THE HONORABLE DEAN S. LUM
Hearing Date: September 13, 2013

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ROBERT S. BRUNER and CECIL G. MARKLEY, individually and on behalf of others similarly situated,

Plaintiffs,

v.

DAVIS WIRE CORPORATION,

Defendant.

CLASS ACTION

No. 12-2-15676-0 SEA

~~[PROPOSED]~~ **FINDINGS AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S RENEWED MOTION TO DENY CLASS CERTIFICATION**

The above-entitled Court, having considered Plaintiffs' Motion for Class Certification and Defendant's Renewed Motion to Deny Class Certification, the parties' related opposition and reply briefs, and the declarations filed in support thereof, and having heard the arguments of counsel at the hearing held on September 13, 2013, and having issued an oral ruling on September 18, 2013 via conference call with all parties present consistent with the findings and order herein, and finding it necessary under *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 821,

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64 P.3d 49 (2003). to demonstrate appropriate consideration "and articulate reference to the criteria of CR 23,"

HEREBY FINDS:

1. Plaintiffs have satisfied the CR 23(a) elements of numerosity, commonality, typicality, and adequacy of representation, as follows for the class defined below:

(A) CR 23(a)(1) - Numerosity: The putative class is so numerous that joinder of all members is impracticable. There is a "rebuttable presumption" that a class of over 40 persons makes joinder impracticable. *Miller*, 115 Wn. App. at 821 (collecting cases). "Plaintiffs seeking to certify a class need not show that it would be impossible to join all of the members of the proposed class." *Id.* They must show only that joinder of all members would be "extremely difficult or inconvenient." *Id.* (quoting *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995)). The putative class consists of at least 108 current and former production workers who were employed by Davis Wire at the Kent facility since April 30, 2009, the start of the class period covered by this lawsuit. The number of potential class members and considerations of judicial economy support the presumption that joinder is impracticable. Accordingly, I find that plaintiffs have met the numerosity requirement under CR 23(a)(1).

(B) CR 23(a)(2) - Commonality: To satisfy this requirement, Plaintiffs' allegations must derive from a "common course of conduct" with respect to the class. *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 682, 267 P.3d 383 (2011) (quoting *Oda v. State*, 111 Wn. App. 79, 91, 44 P.3d 8 (2002)); *Brown v. Brown*, 6 Wn. App. 249, 255, 492 P.2d 581 (1971). "The commonality test is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 323

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(2002). All class members' claims must "depend upon a common contention," and the common contention must be "capable of classwide 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." *Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. ——,131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011).

Plaintiffs are one current employee and one former employee who have sued Davis Wire on behalf of themselves and others similarly situated for unpaid work time and failure to provide statutory meal and rest breaks. Plaintiffs seek class certification for their first, second, third and fifth causes of action, which are claims for Davis Wire's alleged class-wide failure to provide meal periods in violation of RCW 49.12.091 and WAC 296-126-092, its alleged class-wide failure to pay for time spent performing work for Davis Wire prior to the commencement and/or subsequent to the completion of regularly-scheduled and extended shifts in violation of RCW 49.46 and RCW 49.52, and the resultant alleging class-wide failure to pay overtime wages in violation of RCW 49.46.130(1) and WAC 296-126-550 flowing from causes of action one through three. Plaintiffs do not seek class certification as to the fourth cause of action for the class-wide failure to provide rest breaks. The underlying issue on the merits is whether Davis Wire production employees are entitled to wages for unprovided statutory meal breaks and for time worked before the commencement of and subsequent to the completion of production employees' regularly-scheduled and extended shifts.

Defendant argues an individualized inquiry into the circumstances of each employee's individual meal breaks and time spent working before and after the employees' scheduled shifts makes class treatment inappropriate. The Court agrees with respect to the pre-shift and post-

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shift claims, but disagrees as to the meal break claim and the related claim for overtime wages. There is sufficient evidence on this record that analysis of the meal break issues can be done on a class-wide basis and therefore commonality exists as to the meal break claim.

The class of employees plaintiffs seek to represent include production employees working at Davis Wire's Kent facility. Davis Wire allegedly engaged in a common course of conduct in relation to all putative class members by denying production employees their statutorily-mandated 30-minute meal periods. Prior to September 17, 2012, Davis Wire provided all production workers with "on-duty meal periods" which Davis Wire contends were permitted by the collective bargaining agreement between Davis Wire and Teamsters Local 117.

