No. B244383

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 4

NIVIDIA LUBIN, SYLVIA M. MARESCA and KEVIN DENTON,

Plaintiffs and Appellants,

v.

THE WACKENHUT CORPORATION,

Defendant and Respondent.

On Appeal From The Los Angeles Superior Court
The Honorable William F. Highberger
JCCP No. 4545 (Nos. BC326996, BC373415, 00180014)

Service on the Attorney General required per
Business & Professions Code § 17200

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Second **APPELLATE DISTRICT, DIVISION** 4	Court of Appeal Case Number: B244383
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Bradley J. Hamburger, State Bar No. 266916 Gibson, Dunn & Crutcher LLP 333 S. Grand Avenue Los Angeles, CA 90071 TELEPHONE NO.: 213-2297000 FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* bhamburger@gibsondunn.com ATTORNEY FOR *(Name):* The Wackenhut Corp. (now G4S Secure Solutions (USA) Inc.)	Superior Court Case Number: JCCP4545 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Nividia Lubin, Sylvia Maresca, & Kevin Denton RESPONDENT/REAL PARTY IN INTEREST:	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name)*: The Wackenhut Corp. (now G4S Secure Solutions (USA) Inc.)

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

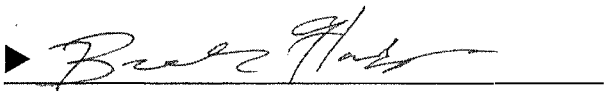
	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	G4S Holding One, Inc. (a Delaware Corporation)	Defendant G4S Solutions (USA) Inc., formerly known as the Wackenhut Corporation, is a wholly-owned subsidiary of G4S Holding One, Inc.
(2)	G4S USA Holdings Limited (a British company)	G4S Holding One, Inc. is a wholly-owned subsidiary of G4S USA Holdings Limited.
(3)	G4S plc (a British company traded on the London Stock exchange)	G4S USA Holdings Limited is a wholly-owned subsidiary of G4S plc
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 15, 2013

Bradley J. Hamburger
(TYPE OR PRINT NAME)

▶ 
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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INTRODUCTION

Even after a class action is certified, "if unanticipated or unmanageable individual issues . . . arise, the trial court retains the option of decertification." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 335 (*Sav-On*).) With the benefit of a further-developed evidentiary record, and the essential guidance of two landmark class certification decisions—*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*) and *Wal-Mart Stores, Inc. v. Dukes* (2011) ___ U.S. ___ [131 S.Ct. 2541] (*Dukes*)—the trial court below properly exercised its discretion to decertify this sprawling and unmanageable wage-and-hour class action after it became clear that individualized issues predominated over any common questions.

This decision was not made lightly. On the contrary, the trial court held three lengthy hearings over the course of several months and ordered multiple rounds of briefing to ensure that the parties and the court had every opportunity to fully grapple with all the relevant issues. After engaging in this rigorous analysis, the trial court issued a 24-page detailed order that carefully parsed the evidence and legal arguments presented by the parties, and largely credited Wackenhut's

evidence over that submitted by Plaintiffs. In short, after a close inspection, the trial court concluded that this case simply could not be resolved on a classwide basis. In the words of the court, "As this case approached trial, the scales fell from the Court's eyes and the unmanageable individual issues present here became apparent." (13 Joint Appendix ("JA") 2940.)

The majority of Plaintiffs' arguments on appeal relate to evidentiary disputes that were properly decided against them. But "the trial court is permitted to credit one party's evidence over the other's in determining whether the requirements for class certification have been met," and a reviewing court "may not substitute [its] own judgment for that of the trial court." (*Dailey v. Sears, Roebuck and Co.* (2013) 214 Cal.App.4th 974, 991-992 (*Dailey*).) Whether Plaintiffs' evidence *could have* supported certification is irrelevant, as this Court's review is limited to determining whether substantial evidence supported the certification decision the trial court *actually made*. (*Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, 726-727 (*Thompson*).)

There is no doubt that substantial evidence supports the trial court's ruling. Plaintiffs sought to maintain certification of an

unmanageable, overbroad class of more than 13,000 security officers—all of Wackenhut's California workforce—who were engaged in many different types of work at facilities ranging from power plants to grocery stores. Nothing held the disparate experiences of these employees together because Wackenhut had not adopted any uniform policies to deny or not provide breaks to class members. As the Supreme Court explained in *Brinker*, where, as here, "no substantial evidence points to a uniform, companywide policy," a class cannot be certified because establishing "liability would have had to continue in an employee-by-employee fashion." (53 Cal.4th at p. 1052.)

On appeal, Plaintiffs now attempt to discredit the court's reliance on *Dukes*. They suggest that by considering the U.S. Supreme Court's guidance on issues of class certification, the trial court committed reversible error. But the court's conclusion that *Dukes* was relevant, persuasive authority is neither surprising nor unusual. In fact, *Brinker* cited *Dukes* with approval (53 Cal.4th at p. 1023), in accordance with California courts' practice of looking to federal law "when seeking guidance on issues of class action procedure." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 318

(*Tobacco II*).) And multiple Court of Appeal decisions have relied upon the very same language from *Dukes* that the trial court found persuasive. (E.g., *Lopez v. Brown* (2013) 217 Cal.App.4th 1114, 1129 (*Lopez*); *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 501 (*Haas*); *Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1458 (*Marler*).)

Because the decertification ruling was supported by substantial evidence, and was not based either on the application of improper criteria or erroneous legal assumptions, this Court should affirm.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Wackenhut's California Operations

Wackenhut employs thousands of security officers throughout California who are stationed at hundreds of different client sites in a broad range of industries (see 15JA3357) including, among others, banks (17JA4014), power companies (18JA4054), public transit systems (18JA4066), jails (18JA4136), business parks (18JA4086), grocery stores (18JA4091), homeowners associations (18JA4091), federal immigration enforcement agencies (18JA4114), distribution centers (18JA4150), construction sites (19JA4334), shopping centers

(18JA4233), gated communities (19JA4433), and post offices (20JA4536).

The security needs of these diverse clients require officers to engage in a range of tasks that vary depending upon the client's business, location, and other factors—which, in turn, affect the type of meal periods that can be provided to any given security officer. Although on a macro level all of Wackenhut's security officers are generally required to "observe and protect" regardless of their post (Appellants' Opening Brief ("AOB") 4), and Wackenhut's job descriptions for various posts generally provide that security officers "are responsible for the protection, safeguarding, and security of assets, personnel, customers, and/or visitors" (AOB2), the realities of the officers' responsibilities on the ground demonstrate "profound differences among the various worksites and the nature of the work performed by [Wackenhut's] security officers." (13JA2951-2952.) As the trial court found, "[t]he nature of the work of a security officer tasked with monitoring sensors and alarms at a nuclear facility simply is not the same as an officer stationed outside of a local bank, or an officer who is in charge of registering inmates at a local jail." (13JA2952.)

The nature and importance of the work performed by Wackenhut's security officers varies widely in actual practice:

- Officers at energy facilities perform critical safety duties, as they are required to check for leaks, odors, or other signs of damage that may indicate potential hazards with respect to the facilities. (22JA4976-4977.)

- Firearm-carrying officers are typically stationed outside certain bank branches in order to deter bank robberies. (18JA4125-4127.)

- Jailers process inmates and engage in detail-specific tasks such as photographing and fingerprinting inmates. (18JA4136.)

- Officers at certain hotels primarily serve as visual deterrents, staying visible and regularly patrolling the property while remaining vigilant for any suspicious activity. (21JA4778-4779.)

- Officers stationed at the gate of an environmental facility are concerned with controlling the flow of goods, people, and vehicles through the entry gate. (21JA4772-4773.)

- Armed officers who transport detainees must perform pat downs to prevent contraband items from entering vehicles. (18JA4115.)

The nature and importance of the work performed by security officers can also vary significantly within a given site. For example, at one distribution center different Wackenhut guards act as patrol officers, truck gate officers, scanner officers, post commanders, console operators, and relief officers, and duties range from controlling the flow of commercial vehicles into the site or patrolling

the premises and checking water pressure, to using scanners to detect weapons or theft of commercial property. (22JA5050-5058.)

The wide range of tasks in which class members engage often requires specialized training; the training materials that Plaintiffs claim set forth standardized Wackenhut procedures are merely the basic foundation that is supplemented with site- and post-specific training. Indeed, Plaintiffs concede that security officers are provided cross-training "with client specific information so that they can work for different types of clients in California." (AOB4-5.)

The disparate training of Wackenhut's thousands of security officers limits Wackenhut's ability to use roving officers to relieve employees for meal breaks without "compromis[ing] the security program." (15JA3536-3540; see also 3JA547 [using officers without proper training is "a sure way to put a customer in jeopardy"]; 3JA587-588.) For example, employees working at some bank locations must complete training required to carry firearms as well as multiple levels of additional, bank-specific training. (18JA4098.) Guards involved with transportation of detained individuals must complete extensive, weeks-long training in driving commercial vehicles, CPR, handcuffing, escorting detainees, and using firearms,

pepper spray, and batons. (18JA4116.) And security officers working as jailers are required to complete state-mandated training relating to adult detention facilities, as well as gang, segregation, self-defense, and booking process training. (18JA4137.)

Although many class members work at single-officer posts where they are the only security officer on duty at the site during any given shift, others work at multi-officer locations or at single-officer locations scheduled with overlapping shifts. (13JA2934; see also 3JA599-600; 18JA4115; 18JA4120-4121.)

B. Wackenhut's Provision of Meal Periods

Wackenhut's general managers for each of the California regions work with supervisors at each site to ensure that the appropriate type of meal period is provided based on the client's needs, including whether security services needs can be met if officers are provided with off-duty meal periods, and whether geographic remoteness, training, or required qualifications limit Wackenhut's ability to relieve officers for breaks. (3JA585-587; 9JA1960-1961; 15JA3536-3540 [explaining why it is "logistically and operationally impossible" to provide off-duty meal breaks at a research facility "without compromising the security"].) Thus, because meal period

policies are "site specific," the type of meal periods provided at each site must "be looked at on an individual basis." (3JA524.)

Even though most class members signed on-duty meal period agreements and were paid for their meal periods, these class members were not necessarily assigned to on-duty posts, or otherwise provided with only on-duty meal periods. For example, according to a San Diego-area manager, although almost all officers in his area signed on-duty meal period agreements, many were assigned to off-duty meal period posts. (3JA601-602.) Moreover, as the trial court found and as Plaintiffs have conceded, "the class as certified include[d] several worksites whose employees . . . undisputedly were provided with off-duty meal periods" despite having signed on-duty meal period agreements. (13JA2943; see also 3JA535, 598-600; 18JA4102; 8JA1887; 14JA3083.) In one region, "approximately 200 out of 800 employees who signed on-duty meal period agreements were assigned to worksites that did not have on-duty meal periods." (13JA2943.)

Wackenhut's managers also testified that even at some single-officer posts, off-duty meal periods were provided notwithstanding the fact that the post would be left without *any* security services during those breaks and the officers had signed on-duty meal period

agreements. (3JA598-599.) And at still other client sites, posts were scheduled for overlapping coverage so that officers could take off-duty meal periods. (3JA599-600.)

Of course, many—but not all—class members were provided with on-duty meal periods under the nature of the work exception. (E.g., 18JA4122.) Yet, as the trial court found, "the meal periods Wackenhut authorized were not necessarily 'on-duty' in all cases, even at worksites that were typically limited to on-duty meal periods." (13JA2943, citing 18JA4067-4068, 18JA4116, 18JA4087, 18JA4229, 15JA3562-3564.) Rather, whether class members were provided with on- or off-duty meal periods varied not only from site to site, but also from shift to shift. For example, one officer noted that he often left his client site in order to pick up food from a local restaurant. (13JA2971, citing 18JA4116.)

Named Plaintiff Nividia Lubin admitted that she left her worksite during meal periods on occasion when someone at the client site relieved her, and Plaintiffs conceded that employees of clients relieved officers at several other sites for their breaks. (15JA3562-3564; 11JA2430.) And for some officers, the availability of relief for meal breaks varied from site to site. For example, one officer

testified that she was relieved for her meal and rest breaks by another guard when she worked at one worksite, but that there was usually no other officer to relieve her for meal breaks when she worked at a different worksite. (19JA4502-4503.)

C. Wackenhut's Provision of Rest Breaks

Wackenhut had a written policy outlining the pertinent rest break requirements under the federal Fair Labor Standards Act ("FLSA") that *expressly* mandated that "[f]ield management is also responsible for complying with any applicable state or local law that provides employees with greater benefits and protections than the FLSA in the locations in which they operate." (3JA631; see also 3JA627; 8JA1906; 8JA1914-1915.)

Although Plaintiffs suggest that Wackenhut's FLSA-focused written policy represented the full extent of its policies regarding rest breaks in California, Wackenhut managers testified that this "basic" policy document provided only the baseline. (8JA1900.) Because the policy was "not exhaustive in the sense that it's a policy for everybody everywhere," Wackenhut's managers were expected to "add to it" by abiding by and implementing the "state and local enhancements to" the FLSA requirements, including any California-

specific enhancements. (8JA1900-1901.) In May 2008, a California-specific addendum was added that was intended to "clarif[y]" Wackenhut's existing written policies. (3JA516.)

As the trial court found, "the record shows that class members at many Wackenhut worksites were provided with rest periods that lacked any restrictions and appeared to be fully off-duty." (13JA2954, citing 18JA4059-4060, 18JA4079; see also 18JA4158-4159 [employee always relieved by another officer for rest breaks and never experienced interruptions]; 18JA4167 [similar].) In fact, many of these class members *always* had uninterrupted rest breaks, and some testified that their supervisors ensured they were aware of their right to take their rest breaks. (E.g., 18JA4074; 18JA4079; 18JA4094; 18JA4098-4099.) Indeed, Plaintiffs conceded that named Plaintiff Nividia Lubin on occasion was relieved for rest breaks. (3 Reporter's Transcript ("RT") 6628.)

While one Wackenhut manager and several declarants testified that certain posts had "on-duty rest break[s]" (AOB58), these individuals meant only that rest breaks at certain posts required some employees to remain at the client site for their breaks, or to be reachable for emergencies. (E.g., 3JA565-568 [officers at certain

posts supposedly had "on-duty" rest breaks because they were required to carry radios or took breaks in the client's lobby]; 9JA1955-1958 [officers with supposedly "on-duty" rest breaks permitted to take breaks in break rooms].) Although some class members recalled being told that they were required to respond to emergencies during rest breaks, if any occurred (e.g., 18JA4127), others stated that their supervisors made clear that they were entitled to and should always take their rest breaks (e.g., 18JA4099).

II. PROCEDURAL HISTORY

A. Initial Class Certification

In March 2010, the trial court granted Plaintiffs' motion for class certification of their meal period, rest break, and wage statement claims. (5JA1135.)

The trial court found that Wackenhut's alleged practice of permitting clients to have a say in whether meal periods were on- or off-duty, coupled with the use of on-duty meal period agreements for most security officers, amounted to a classwide, uniform policy giving rise to predominant common questions. (5JA1137-1139.)

The trial court also found that Wackenhut did not have a policy authorizing and permitting rest breaks—notwithstanding the existence

of a written policy prior to May 2008 that required managers to comply with all applicable local rest break requirements, and a California-specific written rest break policy after May 2008. (5JA1140-1141.) In so finding, the trial court interpreted Wackenhut's purported lack of a written, uniform policy to provide rest breaks in accordance with the particulars of California law to mean that Wackenhut had a uniform policy *not to provide* rest breaks. (5JA1139-1140.) In addition, the trial court found that Plaintiffs' wage statement claims were derivative of the meal and rest break claims, and therefore could also be certified. (5JA1141.)

Although the court granted class certification, it rejected Plaintiffs' five proposed subclasses—which would have divided the class into subgroups based on the type of meal or rest break afforded, the version of the meal period agreement signed, and information included in wage statements—because they were "not sufficiently defined in terms of objective characteristics and common transactional facts thus making impossible the identification of subclass members." (5JA1143; see also 14JA3090 [describing proposed subclasses].)

B. Plaintiffs' Proposed Statistical Sampling of Class Members' On-Duty Meal Period Agreements

In December 2007, Plaintiffs moved to compel production of on-duty meal period agreements for all security officers (1JA1-22), which Wackenhut objected to on the grounds that production of all such documents would be unduly burdensome (1JA84-97). In January 2008, the trial court denied Plaintiffs' motion to compel as to the meal period agreements, finding that such production would be "hopelessly . . . burdensome and oppressive." (2JA339.) The trial court left open the possibility that Plaintiffs could propound "further, more specific requests or interrogatories" in the future. (2JA339.)

In 2011, Plaintiffs sought production of on-duty meal period agreements for a portion of the class (1,200 class members), from which Plaintiffs intended to extrapolate "the percentage of class members that were working without having signed a valid meal period agreement during the period January 7, 2001 to May 23, 2008." (7JA1633.) The parties entered into a stipulation under which Wackenhut agreed that it would not challenge the sampling conducted by Plaintiffs on the grounds that a less than statistically significant number of personnel files were sampled or that there was a bias in the sample. (7JA1633.) Wackenhut expressly "reserve[d] the rights to

challenge, contest, dispute and/or object to" the use of the original 1,200 files for statistical sampling "for any reason other than those reasons set forth" in the agreement. (7JA1634-1636.)[1]

Plaintiffs *never* renewed their motion to compel production of meal period agreements for the entire class, even after the trial court expressed concerns over the propriety of using statistical sampling in this case. (13JA2947.)

C. Proceedings on Wackenhut's Decertification Motion

While the parties were preparing for trial on the merits, the U.S. Supreme Court issued its decision in *Wal-Mart Stores, Inc. v. Dukes*, *supra*, in which it held that class certification requires common questions that are capable of "resolv[ing] an issue that is central to the validity of each one of the claims in one stroke," and have the ability to "generate common *answers* apt to drive the resolution of the litigation." (131 S.Ct. at p. 2551.) The Court also unanimously

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[1] Plaintiffs have conceded on appeal that Wackenhut was not estopped from challenging, and never waived the right to challenge the use of statistical sampling because of its prior objections to production of the on-duty meal period agreements. (AOB50; accord, 13JA2947-2948.) As the trial court found, Wackenhut "expressly reserved its rights to challenge Plaintiffs' use of sampling on any grounds other than certain aspects of the statistical methodology used to create the sampling." (13JA2947.)

rejected the use of statistical sampling to adjudicate class claims, which it labeled "Trial by Formula." (*Id.* at p. 2561.) Because of *Dukes*'s clear implications for the certified class, particularly in light of California's historical reliance on federal cases for guidance on class certification issues, Wackenhut moved to decertify the class.

The trial court held two lengthy hearings on Wackenhut's motion on December 21, 2011 and January 10, 2012, after which it decertified the class. (10JA2322; 3RT6375.) Following the hearings, the trial court directed Wackenhut to submit a proposed order granting the decertification motion, noting that it would allow Plaintiffs to submit objections. (3RT6375-6376.)

