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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ERIC STILLER AND JOSEPH MORO, ON BEHALF OF THEMSELVES INDIVIDUALLY AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, VS. COSTCO WHOLESALE CORPORATION AND DOES 1 THROUGH 25, INCLUSIVE, DEFENDANTS	Case No.: 3:09-CV-02473-H (BGS) Assigned to Hon. Marilyn H. Huff **PLAINTIFFS' REPLY TO COSTCO WHOLESALE CORPORATION'S OPPOSITION TO PLAINTIFFS' MOTION FOR COLLECTIVE ACTION AND CLASS CERTIFICATION** Date: December 13, 2010 Time: 10:30 am Place: Courtroom 13 Complaint Filed: May 15, 2009

I. THE COURT SHOULD CONDITIONALLY CERTIFY THE NATIONWIDE FLSA COLLECTIVE ACTION

Named Plaintiff Eric Stiller has set forth substantial allegations that he is part of a class of similarly situated, full-time, nonexempt, hourly Costco warehouse employees in the United States who experienced unpaid Lockdowns between April 2007 and October 2009 as a result of centralized, Costco-wide policies. As previously demonstrated, these substantial allegations are more than sufficient to satisfy the lenient standard for conditional certification of an FLSA collective action and to require notice to potential Class Members pursuant to 29 U.S.C. § 216(b). *See* Pls.' Mem. at 10-14.

In opposing conditional certification, Costco conflates the standards under § 216(b) with that set forth in the Federal Rule of Civil Procedure 23. Specifically, Costco argues that the Court should apply the standard for *final*, rather than conditional certification under § 216(b); that the Court should impose a nonstatutory numerosity requirement and deny certification on the grounds that Mr. Stiller has not identified other plaintiffs who would opt in; and that there is allegedly no similarly situated class. *See* Def.'s Mem. at 17-25. Costco is wrong in each respect.

The conditional "notice stage" analysis is plainly appropriate here, as the parties' discovery to date has focused solely on class discovery per the joint scheduling motion filed by the parties on November 23, 2010, which provides for Phase I and Phase II discovery. *See* Dkt. 97 at 2. The court rejected a similar argument by the defendant in *Leuthold v. Destination Am., Inc*., 224 F.R.D. 462 (N.D. Cal. 2004). There, "extensive discovery [had] already taken place" and "the parties [had] filed an impressive pile of declarations and deposition excerpts." *Id.* at 467. The court refused to skip the notice stage, however, because (1) "it [was] unclear . . . whether a complete factual record [had] been developed and presented to the court," and (2) "the two-tier approach contemplates progression *through the notice stage* before reaching the more rigorous inquiry required to maintain the class." *Id.* (emphasis added); *see also Harris v. Vector Mktg. Corp*., No. C-08-5198, 2010 U.S. Dist. LEXIS 56110, at *30 (N.D. Cal. May 18, 2010) (Chen, M.J.) (citing *Leuthold* and declining to "convert th[e] first stage of certification

into the second" where there had been discovery relating to summary judgment on individual claims).

Defendant's argument that conditional certification should be denied because there are supposedly a "miniscule" number of potential FLSA plaintiffs is equally misplaced.[1] It is settled in this Circuit and elsewhere that the stricter requirements of Rule 23, such as numerosity, do not govern conditional certification under § 216(b). *See, e.g.*, *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977), *overruled on other grounds by Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 167 n.1 (1989); *Heckler v. DK Funding, L.L.C.*, 502 F. Supp. 2d 777, 780 (N.D. Ill. 2007) (requiring evidence of potential opt-ins "does not make sense"); *Reab v. Electronic Arts, Inc.*, 214 F.R.D. 623, 629 (D. Colo. 2002); s*ee also Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 302 (1985) ("The purposes of the [FLSA] require that it be applied even to those who would decline its protections.").[2]

Moreover, the ability to "attract" opt-ins before court-ordered notice is severely limited, both by discovery rules and ethical rules against attorney solicitation.[3] Acceptance of Costco's

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[1] In point of fact, numerous potential FLSA Class Members have contacted Plaintiffs' counsel, and until recently, of course, seven Plaintiffs were asserting FLSA claims in this matter.

