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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

FELIPE DIAZ,
Plaintiff,
v.

ALCO IRON & METAL CO. and DOES 1 to
30,
Defendants.

No. HG10 517616

ORDER GRANTING MOTION FOR CLASS
CERTIFICATION

Date: June 7, 2011
Time: 3:00 p.m.
Dept.: 17

On June 7, 2011, in Department 17 of the above-entitled court, the Honorable Steven A. Brick presiding, the Motion for Class Certification (the "Motion") came on regularly for hearing. Plaintiff Felipe Diaz ("Plaintiff") appeared by Karl Olson, Michael Ram, Kirk Boyd and Roberto Jiminez. Defendant Alco Iron & Metal Co. ("Defendant") appeared by William Hill.

The Court has considered all of the papers filed in connection with the matter, the arguments of counsel, and, good cause appearing, HEREBY GRANTS the Motion, as set forth below.

1 **I. PROCEDURAL HISTORY**

2 On 5/28/10, Plaintiff filed his complaint, individually and on behalf of similarly
3 situated current and former employees of Defendant, alleging that Defendant engaged in
4 illegal labor practices. By stipulation of the parties, Plaintiff filed a First Amended
5 Complaint (the "Complaint") on 3/9/11. Defendant answered on 4/7/11.

6 The Complaint alleges that since at least 1992, Defendant, which employs over 200
7 workers at 3 different facilities in California, has failed to authorize and permit required
8 meal and rest periods as required under the Labor Code and applicable wage orders, and
9 has failed to maintain required payroll records and comply with legal requirements for
10 paystubs. In addition to claims under the relevant Labor Code provisions and wage order,
11 the Complaint includes causes of action for unfair competition (Bus. & Prof. C. § 17200)
12 and for waiting time penalties (Lab. C. § 201).

13 Plaintiff filed this Motion on 4/14/11. Opposition and reply were filed pursuant to
14 a Court-approved briefing schedule. The Motion seeks to certify all causes of action for a
15 class of persons of approximately 339 workers, defined as follows:

16 All persons who are, were, or will be employed by Alco Iron & Metal Co. in
17 California as 'employees' at any time since April 2006 (the 'California Class
18 Period'). 'Employees' includes, but is not limited to, all persons working for Alco
19 Iron & Metal Co. in any capacity.

20 (See Mem. ISO Mot. at 8.) As the briefing makes more clear, the meal and rest break
21 claim is limited to a claim that afternoon rest breaks were not provided by Defendant and
22 that employees were required to work through their meal periods once a month, by
23 attending mandatory safety meetings. The alleged paystub violation is based primarily on
24 Defendant's failure to redact the first 5 digits of employees' social security number on
25 employee paystubs during 2008 and part of 2009, but may also be derivative of the meal
26 and rest period claims.

1 **II. FACTUAL BACKGROUND AND EVIDENTIARY ISSUES**

2 **A. Factual Background**

3 Defendant is a family business, established in 1953, that employs more than 220
4 employees who perform various tasks related to metal processing and fabricating.
5 Defendant characterizes its workplace conditions as fair, generous and legally-compliant,
6 and touts its low employee turnover rate and the fact that many employees, including
7 Plaintiff, have encouraged friends and relatives to take jobs there.

8 Defendant operates three California facilities: Vallejo, Stockton and San Leandro.
9 Plaintiff worked at the San Leandro facility, on the day shift, for approximately 17 years.
10 There, the day shift generally starts between 6 and 7 a.m., and lasts until 3:30 or 4:00 p.m.
11 As needed, Defendant will also run a night shift.

12 Plaintiff characterizes Defendant as a sweatshop where employees work demanding
13 and sometimes dangerous jobs for low wages in antiquated and abusive conditions. He
14 contends that management expected and pressured employees to work at all times that the
15 machinery was running, and that, during work hours, the machinery only shut down at 9:00
16 a.m., noon, and 7:00 p.m. Thus, he argues, employees were permitted to take their
17 required breaks at 9:00 a.m. and noon, but were unable to take a rest break in the
18 afternoon. Plaintiff further contends that company policies regarding meal and rest breaks
19 did not provide for an afternoon break, in theory or practice, and that no right to an
20 afternoon break was effectively communicated to the workforce. Plaintiff also asserts that
21 employees were required to use one of their 30-minute breaks to attend a monthly
22 mandatory 30-minute work meeting, for which they were uncompensated.

23 With respect to the accurate wage statement claim, Plaintiff asserts that Alco has
24 admitted to including employees' entire 9-digit social security number throughout 2008 and
25 the first two months of 2009. Defendant disputes Plaintiff's contentions and asserts that
26

1 Plaintiff's claims cannot be tried based upon legal and factual issues common to the
2 proposed class. Where relevant, additional facts are discussed below.

3 **B. Defendant's Employee Declarations**

4 In opposition to the Motion, Defendant has provided, among other things, 165
5 declarations from current employees who are members of the putative class. The vast
6 majority (probably over 90%) are provided in Spanish, only, without certified translations.
7 The few that are provided in English appear to be fair translations of the Spanish ones.

8 The declarations follow a pre-set form with only two to three minor variations. The
9 first form declaration contains only two paragraphs, and essentially states that (1) the
10 employee has always been free to take all required breaks and (2) Defendant has never said
11 s/he was not free to take breaks or discouraged employees from doing so. (See, *e.g.* Def's
12 Compendium 1 Ex. 17.) The remaining declarations add a third paragraph stating that the
13 employee prefers to keep the existing break schedule (including an "informal" afternoon
14 break); some add one or two details regarding the break schedules. (See, *e.g.*,
15 Compendium 1 Exs. 65, 66, 70, 78.)