Before the trial court entered any formal order decertifying the class, however, the California Supreme Court issued its decision in *Brinker Restaurant Corp. v. Superior Court*, *supra*, and the parties stipulated to submit additional briefing on the possible impact of that decision on the court's decision to decertify the class. (10JA2350-2355.) After holding a hearing at which it reconsidered in full its decision to decertify the class in light of *Brinker*, the trial court declined to modify its previous ruling decertifying the class. (3RT6655.)

The trial court directed Wackenhut to lodge a proposed decertification order and provided Plaintiffs with ample opportunity to review and propose objections to the proposed order. (12JA2850; 3RT6656-6657.) Plaintiffs filed extensive objections to the proposed order. (12JA2851-13JA2906.)

D. The Trial Court's Decertification Order

On August 1, 2012, the trial court issued a 24-page written order granting Wackenhut's motion to decertify the class in full. The trial court explained that "in light of post-certification developments," including clarification of the law governing class actions, it was exercising its discretion to "determine that decertification [wa]s prudent and proper." (13JA2934.) The court identified two principal reasons for decertifying the class of more than 13,000 separate security officers: (1) "individualized, rather than common, issues now predominate," and (2) in light of the sheer "number of separate factual issues that would be presented," "there [wa]s no way to conduct a manageable trial of Plaintiffs' claims." (13JA2936.)

Changed Circumstances. The trial court found that changed circumstances warranted decertification in light of "significant new case law," and "because the practical difficulties of trying this class

action involving over 13,000 employees holding very diverse positions have become more apparent since certification." (13JA2937; see also 13JA2940 ["Notably, Plaintiffs had not proposed to use statistical sampling to prove their claims at class certification, but it is now clear that the only way to try their claims on a classwide basis would be through such impermissible shortcuts."].)

In finding that *Dukes* supported its decision to revisit certification, the court emphasized that the California Supreme Court and Court of Appeal had already cited *Dukes* with approval on issues of class certification, rendering *Dukes* "[a]t a minimum . . . highly relevant persuasive authority that the Court can and should consider in determining whether to exercise its discretion to certify a class under California law." (13JA2937; 13JA2939-2940.)

Meal Period Claims. In light of *Dukes*'s persuasive guidance, the trial court concluded that the prior purportedly common question it had identified—Wackenhut's alleged policy of delegating to clients the decision whether to provide on- or off-duty meal periods—could no longer support certification because answering this question would not resolve any issues central to the validity of Plaintiffs' meal period claims. (13JA2942.) Rather, the relevant questions under Plaintiffs'

theory of liability on their meal period claims were "whether Wackenhut provided on-duty meal periods, and, if so, whether such meal periods were permissible under the nature of the work exception." (13JA2942.)

Weighing the parties' evidence, the court found that the first question—whether Wackenhut provided on-duty meal periods—could not be answered with common proof because a close review of the record showed a wide variety of experiences across the class that would "require an individualized assessment of the nature of the meal periods Wackenhut actually provided to each class member, and a consideration of the unique factors of" each client that could "vary significantly" among "the hundreds of worksites and over the course of millions of shifts." (13JA2942-2944.)

The court also found that the second question—whether the nature of the work exception was satisfied for each class member and shift—could not be answered on a classwide basis and that individualized issues could not be managed without sacrificing Wackenhut's right to present its defenses to liability. (13JA2944.) The court found that Plaintiffs' proposal to circumvent individualized inquiries into the sufficiency of each class member's meal period

agreement by using statistical sampling "would violate Wackenhut's due process right to 'present every available defense'" and "impermissibly alter the substantive law." (13JA2946, citations omitted.)

The court explained that the question whether an individual class member signed an invalid on-duty meal period agreement "was one of liability, not damages" because Wackenhut would not be liable *at all* to class members who had signed only *valid* agreements. (13JA2948.) It further noted that California cases approving of the use of statistical sampling had relied on federal cases that have since been rejected. (13JA2948.) The court also found that even if sampling was "viable in some cases," "the serious due process concerns presented by Plaintiffs' plan to estimate liability using an admittedly imprecise sampling methodology" meant that "the disadvantages of statistical sampling in this case far exceed its benefits." (13JA2949-2950.)

The court further found that even if statistical sampling was not used, and instead every on-duty meal period agreement was analyzed, unmanageable individualized issues would still predominate because "simply proving that certain class members for some amount of time

signed invalid on-duty meal period agreements [would] not establish liability." (13JA2950.) Rather, Plaintiffs would still be required to establish that those class members with "invalid" agreements were "not provided with off-duty meal periods." (13JA2950.)

In addition, the court found that the question whether the nature of the work prevented class members from taking off-duty meal periods could not be resolved on a classwide basis because there was not a single type of work performed by all class members. (13JA2951-2952.) Central to this determination was the court's finding that there were significant material differences between the class members' duties, which belied Plaintiffs' contention that all class members performed essentially the same work. (13JA2952.)

The court rejected Plaintiffs' argument that no class members were provided with on-duty breaks under the nature of the work exception because Wackenhut could add more officers to each site, use roving guards, or otherwise remake its business to provide off-duty meal periods in every instance. (13JA2953.) The court noted that "[i]t is hard to imagine any job that could not be modified to allow for off-duty meal periods, especially if expense and economic reasonableness were irrelevant" and that the Division of Labor

Standards Enforcement ("DLSE") had rejected a narrow interpretation of the nature of the work exception requiring employers to show that it is "virtually impossible" to provide employees with off-duty meal periods. (*Ibid.*)

Rest Break Claims. As for rest breaks, the court reassessed the evidence and found that the testimony of Wackenhut's managers "shows only that Wackenhut intended to place certain restrictions on rest periods at some worksites," and the question "whether any restrictions placed on rest periods made them on-duty would require unmanageable individualized inquiries into the nature of the rest periods for each distinct worksite, shift, and security officer position." (13JA2954.) The court found that testimony in the record "show[ed] that class members at many Wackenhut worksites were provided with rest periods that lacked any restrictions and appear[ed] to be fully off-duty." (*Ibid.*)

The court rejected Plaintiffs' contention that individualized issues regarding rest breaks could be managed through the creation of a subclass linked to the type of *meal period* afforded, noting that Plaintiffs' theory relied on the faulty assumption that employees who were provided on-duty meal periods were *necessarily* provided only

on-duty rest breaks. (13JA2955.) The court also found that Wackenhut's written policy focused on the FLSA "only provided guidance regarding the requirements of the FLSA, and that each region would supplement this guidance with local requirements"—and thus the policy would not "obviate the need for individualized inquiries into the actual rest periods provided to each class member." (13JA2955-2956.)

Wage Statement Claims. Finally, the court found that the wage statement claims were not suitable for class treatment to the extent they were derivative of the decertified meal and rest break claims. (13JA2956.) The court also found that Plaintiffs' claims premised on Wackenhut's alleged failure to include certain items on wage statements also could not be resolved on a classwide basis. (13JA2957.) The court found that determining whether class members suffered any injury was "an inherently individualized inquiry" because Plaintiffs' theory required proof that class members performed "calculations to determine if they were paid correctly." (13JA2957.)

STANDARD OF REVIEW

A trial court's class certification ruling is reviewed for abuse of discretion, and its findings regarding predominance are generally "reviewed for substantial evidence." (*Brinker*, *supra*, 53 Cal.4th at p. 1022.) "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," and "a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used; or (2) erroneous legal assumptions were made.'" (*Tobacco II*, *supra*, 46 Cal.4th at p. 311, citations omitted.)

"In determining whether the record contains substantial evidence supporting the ruling, a reviewing court does not reweigh the evidence and must draw all reasonable inferences supporting the court's order." (*Dailey*, *supra*, 214 Cal.App.4th at p. 988.) Thus, "[w]here a certification order turns on inferences to be drawn from the facts, 'the reviewing court has no authority to substitute its decision for that of the trial court.'" (*Thompson*, *supra*, 217 Cal.App.4th at p. 726, citations omitted.)

The Court's "'task on appeal is *not* to determine in the first instance whether the requested class is appropriate but rather whether the trial court has abused its discretion in *denying certification.*'" (*Thompson, supra*, 217 Cal.App.4th at p. 726, italics added, quoting *Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 654.) Consequently, the fact that "the trial court in this case viewed the facts or legal issues differently than another trial court" in a similar case does not mean that "an abuse of discretion occurred" (*id.* at pp. 726-727), and "[w]hether the trial court could have properly certified a class based on [Plaintiffs'] conflicting evidence of centralized behavior on the part of [Wackenhut] toward its [employees] . . . is not the inquiry" on appeal. (*Dailey, supra*, 214 Cal.App.4th at p. 997.)

ARGUMENT

As the party seeking to proceed on a classwide basis, Plaintiffs had the burden to establish that all the requirements for class certification were satisfied, including that common questions predominated. (*Sav-On, supra*, 34 Cal.4th at p. 326, citing Code Civ. Proc., § 382; see also *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1451 (*Walsh*) ["The 'proper legal criterion' for deciding whether to . . . decertify a class is simply whether the class

meets the requirements for class certification."].) "[A] common question predominates when 'determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" (*Haas*, *supra*, 207 Cal.App.4th at p. 501, quoting *Dukes*, *supra*, 131 S.Ct. at p. 2551.)

"'What matters to class certification is not the raising of common 'questions'—even [in] droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" (*Lopez*, *supra*, 217 Cal.App.4th at p. 1128, quoting *Dukes*, *supra*, 131 S.Ct. at p. 2551.) Without some "glue" holding together individualized questions, it is impossible to produce a common answer. (*Dukes*, *supra*, 131 S.Ct. at p. 2552.) In addition, a "trial court should deny class certification if it determines that . . . 'class litigation [would be] unmanageable.'" (*Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 915, quoting *Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, 619.)

After holding three lengthy hearings, considering extensive briefing, reviewing a more complete record, and engaging in a rigorous analysis based on the most recent guidance from both the

California Supreme Court and the U.S. Supreme Court, the trial court exercised its discretion to decertify the class after finding "that individualized, rather than common, issues now predominate" and "that there [was] no way to conduct a manageable trial of Plaintiffs' claims." (13JA2936; see *Sav-On*, *supra*, 34 Cal.4th at p. 335.) This ruling should be affirmed because it was firmly supported by substantial evidence, and was not based either on the application of improper criteria or erroneous legal assumptions.

I. THE TRIAL COURT PROPERLY DECERTIFIED THE MEAL PERIOD CLAIM BECAUSE INDIVIDUALIZED ISSUES PREDOMINATE AND ARE UNMANAGEABLE

A. Whether Wackenhut Provided *Only* On-Duty Meal Periods Cannot Be Established on a Classwide Basis

The trial court properly found that the threshold question under Plaintiffs' theory of liability—whether Wackenhut provided its security officers only on-duty meal periods—was not a common question that could justify class certification. (13JA2942-2944.) Rather, the record showed that while many class members may have *signed* on-duty meal period agreements, numerous class members were, in fact, provided with off-duty meal periods. (13JA2943.) And unlike in *Brinker* and the other cases on which Plaintiffs rely, the trial

court correctly found that Wackenhut did not have any uniformly applied policy that might have allowed for classwide adjudication.

1. How or Why Wackenhut Decided to Provide On-Duty Meal Periods Is Irrelevant

When the trial court initially certified Plaintiffs' meal period claims, it focused on a common question that it later found—after considering the U.S. Supreme Court's persuasive guidance in *Dukes*—was not sufficient to justify class treatment. Specifically, the court concluded that its prior focus on Wackenhut's supposed "uniform practice . . . allowing clients to determine whether meal periods will be on-duty or off-duty, as opposed to Wackenhut performing an analysis of whether the 'nature of the work' at each site prevents an employee from being relieved of their duties for 30-minute meal periods" was erroneous. (5JA1138.) The court found that this question was not a true common question that would support class certification because it would not "'resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke.'" (13JA2942, quoting *Dukes*, *supra*, 131 S.Ct. at p. 2551; see also *Haas*, *supra*, 207 Cal.App.4th at p. 501, quoting *Dukes*, *supra*, 131 S.Ct. at p. 2551.)

As the court explained, how or why Wackenhut may have determined to provide on-duty meal periods under the nature of the work exception was "irrelevant"—what actually mattered to Plaintiffs' theory of liability was "whether Wackenhut provided on-duty meal periods, and, if so, whether such meal periods were permissible under the nature of the work exception." (13JA2942.) The trial court's reasoning is amply supported by a consistent line of cases recognizing that class certification cannot be based simply on how an employer determined whether to avail itself of an exception to California's wage-and-hour laws.

For example, in *Walsh v. IKON Office Solutions, Inc.*, *supra*, the court rejected the theory "that an employer is liable if it classifies employees [as exempt from overtime laws] without regard to the law or investigating what work they do, even if the employees were, in fact, subject to the [outside salesperson] exemption." (148 Cal.App.4th at p. 1461.) Instead, *Walsh* held that plaintiffs could not recover unless class members "were not, in fact, subject to the outside salesperson exemption," and that making "that determination require[d] consideration of the individual circumstances" of each class member. (*Ibid.*)

Likewise, in *Arenas v. El Torito Rests., Inc.* (2010) 183 Cal.App.4th 723, 735, the court explained that "there is no estoppel effect given to an employer's decision to classify a particular class of employees as exempt—whether right or wrong, or even issued in bad faith; instead, the only legally relevant issue to alleged misclassification is whether the exemption in fact applies."[2] Although these cases involved alleged misclassification of employees as entirely exempt from California's wage-and-hour laws, this same reasoning applies to the narrower nature of the work exception at issue in this case.[3]

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[2] The Ninth Circuit agrees. (E.g., *In re Wells Fargo Home Mortgage Overtime Pay Litigation* (9th Cir. 2009) 571 F.3d 953, 959 [holding that the "blanket application of [overtime] exemption status, whether right or wrong," does not "suggest a uniformity among employees that is susceptible to common proof"]; *Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 946 [holding that "a district court abuses its discretion in relying on an internal uniform exemption policy to the near exclusion of other factors relevant to the predominance inquiry"].)

[3] The DLSE has approved the use of blanket on-duty meal period agreements—even where employees take off-duty meal periods on occasion—"so long as the conditions necessary to establish that the nature of the employee's work prevents the employee from being relieved of all duty are met for each applicable on-duty meal period taken." (Dept. Industrial Relations, DLSE Opn. Letter 2009.06.09 (June 9, 2009) pp. 6, 9.)

Despite "agree[ing]" with this analysis in their opposition to decertification below (8JA1821), Plaintiffs now suggest that it was erroneous because the court's reassessment was sparked by the discussion of common questions in *Dukes*. (AOB18, 21-22.) But California's class certification requirements are "analogous" to those under Federal Rule of Civil Procedure 23, and thus the California Supreme Court has turned to federal law "when seeking guidance on issues of class action procedure." (*Tobacco II*, *supra*, 46 Cal.4th at p. 318.) Indeed, both the California Supreme Court and the Court of Appeal have followed *Dukes* on several occasions, including in wage-and-hour cases. (*Brinker*, *supra*, 53 Cal.4th at pp. 1023-1025; *Haas*, *supra*, 207 Cal.App.4th at p. 501; *Lopez*, *supra*, 217 Cal.App.4th at p. 1129; *Marler*, *supra*, 199 Cal.App.4th at p. 1458.) Plaintiffs' assertion that the trial court was prohibited from considering the discussion of common questions in *Dukes* cannot be squared with *any* of these decisions, or the long-standing practice of California courts. (See, e.g., *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 453 (*City of San Jose*) [directing trial courts "to rule 23 of the Federal Rules of Civil Procedure"].)

Plaintiffs also cite the reference to the blanket usage of on-duty meal period agreements in *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220 (*Faulkinbury*), and suggest that this practice was critical to the result there. (AOB29, 40.) But *Faulkinbury* actually turned on the fact that the employer *expressly conceded* that it had uniformly applied a policy to provide on-duty meal periods and *admitted* that "it did not believe *any* unpaid, off-duty meal periods were taken during the relevant time period." (216 Cal.App.4th at pp. 234-235, italics added and internal quotation marks omitted.) Wackenhut has never made such a concession, and has argued vigorously that no such common policy exists.

Similarly, the Ninth Circuit's decision in *Abdullah v. U.S. Security Associates, Inc.* (9th Cir. 2013) 731 F.3d 952 (*Abdullah*) was also premised on the district court's finding that an employer had adopted *and uniformly applied* a policy "to require [that] on-duty meal breaks be taken." (*Id.* at p. 966 [emphasizing that employer's "person most knowledgeable" witness admitted that "no single guard post allowed for a lunch break" and that either "a large majority" or "99.9% of employees work[ed] at single guard posts"].) Indeed, *Abdullah* expressly distinguished the prior Ninth Circuit decisions in

Wells Fargo and *Vinole* on the basis that the district court had relied on evidence *other* than the mere blanket usage of on-duty meal period agreements. (See *id.* at p. 965.)[4]

By contrast, the trial court's initial class certification ruling in this case *did* exclusively rely on an irrelevant question focused on how and why Wackenhut determined what type of meal periods to provide. This approach conflicted with *Walsh*, *Arenas*, *Wells Fargo*, and *Vinole*, as well as *Dukes*. The trial court therefore properly corrected its earlier ruling.

2. Plaintiffs Failed to Prove That Wackenhut Had a Uniform On-Duty Meal Period Policy

Plaintiffs contend that the meal period claim must be certified because their "theory of liability will . . . turn on the common question of whether Wackenhut's policies and practices failed to provide Security Officers with off-duty meal periods." (AOB29.) But Plaintiffs have never identified—let alone provided substantial evidence of—*any* written or informal Wackenhut policy to provide

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[4] Even if *Faulkinbury* and *Abdullah* had held that class certification could be premised on an employer's blanket resort to the nature of the work exception (which they did not), that reasoning would be wrong and would squarely conflict with *Walsh*, *Arenas*, *Wells Fargo*, *Vinole*, and the DLSE's guidance.

only on-duty meal periods to all class members, despite their repeated assertions that such a policy existed. (E.g., AOB6.) That is because none existed, as the trial court correctly found.

As described above (see *ante*, at pp. 8-11), the evidence in the record showed significant variation with respect to the types of meal periods provided to class members across the "hundreds of worksites and over the course of millions of shifts." (13JA2943-2944.) While Plaintiffs may disagree with the trial court's assessment of this evidence (AOB34-38), the court had the discretion to weigh and credit one party's evidence over another's, and this Court has "'no authority to substitute [its] own judgment for the trial court's regarding this or any other conflict in the evidence.'" (*Dailey*, *supra*, 214 Cal.App.4th at p. 997, quoting *Sav-On*, *supra*, 34 Cal.4th at p. 331.) And sworn declarations and deposition testimony in the record showing that at least a portion of the class were provided with off-duty meal periods constitutes "substantial evidence." (*Id.* at p. 996.)

