment and secure a refusal," which, as stated earlier, was the issue with which the court was confronted. *Id.* This is a standing issue, not one of typicality.

Defendants identify two equitable defenses, but do not explain how either of them might apply. The first is unclean hands, which the United Stated Supreme Court described thusly: "[e]quity's maxim that a suitor who engaged in his own reprehensible conduct in the course of the transaction at issue must be denied equitable relief because of unclean hands." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995). The only "reprehensible conduct" Defendants have identified is the fact that Plaintiff showed up to the ski lodge knowing that he was likely to be discriminated against. This does not rise to the level of unclean hands. If anything it suggests this was a test case which is a long-accepted tool in civil rights litigation.

The second equitable defense is avoidable consequences. Citing the Restatement Second of Torts, the California Supreme Court described this equitable defense as follows: "[O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort." *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042-43. The court went on to recognize that the doctrine applies to causes of action other than tort, but the point is that the avoidable consequences doctrine arises only after the commission of the tortious (or otherwise illegal) act as a means of mitigating damages. Defendants do not explain how Plaintiff could have lessened the damages he suffered after being discriminated against. Instead, they argue that his injury was self-generated, implying that he could have avoided being discriminated against by not showing up. This is not what the avoidable consequences doctrine addresses. Moreover, if such a defense covered civil rights litigation, very few such cases would survive because each defendant would argue that once a plaintiff knew that a person in his position would experience discrimination, the plaintiff should avoid the offending facility.

Defendants next argue that Rava's claims are atypical because he alone is subject to challenge based on standing under the UCL. First, Defendants argue that a plaintiff who purchases a product solely for the purpose of establishing standing under the UCL suffers no injury in fact. *See Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 816-18. The facts in *Buckland* are distinguishable. In that case the plaintiff freely admitted that she purchased the product – hand cream –

for the sole purpose of establishing standing. *See id.* at 804-05. Although the circumstances strongly suggest that Plaintiff chose to ski at Bear Valley on the day in question in order to establish standing, the record also indicates that Plaintiff used the lift ticket he purchased and went skiing. Alfred G. Rava Decl. in support of Reply ¶ 22. Mr. Rava may have bought his ticket in part to create standing, but he also used it to ride the lift and ski.

Defendant ABI argues that Plaintiff's claims are atypical because there are questions as to whether he suffered "actual damages" under Civil Code section 52(a). This is essentially the same as the UCL argument, though it addresses damages instead of standing. It fails for the same reason.

Plaintiff has sufficiently shown that his claims are typical of the class.

3. Adequacy of Representation

To demonstrate adequacy of representation a plaintiff must show (1) that he has asserted all claims that reasonably could be expected to be raised by members of the class (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 464); (2) that he is not "simply lending his name to a suit controlled entirely by the class attorney" (*Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 578); and (3) that "the qualifications of counsel [are such that] all interests, including those of as yet unnamed plaintiffs are adequately represented (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 12).

Plaintiff has asserted claims under the Unruh Act, the Gender Tax Repeal Act, Civil Code section 51.5, the UCL, and the CLRA, as well as a common law tort claim for negligent hire, supervision, and retention. The complaint seeks actual damages, exemplary damages, restitution, disgorgement, injunctive relief, attorneys' fees and costs. This covers all the bases for claims that reasonably could be expected to be raised by members of the class.

It is likewise clear that Plaintiff is not a mere puppet for class counsel. Mr. Rava has been involved in these types of cases for a long time. Whatever his motives for suing so often, nobody can call him a mere front for his lawyers. On the last issue, adequacy of class counsel, counsel's resume demonstrates qualification to represent the class in this case.

Defendant ABI attacks the adequacy of Plaintiff's class representation, arguing that his long-standing relationships with class counsel present a conflict of interest between him and the rest of the

class. ABI presents evidence that Plaintiff has acted a co-counsel in the Pizzaro case with Joseph Grant of the Grant Law Firm, who is co-counsel in this case. *See* Ex. 4 (Pizzaro Depo. Transcript) at 3. Mr. Grant also worked at the law firm that gave Plaintiff his first job out of law school. Ex. 2 (Rava Depo.) at 14:15-16. In addition, co-counsel Gregory Cartwright has represented Plaintiff in at least 12 other lawsuits. *Id.* at 74:6-18.

Defendant's argument is premised entirely on *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, in which the court disqualified two firms representing the plaintiff. Plaintiff worked as an attorney for the first firm (Westrup Klick). The court cited a long line of cases disqualifying an attorney from acting as class counsel where his own law firm represents the class. *See id.* at 1264-74. That discussion is not particularly germane to this case because Plaintiff is not an attorney in either of the two firms that represent the class.

The other firm representing counsel in *Apple* (Sigel) was disqualified because of the close business connection between it, the plaintiff, and the plaintiff's law firm. The court found that the interests of this second firm and the plaintiff were too intermingled.