16 Plaintiff objects to the admissibility of these declarations on the grounds, among
17 other things, that they were pre-drafted with no input from the declarants and were
18 presented to the employees under coercive circumstances. The record discloses the
19 following:

20 Most declarations were drafted in advance by Defendant and presented to
21 employees in a series of group meetings with management, at each location, in early
22 August 2010. (Bercovich Dep. at 115, 125.) In-house counsel Michael Bercovich, who
23 was designated as a PMQ witness, testified that, for about 20 employees who worked the
24 night shift at San Leandro, the declarations were drafted after meetings with employees (*id.*
25 at 125); however, there is no evidence about how those declarations were prepared or
26 presented or evidence to suggest that those employees provided any more input than

1 others. The group meetings involved 10-12 employees at a time and each lasted about 10
2 minutes. (Bercovich Dep. at 120.)

3 Managers were provided with a meeting script, which they were instructed to read
4 "word for word." (Bercovich Dep. at 116.) Plaintiffs have not provided a copy of the
5 script, though it was apparently produced. (*Id.* at 115.) Mr. Bercovich testified that the
6 script stated Defendant's belief that signing the declarations would be "helpful" to
7 Defendant and would "assist in expediting" the lawsuit, which Defendant believed was
8 filed by Mr. Diaz "to hurt both the company and the employees who remain." (*Id.* at 118.)
9 It also stated Defendant's belief that the lawsuit was Plaintiff's effort "to enrich himself at
10 the expense of our current employees." (*Id.*) In connection with these meetings,
11 management did not provide a copy of the complaint or "told what state law provides."
12 (*Id.* at 171-72.)

13 Employees generally spent between two and five minutes reviewing and signing the
14 declaration. (Bercovich Dep. at 142.) There were only a handful of questions and no
15 more than two employees sought changes to the form declarations. (*Id.* at 121.) In total,
16 165 employees signed the declarations provided and only 4 (Plaintiff's relatives) refused to
17 sign.

18 Even without review of the script, it is apparent that Defendant did not provide a
19 fair or balanced explanation of employees' interests in this lawsuit. The employees were
20 given the impression that the lawsuit was nothing more than a personal vendetta designed
21 to harm the company and its current employees. They were not told what the lawsuit is
22 about, or that the claims asserted could vindicate their rights. The only information given
23 suggested that employees would benefit by cooperating with Defendant. The lack of
24 informed consent seriously undermines the reliability of these declarations.

25 Whether employees were told that signing was voluntary (E. Zamora Dep. at 61),
26 and a decision not to sign would not affect their employment status (J. Rodriguez Dep. at

1 7) is irrelevant if employees were not provided with sufficient information to make an
2 informed decision about whether it was in their interests to sign.

3 The Court therefore STRIKES these declarations in their entirety.¹

4 Even if the Court did not strike these declarations, the Court would afford them little if any
5 weight, given the manner in which they were drafted, reviewed and signed, and the fact
6 that they are conclusory, general in nature, and phrased in absolutes.

7 **C. Other Evidentiary Objections**

8 The Court OVERRULES Defendant's Objections to Plaintiff's Memoranda. (Def's
9 Objs. To Evid. Offered by Pltf ISO Moving Mem. Nos. 4-24 and to Reply Mem. Nos. 8-
10 18). These are not evidentiary objections, but argument. The objections to Plaintiff's
11 moving brief constitute an unauthorized extension of page limits for the opposition brief.
12 The objections to Plaintiff's reply memorandum constitute an unauthorized surreply. The
13 Court has not considered these arguments in deciding the Motion. Counsel is

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15
16 ¹ In its tentative ruling, the Court directed counsel to be prepared to discuss why an
17 apparent violation of CPRC 3-600(D) should not be reported to the State Bar. At oral
18 argument counsel argued that Rule 2-100 permits it to "do whatever it can to contact each
19 member of the putative class and to attempt to defeat the class action by explaining its
20 position, offering settlements, etc.)" as stated in a leading practice manual. (Cal. Prac.
21 Guide: Civ. Pro. Before Trial (The Rutter Group 2010) ¶ 14:92.1.) The fact that one rule
22 permits communications with putative class members (including as a party of Defendant's
23 attempt to defend itself) does not obviate counsel's duty to comply with another that
24 requires the communications to be fair and balanced. However, because outside counsel
25 did not communicate with the employees in soliciting their declarations, it is unclear that
26 Rule 3-600(D) would apply to him in this situation. The same is not true with respect to
Mr. Bercovich, who apparently was present when some of the declarations were solicited.
Whether or not Mr. Bercovich, acting in concert with his outside counsel, committed an
ethical violation, Defendant's statements that the lawsuit was designed to harm the
employees, coupled with the failure to explain the nature of the lawsuit, misleadingly
implied that employees' interests were aligned with the employees, when in fact they were
adverse. The resulting declarations are thus wholly unreliable.

1 ADMONISHED to refrain from utilizing evidentiary objections as a vehicle for further
2 argument.

3 The Court OVERULES all objections to the declarations of experts, including Dr.
4 Drogin's reply declaration, as the expert declarations did not assist the Court in deciding
5 this Motion.