Included among this "substantial evidence" of variations in the types of meal periods Wackenhut provided was evidence that "the class as certified include[d] several worksites whose employees . . . undisputedly were provided with off-duty meal periods" despite

having signed on-duty meal period agreements. (13JA2943, citing 3JA535, 8JA1887; see also 3JA599-600; 18JA4102; 14JA3083.) In one region alone "approximately 200 out of 800 employees who signed on-duty meal period agreements were assigned to worksites that did not have on-duty meal periods." (13JA2943.)

Plaintiffs also challenge the trial court's finding that "the meal periods Wackenhut authorized were not necessarily 'on-duty' in all cases, even at worksites that were typically limited to on-duty meal periods." (13JA2943, citing 18JA4067-4068, 18JA4116, 18JA4087, 18JA4229, 15JA3562-3564.) But Plaintiffs merely disagree with the trial court's finding that the cited declarations were sufficient "under the parameters specified in *Brinker*." (AOB37.) These findings are entitled to deference (see, e.g., *Dailey*, *supra*, 214 Cal.App.4th at p. 997), and, in any event, are entirely correct.

The trial court's findings on this score were directly supported by employee declarations establishing that, even at sites that supposedly were typically limited to on-duty meal periods, employees were at times actually provided with off-duty meal periods. For example, one security officer was "often permitted . . . to pick up food from a local restaurant" during his meal period. (13JA2971, quoting

18JA4116.) Another was "permitted to leave the premise[s]" during meal periods. (13JA2971, quoting 18JA4087.) And named Plaintiff Nividia Lubin admitted that she left her worksite during meal periods on occasion when someone at the client site relieved her, and that she was allowed to leave the site to buy food. (15JA3562-3564.) Wackenhut's declarations did not merely show "accidental off-duty" meal breaks, as Plaintiffs would have the Court believe (AOB35-37)—a number of employees who had signed on-duty meal period agreements, including those stationed at single-guard posts, were provided with off-duty meal breaks through the use of overlapping shifts or client-provided relief. (3JA598-600.)

Because of their failure to establish that Wackenhut had a uniform policy to provide only on-duty meal periods, Plaintiffs' reliance on *Brinker*, *Faulkinbury*, and *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129 (*Bradley*) is misplaced. (AOB33.) These cases stand for the narrow proposition that where an employer adopts a uniform policy that violates wage-and-hour laws and *is applied on a broad, classwide basis*, that policy may provide the basis for class certification because assessment of the legality of the policy itself provides classwide proof of liability. (See *Brinker*,

supra, 53 Cal.4th at p. 1033 [noting only that claims involving a "uniform policy *consistently applied to a group of employees*" allegedly "in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment," italics added]; *Faulkinbury*, *supra*, 216 Cal.App.4th at p. 233 ["The evidence presented in connection with the motion for class certification established Boyd's on-duty meal break policy was uniformly and consistently applied to all security guard employees."]; *Bradley*, *supra*, 211 Cal.App.4th at p. 1150 [defendant conceded that it had *no policy at all* permitting breaks, thus establishing that it treated all class members uniformly with respect to the provision of meal breaks].)[5]

Significantly, Wackenhut has never conceded—and the trial court did not find—that it had a classwide policy uniformly applied to the entire class that required all meal periods to be on-duty, unlike in *Brinker*, where the Supreme Court found that a class was properly certified because the employer conceded the existence of a common policy applicable to all class members. (See *Brinker*, *supra*, 53

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[5] The Court of Appeal's recent decision in *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701 was similarly premised on an employer's uniform failure to authorize or permit meal and rest breaks.

Cal.4th at p. 1033 ["Brinker conceded at the class certification hearing the existence of[] a common, uniform rest break policy. The rest break policy was established at Brinker's corporate headquarters; it is equally applicable to all Brinker employees."].) While Plaintiffs repeatedly invoke this aspect of *Brinker* (see, e.g., AOB23, 31-32), in the absence of any concession or proof of a uniform policy applied to the entire class, it is entirely inapplicable here.

In short, Plaintiffs' assertion that the "trial court chose not to follow *Brinker*" is premised on the flawed notion that *Brinker*'s analysis of the rest break claim there applies to cases in which the defendant did not concede, and the trial court did not find, that a uniform policy not to authorize sufficient breaks existed. (AOB32.) But if *Brinker*'s rest break analysis were applicable even in the *absence* of proof of a uniform policy, the Supreme Court's finding in *Brinker* that the off-the-clock work claim could not be certified would make no sense. (*Brinker*, *supra*, 53 Cal.4th at p. 1052.) Rather, *Brinker* makes clear that where, as here, "no substantial evidence points to a uniform, companywide policy," adjudication "would have

. . . to continue in an employee-by-employee fashion" that is incompatible with class certification. (*Ibid.*)[6]

B. Whether the Nature of the Work Exception Authorized On-Duty Meal Periods Cannot Be Resolved on a Classwide Basis

Even if the question whether Wackenhut provided on-duty meal periods could be answered on a classwide basis, there is no way consistent with due process and substantive law to adjudicate Wackenhut's key defense to liability—the nature of the work exception—on a classwide basis. The nature of the work exception, which permits an employer to provide on-duty meal periods, has two elements. (Cal. Code Regs., tit. 8, § 11040, subd. (11)(A).) First, the "nature of the work" performed by an employee must prevent the employee from being relieved of all duty during a meal period. (*Ibid.*) Second, the parties must have entered into a written agreement regarding on-duty meal periods. (*Ibid.*) The trial court properly found that neither element of the nature of the work exception could

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[6] None of the post-*Brinker* cases adopt Plaintiffs' erroneous reading of *Brinker*. To the extent, however, that these cases could be construed to hold that an unsubstantiated allegation of a classwide policy is enough to justify class certification, they are contrary to the plain meaning of *Brinker* itself and should not be followed.

be assessed on a classwide basis and that therefore unmanageable individualized issues would predominate. (13JA2944.)

Although Plaintiffs suggested various shortcuts—most vigorously the use of statistical sampling—that they claimed would have allowed this defense to be resolved in a class proceeding, each of these proposals would have effectively eliminated this defense and thus impermissibly altered the substantive law in order to facilitate classwide adjudication. (See *City of San Jose*, *supra*, 12 Cal.3d at p. 462 ["Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going."].)

Moreover, Plaintiffs' proposals would have also deprived Wackenhut of its due process right to present "every available defense." (*Lindsey v. Normet* (1972) 405 U.S. 56, 66 (*Lindsey*), citation omitted; accord, *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353.) "A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." (*Carrera v. Bayer Corp.* (3d Cir. 2013) 727 F.3d 300, 307 (*Carrera*); see also *Dukes*, *supra*, 131 S.Ct. at pp. 2560-2561

["[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims."].)

1. The Trial Court Did Not Require Plaintiffs to Disprove Wackenhut's Affirmative Defenses

Plaintiffs wrongly suggest that the trial court shifted to them the burden to prove Wackenhut's affirmative defenses by analyzing whether individualized issues presented by Wackenhut's affirmative defenses would predominate over common issues. (AOB26-30.) This distorted view of certification—that only the plaintiffs' theory of the case is relevant to whether a class may be certified—has been repeatedly rejected. (See, e.g., *Walsh*, *supra*, 148 Cal.App.4th at p. 1450 ["The affirmative defenses of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues."]; *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

While Plaintiffs are correct that Wackenhut would have the burden to establish its affirmative defenses at trial, this does not mean that Plaintiffs—as the party seeking to maintain class certification—did not have the separate burden to *prove* that the requirements for

class certification were satisfied. (See *Sav-On*, *supra*, 34 Cal.4th at p. 326 ["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."].) The trial court thus properly required Plaintiffs to show how Wackenhut's affirmative defenses (and defenses to liability in general) could be adjudicated in a classwide proceeding.

2. Whether the Nature of the Work Prevented Employees from Being Relieved of All Duty Cannot Be Established with Common Proof

The trial court found that "the duties and work environments differ dramatically amongst the class" and thus "the nature of the work performed by Wackenhut security officers cannot be resolved on a classwide basis." (13JA2951.) Based on the evidence of a kaleidoscope of duties performed by Wackenhut security officers at hundreds of different sites (see *ante*, at pp. 4-8), the trial court found that there was "no single type of 'work' the nature of which can be evaluated on a classwide basis." (13JA2952.)

Plaintiffs contend that the trial court's conclusion was erroneous because it "conflated the first prong—whether the nature of the work prevents an employee from being relieved of all duty for a

meal period—with an inquiry into whether job conditions varied at different locations." (AOB40.) But the trial court, in the absence of any binding appellate authority squarely addressing the nature of the work exception, reasonably adopted the DLSE's persuasive "multi-factor objective test" that focuses on context-specific factors such as the type of work performed, availability of other employees to relieve employees during meal breaks, the potential consequences to the employer if the employee is relieved of all duty, the ability of the employer to anticipate and mitigate these consequences, and whether the work product would be affected by relieving the employee of duty during his meal break. (DLSE Opn. Letter 2009.06.09 at p. 7; see 13JA2951.)

Because of the unique diversity in the type of work performed by Wackenhut security officers, an analysis of these factors will vary from site to site, and often from shift to shift. For example, as the trial court found, "the consequences of allowing an off-duty meal period" are not identical across the class, because "[t]he nature of the work of a security officer tasked with monitoring sensors and alarms at a nuclear facility is simply not the same as an officer stationed outside of a local bank, or an officer who is in charge of registering inmates at

a local jail." (13JA2952.) While these factors could potentially be applied in situations where all class members performed the same type of work under the same type of conditions, the record shows that is simply not the case here due to the expansive class Plaintiffs sought to certify and the character of Wackenhut's California operations. (See 13JA2952, citing *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193 (*Bufil*).)

Plaintiffs cite *Faulkinbury* for the proposition that the nature of the work factors can be applied *in this case* on a classwide basis. (AOB41.) But *Faulkinbury* was decided on a vastly different factual record, and the type of "work" performed by the guards in *Faulkinbury* did not differ nearly as much as it does here. And to the extent *Faulkinbury* (or the Ninth Circuit's decision in *Abdullah*) could be read as having endorsed class treatment simply because an employer required all employees to sign on-duty meal period agreements, that approach conflicts with *Walsh*, *Arenas*, *Wells Fargo*, *Vinole*, and DLSE guidance, and should not be followed by this Court.

Remarkably, Plaintiffs also contend that assessing whether the nature of the work prevented employees from being relieved of all duty somehow does *not* "hinge[] upon a determination of what the

'nature of the work' actually *is.*" (AOB41.) Instead, Plaintiffs suggest that the crucial question in the nature of the work analysis is whether, even given unlimited means, the employee could never be relieved of all duty. (AOB40-41.) Plaintiffs' approach would render the nature of the work exception a virtual nullity, as few businesses could not be remade to allow for on-duty meal periods if that were the standard. Not surprisingly, the DLSE has rejected Plaintiffs' radical interpretation, and explained that the "express language of the wage order contains no requirement that, in order to have an on-duty meal period, the employer must establish that the nature of the work makes it 'virtually impossible' for the employer to provide the employee with an off-duty meal period." (DLSE Opn. Letter 2009.06.09 at p. 7.) Plaintiffs' approach also conflicts with *Brinker*'s recognition that practical realities, including differences among industries, must be taken into account when construing the meal period requirement. (See *Brinker*, *supra*, 53 Cal.4th at p. 1040 ["What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law."].)

Because an inquiry into the particular circumstances of each class member's job duties for each shift would be required in order to properly adjudicate the first element of the nature of the work exception, the trial court correctly concluded that unmanageable individual inquiries precluded class certification.

3. The Trial Court Properly Rejected Plaintiffs' Proposal to Use Statistical Sampling to Avoid Individualized Inquiries

Plaintiffs have argued that regardless whether the first element of the nature of the work exception was satisfied, the exception was entirely unavailable to some portion of the class because certain employees allegedly signed on-duty meal period agreements that were not "valid" because they allegedly lacked language related to the ability of employees to revoke the agreements. (AOB44.) Plaintiffs contend that this "invalid" agreement theory "is a claim ideally suited for class treatment." (*Id.*; 13JA2945.) It is not.

As the trial court found, while this theory presented a common legal question (whether an agreement is invalid if it lacks revocation language), this "single common question is overwhelmed by individualized issues related to the on-duty meal period agreements" because "Wackenhut did not use a standard form throughout the class

period, and many class members signed two substantively different versions of the agreement over the course of their employment, either with or without revocation language." (13JA2945.) Plaintiffs argued below, and continue to argue to this Court (AOB45-54), that these individualized issues could be avoided through the use of a shortcut: the assessment of a statistical sample of a portion of class members' on-duty meal periods. In light of the persuasive guidance of the unanimous U.S. Supreme Court in *Dukes* and the serious due process concerns raised by the use of statistical sampling to establish liability, the trial court correctly rejected this shortcut here.

a) Plaintiffs Proposed an Impermissible "Trial by Formula"

California courts have long recognized that "[c]lass actions are provided only as a means to enforce substantive law," and thus "[a]ltering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going." (*City of San Jose*, *supra*, 12 Cal.3d at p. 462; see also *Tobacco II*, *supra*, 46 Cal.4th at p. 313 [class action procedure "does not change . . . substantive law"].) Plaintiffs' statistical sampling proposal would do just that, and would deprive Wackenhut of its due process right to adjudicate its defenses.

The trial court here found that what Plaintiffs proposed in this case was "essentially indistinguishable from the method of proof unanimously rejected" in *Dukes*. (13JA2945.) The U.S. Supreme Court in *Dukes* prohibited the use of "Trial by Formula"—a procedure whereby liability would be determined based on an adjudication of the claims of a sample of the class, with the results extrapolated across the remainder of the class. (131 S.Ct. at pp. 2560-2561.) The Ninth Circuit's en banc majority opinion in *Dukes* had dismissed the notion that individual determinations would render the class action unmanageable, and relying on a prior Ninth Circuit decision, *Hilao v. Estate of Marcos* (9th Cir. 1996) 103 F.3d 767 (*Hilao*), reasoned that the trial court could randomly select a subset of claims, hold individualized determinations as to those claims, and then extrapolate from the sample to calculate Wal-Mart's aggregate liability to the entire class, without assessing evidence relating to class members not within the sample. (See *Dukes v. Wal-Mart Stores, Inc.* (9th Cir. 2010) 603 F.3d 571, 625-626 [en banc], citing *Hilao*, *supra*, 103 F.3d at pp. 782-787.)

In the unanimous portion of its decision in *Dukes*, the U.S. Supreme Court "disapprove[d]" this "novel project." (131 S.Ct. at p.

2561.) The Court held that Wal-Mart had the "right to raise any individual affirmative defenses it may have" and to show that individual class members faced adverse employment actions for "lawful reasons"—and that the sampling procedure the Ninth Circuit had endorsed would preclude Wal-Mart from "litigat[ing] its statutory defenses to individual claims." (*Ibid.*, quotation marks and citation omitted.) Substituting statistical sampling for actual testimony would "'abridge, enlarge or modify'" the "'substantive right[s]'" of the parties in violation of the Rules Enabling Act. (*Ibid.*, quoting 28 U.S.C. § 2072(b).) The Court further concluded that a class action that could not be managed without using such a shortcut could not be certified at all. (*Ibid.* ["[A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."].)

Plaintiffs do not dispute the similarity between their proposal and the one rejected in *Dukes*. Instead, they assert that the "Trial by Formula" holding is limited to the Title VII context, and claim that "[a]ny other interpretation" is a "[m]isreading" of *Dukes*. (AOB19-

21.)[7] But the U.S. Supreme Court in *Dukes* was construing the generally applicable standards for class certification in light of the fundamental principle that procedural mechanisms cannot be used to alter substantive law or deprive a litigant of its right to defend itself. (See *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.* (2010) ___ U.S. ___ [130 S.Ct. 1431, 1437] ["Rule 23 provides a one-size-fits-all formula for deciding the class-action question."].) Indeed, *Dukes* has been applied to all types of cases, including wage-and-hour class actions under California law. (See, e.g., *Wang v. Chinese Daily News, Inc.* (9th Cir. Sept. 3, 2013, Nos. 08-55483, 08-56740) ___ F.3d ___ [2013 WL 4712728] (*Wang*); *Cruz v. Dollar Tree Stores, Inc.* (N.D. Cal. July 8, 2011, Nos. 07-2050 SC, 07-4012 SC) 2011 WL 2682967, at p. *6 [decertifying wage-and-hour misclassification class action and noting that "*Dukes* rejected a 'Trial by Formula' approach"].)

Plaintiffs also suggest that it is somehow significant that *Dukes* rooted its analysis in the federal Rules Enabling Act rather than due

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[7] Tellingly, Plaintiffs' primary support for this argument is *Ross v. RBS Citizens, N.A.* (7th Cir. 2012) 667 F.3d 900, a decision that the Supreme Court vacated and remanded. (See *RBS Citizens, N.A. v. Ross* (2013) 133 S.Ct. 1722.)

process. (AOB19.) But the Rules Enabling Act's prohibition against interpreting procedural rules to "abridge, enlarge or modify any substantive right" (28 U.S.C. § 2072(b)) reflects a fundamental due process norm that is binding on all courts. Indeed, as the U.S. Supreme Court has recognized, "'[d]ue process requires that there be an opportunity to present every available defense.'" (*Lindsey*, *supra*, 405 U.S. at p. 66, citation omitted; see also *Carrera*, *supra*, 727 F.3d at p. 307; *Broussard v. Meineke Discount Muffler Shops, Inc.* (4th Cir. 1998) 155 F.3d 331, 343 [noting that the fact that a procedural "shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court"].) Moreover, this same limitation on the class action procedure is reflected in the California Supreme Court's refusal to sanction procedural shortcuts that would "make a change in the substantive law." (*City of San Jose*, *supra*, 12 Cal.3d at p. 462 & fn. 9.)

b) Plaintiffs Sought to Use Sampling to Establish Liability, Not Merely Damages

Plaintiffs claim that they have never proposed using statistical sampling to prove Wackenhut's liability, but only to determine the aggregate damages recovery for the class. (AOB48-49.) But whether the nature of the work exception applies is clearly a question "of

liability, not damages," as the trial court accurately explained. (13JA2948.) For any given class member, if the nature of the work exception is satisfied—i.e., if an on-duty meal period agreement was valid and the nature of the employee's work actually did prevent Wackenhut from relieving him of all duty—then Wackenhut would not just owe a lower amount of damages; it would not be liable *at all* to that class member. (13JA2948.) Thus, Plaintiffs did not seek to use statistical sampling *solely* for the purpose of establishing aggregate damages.

