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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

Jane Roes, et al.,

Plaintiff,

v.

Deja Vu Services, Inc., et al.,

Defendant.

Case No. 37-2018-28044-CU-OE-CTL

DEFENDANTS' OPPOSITION TO MOTION TO INTERVENE

Assigned to: Hon. Timothy Taylor
Dept: C-72
Complaint Filed: July 6, 2018

Hearing date: January 18, 2019
Hearing time: 1:30 pm

INTRODUCTION

The 11th hour filing by Shannon Liss-Riordan ("Liss") requesting to intervene and indefinitely stay this action is yet another disruptive effort by Liss to delay and undermine the resolution of potential claims on behalf of a multitude of entertainers throughout the nation. She spends numerous pages disparaging counsel for the parties, omitting crucial facts from the three pending cases involving the proposed intervenors which undermine her arguments to this Court, and inaccurately asserting that the proposed intervenors have a direct interest in the pending settlement. While she represents to meet the threshold for intervention in this action, the actual facts demonstrate that her clients have no direct interest in this action and intervention is not warranted.

The bottom line is that not a single proposed intervenor worked during the putative class period in this case and therefore they have no claim against these defendants for the relief that is subject of the pending settlement. None of their claims have been certified as a class since the federal court has determined that these individuals waived their class claims per *Epic Systems Corp. v. Lewis* 138 S. Ct. 1612 (2018). See Order Granting Motions to Compel Arbitration in *Hughes* and *Pera* attached hereto as Exhibit 1 to Declaration of Tammara N. Bokmuller submitted herewith[1]. Moreover, as Liss repeatedly told the Court on November 2, there are 25 different defendants named in this case, yet the proposed intervenors have only alleged claims against 5 of those defendants in their individual suits[2]. Significantly, these individuals have been ordered to arbitrate their individual wage claims and their PAGA claims have been stayed pending the resolution of the individual arbitrations. Even had these claims not been stayed, PAGA claims are not intended to directly benefit an individual employee, but rather only to directly benefit the State through either the LWDA or its agents, and nothing prevents multiple aggrieved employees from pursuing PAGA claims on their own behalf and on behalf of the

[1] Liss will likely argue to the court that because the federal court granted an amendment to the complaint in *Hughes* to add Diana Tejada as a named Plaintiff, this supports a right to intervention. However, the amendment does not confer a direct and immediate interest by these intervenors. Rather, whether Tejada's claims will be subject to arbitration and whether she can bring a class action remains at issue and is not yet subject to briefing.

[2] The defendants in *Hughes*, *Pera* and *Mehraban* are limited to 4 clubs in San Francisco known as Gold Club, Hustler, Condor and Penthouse, as well as the management company SFBSC.

State in separate suits covering the same time period. *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 386–87 (2014); *Julian v. Glenair, Inc.*, 17 Cal. App. 5th 853, 873, (2017).

The proposed intervenors clearly lack a direct interest in the claims of the putative class in this case and therefore lack sufficient grounds to intervene and stay this action as requested. As such, intervention is not authorized under Code of Civil Procedure Section 387 and must be denied.

LEGAL ARGUMENT

A. Requirements for Intervention

Whether intervention is permissive or mandatory, a petition seeking leave to intervene is required; without permission from the court, a party lacks any standing in the action. *Lohnes v. Astron Computer Products* (2001) 94 Cal. App. 4th 1150, 1153. "The purpose of allowing intervention is to promote fairness by involving all parties potentially affected by a judgment." *Simpson Redwood Co. v. State of California* 196 Cal.App.3d 1192, 1199 (1987).

In determining whether a mandatory right to intervene exists under section 387, the threshold question is whether the person seeking intervention has "an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may impair or impede that person's ability to protect that interest." § 387, subd. (d)(1)(B)[3]; *Mylan Laboratories, Inc. v. Soon–Shiong* 76 Cal.App.4th 71, 78 (1999); *California Physicians' Service v. Superior Court* 102 Cal.App.3d 91, 96 (1980).

For permissive intervention, the party seeking to intervene must have a direct and immediate interest in the outcome of the litigation; i.e., he or she must stand to gain or lose by direct operation of the judgment. *Fireman's Fund Ins. Co. v. Gerlach* 56 Cal. App. 3d 299, 303-305 (1976); *US Ecology, Inc. v. State of Calif.* 92 Cal. App. 4th 113, 140 (2001); *City & County of San Francisco v. State of Calif.* 128 Cal. App. 4th 1030, 1037 (2005). "'A person has a direct interest justifying intervention in litigation where the judgment in the action of itself adds to or detracts from his legal rights without reference to rights and duties not involved in the litigation.' [Citations.] Conversely, 'An interest is consequential and thus insufficient for intervention when the action in which intervention is sought

[3] It should be noted that Liss citations to C.C.P. § 387 is inaccurate as she cites to the former subsections of the code.

does not directly affect it although the results of the action may indirectly benefit or harm its owner.'" *Lindelli v. Town of San Anselmo*, 139 Cal. App. 4th 1499, 1505 (2006).

