SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

NICK TORRES, et al, Plaintiffs, v. ABC SECURITY SERVICE, INC., et al, Defendants.	No. RG04 -158744 ORDER GRANTING IN PART AND DENYING IN PART THE MOTION OF PLAINTIFFS FOR CLASS CERTIFICATION Date: November 30, 2006 Time: 2:00 p.m. Dept.: 22

The motion by Plaintiffs for class certification came on regularly for hearing on November 30, 2006, in Department 22, the Honorable Ronald M. Sabraw, presiding. Plaintiffs and Defendants appeared at the hearing through counsel of record. The Court, after full consideration of all papers submitted in support and opposition to the motion, as well as the oral arguments of counsel, decides as follows: IT IS HEREBY ORDERED that Plaintiffs' motion for class certification is GRANTED in part and DENIED in part.

FACTUAL BACKGROUND

This is a purported class action on behalf of all persons employed by ABC Security Services., Inc. ("ABC") in any non-exempt security guard/officer positions ("security guards"). The Fourth Amended Complaint filed August 8, 2006, alleges that ABC unlawfully (1) requires SGs to make excessive deposits for their uniforms, Labor Code 402, (2) fails to pay interest on the uniform deposits, Labor Code 404, (3) imposes charges for the return of dirty or worn

uniforms, Labor Code 2802, (4) fails to reimburse SGs who incur expenses in cleaning and maintaining uniforms Labor Code 2802, (5) requires SGs to pay for obtaining guard cards, (6) fails to provide meal periods and rest breaks, Labor Code 512 and Wage Order section 12, (7) fails to pay overtime when SGs swap shifts, and (8) fails to provide accurate wage statements. The parties agree that the relevant wage order for security guards is Wage Order 4-2001, located at 8 Cal.Code.Regs. 11040. Plaintiffs seek to certify a class for all claims in the Complaint.

ASCERTAINABILITY AND NUMEROSITY

Plaintiffs proposes a class of all security guards during the relevant time frame. ABC does not contest the ascertainability requirement.

The proposed class includes approximately 500 persons, with approximately 200 persons in the proposed subclass. This is sufficiently numerous.

COMMON QUESTIONS OF LAW AND FACT - LEGAL FRAMEWORK.

Plaintiff's 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*. ... "[T]his 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 class action advantageous to the judicial process and to the litigants.'" *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal. 4th 1096, 1108. "The ultimate question in [class actions] is whether . . . 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." *Lockheed Martin*, 29 Cal. 4th at 1104-1105.

Some cases have what the Court will refer to as "absolute commonality." In these cases every member of the proposed class was exposed to the allegedly wrongful practice and the practice was either consistently lawful or unlawful as to all members of the class. The defendant's action can be found to be wrong in the abstract without examining whether it was wrongful as to any individual classmember. *Aguiar v. Cintas Corporation No. 2* (2006) 2006 Cal. App. LEXIS 1663 (applicability of Living Wage Ordinance); *In re Cipro Cases I & II* (2004) 121 Cal. App. 4th 402, 411 (antitrust violations); *Massachusetts Mutual Life Ins. Co. v. Superior Court*, (2002) 97 Cal. App. 4th 1282, 1292-1294 (misrepresentations); *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1278 (erroneous interpretation of legislation). In cases with "absolute commonality," the Court can extrapolate liability findings from the trial witnesses to the absent class members with a great deal of certainty. In a case with absolute commonality, each member of the putative class is identically situated with regard to liability and by definition has standing to maintain the action on his or her own behalf. *Collins v. Safeway Stores, Inc.* (1986) 187 Cal. App. 3d 62, 73. To the extent there are differences among class members, they usually relate to the amount of damages that each class member can recover. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 333.

Other cases have what the Court will refer to as "partial commonality." In these cases every member of the proposed class was exposed to a practice but the trier of fact cannot determine whether the practice was lawful as to any given member of the class without considering individualized factors. The Court can certify a class based on a demonstration of partial commonality. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, addresses this in several places, stating, "Predominance is a comparative concept," 34 Cal. 4th at 334, that the community of interest requirement does not mandate that class members' claims be uniform or identical, 34 Cal.4th at 338, that the "logic of predominance" does not require a plaintiff to prove that a defendant's policy was "either right as to all members of the class or wrong as to all members of the class," 34 Cal. 4th at 338, and "the established legal standard for

commonality ... is comparative," 34 Cal.4th at 339. The federal rules of civil procedure expressly provide for partial commonality. F.R.C.P. 23(b)(2) (injunction only classes without a showing of predominance); F.R.C.P. 23(c)(4) (single issue certification).

