

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

<p>National Federation of the Blind et al Plaintiff/Petitioner(s) VS. PSI Services, LLC et al Defendant/Respondent(s)</p>	<p>No. 21CV000126 Date: 01/31/2023 Time: 3:00 PM Dept: 23 Judge: Brad Seligman ORDER re: Hearing on Demurrer - with Motion to Strike (CCP 430.10)</p>
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The Demurrer filed by California Department of Insurance on 10/17/2022 is Overruled.

Defendant California Department of Insurance’s Demurrer to Plaintiffs’ Second Amended Complaint is OVERRULED.

BACKGROUND

Plaintiffs initiated this action on October 12, 2021, and filed the currently operative second amended complaint (“SAC”) on August 2, 2022. The SAC asserts four causes of action for violations of (1) Government Code § 11135, et seq., (2) the Unruh Civil Rights Act, and (3) the Disabled Persons Act, as well as a claim for (4) declaratory relief.

A. Parties and General Allegations

Defendant California Department of Insurance (“CDI”) regulates insurance sales agents in California and requires a licensing exam for agents who wish to sell insurance in the State. (SAC, ¶ 33.) CDI engages Defendant PSI Services, LLC (“PSI”) to administer these licensing exams, including administering exams over the internet. (SAC, ¶ 36.)

Plaintiffs allege that CDI and PSI discriminate against Plaintiffs, who are blind and use a screen reading device to access information on a computer. (SAC, ¶¶ 1-3.)

The SAC alleges that the individual Plaintiffs Fowler, Mendez, and Cohen could not take the exam online because the exam system was incompatible with their screen readers (SAC, ¶ 49); Plaintiffs were deterred from taking the exam online because of the “accommodation process,” which requires test takers to submit “medical documentation” of a disability (SAC, ¶ 77); and/or the request for accommodations resulted in a delay in scheduling the exam (SAC, ¶ 95).

B. Allegations in the Second Amended Complaint

The SAC adds the National Federation of the Blind (“NFB”) as a named Plaintiff. The SAC also includes Does 1 through 100, which were added to the First Amended Complaint, filed on January 25, 2022.

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The individual Plaintiffs allege to be members of NFB (SAC, ¶¶ 14, 16, 18), which is a nonprofit corporation organized under the laws of the District of Columbia with its principal place of business in Baltimore, Maryland (SAC, ¶ 20). NFB has approximately 50,000 members, with members and affiliates in all 50 states, Washington, D.C., and Puerto Rico. (SAC, ¶ 20.) “The purpose of the NFB is to promote the general welfare of the blind” and “ensure that the blind receive equal access to the opportunities, facilities, services, programs, and activities offered by state agencies.” (Ibid.)

The first cause of action for violation of Government Code § 11135, et seq., is asserted by the individual Plaintiffs against “Defendants and PSI and CDI,” and by NFB against “All Defendants.” (SAC, p. 15.)

The second cause of action for violation of the Unruh Act is asserted by the individual Plaintiffs against “Defendants PSI and CDI.” (SAC, p. 20.)

The third cause of action for violation of the Disabled Persons Act is asserted by the individual Plaintiffs against PSI only. (SAC, p. 22; MPA, p. 6, fn. 1.)

The fourth cause of action is asserted by the individual Plaintiffs against Defendants PSI and CDI, and by NFB against “All Defendants.” (SAC, p. 24.)

The SAC purports to challenge “the failure of other Doe Defendants who contract with PSI to ensure that the online technology used for state licensing exams...are independently accessible to applicants with disabilities.” (SAC, ¶ 4.) NFB alleges that it is “unaware currently of which agencies are still actively using PSI’s inaccessible online exam software” and will “amend their listing of Doe Defendants after appropriate discovery occurs.” (SAC, ¶ 27 [listing state agencies that schedule exams through PSI].)

In asserting the individual causes of action against Doe Defendants, the SAC includes the named Defendant(s) “and any other Doe Defendant state agency.” (See, e.g., SAC, ¶ 121, 190.)

LEGAL FRAMEWORK

The standard for construing a complaint on demurrer is long settled: “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed. [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]” (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

DISCUSSION

Defendant CDI demurs to the first and fourth causes of action on the basis that (1) the Doe Defendants are improperly joined and (2) NFB lacks standing to sue “on behalf of its unidentified members arising out [of] the claims asserted against the Doe Defendants” and PSI. (Notice of Demurrer and Demurrer, p. 2.)

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The Court assumes *arguendo* that CDI may assert these arguments on behalf of others.

A. Doe Defendants

In California, “a plaintiff who is ignorant of a defendant’s identity [may] designate the defendant in a complaint by a fictitious name (typically, as a ‘Doe’), and to amend the pleading to state the defendant’s true name when the plaintiff subsequently discovers it.”

