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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

MANMOHAN DHILLON et al.,

Plaintiffs and Appellants,

v.

ANHEUSER-BUSCH, LLC et al.,

Defendants and Respondents.

F074952

(Super. Ct. No. 14CECG03039)

OPINION

APPEAL from an order of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Hulett Harper Stewart, Dennis Stewart; Gustafson Gluek, Dennis Stewart, Daniel C. Hedlund, Michelle J. Looby, Joshua J. Rissman; Coleman & Horowitz, Darryl J. Horowitz, Sherrie M. Flynn; Freedman Boyd Hollander Goldberg Urias & Ward, Joseph Goldberg, Michael Goldberg, John W. Boyd, Nicholas T. Hart and Frank T. Davis, Jr., for Plaintiffs and Appellants.

Wanger Jones Helsley, Oliver W. Wanger, Patrick D. Toole; Cadwalader, Wickersham & Taft, Peter E. Moll and Brian D. Wallach for Defendant and Respondent Anheuser-Busch, LLC.

Chielpegian Cobb and Mark E. Chielpegian for Defendant and Respondent Donaghy Sales, LLC.

Plaintiffs appealed from the denial of their motion for class certification, contending the trial court erroneously determined their proposed class was not ascertainable. We initially affirmed the order. The Supreme Court granted review, then transferred the matter back to this court to reconsider it in light of the recent decision in *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955 (*Noel*). Applying the rules governing ascertainability, as clarified by the Supreme Court, we conclude the trial court's basis for denial of the motion cannot be upheld. The order must be reversed and the matter remanded to the trial court for a redetermination of the class certification motion.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this action on behalf of themselves and a class of persons similarly situated. The second amended complaint alleged the following: Plaintiffs and the class they seek to represent own and operate retail convenience stores in Fresno and Madera counties, and sell beer manufactured by defendant Anheuser-Busch, LLC (Anheuser-Busch), which plaintiffs purchased from its distributor, defendant Donaghy Sales, LLC (Donaghy). California law requires wholesalers of beer to sell to retailers on a nondiscriminatory basis and to charge only the prices filed with the Department of Alcoholic Beverage Control (ABC). A wholesaler may not charge a special price to a particular customer. The wholesaler's prices may be modified by filing a new or amended schedule of prices with the ABC.

Plaintiffs alleged that, in violation of the wholesale beer pricing and unfair competition laws, defendants engaged in a systematic scheme to favor certain retailers over others in the pricing of beer defendants sold to them. During the class period (the four-year period preceding the filing of the complaint), Donaghy sold beer to certain retailers at effective wholesale prices that were lower than the prices filed with the ABC. It did this by providing certain "favored retailers" with disproportionately large numbers of consumer coupons for discounts off the retail price of beer. Instead of providing the coupons to consumers, however, the favored retailers redeemed them themselves, not

related to a particular sale of beer to a consumer as required by the coupons. They redeemed the coupons by presenting them to Donaghy for credit against a subsequent purchase of beer, by redeeming them through a third-party redemption center, or, if in the form of a check, by depositing the check in the retailer's bank account. Some aspects of the scheme were known to "non-favored retailers, the members of the proposed class," who were provided "comparatively insignificant numbers of coupons," but the full extent of the scheme was concealed from the named plaintiffs and the proposed class.

Plaintiffs alleged that, as a result of this scheme, favored retailers who received the coupons effectively paid wholesale prices below the prices filed with the ABC, and lower than the prices paid by disfavored retailers; this gave the favored retailers an unfair competitive advantage because they could sell beer at retail at a price below the wholesale price paid by the disfavored retailers. This forced the disfavored retailers to match, or attempt to match, the favored retailers' lower prices, often at below the disfavored retailers' wholesale prices. Defendants also sometimes dictated the retail prices the disfavored retailers could charge, requiring them, through threats of retaliation, to charge higher prices than the favored retailers.