The determination of how much commonality is enough to warrant use of the class mechanism requires a fact specific evaluation of the claims, the common evidence, and the anticipated conduct of the trial. For example, it can be appropriate to certify a class of women to pursue claims for sex discrimination where an employer has a pattern of denying promotions to women even though not all women were denied promotions. *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 416 fn1. To ensure that the class mechanism will really be useful, in cases with "partial commonality" the Court usually makes some limited inquiry into whether the plaintiff has an isolated claim or whether there are numerous similar incidents. *Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 336 (defining "pattern or practice"). This can take the Court close to a merits analysis. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 332.

"Partial commonality" cases pose a greater challenge than "absolute commonality" cases because the Court cannot automatically extrapolate liability findings from the trial witnesses to the absent class members. In these cases the Court has to devise "pragmatic procedural devices" and "innovative procedural tools" to structure a trial that provides significant benefits to the parties and the Court while at the same time protecting the rights of all the parties. *State of California v. Levi Strauss & Co.* (1986) 41 Cal. 3d 460, 471. Because "partial commonality" cases present greater trial management concerns, a plaintiff seeking to pursue such a case should present a manageable trial plan at the class certification stage. *Washington Mutual Bank v. Superior Court* (2001) 24 Cal. 4th 906, 923 ("the presentation must be sufficient to permit the district court, at the time of certification, to make a detailed assessment of how the difficulties posed by the variations in state law will be managed at trial"). See also *Southwestern Ref. Co. v. Bernal* (Tex. Sup., 2000) 22 S.W.3d 425, 435 ("We reject [the] approach of certify now and worry later.").

COMMON QUESTIONS OF LAW AND FACT - ANALYSIS.

Commonality is determined with reference to the claims asserted. *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 fn 22. The Court examines each claim in turn.

Uniform claims. Common issues will predominate at trial concerning whether ABC unlawfully requires SGs to make excessive deposits for their uniforms, Labor Code 402, fails to pay interest on the uniform deposits, Labor Code 404, imposes charges for the return of dirty or worn uniforms, Labor Code 2802, and fails to reimburse SGs who incur expenses in cleaning and maintaining uniforms, Labor Code 2802. All of these claims are based on ABC's consistent policies. Therefore, there is "absolute commonality" – either the policies are lawful as to all SGs or they are unlawful as to all SGs. Variations in the damages that the SGs have suffered, if any, can be addressed through a claims process or accounting and do not preclude class certification.

Guard cards. Common issues will predominate at trial concerning whether ABC unlawfully requires SGs to pay for obtaining and maintaining guard cards. California's Bureau of Consumer Affairs requires that security guards take security training tests and pass a test to get a guard card. Thereafter, the guard must pay an annual $122.00 to maintain the card. ABC has a consistent policy of requiring SGs to maintain their own guard cards at their own expense. If an employee does not maintain a card independently, ABC will pay the fee and deduct the $122 charge from the guard's paycheck. There is "absolute commonality" in this claim because either the policies are lawful as to all SGs or they are unlawful as to all SGs. Variations in the damages that the SGs have suffered, if any, can be addressed through a claims process or accounting and do not preclude class certification.

Meal Period "On-Duty" Claims. The meal period "on-duty" claim is based on paragraph 11 of the applicable California Wage Order. The Wage Order states at paragraph 11, "An "on

duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to." Wage Orders Nos. 7-80, 7-98, 7-2001 at ¶11(A). Plaintiffs assert that the written agreements between ABC and the SGs are invalid because the nature of the work does not prevent an employee from being relieved of all duty. (Charleton Dec., Exh H – Meal; Period Waiver.) There is "absolute commonality" in this claim because either the nature of security guard work where a SG is the only person assigned to a location prevents a SG from being relieved of all duty for a meal period or it does not. After this common factual and legal issue is resolved, the result can be applied to all SGs who worked as the only person assigned to a location.