[2] Costco cites cases from notably more conservative jurisdictions, where the courts are less receptive to collective actions and have imposed a numerosity requirement on an *ad hoc* basis. We know of no case from outside the Fifth or Eleventh Circuits that has required numerosity at this stage of FLSA litigation. The court in *Pfohl v. Farmers Insurance Group*, No. CV 03-3080, 2004 U.S. Dist. LEXIS 6447 (C.D. Cal. Mar. 1, 2004), *cited in* Def.'s Mem. 17, cited the plaintiff's unsuccessful "solicitation" of similarly situated employees only as an alternative basis for its detailed denial of certification. *Id*. at *32-33.

[3] California Rule of Professional Conduct 1-400(C) provides that, subject to exceptions not relevant here, "[a] solicitation shall not be made by or on behalf of a member or law firm to a prospective client . . . unless the solicitation is protected . . . by the Constitution." Thus, contacting potential plaintiffs without leave of court could violate the Rule.

argument would thus create a "Catch-22": In order to show numerosity, FLSA plaintiffs would need names and contact information of potential opt-ins; but to obtain this information in discovery, they would first need to satisfy the requirements for conditional certification. *See* Kristin M. Stastny, *Eleventh Circuit Treatment of Certification of Collective Actions Under the Fair Labor Standards Act: A Remedial Statute Without a Remedy?*, 62 U. Miami L. Rev. 1191, 1126 (2008). To the contrary, the only question at this stage is whether Plaintiffs have substantially alleged the existence of a centralized policy that violated the FLSA. *See, e.g., Murillo v. Pacific Gas & Elec. Co*., 266 F.R.D. 468, 470-71 (E.D. Cal. 2010); *Kress v. PricewaterhouseCoopers, LLP*, 263 F.R.D. 623, 627-628 (E.D. Cal. 2009); *Leuthold*, 224 F.R.D. at 466-67. As set forth in Plaintiff's moving brief, the answer is clearly yes.

In arguing that there is no group of employees situated similarly to Mr. Stiller, Costco simply asserts and assumes — much as it does in its arguments regarding the statewide Rule 23 Class, addressed below — that Plaintiffs have not brought forth substantial allegations of "a single decision, policy, or plan supporting certification of a [§ 216(b)] collective action." Def.'s Mem. at 22. On the contrary, Plaintiffs' Memorandum cites substantial evidence that Costco's *official, centralized policies* caused employees to be detained on a regular basis without pay during Lockdowns, until Costco supervisors would open the warehouse doors, and that Costco's *official, centralized policies* actively discouraged Class Members from seeking compensation for this recurring wait time. *See* Pls.' Mem. at 3-10. Mr. Stiller has indeed, in other words, "submit[ted] evidence that the reason why the employees were not compensated . . . is not . . . human error or a rogue store manager, but because of a corporate decision to . . . refuse to pay." *Thompson v. Speedway Superamerica LLC*, No. 09-cv-01242, 2009 WL 130069, at *2 (D. Minn. Jan. 20, 2009) (cited in Def.'s Mem. at 22).

To counter Plaintiffs' substantial showing that Costco's centralized, companywide policies and procedures regularly caused potential Class Members to spend significant amounts of unpaid time in Lockdowns during the period of liability, which ended in October 2009, Costco relies on declarations that tend to show only two essentially irrelevant facts: (1) delays associated with Lockdowns may have been alleviated *since 2009*, when Costco revised its

companywide exit procedures,[4] and (2) Lockdowns did not affect employees at every Costco warehouse *identically* during the Class Period. *See* Dkt. 98-1, 99. *All* of Costco's declarations were executed recently in 2010 and focus on *current* exit procedures — which are not even at issue in this case. To the extent that Costco's declarants refer back to the Class Period, their testimony suggests, at most, that *some* managers at *some* locations could *sometimes* ameliorate some of the illegal effects of the companywide Lockdown policy in that Period. Costco thus fails to undermine Plaintiffs' demonstration that there exists a substantial core of common issues, relating to the application of the Costco-wide Lockdown policy, suitable for resolution by collective and class action.

Moreover, in determining whether to certify the Classes, the Court should place no weight on declarations submitted by Costco from its nonexempt warehouse employees. Courts have recognized that the *ex parte* gathering of such evidence by employers in employment litigation "is rife with potential for coercion." *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1202 (11th Cir. 1985); *see also Belt v. Emcare, Inc*., 299 F. Supp. 2d 664, 668 (E.D. Tex. 2003) ("[W]here the absent class member and the defendant are involved in an ongoing business relationship, such as employer-employee, any communications are more likely to be coercive."); *Bublitz v. E.I. du Pont de Nemours & Co.*, 196 F.R.D. 545, 548 (S.D. Iowa 2000) ("Where the defendant is the current employer of putative class members who are at-will employees, the risk of coercion is particularly high; indeed, there may in fact be some inherent coercion in such a situation."). Therefore, Plaintiffs request that, to the extent that the Court may afford any weight to Costco's self-serving employee declarations at this stage, Plaintiffs be allowed to depose the declarants (and, on a showing of good cause, defense counsel), as a safeguard against consideration of evidence tainted by coercion. The more appropriate course is to resolve the substantial factual questions concerning the effects of the companywide Lockdown policy on Class Members' compensation on a decertification motion after Phase II

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[44] *See, e.g.*, Defendant's Separate Statement of Evidence at ¶¶ 2.3.1, 2.7.1 (Dkt. 98-1) (citing 2009 revisions to Loss Prevention Manual).

discovery, or at trial, rather than short-circuiting those questions at the conditional certification stage. *See* Pls.' Mem. at 13 and cases cited.

II. THE COURT SHOULD CERTIFY THE STATEWIDE CLASS ACTION

Named Plaintiff Joseph Moro demonstrated that the proposed Class II, consisting of hourly, nonexempt Costco warehouse employees in California who experienced unpaid Lockdowns between May 2005 and October 2009, satisfies the requirements for certification under Federal Rule of Civil Procedure 23(b)(3). *See* Pls.' Mem. at 10-25. Costco does not challenge Mr. Moro's showings with regard to the numerosity of the proposed California Class, the typicality of his claims, or the ability of Mr. Moro or his counsel to adequately represent the Class. *See* Fed. R. Civ. P. 23(a)(1), (3)-(4). Rather, Costco argues only that the Court should deny certification of the California Class based on collateral estoppel, that Class II is not ascertainable, and that common issues do not predominate over individualized issues. *See* Def.'s Mem. at 8-17. None of these arguments withstand scrutiny.

A. Class II Is Not Collaterally Estopped.

As Costco notes, the parties have previously briefed and argued the issue of whether *Castaneda v. Costco Wholesale Corp.*, No. BC 399302 (Cal. Super. Ct.), estops Plaintiffs from proceeding on a class basis here. A party asserting collateral estoppel must establish, among other things, that the *identical* relevant issue was actually litigated *and* necessarily decided in a prior case between the same litigants or their privies. *See Lucido v. Superior Court*, 51 Cal. 3d 335, 341 (1990). As Mr. Moro demonstrated in opposing Costco's partial summary judgment motion, the *Castaneda* court's cursorily ruling that the claims of the class proposed there lacked sufficient commonality has no preclusive effect in this case. First, the proposed *Castaneda* class was vastly broader than the proposed Class II here and included *all* hourly, nonexempt Costco warehouse workers in the state. Second, the proposed *Castaneda* class also pursued claims relating to security checks during business hours, in addition to Lockdown claims. Third, it is unclear from the *Castaneda* court's transcribed comments exactly which aspects of the overbroad proposed class persuaded the court to refuse to certify. *See* Dkt. 84. In collateral estoppel terms, the certification of the California Class proposed in *this* case was

neither actually litigated nor necessarily decided in *Castaneda*, and it would be fundamentally unfair to deem the proposed Class II Members here to be in privity with the much larger and more disparate proposed class in *Castaneda*. *See, e.g., Salgado v. Wells Fargo Fin. Inc.*, No. CIV-08-0795, 2008 U.S. Dist. LEXIS 78699, at *8-10 (E.D. Cal. Oct. 3, 2008) (Damrell, J.) (finding no collateral estoppel based on prior denial of certification of broader class); *Bufil v. Dollar Fin. Group, LLC*, 162 Cal. App. 4th 1193, 1201 (2008) (reversing invocation of collateral estoppel where trial court "ignored an obvious narrowing of the class").

Costco asserts that "*Castaneda* found a lack of predominating common issues as to . . . closing-shift as well as to nonexempt employees generally." Def.'s Opp. at 10. Costco fails, however, to cite any portion of the *Castaneda* transcript where the court purportedly made that clear. In any event, such a finding would still not make any issue in *Castaneda identical* to any issue in this case, inasmuch as Class II here would not include *all* closing-shift employees, but only those who experienced unpaid Lockdowns. Costco also claims, for reasons that are obscure, that the prospect of the nationwide FLSA collective action here "makes the *Castaneda* conclusion about lack of commonality simply all the more compelling." *Id.* But given that (1) Costco no longer argues that collateral estoppel bars conditional certification of the *FLSA* Class, and (2) the proposed *California* Class includes no out-of-state employees (who would have FLSA claims but no state-law claims), it is apparent that the FLSA collective action does not detract from Rule 23 commonality. In sum, *Castaneda* does not collaterally estop certification of Class II.

B. The California Class Is Ascertainable.

Mr. Moro demonstrated that Class II is ascertainable in that Class Members are identifiable by an objective description — hourly, nonunion, nonexempt warehouse employees who were subject to Costco's Lockdown procedures — rather than by whether they have valid claims. Costco professes not to understand the import of the term "subject to Costco's Lockdown procedures." *Id*. at 11. This limitation means that Class Members were prevented from leaving the premises of a warehouse, after clocking out, while the warehouse managers were implementing the closing procedures set forth in the companywide Loss Prevention

Manual. There is no merit to Costco's contention that this definition renders the proposed Class unascertainable or impermissibly "fail safe." *Id*. The criteria by which Class Members can identify themselves are factual and objective. *See, e.g., Cervantez v. Celesica Corp*., 253 F.R.D. 562, 577 (C.D. Cal. 2008) (certifying Rule 23 class of employees who "were not provided a meal or rest period to which they were entitled"). The test involves no subjective elements or predeterminations of the merits of the kind that caused courts to deny certification in the cases Costco cites. *See Crosby v. Social Sec. Admin*., 796 F.2d 576, 580 (1st Cir. 1986) (affirming dismissal of action on behalf of putative class of claimants who had received no disability hearing or decision "within a reasonable time"); *Dunn v. Midwest Buslines, Inc*., 94 F.R.D. 170, 172 (E.D. Ark. 1982) (proposed class included "those who have been actually discriminated against," raising a merits issue); *Hagen v. City of Winnemucca*, 108 F.R.D. 61, 63 (D. Nev. 1985) (same problem with proposed class of "all persons whose constitutional rights had been violated"); *Armstrong v. Chi Park Dist*., 117 F.R.D. 623, 626-67 (N.D. Ill. 1987) (same problem with proposed class denied promotion "because of their sex").

C. Common Issues Predominate

Mr. Moro further demonstrated that the claims of the proposed Class II predominantly involve common issues — including whether Costco's Lockdown-related policies in fact caused Class Members to perform unpaid work; whether Costco thereby gained an unfair advantage over its competitors; whether Costco violated California's labor and/or competition laws; and whether Mr. Moro and other Class Members are entitled to relief in the form of straight-time and/or overtime. Costco argues that individual inquiries would predominate because it might argue that any particular Class Member either (1) did not perform any unpaid work, or performed such work (2) voluntarily or not under Costco's control, (3) without Costco's knowledge, (4) contrary to Costco's policies, (5) without reasonably seeking payment, or (6) to a *de minimis* extent. *See* Def.'s Opp. at 12-15. In fact, however, Costco's laundry list of potential defenses confirms that the *core* disputes between Costco and the Class raise common, rather than individual issues.

As noted above, Plaintiffs have raised substantial allegations that Costco's centralized policies caused Class Members to be detained on a regular basis without pay during Lockdowns, until Costco supervisors would permit the employees to leave the warehouses, and that Costco's centralized policies actively discouraged Class Members from seeking compensation for this recurring wait time. Proof of those allegations at trial would, by definition, defeat Costco's defenses that it lacked knowledge of, or responsibility for the unpaid time that warehouse employees spent in Lockdowns; that it did not exert control over Class Members during Lockdowns; and that Class Members are to blame for not making greater use of the Exception Logs to claim compensation. The *generalized* off-the-clock claims asserted in the Wal-Mart cases on which Costco heavily relies lacked such a common, Class-wide core. *See, e.g., Basco v. Wal-Mart Stores, Inc*., 216 F. Supp. 2d 592, 595-96 (E.D. La. 2002) (plaintiffs alleged generally that they were worked off the clock and/or without breaks, in various circumstances); *Wal-Mart Stores v. Lopez*, 93 S.W.3d 548, 558 (Tex. App. 2002) (plaintiffs alleged a wide variety of reasons for unpaid work, and not all alleged management knowledge); *Petty v. Wal-Mart Stores, Inc.*, 148 Ohio App. 3d 348, 356 (2002) (similar).

Costco argues that warehouse managers had discretion to depart from the Lockdown policy set forth in the 2004 Manual, and that circumstances at closings therefore varied from warehouse to warehouse. The mandatory, *non*discretionary nature of the Manual's "minimum guidelines" for closing prior to October 2009 is unmistakable, however. *See* Pls.' Mem. at 5-10. Accordingly, Class II Members have substantial grounds to claim — and a high likelihood of establishing at trial — that the policies issued at Costco headquarters, rather than local circumstances or decisions by individual managers, caused Class Members to work without pay during Lockdowns. If some warehouse managers did not strictly implement or enforce Costco's Lockdown policy at closing time, this would only mean that employees at those locations did not suffer all of the consequences of the centralized policy (and might not be members of Class II), not that there was no such policy. *See, e.g*., *Sullivan v. Kelly Servs., Inc*., 268 F.R.D. 356, 365 n.7 (N.D. Cal. 2010) (noting that arguments as to whether certain

individuals could be class members were "misguided" with respect to whether common issues predominated among class members).

To be sure, individual issues relating to damages will remain after the Class-wide liability issues are decided. But as Mr. Moro previously established (Pls.' Mem. 19-20), the need for individual damages determinations does not bar class certification. *See, e.g., Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001).

Likewise, Defendant's attempt to defeat class certification based on the *de minimis* doctrine must be rejected. As Plaintiffs set forth in their moving brief, this is fundamentally a damages issue that has no relevance to class certification. *See Kurihara v. Best Buy Co*., No. C 06-01884, 2007 U.S. Dist. LEXIS 64224 at *24-31 (N.D. Cal. Aug. 30, 2007) (Patel, J.). In fact, Defendant itself implicitly recognizes this in stating, that "under *Lindow*, a warehouse delay would not necessarily mean *that Costco must pay*." Def's Opp. at 14 (emphasis added). Moreover, as also set forth in Plaintiff's Memorandum, the aggregate amount of unpaid time, and the degree of regularity, that must be shown to make a claim non-*de minimis* can be decided on a Class-wide basis. *See, e.g., Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180, 206 (N.D. Cal. 2009) (concluding that "both the commonality . . . and predominance requirement are met" despite *de minimis* defense).

III. COSTCO'S OBJECTIONS TO PLAINTIFFS' EVIDENCE

Costco has filed 35 so-called "objections" to certain evidence cited in support of Plaintiffs' Motion. *See* Dkt. 98-2. Only *nine* of those 35 (numbers 27-35) are actually objections based on the Federal Rules of Evidence. Even then, these objections are misplaced. "On a motion for class certification," unlike on a motion for summary judgment, "the court may consider evidence that may not be admissible at trial." *Mazza v. American Honda Motor Co*., 254 F.R.D. 610, 616 (C.D. Cal. 2008) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974)); *see also Heffelfinger v. Elec. Data Sys. Corp*., 2008 U.S. Dist. LEXIS 5296, at *8 n.18 (C.D. Cal. Jan. 7, 2008) (Morrow, J.) (citing cases). The Court need only engage in a "limited inquiry" into whether the proffered material is reliable and relevant to certification.

Parkinson v. Hyundai Motor Am., 258 F.R.D. 580, 599 (C.D. Cal. 2008) (considering expert report). None of Costco's nine formal objections under the Federal Rules calls into question the reliability of Plaintiffs' evidence on any material point.

Costco's 26 other purported "objections" do not challenge the admissibility of any evidence, but are simply faulty arguments that Plaintiffs "mispresented" evidence. Costco's chief target (in 16 of its 26 "objections" alleging misrepresentation) is the evidence cited for the statement in Plaintiffs' Memorandum that Costco's "***regular lockdowns were conducted pursuant to companywide policies, and consistently lasted 10 to 15, and sometimes as long as forty-five, minutes***." Pls.' Mem. at 2, n.2; *see* Def. Obj. Nos. 1-8, 10-17. The evidence cited in the supporting footnote — and elsewhere in the Memorandum — fully supports that statement, however. Costco mainly quibbles over whether some of the cited testimony supports *some but not all* of the above-quoted statement, and over the use of the terms "regular" and "consistently," which obviously do *not* imply that employees were held in Lockdowns for exactly the same amount of time every night. Costco identifies no material misstatements by Plaintiffs. Thus, its objections should be disregarded or overruled.

III. CONCLUSION

Accordingly, the Court should conditionally certify Class I and certify Class II.

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Respectfully submitted,

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