The second amended complaint alleged brothers Vinay Vohra and Vikram Vohra (collectively the Vohra brothers), as well as others to be identified later, were favored retailers and conspirators with defendants. They allegedly accepted large numbers of coupons and used them to compete unfairly, including by selling at retail below the wholesale price filed with the ABC, "in active cooperation with the Defendants." Plaintiffs alleged four causes of action: (1) unlawful business practices (Bus. & Prof. Code, § 17200 et seq.); (2) unfair business practices, including allegations of incipient violation of antitrust law (Bus. & Prof. Code, § 17200 et seq.); (3) secret payment or allowance of rebates (Bus. & Prof. Code, § 17045); and (4) soliciting or participating in a violation of the unfair competition laws (Bus. & Prof. Code, §§ 17047, 17048).

Plaintiffs filed a motion for class certification. They defined the class to be certified as:

“All persons who own retail business establishments in Fresno and Madera Counties classified in the Donaghy sales database within one of the following channel descriptions and channel id numbers (‘Cid#’): a) Convenience/Cid#190); b) Oil and service/Cid#195); c) Grocery/Cid#265; d) Gas and convenience/Cid#294; e) Package liquor/Cid#290; f) Mom and Pop/Cid#175; g) Deli/Cid#180; h) Bodega/Cid#185; and i) Package Liquor/Cid#290 and which purchased from Defendant Donaghy beer manufactured and/or sold by Defendant Anheuser-Busch during the period from October 10, 2010 through December 31, 2014 excluding [the] Vohra [brothers] and Hardeep Singh and all entities owned, controlled by or affiliated with any of them.”

Defendants opposed the motion. The trial court denied the motion, concluding plaintiffs failed to demonstrate the existence of an ascertainable class. Plaintiffs appealed, and we issued an opinion affirming the order. Plaintiffs’ petition for review by the Supreme Court was granted. Subsequently, the Supreme Court transferred the matter back to this court, with instructions to vacate our decision and reconsider the matter in light of its recent decision in *Noel*. We vacated our prior decision, and now reconsider the matter as directed.

DISCUSSION

I. Standard of Review

“The denial of certification to an entire class is an appealable order.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) “On review of a class certification order, an appellate court’s inquiry is narrowly circumscribed. ‘The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: “Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.”’ [Citation.] A certification order generally will not be disturbed unless (1) it is

unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]’ [Citations.] ... We must ‘[p]resum[e] in favor of the certification order ... the existence of every fact the trial court could reasonably deduce from the record’ ” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022.)

“[A]ppellate review of orders denying class certification differs from ordinary appellate review. Under ordinary appellate review, we do not address the trial court’s reasoning and consider only whether the result was correct. [Citation.] But when denying class certification, the trial court must state its reasons, and we must review those reasons for correctness.” (*Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1221.) “We review the trial court’s actual reasons for granting or denying certification; if they are erroneous, we must reverse, whether or not other reasons not relied upon might have supported the ruling.” (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530.)

II. Standards for Class Certification

Class actions are authorized “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.” (Code Civ. Proc., § 382.) “Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. [Citations.] In turn, 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.’ ” (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.) The class representative must also demonstrate the proposed class action would be manageable and

would be superior to alternative means of proceeding. (*Noel, supra*, 7 Cal.5th at p. 968; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 922–923.)

“The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’ ” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) A plaintiff seeking class certification bears the burden of satisfying the requirements for certification, including the element of ascertainability. (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 154.) Pleadings are not evidence and cannot satisfy the plaintiff’s evidentiary burden. (*Ibid.*) The trial court may consider the totality of the evidence, including evidence presented by the defendant, in determining whether the plaintiff has established the elements required for class certification. (*Ibid.*)

III. Standards for Determining Whether Class Is Ascertainable

In *Noel*, the plaintiff filed a putative class action, alleging the packaging of an inflatable outdoor pool he purchased from the defendant misled buyers about the size of the pool. (*Noel, supra*, 7 Cal.5th at p. 961.) He moved for class certification, defining the plaintiff class as “ ‘[a]ll persons who purchased the Ready Set Pool at a Rite Aid store located in California within the four years preceding the date of the filing of this action.’ ” (*Id.* at p. 963.) The plaintiff supported the motion with evidence of the number of pools sold in California and the revenue defendant obtained from these sales, but did not address whether defendant had records of the transactions that would identify the buyers. (*Ibid.*) The trial court denied class certification, finding the plaintiff had not met his burden of showing the class was ascertainable, because he presented no evidence regarding the method that would be used to identify the class members, the records that were available to identify them, or how the records would be obtained. (*Id.* at pp. 964–965.)