Meal Period Claims – Underlying law. The meal period claims are based on Labor Code 512 and paragraph 11 of the applicable California Wage Order. Labor Code 512 states. "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes ... ." The applicable California Wage Orders state at paragraph 11, "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes." Wage Orders Nos. 7-80, 7-98, 7-2001 at ¶11(A).

Labor Code 512 is ambiguous as to whether an employer's obligation to "provide" a meal period requires the employer to make a meal period of 30 minutes available or to ensure that a meal period of 30 minutes is taken. Labor Code 226.7 is similarly ambiguous. The Wage Orders indicate that every person who works for more than five hours must be offered and must take a meal period of not less than 30 minutes. Paragraph 11 of the Wage Orders state "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes ..." "No employer shall employ" is mandatory and directive language. The remainder of the sentence does not include the "authorize and permit" language, and avoids the ambiguous term "provide." A review of the Wage Orders as a whole supports the same

conclusion. Employers are to provide meal periods of not less than 30 minutes, the time spent on meal periods is not "hours worked," and "hours worked" is any time in which an employee is "suffered or permitted to work, whether required to do so or not," Paragraph 2(G). In addition, employers must maintain time records of when meal periods begin and end, Paragraph 7(A)(3), so employers should know if employees are taking their assigned meal periods. Reading these sections as a whole suggests that an employer must not knowingly suffer or permit an employee to work during an assigned meal period. The Court has been unable to locate any case law directly applicable to determining the elements of a meal period claim. *California Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal. App. 3d 95, 114-115, states that the general experience of mankind is that it takes 30 minutes to eat a meal, but does not address whether the Wage Orders permit employees to elect voluntarily to eat quickly and return to work in fewer than 30 minutes. The Court concludes that the Labor Code and the Wage Orders require employers to ensure that employees take meal periods of not less than 30 minutes.

Rest Break Claims – Underlying law. The rest break claims are based on paragraph 12 of the applicable California Wage Orders, which state, "Every employer shall authorize and permit all employees to take rest breaks ..." The rest breaks are to be "at the rate of 10 minutes net rest time per four (4) hours or major fraction thereof." Regarding pay, "Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages." Wage Orders Nos. 7-80, 7-98, 7-2001 at ¶12(A). There is no clear statutory or case law guidance on what elements an employee must prove to establish a violation of the rest break provisions.

The Wage Order requires employers to make rest breaks available to employees, but does not require employers to ensure that the employees take the full time allotted for those breaks. The critical phrase in the Wage Order is "authorize and permit." It is unclear whether this term means "require" or "allow." When used by the Legislature in other contexts, the phrase "authorize or permit" appears to be synonymous with "allow." In several statues the phrase "authorize or permit" could be replaced with "allow" without altering the apparent meaning of

the statute, whereas replacement of "authorize or permit" with "require" would lead to strained or nonsensical language. See, e.g., Business and Professions Code 20999(c); Cal. Ed Code 1270.1; Cal Gov Code § 6546.1; Cal. Health and Safety Code 1371.3; Unemployment Insurance Code 1095(t). Case law addressing other issues suggests a similar interpretation of "authorize and permit." *Haggis v. City of Los Angeles* (2000) 22 Cal. 4th 490, 498 (equating the phrase "authorize and permit" with matters that are discretionary or permissive and placing them in contrast to matters that are obligatory or required). Case law does not clarify whether rest breaks must be allowed or required. There is a public policy that employees must have the option of taking rest breaks to rest, go to the toilet, and similar matters. *California Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 115. It is less clear whether public policy would require employees to take their breaks. Finally, the Court has considered the practicalities of the workplace. Employers generally determine when any given employee gets to take his or her break. In legal terms, rest periods are paid time that counts as "hours worked" and "hours worked" is defined as when an employee is subject to the control of an employer. *Morillion v. Royal Packing* (2000) 22 Cal.4th 575, 578. Therefore, a rest period can be viewed as an assignment from the employer that an employee accepts just as the employee would accept an assignment to stock shelves or work a cashier. The Wage Order requires employers to assign employees to rest breaks, and that if an employee completes the assignment to his or her satisfaction in less than 10 minutes then the employee can voluntarily elect to move on to other assignments. The Court concludes that employers must allow their employees to take net 10 minute rest breaks, but employers are not liable if their employees voluntarily elect not to take all the allotted rest time.