6 The Court SUSTAINS the following Objections of Defendant to Plaintiff's
7 Evidence in Support of the Motion: Nos. 2 [argument]; 3 [more prejudicial than
8 probative]. The following Objections of Defendant to Evidence Offered in Support of
9 Reply Brief are SUSTAINED: Obj. No. 7 (to Declaration of Felipe Diaz). The Court
10 OVERRULES Defendant's objections to the Declarations of R. Aguilar and M. Segovia.

11 Notwithstanding Plaintiff's failure to state objections specifically and in a format
12 that facilitates the Court's review and ruling on the evidence (using, *e.g.*, the format
13 required for summary judgment motions) and his failure to provide a proposed order, the
14 Court SUSTAINS the following objections to Defendant's evidence: Bercovich Decl. Nos.
15 2 [legal argument], 4 [same], 6 [same]; Fletcher Decl. Nos. 2 [sustained in part, as to "as
16 required by law"], 4 [legal conclusion]; Simi Decl. No. 4 [legal conclusion]; E. Zamora
17 Nos. 2 [in part - legal conclusion], 5 [legal conclusion]. The remainder of Plaintiff's
18 objections to these declarations are OVERRULED. In addition, all of Plaintiff's objections
19 to the following declarations are OVERRULED: E. Fonseca, J.C. Gil; B. Gill; A.
20 Rodriguez; J. Rodriguez; J. Zamora.

21 Plaintiff's objections to the Kantor Decl. are not properly numbered and do not
22 identify clearly the testimony objected to, such that the Court can determine the precise
23 testimony to which Plaintiff objects. Notwithstanding, the Court SUSTAINS Plaintiff's
24 objections to Mr. Kantor's statements regarding what the law requires and his testimony
25 that Defendant has complied with the law, as inadmissible legal conclusion. The Court
26 also SUSTAINS the objection to Mr. Kantor's statements regarding actual break practices

1 at the three facilities, as lacking foundation and personal knowledge, as Mr. Kantor
2 testified at deposition that he did not know what supervisors did to provide breaks or
3 ensure break compliance. The remainder of Plaintiff's objections to his declaration are
4 OVERRULED.

6 III. APPLICABLE LEGAL STANDARD

7 Class actions in California are governed by Code of Civil Procedure section 382,
8 authorizing such suits "when the question is one of a common or general interest, of many
9 persons, or when the parties are numerous, and it is impracticable to bring them all before
10 the court."

11 "To obtain certification, a party must establish the existence of both an
12 ascertainable class and a well-defined community of interest among the class-members."
13 (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435, citing *Richmond v. Dart Industries,*
14 *Inc.* (1981) 29 Cal.3d 462.) This requires an inquiry into numerosity, ascertainability,
15 whether common questions of law or fact predominate, whether the class representatives
16 have claims or defenses typical of the class; and whether the class representatives can
17 represent the class adequately. (See *id.*) Other relevant considerations include, inter alia,
18 the probability that each class member will come forward ultimately to prove his or her
19 separate claim to a portion of the total recovery and whether the class approach would
20 actually serve to deter and redress alleged wrongdoing. (*Id.*)

21 It is Plaintiffs' burden to support each of the above factors with a factual showing.
22 (See *Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462.)

23 The Court is vested with discretion in weighing the concerns that affect class
24 certification. (See *Sav-on Drug Stores Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326,
25 336.) "[B]ecause group action also has the potential to create injustice, trial courts are
26 required to 'carefully weigh respective benefits and burdens and to allow maintenance of

1 the class-action only where substantial benefits accrue both to litigants and the courts."
2 (*Linder*, 23 Cal.4th at 435.) Accordingly, the trial court may assess the advantages of
3 alternative procedures for handling the controversy. (See *Caro v. Procter & Gamble Co.*
4 (1993) 18 Cal.App.4th 644, 660-662.)

5 Class certification is "essentially a procedural [question] that does not ask whether
6 an action is legally or factually meritorious." (*Linder*, 23 Cal.4th at 439.) Accordingly,
7 "the focus in a certification dispute is on what type of questions -- common or individual --
8 are likely to arise in the action, rather than on the merits of the case[.]" (*Sav-on*, 34 Cal.4th
9 at 327.) Analysis of class certification criteria may come close to examining the merits,
10 because facts relevant to the merits may be and are often enmeshed with class certification
11 criteria, such as commonality; but it is not a merits decision. (See *Linder* at 432.)
12 Similarly, the Court may be required to resolve threshold legal issues in order to determine
13 whether, under the facts presented, class treatment is warranted. (See *In re Lamps Plus*
14 *Overtime Cases* (2011) 195 Cal.App.4th 389, __, *9.)

16 **IV. NUMEROSITY**

17 The Motion seeks certification of a class of approximately 339 persons. Defendant
18 does not dispute that this is sufficiently numerous to support classification if the remaining
19 criteria are met. (See, e.g., *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934;
20 *Bowles v. Superior Court* (1955) 44 Cal.2d 574, 587; *Hebbard v. Colgrove* (1972) 28
21 Cal.App.3d 1017, 1030.)

23 **V. ASCERTAINABILITY**

24 The purpose of the ascertainability requirement is to ensure adequate notice to
25 putative class members and to be able to determine after the litigation has concluded who
26 is barred from relitigating. (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113

1 Cal.App.4th 836, 858.) In determining whether a class is ascertainable, the Court
2 examines the class definition, the size of the class and the means of identifying class
3 members. (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193,1206.) The
4 class definition should be precise, objective, and presently ascertainable.