Because the *Noel* court concluded existing case law did not clearly explain what the element of ascertainability in class certification entailed, it clarified that element.

(*Noel, supra*, 7 Cal.5th at pp. 967, 969.) The court noted there were two basic views of the ascertainability requirement expressed in appellate decisions. (*Id.* at p. 974.) In the first view, a “ ‘class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.’ ... A similar formulation regards a class as ascertainable when it is defined ‘in terms of objective characteristics and common transactional facts’ that make ‘the ultimate identification of class members possible when that identification becomes necessary.’ ” (*Ibid.*) The second view “entails a more exacting inquiry,” which requires an “examination into ‘(1) the class definition, (2) the size of the class and (3) the means of identifying class members.’ ” In this view, “ ‘[c]lass members are “ascertainable” where they may be readily identified without unreasonable expense or time by reference to official records.’ ” (*Ibid.*)

The court rejected the second view, and specifically the notion that a class action plaintiff was required to prove “the existence of records (or some other mechanism or channel) through which individual class members can be identified for the purpose of providing them with personal notice of the proceeding.” (*Noel, supra*, 7 Cal.5th at p. 975.) It observed: “due process does not invariably require that personal notice be directed to all members of a class in order for a class action to proceed, or for that matter that an individual member of a certified class must receive notice to be bound by a judgment. [Citations.] It follows that a construction of the ascertainability requirement that presumes such notice *is* necessary to satisfy due process, and demands that the plaintiff show how it can be accomplished, threatens to demand too much, too soon. It is likewise mistaken to take a categorical view that the relevant due process interests can be satisfied only when ‘official records’ [citation] supply the means of identifying class members.” (*Id.* at p. 984.)

The court also rejected imposing on the plaintiff the additional burden of demonstrating that individual members of the class could be readily identified without unreasonable expense or time. (*Noel, supra*, 7 Cal.5th at p. 985.) “With such a requirement, class certification may be denied on ascertainability grounds due to expected complexities in the provision of notice, or in distinguishing class members from nonmembers—without close consideration necessarily being given to whether these difficulties are actual, as opposed to merely hypothetical, or whether they are so intransigent and pervasive that they would make a class proceeding unmanageable, or undesirable in light of the plausible alternatives.” (*Id.* at pp. 975–976.) Class certification involves careful weighing of the benefits and burdens of the proposed class action, and focusing on the potential difficulty of identifying class members “trains the court’s attention, at a threshold juncture, exclusively toward the side of the ledger where costs and challenges are compiled,” without giving adequate attention to countervailing considerations. (*Id.* at p. 985.) Instead, the court noted, difficulties in identifying or notifying members of the class may be considered in connection with other elements of the class certification analysis, such as whether a class action would be manageable or whether it would be superior to alternative procedures. (*Id.* at p. 986.)

The court adopted the first view of the ascertainability requirement, concluding “that the functions properly assigned to the ascertainability requirement are best served by regarding a class as ascertainable when it is defined ‘in terms of objective characteristics and common transactional facts’ that make ‘the ultimate identification of class members possible when that identification becomes necessary.’ ” (*Noel, supra*, 7 Cal.5th at p. 967.) This standard includes “class definitions that are ‘sufficient to allow a member of [the class] to identify himself or herself as having a right to recover based on the [class] description.’ ” (*Id.* at p. 980.) It excludes classes that are defined too vaguely, are defined by subjective criteria, such as by a person’s state of mind, or are defined in terms of success on the merits. (*Id.* at pp. 977, 980–981 & fn. 12.)