As set forth below, the proposed settlement in this case does not directly affect the proposed intervenors and therefore under either mechanism for intervention, the motion must be denied.

B. The Proposed Intervenors Do Not Meet the Criteria for Mandatory Intervention

The proposed intervenors contend that mandatory intervention is required because they are "among the dancers who are included in the proposed Roe class action." (Motion at page 11.) They do not offer a single piece of evidence to support this assertion. Upon investigation it turns out that this statement is patently false as none of the proposed intervenors worked during the putative class period and therefore have no direct or immediate interest in this case supporting a right to intervene. See Declarations of Richard Hinkley, Gary Marlin, Jean Claude Pomerleau, Kyriacos Kalfas, and Nicole Turnwald submitted herewith.

Per paragraph 3.10 of the Settlement Agreement the class is defined in pertinent part as "(a) for Entertainers who Performed at one or more of the San Francisco Clubs, the time period from April 14, 2017 to the Preliminary Approval Date (the "San Francisco Class Period"); and b) for Entertainers who performed at one or more of the Greater California Clubs, the time period from February 7, 2017 to the Preliminary Approval Date (the "Greater California Class Period")."

As established by the declarations submitted in support of this Opposition, none of the proposed intervenors worked for any defendant during the defined Class Period. There is not a single proposed intervenor that worked at one of the Defendants' establishments after January, 2017, which is before the putative class period. Rather, the last performance dates for these individuals are as follows:

- Elana Pera June 27, 2016
- Penny Nunez May 5, 2016
- Sarah Murphy February 27, 2015
- Poohrawn Mehraban January 28, 2017
- Nicole Hughes October 9, 2015
- Angelynn Hermes June 20, 2015
- Gypsy Vidal December 18, 2015

Because none of the proposed intervenors worked during the putative class period, these individuals have no wage claims or PAGA claims that are impacted by the outcome of this action such that they lack a direct interest in this action.

It is anticipated that the proposed intervenors will argue that their stayed PAGA claims brought in a representative capacity on behalf of other aggrieved employees are directly affected by this settlement because other aggrieved workers may have claims during the putative class period that will be resolved. However, such an argument does not support intervention. An action under PAGA is designed to protect the public, it is not a benefit private parties. *Arias v. Superior Court* 46 Cal.4th 969, 986 (2009). PAGA is a dispute between the employer and the State, not any individual. *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 386–87 (2014). PAGA plaintiffs are private attorneys general who, stepping into the shoes of the LWDA, bring claims on behalf of the state agency, not on their own behalf. See *Arias, supra*, Cal. 4th at 980. PAGA actions primarily seek to vindicate the public interest in enforcement of California's labor law. See *Sample v. Big Lots Stores, Inc.*, No. C 10–03276 SBA, 2010 WL 4939992, at *3 (N.D.Cal. Nov. 30, 2010); *Franco v. Athens Disposal Co.*, 171 Cal.App.4th 1277, 1300 (2009). The bulk of any recovery goes to the LWDA, not to aggrieved employees. And, the twenty-five percent portion of the penalty awarded to the aggrieved employee does not reduce any other claim that the employee may have against the employer for alleged labor code violations. See *Caliber Bodyworks, Inc. v. Super. Ct.*, 134 Cal.App.4th 365, 378 (2005). The employee's recovery is thus an incentive to perform a service to the State, not restitution for wrongs done to members of the class. *Baumann v. Chase Inv. Services Corp*. (2014) 747 F.3d 1117, 1124 (9th Cir.); *Franco, supra*, 171 Cal. App. 4th at 1300. Furthermore, the courts are clear that nothing prohibits separate but similar actions by different employees against the same employer. *Julian, supra*, 17 Cal. App. 5th at 866.

In this case, the LWDA has been advised of the pending settlement as required pursuant to Labor Code section 2699. It has not asserted an objection to the settlement or otherwise indicated that the settlement of the PAGA claims is insufficient. This PAGA claim is brought for the benefit of the State, not any individual employees, and is authorized to be brought by multiple employees in separate suits, such that any argument that the PAGA claims should only be prosecuted by the intervenors for

their benefit is insufficient to support intervention. The PAGA claims in the *Hughes* and *Pera* actions are stayed pending the completion of the individual arbitrations for the named plaintiffs. Whether or not the PAGA clams ever proceed or relief is afforded is entirely uncertain. This settlement, however, provides an immediate benefit to the LWDA.

C. **Because the Proposed Intervenors Lack any Interest in the Pending Action Permissive Intervention is not Warranted**

Proposed Intervenors contend that they have demonstrated a direct and immediate interest supporting permissive intervention because "absent class members are bound by the doctrine of res judicata in a class action settlement and their claims and those of the class they have sought to represent for the past two years could be wiped out without adequate compensation". First, the claims of the proposed intervenors will not be wiped out because they have no claims during the putative class period. Second, as of now, there is no certified class or class counsel so the adequacy of the settlement as to the class is irrelevant to the issue of whether the proposed intervenors have a direct interest in this action. There is no evidence to dispute that the proposed intervenors have any interest in this action that would justify their intervention.

