NO JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUAN PEREZ, on behalf of himself and those similarly situated, Plaintiff, v. ALTA-DENA CERTIFIED DAIRY, LLC, a Delaware Limited Liability Company; and DOES 1 through 10, inclusive, Defendants.	CASE NO. CV 13-7741-R ORDER DENYING PLAINTIFF'S MOTION TO CERTIFY CLASS

Before the Court is Plaintiff's Motion to Certify Class (Dkt. No. 61), which was filed on September 14, 2016. After thorough briefing by both parties, this Court took the matter under submission on October 4, 2016.

"Parties seeking class certification bear the burden of demonstrating that they have met each of the four requirements of Federal Rule of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b)." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-80 (9th Cir. 2001) (citation omitted). Rule 23(a) requires that: (1) the class be so numerous that joinder of all parties would be impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the class representative are typical of the overall class, and (4) the class representative

will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). A court must conduct a rigorous analysis of each 23(a) factor and in order to do so, may assess merits issues to the limited extent necessary to evaluate each factor. *Ellis*, 657 F.3d at 980. If the Rule 23(a) requirements are satisfied, the class must meet one of the three requirements of Rule 23(b).

In order to certify his class, Plaintiff must first show numerosity, commonality, typicality, and adequacy as required by Rule 23(a). Plaintiff's proposed class contains at least 105 members. Joinder of 105 members would be impracticable. Defendant does not dispute this point. Therefore, the Court concludes that the numerosity requirement has been satisfied. Additionally, though not required by Rule 23(a), a Plaintiff must also propose a class whose members are ascertainable. *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516, 523 (C.D. Cal. 2011). Here, the proposed classes would include employees who were subject to the challenged employment policies. Such a definition would allow the Court to determine who is and who is not a member of the classes. No merits decisions would be required to make such a determination as Defendant suggests. The issue of statute of limitations would not be on the merits, and if a driver was somehow exempted from the policy, Defendants records would be capable of showing such. Thus, the proposed class is also ascertainable.

Next, the class must have questions of fact or law that are common to the class. The main inquiry as to commonality "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." *Wal-mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (citations omitted). However, while a court must conduct a rigorous analysis of the commonality requirement, it is not as rigorous the inquiry into predominance under 23(b)(3). In *Dukes*, the Supreme Court held that the putative class did not meet the commonality requirement of 23(a)(2) noting the lack of any company wide policy which may have affected class members. *Id*. at 359. Here, there is evidence of policies which applied to the putative class members. These policies provide a common fact and question of law which satisfies the commonality prerequisite.

Plaintiff's claims must also be typical of the other members of the proposed classes. Plaintiff claims the denial of the same breaks under the same policies as the other drivers.

Defendant argues that as a former employee, Plaintiff cannot receive injunctive relief thereby distinguishing himself from the other class members. However, Plaintiff points out that he is not seeking injunctive relief, nor is the rest of the class. Therefore, Plaintiff's claims are typical of those raised by the rest of the proposed class.

Finally, Plaintiff must show that he will be a fair and adequate representative of the class. Defendant argues that Plaintiff's admission of logging meal breaks that he did not actually take renders him inadequate. All that is required of Plaintiff is that he be a fair representative of the class without any prohibitive conflicts between himself and the rest of the class. Here, Plaintiff is not the only driver to admit to logging meal breaks when he did not take one. Such an issue does not prevent him from fairly representing the interests of the class. Plaintiff is an adequate class representative.

Having satisfied the requirements of 23(a), Plaintiff seeks certification under Rule 23(b)(3). Plaintiff raises a total of six causes of action against Defendant. The primary claims for the purpose of class certification are: claim one for failure to provide meal and rest breaks and claim two for failure to pay wages. The remaining four claims are derivative of the first two.

Rule 23(b)(3) requires that "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." Fed. R. Civ. P. 23(b)(3). The predominance test supports the goal of judicial economy implicit in the policy of permitting class action suits. *See Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1189 (9th Cir. 2001). "If the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate . . . Moreover, when individual rather than common issues predominate, the economy and efficiency of class action treatment are lost and the need for judicial supervision and the risk of confusion are magnified." *Zinser*, 253 F.3d at 1189. Uniform policies often satisfy the predominance requirement of 23(b)(3). However, where a uniform policy "says little about the main concern in the predominance inquiry: the balance between individual and common issues[,]" the mere existence of such a policy is insufficient to satisfy the predominance requirement. *In re Wells*

Fargo Home Mortg. Overtime Pay Litigation, 571 F.R.D. 953, 959 (9th Cir. 2009).

Plaintiff's Motion proposes two subclasses as to the first cause of action based on three different theories. The first proposed subclass under the first cause of action is labeled the "Meal Period Subclass." Plaintiff offers two theories supporting this subclass, the "Route Restriction Theory" and the "Meal Break Timing Theory." The Route Restriction Theory posits that Defendant had a uniform policy prohibiting drivers from deviating from their route for any reason and stating that "lunches must be taken within a one half mile radius of the drivers prescribed route."[1] Plaintiff contends that a determination of the legality of this policy could be resolved in one stroke and predominate over any individualized issues pertinent to class members.

