UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 07-8336-MWF (FMOx) Date: December 18, 2012
Title: Geraldo Ortega, et al. v. J.B. Hunt Transport, Inc.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Rita Sanchez	Not Reported	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendant:
Not Present	Not Present

Proceedings (In Chambers): ORDER DENYING DEFENDANT'S MOTION FOR DECERTIFICATION OF THE CLASS [77]

This matter is before the Court on Defendant J.B. Hunt Transport, Inc.'s ("JBH") Motion for Decertification of the Class ("Motion"). (Docket No. 77). JBH seeks to decertify the class previously certified by the Court (the Honorable Florence-Marie Cooper) in this case on May 15, 2009 ("Certification Order"). (Docket No. 64). The Certification Order identified a class consisting of "[a]ll of Defendant's California-based, local and regional intermodal and local and regional DCS drivers who worked for Defendant in the four years prior to the filing of the original complaint in this action and/or through to the time of trial in this case." (*Id.* at 6-7). The class was certified as to Plaintiffs' meal break, rest break, minimum wage, and pay stub claims. (*Id.*). The Court concluded that the class meets the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(3), but stayed the case pending the California Supreme Court's decisions in *Brinkley* and *Brinker*. (*Id.* at 20). After those decisions issued, the parties jointly requested that the Court lift the stay and JBH filed the pending Motion.

JBH argues that the California Supreme Court's decision in *Brinker* and the United States Supreme Court's decision in *Dukes* impact the legal sufficiency of the class such that it must be decertified. *See Wal-Mart Stores, Inc. v. Dukes*, -- U.S. --, 131 S.Ct. 2541, 180 L.Ed. 2d 374 (2011); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1017, 139 Cal. Rptr. 3d 315 (2012). JBH contests only the Rule 23(a) and (b)(3) factors of predominance and commonality. Plaintiffs argue in opposition that the cases JBH relies on do not undermine the sufficiency of the class

and that the factual basis on which the class was originally certified has not changed. The Court held a hearing on December 17, 2012. Having considered the parties' submissions and arguments, the Court agrees with Plaintiffs – certification of the class remains proper even after *Brinker* and *Dukes*. Accordingly, the Motion must be DENIED.

I. REQUESTS FOR JUDICIAL NOTICE AND EVIDENTIARY OBJECTIONS

The Court has considered the statements in Plaintiffs' Evidentiary Objections to Declarations of Leonard Garcia, Aaron Regalado and Tony Vargas ISO Defendant's Motion for Decertification of Class. (Docket No. 82). Plaintiffs object to various statements in the Garcia, Regalado, and Vargas Declarations as lacking foundation and representing improper opinion testimony or legal conclusions. Each of the 25 statements to which Plaintiffs object represents proper lay opinion testimony for which an adequate foundation is laid. To the extent that certain of the statements may be read as purporting to state legal conclusions, the Court considered only the lay sense of the legal terms of art. Accordingly, Plaintiffs' objections are OVERRULED.

JBH's Request for Judicial Notice in Support of Defendant's Motion for Decertification of the Class seeking notice of the existence of six orders from state and federal courts located in California is GRANTED. (Docket No. 77-2). These orders are matters of public record and their existence is not reasonably subject to dispute. Plaintiffs' Request for Judicial Notice in Support of Opposition to Motion for Decertification of Class and JBH's Supplemental Request for Judicial Notice in Support of Defendant's Motion for Decertification of the Class are also GRANTED for the same reasons. (Docket Nos. 83, 85).

II. MEAL AND REST BREAK CLAIM

JBH's argument that individual issues necessarily predominate with regard to Plaintiffs' meal and rest break periods is essentially a recitation of its position on class certification. (*See* Docket No. 64 at 10, "Stated otherwise, Defendant argues

that any assessment of whether breaks are provided and drivers are compensated for all hours worked will require a highly individualized inquiry into what activities a particular driver performed on a particular day, when and how each driver made decisions about taking breaks, and whether the decision to take a break had any effect on a driver's compensation."). The Court disagreed at that stage and reasoned that the class meal and rest break claims center on JBH's uniform policy and compensation scheme, which are applied to all class members. (*Id.* at 11). As the Court explained, "[t]his inquiry encompasses the issues of whether Defendant's compensation scheme does, in fact, provide for code-compliant breaks, pay drivers for rest breaks, and otherwise compensate drivers for all time worked." (*Id.*).

JBH now argues that *Brinker* and *Dukes* undercut the Court's prior ruling as to predominance and commonality, contending that certification of the meal and rest break periods depended on a now-defunct legal conclusion that employers are under a duty to ensure that employees do not work during their meal and rest periods and repeating its argument that individual questions predominate. Although the court in *Brinker* indeed held that an employer's obligation to provide a break period does not include an obligation to ensure the break is actually taken, this conclusion does not necessarily preclude a finding of predominance or commonality. *Brinker*, 53 Cal. 4th at 1017. Rather, the *Brinker* court explained that where it is alleged with factual support that common, uniform policies consistently applied resulted in the purported violations, class treatment may be appropriate. *Id.* at 1033. Additionally, the *Brinker* court observed that an "employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks." *Id.* at 1040. Because the plaintiffs in *Brinker* alleged such a uniform policy with regard to rest breaks, the *Brinker* court determined that rest break claims could proceed on a class-wide basis. *Id.* at 1033.