Thus, in order to demonstrate the proposed class is ascertainable, a class action plaintiff need not show, at the time of class certification, how the members can be identified, or how the members can be distinguished from those who are not members of the class. The plaintiff need only show that the proposed class is defined in terms of objective characteristics and common transactional facts that make it possible to identify the class members when that becomes necessary. We interpret *Noel* to mean a plaintiff can satisfy its burden of showing it will be possible to identify the class members when necessary by showing the definition will allow the members either to identify themselves as part of the class or to be identified through records of relevant transactions.¹

Issues such as how to identify the members of the class, how to distinguish them from those who are not included in the class, and how to notify the class members of the class action may be considered in connection with elements in the class certification analysis other than ascertainability, such as: whether the issues common to the entire class predominate over individual issues or issues common only to a smaller group within the class; and whether, with the class as defined, a class action would be manageable and superior to other methods of proceeding.

IV. Application to the Trial Court's Ruling

The trial court applied a test of ascertainability that included elements rejected by *Noel*. The standards it discussed included examining the means available to identify class members and determining whether the class members could be readily identified without unreasonable expense or time by reference to official records. It added: "Class certification is properly denied for lack of ascertainability when the proposed definition is overbroad and the plaintiff offers no means by which only those class members who have claims can be identified from those who should not be included in the class" (citing *Hale*

¹ We are not suggesting these are the exclusive means of identifying class members. They also may be identifiable through some combination of these two methods, or through other means, depending upon the circumstances of the particular case.

v. Sharp Healthcare (2014) 232 Cal.App.4th 50, 58–59, disapproved by *Noel, supra*, 7 Cal.5th at p. 986, fn. 15). The trial court concluded “the class is either unascertainable, or is ascertainable only based on a case-by-case reference to [Donaghy’s] business records, and some other unknown and unidentified criteria to determine who allegedly conspired with Defendants ... , and is thus not a class member Plaintiffs have offered no means by which only those class members who have claims can be identified without unreasonable expense [or] time by reference to official records.”

The trial court discussed differences between the class definition alleged in the second amended complaint,² the class definition presented for approval in the motion for class certification, and the substantive allegations made in the second amended complaint. It noted the second amended complaint alleged disfavored retailers (the proposed class members) were being hurt by the actions of defendants and their favored retailers and coconspirators. Favored retailers allegedly were those who received disproportionately large numbers of coupons. The Vohra brothers were alleged to be favored retailers and coconspirators. The class definition proposed in the motion for class certification excluded them and Hardeep Singh by name, as well as the entities they owned or controlled. The trial court noted plaintiffs did not identify any objective criteria to define “favored retailers” or explain how they determined that only the Vohra brothers and Singh were favored retailers and coconspirators and should be excluded from the

² The second amended complaint defined the proposed class as:

“All persons who own retail business establishments in Fresno and Madera Counties where that retail business establishment, or if the person owns more than one such establishment at least one of those establishments, is of a physical size not exceeding 5,000 square feet (‘Convenience Store’) and purchased from Defendant Donaghy beer manufactured and/or sold by Defendant Anheuser-Busch during the period from four years prior to the filing of this Complaint to the date of the filing of this Complaint (the ‘class period’), excluding persons identified in this Complaint as co-conspirators with Defendants Donaghy and Anheuser-Busch and any co-conspirators subsequently identified after the filing of this Complaint.”

class on that basis. It discussed the reports of plaintiffs' experts, filed in support of the motion, which failed to define "favored retailers" and used that term to refer to retailers identified by plaintiffs' counsel in multiple different lists that did not include all of the same retailers. The trial court concluded plaintiffs had provided no explanation, and no evidence, regarding how the favored retailers or coconspirators could be identified, through Donaghy's business records or otherwise, and excluded from the class. Plaintiffs failed to identify the means available for identifying class members without unreasonable effort by reference to official records, and therefore failed to demonstrate the existence of an ascertainable class.

In our prior unpublished opinion, *Dhillon v. Anheuser-Busch, LLC* (Jan. 28, 2019, F074952), we concluded that defining the proposed class in terms of Donaghy's sales categories would not appear to enable persons hearing the definition to determine whether they were members of the class. Further, we noted the lack of consistency between the allegations of the second amended complaint and plaintiffs' experts' reports on the one hand, and the class definition proposed in the motion for class certification on the other. The second amended complaint was alleged in terms of favored retailers, coconspirators, and disfavored retailers. The expert reports used those same terms and relied on lists of favored retailers that included 18 to 35 retailers. Nonetheless, in the class definition presented in the motion for class certification, plaintiffs proposed to exclude only the Vohra brothers and Singh from the class, apparently as favored retailers and coconspirators. We concluded plaintiffs could not avoid the requirement that the proposed class be defined in terms of objective characteristics and common transactional facts by naming individuals excluded from the proposed class, based on unexplained criteria they applied. We affirmed the trial court's denial of class certification, finding the trial court properly concluded plaintiffs failed to establish an ascertainable class.

