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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, Plaintiff, v. LAW SCHOOL ADMISSION COUNCIL, INC., Defendant.	No. CV 12-1830-EMC
JOHN DOE, *et al.*, and all other similarly situated individuals, Real Parties in Interest.	**LSAC'S OPPOSITION TO DFEH MOTION TO PROCEED FOR GROUP OR CLASS RELIEF**
THE UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. LAW SCHOOL ADMISSION COUNCIL, INC., Defendant.	Hearing Date: April 4, 2013 Hearing Time: 1:30 p.m.
ANDREW QUAN *et al.*, Plaintiff-Intervenors, v. LAW SCHOOL ADMISSION COUNCIL, INC., Defendant.	

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Defendant Law School Admission Council, Inc. ("LSAC") hereby opposes the motion of the Department of Fair Employment and Housing ("DFEH") to Proceed for Group or Class Relief (D.E. 106) ("Mot.").

BACKGROUND

LSAC is a non-profit membership organization based in Pennsylvania. LSAC provides services for its member schools and individuals who wish to attend law school, including developing and administering the LSAT examination. Law schools across the country rely upon LSAT scores as one factor among many in evaluating admission applications.

According to the allegations of DFEH's First Amended Group and Class Action Complaint for Damages and Injunctive Relief (D.E. 104) ("Complaint"), Jane Doe and Nicholas Jones filed verified complaints with DFEH pursuant to Government Code § 12960[1] on May 9, 2010, and January 12, 2010, respectively, alleging that LSAC denied them full and equal access to the LSAT by denying their requests for testing accommodations, in violation of the California Fair Employment and Housing Act ("FEHA") and Unruh Civil Rights Act ("Unruh Act"). Complaint ¶¶ 18-19.

DFEH issued a Notice of Class Action Complaint and Group Complaint on July 22, 2010, pursuant to Government Code §§ 12960 and 12961, stating that the Director of DFEH "has determined that the cases listed below will be treated and proceed as a group or class complaint for all purposes . . . ." *Id.* ¶ 21 and Ex. 3. The Notice identified three individual claimants, including Doe and Jones, and described the purported class as "all disabled individuals in the State of California who have or will request a reasonable accommodation for the [LSAT] . . . and who have or will be unlawfully denied such request from January 19, 2009 to the conclusion of the Department's investigation of this complaint." *Id.* at Ex. 3. The Notice further stated that there "are common questions of law and fact involved which affect the parties to be represented and those persons similarly situated," and "[t]he nature of the group or class is such that proof of a single set of facts will establish the right of each member of the group to recover." *Id.* DFEH

[1] All statutory citations herein are to the California Code, unless otherwise noted.

did not identify the "common questions of law and fact."

In August 2010, DFEH served broad discovery requests on LSAC, asking for the identities of all persons in California who submitted requests for disability-related accommodations over a 21-month period of time, and all documents associated with these requests. LSAC objected. Six months later, DFEH filed a petition in superior court to compel compliance with its investigative discovery. The court ordered compliance in substantial part. It required LSAC to produce records for all individuals in California who had requested accommodations on the LSAT during the applicable time period, after removing or redacting personally identifiable information from those records. It also required LSAC to send a Notice of Investigation to all of those individuals, informing them of DFEH's investigation and asking whether they wanted LSAC to make the recipient's name and contact information available to DFEH. *See* D.E. 13-2.

In May 2011, LSAC mailed a Notice of Investigation to 311 individuals. *See* D.E. 13-3 at Ex. 2 ¶ 2. Eighty-nine of those individuals completely and fully executed consent forms authorizing LSAC to share their names with DFEH. DFEH then worked with 35 of those individuals to prepare and file administrative complaints, bringing the total number of complainants at the agency level to 38.

On February 6, 2012, DFEH filed a "Group and Class Accusation" before the California Fair Employment & Housing Commission ("FEHC"). The administrative Accusation did not address any class certification requirements set by state or federal court rules. *See* Mew Decl. Ex. 1 ¶¶ 4, 6 (filed herewith). DFEH amended the accusation on February 17th to remove one complainant and correct another complainant's name (as amended, the "Accusation"). The Accusation alleged that LSAC had violated the rights of 17 individuals under the FEHA by refusing to grant their accommodations requests.