Significantly, Plaintiffs have never been able to identify *any* authority sanctioning the use of statistical sampling for the purpose of determining *liability*. On the contrary, California courts have expressly rejected the notion that statistical sampling could be "an adequate evidentiary *substitute* for demonstrating the requisite commonality" necessary to maintain a class action, or that it could be used "to manufacture predominate common issues where the factual record indicates none exist." (*Dailey*, *supra*, 214 Cal.App.4th at p. 999.)

Moreover, even if Plaintiffs only sought to use statistical sampling to prove aggregate damages here—and they did not—the

use of such a procedural shortcut would still "'raise[] serious due process concerns' because it would deprive Wackenhut of its 'right to pay damages reflective' of its actual liability" by producing "imprecise individual recoveries that do not accurately reflect the actual damages incurred by each class member" and posing a serious risk of overcompensation. (13JA2946, quoting *McLaughlin v. Am. Tobacco Co.* (2d Cir. 2008) 522 F.3d 215, 231-232 (*McLaughlin*).) In other words, "[r]oughly estimating the gross damages to the class as a whole and only subsequently allowing for processing of individual claims would inevitably alter defendants' substantive right[s]." (*McLaughlin*, 522 F.3d at pp. 231-232; accord, *City of San Jose*, *supra*, 12 Cal.3d at p. 462; *In re Hotel Tel. Charges* (9th Cir. 1974) 500 F.2d 86, 90 ("[A]llowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights.").)

Plaintiffs' approach would also harm absent class members, whose rights to a full and fair recovery would be sacrificed in the name of class certification. (13JA2946-2947; cf. *Std. Fire Ins. Co. v. Knowles* (2013) ___ U.S. ___ [133 S.Ct. 1345, 1350] [rejecting attempt by class counsel to evade federal jurisdiction by purporting to

limit the amount of damages putative class members could recover].) Indeed, Plaintiffs themselves urged the trial court not to concern itself with "inherent fairness [as] to how much money each individual class member gets," because whether one class member "gets $10.00 more than he deserves and [another] gets $10.00 less" is "a[] wash" because "the whole idea of a class action is that there is going to be some imprecision." (3RT6310.) But as the trial court correctly found, forcing class members with valid claims "to share a portion of their rightful recovery with class members who were never injured" (or injured to a lesser degree) would improperly "result[] in a windfall for some class members and leav[e] other class members undercompensated." (13JA2946, citing 3RT6310, 3RT6323.) And because absent class members are not bound by judgments where class representatives inadequately protect their interests (*Carrera*, *supra*, 727 F.3d at p. 310), the use of statistical sampling to determine damages raises the possibility that Wackenhut will face individual suits by undercompensated class members—thus eliminating the efficiency and finality the class action procedure is meant to secure.

c) Plaintiffs' Reliance on the *Brinker* Concurrence Is Unavailing

Plaintiffs rely on Justice Werdegar's concurrence in *Brinker* to argue that *Dukes*'s rejection of "Trial by Formula" is inapplicable to California class actions. (AOB24-25.) But even if that concurrence were binding (which it is not), at most it suggests that statistical sampling might be used to determine the "*extent* of liability"—i.e., the amount of damages—not liability itself. (*Brinker*, *supra*, 53 Cal.4th at p. 1054 (conc. opn. of Werdegar, J.), italics added; see *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, 1369 (*Morgan*).)[8]

Moreover, the primary case cited by the *Brinker* concurrence—*Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715 (*Bell*)—relied on now-repudiated federal authorities that improperly endorsed the use of statistical sampling and extrapolation to adjudicate class

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[8] Contrary to Plaintiffs' contention (AOB25), the *Brinker* concurrence clearly describes *Dilts v. Penske Logistics, LLC* (S.D. Cal. 2010) 267 F.R.D. 625 as a decision in which *only* "class damages could be established through statistical sampling and selective direct evidence," and notes that liability would be established through employer records and direct testimony. (*Brinker*, *supra*, 3 Cal.4th at p. 1054 (conc. opn. of Werdegar, J.).)

claims.[9] In *Bell*, the trial court allowed experts to calculate damages by extrapolating from the depositions of 295 class members to determine the total number of overtime hours worked by a class of 2,402 employees. (*Id.* at p. 724.) On appeal, the defendant argued that "the use of statistical sampling and extrapolation violated its right to due process in the determination of damages." (*Id.* at p. 751.) The Court of Appeal rejected this argument, following the Ninth Circuit's decision in *Hilao v. Estate of Marcos*, *supra*, 103 F.3d at p. 786, and a federal district court decision, *In re Simon II Litigation* (E.D.N.Y. 2002) 211 F.R.D. 86, 148-154. (See *Bell*, *supra*, 115 Cal.App.4th at pp. 752-755.) But as the trial court here recognized, neither *Hilao* nor *Simon II* remains good law. (13JA2948-2949; see also *Dukes*, *supra*, 131 S.Ct. at pp. 2550, 2561 [expressly rejecting "the approach the Ninth Circuit approved in *Hilao*"]; *McLaughlin*, *supra*, 522 F.3d at p. 231 [overruling the approach endorsed in *Simon II*].)

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[9] The *Brinker* concurrence also cites *Sav-On*'s endorsement of statistical sampling, but *Sav-On* merely adopted *Bell*'s reasoning without elaboration or any independent analysis.

d) Plaintiffs Waived Their Argument That Further Discovery Should Have Been Ordered by Failing to Seek Such Discovery

Plaintiffs erroneously contend that the trial court "barred further discovery . . . where further discovery would have eliminated the due process issue with respect to sampling." (AOB51.) But as Plaintiffs concede (AOB51-52), their discovery requests and motions were all made *before* their decision to pursue statistical sampling. And while Plaintiffs stated at the final decertification hearing that Wackenhut "would have to produce the meal period agreements" if it wanted to pursue its defenses (3RT6653), they never actually renewed their motion to compel the production of the agreements and instead made a "voluntary decision not to press for full discovery." (13JA2947.) Therefore, Plaintiffs have waived their argument that they were entitled to further discovery. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603 ["[I]ssues not raised in the trial court cannot be raised for the first time on appeal."].)

Plaintiffs cite no case to support their argument that the trial court abused its discretion by refusing to grant further discovery that they never formally requested. The only case they cite on this issue, *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325 (*Lee*), is

inapposite. *Lee* involved a trial court's discretion to deny discovery when a plaintiff *did* bring a motion to compel disclosure of the identities of potential class members—"generally discoverable" information the plaintiff there had *at all times* affirmatively sought. (*Id.* at pp. 1336-1337.) Here, unlike in *Lee*, Plaintiffs clearly had—and forfeited—"an adequate opportunity to meet [their] burden" by insisting upon disclosure of the necessary evidence for their case once they realized that statistical sampling would not be permitted. (*Id.* at p. 1336; accord, 13JA2947.) Plaintiffs' failure to move to compel once the trial court decided it would not allow statistical sampling should not grant them another bite at the certification apple.[10]

II. THE TRIAL COURT PROPERLY DECERTIFIED THE REST BREAK CLAIM BECAUSE INDIVIDUALIZED ISSUES PREDOMINATE AND ARE UNMANAGEABLE

As with their meal period claims, the threshold question under Plaintiffs' theory of liability—whether Wackenhut authorized and

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[10] Even if Plaintiffs were to obtain every on-duty meal period agreement and attempt to prove liability without statistical sampling, an "invalid" on-duty meal period subclass would still be improper. (See 13JA2950.) Even in the absence of manageability concerns, the threshold question—whether Wackenhut provided only on-duty meal periods—would still have to be resolved through unmanageable individualized inquiries. (See *ante*, at pp. 28-40.)

permitted class members to take permissible rest breaks—cannot be resolved on a classwide basis. On the contrary, individualized inquiries into the nature of the rest breaks afforded to class members at hundreds of sites and over the course of millions of shifts would be necessary to establish liability here.

After weighing the evidence, the trial court found that Plaintiffs had failed to identify any uniform policy prohibiting class members from taking off-duty rest breaks. Rather, in assessing Plaintiffs' theory of liability, the court found that "[e]vidence in the record showed that class members at many Wackenhut worksites were provided with rest periods that lacked any restrictions and appear[ed] to be fully off-duty." (13JA2954, citing 18JA4059-4060, 18JA4079; see also 18JA4068; 18JA4158-4159.) And while the court acknowledged that Wackenhut "intended to place certain restrictions on rest periods at *some* worksites," it also clarified that "these restrictions *may or may not* have rendered such rest periods on-duty." (13JA2954, italics added.) These factual findings are supported by substantial evidence and are entitled to deference. (*Thompson*, *supra*, 217 Cal.App.4th at p. 726; *Dailey*, *supra*, 214 Cal.App.4th at p. 997.)

Plaintiffs' arguments on appeal regarding rest breaks rely on two faulty assumptions: that Wackenhut had a uniform policy not to authorize or permit rest breaks, and that no class members were provided valid rest breaks because some breaks were subject to certain minimal restrictions. Both assumptions are contrary to the trial court's well-supported findings and based on incorrect interpretations of California law.

A. Wackenhut Had a Written Policy Authorizing Rest Breaks in Accordance with Applicable Local Laws

Plaintiffs' primary argument is premised on the unsupported assertion that Wackenhut had a uniform policy not to "authorize and permit" off-duty rest breaks because of what they claim are inadequacies in Wackenhut's *written* policy prior to May 2008. (AOB55.) But, as the trial court correctly found, that policy actually authorized and permitted rest breaks in accordance with applicable law. (13JA2956.) Indeed, the policy made clear that "[f]ield management is also responsible for complying with *any applicable state or local law that provides employees with greater benefits and protections than the FLSA* in the locations in which they operate." (3JA631, italics added.) And in accordance with the policy, individual Wackenhut supervisors ensured that their security officers

were provided with the rest breaks required under California law. (E.g., 18JA4094.)

But even if this written policy were insufficient (and it was not), Plaintiffs have never been able to identify a single authority requiring employers to adopt a *written* rest break policy in order to comply with their obligations under California law. On the contrary, "the absence of a formal written policy . . . does not necessarily imply the existence of a uniform policy or widespread practice of either depriving . . . employees of meal and rest periods or requiring them to work during those periods." (*Dailey*, *supra*, 214 Cal.App.4th at p. 1002; see also *Morgan*, *supra*, 210 Cal.App.4th at pp. 1364-1368 [finding an ambiguous written policy could not serve as proof of the presence or absence of any uniform classwide policy].)

In any event, what is critical is not merely what rest break policy Wackenhut may have adopted, but instead whether that policy was actually applied to the entire class *in practice*. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 714, fn. 11 [liability is dependent upon application of a policy, "not the mere adoption of the policy itself"].) The Supreme Court in *Brinker* reaffirmed this fundamental principle, holding that "where no substantial evidence

points to a uniform, companywide policy," establishing "liability [must] continue in an employee-by-employee fashion." (53 Cal.4th at p. 1052.)[11] And, as *Brinker* teaches, "what will suffice" as an off-duty break "may vary from industry to industry"—there is not a one-size-fits-all definition of a compliant break for all industries or employers. (*Id.* at p. 1040.)

Substantial evidence in the record establishes that Wackenhut did not in practice uniformly deny rest breaks to all class members. (13JA2954-2956.) In fact, multiple class members stated that though they were provided with on-duty meal periods, they were *always* provided off-duty rest breaks, and certain supervisors "required" that their employees take the rest breaks to which they were entitled. (18JA4074; 18JA4079; 18JA4094; 18JA4099.) And because Wackenhut provided—and the trial court credited—"substantial evidence disputing the uniform application of its business policies and practices . . . the trial court was acting within its discretion in finding

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[11] (See also *Wang*, *supra*, 2013 WL 4712728, at p. *3 [vacating certification of wage-and-hour class of approximately 200 employees after *Dukes* because there were "potentially significant differences among the class members" that could "'impede the generation of common answers'"].)

that [Plaintiffs'] theory of [Wackenhut's] liability was not susceptible of common proof at trial." (*Dailey*, *supra*, 214 Cal.App.4th at p. 997.)

B. *Brinker*, *Faulkinbury*, and *Bradley* Are Distinguishable Because Wackenhut Did Not Have a Uniform Policy to Deny or Not Provide Rest Breaks

Ignoring obvious distinguishing factors, Plaintiffs argue that class certification here is supported by *Brinker*, *Faulkinbury*, and *Bradley*. But unlike the defendants in those cases, Wackenhut has *never* conceded that it had a rest break policy that was uniformly applied to the entire class prohibiting employees from taking off-duty rest breaks. (See *Brinker*, *supra*, 53 Cal.4th at p. 1033 ["Brinker conceded at the class certification hearing the existence of[] a common, uniform rest break policy. The rest break policy was established at Brinker's corporate headquarters; it is equally applicable to all Brinker employees."]; *Faulkinbury*, *supra*, 216 Cal.App.4th at pp. 236-237 [defendant did not contest that it had no policy authorizing rest breaks]; *Bradley*, *supra*, 211 Cal.App.4th at p. 1150 [defendant conceded it had no policy to provide rest breaks].)

This distinction between the concededly uniform policies in *Brinker*, *Faulkinbury*, and *Bradley* and the non-uniform application of informal rest break policies here is crucial. The employers'

admissions that uniformly applied policies existed in those cases eliminated the need to evaluate liability on an employee-by-employee basis and thus produced common questions capable of resolution in one stroke. Here, by contrast, the legality of Wackenhut's basic policy will not resolve the question whether the individual employees were provided compliant rest breaks. That question can only be answered through examining the informal policies applicable to, and experiences of, each class member at the "hundreds of worksites and over the course of millions of shifts." (13JA2942-2944.)

C. The *Rest Break* Claims Cannot Be Certified Merely Because Some Employees Had On-Duty *Meal Periods*

The trial court properly found that a rest break subclass based on whether class members had on-duty *meal periods* could not be certified because of predominance and ascertainability issues. (13JA2955.) Any contrary decision would effectively render all employers exercising their right to provide on-duty meal periods under the nature of the work exception automatically subject to classwide liability for rest break claims, even where the employer undeniably provided compliant off-duty rest breaks.

Plaintiffs cite no authority to support their novel theory, and none exists. The cases they do cite (AOB62) involve employers who

adopted uniform policies that did not authorize their employees to take rest breaks, or failed to proffer *any* evidence that employees were provided with off-duty rest breaks. (See *Faulkinbury*, *supra*, 216 Cal.App.4th at p. 236 [defendant's employee handbook forbade employees from leaving posts without permission for any type of break]; *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 963 (*Cicairos*) [defendant provided no evidence that rest breaks were provided].)

Plaintiffs incorrectly claim that *Bufil v. Dollar Financial Group, Inc.*, *supra*, stands for the proposition that proof of on-duty meal periods *necessarily* demonstrates that rest breaks were also on-duty. (AOB62.) Not so. *Bufil*'s class certification analysis was premised on evidence showing that employees were *never* allowed to be off-duty. (162 Cal.App.4th at p. 1208.) Here, no similar classwide evidence exists.

At bottom, Plaintiffs would have the Court adopt an irrebuttable presumption that because an employee was provided an on-duty meal period, any rest breaks provided to that employee would also have to be on duty. Even if such a presumption were appropriate, it would be particularly absurd to apply it here, given that Plaintiffs' own chart

submitted in support of their class certification motion expressly admitted that several of their own declarants who were stationed at on-duty meal break posts nevertheless were "[a]uthorized & [p]ermitted to take a [r]est [b]reak." (14JA3104-3108 [see, e.g., entries for Ammari and Baca].)

D. That Some Employees May Have Been "On Call" During Rest Breaks Cannot Support Certification

Plaintiffs assert that rest breaks at sites where guards were required to remain on call could not have constituted compliant off-duty breaks, and that the question whether they could do so was a common one ripe for class adjudication. (AOB61-62.) Plaintiffs, however, failed to present evidence that *all* class members were required to remain "on call" during rest breaks.[12]

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[12] Moreover, under California law, an "'on call' rest period is acceptable." (*Temple v. Guardsmark LLC* (N.D. Cal. Feb. 22, 2011, No. C 09-02124 SI) 2011 WL 723611, at *6; see also *Dailey*, *supra*, 214 Cal.App.4th at p. 1001; Dept. Industrial Relations, DLSE Opn. Letter No. 1994.02.16 (Feb. 16, 1994) p. 4 ["simply requiring the worker to respond to call backs is [not] so inherently intrusive as to require a finding that the worker is under the control of the employer"]; Dept. Industrial Relations, DLSE Enforcement Policies & Interpretations Manual (June 2002 rev.) § 47.5.5 [similar]; cf. Dept. Industrial Relations, DLSE Opn. Letter No. 1992.01.28 (Jan. 28, 1992) p. 3 [noting that there is "no presumption" that an employee who is required to respond to pages

[Footnote continued on next page]

Individualized inquiries into what restrictions, if any, were placed on rest breaks that Wackenhut provided to class members necessarily predominate. For each class member, at minimum the following questions would have to be answered to establish liability under Plaintiffs' "on-call" rest breaks theory:

- Was the employee required to—and did she—carry a radio, pager, or cell phone on rest breaks?
- Was the employee required to—and did she—remain at her post during rest breaks, or was she permitted to take rest breaks elsewhere?
- Was the employee required to—and did she—respond to emergencies or other matters during rest breaks?
- Were employees afforded additional, uninterrupted rest breaks to make up for any interrupted break?

None of these questions can be answered on a classwide basis because there is no common policy or other common proof directly establishing the parameters of the rest breaks that Wackenhut provided; instead, "potentially significant differences among the class members" demand employee-by-employee adjudication. (*Wang*,

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[Footnote continued from previous page]

during meal periods is "under the direction or control of the employer"].)

supra, 2013 WL 4712728, at p. *3; accord, *Brinker*, *supra*, 53 Cal.4th at p. 1022, fn. 5.)

III. THE TRIAL COURT PROPERLY DECERTIFIED THE WAGE STATEMENT CLAIMS BECAUSE INDIVIDUALIZED ISSUES PREDOMINATE AND ARE UNMANAGEABLE

Plaintiffs' wage statement claims fall into two categories: (1) those derivative of their meal and rest break claims, which Plaintiffs concede were properly decertified if the meal and rest break claims were properly decertified, and (2) those premised on an "alternative theory of liability." (AOB63-64; 13JA2956.)

The court properly rejected Plaintiffs' second, alternative theory of liability—alleging a failure to include certain statutorily required information on employee wage statements (AOB64)—because they failed to proffer *any* means of establishing classwide that each class member "suffer[ed] injury *as a result of* a knowing and intentional failure by [Wackenhut] to comply with subdivision (a)" of Labor Code, section 226. (Lab. Code, § 226, subd. (e), italics added; see *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1142-1143 fn. 6 (*Price*).)

Plaintiffs' theory of injury is premised on a hypothetical "mathematical injury" class members *might* have suffered if they

performed calculations to determine if they were paid correctly. Indeed, Plaintiffs conceded that no class members would testify to having been paid "even . . . two cents less on [any] paycheck than they were due." (3RT6372-6373; 13JA2957.) But, as the trial court recognized, "whether class members actually performed [calculations to determine whether they were paid correctly] is an inherently individualized inquiry" rendering certification improper. (13JA2956-2957.)

