SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 09/04/12			DEPT. 33
HONORABLE CHARLES F. PALMER	JUDGE	M. FAUNE	DEPUTY CLERK
HONORABLE #	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. KINNEY, C.A.	Deputy Sheriff	Y. HUFF, CSR#12570 **Reporter Pro Tempore**	Reporter

8:30 am	BC434587	Plaintiff	ALEXANDER WHEELER (X)
		Counsel	KIRK HANSON (X)
	HECTOR BANDA		JEFFREY JACKSON (X)
	VS	Defendant	
	VERIZON CALIFORNIA INC	Counsel	STEVEN KATZ (X)
	Consolidated with BC442358		
	NON-COMPLEX (05-07-10)		

NATURE OF PROCEEDINGS:

MOTION OF PLAINTIFFS AND THE PUTATIVE CLASS FOR CLASS CERTIFICATION;
(c/f 6/19/12)

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore is signed and filed this date.

The matter is called for hearing.

The court adopts its tentative ruling as the final ruling of the court as follows:

The motion of plaintiffs Miguel Quintero Sanchez ("Sanchez") and Scott Cerkoney ("Cerkony") (collectively, "plaintiffs") for preliminary class certification is GRANTED.

Class certification is appropriate when "the question is one of a common or general interest, of many persons, or when parties are numerous and it is impracticable to bring them all before the court." CCP section 382. "To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among class members. The community of interest involves three factors: '[1] predominant common questions of law or fact; [2] class representatives with claims or defenses typical of the class; and [3] class representatives who can

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adequately represent the class. The party seeking certification has the burden of establishing the prerequisites for a class action." Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435. A plaintiff must present substantial evidence demonstrating that these factors have been satisfied as "a certification ruling not supported by substantial evidence cannot stand." Lockheed Martin Corp. v. Superior Court (Carillo) (2003) 29 Cal.4th 319, 327.

Ascertainability

The court finds that the class is ascertainable. An ascertainable class exists after examining "(1) the class definition, (2) the size of the class, and (3) the means available for identifying class members." Global Minerals & Metals Corp. v. Superior Court (National Metals, Inc.) (2003) 113 Cal. App. 4th 836, 849. Class members are "ascertainable" where they may be readily identified without unreasonable expense or time by reference to official records. Aguiar v. Cintas Corp. No. 2 (2006) 144 Cal. App. 4th 121, 135.

In defining an ascertainable class, "the goal is to use terminology that will convey 'sufficient meaning to enable persons hearing [the definition] to determine whether they are members of the class plaintiffs wish to represent' . . . [Ascertainability] goes to heart [sic] of question

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of class certification, which requires a class definition that is 'precise, objective and presently ascertainable.'" Global Minerals, supra, 113 Cal. App. 4th at 858. The class definition may plead ultimate facts or conclusions of law. Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal. App. 4th 908, 915. Yet, if appropriate, a court may modify the class definition to excise a liability-based component if the "evidence . . . shows such a redefined class would be ascertainable." Id. at 916.

The proposed class definition is clear and uses objective language. It applies only to Defendant's hourly employees and sets forth a discrete time period. Also, the class members are easily identifiable from defendant's company records because they were all sent computer-generated wage statements. Motion, Hanson Decl., Exh. 2 ("Van Deboe Depo."), pp. 16:25-20:17, 84:17-86:4, 105:19-107:14, 185:8-186:18. Therefore, the class is ascertainable.

The court finds that the class definition should be revised to reflect the class in fact described in the moving papers. See Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification filed herein February 2, 2012, pp.3-4. In particular, the court finds the class definition should be revised to be "All persons who were or are employed by Verizon California, Inc. in

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California as hourly employees at any time between April 1, 2009 and May, 2011

Numerosity

The class is sufficiently numerous.

Numerosity means the class is sufficiently numerous that individual joinder is impracticable. However "no set number is required as a matter of law for the maintenance of a class action." Rose v. City of Hayward (1981) 126 Cal. App. 3d 926, 934. Courts have certified class actions with class members ranging from 30-40 because individual joinder is impractical. See Id. at 934 (42 members); Collins v. Rocha (1972) 7 Cal.3d 232, 235 (44 members). Some courts have certified smaller classes. See e.g. Hebbard v. Colgrove (1972) 28 Cal. App. 3d 1017, 1030 (28 members); Bowles v. Superior Court (1955) 44 Cal.2d 574 (10 members); Philadelphia Electric Co. v. Anaconda American Brass Co. (E.D. Pa 1968) 43 F.R.D. 452, 463 (25 members); Dale Electronics, Inc. v. R.C.L. Electronics, Inc. (D.C.N.H. 1971) 53 F.R.D. 531, 534, 536 (13 members). The class consists of approximately 11,300 persons. Motion, Hanson Decl., Exh. 1, Responses Nos. 3-4. It is impractical to join thousands of persons into a single action. Therefore, the class is sufficiently numerous.