Thus, after being provided with records for 311 individuals and going through a class notification process in which 89 of those 311 individuals elected to have their names provided to DFEH, DFEH apparently concluded that 17 individuals had viable complaints. Nevertheless, the Accusation was made on behalf of the 17 designated individuals and all "similarly situated

individuals," whom DFEH referred to as "class complainants."

LSAC elected to have the dispute heard in court. *See* Complaint ¶ 41. DFEH therefore withdrew its Accusation, and filed a complaint in California superior court. *See id.* LSAC removed the case to federal court.

In its Complaint, DFEH names seventeen real parties in interest, and states that it "brings this case on behalf of a group of 17 named individuals." *See* Complaint ¶¶ 2, 6.[2] The Complaint also contains a series of "Class Action Allegations" that were not present in DFEH's administrative Accusation. *See id.* at p. 4. DFEH purports to bring the case as a class action on behalf of "all disabled individuals in the State of California who requested a reasonable accommodation for the [LSAT] from January 19, 2009 to the present." *Id.* ¶ 7. DFEH identifies the Director of DFEH, "with the assistance of the 17 named real parties in interest," as the class representative. *Id.* ¶ 8. DFEH alleges in its Complaint that Government Code § 12961 authorizes "the Director to pursue this litigation as a class representative" and authorizes "DFEH to seek class relief without being certified as a class representative." *Id.* Nevertheless, DFEH also alleges that the lawsuit meets the criteria for class certification, and addresses judicial prerequisites to proceeding with a class action, including numerosity, commonality, typicality, and adequacy of representation. *See id.* ¶¶ 9-13.[3]

The Complaint asserts five causes of action, and alleges that LSAC violates the rights of the purported class members and/or the real parties in interest under the FEHA and the Unruh Act by violating the federal Americans with Disabilities Act ("ADA") (which is incorporated by reference in the Unruh Act). *See id.* ¶¶ 15, 186-215. DFEH seeks injunctive relief and damages for the individuals on whose behalf it purports to sue. *See id.* at ¶¶ 216-26. The only issue before

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[2] DFEH's class allegations are substantially the same in its original and amended complaints. Indeed, DFEH continued to embrace the concept of "class" claims in its amended complaint, expanding the class to cover individuals who requested testing accommodations between February 7, 2012 and "the present." *See* DFEH Mot. for Leave to File First Amended Complaint (D.E. 87), at 2.

[3] *See generally* Fed. R. Civ. P. 23; Code Civ. P. § 382; *McCullah v. Southern Cal. Gas Co.*, 82 Cal. App. 4th 495, 498 (2000).

the Court is whether DFEH can pursue class claims pursuant to the FEHA without meeting the class certification requirements of Fed. R. Civ. P. 23.

STATEMENT OF THE ISSUE

Whether DFEH can pursue class claims in federal court based upon a provision in a California statute without satisfying the class certification prerequisites of Federal Rule of Civil Procedure 23.

ARGUMENT

I. FEDERAL RULE OF CIVIL PROCEDURE 23 APPLIES IN THIS FEDERAL COURT PROCEEDING.

The Federal Rules of Civil Procedure apply to the conduct of all civil actions and proceedings in United States district courts, including cases removed from state court. *See* Fed. R. Civ. P. 1; Fed. R. Civ. P. 81(c)(1); *see also* 28 U.S.C. § 2072(a) (providing that the Supreme Court "shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . ."). Federal Rule of Civil Procedure 23 sets out the prerequisites to maintaining a class action in federal court, and "automatically applies" in this case. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S. Ct. 1431, 1438 (2010). Accordingly, DFEH cannot pursue class claims unless a class is certified in accordance with Rule 23.

DFEH contends that Government Code § 12961 authorizes the Director of DFEH to pursue class claims without being certified as a class representative. *See* Complaint ¶ 8; Mot. at 12 n.7. DFEH's position, if accepted, would lead to a conflict between Section 12961 and Federal Rule of Civil Procedure 23. Rule 23 "provides a one-size-fits-all formula for deciding the class-action question." *Shady Grove*, 559 U.S. at 1437. Government Code Section 12961, however, "attempts to answer the same question" – whether DFEH's suit may proceed as a class action. *Id.* In the face of this conflict between the state statute and the federal procedural rule, Rule 23 controls, "'unless it exceeds statutory authorization or Congress's rulemaking power.'" *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1203 (10th Cir. 2012) (citing *Shady Grove*, 130 S. Ct. at 1437)).

