

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

JOSE ROMERO, on behalf of himself
and those similarly situated,

Plaintiffs,

v.

ALTA-DENA CERTIFIED DAIRY,
LLC, ALTA-DENA DAIRY, INC.,
ALTA-DENA CERTIFIED DAIRY,
INC.; and DOES 1 through 100,
inclusive,

Defendants.

Case No. CV13-04846 R (FFMx)
Honorable Manuel L. Real

CLASS ACTION

**ORDER DENYING PLAINTIFF'S
MOTION FOR CLASS
CERTIFICATION**

1 This cause has come before the Court upon Jose Romero’s (“Plaintiff”)’s
2 Motion for Class Certification. The Court, having carefully considered the briefs,
3 and all matters presented to the Court and good cause appearing, hereby **ORDERS,**
4 **ADJUDGES and DECREES** that:

5 Plaintiff’s Motion for Class Certification is **DENIED**.

6 Plaintiff moves for certification of five separate classes under Federal Rule of
7 Civil Procedure 23. In his motion, Plaintiff proposes five classes, which he has
8 labeled the: “Mandatory Uniform”; “Auto Meal Deduction”; “Time Shaving”;
9 “Weighted Average Overtime”; and “Waiting Time” classes.

10 A party seeking class certification must demonstrate that all of the
11 requirements of Federal Rule of Civil Procedure 23(a) and one of the three
12 subsections of 23(b) are met. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541,
13 2548 (2011). Plaintiff argues that the requirements of Rule 23(b)(3) are satisfied.

14 Plaintiff’s proposed “Mandatory Uniform” and “Auto Meal Deduction”
15 classes encompass allegations and class definitions that are not found in the
16 operative first amended complaint. Certification of those classes is denied on that
17 basis. *Costelo v. Chertoff*, 258 F.R.D. 600, 604-05 (C.D. Cal. 2009); *see also*
18 *Johnson v. Harley-Davidson Motor Co. Grp.*, 285 F.R.D. 573, 577 n.2 (E.D. Cal.
19 2012).

20 With respect to the “Time Shaving” class, certification is denied because
21 common questions of law or fact do not predominate. Fed. R. Civ. P. 23(b)(3). A
22 determination of whether Rule 23(b)(3) is satisfied turns on close scrutiny of the
23 relationship between common and individual issues. *In re Wells Fargo Home*
24 *Mortgage Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009).

25 Plaintiff alleges that defendant Alta-Dena Certified Dairy, LLC (“Alta-
26 Dena”) rounded putative class members’ time punches for clocking in and out of
27 work. Yet Plaintiff acknowledges that Alta-Dena rounds these time punches both
28 up and down. Under California law, such a policy is permissible if it is consistent

1 and on average favors neither overpayment nor underpayment. *See's Candy Shops,*
2 *Inc. v. Superior Court*, 210 Cal. App. 4th 889, 901-02 (2012). Plaintiff alleges that
3 Alta-Dena required putative class members to arrive to work five minutes early,
4 resulting in an inequitable rounding practice. Plaintiff, however, concedes that
5 there was no written company-wide policy that required him to clock in five
6 minutes before his shift. As numerous declarations of putative class members show,
7 a determination into whether Alta-Dena's rounding policy violates California law
8 would entail, among other things, determining why an individual employee clocked
9 in early and whether he or she began work immediately upon clocking in. *See*
10 *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516, 531-36 (C.D. Cal. 2011) (denying
11 class certification of rounding claim because "how those policies affect members of
12 the class depends on the individual circumstances of each [] employee."); *Babineau*
13 *v. Fed. Exp. Corp.*, 576 F.3d 1183 (11th Cir. 2009) (affirming denial of class
14 certification). These individualized questions of fact predominate and, therefore,
15 certification on the basis of Rule 23(b)(3) is not appropriate.

16 As for the "Weighted Average Overtime" class, Plaintiff admits that he is not
17 a union member and that approximately 700 of the 995 putative class members are.
18 These union members' overtime payments are governed by a series of collective
19 bargaining agreements. Because of this, Plaintiff's claim based on overtime is not
20 typical of the overtime class he seeks to represent. Fed. R. Civ. P. 23(a)(3). "The
21 test of typicality is whether other members have the same or similar injury, whether
22 the action is based on conduct which is not unique to the named plaintiffs, and
23 whether other class members have been injured by the same course of conduct."
24 *Hannon v. Data Products Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

25 Plaintiff's claimed injury regarding overtime is based upon California Labor
26 Code Section 510. Pursuant to Section 514 of the Labor Code, section 510 of the
27 Labor Code does not apply to employees that are parties to certain types of
28 collective bargaining agreements. Plaintiff's claim is therefore not typical because

1 it is based upon a statute that many or most of the putative class members may not
2 invoke.

3 The “Weighted Average Overtime” class is also not appropriate for class
4 treatment because individualized factual issues predominate. Fed. R. Civ. P.
5 23(b)(3). This is so because the individual collective bargaining agreements would
6 have to be examined to determine whether they fall within the parameters of
7 California Labor Code Section 514.

8 In his reply brief, Plaintiff asks the Court to allow him to change his class
9 definition so that unionized members who fall within coverage of 514 are excluded.
10 Plaintiff has had ample opportunity to define his class. His new class definition
11 was raised for the first time in his reply brief, and he did not move to further amend
12 his first amended complaint to include this newly defined class. *See Costelo*, 258
13 F.R.D. at 604-05. His request in reply that the class definition be modified from
14 that which is in the operative complaint and in his opening motion for class
15 certification is denied.

16 As for the “Waiting Time” class and claims, they are derivative of the other
17 claims. Because class treatment of the other claims is not appropriate, class
18 treatment of the “Waiting Time” claims is also necessarily not appropriate. *See*
19 *Collins v. ITT Educ. Servs., Inc.*, CV 12-1395 DMS BGS, 2013 WL 6925827, at
20 *10 (S.D. Cal. July 30, 2013) (denying class certification of waiting time claims
21 that were derivative of claims not suitable for class treatment).

22 Additionally, certification of all five of the proposed classes is not warranted
23 because a class action is not the superior method of adjudicating this controversy.
24 Fed. R. Civ. P. 23(b)(3). Here, putative class members who are part of a union
25 could pursue any grievances through their respective collective bargaining
26 agreements. Nonunionized employees could pursue any grievances concerning their
27 wage and hour claims through the California Division of Labor Standards and
28 Enforcement (“DLSE”). A class action is not superior to these other methods of

1 dispute resolution because the collective bargaining agreements and the DLSE are
2 specifically designed to address the types of wage and hour claims contained in the
3 first amended complaint in an efficient and fair manner. There is nothing to
4 indicate that those alternative channels are either unavailable or inadequate to
5 address these claims.

6 Therefore, Plaintiff's Motion for Class Certification is DENIED.

7
8 **IT IS SO ORDERED.**

9
10 DATED: January 30, 2014



11 Hon. Manuel L. Real
12 UNITED STATES DISTRICT JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28