5 Defendant's challenge to ascertainability is without merit, and partially a merits
6 defense. However, if a class is certified, the class period must have an end date
7 (customarily, when the class list is finalized for purposes of mailing notice).

8

9 VI. COMMON FACTUAL AND LEGAL ISSUES

10 "Plaintiffs' burden on moving for class certification ... is not merely to show that
11 some common issues exist, but, rather, to place substantial evidence in the record that
12 common issues predominate." (*Lockheed Martin Corp. v. Superior Court* (2003) 29
13 Cal.4th 1096, 1108.) While it is not necessary that the allegedly unlawful practice affected
14 every member of the proposed class in the same way or that the practice had a consistent
15 effect on all members of the class (*Sav-on, supra*, 34 Cal.4th at 334, 338-39) the inquiry
16 focuses on whether the defendant had an institutional practice affecting all of the potential
17 class members. (*Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1299.) The
18 determination of how much commonality is enough to warrant use of the class mechanism
19 requires a fact specific evaluation of the claims, the common evidence, and the anticipated
20 conduct of the trial. California courts consider "pattern and practice evidence, statistical
21 evidence, sampling evidence, expert testimony, and other indicators of a defendant's
22 centralized practices in order to evaluate whether common behavior towards similarly
23 situated plaintiffs makes class certification appropriate." (*Sav-on, supra*, at 333, fn.
24 omitted.)

1 Commonality is determined with respect to the claims and defenses as pleaded.
2 (*Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 n.22.) Thus,
3 each of Plaintiffs' claims is discussed below.

4 **A. Afternoon Rest Break Claim**

5 While the law concerning the extent of Defendant's obligations to "provide"
6 nonexempt employees with uninterrupted meal and rest breaks is in flux, even under
7 Defendant's authorities, the employer is required to (1) clearly communicate the right to
8 take a 30-minute uninterrupted meal period and, for every four hours worked, a 10-minute
9 uninterrupted rest period, from work and (2) ensure that workers are relieved of all duty for
10 the appropriate time period. (See *Bufile v. Dollar Financial Group, Inc.* (2008) 162
11 Cal.App.4th 1193, 1199; *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949,
12 962.) Defendant must refrain from activity that interferes with employees' ability to take
13 their break; however, Labor Code section 226.7 does not require Defendant to guarantee
14 that breaks are in fact taken.

15 This is consistent with *In re Lamps Plus Overtime Cases* (2011) 195 Cal.App.4th
16 389, in which the Second District Court of Appeal held that employers need make breaks
17 available, not ensure that they are actually taken [the "mandate that an employer may not
18 frustrate the exercise of employees' meal breaks is not equivalent to an obligation to ensure
19 that an employee actually takes the break"].) (195 Cal.App.4th at ___, *7.)

20 **1. Defendant's Communication Regarding the Availability of Breaks**

21 While the evidence on this issue is scattered and imprecise, it is fairly clear that the
22 only written materials provided to employees concerning their right to take breaks
23 consisted of the wage orders were posted (in English and Spanish) in the break room at
24 each facility. (See Bercovich Dep. at 158-59; Bercovich Decl. ¶ 2. See also F. Diaz Dep.
25 at 19-20 [employment information was posted in break room in Spanish]; J. Rodriguez
26 Dep. at 17 [same].) Various employee handbooks were produced by Defendant, but Mr.

1 Bercovich testified that he did not know whether these handbooks had ever been
2 distributed to employees, and that he never made any effort to do so. (Bercovich Dep. at
3 71-72.) Moreover, there is evidence that Defendant was aware that many members of the
4 putative class spoke predominantly or only Spanish (see, e.g., Bercovich Dep. at 120-121;
5 Def's Compendium 1 [employee declarations]), but Mr. Bercovich, who participated in the
6 preparation of at least one of the manuals, testified that he had never seen the April 2006
7 manual (which was in effect for 60% of the class period) translated into Spanish.
8 (Bercovich Dep. at 71.) There is nothing in the record to suggest that any other employee
9 manual was translated into Spanish either.

10 Defendant suggests that this will be an individualized question, because supervisors
11 also communicated the availability of breaks orally, at each facility, to their subordinates.
12 The sole evidence in support of this contention, however, is Mr. Bercovich's conclusory
13 statement that managers communicate this information. (See Opp. Mem. at 8 & n.20,
14 citing Bercovich Decl. ¶ 2.) Mr. Bercovich does not provide any foundation for this
15 statement, testimony that he was unable to provide at his deposition. (See Bercovich Dep.
16 at 66 [stating that he did not know when and under what circumstances employees were
17 encouraged to take breaks].) It has little, if any, evidentiary value and thus does not
18 establish that individualized issues predominate.

19 Defendant has also supplied management employee declarations to the effect that
20 employees are "permitted" to take breaks and are observed taking their breaks, including
21 their afternoon rest breaks, on a regular basis. (See Fletcher Decl. [GM of Vallejo facility];
22 Simi Decl. [GM, Stockton]; Zamora Decl. [GM, San Leandro]; Kantor Decl. [President
23 and part owner].) None, however, mention any effort to communicate the availability of
24 breaks to employees - on a group or individual basis.

1 How Defendant communicated the availability of breaks can be decided based
2 upon common evidence about management's conduct. The question of whether those
3 communications were sufficient is a common question of law.