Rule 23 conforms to the Rules Enabling Act, and thus falls within its statutory authorization. The Rules Enabling Act provides that the Federal Rules apply unless they "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see generally Hanna v. Plumer*, 380 U.S. 460, 464 (1965); *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003). In determining whether a Federal Rule abridges, enlarges, or modifies any substantive right, "'[t]he test must be whether a rule really regulates procedure – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.'" *Hanna*, 380 U.S. at 464 (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

Rule 23 "really regulates procedure." *Id.* It only controls which claims can be joined and pursued on a class-wide basis in federal court. *See Shady Grove*, 130 S. Ct. at 1442-4343 ("[R]ules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also valid. . . . Such rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed. Rule 23 – at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action – falls within § 2072(b)'s authorization.") (Scalia, J., plurality opinion); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'") (citation omitted); *cf. Jones*, 674 F.3d at 1209 ("Here, Rule 38 regulates only the procedure used to enforce a state-created right, and thus it is a procedural rule, authorized by the Rules Enabling Act.").

Application of Rule 23 also does not abridge, enlarge, or modify any substantive rights under the FEHA in this case. *Cf. Freund*, 347 F.3d at 761-62 (explaining that California rule regarding appealability of punitive damage awards was not substantive: "it does not add, subtract, or define any of the elements necessary to justify punitive damages; it merely establishes when and how those pre-existing substantive rules can be reviewed"). Rule 23 does not impact the substantive rights or obligations of the putative class members or LSAC. It therefore does not run afoul of the Rules Enabling Act, and is properly applied in this case. *See In re Katrina Canal*

Breaches Consol. Litig., No. 05-4182, 2009 U.S. Dist. LEXIS 69708, at *266-67 (E.D. La. Aug. 6, 2009) (applying Federal Rule 23, not Louisiana state class certification rules: "Without any substantive reason to question congressional authority or that authority delegated to the Supreme Court to promulgate Rule 23, this Court must follow the federal rule.") (citation omitted). This is consistent with the Court's holding in *Shady Grove* that Federal Rule 23, and not a New York statute prohibiting class actions in suits seeking penalties or statutory minimum damages, applied in determining the appropriateness of class certification in a diversity action in federal district court. *See* 130 S. Ct. at 1436, 1448.

Thus, DFEH cannot rely on California Government Code § 12961 to avoid meeting the class certification requirements of Federal Rule of Civil Procedure 23. *Cf. DFEH v. Lucent Tech., Inc.*, 642 F.3d 728, 741 (9th Cir. 2011) (holding that proposed intervenor could not rely on a provision in the FEHA that allows aggrieved parties to intervene in employment discrimination cases brought by DFEH to "negate the requirement of the federal rule" governing intervention).[4] This is the case regardless of any professed policy justifications for allowing DFEH to proceed without having a class certified. *See, e.g, Jones v. Bock*, 549 U.S. 199, 212 (2007) ("[C]ourts generally should not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns."); *Freund*, 347 F.3d at 762 (noting that "procedural rules commonly have a basis in public policy[,]" but also explaining: "it is well established that rules regarding the appropriate standard of review, or even the availability of review at all, to be applied by a federal court sitting in diversity, are questions of federal law"). DFEH must satisfy the requirements of Rule 23 to pursue class claims in this case.

[4] Although *Lucent* involved a different issue, it dealt directly with DFEH's role in FEHA litigation and operation of the FEHA in federal court litigation. Its analysis is therefore informative to the current issue before the Court.

II. DFEH'S LAWSUIT IS NOT EXEMPT FROM THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23 AS A "GOVERNMENT ENFORCEMENT ACTION"

Notwithstanding the class certification allegations in its own Complaint, DFEH now seeks to avoid application of Rule 23's class action certification requirements by arguing that DFEH is not pursuing a class action after all. DFEH now argues that its complaint was filed as a "government enforcement action," and therefore is not subject to Rule 23. *See* Mot. at 7-10.

DFEH relies on recent Ninth Circuit cases decided in connection with the federal Class Action Fairness Act (CAFA), *Washington State v. Chimei Innolux Corp.* and *State of Nevada v. Bank of America*, to argue that the current action is a government enforcement action. *See* Mot. at 9-10. However, the Ninth Circuit's analyses in these cases show why the current lawsuit is ***not*** properly characterized as a "government enforcement action" exempt from Rule 23 requirements.