Typicality

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Sanchez and Cerkoney are typical class members.

The named plaintiff must be a member of the class. Petherbridge v. Altadena Federal Savings and Loan Association (1974) 37 Cal.App.3d 193, 200. Typicality looks to the nature of the claims or defenses, not the specific facts from which the claims or defenses arose or the relief sought. Seastrom v. Neways, Inc. (2007) 149 Cal. App. 4th 1496, 1502. 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." Id. However, the class representative's interests need not be identical to those of class members, only similarly situated. Classen v. Weller (1983) 145 Cal.App.3d 27, 46.

Sanchez and Cerkoney worked for Defendant as hourly employees during the class period. Motion, Sanchez Decl., 2; Cerkoney Decl., 2. Both Plaintiffs allege that their paystubs were missing key information and they were not able to tell how many hours they worked each week or if they were being properly paid. Motion, Sanchez Decl., 3-5; Cerkoney Decl., 3-5. This is the basis of the claim raised on behalf of the class members. FAC, 31-37.

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NON-COMPLEX (05-07-10)

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Defendant Counsel: STEVEN KATZ (X)

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The Second Amended Complaint (the "SAC") was filed in August 2012, which is more than one year after the end of the class period (May 2011). Defendant argues that Sanchez is not a typical class member because his class claims are time-barred under the one-year statute of limitations of Labor Code section 226 and his claims do not relate back to the original filing date of this action. In order for an amended pleading to relate back to the original filing date, the amended pleading must 1) rest on the same general set of facts; 2) involve the same injury; and 3) refer to the same instrumentality as the original pleading. Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 408-09. Defendant argues that Sanchez' injury is separate and distinct from former plaintiff Banda's injury and the rule that timely filing of a class action tolls the statute of limitations for all members of the putative class only applies to the putative class members' individual claims. See American Pipe & Construction Co v. Utah (1974) 414 US 538, 553-54. Defendant contends that the class action tolling rule cannot be used to "resurrect" class claims that are time-barred because the American Pipe tolling rule only applies to individual claims. In support of this assertion, defendant points to a Ninth Circuit case, Robbin v. Fluor Corporation, which held that the American Pipe tolling rule does not apply to class members who, after dismissing a class action, file a subsequent class action. (9th Cir. 1987) 835 F.2d 213, 214.

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Robbins is distinguishable. In Robbins, the plaintiff filed a class action matter in which class certification was denied and the matter voluntarily dismissed. Id. at 213. Two years after the dismissal of the first class action case, the named plaintiff filed a second class action case. Id. The Ninth Circuit, consistent with other circuit courts, found that allowing the named plaintiff to file a second class action complaint using the tolling rule of American Pipe was an abuse of the rule. Id. at 214. In making this finding, the Robbins court relied on the reasoning of Korwek v. Hunt, which discussed how the named plaintiffs filed a second class action complaint nearly identical to the first class action complaint despite the trial court's ruling in the original case denying class certification on grounds of overwhelming unmanageability. Id. (citing Korwek v. Hunt (2d Cir. 1987) 827 F.2d 874, 879). Here, there has been no finding by the Court that class certification is improper and there has been no dismissal of the class claims in this action. Leave to amend the complaint was approved by the Court, and not made independently by the named plaintiffs. Moreover, Sanchez has, since the filing of the initial complaint in this action, been a member of the putative class. Thus, the present case does not reflect the abuse present in Robbins or Korwek and it is appropriate to apply the American Pipe tolling rule.

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As members of the class with claims that are identical to the claims raised on behalf of the class, Sanchez and Cerkoney are typical class members.

Adequacy

Sanchez and Cerkoney are adequate class representatives. Attorneys Kirk Attorneys Hanson and Alexander Wheeler are qualified to be class counsel.

Adequacy consists of two factors: (1) adequacy of the proposed class representative, and (2) adequacy of proposed class counsel.

In order to satisfy due process and res judicata requirements, the class representative must adequately represent and protect the class interests. City of San Jose v. Superior Court (Lands Unlimited) (1974) 12 Cal.3d 447, 463. The class representative must raise claims "reasonably expected to be raised by the members of the class." Id. at 464. Additionally, there must not exist any antagonisms or conflict between the class representative and the class members' interests. J.P. Morgan & Co., Inc. v. Superior Court (Heliotrope General, Inc.) (2003) 113 Cal. App.4th 195, 212. However, "only a conflict that goes to the very subject matter of the litigation will

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defeat a party's claim of representative status." Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 470.