4 **2. Whether Defendant Ensured That Employees Were Relieved of all Duty**

5 Generally, Defendant takes the position that it had no duty to ensure that breaks
6 were taken at any specific time. Defendant provides declarations stating that management
7 did not monitor break-taking, schedule the afternoon break, or make efforts to "ensure"
8 that afternoon breaks were taken. (See Bercovich Decl. ¶ 4 [Defendant does not force
9 employees to take breaks]; Fletcher Decl. ¶ 4 [same]; Simi Decl. ¶ 4 [same]; E. Zamora
10 Decl. ¶¶ 2, 5 [afternoon breaks not scheduled but taken "whenever they choose" in San
11 Leandro; employees not forced to take breaks]. See also J. Rodriguez Decl. ¶ 3 [afternoon
12 break not scheduled, but taken "as needed"].)

13 Other evidence suggests that breaks were (or should have been, under Defendant's
14 policies and procedures) "assigned" or "scheduled." The April 2006 employee manual
15 states that managers would "advise [employees] of the time and duration of [their] breaks."
16 (See Bercovich Decl. Ex. B at 69.) The 2009 manual does not mention an afternoon break
17 but tells employees that, with respect to "meal and rest periods," they are "expected to
18 observe [their] *assigned working schedule*." (Id. Ex. C at 45, emphasis added.) Defendant
19 has produced at least one work/break schedule for the Stockton facility. (Bercovich Dep.
20 Ex. 11.)

21 While the evidence shows that management made efforts of some kind to schedule
22 *some* breaks and thus, ensure that employees were relieved at the appropriate time, it also
23 shows that for much of the class period, no efforts were made at any of the three facilities
24 to schedule *afternoon* rest breaks. Specifically:

25 At the San Leandro facility, Mr. Bercovich testified that Defendant's only effort to
26 schedule breaks was to shut down unspecified "machinery" located in the "scrap yard"

1 (where most employees worked) for about ½ hour at 9:00 a.m., noon, and 7:00 p.m. (See,
2 e.g., Bercovich Dep. at 63-64, 66-67.) There was no scheduled shutdown in the afternoon.
3 (*Id.* at 83.) No witness describes any other efforts to relieve employees of duty,
4 individualized or otherwise.

5 At the Stockton facility, some evidence suggests that morning and lunch breaks
6 were scheduled by management, but afternoon breaks were not. (Bercovich Dep. Ex. 11
7 [work schedule].) While there is no testimony that this schedule is representative of
8 Defendant's practices for the entire class period, Defendant has not objected to this exhibit.
9 (See Def's Objs. 21-22.) On opposition, Defendant provided no evidence that it did
10 anything to ensure that employees - individually or collectively - were relieved of all duty
11 for ten minutes each afternoon. Defendant's conduct was the same towards all employees,
12 and thus can be determined by common facts. The question of whether it complied with
13 the law will be a common legal issue.

14 As to the Vallejo facility, the evidence is similar. Defendant admits that prior to
15 October, 2009, managers did not "schedule" any breaks for employees at the Vallejo
16 facility. (Bercovich Dep. at 72.) Moreover, on opposition, Ms. Fletcher, the GM of this
17 facility, provided no facts suggesting that her efforts (if any) to ensure that each employee
18 was relieved of duty were in any way individualized. Rather, it appears that, like other
19 managers, she left this issue up to her employees to work out for themselves. (See also
20 Olson Reply Decl. Ex. B (E. Zamora Dep.) at 18 [when asked whether he did anything to
21 monitor break-taking, responding that he would walk the floor periodically "to make sure
22 that the guys are doing their job"]; *id* at 45 [denying that he monitored whether workers
23 were taking breaks]; *id* at 49 [he never encouraged an employee to take a break].) And
24 after October 2009, if (afternoon) breaks were scheduled, this is a common fact relevant to
25 Defendant's efforts, if any, to ensure employees were relieved of all duty for the
26 appropriate time.

1 The related theory that Defendant actively interfered with employees' ability to take
2 breaks also appears to turn on common evidence. Plaintiff alleges (and provides evidence
3 of) common conduct toward employees. On opposition, Defendant offered no evidence
4 showing that employees missed breaks for personalized reasons, necessitating individual
5 inquiries. Whether Defendant had a policy regarding afternoon breaks, or a practice of
6 pressuring employees to work through the afternoon, are factual issues common across the
7 class.² If Plaintiff establishes such conduct at trial, whether the conduct constitutes
8 "interference" is a common legal issue.

9 **3. Whether Breaks Were Not Taken as a Result**

10 Because rest breaks are not required to be recorded, the only source of information
11 for determining whether breaks were taken is through individual testimony. Plaintiff's
12 employee declarations are so conclusory and devoid of facts foundation that they have little
13 evidentiary value. (See, generally, Plaintiffs' 16 Class Members Decls. ISO Mot. [stating
14 that employees were provided with a morning break and a lunch period, but that they did
15 not "receive" any afternoon break; not explaining how or why breaks were not received].)

16 The parties' apparent inability to obtain reliable testimony on this issue (and thus,
17 how individual testimony can safely be extrapolated to a class of other employees) is a
18 serious concern. Not only is there the failure of Plaintiff to adduce compelling evidence
19 that a substantial number of class members were harmed by Defendant's conduct, but
20 individual employees have provided conflicting testimony on this very issue, depending
21 upon who is doing the questioning.³

22
23 ² Defendant's repeated mantra that "management never told any employee that they could
24 not have an afternoon break" is not only a merits defense, but irrelevant. The law asks
25 whether Defendant communicated a right to breaks and relieved employees of all duty so
26 that they could take them.