In *Chimei*, the Attorneys General of Washington and California filed *parens patriae* actions alleging that the defendants engaged in a conspiracy to fix prices. The issue was whether the lawsuits were "class actions" within the meaning of the CAFA. The Ninth Circuit noted that, under the definition in CAFA, "a suit commenced in state court is not a class action unless it is brought under a state statute or rule similar to Rule 23 that authorizes an action 'as a class action.'" 659 F.3d at 848 (citation omitted). The *parens patriae* lawsuits filed in *Chimei* were not filed under Rule 23 or any similar state statute or rule. *See id.* In contrast here, DFEH is suing under a state statute that specifically refers to a "class complaint." *See* Gov't Code § 12961. The state statute reflects traditional class action factors, allowing class claims only "where an unlawful practice alleged in a verified complaint adversely affects, in a similar manner, a group or class of persons of which the aggrieved person filing the complaint is a member, or where such an unlawful practice raises questions of law or fact which are common to such a group or class . . . ." *Id.*

Furthermore, DFEH's action bears little resemblance to the California *parens patriae* action discussed in *Chimei.* As the Ninth Circuit explained, "[t]he doctrine of *parens patriae* allows a sovereign to bring suit on behalf of its citizens when the sovereign alleges an injury to a sufficiently substantial segment of its population, articulates an interest apart from the interests of

particular private parties, and expresses a quasi-sovereign interest." 659 F.3d at 847 (citation omitted). The California statute at issue in that case expressly referred to the Attorney General's action as a *parens patriae* action. *See id.* (citing Bus. & Prof. Code § 16760(a)(1)). The state statute made no reference to class claims or to any of the typical class action prerequisites. *See id.* The Ninth Circuit emphasized that a *parens patriae* action "may well result in a settlement that does not include restitution to victims of the fraud, but only results in penalties paid to the public treasury." *Id.* at 848 (describing this as the "great distinction" between a *parens patriae* lawsuit and a "true class action").[5]

In contrast, DFEH cites to nothing in the FEHA that refers to DFEH proceeding as *parens patriae* on behalf of the citizens of the State of California. Instead, the applicable statute provides that "the director [of DFEH] in his or her discretion may bring a civil action in the name of the department ***on behalf of the person claiming to be aggrieved***." Gov't Code § 12965(a) (emphasis added). In any civil action filed by DFEH, the person claiming to be aggrieved is "the real party in interest . . . ." *Id.* The FEHA specifically refers to DFEH pursuing "class" claims, and places limitations on when such claims may be pursued. *See* Gov't Code § 12961. DFEH is not seeking relief for the public at large or civil penalties payable to the State of California, but rather, specific relief on behalf of the real parties in interest and members of the purported class. *See* Complaint ¶¶ 216-226 (setting out prayer for relief "as to real parties in interest" and "as to all members of the class, including the real parties in interest").

A comparison to the other case primarily relied upon by DFEH, *People v. Pacific Land Research Co.*, 20 Cal. 3d 10 (1977), *see* Mot. at 8, also shows why DFEH's current action is not exempt from class certification requirements as a "government enforcement action." In *Pacific Land Research*, the relevant state statute authorized the Attorney General to prosecute actions "in the name of the people of the State of California" and to seek injunctive relief and civil penalties.

[5] The Ninth Circuit's decision in *Nevada v. Bank of America* followed the *Chimei* court's analysis. 672 F.3d 661, 667 (9th Cir. 2012) ("Our decision in *Chimei*, which Bank of America concedes controls our decision as to whether this action is a CAFA class action, makes clear that it cannot be so characterized.").

See 20 Cal. 3d at 14 (discussing Bus. & Prof. Code §§ 17535-36). The issue before the Supreme Court of California was whether the action was in the nature of a class action, insofar as restitution was sought for individual victims. *See id.* at 16. The court reasoned:

> An action filed by the People seeking injunctive relief and civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties. The purpose of injunctive relief is to prevent continued violations of the law and to prevent violators from dissipating funds illegally obtained. Civil penalties, which are paid to the government, . . . are designed to penalize a defendant for past illegal conduct. The request for restitution on behalf of vendees in such an action is only ancillary to the primary remedies sought for the benefit of the public. . . . While restitution would benefit the vendees by the return of the money illegally obtained, such repayment is not the primary object of the suit, as it is in most private class actions.

Id. at 17 (citations omitted).