Rest Break and Meal Period Claims – Commonality. Plaintiffs have demonstrated that common issues will predominate on the rest break and meal period claims for monetary relief. There will be common issues of fact whether ABC's staffing practices deprived SGs of meal

periods and the opportunity to take rest breaks. There is evidence that the many SGs worked at locations where they were the only SG. (Rukin Dec. Exh C, Thrower Depo at 210-211; Index of Class Member Declarations.) There is evidence that ABC required SGs to be at their post at all times. (Charleton Dec., Exh H.) Therefore, there will be common issues whether SGs were authorized or permitted to take the rest breaks permitted by the Wage Order. Likewise, there will be common issues whether SGs were provided meal periods as required by Labor Code 512, but the merit of the meal period claims is dependent on the validity of the "on duty" meal period agreements.

Plaintiffs have demonstrated that common issues will predominate on the rest break and meal period claims for injunctive relief. There is evidence that many SGs work alone. There are common issues about whether ABC's staffing and other practices are lawful in light of the requirement that SG's must be provided meal periods (unless waived by agreement) and must be given the opportunity to take rest breaks.

Overtime on swapped shifts. Plaintiffs have not demonstrated that common issues will predominate at trial concerning whether ABC unlawfully fails to pay overtime when SGs swap shifts. There is no evidence that ABC has a policy of not paying overtime when a guard works more than 8 hours in a day or 40 hours in a week due to a swapped shift. The record does not contain evidence that ABC has an express policy of not paying overtime when a guard works more than 8 hours in a day or 40 hours in a week due to a swapped shift. The record likewise does not contain evidence that ABC's policies on overtime were implemented or ignored with the result that there was widespread de facto policy or practice of failing to pay overtime on swapped shifts. There is no basis for the Court to conclude that ABC's asserted failures to pay overtime to one of the named plaintiffs were anything more than a few isolated incidents. *Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 336 (defining "pattern or practice").

Wage Statements. Common issues will predominate at trial concerning whether ABC unlawfully fails to provide accurate wage statements. The wage statement claims are in large measure derivative of the other claims.

TYPICALITY AND ADQUACY OF REPRESENTATION.

Jones-Joseph and Torres are typical of the classes they seek to represent. Jones-Joseph was primarily a dispatcher as opposed to a SG, but did work as a SG for some time. (Jones-Joseph at 23-26 and 29.) Jones Joseph can, therefore, assert claims of SGs. The Court also notes that the fact that Jones-Joseph was primarily a dispatcher as opposed to a SG affects only her typicality to assert the meal period and rest break claims. The experiences and claims of Jones Joseph and Torres appear to be reasonably typical of the experiences and claims of the putative class as a whole.

Plaintiffs have demonstrated that they will adequately represent the class. They have no conflicts with the class.

Plaintiffs have retained competent class counsel. The evidence that one member of one of the firms representing Plaintiffs was the subject of bar discipline does not render his law firm inadequate and is no reflection on the other law firm. The Court also notes that the Bar can impose a range of discipline from private admonition to public admonition to suspension to disbarment. By imposing discipline less than suspension or disbarment the Bar suggested that the attorney can represent clients adequately.

ABC has presented the declarations of Tselentis, Minor, Polk, and Reyes, each of which state that counsel for Plaintiffs sent correspondence to the declarants and asked the declarants to sign declarations. The declarations reveal that counsel for Plaintiffs solicited information from witnesses (permitted), requested the witnesses to sign declarations (permitted), and that the declarants refused to sign the draft declarations (permitted). Absent evidence of

misrepresentation or coercion, the Court will not find that the efforts of counsel to gather information from witnesses is improper.

There are individualized factors concerning Jones-Joseph (fired) and Torres (revoked his on-duty meal agreement). To the extent relevant to the merits of this case, these individualized issues are factually disputed and the Court will not presume that ABC's version is correct at this stage in the proceedings. The individualized issues do not subject Jones-Joseph and Torres to individualized defenses on the merits that will interfere with their ability to represent the class.

POLICY CONSIDERATIONS.

ABC argues that class certification is not appropriate because the claims are weak. The Court does not consider the merits of a case on class certification. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440 (determination of whether a class should be certified is a procedural question and does *not* include a weighing of whether the action is legally or factually meritorious).