In regards to class counsel, he/she must be qualified, experienced and generally able to conduct the proposed litigation. McGhee v. Bank of America (1976) 60 Cal.App.3d 442, 450; Miller v. Woods (1983) 148 Cal.App.3d 862, 874.

Defendant argues that Cerkoney is not an adequate class representative because of he filed an individual action for discrimination and harassment on May 15, 2012. According to Defendant, this individual action creates a conflict of interest because Cerkoney will be motivated to compromise the class claims to benefit his individual claims. This is the same conflict that existed in Apple Computer v. Superior Court (2005) 126 Cal.App.4th 1253, where the California Court of Appeals disqualified class counsel on the grounds that he was also the named plaintiff in the action, according to Defendant.

This analogy is unpersuasive. As explained by the Apple Computer court, the conflict arises when class counsel acts as the class representative because attorneys' fees are such a large part of a class action settlement.

"[The] majority of courts ... have refused to permit

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Defendant Counsel: STEVEN KATZ (X)

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class attorneys, their relatives, or business associates from acting as the class representative. [] The most frequently cited policy justification for this line of cases arises from the possible conflict of interest resulting from the relationship of the putative class representative and the putative class attorney. Since possible recovery of the class representative is far exceeded by potential attorneys' fees, courts fear that a class representative who is closely associated with the class attorney would allow settlement on terms less favorable to the interests of absent class members." (Susman v. Lincoln American Corp. (7th Cir.1977) 561 F.2d 86, 90-91 (Susman), fns. omitted; see id. at p. 90, fns. 5, 6 & 7 [collecting cases].)

"In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain. The impropriety of such a position is increased where, as here, the attorney is also the representative who brought the action on behalf of the class, and where, as here, the potential recoveries by individual members, including representatives, of the class are likely to be very small in proportion to the total amount of recovery by the class as a whole. Thus, [p]laintiffs may stand to gain little as class representatives, but may gain very much as attorneys for the class." (Graybeal v. American Savings & Loan Association (D.D.C.1973) 59 F.R.D. 7,

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13-14.)"

Apple Computer v. Superior Court (2005) 126 Cal.App.4th 1253, 1264-65. Here, there is no relationship between the individual recovery Cerkoney could obtain in the discrimination case and the class recovery in the instant action so he has no apparent incentive to compromise the class recovery.

Defendant also challenges the adequacy of Plaintiffs' Counsel, Kirk Hanson of Jackson Hanson LLP, and Alexander Wheeler of R. Rex Parris Law Firm, to represent the class. Defendant contends that plaintiffs' counsel was aware of Mr. Banda's release of claims for many months before it was brought to the Court's attention on June 19, 2012. Defendant bases this contention on the fact that Mr. Banda spoke with Sanchez in April or May 2012, at which time Sanchez was encouraged to contact Mr. Banda's counsel. Supp. Oppo., Katz Decl., Exh. D ("Quintero Depo."), pp. 22:2424:14, 25:10-12, 28:17-29:12, 30:12-33:8.

If Mr. Banda and Sanchez spoke in April or May 2012, this does not mean Sanchez contacted Plaintiffs' counsel at that time. Plaintiffs' counsel respond that they only became aware of Mr. Banda's release of claims on May 16, 2012. Supp. Reply, Hanson Decl., 2. At that time, it took actions to investigate the scope of the release and locate an

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additional class representative. Supp. Reply, Hanson Decl., 4.

It appears that Plaintiffs' counsel brought the issue of Mr. Banda's release of claims to the Court's attention within a reasonable amount of time. Defendant only offers speculation as to when Plaintiffs' counsel was made aware of the release. Taking Attorney Hanson's evidence at face value, the matter was brought to the Court's attention only one month after Plaintiffs' counsel learned of it. This does not amount to unreasonable delay or subterfuge.

a. Class Representative: As Sanchez and Cerkoney are typical class members, they appear to have interests that are in line with the interests of the class members. Both attest that this is the true in their declarations, and state their intention to continue representing the interests of the class. Motion, Sanchez Decl., 3-9; Cerkoney Decl., 7-9. Based on their declarations, Plaintiffs Sanchez and Cerkoney have demonstrated their adequacy to represent the class.

b. Class Counsel: Plaintiffs are represented by Kirk Hanson of Jackson Hanson LLP and Alexander Wheeler of R. Rex Parris Law Firm. Both attorneys have practiced law for many years and have significant experience prosecuting wage and hour class action cases. Motion, Hanson Decl., 5-9; Wheeler Decl., 2-5. Based on this background, both

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Attorneys Hanson and Wheeler are qualified to be appointed Class Counsel in this case.