Undeterred, Plaintiffs contend that they need not demonstrate an ability to prove classwide that employees actually performed any calculations or were otherwise actually harmed by confusion over their wage statements. (AOB64-67.) Plaintiffs are generally correct that there is a distinction between the "injury" that encompasses the invasion of the legally protected interest and the "harm" manifesting as the material detriment to the plaintiff. (AOB67.) But in interpreting the statutory section at issue here, *Price* held that "[t]he injury requirement in section 226, subdivision (e), cannot be satisfied simply because one of the nine itemized requirements in section 226, subdivision (a) is missing from a wage statement." (192 Cal.App.4th at p. 1142.) *Price* explained that such a technical violation could not

establish the injury necessary to trigger liability, because "the deprivation of [required] information, standing alone, is not a cognizable injury." (*Id.* at p. 1143; accord, 13JA2956-2957.)

Plaintiffs' do not identify any binding authority to support their strict liability-type theory. Plaintiffs cite *Kisliuk v. ADT Security Services* (C.D. Cal. 2008) 263 F.R.D. 544 (*Kisliuk*) for the proposition that mere technical noncompliance establishes injury (AOB66-67), but *Kisliuk* was decided before *Price* and expressly noted that at the time of its decision no California case had yet construed section 226, subdivision (e)'s "injury" requirement. (263 F.R.D. at p. 548.) *Price* effectively invalidated *Kisliuk*'s reasoning.[13] *Cicairos*, *supra*, 133 Cal.App.4th 949, is even more inapposite. *Cicairos* did not find that a mere technical violation could establish *injury* under section 226 (AOB64-65), but rather that failure to include the required information could establish a statutory *violation.* (133 Cal.App.4th at pp. 954-955.)

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[13] Given the California Court of Appeal's clear rejection of liability based on mere technical violations in *Price*, Plaintiffs' reliance on contrary federal district court cases is likewise unpersuasive. (AOB65.)

Plaintiffs suggest that *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286 (*Jaimez*) held that subdivision (e)'s "injury" requirement does not preclude certification, because it merely relates to the amount of damages. (AOB65-66.) But *Price* subsequently cited *Jaimez* to *support* its conclusion that an alleged "mathematical injury" that did not actually result in requiring employees to "reconstruct time records to determine if they were correctly paid" could not establish the threshold "injury" element. (*Price*, *supra*, 192 Cal.App.4th at p. 1143.) Plaintiffs' contrary interpretation of *Jaimez* should be rejected, particularly as it would effectively render subdivision (e)'s injury requirement a nullity.

Because Plaintiffs can identify no means to establishing any compensable injury on a classwide basis, the court properly decertified the wage statement claims.

CONCLUSION

For all the foregoing reasons, the Court should affirm the trial court's decision.

DATED: November 15, 2013

Respectfully submitted,

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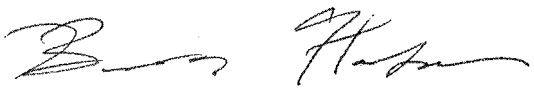
CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c), of the California Rules of Court, the undersigned hereby certifies that the foregoing Respondent's Brief is in 14-point Times New Roman font and contains 13,884 words, according to the word count generated by the computer program used to produce the brief.



Bradley J. Hamburger

Exhibit A

Wang v. Chinese Daily News, Inc.
(9th Cir. Sept. 3, 2013, Nos. 08-55483, 08-56740)
___ F.3d ___ [2013 WL 4712728]

2013 WL 4712728
Only the Westlaw citation is currently available.
United States Court of Appeals,
Ninth Circuit.

Lynne WANG; Yu Fang Ines Kai; Hui Jung Pao, on behalf of themselves and all others similarly situated; Lien Yi Jung; Yu Fang Kai; Chang Chingfang; Jeffrey Sun; Shieh–Sheng Wei; Yun Min Pao; Hui Jung Lee; Chengyang Yan; Shiang Huang; Chih–Ming Sheu; Minh Vi–Huynh; Jenny Liu Hung, Plaintiffs–Appellees,

v.

CHINESE DAILY NEWS, INC., Defendant–Appellant.

Lynne Wang; Yu Fang Ines Kai; Hui Jung Pao, on behalf of themselves and all others similarly situated, Plaintiffs–Appellees,

v.

Chinese Daily News, Inc., Defendant–Appellant, and

Lien Yi Jung; Yu Fang Kai; Chingfang Chang; Shieh–Sheng Wei; Yun Min Pao; Hui Jung Lee; Chenyang Yan; Shiang L. Huang; Chih–Ming Sheu; Minh Vi–Huynh; Jenny Liu Hung; Jeffrey Sun, Plaintiffs.

Nos. 08–55483, 08–56740. | Argued and Submitted July 31, 2012. | Filed Sept. 3, 2013.

Attorneys and Law Firms

Della Barnett, Berkeley, CA; Cordelia Dai and Randy Renick (argued), Hadsell Stormer Richardson & Renick, LLP, Pasadena, CA, for Appellees.

Michael M. Berger (argued), Benjamin G. Shatz, Yi–Chin Ho, and Andrew L. Satenberg, Manatt, Phelps & Phillips, Los Angeles, CA, for Appellant.

Appeal from the United States District Court for the Central District of California, Consuelo B. Marshall, Senior District Judge, Presiding. D.C. No. 2:04–cv–01498–CBM–JWJ.

Before STEPHEN S. TROTT and WILLIAM A. FLETCHER, Circuit Judges, and CHARLES R. BREYER, District Judge. *

* The Honorable Charles R. Breyer, District Judge for the U.S. District Court for Northern California, sitting by designation.

Opinion

ORDER AND OPINION

W. FLETCHER, Circuit Judge:

ORDER

***1** This court's opinion filed March 4, 2013, and reported at 709 F.3d 829 (9th Cir.2013), is withdrawn, and is replaced by the attached Opinion.

With the filing of the new opinion, the panel has voted unanimously to deny the petition for rehearing. Judge Fletcher has voted to deny the petition for rehearing en banc, and Judges Trott and Breyer so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

OPINION

Named plaintiffs filed a class action suit against defendant-appellant Chinese Daily News, Inc. ("CDN"), alleging violations of the federal Fair Labor Standards Act ("FLSA"), of California's Unfair Business Practices Law, and of the California Labor Code. The district court certified the FLSA claim as a collective action and certified the state-law claims as a class action. After a sixteen-day jury trial and a three-day bench trial, the district court entered judgment in favor of plaintiffs. On September 27, 2010, we affirmed the district court. On October 3, 2011, the United States Supreme Court vacated and remanded for reconsideration in light of its decision in *Wal–Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541 (2011). We now reverse the district court's certification of the plaintiff class under Federal Rule of Civil Procedure 23(b)(2), and we remand for the district court to reconsider its analysis under Rules 23(a) and 23(b)(3).

I. Background

On March 5, 2004, Lynne Wang, Yu Fang Ines Kai, and Hui Jung Pao filed suit against CDN on behalf of current, former, and future CDN employees based in CDN's San Francisco and Monterey Park (Los Angeles) locations, claiming violations of the FLSA, 29 U.S.C. § 206 et seq., California's Unfair Competition Law, Cal. Bus. & Prof.Code § 17200 et seq., and California's Labor Code. Plaintiffs alleged that CDN employees were made to work more than eight hours per day and more than forty hours per week. They further alleged that they were wrongfully denied overtime compensation, meal and rest breaks, accurate and itemized wage statements, and penalties for wages due but not promptly paid at termination. They sought damages, restitution, attorneys' fees, and injunctive relief.

After plaintiffs narrowed the class definition to include only non-exempt employees at the Monterey Park facility, the district court certified the FLSA claim as a collective action. The district court certified the state-law claims as a class action under Rule 23(b)(2). *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 611 (C.D.Cal.2005). In the alternative, the district court held that the class could be certified under Rule 23(b)(3). *Id.* at 614.

The post-certification litigation proceeded in three stages. First, both sides sought summary judgment on the question whether CDN's reporters were eligible for overtime under the FLSA. The court granted summary judgment to plaintiffs, holding that CDN's reporters did not fall within the "creative professional exemption" and were thus eligible for overtime. *Wang v. Chinese Daily News, Inc.*, 435 F.Supp.2d 1042, 1055 (C.D.Cal.2006); *see* 29 C.F.R. § 541 .302(d). Second, the district court held a sixteen-day jury trial. The jury returned a special verdict awarding the plaintiff class over $2.5 million in damages. Third, the court held a bench trial on the remaining issues of injunctive relief, penalties, prejudgment interest, and restitution. It held that plaintiffs' injuries could be remedied by damages and denied plaintiffs' request for an injunction.

***2** We affirmed. *Wang v. Chinese Daily News*, 623 F.3d 743 (9th Cir.2010). The Supreme Court granted certiorari, vacated our opinion, and remanded for reconsideration in light of *Wal–Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). The parties submitted post-remand supplemental briefing, and we held oral argument.

II. Discussion

A party seeking class certification must satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one of the categories under Rule 23(b). The district court held that Rule 23(a) had been satisfied and certified the class under Rule 23(b)(2). In the alternative, it held that the class could be certified under Rule 23(b)(3). *Wang*, 231 F.R.D. at 614. We reverse the district court's certification under Rule 23(b)(2) for purposes of monetary relief in light of *Wal–Mart*. We remand for the district court to reconsider its analysis under Rules 23(a) and 23(b)(3), and to examine whether the Rule 23(b)(2) class certification may continue for purposes of injunctive relief.

A. Rule 23(a)

"Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal–Mart*, 131 S.Ct. at 2550. The rule requires a party seeking class certification to satisfy four requirements: numerosity, commonality, typicality, and adequacy of representation. *Id.* The rule provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). Class certification is proper only if the trial court has concluded, after a "rigorous analysis," that Rule 23(a) has been satisfied. *Wal–Mart*, 131 S.Ct. at 2551 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982)). CDN challenges the district court's finding that the commonality requirement of Rule 23(a)(2) was satisfied. CDN does not challenge other Rule 23(a) findings of the district court.

Plaintiffs argue that CDN has waived its right to challenge the district court's commonality finding because its opening brief, filed before the Supreme Court's decision in *Wal–Mart,* discussed the existence of common questions only in arguing against Rule 23(b)(3) certification. CDN did not argue the issue of commonality in its discussion of Rule 23(a). "Generally, an issue is waived when the appellant does not specifically and distinctly argue the issue in his or her opening brief." *United States v. Brooks,* 610 F.3d 1186, 1202 (9th Cir.2010) (internal quotation marks omitted). However, we may consider new arguments on appeal if the issue arises because of an intervening change in law. *See Randle v. Crawford,* 604 F.3d 1047, 1056 (9th Cir.2010). We conclude that the Court's decision in *Wal–Mart* presents a sufficiently significant legal development to excuse any failure of CDN to discuss the commonality requirement of Rule 23(a)(2) in its opening brief. Further, any potential prejudice to plaintiffs is cured by the fact that both parties were able to address the commonality issue under Rule 23(a)(2) in their supplemental briefs submitted after the Supreme Court's remand.

***3** The district court held that the commonality requirement was satisfied because of numerous common questions of law and fact arising from CDN's "alleged pattern of violating state labor standards." 231 F.R.D. at 607. However, as the Supreme Court noted in *Wal–Mart,* "any competently crafted class complaint literally raises common questions." *Wang,* 131 S.Ct. at 2551 (alteration and internal quotation marks omitted). "What matters to class certification is not the raising of common questions—even in droves —but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (alteration and internal quotation marks omitted). Dissimilarities within the proposed class may "impede the generation of common answers." *Id.* "If there is no evidence that the entire class was subject to the same allegedly discriminatory practice, there is no question common to the class." *Ellis v. Costco Wholesale Corp.,* 657 F.3d 970, 983 (9th Cir.2011).

Wal–Mart was "one of the most expansive class actions ever." *Wal–Mart,* 131 S.Ct. at 2547. The class was a nationwide class of approximately 1.5 million current and former female Wal–Mart employees alleging "that the discretion exercised by their local supervisors over pay and promotion matters violate[d] Title VII by discriminating against women." *Id.* The Supreme Court noted that the plaintiffs in *Wal–Mart* "wish[ed] to sue about literally millions of employment decisions at once." *Id.* at 2552. In order to show that examination of the class claims would "produce a common answer to the crucial question" of why each employee was disfavored, the plaintiffs needed to present "significant proof" that Wal–Mart "operated under a general policy of discrimination." *Id.* at 2552–53 (internal quotation marks omitted). Wal–Mart's publicly announced policy forbade discrimination. In the view of the Court, the only countervailing evidence of a general policy of discrimination offered by plaintiffs was "worlds away from significant proof." *Id.* at 2554 (internal quotation marks omitted).

Wal–Mart reiterated that the "rigorous analysis" under Rule 23(a) "sometimes [requires] the court to probe behind the pleadings before coming to rest on the certification question." *Id.* at 2551 (quoting *Falcon,* 457 U.S. at 160, 161). As we explained in *Ellis,* 657 F.3d at 981, "the merits of the class members' substantive claims are often highly relevant when determining whether to certify a class," and "a district court *must* consider the merits" if they overlap with Rule 23(a)'s requirements. "[T]he district court was required to resolve any factual disputes necessary to determine whether there was a common pattern and practice that could affect the class *as a whole.*" *Id.* at 983.

Wal–Mart is factually distinguishable from our case. Most important, the class here is much smaller. It encompasses only about 200 employees, all of whom work or worked at the same CDN office. Plaintiffs' claims do not depend upon establishing commonalities among 1.5 million employees and millions of discretionary employment decisions. Nonetheless, there are potentially significant differences among the class members.

***4** We vacate the district court's Rule 23(a)(2) commonality finding and remand for reconsideration in light of *Wal–Mart.* On remand, the district court must determine whether the claims of the proposed class "depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart,* 131 S.Ct. at 2551. Plaintiffs need not show that every question in the case, or even a preponderance of questions, is capable of classwide resolution. So long as there is "even a single common question," a would-be class can satisfy the commonality requirement of Rule 23(a)(2). *Wal–Mart,* 131 S.Ct. at 2556 (alteration and internal quotation marks omitted).

B. Rule 23(b)(2)

In our earlier opinion, we affirmed the district court's certification under Rule 23(b)(2). Relying upon our en banc decision in *Dukes v. Wal–Mart Stores, Inc.*, 603 F.3d 571 (9th Cir.2010) (en banc), we held that the class certification under Rule 23(b)(2) was proper because the class's claims for monetary relief did not predominate over its claims for injunctive relief. *Wang*, 623 F.3d at 755. After we issued our decision in this case, however, the Supreme Court reversed our en banc decision. In reversing, the Court made clear that "individualized monetary claims belong in Rule 23(b)(3)" rather than Rule 23(b)(2). *Wal–Mart*, 131 S.Ct. at 2558. The Court left open the possibility that "incidental" monetary claims could be brought in a Rule 23(b)(2) class action, but it declined to decide that question. *Id.* at 2560–61.

Plaintiffs concede that class certification for their monetary claims under Rule 23(b)(2) cannot stand in light of *Wal–Mart*. *See Wal–Mart*, 131 S.Ct. at 2559–60. However, the possibility of a Rule 23(b)(2) class seeking injunctive relief remains. Rule 23(b)(2) applies "when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* at 2557; *see also Ellis*, 657 F.3d at 987 (indicating that the court could certify a Rule 23(b)(2) class for injunctive relief and a separate Rule 23(b)(3) class for damages).

We remand to the district court for a determination whether, in light of *Wal–Mart*, the previously granted certification of a Rule 23(b)(2) class should continue for purposes of injunctive relief. The district court should first consider its commonality finding under Rule 23(a)(2). If it again finds commonality, it should consider whether class certification under Rule 23(b)(2) for purposes of injunctive relief can be sustained. It appears that none of the named plaintiffs has standing to pursue injunctive relief on behalf of the class, as none of them is a current CDN employee. *See Wang*, 623 F.3d at 756. However, because the Rule 23(b)(2) class was certified by the district court while they were current employees, the class certification with respect to injunctive relief may survive if there are identifiable class members who are still employed by CDN. *See Bates v. United Parcel Servs., Inc.*, 511 F.3d 974, 987 (9th Cir.2007) (en banc).

C. Rule 23(b)(3)

***5** In our earlier opinion, we declined to consider whether the district court's alternative ruling certifying the class under Rule 23(b)(3) was proper. Rule 23(b)(3) provides that class certification is permissible if:

> the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3). The predominance analysis under Rule 23(b)(3) focuses on "the relationship between the common and individual issues" in the case and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir.1998) (citation and internal quotation marks omitted).

For three reasons, we remand to the district court for reconsideration of the propriety of class certification under Rule 23(b)(3). First, the district court can certify a class under Rule 23(b)(3) only if it first again determines that plaintiffs meet the commonality requirement under Rule 23(a). *See supra* Section II.A.

Second, the district court's conclusion that common questions predominate in this case rested on the fact, considered largely in isolation, that plaintiffs are challenging CDN's uniform policy of classifying all reporters and account executives as exempt employees. *See Wang*, 231 F.R.D. at 612–13. In two recent decisions, we criticized the nature of the district court's Rule 23(b)(3) predominance inquiry in this case. *See In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958–59 (9th Cir.2009); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944–48 & n .14 (9th Cir.2009). We observed that the district court in this case "essentially create[d] a presumption that class certification

is proper when an employer's internal exemption policies are applied uniformly to the employees." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d at 958. We wrote that such a presumption "disregards the existence of other potential individual issues that may make class treatment difficult if not impossible." *Id.* The main concern of the predominance inquiry under Rule 23(b)(3) is "the balance between individual and common issues." *Id.* at 959. "[A] district court abuses its discretion in relying on an internal uniform exemption policy to the near exclusion of other factors relevant to the predominance inquiry." *Vinole,* 571 F.3d at 946.

***6** Third, the California Supreme Court has recently clarified California law concerning an employer's duty to provide meal breaks. In *Brinker Rest. Corp. v. Superior Court,* 273 P.3d 513, 535 (Cal.2012), the court held that an employer is obligated to "relieve its employee of all duty for an uninterrupted 30–minute period" in order to satisfy its meal-break obligations, but that the employer need not actually ensure that its employees take meal breaks. If an employee works through a meal break, the employer is liable only for straight pay, and then only when it "knew or reasonably should have known that the worker was working through the authorized meal period." *Id.* at 536 n. 19 (internal quotation marks omitted).

> On the other hand, an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks.... The wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks.

Id. at 536.