Plaintiffs contend that the employer expected that its production employees would remain at their machines with the machines running at all times. They contend that Davis Wire did not provide Plaintiffs and class members meal periods either scheduled or unscheduled, interrupted or uninterrupted, and employees were required to perform active work during the entirety of their shifts, without respite. They further contend that because production workers were required to monitor and remain vigilant to the operation of their machines throughout their meal periods and engaged in unremitting work activities while eating, they did not receive the meal breaks required under Washington state law.

In September 2012, five months after this lawsuit was filed, Davis Wire issued a meal and rest break policy providing for scheduled off-duty 30-minute unpaid meal breaks, except in four departments where, according to the Company's policy, the employees cannot be relieved of all duty for a 30-minute meal period because of the nature of their work. The September 17, 2012 policy excludes production employees in the Galvanizing, Wire Drawing, Strander and

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Rail Tie departments from the unpaid, off-duty meal breaks. Because employees in those four departments allegedly continue to receive "on-duty meal periods" in the same manner as before the policy, Plaintiffs contend these employees continue to be denied statutorily-required meal breaks.

The foregoing demonstrate the existence of common questions with common answers, including whether production workers were required to monitor and remain vigilant to the operation of their machines throughout their meal periods and, if so, whether this constituted engagement in unremitting work activities inconsistent with Washington's meal break requirements. *See* WAC 296-126-092(1) through (3); RCW 49.12.091; *Pellino*, 164 Wn. App. at 686-93.

The fact that there may be some differences among how many minutes individual employees had to eat meals on any given day does not defeat commonality. *See Miller,* 115 Wn. App. at 825; *Schnall v. AT&T Wireless Serv.,* 139 Wn. App. 280, 296-97, 296-297, 161 P.3d 395 (2007). These differences, to the extent they exist, do not detract from the common questions on the meal break claims in the case, which are (1) whether Davis Wire had a policy and practice prior to September 2012 of requiring production workers to keep machines running and eat at their work stations during their so-called "on duty" meal periods; and (2) if so, whether the need to continually monitor the machines violated the meal period requirements under WAC 296–126–092, L&I's administrative policy, and the holding in *Pellino v. Brink's. Cf. Faulkinbury v. Boyd & Assoc.*, 156 Cal. Rptr.3d at 641 (Cal. App. 2013) (lawfulness of employer's policy requiring all security guards to take an on-duty meal period was predominant question in lawsuit).

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The Court also finds that there are common issues of law and fact regarding the scope and nature of the collective bargaining agreement between Davis Wire and the employees' union and how Davis Wire is attempting to use the CBA as a defensive measure.

Commonality has been established for the meal break claim, as well as Plaintiffs' claim for overtime wages flowing from that cause of action.

(C) CR 23(a)(3) – Typicality Is Met As To the Meal Break Claim: "Typicality is satisfied if the claim 'arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.'" *Pellino*, 164 Wn. App. at 684 (quoting *Smith v. Behr Process Corp.*, 113 Wn.App. at 320). This factor closely resembles that of commonality and requires that the representatives be "part of the class and 'possess the same interest and suffer the same injury' as the class members." *General Tel. Co. v. Falcon*, 457 U.S. 147, 156-57, 72 L.Ed.2d 740, 102 S.Ct. 2364 (1982) (citations omitted). In *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998), the Ninth Circuit explained that the representative claims are "typical" if they are "reasonably co-extensive with those of absent class members...."

Plaintiffs have satisfied this test as to the meal break claim. Their meal break claim, and the circumstances surrounding their work vis-à-vis their meal breaks or lack thereof, are typical for all other employees during the same time period and their claims are identical to the claims of the putative class members.

(D) CR 23(a)(4) - Adequacy of Representation: Plaintiffs must demonstrate that there is no adversity of interest between the class representative and other class members, and that the attorneys for the class representative are qualified to conduct the proposed litigation. In this

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case, the interests of Bruner and Markley are completely aligned with those of the putative class members and they will be more than adequate as class representatives.

Different periods of recovery caused by Mr. Bruner's bankruptcy or Mr. Markley's retirement create no conflict that would render them inadequate as class representatives. *Hunt v. Check Recovery Systems, Inc.*, 241 F.R.D. 505, 511 (2007), *as modified by* 2007 WL 2220972 (N.D. Cal. Aug. 1, 2007), *aff'd* 560 F.3d 1137 (9th Cir. 2009), *cert. denied*, 558 U.S. 826 (2009); *Cobb v. Monarch Finance Corp.*, 913 F.Supp. 1164, 1173 (N.D.Ill.1995).

The fact that Mr. Markley has difficulty reading is not relevant to the inquiry of adequacy of representation. Bruner and Markley have a basic grasp of the wrongs alleged against Davis Wire and the nature of the claims in the case. They have responded to discovery and appeared for deposition. They understand their role is to advance the interests of all the class members, not just themselves. This is sufficient to establish their adequacy. *See, Rubenstein v. Collins*, 162 F.R.D. 534, 539 (S.D.Tex.1995); *McGuire v. Dendreon Corp.*, 267 F.R.D. 690, 696-97 (W.D. Wash. 2010).

Plaintiffs' counsel are competent litigators with substantial experience in complex litigation, especially in the area of wage and hour class actions. Plaintiffs' counsel has the ability, and will continue vigorously, to prosecute this action. The Schwerin firm's simultaneous representation of Teamsters Local 117 does not render it inadequate class counsel. Teamsters Local 117 has been a long-term institutional client of the Schwerin firm. Neither Adam Berger nor SGB currently represent or have ever represented Teamsters Local 117 or any other Teamster local in this or any other matter. Thus, they are immune to Defendant's claim that the Union's existence as a client of the Schwerin firm might compromise Plaintiffs' control over the

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litigation. Neither the fact that Teamsters Local 117 is paying the costs of this litigation nor the fact that the Schwerin firm continues to represent Local 117 in unrelated matters creates a conflict of interest or prevents counsel from adequately representing plaintiffs in this matter. *See Shafer v. Farm Fresh*, Inc., 966 F.2d 142 (4th Cir. 1992); *Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653, 663–64 (E.D. Mich. 1995), *aff'd sub nom.*, 91 F.3d 143 (6th Cir. 1996); *Sharp v. Next Entm't, Inc.*, 78 Cal.Rptr.3d 37 (Cal. App. 2008); *Prater v. Ohio Educ. Ass'n*, 2008 WL 2566364 at *7 (S.D. Ohio 2008); *Coffin v. Bowater Inc.*, 228 F.R.D. 397, 405 (D. Me. 2005).

2. The Court also finds that Plaintiffs have satisfied the tests contained in CR 23(b), namely, predominance of common issues and superiority of the class action mechanism.

(A) Predominance: Plaintiffs argue that this case should be certified under CR 23(b)(3), which requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and ... a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The CR 23(b)(3) predominance requirement is "somewhat more stringent than the CR 23(a)(2) commonality requirement but involves a similar inquiry...[It] is not defeated merely because individual factual or legal issues exist; rather, the relevant inquiry is whether the issue shared by the class members is the dominant, central, or overriding issue shared by the class." *Miller,* 115 Wn. App. at 825. Whether common issues predominate over individual ones is a "pragmatic" inquiry into whether there is a "common nucleus of operative facts" as to all class claims. *Smith*, 113 Wn. App. at 323. Common questions may predominate even though there are also individual questions that might take some time to resolve. *E.g., Kirby v. Colony Furniture Co.,* 613 F.2d 696, 699-700 (8th Cir. 1980).

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(DSJ) principally the scope and nature of the CBA, how the CBA is to be construed and defendant's defenses under the CBA, and, less importantly

Common questions predominate with respect to the meal break claim, ~~specifically:~~ (1) whether Davis Wire had a policy and practice prior to September 2012 of requiring production workers to keep machines running and eat at their work stations during their "on duty" meal periods; and (2) if so, whether the need to continually monitor the machines violated the requirements of WAC 296-126-092, L&I's administrative policy, and the holding in *Pellino v. Brink's. Cf. Faulkinbury*, 156 Cal. Rptr.3d at 641 (lawfulness of employer's policy requiring all security guards to take an on-duty meal period was predominant question in lawsuit).

Predominance is not destroyed by the possibility that some workers were sometimes able to take some minutes away from their machines to eat. In *Anfinson v. FedEx Ground*, the Washington Supreme Court held that plaintiff did not have to prove that an alleged wage violation affected every single member of a class in order to establish liability under the MWA. 174 Wn.2d 851, 875-76, 281 P.3d 289 (2012) (explaining that defense counsel's argument that plaintiffs failed to meet their burden if they proved that only 319 of 320 class members had been misclassified, is "an incorrect statement of the law"; also holding that class wide liability could be established through representative evidence).