The proposed intervenors assert at page 14 that the *Hughes* and *Pera* plaintiffs and the class they seek to represent could have their claims released for a much smaller sum compared to what they may recover if their cases go forward in their individual actions; however, this is once again just unsupported speculation by Liss. First, there is no showing that any of the *Hughes/Pera* plaintiffs have claims during the proposed class period here. In fact, they do not. Second, after Liss' proclaimed 2 years of litigation, Liss has not recovered a single cent against these defendants in any of the actions her clients have brought against them or have objected to. In fact, her actions have done nothing but hurt the class members.

For example, in *Doe v. Deja Vu Services, Inc.* et al in the United States District Court for the Eastern District of Michigan, Southern Division, Case No. 1:16-cv-10877, filed March 10, 2016, after preliminary approval of the settlement Liss asserted objections on behalf of two class members to the class action settlement. That settlement covered approximately 28,000 class members over a period of 1,794 days, with a total cash outlay of $1,800,000 – and no conversion. The district court granted final

approval over the objections of Liss and her clients, finding that the settlement was adequate, fair and reasonable. In response, Liss appealed the order, which remains pending in the Sixth Circuit Court of Appeal. Therefore no monies have been distributed to the class, and if Liss has her way, no settlement will be achieved.

Similarly, in *Jane Roes 1-2 v. SFBSC Management, LLC* in the United States District Court for the Northern District of California, Case No. 3:14-cv-03616-LB, filed August 8, 2014[4], after preliminary approval of the settlement Liss asserted objections on behalf of nine class members to the class action settlement. That settlement covered approximately 4,700 class members over a period of 2,439 days, with a total cash outlay of $2,000,000 – and no conversion. The district court also granted final approval over the objections of Liss and her clients finding that the settlement was adequate, fair and reasonable. In response, Liss appealed the order, which remains pending on the Ninth Circuit. Again, no monies have been distributed to the class.

In *Hughes v. S.A.W. Entertainment, Ltd*., pending in the Northern District of California Case No. 16-cv-003371 filed June 16, 2016, and *Pera v. S.A.W. Entertainment, Ltd*., pending in the Northern District of California Case No. 17-cv-00138-LB filed January 11, 2017, the court has ordered the individual claims to arbitration, staying the PAGA claims.

This counsel is not aware of a single case where Liss has either achieved a settlement or an award against one of these Defendants. Liss has done little for the class other than to delay payment and disrupt any chance of class members receiving any type of compensation. The class members are largely transitory such that as time goes on there is a far less likelihood that the class members will be located in order to accept payment. To assert that Liss will obtain an award in excess of the proposed settlement for the class is baseless conjecture unsupported by any affirmative conduct.

D. The Proposed Class is Adequately Represented

Liss' arguments that the proposed class is not adequately represented fails to meet the most basic showing and is merely a biased conclusion. The question is not whether counsel will adequately

[4] It should be noted that class counsel in *Jane Roes 1-2 v. SFBSC Management, LLC* is not in any way related to Sommers Schwartz, P.C., counsel of record in the current action. Sommers Schwartz played no role in achieving that settlement which was approved by the federal court under terms that are not as advantageous to the class as those asserted in the present case.

represent the class, the question is whether the class representatives will adequately represent the class members. See *Capitol People First v, State Dept of Developmental Services*, 155 Cal.App. 4th 676, 696-697 (2007) ["To assure 'adequate' representation, the class representative's personal claim must not be inconsistent with the claims of the others members of the class".] Here, there is no argument that the Roe Plaintiffs adequately represent the class. Rather, the argument is that counsel does not adequately represent the class. In support she states that Plaintiffs' counsel here have not adequately accounted for the interests of the *Hughes* and *Pera* Plaintiffs" and "[c]ounsel for plaintiffs in this case has previously entered into insufficient, coupon based settlements involving these same defendants that is subject of the appeal in *Doe v. Déjà Vu*, No. 17-1801 (6th Cir.)". First, since the *Hughes* and *Pera* plaintiffs have no interest in this action because their claims fall outside the putative class period, there can be no finding that their interests are not adequately addressed by the Roes or Plaintiffs' counsel. Second, the pending settlement does not include any coupon based recovery so the relevance of that statement is puzzling and should have no impact on whether Plaintiffs' counsel can adequately represent the class here. Third, the *Doe* settlement she cites to as the basis for her claim that counsel is inadequate was approved by the federal court over her objections, indicating that at least one court has determined that class counsel was adequate.

In short, just because Liss does not agree with the settlement, this does not mean that the class is not adequately represented. The proposed intervenors are not part of the putative class and therefore any claim that the interests of the Roes are in conflict with those of the proposed intervenors is insufficient to support intervention in this case.

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CONCLUSION

The proposed intervenors have failed to demonstrate that there is any basis to intervene and stay this action. Their individual claims fall outside the putative class period such that they lack any interest in the outcome of these proceedings. As such, the motion to intervene must be denied.

Dated: November 15, 2018

CLARK HILL LLP

By: _____
Tammara N. Bokmuller
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