We vacate the district court's Rule 23(b)(3) certification and remand to permit the court to reconsider its analysis in light of *Wal–Mart,* in light of *Wells Fargo* and *Vinole,* and in light of *Brinker.* Rule 23 provides district courts with broad authority at various stages in the litigation to revisit class certification determinations and to redefine or decertify classes as appropriate. *Armstrong v. Davis,* 275 F.3d 849, 871 n. 28 (9th Cir.2001), *abrogated on other grounds by Johnson v. California,* 543 U.S. 499, 504–05 (2005). The district court should consult the entire record of this case in the exercise of that authority.

Conclusion

We reverse the district court's class certification under Rule 23(b)(2) for purposes of monetary relief. We vacate and remand for the district court to reconsider its findings of commonality under Rule 23(a) and predominance under Rule 23(b)(3). We also vacate and remand for reconsideration of class certification under Rule 23(b)(2) for purposes of injunctive relief. Because we vacate the district court's class certification, we do not reach any other issues from trial, including the calculation of damages.

REVERSED in part, VACATED, and REMANDED.

Parallel Citations

21 Wage & Hour Cas.2d (BNA) 202, 13 Cal. Daily Op. Serv. 9741, 2013 Daily Journal D.A.R. 11,875

End of Document

Exhibit B

Cruz v. Dollar Tree Stores, Inc.
(N.D. Cal. July 8, 2011, Nos. 07-2050 SC, 07-4012 SC)
2011 WL 2682967

2011 WL 2682967
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Miguel A. CRUZ, and John D. Hansen,
individually and on behalf of all
others similarly situated, Plaintiffs,
v.
DOLLAR TREE STORES, INC., Defendant.
Robert Runnings, individually, and on behalf
of all others similarly situated, Plaintiffs,
v.
Dollar Tree Stores, Inc., Defendant.

Nos. 07–2050 SC, 07–4012 SC. | July 8, 2011.

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Opinion

ORDER DECERTIFYING CLASS

SAMUEL CONTI, District Judge.

I. *INTRODUCTION*

***1** This is a certified class action brought by Plaintiffs Robert Runnings ("Runnings"), Miguel Cruz ("Cruz"), and John Hansen ("Hansen") (collectively, "Plaintiffs"), who allege that they and other current and former store managers at Defendant Dollar Tree Stores, Inc. ("Defendant" or "Dollar Tree") were misclassified as executive-exempt employees and thereby denied overtime pay and meal and rest breaks in violation of California law. On May 27, 2011, the Court conducted a hearing on the trial plans submitted by Plaintiffs and Defendant. At the conclusion of the hearing, the Court expressed concern over the continued propriety of class treatment in this case and ordered the parties to submit briefs addressing whether continued class treatment was appropriate. The parties have submitted briefs in response to the Court's order. ECF Nos. 314 ("Def.'s Br."), 317 ("Pls.' Br."). [1] After reviewing these briefs, and many other papers submitted by the parties over the course of this litigation, the Court finds that continued class treatment is inappropriate and DECERTIFIES the class for the following reasons.

1 *Cruz v. Dollar Tree,* Case No. 07–2050 ("Cruz action"), and *Runnings v. Dollar Tree,* Case No. 07–4012 ("Runnings action"), have been consolidated. Unless otherwise noted, all docket numbers in this Order refer to docket entries in the *Cruz* action.

II. *BACKGROUND*

The Court assumes the parties are familiar with the procedural and factual background of this case, which the Court set out in its May 26, 2009 Order Granting the Amended Motion for Class Certification. ECF No. 107 ("Orig.Cert.Order"). Accordingly, the Court provides a truncated version here.

Plaintiffs are former Dollar Tree employees who held the position of store manager. On April 11, 2007, Cruz and Hansen filed suit ("the *Cruz* action") on behalf of themselves and all others similarly situated against Dollar Tree, alleging that Dollar Tree improperly categorizes its store managers as executive-exempt employees under California and federal labor laws. ECF No. 1 ("Compl."). In August 2007, Runnings filed a similar action in state court (the "*Runnings* action"), which was subsequently removed and consolidated with the *Cruz* action. *See* ECF No. 45.

On May 26, 2009, the Court certified a class of "all persons who were employed by Dollar Tree Stores, Inc. as California retail Store Managers at any time on or after December 12, 2004, and on or before May 26, 2009," and appointed Plaintiffs as class representatives. *See* Orig. Cert. Order. The class consisted of 718 store managers ("SMs") who worked in 273 retail locations. *Id.*

On June 18, 2010, in the wake of two Ninth Circuit decisions regarding employment class actions—*In re Wells Fargo Home Mortgage Overtime Pay Litigation,* 571 F.3d 953 (9th Cir.2009) (*"Wells Fargo I"*), and *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir.2009)—Dollar Tree moved for decertification, arguing that changes in the law made continued class treatment inappropriate. ECF No. 188. On September 9, 2010, the Court granted in part and denied in part Dollar Tree's motion for decertification. ECF No. 232 ("Part.Decert.Order").

***2** As explained in the Original Certification Order and the Partial Decertification Order, Dollar Tree requires its SMs to complete weekly payroll certifications indicating whether they spent more than fifty percent of their actual work time each week performing seventeen listed duties that Dollar Tree believes to be "managerial" in nature. *See* Part. Decert. Order at 2. The certification form states that SMs "may not spend more than a total of 35% of his/her actual work time each week receiving product, distributing and storing product, stocking product and cashiering." *Id.* Each SM must certify "yes" if he or she spent the majority of his or her time performing the seventeen duties and "no" if he or she did not. *Id.* The payroll certification form further states that if the SM responds no, "s/he must immediately provide an explanation to both Payroll and Human Resources. No salary or wage will be withheld because of non-compliance." *Id.* The form provides a space for SMs to write an explanation. *Id.*

In its Partial Decertification Order, after reviewing the Ninth Circuit's decisions in *Wells Fargo I* and *Vinole* and examining subsequent district court reactions, the Court decided that, with a modification of the class definition, this case could proceed as a class action. The Court held that Dollar Tree's payroll certifications provided common proof of how SMs were spending their time. Part. Decert. Order at 12–13. The Court reasoned that this common proof—which was lacking in other cases [2] where classes were decertified after *Vinole* and *Wells Fargo I*—would obviate the need for much individual testimony from SMs concerning how they spent their time. *Id.* However, the Court narrowed the class to include only those SMs who certified "no" on a payroll certification form at least once during the class period. The Court reasoned that, in order to prove liability with regard to the SMs who always certified "yes," Plaintiffs would need to show that these SMs were not truthful when completing their payroll certifications. *Id.* Such credibility determinations would require individualized inquiries that would overwhelm the common issues in the case. *Id.* By narrowing the class, the Court sought to avoid this problem.

2 *See, e.g., In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 268 F.R.D. 604, 611 (N.D.Cal. Jan.13, 2010) (*"Wells Fargo II"*) (denying class certification because plaintiffs could not produce "common proof that would absolve this court from inquiring into how each [manager] spent their working day").

The Partial Decertification Order resulted in a class consisting of 273 members and defined as "all persons who were employed by Dollar Tree Stores, Inc. as California retail store managers at any time on or after December 12, 2004, and on or before May 26, 2009, and who responded 'no' at least once on Dollar Tree's weekly payroll certifications." *Id.* at 23. The class definition has not been altered further. [3]

3 On March 8, 2011, the Court granted in part Dollar Tree's Motion to Dismiss Claims of Class Members Who Failed to Respond to Discovery Requests. ECF No. 282 ("Mar. 8, 2011 Order"). The Court dismissed the claims of eighty-nine class members who failed to respond to limited discovery authorized by the Court despite multiple warnings that failure to respond might result in dismissal. *Id.* The Court declined to dismiss twenty class members who did not receive the final warning letter sent by Plaintiffs' counsel. The March 8, 2011 Order reduced the class to its current size of 184 members.

The Court subsequently reviewed motions from Plaintiffs and Defendant addressing trial management issues, reviewed and denied a motion for reconsideration of the Partial Decertification Order filed by Plaintiffs, and held a May 27, 2011 hearing to discuss trial management issues. *See* ECF Nos. 277 ("Def.'s Trial Plan"), 290 ("Pls.' Trial Plan"), 301 ("Mot. for Recon."). These developments, along with the Ninth Circuit's decision in *Marlo v. United Parcel Serv., Inc.*, No. 09–56196, 2011 U.S.App. LEXIS 8664, 2011 WL 1651234 (9th Cir. Apr. 28, 2011) (*"Marlo II"*), made the Court increasingly concerned that individualized issues will predominate over class-wide issues if this case proceeds to trial as a class action. The Court thus decided to entertain further briefing from the parties regarding the propriety of continued class treatment. The Supreme Court's recent decision in *Wal–Mart Stores, Inc. v. Dukes*, No. 10–277, 2011 U.S. LEXIS 4567 (June 20, 2011), has since heightened the Court's concerns. Having considered the parties' briefings, recent developments in the case, and recent developments in the law of class actions, the Court finds that decertification of the class is warranted.

III. *LEGAL STANDARD*

***3** The district court has the discretion to certify a class under Federal Rule of Civil Procedure 23. *See Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir.2003). Rule 23(a) requires that the plaintiff demonstrate (1) numerosity, (2) commonality, (3) typicality, and (4) fair and adequate representation of the class interest. Fed.R.Civ.P. 23(a). In addition to meeting these requirements, the plaintiff must also show that the lawsuit qualifies for class action status under

one of the three criteria found in Rule 23(b). *Dukes,* 2011 U.S. LEXIS 4567, at *12.

A district court's order to grant class certification is subject to later modification, including class decertification. *See* Fed.R.Civ.P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."). "If evidence not available at the time of certification disproves plaintiffs' contentions that common issues predominate, the district court has the authority to modify or even decertify the class." *Dukes v. Wal–Mart Stores, Inc.,* 603 F.3d 571, 579 (9th Cir.2010), *rev'd on other grounds,* No. 10–277, 2011 U.S. LEXIS 4567 (June 20, 2011).

In considering the appropriateness of decertification, the standard of review is the same as a motion for class certification: whether the Rule 23 requirements are met. *O'Connor v. Boeing N. Am., Inc.,* 197 F.R.D. 404, 410 (C.D.Cal.2000). "Although certification decisions are not to focus on the merits of a plaintiff's claim, a district court reevaluating the basis for certification may consider its previous substantive rulings in the context of the history of the case, and may consider the nature and range of proof necessary to establish the class-wide allegations." *Marlo v. United Parcel Serv., Inc.,* 251 F.R.D. 476, 479 (N.D.Cal.2008) (*"Marlo I"*) (internal citations omitted).

IV. *DISCUSSION*

The central issue in this case is whether Dollar Tree misclassified its SMs as exempt. Here, the Court previously ruled that Plaintiff had satisfied Rule 23(a) and certified the class under Rule 23(b)(3). *See* Orig. Cert. Order. Dollar Tree argues that continued certification under Rule 23(b)(3) is improper because Plaintiffs have failed to provide common proof of misclassification, and that therefore individual inquiries will predominate at trial. [4] Def.'s Br. at 1. Plaintiffs argue that there have been no new developments in the facts of this case or in the law that compel decertification. Pls.' Br. at 4. The Court agrees with Dollar Tree.

4 Dollar Tree also argues that Plaintiffs fail to satisfy the commonality requirement of Rule 23(a). Because the Court finds that the predominance requirement is not met, it does not address whether Rule 23(a) is satisfied.

Rule 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). Among the issues central to the predominance inquiry is whether the case, if tried, would present intractable management problems. Fed.R.Civ.P. 23(b)(3)(D).

***4** Developments in this case and in the case law since the Court issued its Partial Decertification Order in September 2010 have persuaded the Court that individual issues predominate in this case and trial as a class action would present unmanageable difficulties. In particular, the basis for continued certification of the present class in the Court's Partial Decertification Order—the determination that the payroll certification forms could serve as reliable common proof of how SMs were spending their time—is no longer tenable. *Both* parties have repeatedly attacked the reliability of the certification forms. Additionally, it has become clear to the Court that "the crux" of Plaintiffs' proof at trial will be representative testimony from a handful of class members. *See* ECF No. 290 ("Pls.' Mot. for Pre–Trial Order") at 6. The appropriateness of such a trial plan was a questionable proposition under this circuit's case law at the time of the Court's Partial Decertification Order. [5] It is now untenable in light of the Ninth Circuit's decision in *Marlo II* and the Supreme Court's decision in *Dukes.*

5 *See, e.g., Wells Fargo II,* 268 F.R.D. at 612 ("[T]he court has been unable to locate any case in which a court permitted a plaintiff to establish the non-exempt status of class members, especially with respect to the outside sales exemption, through statistical evidence or representative testimony."); *Beauperthuy v. 24 Hour Fitness USA, Inc.,* 2011 U.S. Dist. LEXIS 24768, *59–60, 2011 WL 750409 (N.D.Cal.2011) (rejecting the use of representative testimony where deposition testimony "show[ed] that for every manager who says one thing about his or her job duties and responsibilities, another says just the opposite.").

The Court begins by briefly reviewing the California labor law at issue in this case and then proceeds to explain why continued class treatment is no longer appropriate.

A. *California's Executive Exemption in Class Actions*

California law requires that all employees receive overtime compensation and authorizes civil actions for the recovery of unpaid compensation. Cal. Lab.Code §§ 510, 1194. However, the law recognizes an exemption for "executive" employees who meet six criteria. To qualify as executive-exempt, an

employee must: (1) manage the enterprise, a customarily recognized department, or subdivision thereof; (2) direct the work of two or more other employees; (3) have the authority to hire or fire, or have their recommendations to hire, fire, or promote given weight; (4) exercise discretion and independent judgment; (5) be "primarily engaged" in exempt duties; and (6) earn a monthly salary equal to twice the state minimum wage for full-time employment. Cal.Code Regs. tit. 8, § 11070(1)(A)(1)(a)-(f).

The "primarily engaged" prong of the exemption inquiry requires a week-by-week analysis of how each employee spent his or her time. *Marlo II,* 2011 U.S.App. LEXIS 8664, at *14, 2011 WL 1651234. The applicable regulations state that in determining whether an employee is "primarily engaged" in exempt work, "[t]he work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work ... shall be considered." Cal.Code Regs. tit. 8, § 11090(1)(A)(1)(e). California courts have construed this requirement to mean that "the Court must determine whether any given class members (or all the class members) spend more than 51% of their time on managerial tasks *in any given workweek." Dunbar v. Albertson's, Inc.,* 141 Cal.App.4th 1422, 47 Cal.Rptr.3d 83, 86 (Ct.App.2006) (emphasis added).

***5** In order to satisfy Rule 23(b)(3), Plaintiffs must provide common proof that "misclassification was the rule rather than the exception." *Marlo II,* 2011 U.S.App. LEXIS 8664, at *12, 2011 WL 1651234. Thus, Plaintiffs must provide common proof that, among other things, class members were spending more than fifty-one percent of their time on managerial tasks in any given workweek. In its Partial Decertification Order, the Court held that the payroll certification forms could provide this proof. Subsequent developments have demonstrated that the certification forms cannot serve as reliable common proof and that Plaintiffs instead intend to rely on individual testimony by exemplar class members at trial.

B. *Changes in the Legal Landscape Favor Decertification*

Two developments in the law of employment class actions since the Court issued its Partial Decertification Order bear heavily on the Court's decision that class treatment in this case is no longer proper.

First, the Ninth Circuit's recent decision in *Marlo II* affirms the impropriety of relying on representative testimony where plaintiffs have provided no reliable means of extrapolating that testimony to the class as a whole. In *Marlo II,* the Ninth Circuit affirmed the decision of this district court decertifying a class of employees who alleged they were misclassified as executive-exempt. 2011 U.S.App. LEXIS 8664, at *17, 2011 WL 1651234. The district court found that the plaintiffs had failed to satisfy Rule 23(b) (3)'s predominance requirement because they had failed to provide common evidence of misclassification that would obviate the need for individualized inquiries. *Marlo I,* 251 F.R.D. at 485. The court explained that the plaintiffs' primary evidence at trial would be the testimony of individual class members. *Id.* at 486. The court concluded:

> Without more than this individual testimony, the Court cannot conceive how the overtime exemption will be presented to the jury as a common issue for class-wide adjudication, as opposed to a number of individualized inquiries. There is a significant risk that the trial would become an unmanageable set of mini-trials on the particular individuals presented as witnesses.

Id. In affirming the district court's decision, the Ninth Circuit held that the plaintiffs' evidence did not support predominance, and that the district court did not abuse its discretion by holding that representative testimony did not support a class-wide determination. *Marlo II,* 2011 U.S.App. LEXIS 8664, at *15–17, 2011 WL 1651234. As explained below, given that the payroll certification forms in the instant case can no longer be considered reliable proof, Plaintiffs' evidence in this case closely parallels that in *Marlo II* and fails to establish predominance for the same reasons.

Second, the United States Supreme Court's recent decision in *Dukes* provides a forceful affirmation of a class action plaintiff's obligation to produce common proof of class-wide liability in order to justify class certification. In *Dukes,* the Court reversed certification of a class of current and former female Wal–Mart employees who alleged that Wal–Mart discriminated against them on the basis of their sex by denying them equal pay and promotions in violation of Title VII of the Civil Rights Act of 1964.2011 U.S. LEXIS 4567, at *37–38. The Court found that the plaintiffs had failed to satisfy the commonality requirement of Rule 23(a). *Id.* The Court emphasized that it was not enough to pose common questions; rather, those questions must be subject to common

resolution. *Id.* at *19. The evidence of commonality the plaintiffs offered--consisting of statistical evidence of pay and promotion disparities, anecdotes from class members, and the testimony of a sociologist who opined that Wal–Mart had a culture of sex discrimination—failed to provide the "glue" necessary to render all class members' claims subject to common resolution. *Id.* at *27–34. Similarly here, as explained below, Plaintiffs have failed to provide common proof to serve as the "glue" that would allow a class-wide determination of how class members spent their time on a weekly basis. In the absence of such proof, the commonality threshold, let alone the predominance inquiry of Rule 23(b)(3), has not been met.

***6** Also of importance to this case, *Dukes* rejected a "Trial by Formula" approach to damages akin to that which Plaintiffs have proposed here. *Id.* at *48–51. The *Dukes* plaintiffs intended to determine each class member's damages using a formulaic model approved by the Ninth Circuit in *Hilao v. Estate of Marcos,* 103 F.3d 767, 782–87 (9th Cir.1996). *Id.* In *Hilao,* compensatory damages for 9,541 class members were calculated by selecting 137 claims at random, referring those claims to a special master for valuation, and then extrapolating the validity and value of the untested claims from the sample set. *See Dukes,* 603 F.3d at 625–26. The Ninth Circuit in *Dukes* concluded that a similar procedure could be used by allowing Wal–Mart "to present individual defenses in the randomly selected sample cases, thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something other than gender discrimination." *Id.* at 627 n. 5. The Supreme Court rejected this "novel project" as a "Trial by Formula" that would deprive Wal–Mart of its right to assert statutory defenses to the individual claims of all class members. *Dukes,* 2011 U.S. LEXIS 4567, at *48–51. Here, Plaintiffs rely on *Hilao* to propose determining individualized damages "in a formulaic manner." Pls.' Mot. for Pre–Trial Order at 4 n. 10. In light of the Supreme Court's rejection of this approach, it is not clear to the Court how, even if class-wide liability were established, a week-by-week analysis of every class member's damages could be feasibly conducted.