ABC argues that class certification is not appropriate because the money at issue for each class member is minimal and the cost of administration will outweigh any benefits to the members of the class. There is some support for this argument. *Blue Chip Stamps v. Superior Court of Los Angeles County* (1976) 18 Cal. 3d 381, 386; *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274-1275; *Devidian v. Automotive Service Dealers Assn.* (1973) 35 Cal. App. 3d 978. Class actions do, however, serve their purposes even if they cannot provide compensation to individual class members. Where the cost of claims administration outweighs the benefits to be provided, the Court can use a cy pres distribution. C.C.P. 384(b); *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706. In addition, even if an administrative process is inefficient or a cy pres distribution is inexact, a monetary recovery serves the purpose of deterring unlawful business practices.

There is a relatively simple administrative procedure for handling individual Labor Code claims. Labor Code 98. The administrative process is presumptively adequate for most claims. In this case, however, the claims are so small that it is unlikely that even a few employees would use a simple administrative process.

CONCLUSION.

Class certification is GRANTED to the extent that Plaintiffs seek monetary relief on the guard card, meal period "on duty," meal period, rest break, and wage statement claims. The class definition for those claims is: "All persons employed by ABC Security Service, Inc. in any non-exempt security guard or security officer positions in the State of California at any time from June 2, 2000, through [DATE]." The ending date will be the date the mailing list is fixed for purpose of class notice. See *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-812 (membership in class dependent on notice and an opportunity to opt-out). The class duration is set by the four year statute of limitations for the UCL claim. The Labor Code and other claims might have shorter limitations periods.

Class certification is GRANTED to the extent that Plaintiffs seek monetary relief on the uniform claims (claim that ABC failed to pay interests on the uniform deposits and failed to reimburse cleaning costs at the termination of employment). The class definition is: "All persons who were employed by ABC Security Service, Inc. in any non-exempt security guard or security officer positions in the State of California who terminated from ABC's employ at any time from June 2, 2000, through [DATE]." The ending date will be the date the mailing list is fixed for purpose of class notice.

Class certification is GRANTED to the extent that Plaintiffs seek injunctive relief on the uniform, guard card, meal period "on duty," meal period, and rest break claims. The class definition is: "All persons employed by ABC Security Service, Inc. in any non-exempt security

guard or security officer positions in the State of California at any time from June 2, 2000, through the date of judgment.

Class certification is DENIED to the extent that Plaintiffs seek monetary or injunctive relief on the overtime on swapped shifts claims.

This order on class certification is not an indication of the merit of any of the claims.

EVIDENCE

The Court has considered all the declarations submitted, as well as the exhibits attached thereto. The Court's consideration of the evidence is limited to the motion for class certification and should not be construed as an indication of admissibility in future motions or at trial.

FURTHER PROCEEDINGS.

The Court sets the next case management conference for January 24, 2007, at 10:00 am.

At the case management conference the parties should be prepared to discuss the necessity of providing class notice, the mechanics and form of any such notice, and whether a formal motion on class notice will be required. C.R.C. 1856. To the extent that Plaintiffs seek monetary relief, the Court is inclined to order notice and provide absent class members an opportunity to opt out. *Bell v. American Title Ins. Co.* (1991) 226 Cal. App. 3d 1589, 1609. To the extent that Plaintiffs seek injunctive relief, the Court is inclined to order that it is not necessary to provide class members with notice and an opportunity to opt out of the class. C.R.C. 1856(b)(1) and (2) and (c)(1) and (2). See also *Frazier v. City of Richmond* (1986) 184 Cal. App. 3d 1491, 1500-1501.

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At that time, counsel should also be prepared to discuss (1) what discovery is necessary before trial, (2) motions for summary adjudication or summary judgment, (3) trial setting.

Dated: December 12, 2006

Judge Ronald M. Sabraw

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RG04158744

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the Alameda County Superior Court and not a party to this cause. I served this ORDER GRANTING IN PART AND DENYING IN PART THE MOTION OF PLAINTIFFS FOR CLASS CERTIFICATION by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

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Dated: December 12, 2006

Executive Officer/Clerk of the Superior Court

By _____
Elizabeth Opelski-Erickson, Deputy Clerk