³ For example, Juan Carlos Gil has, in the last 10 months, signed three contradictory
declarations on this issue. Despite acknowledging the conflicting testimony, he provided
no explanation. (See J.C. Gil Decl. dated April 2011 ¶ 3.) Jose Rodriguez likewise signed

1 On balance, the Court concludes that there is probably sufficient commonality on
2 this claim to warrant proceeding on a class basis. (See *Sav-On*, 34 Cal.4th at 338
3 [defendant's common conduct need not affect every class member]; *City of San Jose v.*
4 *Superior Court* (1974) 12 Cal.3d 447, 460 [so long as each person is "not [] required to
5 individually litigate numerous and substantial questions to determine his [or her] right to
6 recover following the class judgment; and the issues which may be jointly tried, when
7 compared with those requiring separate adjudication, must be sufficiently numerous and
8 substantial to make the class action advantageous to the judicial process and to the
9 litigants", common issues predominate].) It is worth noting, however, that Plaintiff has not
10 explained whether and how he intends to prove, at trial, how many class members missed
11 how many breaks due to Defendant's alleged conduct. (See, e.g., *Bell v. Farmers Ins.*
12 *Exchange* (2004) 115 Cal.App.4th 715, 750 [damages may be proven by statistical
13 analysis].) Plaintiff's expert declaration does not address this issue. This is a serious
14 manageability issue which counsel must address in Plaintiff's trial plan.

15 **B. Missed Lunch Break Claim / Safety Meetings**

16 Plaintiff contends that he and other employees were required to give up lunches on
17 a monthly basis in order to attend safety meetings. The safety meetings at issue were
18 apparently mandatory group meetings.

19
20 an August 2010 declaration for Defendant, stating that he was "always permitted" to take a
21 second rest break (Compendium 1, Ex. 116), and a March 2011 declaration for Plaintiff
22 stating that he "did not receive an afternoon break" (Pltf's 16 Class Member Decl. Ex. 13.)
23 At deposition, he affirmed that his August 2010 declaration was true, i.e. that he got
24 afternoon breaks. (Mackay Decl. Ex. B at 8-9.) Again, although Defendant questioned
25 him about the conflicting March 2011 declaration, no explanation is provided to the Court.
26 (Mackay Decl. Ex. B at 15.) Jose Luis Cardenas likewise signed an August 2010
declaration stating that he always got afternoon breaks, a March 2011 declaration stating
that he did not receive them, and at deposition reverted to his original position.
The fact that apparently coerced declarations have been stricken for the purposes of this
Motion does not guarantee the parties' ability to obtain reliable testimony for trial.

1 Defendant argues that some workers missed these meetings in order to maintain
2 service for customers or clients. (Diaz Dep. at 42.) This is a merits/damages issue.
3 Defendant also argues that after the meetings, workers were permitted to take their
4 lunches. (*Id.* at 37.) This is also a merits issue. The testimony provided suggests that all
5 employees (with the exception of any who were servicing clients) got a meal period of
6 some length - after these meetings - but suggests that the length was, at most, 15 or 20
7 minutes. Even assuming that Defendant will be able to prove that this was sufficient to
8 satisfy the wage order and will prevail at trial, it will do so based upon common, not
9 individualized evidence.

10 Defendant's reliance upon Emilio Zamora's testimony that employees were
11 uniformly provided with meal periods after these meetings (E. Zamora Decl. ¶ 7) equally
12 fails to demonstrate any individualized factual issue. Rather, it demonstrates that this issue
13 can be determined through common evidence - the testimony of supervisors.

14 **C. Recordkeeping claims - Failure to Record Meal Breaks**

15 Defendant has no obligation to record paid *rest* breaks. Defendant is obligated,
16 however, to record unpaid *meal* breaks unless all operations cease. (See Wage Order 1-
17 2001 § 7(a)(3) ["Meal periods during which operations cease... need not be recorded."].)

18 There is no dispute that, at Alco, employee lunch breaks are unpaid and have not
19 been recorded. (See, *e.g.*, Bercovich Decl. Ex. B at 69 [meal period is unpaid]; Olson
20 Reply Decl. Ex. B (E. Zamora Dep. at 28 [30-minutes is automatically deducted from
21 paychecks for lunch break; employees do not clock in or out for meal period].) Plaintiff
22 argues that lunch breaks should have been recorded. Defendant argues that recording was
23 not required because all operations shut down for the meal period at noon each day, and
24 that in any event this is an individualized issue because employees could shut down their
25 own heavy equipment to take a break (and thus that it had no obligation to record breaks).

26

1 There is some evidence that some machinery may have been subject to "scheduled
2 shutdowns." (See Bercovich Decl. ¶ 6 [testifying, without elaboration or explanation, that
3 "our operations cease during meal periods"]. At deposition, Mr. Bercovich testified that
4 some employees did not work with "machinery" subject to scheduled shutdowns.
5 (Bercovich Dep. at 66-67; 83.) Emilio Zamora testified that there are many different types
6 of machines, and some "are constantly in motion throughout the day." (Reply Decl. of K.
7 Olsen Ex. B (E. Zamora Dep.) at 16.)

8 Nonetheless, the question of whether "operations cease," and thus, whether
9 Defendant was obliged to record lunch periods, can be determined by reference to common
10 evidence. The question does not turn on whether individual employees shut down their
11 equipment at break time, but whether "operations" ceased for the lunch period each day.