(*McClatchy v. Coblentz, Patch, Duffy & Bass, LLP* (2016) 247 Cal.App.4th 368, 371, citing Code of Civil Procedure § 474.) Section 474 is a procedural device “for adding defendants after the statute of limitations has expired.” (*Ibid.*)

CDI’s demurrer on this issue is premature because Doe Defendants are not parties to the litigation. The cases cited by CDI are all distinguishable because they involve analysis of whether named parties were properly joined. (*Petersen v. Bank of America Corp.* (2014) 232 Cal.App.4th 238 [involving 965 plaintiffs and six named defendants]; *David v. Medtronic, Inc.* (2015) 237 Cal.App.4th 734 [considering joinder of Medtronic, Wyeth, and a Medtronic employee]; *Moe v. Anderson* (2012) 207 Cal.App.4th 826 [considering joinder of claims involving two “separate and distinct sets of plaintiffs (i.e., (1) Paula and Robert, and (2) Edelmira and Richard) [who] sued Anderson for separate and distinct sexual assaults during separate and distinct time periods”]; *Jensen v. Home Depot, Inc.* (2018) 24 Cal.App.5th 92 [considering joinder of claims by two named plaintiffs]; *Landau v. Salam* (1971) 4 Cal.3d 901 [considering joinder of claims against defendants “Mary Salam and Charge A Car, Inc.”]; *Kraft v. Smith* (1944) 24 Cal.2d 124 [“Plaintiffs, husband and wife, have joined as defendants in one action Drs. Joseph Smith and E. C. Innis, physicians and surgeons, who independently of each other, treated plaintiff wife at different times and places...”]; *Hoag v. Superior Court* (1962) 207 Cal.App.2d 611, 613 [“The complaint contains twelve causes of action, one on behalf of each of the three plaintiffs against each of the four defendants.”]; *Coleman v. Twin Coast Newspaper, Inc.* (1959) 175 Cal.App.2d 650, 652 [“Each plaintiff set forth a separate cause of action against three named defendants...”].)

CDI provides no authority—and this Court can find none—where a demurrer was sustained based upon misjoinder of Doe Defendants. This is likely because, prior to being named by amendment and served with process, a Doe Defendant is “not a party to the litigation.” (*McClatchy, supra.*, 247 Cal.App.4th at p. 375; see also *Liera v. Los Angeles Finance Co.* (1950) 99 Cal.App.2d 254, 257 [finding Doe Defendant could not seek change of venue]; *Mercantile Trust Co. of San Francisco v. Stockton Terminal & E.R. Co.* (1919) 44 Cal.App.558, 560 [finding doe defendant “had no right to appear” in the action because doe defendant “was not by name a party to the suit, and he was not served as one of those sued by a fictitious name”].)

Further, even if CDI’s argument were not premature *arguendo*, the Court declines to engage in a fact-based and, on this record, speculative analysis of whether some unknown entity’s potential liability arises from the same transaction, or whether the claims share common questions. In any event, the Court generally dismisses unnamed Doe Defendants on the first day of trial.

Therefore, Defendant’s Demurrer is **OVERRULED** insofar as it is based upon misjoinder of the Doe Defendants. The Court overrules the demurrer on the limited basis that the argument is premature and expresses no opinion about the Doe allegations or propriety of any subsequent

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joinder.

B. Associational Standing

Next, CDI argues that NFB fails to establish it has associational standing “against the Doe Defendants and PSI.” (MPA at 10:8-9.) NFB asserts two causes of action against “All Defendants”—the first cause of action for violation of Government Code § 11135, et seq., and the fourth cause of action for declaratory relief—however, CDI challenges standing as to the Doe Defendants and PSI only, and does not challenge standing as to CDI, itself.

For the reasons stated above, the Court declines to assess whether NFB has associational standing as to the Doe Defendants.

The Demurrer is **OVERRULED** insofar as Defendant argues NFB lacks standing as to PSI.

The parties agree that California courts follow the federal three-factor test for associational standing set forth in *Hunt v. Washington Apple Advertising Com’n* (1977) 432 U.S. 333, 343. (MPA, 10:8-18, citing *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1004; *Opposition*, 7:23-8:4, citing *Assn for Los Angeles Deputy Sheriffs v. Macias* (2021) 63 Cal.App.5th 1007, 1019.)

Under *Hunt*, an association has standing to sue on behalf of its members where (1) its members would otherwise have standing to sue as individuals, (2) the interests sought to be protected are germane to the association’s purpose, and (3) neither the claim nor the relief requires participation of individual members in the lawsuit. (*Macias*, supra, p. 1019.)

CDI argues that NFB fails to satisfy the first and third requirements. (MPA, 10:17-18.)