It is not the case, then, that the mere allegation of meal or rest break violations vitiates class treatment. Nor is it the case that the Certification Order certified the meal and rest break claims exclusively on the theory that JBH was required to ensure its drivers took their legally mandated breaks. The Court instead certified the class as to Plaintiffs' meal and rest period claims because those claims involve the application of a uniform policy and allegations that the uniform policy (or uniform lack of

policy) violates operative law. (Docket No. 64 at 18, "Here, for purposes of class certification, the Court finds that common issues predominate regarding, *inter alia*, whether Defendant complied with state law obligations to provide and record code-compliant breaks to class members.").

Brinker specifically anticipates the maintenance of class claims with this type of common proof. With regard to meal breaks, class wide questions include whether the policies of JBH sufficiently "provided" Plaintiffs with an opportunity to take code-complaint breaks and whether those breaks were properly recorded. As counsel for Plaintiffs noted at the hearing, *Brinker* requires that an employer must sufficiently provide a break before an employee's reasons for foregoing the break become analytically significant. *Brinker*, 53 Cal. 4th at 1033 ("No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it."). With regard to rest breaks, class wide questions include whether JBH sufficiently "provided" the opportunity for those breaks and whether JBH's policies compensated Plaintiffs for break time and missed breaks in compliance with the Labor Code.

Because these questions are common to all class members and will result in disposition of common issues, the class satisfies Rule 23(a)'s commonality requirement. *Dukes*, 131 S.Ct. at 2551 ("That common contention, moreover, must be of such a nature that it is capable of class wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."). Even under the rigorous commonality analysis required by *Dukes*, the question "whether Defendant's compensation system, which applies in the same manner to all potential class members on all work days, satisfies the requirement that an employer 'provide' meal breaks. . . is [a question] common to all potential class members." (Docket No. 64 at 17; *see also* Ex. A to Plaintiffs' Request for Judicial Notice, *Bickley v. Schneider National Carriers, Inc.*, CV-8-5806, at 12-13 (N.D. Cal. Sept. 7, 2012)).

Moreover, the Court agrees with the conclusion in the Certification Order that JBH's argument as to the legality of the purported "piece rate" compensation system goes to the merits of the case and need not be considered in connection with

certification. Plaintiffs argue that the compensation scheme violates California labor regulations, and JBH resists this contention. Whether the overarching compensation scheme JBH utilizes actually pays its employees in compliance with California regulations is a question that is capable of a common answer. A ruling on this question would be a premature ruling on the merits of the case and is not necessary for the Court's conclusion that common questions predominate. If Plaintiffs' claims are legally untenable, they are legally untenable as to the entire class. In other words, the legality of JBH's compensation scheme does not overlap with the factors the Court must consider in connection with Rule 23, and therefore the Court need not consider those merits questions. *Cf. Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (district court must consider merits if they overlap with certification factors).

Accordingly, the Motion as to Plaintiffs' meal and rest period break claims is DENIED.

III. MINIMUM WAGE CLAIM

JBH argues that the Court should also reach the merits question of whether its "piece rate" compensation system violates California's minimum hourly wage requirements. It then argues that the propriety of the compensation system as applied to each employee for each task depends on contractual analysis that differs by employee and contractual intent. Plaintiffs' allegation, however, is precisely that the "piece rate" compensation is unlawful in its entirety, and there is at least some legal support for this contention. *See, e.g., Cardenas v. McLane FoodServices, Inc.*, 796 F.Supp.2d 1246, 1252 (C.D. Cal. 2011) ("this Court finds that a piece-rate formula that does not compensate directly for all time worked does not comply with California Labor Codes, even if, averaged out, it would pay at least minimum wage for all hours worked"); *but see Cole v. CRST, Inc.*, 2012 U.S. Dist. LEXIS 144944, at *17-22 (C.D. Cal. Sept. 27, 2012) (plaintiff failed to show activity-based compensation policy for drivers unlawfully paid less than minimum wage for non-driving duties). Whether the "piece rate" compensation scheme applied to all class members violates California law is a common question capable of resolution. That

distinguishes Plaintiffs' claims from contract actions and renders Plaintiffs' allegations appropriate for class treatment.

Accordingly, the Motion as to Plaintiffs' minimum wage claim is DENIED.

IV. INACCURATE WAGE STATEMENT CLAIM

JBH's Motion with regard to Plaintiffs' wage statements focuses on whether Plaintiffs' injuries, as a statutory element, can be ascertained on a class-wide basis. The Certification Order properly addressed this argument. There, the Court concluded that the type of injuries alleged by Plaintiffs, including confusion, expense, and the possibility of missed overtime pay, are sufficient to constitute actual injury under California Labor Code Section 226; further, the standard nature of the wage statements renders the claim appropriate for class treatment. (Docket No. 64 at 27). "Here, neither the allegations in Plaintiffs' Complaint nor the referenced portion of Lead Plaintiff Patton's deposition testimony compels a determination that Plaintiffs have not alleged or cannot demonstrate injury sufficient to support a claim for violation of Labor Code Section 226." (*Id.* at 26-27). *See also Price v. Starbucks*, 192 Cal. App. 4th 1136, 1143 (2011) (citing the Certification Order and noting that Plaintiffs in this action sufficiently allege and present evidence of class-wide statutory injury because the uniform wage statements failed to include hours worked and the applicable hourly rate).

Finally, JBH's contention with regard to violations of due process and the Rules Enabling Act is simply unpersuasive because individualized proof is not necessary to establish the existence, legality, or applicability of a company-wide compensation or break policy.

Accordingly, the Motion as to Plaintiffs' wage statement claim is DENIED.

IT IS SO ORDERED.

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