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

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

Plaintiff's Motion for Class Certification is **DENIED**.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

DATED: January 30, 2014

Hon. Manuel L. Real
UNITED STATES DISTRICT JUDGE