Here, Plaintiff must ultimately prove that Defendant failed to "relieve its employees of all duty, relinquish[] control over their activities and permit[] them a reasonable opportunity to take an uninterrupted 30-minute break." *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1040 (2012). "The employer is not obligated to police meal breaks and ensure no work thereafter is performed." *Id.* at 1041. The effect the Route Restriction Policy had on workers is an important question in this case and it would have to be determined on a case by case basis. Did the drivers feel they were controlled by the Route Restriction Policy? Did the drivers adhere to the policy? If the drivers were working during their meal period, was it because of the policy? For instance, Defendant admitted that he never read the policy and was unaware of its existence. Some putative class members testified that they could simply leave their trucks and go get lunch elsewhere while others prefer to bring their lunches to eat in the trucks. These individualized decisions would be critical in determining whether the Route Restriction Policy relinquishes control of the employees. They sit at the heart of Defendant's potential liability. These considerations unique to each driver predominate over any issues common to the putative class.

Plaintiff's next theory of certification for the Meal Period Subclass is the "Meal Break Timing Theory." Under *Brinker*, an employer must provide a meal period "after no more than five hours of work and a second meal period after no more than 10 hours of work." 53 Cal.4th at 1050.

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[1] This Court will not make the merits determination regarding the joint employer argument raised by both parties. Such a decision is inappropriate for class certification, and, ultimately, unnecessary to the Court's ruling.

Defendant's meal timing policy stated that employees were provided a meal period "in accordance with California law," and "[employees] may be assigned meal times by [their] manager or [they] may be allowed to arrange [their] own time with [their] location manager's consent." Plaintiff's arguments in favor of predominance on the "Meal Break Timing Theory" suffer from the same defects as the "Route Restriction Theory." Again, individual questions to each driver would predominate. It will be necessary to determine why a driver decided to take a meal break at a particular time, what the manager instructed the driver, and was the driver even aware of the policy. Furthermore, this policy, in part, left the timing of the meal periods up to the driver's discretion. *Dukes* found that a discretionary policy "is a policy against having uniform employment practices." 564 U.S. at 355. Therefore, the policy in this instance says little about the balance between individual and common issues.

Finally, Plaintiff argues that a Rest Period Subclass should be certified on its "Rest Break Timing Theory." Defendant had a practice of allowing drivers to combine rest breaks and meal breaks. *Brinker* requires that an employer "authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period." 53 Cal. 4th at 1031. Plaintiff's theory suffers from the same *Dukes*-discretionary problems as the "Meal Break Timing Theory." Defendant allowed the drivers to combine meal and rest breaks. There was no policy compelling a combination of meal and rest breaks; it was up to each driver's discretion. Did an individual driver choose to combine her meal and rest break? Did she simply prefer one longer break? Would it have even been practicable for her to take her meal period at a different time? All of these questions would have individualized answers for each putative class member. Again, individual issues would be predominate.

The "Route Restriction Theory" and "Meal Break Theory" fail to establish that the Meal Period Subclass is predominated by common questions. The same is true for the "Rest Break Timing Theory" and the Rest Period Subclass. The Motion to Certify both subclasses is DENIED.

Plaintiff's Motion proposes one subclass as to the second cause of action based on two different theories. Plaintiff first offers the "Auto-Deduct Route Restriction Theory" as a derivative of its meal period "Route Restriction Theory." As this Court denied certification on that theory

above, the "Auto-Deduct Router Restriction Theory" is also denied. Thus, Plaintiff is left with his "Auto-Deduct Xata Records Theory" to justify certification of a class under his failure to pay wages claim. Under the Defendant's automatic deduction policy, if a driver logged a full workday but did not take a meal break, Defendant would automatically deduct 30 minutes from the time records. Plaintiff argues that this auto-deduction policy deprived drivers of pay to which they were lawfully entitled. However, like the other theories and subclasses, individual issues predominate. If, for example, drivers took a meal break, but did not in fact log that time in their Xata records, Defendant would not have deprived them of pay to which they were entitled. Additionally, Xata logging issues could prevent a driver from logging their meal periods. One driver stated that he took a meal break while his truck was waiting to be loaded. The driver properly marked the time in his Xata records as waiting for a loading. Then, he decided to take his meal period. Xata prevented the logging of multiple codes. Therefore, the records indicated that he was waiting for the truck to be loaded rather than taking his meal break. An auto-deduction in this case would not deprive a driver of hours he worked. This uniform policy says little about the ultimate inquiry into the predominance of common or individualized issues. Because these individualized issues predominate, the motion to certify the auto-deduction subclasses is DENIED.

The remaining claims are derivative of claims one and two. Given that all proposed classes for the first two claims are denied, classes under claims three through six are also denied.

While this Court recognizes the potential impact of Defendant's uniform policies, it is clear that they do not answer "the main concern in the predominance inquiry: the balance between individual and common issues[.]" Many individual questions would have to be answered by each class member. Therefore, Plaintiff's Motion to Certify Class is denied in its entirety.

IT IS HEREBY ORDERED that Plaintiff's Motion to Certify Class is DENIED. (Dkt. No. 61).

Dated: October 24, 2016

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE