SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ERIC L. NELSON, JUAN M. MEJOREDO, and ROBERT DOWLING, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

SOUTHERN CALIFORNIA GAS COMPANY, a California Corporation and SEMPRA ENERGY, a California Corporation,

Defendants.

CASE NO. BC451310

[~~PROPOSED~~] ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION, GRANTING DEFENDANT'S MOTION TO DENY REPRESENTATIVE STATUS, AND RULING MOOT DEFENDANT'S MOTION FOR AN ORDER DECLARING THIS MATTER INAPPROPRIATE FOR CLASS TREATMENT

This case came on for hearing on December 13, 2011, in Department 23 of this Court, Hon. Zaven V. Sinanian, presiding. Before the Court are related motions: (i) plaintiffs' Motion for Class Certification and (ii) the Motion of defendant Southern California Gas Company ("Gas Company") to Declare This Case Inappropriate for Class Treatment and Representative Status. Louis M. Marlin and Kristen Marquis Fritz of Marlin & Saltzman LLP appeared for plaintiffs. Paul Grossman, Leslie L. Abbott, and Eric E. Stevens of Paul Hastings LLP appeared for the Gas Company.

After full consideration of the pleadings, files herein, and the extensive oral argument of counsel, the Court adopts its tentative ruling and DENIES plaintiffs' Motion for Certification;

GRANTS the Gas Company's Motion to Deny Representative Status; and rules MOOT the Gas Company's Motion to Declare This Matter Inappropriate for Class Treatment, for the reasons set forth below and in the attached tentative ruling, incorporated herein by reference.

The Court DENIES plaintiffs' Motion on the grounds that plaintiffs have not satisfied the elements necessary for class certification. Plaintiffs have satisfied the elements of (1) numerosity and (2) adequacy of the proposed class representatives and one of the proposed class counsel, Louis Marlin of Marlin & Saltzman LLP. However, plaintiffs have failed to meet their burden of showing (1) a predominance of common questions, and (2) the superiority of class treatment. Despite the Gas Company policies that plaintiffs allege exist, whether a particular employee is given a compliant meal period and break time, or works "off the clock," varies location by location, supervisor by supervisor, and employee by employee. This variation requires numerous individualized inquiries with respect to putative class members' experiences and makes the claims brought on behalf of the class difficult if not impossible to manage on a class basis.

Having DENIED plaintiffs' Motion, the Court rules the Gas Company's Motion MOOT with respect to class certification.

The Court GRANTS the Gas Company's Motion in part and holds that plaintiffs cannot bring their Private Attorney General Act claim as a representative action on behalf of other "aggrieved employees" because individual issues again predominate and, thus, a representative action would not be manageable.

The Court GRANTS in part and DENIES in part the Gas Company's Evidentiary Objections as detailed in the Court's tentative ruling.

Plaintiffs' individual claims were not at issue and may continue. The Court therefore further sets a Trial Setting Conference on plaintiffs' individual claims for February 7, 2011, at 8:30 a.m.

IT IS SO ORDERED.

DEC 19 2011

ZAVEN V. SINANIAN

DATED: December __, 2011

Hon. Zaven V. Sinanian, Presiding

LOS ANGELES SUPERIOR COURT
CIVIL – GENERAL JURISDICTION
Department 23
Hon. Zaven V. Sinanian

Nelson, et al. v. Southern California Gas Company., et al.

Case No. BC451310

(1) PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; and
(2) DEFENDANT'S MOTION FOR AN ORDER DECLARING THIS MATTER INAPPROPRIATE FOR CLASS TREATMENT AND REPRESENTATIVE STATUS

Hearing Date: December 13, 2011

TENTATIVE RULING

Plaintiffs' Motion for Class Certification is DENIED for lack of evidence of commonality and superiority.

Defendant's Motion for an Order Declaring this Matter Inappropriate for Class Treatment and Representative Status is MOOT/GRANTED.

SUMMARY / PROCEDURAL HISTORY

Plaintiffs Eric L. Nelson, Juan M. Mejoredo and Robert Dowling filed this class action case on December 14, 2010 against Defendants Southern California Gas Company and Sempra Energy. Plaintiffs allege various wage and hour violations on behalf of themselves and a class of similarly situated persons working for Defendants as Field Operations employees. Sempra Energy was dismissed on August 18, 2011.

The operative complaint is the Second Amended Complaint ("SAC"), filed on November 2, 2011. The SAC alleges 1) Missed Meal and Rest Breaks; 2) Failure to Compensate for All Hours Worked; 3) Failure to Pay Full Overtime Compensation; 4) Failure to Compensate for All

Hours Worked; 5) Failure to Furnish Accurate, Itemized Wage Statement; and 6) Failure to Pay Compensation Upon Discharge or Quit.

Defendant's Motion for an Order Declaring this Matter Inappropriate for Class Treatment and Representative Status was filed on November 9, 2011. Plaintiff's motion for class certification was filed on November 10, 2011. The parties' respective oppositions were filed on November 29, 2011. The replies were filed on December 8, 2011. As the motions cover the same issues with respect to certification, they will be analyzed jointly as to the propriety of class certification..

PROPOSED CLASS DEFINITION

> All individuals who are currently employed, or formerly have been employed, as non-exempt Field Operations employees for Southern California Gas Company during the Class Period, which is December 14, 2006 through the date of judgment. Excluded from the Class are Meter Readers and current and former employees who work only at a base location (as opposed to in the field) including, but not limited to, Field Planners.
>
> Sub-class I: all Class members whose employment required them to wear employer-supplied coveralls and other protective gear during their shift.
>
> Sub-class 2: all Class members whose employment with Defendant terminated.

REQUEST FOR JUDICIAL NOTICE

Defendant's request for judicial notice of 1) DLSE Opinion Letter dated January 28, 1992; and 2) DLSE Opinion Letter dated July 12, 1996 is granted pursuant to Cal. Evidence Code sections 452(d) and 453.

EVIDENTIARY OBJECTIONS

Defendant's evidentiary objections are ruled on as follows:

- To Frias Decl.: Sustained as to Nos. 1-8 (foundation and not admissible to prove the content of a writing).
- To Dowling Decl.: Sustained as to Nos. 3 (hearsay); 14 (foundation; not admissible to prove content of a writing); Overruled as to Nos. 1, 2, 4-13, 15,-17.
- To Nelson Decl.: Sustained as to Nos. 3 (hearsay); 16 (foundation; not admissible to prove content of a writing); Overruled as to Nos. 1, 2, 4-15, 17-20.
- To Mejoredo Decl: Sustained as to Nos. 3 (hearsay); 15 (foundation; not admissible to prove content of a writing); Overruled as to Nos. 1, 2, 4-14, 16-18.

DISCUSSION

A. Ascertainability

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 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 class definition is straightforward and objective in that it applies to a specific type of Defendants' employees and specifically excludes other types of employees. The class is also properly limited to a discrete time period. Therefore, any layperson reading the definition will be able to determine whether they are a member of the class. Finally, Defendant is able to identify the class members from their records. Motion, Marlin Decl., ¶ 10.

B. **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). There are approximately 3,000 persons who fall within the class definition. Motion, Marlin Decl., ¶ 10. It would be highly impractical to join that many people individually into an action.

C. **Typicality**

Plaintiffs Nelson, Mejoredo and Dowling 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.

Plaintiffs Nelson, Mejoredo and Dowling work or worked for Defendant as Field Operations employees during the class period. Motion, Nelson Decl., ¶ 2; Mejoredo Decl., ¶ 2; Dowling Decl., ¶ 2. Therefore, they fall within the class definition. Plaintiffs allege that they suffered the same harm that is alleged on behalf of the class members, namely, that they were not provided fully off-duty meal breaks and were required to perform unpaid off-the-clock work. Motion, Nelson Decl., ¶ 22; Mejoredo Decl., ¶ 20; Dowling Decl., ¶ 18. Therefore, the claims alleged on their behalf are identical to the claims raised on behalf of the putative class members.

D. Adequacy

Plaintiffs Nelson, Mejoredo and Dowling are adequate class representatives. Attorney Louis P. Marlin is qualified to act as Class Counsel; however, attorney Ken M. Fitzgerald is not qualified to act as 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 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. The Court has an obligation to closely scrutinize the qualifications of counsel to assure that all interests, including those of as yet unnamed plaintiffs are adequately represented. *Cal Pak Delivery Inc v. United States Parcel Service Inc* (1997) 52 Cal.App.4th 1, 12.

a. Class Representative: There appears to be no conflict of interest between the putative class members and Plaintiffs Nelson, Mejoredo and Dowling, as they are typical class members with claims identical to the claims raised on behalf of the class. Plaintiffs state in their declarations that they understand they have obligations to the class members and are willing to meet those obligations. Motion, Nelson Decl., ¶¶ 23-28; Mejoredo Decl., ¶¶ 21-

26; Dowling Decl., ¶¶ 19-24. Therefore, Plaintiffs have demonstrated that they understand their duties as class representatives, and are not going to put their interests ahead of the class.

b. Class Counsel: Plaintiffs are represented by Louis P. Marlin of Marlin & Saltzman LLP and Ken M. Fitzgerald of Fitzgerald Lundberg & Romig. Mr. Marlin's firm has handled numerous class action matters, including many that have settled for millions of dollars. Cert Motion, Marlin Decl., ¶ 5. Given this experience, Mr. Marlin is qualified to represent the class. Mr. Fitzgerald has been practicing law for over two decades, however, his declaration does not indicate that he has any experience representing class action plaintiffs. *See* Motion, Fitzgerald Decl. Therefore, he has not demonstrated that he has the experience and knowledge to represent a class consisting of several thousand members. Mr. Fitzgerald is not qualified to be appointed class counsel in this matter. However, Mr. Fitzgerald may be able to overcome this deficiency if he can show that he is prepared to prosecute the case in association with Louis P. Marlin, who is qualified to act as class counsel.

E. Commonality

Common questions do not predominate the class claims.

"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.

Moreover:

> 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 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). The starting point for this analysis is Plaintiff's theory of recovery. *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1531 (ruling that "the trial court must evaluate whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment."). "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 . . . ." *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450.

Failure to Provide Meal Breaks

Plaintiffs' theory of the case with respect to the meal break claim is that Defendant required class members to respond to pages/calls from dispatch at all times, even while on their breaks and were subject to additional restrictions on their breaks. According to Plaintiffs, these rules resulted in class members being unable to take duty free meal breaks. The Division of Labor Standards Enforcement ("DSLE") issued an opinion letter addressing the issue of employees who use pagers or other communication devices while in the field:

> Our analysis must be with the fact that the IWC Orders require that (1) the employee be allowed a "duty free" meal period; and (2) the term "hours worked" includes all time the employee is engaged, suffered or permitted to

work. In order to clarify the Division policy in this regard we submit the following:

> If the employee is simply required to wear a pager or respond to an in-house pager during the meal period there is no presumption that the employee is under the direction or control of the employer so long as no other condition is put upon the employee's conduct during the meal period. . . .
>
> So long as the employee who is simply required to wear the pager is not called upon during the meal period to respond, there is no requirement that the meal period paid for. On the other hand, if the employee responds, as required, to a pager call during the meal period, the whole of the meal period must be compensated.

DLSE Opinion Letter, 1992-01-28, p. 3. The evidence demonstrates that it was Defendant's policy for field employees to receive messages from dispatch, even during a break. Cert Motion, Ayala Depo., p. 71:16-22; Tuttle Depo., p. 39:2-8; Ex. 2; Shubert Depo., pp. 45:17-46:23; Smith Depo., p. 33:4-17; Stan Depo., pp. 51:25-52:8, 57:15-24; Christian Depo., pp. 48:24-49:6; Frazier Depo., p. 54:6-9; Contreras Depo., 56:6-18; Rangel Depo., pp. 52:17-21, 53:9-19; Knight Depo., p. 49:1-18; Doyle Depo., p. 45:4-21; Fischer Depo., pp. 57:5-58:4; Palazzo Depo., pp. 45:3-46:11; Martinez Depo., p. 46:5-10. Although the field employees' supervisors almost all testified that the class members were expected to respond to such messages, there is no set time in which employees were required to respond. Cert Motion, Tuttle Depo., p. 57:3-8; Shubert Depo., p. 46:19-23. Some class members indicated that they would ignore a message received during their meal break; others stated they would inform the dispatcher they are on their meal break. Deny Cert Motion, Franklin Decl., ¶ 22; Mokbel Decl., ¶ 22.

This evidence indicates that whether a class member actually responded to a message received during their meal break is a question that cannot be determined on a classwide basis

because of variations in practice. Plaintiffs point to no evidence that demonstrates the class members felt compelled to respond to messages immediately given that there was no set response time. A variety of factors could influence whether a class member responded to a message received during a break, including the urgency of the message, how much time was left for the break, and whether the particular supervisor was lenient or stringent in enforcing rules. Plaintiffs are unable to demonstrate how these factors can be evaluated for all class members.

Next, Plaintiffs point to the restrictions on the class members' meal breaks—that class members must stay "en route," cannot run personal errands, may not meet in groups of more than two, cannot drink alcoholic beverages, and cannot prepare hot beverages—as evidence that class members were under Defendant's control during their breaks. The last two restrictions can be dismissed as irrelevant; they are both reasonable restrictions for the safety of the employees and the public given that the class members work around natural gas. *See* 49 CFR §§ 199.217-219.

The requirement that the class members must stay "en route" is the requirement that they stay within a reasonable geographic limit of their orders. What is reasonable is up to each supervisor; there is no specific geographic limitation. Deny Cert Motion, Dowling Depo., p. 124:13-125:1; Ayala Depo., p. 36:20-37:21. Cert Motion, Starr Depo., p. 62:13-63:24. Given that there is some ambiguity as to the definition of "en route," the application of the rule appears to have been classwide. Cert Motion, Fischer Depo., p. 75:7-21; Doyle Depo., pp. 55:4-56:11;,59:24-60:4; Knight Depo., p. 68:1-23; Rangel Depo., p. 59:13-22, 65:20-23; Frazier Depo., pp. 68:4-69:19; Christian Depo., pp. 60:24-62:1; Starr Depo., pp. 62: 10-63:4; Smith Depo., pp.