Commonality

The court finds that common questions predominate.

"The ultimate question in every [purported class action] is whether, given an ascertainable class, the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." Brown v. The Regents of the University of California (1984) 151 Cal.App.3d 982, 989.

Further:

"Plaintiffs' burden on moving for class certification . . . is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues predominate. As we previously have explained, "this means 'each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the

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class action advantageous to the judicial process and to the litigants.'" (Citations omitted)."

Lockheed Martin Corp., supra, 29 Cal.4th at 1108 (italics in original).

"In examining whether common issues of law or fact predominate, the court must consider the plaintiff's legal theory of liability. [Citation.] 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. [Citations.]."

Faulkinbury v. Boyd & Associates, Inc. (2010) 185 Cal.App.4th 1363, 1380 (citing Walsh v. IKON Office Solutions, Inc. (2007) 148 Cal.App.4th 1440, 1450).

Plaintiffs bring this action against Defendant on a theory that the wage statements provided to the class members violated Cal. Labor Code section 226(a). Section 226(a) states that an employer must provide wage statements that include:

(1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the

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Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

To recover damages for a violation of Labor Code section 226, an employee must have suffered an actual injury. Cal. Labor Code § 226(e); Price v. Starbucks (2011) 192 Cal.App.4th 1136, 1142-1143. However, "[w]hile there must be some injury in order to recover damages, a very modest showing will suffice." Jaimez v. Daiohs USA, Inc. (2010) 181 Cal.App.4th 1286, 1306. Defendant provided one version of the wage statement to the class members from the commencement of the class period until April 10, 2010, and a second version of the wage

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statement from April 11, 2010 until May 2011. Plaintiffs allege that both versions violate the section 226(a), but in different ways. According to Plaintiffs, the first version does not list:

" The pay period start date;
" The regular hours worked by the employee;
" The overtime pay rates; and
" Separate listings of time-and-a-half overtime and double-time overtime hours.

Motion, Van Deboe Depo., Exhs. 2, 4. The second version purportedly lists the overtime rate as two, separate false rates; one rate is labeled "overtime premium" (one-half of the regular rate) and the second rate is "overtime wages" (the same rate as the regular rate). Neither of these is the correct overtime rate, and the separate listings make it appear that the employee worked twice the number of overtime hours that he or she actually worked. Motion, Van Deboe Depo., Exh. 5. Plaintiffs allege that because of these deficiencies, they could not tell what days were included in the pay period, whether they were being paid for all days within a pay period, the total number of regular or overtime hours they worked, or whether they were paid correctly for all hours worked. Motion, Sanchez Decl., 5-6; Cerkoney Decl., 4-7. Plaintiffs contend that based on the uniformity of the two wage statement versions sent to the class members, defendant's liability for the above deficiencies can

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HONORABLE CHARLES F. PALMER	JUDGE	M. FAUNE	DEPUTY CLERK
HONORABLE #	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. KINNEY, C.A.	Deputy Sheriff	Y. HUFF, CSR#12570 **Reporter Pro Tempore**	Reporter

8:30 am	BC434587	Plaintiff	ALEXANDER WHEELER (X)
		Counsel	KIRK HANSON (X)
	HECTOR BANDA		JEFFREY JACKSON (X)
	VS	Defendant	
	VERIZON CALIFORNIA INC	Counsel	STEVEN KATZ (X)
	Consolidated with BC442358		
	NON-COMPLEX (05-07-10)		

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be determined as common questions for all the class members.

Defendant responds that the purported deficiencies indicated by Plaintiffs are not consequential injuries for which they may obtain damages under Section 226. Citing Price v. Starbucks Corp., 192 Cal.App.4th 1136, 1142; Elliot v. Spherion Pac. Work (CD Cal. 2008) 572 F.Supp.2d 1169, 1180-81. Rather, defendant asserts the purported deficiencies simply require Plaintiffs and the class members to perform middle-school math from the information already listed on the pay statements in order to calculate what is missing. Oppo., pp. 15:21-17:9. Defendant argues that in order to prove entitlement to damages, each class member would be required to demonstrate that they were confused by the above deficiencies by individually explaining their mathematical abilities.