DFEH's lawsuit does not share these fundamental characteristics of a "government enforcement action." DFEH is pursuing claims on behalf of seventeen specific individuals—the "real parties in interest"—and a purported class. It is seeking targeted relief, including both injunctive relief and monetary damages, all of which would specifically benefit the individuals on whose behalf DFEH is proceeding. *See* Complaint ¶¶ 216-225.[6] Unlike in *Pacific Land Research*, the relief sought by DFEH can hardly be described as "ancillary" to any other remedies sought in this action. DFEH is pursuing class claims in this case, and to do so, it must meet the requirements of Fed. R. Civ. P. 23. *See* Gov't Code §§ 12961, 12965(a); *see also* Complaint ¶¶ 7-13.

III. *GENERAL TELEPHONE* DOES NOT SUPPORT DFEH'S POSITION.

DFEH next argues that the Supreme Court's analysis in *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980) is applicable here. According to DFEH, just as the EEOC may pursue group or class relief under Title VII without having a class certified, it may properly proceed with its class claims in federal court without having to meet the certification

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[6] *Pacific Land Research* also notes that an action by the Attorney General on behalf of the People lacks the "fundamental attribute" of a consumer class action because the Attorney General ordinarily is not a member of the class, and his role may be inconsistent with the welfare of the class. 20 Cal. 3d at 18. But here, DFEH's Complaint expressly states that, "[w]ith the assistance of the real parties in interest, the DFEH will fairly and adequately represent the interests of all members of the class in the adjudication of their similar legal claims." Complaint ¶ 13.

requirements of Rule 23. *See* Mot. at 10-15. There are numerous differences between Title VII and the FEHA, however, which underscore why DFEH cannot avoid the class certification requirements of Rule 23 in this case.

Under the FEHA, an action by the DFEH is brought in "in the name of the department on behalf of the person claiming to be aggrieved." Gov't Code § 12965(a). The person claiming to be aggrieved is the real party in interest. *See id.* The FEHA makes specific reference to DFEH pursuing "class" claims, and DFEH can only pursue such claims under the state statute if an alleged unlawful practice "adversely affects, in a similar manner, a group or class of persons of which the aggrieved person filing the complaint is a member, or where such an unlawful practice raises questions of law or fact which are common to such a group or class[.]" Gov't Code § 12961. In contrast, nothing in Title VII describes the "persons aggrieved" as the real parties in interest. 42 U.S.C. § 2000e-5(f)(1). Likewise, nothing in Title VII refers to the EEOC pursuing "class" claims. *See id.*

At a more fundamental level, it is one thing to conclude that a *federal* statute allows a *federal* government enforcement action to be pursued outside the class action requirements of the *federal* rules, as the Supreme Court did in *General Telephone*. But this same analysis cannot be extended wholesale to allow a *state* statute to prescribe the procedure for pursuing purported class claims in *federal* court. This is not a case like *Arizona Civil Rights Division v. Hughes Air Corp.*, 139 Ariz. 309 (1983), cited by DFEH, *see* Mot. at 10 n.6, where a state court applied the *General Telephone* analysis to conclude that a *state* agency could bring a *state* enforcement action in *state* court without satisfying *state* class action requirements.

DFEH argues that "to impose Rule 23 onto this government enforcement action . . . would interfere with the public interest and the enforcement scheme contemplated by the State of California." Mot. at 15.[7] But applying Rule 23 class certification requirements in this case does not impact the substance of the claims being pursued by DFEH. *See Shady Grove*, 559 U.S. at

[7] LSAC cannot be faulted for insisting that federal procedural rules and standards be applied in this federal court proceeding. *See* DFEH Mot. at 15 ("[LSAC] is attempting to argue that we *must* comply with Rule 23 – so that it can later argue that he Department *cannot* comply with Rule 23.").

1443 (Scalia, J., plurality opinion) ("A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged."). It only regulates the procedure by which this action will proceed, and in a manner consistent with the express language of Government Code §§ 12961 and 12965. DFEH can seek class certification pursuant to Rule 23, and, if that is not successful, it can proceed on behalf of the existing real parties in interest (who are already a "group" of individuals on whose behalf DFEH is seeking relief). As the Supreme Court has noted, "[t]o hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." *Hanna*, 380 U.S. at 473-74.

CONCLUSION

For the foregoing reasons, DFEH's motion to proceed for group or class relief without meeting the requirements of Fed. R. Civ. P. 23 should be denied.

Dated: March 7, 2013

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

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