Under *Noel*, the current test of ascertainability is whether the proposed class is defined in terms of objective characteristics and common transactional facts that make it

possible to identify the class members when that becomes necessary. (*Noel, supra*, 7 Cal.5th at p. 967.) The standard includes both proposed classes whose members may be identified by relevant records, and proposed classes whose members may identify themselves as members of the class based on the class definition.

Plaintiffs' proposed class definition contains common transactional facts: that the retailers "purchased from Defendant Donaghy beer manufactured and/or sold by Defendant Anheuser-Busch" during the specified time period. It also appears to contain objective characteristics: the proposed class consists of owners of certain types of retail businesses, defined by categories in Donaghy's sales records, and excluding specified individuals and their entities. The specified categories of retailers may not be familiar or understandable to persons who are not privy to Donaghy's records, and may not make self-identification feasible. However, assuming plaintiffs demonstrated these categories actually appeared in Donaghy's records during the time period in issue, and identified types of retailers to whom Donaghy sold Anheuser-Busch beer during that period, a retailer's inclusion in those records would provide an objective characteristic that would permit identification of the retailers who are members of the proposed class when that becomes necessary.

The exclusion from the proposed class of the Vohra brothers, Singh, and their retail entities, and no other "favored" retailers, appears to present issues more appropriately considered in connection with the other elements of the class certification analysis: a well-defined community of interest and substantial benefits to the litigants and the court from class certification.

In light of *Noel's* clarification of the element of ascertainability, we conclude the trial court's decision rested on improper criteria or erroneous legal assumptions and must be reversed. We must remand to the trial court to determine whether the evidence presented by plaintiffs demonstrates the categories in their proposed class definition actually exist in Donaghy's records, and make " 'the ultimate identification of class

members possible when that identification becomes necessary.’ ” (*Noel, supra*, 7 Cal.5th at p. 967.) If the trial court determines the proposed class as defined in plaintiffs’ motion for class certification is ascertainable under *Noel*, it must then analyze the other elements required for class certification, and determine whether plaintiffs have demonstrated their action is appropriate for class treatment.

In light of *Noel*’s narrow construction of the ascertainability requirement, the concern about the disconnect between the class definition proposed in the motion for class certification and the theories of liability set out in the second amended complaint and expounded on in the expert reports submitted in support of the motion (which contrast favored and disfavored retailers, although both groups appear to be included in the proposed class definition) would be better addressed in connection with other elements of the class certification analysis. In considering the element of predominant questions of law or fact, for example, the trial court must examine the allegations of the pleadings to determine the issues that must be litigated, then consider whether the pleadings and the evidence submitted demonstrate that the legal and factual issues common to the proposed class, as it is now defined by plaintiffs, predominate. It must determine whether the issues presented “are such that their resolution in a single class proceeding would be both desirable and feasible,” that is, “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.’ ” (*Brinker Restaurant Corp. v. Superior Court, supra*, 53 Cal.4th at pp. 1021–1022.) The trial court must also consider the other elements of the class certification question—whether, in light of the pleadings, declarations, and expert reports, the claims of the class representatives are typical of those of the proposed class, the class representatives can adequately represent the interests of the proposed class as a whole, and the proposed class action would be manageable and superior to other methods of proceeding.

DISPOSITION

The order denying plaintiffs' motion for class certification is reversed. The matter is remanded to the trial court for a redetermination of that motion, in light of *Noel* and this opinion, based on an analysis of all the elements required for class certification. Plaintiffs are entitled to their costs on appeal.

HILL, P.J.

WE CONCUR:

SMITH, J.

DESANTOS, J.