> [T]he interests of [plaintiff] and the Sigel firm reach beyond this case to the 13 other actions in which Westrup Klick and the Sigel firm serve or served as co-counsel; six are still active. Because Cagney, as an attorney at Westrup Klick, may benefit from attorneys' fees recovered in the other litigation, he is not sufficiently independent to serve as the class representative in this one. Here, in light of the financial relationship and interdependence between Cagney and the Sigel firm, Cagney may acquiesce in, rather than monitor, the firm's decisions, and the firm may benefit from the situation by seeking to maximize its recovery of attorneys' fees.

Id. at 1276-77.

The question here is whether Plaintiff's long-standing relationship with Mr. Grant and the Cartwright firm raise similar concerns. Unlike in *Apple*, Defendant has presented evidence of only one case in which Plaintiff served as co-counsel with Mr. Grant. Given the fact that Mr. Grant is not licensed to practice law in California and is only appearing pro hac vice, the opportunities for Plaintiff and Mr. Grant to work together in the future (at least in California) are limited.

As for the Cartwright firm, there is an important factual distinction between this case and *Apple*. In *Apple*, the problem was that the Sigel firm had been co-counsel with the plaintiff's law firm in at least

thirteen other actions. Because the plaintiff worked for a law firm that had such close ties with the Sigel law firm there was the potential that he might benefit from attorneys' fees recovered in the other litigation. *Id.* at 1276. Therefore, the court found that he was "not sufficiently independent to serve as the class representative." *Id.* at 1277.

In the case at bar, Defendant emphasizes the fact that Plaintiff has been represented by the Cartwright firm in at least twelve other cases. This differs from serving as co-counsel. Attorneys serving as co-counsel have a shared interest in maximizing their fees. This necessarily puts them at odds with the class, which has a shared interest in maximizing class recovery. There is no such inherent conflict between an attorney and his repeat client. Defendant argues that Plaintiff has an interest in continuing his "business" relationship with class counsel, but in reality, Plaintiff could likely do just as well with someone else representing him. There is nothing inherently special about the relationship between Plaintiff and his counsel that gives rise to a conflict of interest between Plaintiff and the rest of the class.

Plaintiff has sufficiently demonstrated that he and class counsel are adequate representatives of the class.

C. Superiority

"[B]ecause group action has the potential to create injustice, trial courts are required to carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts. [Citations]" *Linder v. Thrifty Oil* (200) 23 Cal.4th 429, 435. The class device must be "superior to, and not just a good as, other available methods for handling the controversy, and such a determination lies in an area where the trial court's discretion is paramount." *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975) (*cited with approval in Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 394).

Defendants attack the superiority of the class device almost exclusively on the basis of *Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225. In that case the appellate court validated the trial court's conclusion that class treatment was not a superior. The trial court's reasoning is convincing with respect to the case at bar.

(1) "individual claims were viable without class treatment." *Id.* at 1229.

In *Reese*, the trial court observed that "denial of class treatment would not burden potential class members since there were ... 'enough incentives built into the statute [the Unruh Civil Rights Act] that any person who truly feels aggrieved by defendant's Ladies Day practice will file suit.'" *Id.* at 1235. The appellate court held that this was a relevant consideration in assessing whether class treatment would bring substantial benefits, "[s]ince one important function of class actions is to provide 'small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation' [Citations.]" *Id.*

In the case at bar, the built-in incentives are even greater than they were in *Reese*. Now the Unruh Act authorizes a statutory penalty of $4,000, which is four times greater than when *Reese* was decided. Civil Code § 52; *Reese*, 73 Cal.App.4th at 1238. Furthermore, an examination of the legislative history of the Unruh Act reveals that the purpose of the statutory penalty is to encourage individual suits.

In 2001 the penalty for violating the Unruh Act was increased to $4,000, just below the then jurisdictional limit of the Small Claims Court. The legislature's goal was to incentivize victims of discrimination. As stated by the senate judicial committee:

> Raising the minimum penalty at a level that is still below the threshold for small claims court actions makes it more likely that claims will be followed [sic] and that violators will be unwilling to incur these costs as absorbable business costs.... [¶] The rationale given for raising the minimum penalty to $4,000, as opposed to a higher amount, is that these claims are usually pursued by victims in small claims court, which has a jurisdictional limit of $5,000. Further, the amount will ensure that the small business (who is usually the violator) is not put out of business by the commission of one violation."

Req. for Judicial Notice, Ex. B (Senate Judiciary Committee, Report on Assembly Bill No. 587 (2001-2002 Reg. Sess.) July 3, 2001).