Individual variations in damages are immaterial since class certification should not be denied simply because the class members may eventually have to make individual showings of damages. *Leyva v. Medline Indus.*, 716 F.3d 510 (9th Cir. 2013); *Smith*, 113 Wn. App. at 323 ("[t]hat class members may eventually have to make an individual showing of damages does not preclude class certification."). The amount of damages is invariably an individual question that does not alone defeat class certification. *Leyva, supra.* Moreover, Plaintiffs cite *Pellino* and *IBP v. Alvarez*, 339 F.3d 894, 914 (9th Cir. 2003), for the proposition that 30 minutes of damages are

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owed for whenever an employer infringes on an employee's meal period to any extent. If this is correct, then it appears that damages for each class member can be calculated on a formulaic basis from Davis Wire's payroll and timekeeping data.

(B) Superiority Rule 23(b)(3) requires consideration of (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (d) the difficulties likely to be encountered in the management of a class action. These factors favor class certification.

The Court finds that the class is relatively small, numbering slightly over one hundred, rather than thousands, is concentrated in a limited geographic area, and comprises a known group of identifiable class members, none of whom have expressed an interest in the controlling the litigation. The issue is limited and is suited to resolution in a single case rather than a multitude of individual actions.

HAVING MADE THE FOREGOING FINDINGS,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Class Certification pursuant to CR 23(a) and (b)(3) is GRANTED as to the meal period claims and DENIED as to the pre-shift and post-shift claims.

IT IS FURTHER ORDERED that Defendant's Renewed Motion to Deny Class Certification is GRANTED as to the pre-shift and post-shift claims, is DENIED as to the meal period claims, and is DENIED as moot as to the rest break claims.

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IT IS FURTHER ORDERED that the certified class be defined as follows: All production workers employed by Davis Wire Corp. in Kent, Washington between April 30, 2009 and September 16, 2012, and all production workers employed by Davis Wire Corp. in Kent, Washington in the galvanizer, wire drawing, strander and rail tie departments between September 17, 2012 and the date of the Class Notice.

IT IS FURTHER ORDERED that Adam Berger and Martin Garfinkel of Schroeter Goldmark & Bender, and Dmitri Iglitzin and Jennifer L. Robbins of Schwerin Campbell Barnard Iglitzin & Lavitt, shall be designated as counsel to the class, and that Robert Bruner and Cecil Markley shall be designated as class representatives;

IT IS FURTHER ORDERED that the parties shall confer and attempt to agree upon a Notice to class members. If no agreement can be reached, each party shall submit to the Court a proposed Notice no later than no later than fourteen (14) calendar days after the entry of the Amended Case Schedule;

IT IS FURTHER ORDERED that Defendant's counsel shall provide to Class Counsel, within fourteen (14) days of the date of this Order, a complete and corrected list of the putative class members which list shall include, for each class member, the person's name, address, and social security number (which shall only be used to identify correct addresses if necessary);

IT IS FURTHER ORDERED that Class Counsel shall mail the Class Notice within fourteen (14) days of the receipt of the class list described above, or fourteen (14) days after entry of the Court's order approving the Class Notice, whichever is later;

IT IS FURTHER ORDERED that the Notice to potential class members shall provide, *inter alia,* that class members shall have thirty (30) days from the date of mailing of the Class

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Notice within which to return their exclusion requests advising counsel of their desire to opt-out of the case;

IT IS FURTHER ORDERED that any class member who does not request exclusion may enter an appearance through counsel; and

IT IS FURTHER ORDERED that in the event any notice is returned undeliverable, all counsel shall use their best efforts to obtain corrected addresses. When corrected addresses are obtained, Class Counsel shall mail promptly to the affected individuals the approved Notice, with exception that the deadline for returning the exclusion forms shall be at least thirty (30) days after the date of mailing. DSL *

Dated: December 3, 2013.

HON. DEAN S. LUM
JUDGE OF THE SUPERIOR COURT

Presented by: DSL

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* Plaintiffs did not seek certification with respect to their rest break claims and defendant's motion is granted as to these claims. DSL

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