C. *Recent Developments in this Case Compel Decertification*

Since issuing its Partial Decertification Order, the Court has learned that the payroll certification forms cannot serve as reliable common proof of misclassification, and that Plaintiffs intend to rely primarily on individual testimony by exemplar class members to prove their case. These developments lead the Court to conclude that individual issues will predominate at trial.

1. *The Payroll Certification Forms Can No Longer Be Considered Reliable Common Proof*

In its Partial Decertification Order, the Court found that the payroll certifications appeared reliable based on the analysis of Dollar Tree's expert Robert Crandall. *See* Part. Decert. Order at 17–20. In making this determination, however, the Court expressly noted that "[t]he Court is not bound by these determinations as the litigation progresses. If persuaded by the parties to do so, the Court can revise its determination concerning the overall reliability of the certifications." *Id.* at 20. The Court has since learned that approximately sixty percent of class members stated under oath that either (1) they were not truthful when submitting their weekly payroll certifications, or (2) their "yes" responses did not in fact indicate that they spent more than fifty percent of their actual work time performing the tasks listed on the form. ECF No. 298–1 ("Vandall Decl. ISO Objections to Ngo Decl.") at ¶ 4.[6] An additional twenty-five percent of the class could not recall whether they were truthful when submitting their weekly certifications or provided no response at all. *Id.*

6 When it issued the Partial Decertification Order, the Court was only presented with evidence that ten class members indicated they were not truthful when submitting their payroll certifications. *See* Part. Decert. Order at 17. Dollar Tree has subsequently provided evidence that 111 class members indicated the same. Vandall Decl. ISO Objections to Ngo Decl. at ¶ 4.

***7** In addition, Plaintiffs themselves have argued on numerous occasions since the Court's Partial Decertification Order that the certifications are not an accurate indication of how class spent their time. They have made this argument despite the repeated admonition that "if Plaintiffs intend to argue that the certifications do not provide a reliable measure of weeks when SMs were not spending most of their time performing managerial tasks, then it is not clear to the Court how this case can proceed as a class action." Part. Decert. Order at 17; *see also* ECF No. 294 ("Order Granting Leave to File Mot. for Recons.") at 2 (same). Indeed, in opposition to Defendant's motion for summary adjudication, Plaintiffs argued that "the certification responses are clearly unreliable." *Runnings* action, ECF No. 337 ("Pls.' Opp. To MSA") at 10. Plaintiffs argued that class members were confused about how to complete the forms, that the analysis of

Defendant's expert Crandall was based on old data compiled prior to the narrowing of the class, and that there are a large number of weeks for which class members did not fill out certification forms. *Id.* Similarly, in Plaintiffs' motion for reconsideration filed on April 22, 2011, Plaintiffs argued that "[r]ecent events ... have revealed that Dollar Tree's [payroll certification] records are wrought with problems and have therefore provided an unreliable basis by which to establish eligibility for class membership." ECF No. 301 at 1.

Plaintiffs now argue that the certification forms are indeed reliable common proof of how class members were spending their time. Pls.' Br. at 8–10. Their argument, however, amounts to nothing more than pointing to the Court's determination in the Partial Decertification Order and noting that Dollar Tree has used the process for years. *Id.* This does nothing to overcome the fact that a majority of class members have stated under oath that their certifications were not truthful or did not accurately reflect the time they actually spent performing the tasks listed on the form.

In sum, the Court's certification of the current class was premised on the reliability of the payroll certifications as common proof of misclassification. Subsequent briefing by both parties has made this premise no longer sustainable. As a result, it is no longer possible to view the negative responses as, in the words of the Supreme Court, the "glue" that holds all of the individualized experiences of the class members together. *See Dukes,* 2011 U.S. LEXIS 4567, at *24.

2. *Representative Testimony Cannot Properly Serve as Common Proof of Class-wide Liability in This Case*

Plaintiffs indicated in their trial plan that they intend to make representative testimony "the crux" of their case. Pls.' Mot. for Pretrial Order at 6 ("exemplar plaintiffs' testimony will be the crux of the Plaintiffs' case"); *id.* at 8 ("the liability issues in this case should be driven by the actual work performed by the class members as evidenced by the exemplar plaintiffs' testimony ."). They now contend that this Court already decided that representative testimony of exemplar plaintiffs would be binding on the rest of the class when it chose to certify this case as a class action. Pls.' Br. at 19. According to Plaintiffs, "this Court should simply order that the testimony of five exemplar plaintiffs will be extrapolated to the class as a whole." *Id.* The Court declines to do so. In its Partial Decertification Order, the Court noted that "representative testimony seems appropriate as part of Plaintiffs' case-in-chief." Part. Decert. Order at 21 n. 5. However, as the order makes clear, this statement was premised on the determination that the payroll certifications provided the glue necessary to justify extrapolation from a subset of class members to the class as a whole. As explained above, this conclusion is no longer tenable.

***8** Courts in this district have repeatedly decertified classes in overtime exemption cases where Plaintiffs have provided no reliable means of extrapolating from the testimony of a few exemplar class members to the class as a whole. In *Marlo I,* the Court explained that:

> Plaintiff's evidence at trial primarily would be individual [class members'] testimony.... The exempt/non-exempt inquiry focuses on what an employee actually does. The declarations and deposition testimony of [class members] submitted by the parties suggest variations in job duties.... Without more than this individual testimony, the Court cannot conceive how the overtime exemption will be presented to the jury as a common issue for class-wide adjudication, as opposed to a number of individualized inquiries.

251 F.R.D. at 486. The court decertified the class because the plaintiff failed "to provide common evidence to support extrapolation from individual experiences to a class-wide judgment that is not merely speculative." *Id.* The Ninth Circuit affirmed, as explained supra. *See also Wells Fargo II,* 268 F.R.D. at 612 (denying class certification in overtime exemption case because differences among class members rendered representative testimony insufficient common proof of misclassification); *Whiteway v. FedEx Kinkos Office and Print Servs., Inc.,* No. 05–CV–02320 (N.D.Cal. Oct. 2, 2009) (decertifying class in overtime exemption case because plaintiff could not show how testimony of 10–20 class members could be extrapolated to the class).

Because it is no longer viable to consider the payroll certifications reliable common proof of how class members were spending their time, there is no basis for distinguishing this case from those in which this district has found certification improper. As in those cases, the failure of Plaintiffs here to offer a basis for extrapolation of representative testimony to the class as a whole is fatal to continued certification.

3. *Plaintiffs' Other Evidence Does Not Provide Common Proof of How Class Members Spent Their Time*

Plaintiffs contend that, even if the payroll certification forms are not reliable, class-wide liability may be tried by a plethora of other common evidence. Pls.' Br. at 10. Plaintiffs have presented evidence of Dollar Tree's centralized operational and human resources hierarchy. *See Runnings* action, ECF No. 124 ("Pls.' Am. Mot. for Class Cert."). They have likewise presented evidence that all store managers are given uniform training and training-related materials, use the same on-the-job tools, receive "daily planners" that require them to perform certain tasks, and are subject to other Dollar Tree policies intended to standardize the experiences of all store managers. *Id.*

While this evidence does provide some proof that class members shared a number of common employment experiences, it does not provide common proof of whether they were spending more than fifty percent of their time performing exempt tasks. As the Ninth Circuit explained in *Marlo II,* the existence of "documents explaining the activities that [managers] are expected to perform, and procedures that [managers] should follow ... does not establish whether [the managers] actually are 'primarily engaged' in exempt activities during the course of the workweek." 2011 U.S.App. LEXIS 8664, at *13, 2011 WL 1651234. This evidence is therefore insufficient to establish that common issues will predominate over individualized ones at trial.

V. *CONCLUSION*

*9 For the foregoing reasons, the Court finds that continued class treatment is not appropriate in this case and DECERTIFIES the class. The Court invites Class Counsel to file a motion to equitably toll the statute of limitations on the misclassification claims of former class members to preserve their right to pursue individual claims against Dollar Tree. The Court encourages the parties to resolve this issue by stipulation.

The parties shall appear for a Case Management Conference on September 9, 2011 at 10:00 a.m. in Courtroom 1, on the 17th floor, U .S. Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102.

IT IS SO ORDERED.

End of Document

Exhibit C

Temple v. Guardsmark LLC
(N.D. Cal. Feb. 22, 2011, No. C 09-02124 SI)
2011WL 723611

2011 WL 723611
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Phillip TEMPLE, Plaintiff,
v.
GUARDSMARK LLC, Defendant.

No. C 09–02124 SI. | Feb. 22, 2011.

Attorneys and Law Firms

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Opinion

ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND GRANTING DEFENDANT'S MOTION TO DENY CLASS CERTIFICATION

SUSAN ILLSTON, District Judge.

*1 On February 18, 2011, the Court heard argument on plaintiffs' Motion for Class Certification and defendant's Motion to Deny Class Certification. Having considered the arguments of counsel and the papers submitted, the Court hereby DENIES plaintiffs' motion and GRANTS defendant's motion. [1]

1 Because the arguments raised in and evidence presented with the two motions overlap to a considerable degree, the Court will analyze the question of class certification only once

BACKGROUND

In this proposed class action, named plaintiffs Phillip Temple and Johnny McFarland bring several claims against defendant Guardsmark, which employed plaintiffs to work as security guards for third party clients. On May 14, 2009, plaintiff Temple filed a class action complaint making a variety of allegations of violation of California law relating defendant's method of payment for the maintenance of uniforms and its alleged failure to provide appropriate rest periods. Compl. (Doc. 1); First Am. Compl. (Doc. 6). Among other things, and in relation to the uniform maintenance claim, plaintiff Temple alleged that defendant failed to provide "accurate wage statements." *See* Compl. at ¶ 13. On April 7, 2010, the Court granted summary judgment to defendant on the claim of failure to provide reimbursement for maintenance of uniforms. Doc. 51.

On June 23, 2010, plaintiff Temple filed a second amended class action complaint in which Johnny McFarland was named as a plaintiff for the first time. Although defendant stipulated that it did not oppose the Court granting plaintiff leave to file the second amended complaint, defendant did reserve its right to make statute of limitations-based arguments. Doc. 66.

In this operative complaint, plaintiffs attempt to bring two claims on behalf of two subclasses of California employees who worked shifts during which they were the sole Guardsmark security officer at the client site. Plaintiffs would bring one set of claims based on defendant's alleged failure to provide ten minute rest periods as required by California law. *See* Second Amended Complaint (doc. 69). [2] Both named plaintiffs argue that defendant required security guards working alone to be alert and attentive at all times, which effectively precluded them from being able to take proper "off duty" rest periods. Plaintiff McFarland would bring a second set of claims based on defendant's alleged failure to provide accurate wage statements with respect to overtime. *Id.* Plaintiff McFarland argues that the wage statements produced by defendant do not have a double over time column—that is, a separate statement of the number of hours worked for which the employee is entitled under California law to two times the employee's regular rate of pay.

2 In 2006, the District Court for the Central District of California denied a motion for class certification in a case brought against defendant that raised a similar claim. *See Lanzarone v. Guardsmark Holdings, Inc.*, No. CV06–1136, 2006 WL 4393465 (C.D.Cal. Sept. 7, 2006).

I. Facts regarding the rest period claim

A. Policies

Defendant has certain written policies that both defendant and plaintiffs agree apply to the prospective class members.

These policies are contained in (1) a national policy handbook called General Orders, Regulations And Instructions For Uniform Personnel ("GORI"); (2) a California employee manual called "Guardsmark means this to you"; and (3) individual Mission Partnership Statements ("MPSs") that exist for each of defendant's clients. In addition, California employees who are scheduled to work shifts by themselves sign agreements foregoing their right to an off-duty meal period. Qualls Decl., Ex. D.

1. The GORI

***2** In relevant part, the GORI discusses what it means for a security officer to be "On Duty." It first provides that an officer is "On Duty" until "properly relieved ... at the specified time, or on instruction of [a] superior officer, or on instruction of a client." Qualls Decl., Ex. B, at 22. It then defines being "On Duty" to mean a variety of things, including "remain[ing] on duty the full time called for or until properly relieved"; "be[ing] alert and carefully watch[ing] everything in your area of responsibility"; "tak[ing] quick and proper action when the situation requires it; report[ing] to your superior at once all information, complaints or observations about protection problems." *Id.* at 22–23. In contrast, an "On Duty" officer must *not* "smoke," except in certain areas; "carry any reading material, radios, television sets, tape recorders, tools or other material on the job site except that provided by Guardsmark or furnished by the client"; "sleep"; "lean against walls or objects"; "let ... any person ... go through a gate or enter a restricted area in violation of regulations"; "leave your post except when properly relieved, or with permission of your superior officer or supervisor, or when told to do so by the client, or to act on a complaint, to assist an injured person, or in case of a fire or similar situations" (and "[i]f you leave your post for these reasons, you must notify another Guardsmark employee or the client and take whatever steps are necessary for the protection of your post while you are absent"); "eat or drink while on duty unless authorized by the Manger in Charge." *Id.* at 23–24.

2. Guardsmark means this to you

The California employee manual "Guardsmark means this to you" contains a more specific statement about rest periods. The manual was amended during the class period. From 2005 until 2008, the manual stated:

> Separate and apart from meal breaks, all security officers are also required to take ten-minute off-duty rest breaks for every four hours worked.... Under no circumstances are you to skip or shorten your rest breaks.... Your site supervisor or manager may provide instruction on when breaks should be taken.

East Decl. Ex. B at 4. From 2008 until the present, the manual stated:

> Separate and apart from meal periods, and regardless of any other instructions, all California security officers are authorized and permitted to take rest periods of at least ten minutes in length once during every four-hour period worked.... If a rest break is interrupted due to an emergency or client need, the affected officer is authorized and permitted to take a new and complete ten-minute rest period in place of the interrupted rest period.
>
> Your supervisor may provide site specific instructions on where or when, during your shift, such rest periods may or may not be taken. If you feel you are not receiving proper rest periods, you should contact your supervisor, Manager or Manager in Charge. Officers are paid during rest periods, and unless instructed otherwise, are to remain at or near the client account during rest periods.... In order to ensure that officers remain alert, Guardsmark encourages officers to take all of their allotted rest periods for the full ten minutes each.

***3** *Id.* Ex. A at 3–4.

3. Mission Partnership Statements

The parties did not provide the Court with copies of the MPSs. However, they did stipulate that the MPSs in California all contain the following provision:

> As a security officer, you must be mentally capable of responding quickly to instructions and remain constantly alert at your post, ready to react to any situation. Carry out orders promptly. Be an astute observer. And *never* sleep on the job.

Qualls Decl. Ex. A at ¶ 3 (emphasis in original).

4. Signed off-duty meal break waivers

California employees who are scheduled to work shifts by themselves sign agreements forgoing their right to an off-duty meal period. Qualls Decl., Ex. D. These agreements refer to the "nature of the work" as sometimes preventing solo shift workers from being able to take off-duty meal periods.

B. Practices

The record before the Court also contains a variety of declarations from individuals who are prospective class members, each discussing how and why that employee did or did not take rest breaks. [3]

3 Plaintiffs object to the admissibility of the 96 declarations submitted by defendant. Defendant first disclosed the identity of the 96 declarants as people with knowledge about the case in a supplemental disclosure filed November 4, 2010, the same day as defendant filed its motion to deny class certification and the accompanying declarations. Plaintiffs object that this was not "a timely" supplement, as required by Federal Rule of Civil Procedure 26(e)(1). They argue that it interfered with plaintiffs' ability to conduct discovery, especially since defendant had refused to provide plaintiffs with the identities of putative class members during discovery, and so there was no other way for plaintiffs to learn about these declarants.

Defendant replies by arguing, in essence, that class action litigation is always conducted this way. Defendant also argues that plaintiffs could have gotten the names of prospective class members by agreeing to a compromise proposed by defendant, or by moving to compel production; that plaintiffs also disclosed the identity of their declarants at the last moment; and that plaintiffs could have attempted to conduct further discovery in the four months since the 96 names were disclosed, but that it has chosen not to.

Without condoning the method in which defendant conducted disclosure or discovery in any way, the Court denies plaintiffs' request to exclude the declarations. It does not appear that plaintiffs were harmed by the tardiness of the disclosure. *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 n. 1 (9th Cir.2001) (citing Fed.R.Civ.P. 37(c)(1)). The Court would have been more sympathetic to plaintiffs' objection if, instead of merely objecting to the declarations two months after they were filed, plaintiff had attempted to depose the declarants to test their assertions, or if plaintiff had worked more diligently to secure the names and contact information of a broader swath of potential class members.

1. Plaintiffs' declarations

Plaintiff presents fourteen declarations from individuals who would be members of the class. *See* Index of Decl. of Proposed Class Members & Exs. A–N (Doc. 108). The employees state that they were required to remain "on-duty" throughout their solo shifts, which some explain meant that they were required to remain alert and attentive to, and actively observe, site conditions. *Id.* Of these fourteen employees, seven (including the two named plaintiffs) worked in the San Francisco Bay Area and had Mike Kahrimanian as a supervisor at some point. *Id.* Exs. A, B, D, E, F, J, K. Many credit Kahrimanian specifically as telling them to remain alert during their rest periods. *See, e.g., id.* Ex. D ¶ 2. Two worked in Palm Springs. *Id.* Exs. G, H. The remaining five worked in one or more of the following offices: San Diego, Oakland, San Francisco, Orange County, and San Mateo. *Id.* Exs. C, I, L, M, N.

2. Defendant's declarations

Defendant submits declarations from 96 employees who are potential class members. Doc. 93. All attest that they worked solo shifts and were "authorized and permitted" to take rest breaks. All explain how it was that they were able to go off duty even though they were working alone. Some closed their posts and/or left them unattended. Some were relieved by clients. Some put up a sign. Some spent their breaks in the security office or breakroom. Each declaration also includes a sentence that begins with "During my rest breaks, I generally like to...." Different employees indicate that they generally like to go to the breakroom, make phone calls, listen to an MP3 player, read a newspaper, sit down, have a snack or drink, take a walk, read, smoke a cigarette, watch tv, relax, check email, send text messages, play video games, draw, etc.

The declarants also listed the account for which they work all or almost all of their hours. The 96 declarants listed approximately 64 different accounts.

II. Facts regarding the wage statement claim

*4 Non-party Commercial Data Corporation ("CDC") creates employee wage statements for defendant. Qualls Decl. Ex. H (Essary Depo.) (Doc. 102–2) at TR 13:13–13:25. The last time CDC modified the program that it uses to create these statements was in 2000. *Id.* at TR 12:7–12:11.