12 No party has provided any case law construing the wage order, but a common sense
13 reading of "operations" would not be satisfied by an individual employee's ability to shut
14 down one piece of equipment. More likely, the shutdown of "operations" refers to a period
15 when an entire company, or plant, or division shuts down all manufacturing equipment,
16 such that Defendant has effectively relieved all employees of all duty during the
17 appropriate time period. Whether a facility-wide (or similar) shutdown occurred each day
18 at lunch can be determined by reference to common evidence, such as testimony of facility
19 managers, facility operating schedules, maintenance records and the like. Furthermore,
20 because there is no dispute that Defendant did not record meal breaks or rest breaks, as it
21 had no policy requiring such recordation, another factual issue can be resolved on a class-
22 wide basis. Common issues of fact and law predominate on this claim.

23 **D. Inaccurate Pay Stub claims (Lab. C. § 226)**

24 It is unclear whether Plaintiff is pursuing derivative claims (pay stubs were
25 allegedly inaccurate because of the foregoing meal and rest period violations), or only
26 pursuing a claim based upon Defendant's inclusion of employees' full social security

1 numbers on their paystubs in 2008 and part of 2009. To the extent these claims are
2 derivative of the above claims, the only certifiable claim is the "failure to record lunch
3 breaks" claim.

4 If at trial, Plaintiff establishes meal or rest period violations, Defendant's pay stubs
5 will have failed to "provide[] the essential information for verifying that they were being
6 properly paid for all hours worked" for all affected employees. (See, e.g., *Price v.*
7 *Starbucks Corp.* (2011) 192 Cal.App.4th 1136, __; *Morgan v. United Retail Inc.* (2010)
8 186 Cal.App.4th 1136, 1149.) The injury question will be common.

9 To the extent that this cause of action is based upon Plaintiff's theory that including
10 employees' full, unredacted social security numbers on paystubs violates section 226, there
11 are also common questions of fact and law. Common factual questions include the reason
12 for Defendant's failure to properly redact (evidence indicates that it was due to centralized
13 accounting decisions and practices), and whether Defendant's failure was "knowing and
14 intentional." While in its tentative ruling the Court expressed serious doubt as to whether,
15 as pleaded, Plaintiff has stated a claim, that is a legal issue that will be common to the
16 entire class. The one issue that appears to be individualized in nature is whether any
17 employee was injured by the violation. (See, e.g., *Villacres v. ABM Indus. Inc.* (9th Cir.
18 2010) 384 F.App'x. 626, 627 [technical violation of section 226 is not sufficient to support
19 claim under section 226; Plaintiff must show that he suffered some injury].) While it is a
20 close question, the Court finds that common questions predominate.

21 **E. Waiting Time Penalties, Unfair Competition Claims**

22 Plaintiff's claims for waiting time penalties and unfair competition are derivative of
23 the foregoing claims, as they rely upon alleged violations of the same laws and are based
24 upon the same evidence. Thus, as the discussed above, these claims turn to the same
25 extent on common evidence and common legal issues.

26

1 **VII. TYPICALITY OF CLAIMS AND ADEQUACY OF REPRESENTATION**

2 A named plaintiff can be typical of the class members even if the named plaintiff's
3 circumstances are not the same as all the other class members. (*Daniels v. Centennial*
4 *Group, Inc.* (1993) 16 Cal.App.4th 467, 473; *Wershba v. Apple Computer* (2001) 91
5 Cal.App.4th 224, 238.) To be typical, he or she need only assert the same claims and
6 defenses generally. (See, e.g., *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069,
7 1090; *Medraza v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 99 [plaintiff is
8 not sufficiently typical "when a defense unique to the class representative will be a major
9 focus of the litigation"].)

10 Defendant argues that Plaintiff's claims are not typical, first, on the grounds that
11 Plaintiff only cares about the 10-minute afternoon break claim and the social security
12 number claim, and thus cannot adequately represent others who have other claims in this
13 case. This is not a valid challenge to Plaintiff's typicality.

14 Defendant also focuses on the fact that Plaintiff never worked at Stockton or
15 Vallejo facilities, but does not explain how this would render Plaintiff inadequate to
16 represent employees from these other facilities. There is no evidence that Plaintiff is
17 subject to a unique defense, conflict or any other reason that Plaintiff will not vigorously
18 pursue this claim on behalf of all workers, regardless of where they work.

19 Defendant's argument that Plaintiff, as a former employee, is not adequate for the
20 purposes of seeking injunctive relief on behalf of current employees because he has no
21 interest in obtaining injunctive relief, is not availing. *Wright v. Circuit City Stores, Inc.*
22 (N.D. Ala. 2001) 201 F.R.D. 526, 546 is readily distinguishable. Plaintiff's incentive to
23 obtain penalties under the Labor Code and restitution under the UCL are aligned with
24 current employees' burden of proof to obtain injunctive relief under section 17200. Indeed,
25 Plaintiff, who no longer faces the threat of retaliation, may be better situated to litigate
26 claims vigorously against Defendant.

1 Finally, Defendant does not dispute Plaintiff's counsel's adequacy to represent the
2 class.

3 Thus, Plaintiff and his counsel are adequate to represent the class and are
4 APPOINTED as Class Representative and Class Counsel, respectively.