This assertion, however, is not supported by case law. In none of the cases on which defendant relies was the court concerned with the level of mathematical ability of the plaintiffs or class members to determine whether the wage statements violated section 226(a). See Price, supra, 192 Cal.App.4th at 1142-43; Jaimez v. DAIOHS USA, Inc. (2010) 181 Cal.App.4th 1286, 1306. In Elliot, the District Court described the kinds of injuries that meet the standard under section 226(e), which include the "possibility of not being paid overtime,

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employee confusion over whether they received all wages owed them, difficulty and expense involved in reconstructing pay records, and forcing employees to make mathematical computations to analyze whether the wages paid in fact compensated them for all hours worked." 572 F.Supp.2d at 1181. These injuries do not require that the court subjectively determine the mathematical capabilities of the individual class members to determine if there was some injury. Rather, each of the deficiencies asserted by plaintiffs can be analyzed individually and collectively to determine whether it caused the types of injuries referred to in Elliot, or if it is simply a non-injurious deficiency, like the injury asserted in Price. See Price, supra, 192 Cal.App.4th at 1143. The court further notes that the failure to state the pay period start date in the first version of the wage statement and the description in the second version of the wage rates provided as "overtime premium", term not in common usage which represents a rate ½ the regular pay rate, require the employee to go outside simple computations based on the information reflected on the wage statement render the information contained in the statements not subject to simple calculation to determine whether proper wages have been paid. The absent starting date can only be remedied without speculation by inquiry of the employer and the confusing labeling of the applicable hourly rates similarly requires inquiry of the employer or speculation.

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M. KINNEY, C.A.	Deputy Sheriff	Y. HUFF, CSR#12570 **Reporter Pro Tempore**	Reporter

8:30 am	BC434587	Plaintiff Counsel	ALEXANDER WHEELER (X) KIRK HANSON (X) JEFFREY JACKSON (X)
	HECTOR BANDA VS VERIZON CALIFORNIA INC	Defendant Counsel	STEVEN KATZ (X)
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The court further observes that unlike the plaintiff in Price, the plaintiffs here have made a detailed evidentiary showing that several steps are necessary for an employee to be able to determine their reate of pay, number of hours worked, the type of hours worked during each work period and the work period itself. See Van Deboe Deposition 26:13-27:24; 29: 16-31:16; 35:17-39:2; 41:20-42:20; 45:5-49:4; 53:22-54:13; 66:7-69:17; 69:21-72:6; and 73:10-22, Cerkoney Deposition 35:7-36:30:17-31:25; 28:20-29:4.

In sum, given the number and magnitude of issus amenable to class determination, the court finds that class issues predominate.

Superiority/Substantial Benefits

The court finds that a class action is the superior means of resolving this action.

In addition to the requirements stated in CCP § 386, ourts have held that a "class action also must be the superior means of resolving the litigation, for both the parties and the court." Aguiar v. Cintas Corporation No. 2 (2006) 144 Cal.App.4th 121, 132-33. Class suit is appropriate when the injury is of insufficient size to warrant individual action, and/ denial of class relief will result in an unjust advantage to the wrongdoer. Id. Thus, the Court should consider the probability of each

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class member coming forward to prove his or her claim and whether a class approach will deter and redress the alleged wrongdoing. Id. Generally, four factors are considered in deciding if class adjudication is superior:

"(1) The interest of each member in controlling his or her own case personally; (2) The difficulties, if any, that are likely to be encountered in managing a class action; (3) The nature and extent of any litigation by individual class members already in progress involving the same controversy; [and] (4) The desirability of consolidating all claims in single action before a single court."

Basurco v. 21st Century Insurance Company (2003) 108 Cal.App.4th 110, 121. Furthermore, as there is a potential to create injustice, the Court must "carefully weigh respective benefits and burdens and . . . allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts." Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435; Aguiar, supra, 144 Cal.App.4th at 132-33.

Here, having weighed the respective burdens, the court finds that the class claims can be determined substantially through common proof. Management of the class will be relatively straightforward insofar as the evidence will consist predominantly of the two versions of the wage statements issued to the

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class members and inquiry into whether there is sufficient injury to trigger liabililty under Section 226. Given the large size of the class, the court finds the ability to resolve all the claims in a single action will promote judicial efficiency. Accordingly, resolving the claims through class treatment is superior to adjudication by individual actions.

RULINGS ON EVIDENTIARY OBJECTIONS

Insofar as the objections are not numbered, the court has entered its evidentiary rulings on the written objections which may be found in the file.

The court sets a STATUS CONFERENCE Re: Notice on 10/4/12 at 8:30 a.m., in this department.

Notice is waived.

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