Plaintiff McFarland worked over twelve hours on at several occasions in 2005, 2006, 2007, and 2008. His pay stubs do

not separately list the hours over twelve that he worked, or the rate of pay to which he was entitled for those hours. *See, e.g.,* McFarland Decl. (Doc. 109, Ex. B), Ex. 1, JM 0248 & Ex. 6, JM0381. According to the pay stubs plaintiff McFarland submitted, the most recent day that he worked over twelve hours was November 30, 2008. [4]

4 Plaintiffs' motion for class certification says that plaintiff McFarland worked longer shifts in 2010 and 2009. However, it appears that these are typographical errors, as the documents that plaintiffs cite in support list dates in 2005 and 2008, respectively. *Compare* Pl. Mot. for Class Cert. at 12–13 *with* McFarland Decl. Ex. 1, JM 0248 & Ex. 6, JM 0381.

On May 14, 2009, plaintiff Temple sent notice to the California Labor Workforce Development Agency ("LWDA"), specifically mentioning that he was bringing a civil action for his uniform and rest period claims. Bern Decl. (Doc. 118–2), Ex. F. He did not specifically state that his wage statements were inaccurate. However, he did say that "said conduct ... violates each Labor Code section as set forth in California Labor Code § 2699.5." *Id.* Section 2699.5 of the Labor Code references subdivision (a) of Section 226, and Section 226(a) requires wage statement to show "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee."

On May 12, 2010, the day after plaintiffs sought leave to file the second amended complaint, plaintiff McFarland sent his own LWDA notice. It specifically alleges that defendant failed to provide accurate wage statements in violation of Labor Code Section 226. Bern Decl. (Doc. 118–2) Ex. F.

LEGAL STANDARD

The decision whether to certify a class is committed to the discretion of the district court within the guidelines of Federal Rule of Civil Procedure 23 ("Rule 23"). *See* Fed.R.Civ.P. 23; *Cummings v. Connell,* 316 F.3d 886, 895 (9th Cir.2003). A court may certify a class if a plaintiff demonstrates that all of the prerequisites of Rule 23(a) have been met, as well as at least one of the requirements of Rule 23(b). *See* Fed.R.Civ.P. 23; *Valentino v. Carter–Wallace, Inc.,* 97 F.3d 1227, 1234 (9th Cir.1996).

Rule 23(a) provides four prerequisites that must be satisfied for class certification: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a).

A plaintiff seeking certification must also establish that one or more of the grounds for maintaining the suit are met under Rule 23(b), including (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication. Fed.R.Civ.P. 23(b).

***5** In determining the propriety of a class action, the court must focus solely on whether the requirements of Rule 23 are met, not whether the plaintiff has stated a cause of action or will prevail on the merits. *Staton v. Boeing Co.,* 327 F.3d 938, 954 (9th Cir.2003). Accordingly, the court must accept as true the substantive allegations made in the complaint. *In re Petroleum Prods. Antitrust Litig.,* 691 F.2d 1335, 1342 (9th Cir.1982). However, although the court may not require preliminary proof of the substance of the plaintiff's claims, it "need not blindly rely on conclusory allegations which parrot Rule 23 requirements," but may also "consider the legal and factual issues presented by plaintiff's complaint." 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 7.26 (4th ed.2005). The court should conduct an analysis that is as rigorous as necessary to determine whether class certification is appropriate. *Gen. Tel. Co. of the Sw. v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

DISCUSSION

I. The rest period claim

California mandates that employers "authorize and permit" their employees to take ten minute rest periods for every four hours worked. *See* Cal. Labor Code § 226.7(a); 8 Cal.Code Reg. § 11040(12)(A). If an employer fails to do so, it must pay the employee an additional hour of wages per rest period not provided. *See* Cal. Labor Code § 226.7(b); 8 Cal.Code Reg. § 11040(12)(B). An Opinion Letter from California's Division of Labor Standards Enforcement further explains that the ten minutes must be consecutive, and the rest period must be "duty-free." DLSE Opinion Letter of Feb. 2, 2002,

Re: Rest Period Requirements. If "the nature of the work prevents an employee from being relieved of all duty," and if the employee consents in writing, an employer is allowed to provide an on-duty lunch period instead of an off-duty lunch period. *See* 8 Cal.Code Reg. § 11040(11)(A). No such exception exists for rest periods.

Plaintiffs allege that defendant violated their right to ten minute rest periods and ask the Court to certify a class of plaintiffs to proceed with that claim. The proposed class would consist of all persons employed by defendant in California between May 14, 2005, and the present, who worked as the sole security officer at a client work site for a shift of a certain length. There is a question of law common to this class: whether or not the class members were permitted to take a duty-free rest period as required by California law. The main question that the parties disagree about is whether common questions predominate. Fed.R.Civ.P. 23(b)(3). [5]

5 Plaintiffs do not argue that they are able to satisfy the requirements of Rule 23(b)(1) or Rule 23(b)(2).

Plaintiffs argue that common factual questions predominate, because they will be able to rely primarily on common, written policies, as common proof of a rest period violation. Plaintiffs argue that the GORI, the MPSs, and the signed off-duty meal break waiver all interact to show one thing: security officers working alone were not allowed to leave their posts, and indeed that they were "On Duty" as defined by the GORI at all times during their shift. This means that solo shift employees were required to remain alert to site conditions and respond as required, even during their ten minute rest periods, and this is contrary to California law. They could not sleep, they could not leave their post, they could not block their ability to hear.

***6** Defendants argue that plaintiffs will not be able to prove their case by relying on the existence of common policies. Rather, defendants argue, there is a narrow California-specific policy about rest periods that complies with California law on its face. The security officers were "subject to recall," defendants say, but that just means that they were on call, needed to respond in case of emergency, and in the uncommon instance that their rest periods were interrupted they would receive another uninterrupted rest period. Additionally, defendants argue, they have declarations from ninety-six potential class members who were all provided lawful rest periods that fit defendant's description of rest periods "subject to recall"—and who all took them much of the time. Thus, even if plaintiffs have isolated one general question of whether the narrow California-specific policy displaced the general, national always-on-duty police, that question does not have a common answer. Rather the question would need to be asked and asked again on an employee-by-employee, site-by-site, or supervisor-by-supervisor basis.

After viewing the evidence presented by each party, the Court concludes that plaintiffs have not met their burden to establish that common issues of law and fact will predominate. The parties agree generally on what California law requires ("on call" rest period is acceptable, "on duty" is not). They disagree about what defendant actually permits. Therefore, although the same general legal question frames the case, the primary questions will be factual. The parties also agree generally on what their written policies say. They disagree about how the written policies interact in practice. This is the disagreement that is at the heart of this case

In this case, how the written policies interact in practice is not one question but many, and plaintiffs have not shown a way that those questions would be susceptible to common proof. Contrary to plaintiffs' assertions, they will not be able to prove their claim by arguing that the written policies are facially insufficient. From 2005 to 2008, California employees were informed in writing that they were required to take "off-duty rest breaks." East Decl. Ex. B at 4. After 2008, California employees were informed more specifically that the rest period policy existed "regardless of any other instructions." *Id.* Ex. A at 3--4. Moreover, the later policy explained that, "[i]n order to ensure that officers remain alert, Guardsmark encourages officers to take all of their allotted rest periods for the full ten minutes each," thus *contrasting* the officers' activity during the rest period with the general requirement that security officers remain alert. *See id.*

Although the off-duty lunch waivers would help plaintiffs prove their case by common proof, plaintiffs have not convinced the Court that the waivers are as powerful a piece of evidence as plaintiffs believe. First, it is not clear how often solo shift workers ate lunch on duty---only that they were asked to consent to doing so. And the inference that plaintiffs ask the Court to make from the waivers (which they later will later ask the trier of fact to make) is not a uniformly logical inference. [6] Compare an officer who must check in every truck or employee entering a site, with an officer who must walk a certain number of circuits every hour to monitor the perimeter of a site. It might be impossible for either to stop working for half an hour to eat lunch. But the latter employee

might easily be able to take a ten minute off-duty rest period without worry.

6 Plaintiffs argue that the reference to the "nature of the work" in the waivers means unequivocally that there is a security requirement that a security officer be "on post" at all times. Pl. Reply at 1. For this proposition, plaintiffs cite the deposition testimony of Coley Buellesfeld. Although the deposition transcripts in this case are exceptionally difficult to understand at times, due in no small part to the fact that defendant's attorney objected at least once to almost every question that was asked during each deposition, it does seem that Buellesfeld in fact testified that *some* posts served by solo shift workers needed to be manned at all time, not that all or even most posts did. The portion of the Buellesfeld transcript cited by plaintiffs reads as follows:

> Q. What are the security duties that are such that a meal period must be on duty?
>
> MR. BERN: Objection. Overbroad, vague and ambiguous, calls for speculation. BY MR. QUALLS:
>
> Q. You can answer.
>
> MR. BERN: And outside the scope of the designated topics and outside the scope of the litigation.
>
> THE WITNESS: Repeat the question now.
>
> (Record read by the reporter)
>
> THE WITNESS: It would depend—it would be—it would depend on the security requirements that —for example, that the post could not be—has to be manned at all times. It depends on the post. Everyone is—I mean not everyone, but many are different.

Qualls Suppl. Decl. Ex. A at TR 27:25–28:16.

***7** The declarations in this case also support the Court's conclusion that plaintiffs have not carried their burden to show that common issues will predominate. A class action defendant does not win a Rule 23(b)(3) battle merely by presenting more declarations than the plaintiffs. In this case, however, while plaintiffs have presented fourteen declarations that seem to show a common policy, the declarations do not support plaintiff's argument that the class claim is susceptible to common proof. Many of the declarations focus on how individual supervisors explained the interaction of the different written policies to the declarant. Most of the declarations are written in extremely broad terms, raising the question of what many of the declarants mean when they say that solo shift workers must remain "alert" to site conditions—and perhaps more importantly, what the supervisors meant who communicated that oral policy. Moreover, half of the declarations are written by employees who were supervised at one point or another by Mike Kahrimanian, raising the distinct possibility that Mike Kahrimanian gave idiosyncratic directions to his employees based on a personal misunderstanding of defendant's policies.

Defendant's declarations, in contrast, are from 96 employees who worked primarily on 64 different accounts. Many of the declarants state that they were permitted to do activities that are not consistent with a policy requiring guards to remain alert to site conditions (as opposed to remaining on call to respond in case asked to go off break), such as leaving their post, sleeping, listening to music, etc.

Finally, the Court notes that the parties have stipulated to the numerosity requirement, and perhaps because of this, plaintiffs did not provide the Court with any estimate of the number of potential class members in their briefing. Nor did plaintiff provide the Court with any estimate of how many class members were supervised by Mike Kahrimanian, or might have worked in similar situations to plaintiffs' fourteen declarants. At the hearing, plaintiffs stated that there would be perhaps 5,000 people in the class; defendant stated that the number would likely be smaller; but neither party provided a source for its estimate. Plaintiffs make it impossible for the Court to know whether the 96 declarations presented by defendant are a sizable portion of the class or not, and plaintiffs make it impossible for the Court to know how similarly situated plaintiffs' declarants are to the remaining absent class members.

The Court will not certify the rest period class.

II. Wage statement claims

California Labor Code Section 226(a) requires wage statements to show "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." California law also requires that employees be paid double their regular rate of pay for every hour worked over twelve hours in a single day. Cal. Labor Code § 510. Finally, California requires that an "aggrieved employee or representative ... give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation," *before* bringing a civil action based on violation of Section 226(a) of the Labor Code. Cal. Labor Code §§ 2699.3, 2699.5. Courts have held, and the parties agree, that a

one-year statute of limitations applies to an inaccurate wage statement claim. *See, e.g., Harris v. Vector Marketing Corp.*, No. C–08–5198, 2010 WL 56179, * 3 (N.D.Cal. Jan.5, 2010) (citing Cal.Code Civ. Pro. § 340(a) and cases).

***8** The second subclass would make claims based on defendant's alleged failure to provide accurate wage statements with respect to overtime. *Id.* Only plaintiff McFarland brings this claim, and he argues that the wage statements produced by defendant do not have a double over time column—that is, a separate statement of the number of hours worked for which the employee is entitled under California law to two times the employee's regular rate of pay. [7]

7 Plaintiff McFarland does not argue that defendant failed to pay him the appropriate wage.

Defendant's main argument in opposition to certification of this subclass is that plaintiff McFarland cannot actually bring a claim for violation of Section 226(a) of the Labor Code, and therefore, at the very least, he fails to meet the adequacy requirement of Rule 23(a). The filing of an administrative LWDA notice is a prerequisite of bringing suit. Plaintiff McFarland did not file notice until over a year after his last 12–hour–plus shift. Thus, even if the second amended complaint could be said to relate back to the first (and defendant believes it could not), it would not matter, because the statute of limitations is calculated from the time that the precondition of suit is met.

Plaintiff's only argument in response is that the second amended complaint relates back to the first, and the first tolled the statute of limitations for all class members.

Several courts have explained that

> A subsequent pleading which sets out the subsequent performance of a condition precedent to suit cannot relate the time of performance of the condition back to the time of the filing of the original complaint and thereby toll the running of the period of limitation, since the rule of relation back does not operate to assign the performance of a condition precedent to a date prior to its actual occurrence.

Harris, 2010 WL 56179, at * 3; *accord Moreno v. Autozone, Inc.*, No. C05–04432, 2007 WL 1650942, at *2 (N.D.Cal. June 5, 2007); *Wilson v. People ex rel. Dep't of Public Works,* 271 Cal.App.2d 665, 669, 76 Cal.Rptr. 906 (1969). That is to say, a condition precedent is a condition precedent. Thus, it would seem, in order for plaintiff McFarland to be permitted to calculate the statute of limitations from the date of the filing of the first amended complaint, he needs to show not merely that the first amended complaint gave defendant notice of his claim, but also that the condition precedent to suit had already been met. This raises the question of whether plaintiff Temple's LWDA notice allows plaintiff McFarland's claim to proceed now.

In other contexts, where a *single* plaintiff's administratively exhausted claims developed or changed during litigation, courts have looked to see whether (1) the claim in the law suit comes "within the scope" of the original exhausted claim or (2) an untimely-filed administrative claim can "relate back" to a timely-filed administrative claim. [8]

8 It appears that it must be decided on a statute-by-statute basis whether the relation-back doctrine is applicable to administrative charges, based at least in part on the statute's purpose. *See, e.g., Rodriguez v. Airborne Express,* 265 F.3d 890, 898 (9th Cir.2001) (accepting state agency's conclusion that the relation-back doctrine is applicable to administrative charges filed pursuant to California's Fair Employment and Housing Act); *Peterson v. City of Wichita,* 888 F.2d 1307, 1308–09 (10th Cir.1989) (upholding regulation permitting EEOC to allow relation-back of amendments, and listing other courts in accord). The Court assumes, without deciding, that the relation-back doctrine is applicable to this part of the California Labor Code.

For example, discussing California's Fair Employment and Housing Act ("FEHA"), which also has an administrative exhaustion requirement, the California courts and the Ninth Circuit explain that the allegations in a civil suit are within the scope of an administrative complaint if they " 'can reasonably be expected to grow out of the charge' " made to the administrative agency. *Rodriguez v. Airborne Express,* 265 F.3d 890, 897 (9th Cir.2001) (quoting *Sandhu v. Lockheed Missiles & Space Co.,* 26 Cal.App.4th 846, 859, 31 Cal.Rptr.2d 617 (1994)); *see also Sandhu,* 26 Cal.App.4th at 859, 32 Cal.Rptr.2d 193 (adopting in FEHA cases and calling the Ninth Circuit's EEOC test a " 'like or reasonably related' standard"). In *Rodriguez,* the Ninth Circuit explained that a lawsuit for disability discrimination is not within the scope of

an administrative claim for race discrimination. *Id.* "The two claims involve totally different kinds of allegedly improper conduct, and investigation into one claim would not likely lead to investigation of the other." *Id.*

***9** Next, the *Rodriguez* court considered whether an untimely-filed administrative claim could be said to relate back to an original, timely filed claim. The court discussed the two basic standards used by different circuits when dealing with the relation back of an EEOC complaint. Some prohibit amendments introducing a new theory of recovery. Others permit such amendments, as long as the new legal theory is based on the same general facts. The Ninth Circuit decided to use a variation on the latter test, requiring in addition that "the factual allegations ... be able to bear the weight of the new theory added by amendment." *Id.* at 899.

The tests used in the FEHA and EEOC context are fairly permissive. The parties have not briefed, and the Court need not rule, on whether the statute here should be interpreted to permit such broad expansion and development of exhausted claims. Even under the FEHA/EEOC standards, and even assuming that plaintiff McFarland can rely on an administrative LWDA notice filed by another Guardsmark employee, plaintiff McFarland's double-time wage statement claim cannot be said to come "within the scope" of the original exhausted claims, and his administrative filing cannot be said to "relate back" to the timely-filed LWDA notice. In his LWDA letter, plaintiff Temple contended

> that his employer Guardsmark failed to properly compensate him, and similarly aggrieved Guardsmark employees, for uniform maintenance as required by California Labor Code section 2802, and that Guardsmark failed to provide him and other security guards with off-duty rest periods in violation of California Labor Code § 226.7. Said conduct, in addition, violates each Labor Code section as set forth in California Labor Code § 2699.5.

Bern Decl. (Doc. 118–2), Ex. F. Investigation into these two claims would not likely lead to an investigation as to whether Guardsmark pay statements accurately list double-overtime hours and compensation. Nor do the factual allegations in the LWDA letter "bear the weight" of this new theory.

On this record, the Court concludes that plaintiff McFarland is not an adequate representative of the class claims, and therefore the Court will not certify this class.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendant's motion to deny class certification and DENIES plaintiff's motion for class certification. (Docs. 88 & 102.)

IT IS SO ORDERED.

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PROOF OF SERVICE

I, Alma Y. Banuelos, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071-3197, in said County and State.

On November 15, 2013, I served the following document(s):

RESPONDENT'S BRIEF

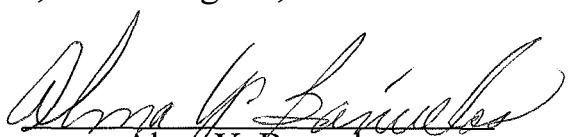
on the parties stated below, by the following means of service:

SEE ATTACHED SERVICE LIST

Unless otherwise noted on the attached Service List, **BY MAIL:** I placed a true copy in a sealed envelope or package addressed as indicated above, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 15, 2013, at Los Angeles, California.



Alma Y. Banuelos

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Clerk of the Court California Supreme Court 350 McAllister Street Room 1295 San Francisco, CA 94102	Electronic copy submitted to the Second District Court of Appeal, at http://www.courts.ca.gov/8872.htm#tab17043. Service on the California Supreme Court is included (Cal. Rules of Court, rule 8.212, subd. (c)(2).)
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