5 **VIII. SUPERIORITY AND MANAGEABILITY**

6 **A. Policy Considerations**

7 The costs and benefits of adjudicating the class claims together, on one hand,
8 would alleviate the serious cost of proceeding by numerous separate actions, on the other.
9 (Sav-on, supra, at 1347.) A related factor is whether class members would pursue their
10 claims, individually, if a class were not certified. Defendant has not stated that any other
11 individual claims have been filed. In addition, the law recognizes that current, and even
12 former, employees may be hesitant to file an individual suit against their (former)
13 employer based upon fears regarding job security, prospects for promotion, or adverse job
14 references. (See *Bell, supra*, 115 Cal.App.4th at 807.) The record here provides some
15 support for such a finding.

16 Another factor bearing on superiority is the recognized need to effectuate the public
17 policy embodied in California labor laws, including the prospect of random and
18 fragmentary enforcement of employers' legal obligations with respect to employees who
19 are non-exempt. (See *Bell, supra*, at 745, quoting *Vasquez v. Superior Court*, 4 Cal. 3d
20 800, 807.) A class action would provide a single resolution for all parties involved, and
21 thus - where underlying factual issues are common - could provide more uniform guidance
22 regarding enforcement. Again, however, the requisite commonality is lacking for several
23 claims.

24 **B. Manageability**

25 "Individual issues do not render class certification inappropriate so long as such
26 issues may effectively be managed." (See *Bomersheim v. Los Angeles Gay and Lesbian*

1 *Center* (2010) 184 Cal.App.4th 1471, 1487-88, citing *Sav-on*, 34 Cal.4th at 334.)

2 Plaintiff's burden, on this motion, is to demonstrate that such issues can be managed;

3 As noted above, there are manageability issues that Plaintiff will be required to address at
4 in his trial plan in order to proceed to trial on class claims.

5 **IX. CLASS CERTIFICATION**

6 For the foregoing reasons, the Court GRANTS the Motion, and CERTIFIES the
7 following class:

8 All persons have worked at any time between April 1, 2006 and July_, 2011, for
9 Alco Iron & Metal Co. in California.

10 This class is not restricted to hourly employees because the wage statement claim is
11 apparently asserted on behalf of all employees, including exempt employees. In the event
12 that Plaintiff elects not to pursue that claim, the Class would be appropriately modified to
13 include only hourly employees. (See, e.g., *Sevidal v. Target Corp.* (2010) 189 Cal. App.
14 4th 905, 921 [class definition should not include large numbers of persons clearly not
15 entitled to relief sought].) In addition, for the reasons discussed above, the class definition
16 requires a specific end date prior to the sending of notice.

17 **X. FURTHER PROCEEDINGS**

18 **A. Proposed Class Notice**

19 The Court notes that Plaintiff has submitted a proposed notice. The Court assumes
20 that the notice will be translated into Spanish and sent in both Spanish and English.

21 The format, content and form of the notice should be improved. It should be
22 redrafted with the goal of making it easier to understand for non-lawyers, and reformatted
23 in a consumer-friendly question and answer format rather than as a pleading. (See The
24 Federal Judicial Center's "Illustrative" Forms of Class Action Notices at
25 <http://www.fjc.gov/>.) Counsel should comply with the standards in the S.E.C.'s plain
26

1 English rules. (17 C.F.R. § 230.421.) Legalese should be omitted. Information should be
2 conveyed in the simplest possible terms.

3 The FJC form notices include important information about how class actions work,
4 as well as explanations of the choices class members may have and their consequences.
5 One of the model notices is formatted for trial (as opposed to settlement) purposes.

6 The notice should, in addition to providing contact information for Class Counsel,
7 should state whether counsel speak Spanish. The notice should contain a prominent non-
8 retaliation statement.

9 The Court has set a Case Management Conference at 3:00 p.m. on 6/29/11 for
10 consideration of the revised proposed class notice. Plaintiff shall submit the revised
11 proposed notice directly to Department 17 by both electronic mail (PDF) and hard copy,
12 and serve it on Defendant on the same date, via facsimile, hand delivery and/or electronic
13 mail, no less than five (5) court days prior to the CMC.

14 **B. Trial Plan**

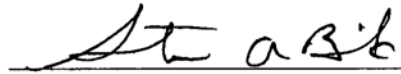
15 Trial is currently set for 10/31/11. Plaintiff is required to present a trial plan that
16 demonstrates that there can be an effective class trial of common issues and any
17 individualized issues, that will provide due process to the absent class members and
18 Defendant while respecting the time of the Court and/or jury. The trial plan must identify
19 the common factual and legal issues and identify the specific documents and witnesses that
20 Plaintiff will present to prove the common factual issues. For each witness, Plaintiff must
21 describe their testimony in 3 - 4 sentences and estimate the hours of direct testimony. (See
22 Tate v. Kaiser, RG07 318416, Order of April 28, 2009; Workman Decl. filed June 25,
23 2009.)

24 The trial plan is not a substitute for Local Rule 3.35 and will not bind the Plaintiffs
25 to the precise witnesses and documents that they can present at trial. The trial plan must,
26

1 however, give the Court a factual basis for determining whether the trial will be
2 manageable and for determining the length of the trial.

3 The Court has set a second Case Management Conferences for 3:00 p.m. on 8/2/11
4 to consider Plaintiff's trial plan. Plaintiff shall file and deliver a copy of his proposed trial
5 plan directly to Department 17, and serve on Defendant on the same date, via facsimile,
6 hand delivery or (if agreed by Defendant) electronic mail, no less than five (5) court days
7 prior to the August CMC.

8 Dated: June 16, 2011.


9 _____
10 Steven A. Brick
11 Judge of the Superior Court
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