This legislative history points to another reason class treatment is not superior. Under Civil Code section 52, the court has no discretion to award statutory penalties in an amount any less than $4,000. Note the use of the word "minimum" in the report: "...raising the minimum penalty to $4,000..." (Id., emphasis added) Assuming Plaintiff succeeds on the merits, Bear Valley Ski Resort would be liable for mandatory statutory penalties of $4,000 x 995 putative class members. The product

of $3,980,000 constitutes a draconian sum that would strip Bear Valley of its assets. Bear Valley Ski Resort is the precise kind of entity the legislature intended to at once punish and protect: punish by making it uneconomical to discriminate and economical for plaintiffs to sue, and protect by preventing plaintiffs from being able to demolish the business on account of one violation. To be sure, Plaintiff has alleged 995 violations, one for each class member, but they all arise from a single event. Allowing class treatment in this situation will frustrate the stated legislative purpose of protecting businesses. This legislative history does not support a finding that class treatment is superior in a case such as Mr. Rava's.

Furthermore, the 2001 increase in statutory penalties occurred after *Reese* was decided. The legislature could have responded to *Reese* by making it easier for plaintiffs to certify a class. Instead, the legislature responded by providing further incentives for individual plaintiffs to pursue claims.

(2) "multiple lawsuits were unlikely in light of the fact that the only aggrieved party who had brought suit (plaintiff) had deliberately generated his own injury..." *Reese*, 73 Cal.App.4th at 1229.

The trial court noted that in the four-year period between the acts alleged in the complaint and the time certification was denied, not a single other plaintiff came forward to complain of the alleged Unruh Act violations. *Id.* at 1235. The appellate court ruled that "where the only lawsuit on file was based on a self-generated injury, the trial court could reasonably conclude that it would likely not have to adjudicate a multiplicity of actions if the class was not certified." *Id.* at 1236.

In the case at bar, the events giving rise to Plaintiff's complaint occurred over six years ago, on March 22, 2003. The circumstances of the case suggest that the injury was "self-generated," and no other individuals have come forward with claims against the Defendants.

(3) "class treatment would consume more time and expense than adjudicating the pending case or a limited number of individual suits." *Id.* at 1229.

The appellate court admonished that "[i]n a typical case, it would be speculative to" assume that multiple claims are not likely, and that "a court should not uncritically assume that the absence of

multiple actions reflects an absence of aggrieved parties." *Id.* at 1237. Nevertheless, their opinion stated that a trial court "may appraise 'the extent and nature of other litigation already commenced by members of the class' in determining whether a class action is superior. [Citation.]" *Id.* The evidence reflected that no other aggrieved party had brought suit in four years and that the plaintiff had deliberately gone to the defendant's place of business instead of his usual proprietor for the purpose of being denied the discount. *Id.* The appellate court found no abuse of discretion in finding that under these circumstances multiple claims would not likely arise. *Id.*

The facts before this court show that in the six years since the Ladies Day event, no other individuals have filed suit. In addition, the circumstances strongly suggest that Plaintiff went to Bear Valley in part to generate this lawsuit. Under these circumstances, it is unlikely that multiple claims will arise. Therefore, class treatment – with its fiduciary nature and its notice and court approval requirements – is likely to consume more time and expense than adjudicating individual suits.

(4) "the statutory penalties sought by plaintiff and others could disgorge any unjust enrichment without resort to class certification." *Id.* at 1229.

If class certification is denied, then Plaintiff only has standing to assert an Unruh Act cause of action for himself, which means Defendants would only have to pay $4,000 in statutory penalties. Mr. Rava's win, however, would cancel not only any profit Defendants gain from their transaction with him, but with many other individuals as well, because one $4,000 penalty would wipe out the profits from a large number of lift ticket sales. Should other people file, each of their actions could eventually eliminate the profit defendants realized from the event.

(5) "some form of effective class-wide relief was available without class certification through the unfair competition claim alleged by plaintiff." *Id.*

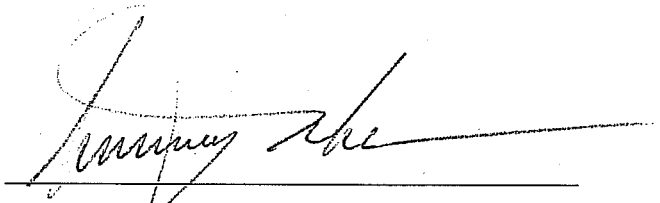
The trial court did not depend on this factor; the court of appeal added it. Proposition 64 has eliminated this point. To maintain a cause of action under the UCL, Plaintiff now must demonstrate that he meets Code of Civil Procedure section 382 requirements for maintaining a class action. Thus, if the court denies certification, injunctive relief and restitutionary disgorgement will not be available to absent class members.

The court must admit that this factor and the change in the law does constitute a reason in favor of finding superioririty. However, the fact that injunctive relief is not available means nothing here because the lift ticket giveaway was a one-day event that has not been repeated. Timothy Bottomly Decl. ¶ 4. Moreover, the potential statutory penalty more than makes up for the restitutionary item, i.e., the cost of the lift ticket, which is now unavailable thanks to Proposition 64. For these reasons, considering the facts and taking all of the above considerations into account, the court concludes that class treatment is not superior to the maintenance of individual suits.

Plaintiff's motion for class certification is DENIED.

IT IS SO ORDERED.

DATED: _____



Anthony J. Mohr

Judge of the Los Angeles Superior Court