39:18-40:1; Palazzo Depo., p. 59:21-25; Martinez Depo., p. 62:16-19. Whether the requirement that the class members stay "en route" amounts to such a restriction that Defendant remains in control of their meal breaks, cannot be determined for the entire class and would require individualized analysis. In other words, there are differences in how the rule is applied by supervisors that would create individualized questions for putative class members.

Next, Plaintiffs argue that the class members are not permitted to conduct personal business during meal breaks because company vehicles may only be used for company business. Plaintiffs do not provide evidence that this rule is applied uniformly to the class members. Indeed, one of the supervisors testified that the class members are permitted to conduct personal business on their breaks. Cert. Motion, Ayala Depo., p. 37:22-24. It is Plaintiffs' burden to demonstrate that the application of this rule is uniform as to the class members, but they have failed to do so. Therefore, individualized questions have to be answered to determine whether the class members could perform personal business on their meal breaks.

Finally, Plaintiffs contend that class members were not permitted to have meetings of more than two persons or more than one crew. They point only to their own experiences, working out of the same location, as evidence that this rule was applied to the class. Motion, Nelson Decl., ¶¶ 13, 19; Mejoredo Decl., ¶¶ 12, 17; Dowling Decl., ¶¶ 11, 16. This is not sufficient to show class wide application to a class of several thousand persons stationed out of dozens of locations. Therefore, Plaintiffs have not met their burden to show that common questions can be used to evaluate this requirement.

In sum, the meal break claim is subject to numerous individualized inquiries with respect to whether class members' breaks were interrupted by messages to which they responded or did not respond to, the application of the rule against personal business and the application of the rule against class members meeting for lunch with more than two persons.

Failure to Pay for Off-the-Clock Work

Plaintiffs argue that Defendant failed to pay the class members for the time it takes them to put on their coveralls and for the time it takes to boot up/down their computers. Although the written policy was that employees were not permitted to take coveralls home prior to February 2011, there is no evidence that this rule was actually enforced on a classwide basis. Again, Plaintiffs point only to their personal experiences, which is not sufficient to impute to the entire class. Defendant provides evidence that most of the class members feel free to take the coveralls home and change at home. Oppo. to Cert Motion, Aranda Decl., ¶ 24; Parker Decl., ¶ 23; Mokbel Decl., ¶ 25; Abbot Decl., Exh. 4; Palazzo Depo., p. 72:7-24. This makes that time non-compensable. Therefore, there is no evidence that this rule is applied uniformly to the class, such that its impact can be determined through common questions.

As for the claim that class members are not paid for the time they spend booting up / down their computers, Plaintiffs' motion provides no evidence that this is required to be performed off-the-clock. On the other hand, Defendant provides credible evidence that some class members are instructed to boot up their computers only after the start of their scheduled shift. Oppo. to Cert Motion, Christian Decl., ¶ 12(b); Fischer Decl., ¶ 11(b); Palazzo Decl., ¶¶ 11(b); Contreras Decl., ¶ 12(a); Doyle Decl., ¶ 12(a); Fraizer Decl., ¶ 13(a). Therefore, it is a

matter of individualized inquiry as to whether any class member booted up / down their computer while off-the-clock, and Defendant's awareness of this off-the-clock work.

F. **Superiority/Substantial Benefits**

A class action is not a superior means of resolving this action.

In addition to the requirements stated in CCP section 386, the courts 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. The *Aguiar* Court indicated class suit is appropriate when the injury is of insufficient size to warrant individual action, and/or denial of class relief will result in an unjust advantage to the wrongdoer. *Id.* Thus, the Court should consider the probability of each class member coming forward to prove his/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,* 144 Cal.App.4th at 132-33. Here, the claims brought on behalf of the class would be difficult if not impossible to manage. Individual not common questions are likely

to arise in the litigation. The proposed class consists of several thousand members, each of whom would have to be questioned with respect to the theories noted above. Plaintiffs have failed to show that questions of fact and law common to the class predominate over the questions affecting individual members. The class is likely to splinter into individualized trials where common questions do not predominate and the litigation of the action as a class is inappropriate. See *Arenas v. El Torito Restaurants Inc.* (2010) 183 Cal.App.4th 723, 732. Consolidation of the claims into a single action, therefore, would not be superior or substantially beneficial to the litigants and the court.

CONCLUSION

Plaintiffs' Motion for Class Certification should be DENIED for lack of evidence of commonality and superiority.

Defendant's Motion for an Order Declaring this Matter Inappropriate for Class Treatment and Representative Status is MOOT/GRANTED.