1. Individual Standing

CDI argues that NFB fails to identify any specific member who would have standing to sue individually, and that the allegations do not satisfy the particularity requirement for claims against public entities.

First, it is unclear that the particularity requirement would apply to PSI, which is alleged to be a private entity. (SAC, ¶ 3.) However, assuming arguendo it does, the Court would not find that NFB’s associational standing fails under the first *Hunt* factor.

CDI relies upon *Coalition for ICANN Transparency Inc. v. VeriSign, Inc.* (N.D. Cal. 2006) 452 F.Supp.2d 924, which is not only readily distinguishable but also supports the conclusion that NFB satisfies the first element of the *Hunt* test.

First, *Coalition for ICANN Transparency* is distinguishable because the complaint contained only “a single cryptic sentence about its members’ identities.” (*Id.*, p. 934.) Here, the three individual Plaintiffs allege to be members of NFB. (SAC, ¶¶ 14, 16, 18.) CDI does not challenge the standing of the individual Plaintiffs.

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On reply, CDI suggests that standing based upon a named plaintiff's allegations "belies logic." (Reply, 10:24.) However, ICANN cited *Clark v. McDonald's Corp.* (D.N.J. 2003) 213 F.R.D. 198, which found that an association satisfied the first element of the Hunt test vis-a-vis the individual plaintiff, who was a member of the association. (*Id.*, p. 935 ["In addition, the [Clark] court reasoned, Clark's Access Today membership satisfied Hunt's first prong and conferred associational standing upon the organization."]; see also *Clark*, supra, p. 215 ["The short answer to Defendants' present challenge, therefore, is that Clark's standing, albeit limited, enables Access Today to satisfy the first prong of the Hunt test."].)

Clark similarly "disagree[d]" with the defendant's argument that an association's "standing is concomitantly limited so as to be coextensive with the standing Clark [the individual plaintiff] enjoys." (*Clark*, supra, p. 215; see also ICANN, supra, pp. 935-936 [noting that the Clark "court found unpersuasive [defendant's] novel theory that Clark's standing shaped the contours of other Access Today members' standing"].)

CDI's attempt to distinguish standing "arising out of PSI's contracts with the Doe Defendants" from standing "arising out of PSI's contract with CDI" requires an "exactitude" that even federal courts (which generally apply a stricter pleading standard) consider to be "an 'exaggerated' pleading requirement as it relates to associational standing." (*Clark*, supra, p. 215-216, quoting *Hospital Council of W. Penn. v. City of Pittsburg* (3d Cir. 1991) 949 F.2d 83, 88.)

Therefore, for purposes of CDI's demurrer, NFB satisfies the first Hunt element.

2. Individual Participation

Finally, CDI argues that "the claims asserted against the Doe Defendants require proof, for each individual members NFB represents, that he or she was" discriminated against. (MPA, 12:4-9, citing *Cohen v. City of Culver City* (9th Cir. 2014) 754 F.3d 690, 695 [stating the requirements to prevail on a Title II claim].)

CDI relies upon *American Baptist Churches in the U.S.A. v. Meese* (N.D. Cal. 1989) 712 F.Supp. 756, for the proposition that associational standing may be improper even where the association seeks only declaratory or injunctive relief. (MPA 12:15-19.) However, as Plaintiffs note in opposition, *National Ass'n for Advancement of Colored People v. Ameriquest Mortg. Co.* (C.D. Cal. 2009) 635 F.Supp.2d 1096 distinguished *Meese*, finding that it "actually argues against Defendants' position" that "discrimination allegations require individualized proof, and thus member participation is necessary." (*Id.*, p. 1103.) CDI does not address *Ameriquest Mortgage* on reply. (Reply, 11:12-12:13.)

Nor does CDI address Plaintiffs' cited cases finding that NFB and similar organizations satisfy the third Hunt factor and have standing to assert claims for injunctive and declaratory relief based upon alleged violations of the ADA, Unruh Act, and Disabled Persons Act. (*National Federation of Blind v. Target Corp.* (N.D. Cal. 2007) 582 F.Supp.2d 1185, 1192 [finding NFB had associational standing to seek injunctive relief based upon claims that Target.com was inaccessible to blind individuals]; see also *National Federation of the Blind of Cal. v. Uber Techs., Inc.* (N.D. Cal. 2015) 103 F.Supp.3d 1073, 1079 [finding National Federation of the Blind of California had standing to seek declaratory and injunctive relief based upon claims that

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Uber drivers discriminated against blind individuals by refusing to transport their service animals].)

Therefore, CDI's Demurrer is **OVERRULED** to the extent it challenges NFB's associational standing.

The Court orders counsel to obtain a copy of this order from the eCourt portal.

Dated: 01/31/2023

A handwritten signature in black ink, appearing to read 'Brad Seligman', is centered on the page.

Brad Seligman / Judge