FILED
ALAMEDA COUNTY
NOV 23 2015
CLERK OF THE SUPERIOR COURT
By: ______ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

JOSE ANDINO, individually and on behalf of all others similarly situated, **Plaintiff,** **v.** **KASIER FOUNDATION HOSPITALS, and DOES 1 through 100,** **Defendants.**	**Case No. RG11-580548** **ORDER GRANTING CLASS CERTIFICATION**

On November 20, 2015, plaintiff Jose F. Andino ("Plaintiff") appeared on his Motion For Class Certification ("Motion") came on for hearing. The parties appeared through counsel as noted in the minutes. The matter was submitted, and the court now rules as follows:

BACKGROUND:

Plaintiff is a former employee of defendant Kaiser Foundation Hospitals ("Defendant") who alleges that he was underpaid regular and overtime wages due to Defendant's rounding of time entries. Plaintiff's original complaint was filed on June 14, 2011, and the currently operative Second Amended Complaint was filed on April 2, 2013 ("Complaint"). The Complaint includes causes of action for (1) Underpayment of Hourly Wages (Wage Order 5-2002); (2) Underpayment of Overtime Wages (Wage Order 5-2002); (3) Failure to Provide Accurate Itemized Wage Statements (Labor Code § 226); (4) Failure to Timely Pay Wages to Terminated Employees (Labor Code section 201-203); (5) Violation of Unfair Competition Law (Business and Professions Code §§ 17200, et seq., "UCL"); and (6) Statutory Penalties (Labor Code §§ 558, 2699(f), "PAGA").

MOTION:

Plaintiff now moves for class certification of a Plaintiff Class defined as "all individuals employed by Defendant in California as hourly employees whose time clock hours have been rounded for payment purposes at any time beginning four years prior to the filing of the Complaint." Plaintiff also requests certification of three subclasses: 1) a Wage Statement Subclass, defined as "all members of the Plaintiff Class who, within three years of the filing of the Complaint, were subject to a company practice of failing to accurately itemize wage statements"; 2) a Waiting Time Subclass, defined as "all members of the Plaintiff Class who, within three years of the filing of the Complaint, were subject to a company practice of failing to timely pay wages at termination"; and 3) a 17200 Subclass, defined as "all California Class members bringing wage claims under

the California Unfair Competition Law.

LEGAL STANDARDS:

Class actions in California are governed by Code of Civil Procedure section 382, authorizing such suits "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (*Fireside Bank v. Sup. Ct.* (2007) 40 Cal.4th 1069, 1078; *City of San Jose v. Sup. Ct.* (1974) 12 Cal.3d 447, 458.) "[T]he party advocating class treatment must demonstrate [a] the existence of an ascertainable and sufficiently numerous class, [b] a well-defined community of interest, and [c] substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004 at p. 1021 [citing *Fireside Bank* at p. 1089; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; *and City of San Jose* at p. 459].) The community of interest requirement embodies three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Ibid.*)

"The 'ultimate question' the element of predominance presents 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'" (*Brinker* at p. 1021 [citing *Collins v. Rocha* (1972) 7 Cal.3d 232, 238, and *Sav-On Drug Stores, Inc. v. Sup. Ct.* (2004) 34 Cal.4th 319, 326]), the answer to which "hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.'" (*Ibid.*) Generally, "if the defendant's liability can

be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Id.* at p. 1022 [citing *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916].) Class certification is, however, "essentially a procedural [question] that does not ask whether an action is legally or factually meritorious" (*Brinker* at p. 1023 [citing *Sav-On* at p. 326 and *Linder* at p. 439]), and "the focus in a certification dispute is on what type of questions - common or individual - are likely to arise in the action, rather than on the merits of the case." (*Sav-On* at p. 327.)

Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing. (*Linder* at p. 435.) In addition, the trial court may assess the advantages of alternative procedures for handling the controversy. (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 660-662.) The court is vested with discretion in weighing the concerns that affect class certification. (*Sav-On* at p. 336.) "[B]ecause group action also has the potential to create injustice, trial courts are required to 'carefully weigh respective benefits and burdens and to allow maintenance of the class-action only were substantial benefits accrue both to litigants and the courts.'" (*Linder* at p. 435.) It is, of course, plaintiff's burden to support each of the above factors with a factual showing. (*Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462.)

With these standards in mind, the court turns to the issues presented.

SUMMARY OF PLAINTIFF'S ARGUMENTS:

Plaintiff asserts that the proposed class includes approximately 86,000 employees,

making it sufficiently numerous, and that all of putative class members may be readily identified from Defendant's records, making the class ascertainable. Defendant does not argue otherwise, and the court so finds.

Plaintiff further asserts that Defendant has, throughout the proposed class period, employed a uniform time rounding policy and practice that was consistently applied to the entire workforce of hourly employees, pursuant to which up to six minutes of time is erased from the employee's compensable time before the scheduled shift start time (arriving early), up to six minutes of time is added to the employees compensable time after the scheduled shift start time (arriving late), up to six minutes of time is erased from the employees compensable time after the scheduled end of shift (leaving late), up to six minutes of time is added to the employee's compensable time before the scheduled end of shift (leaving early), and that meal periods are rounded to 30 minutes if the meal period clock out is between 24 and 36 minutes.

Plaintiff seeks certification to adjudicate the singular questions of whether Defendant's uniform rounding practices, in conjunction with its attendance and tardiness policies, complies with California labor law.

Plaintiff argues that class certification is appropriate to determine whether Defendant's consistently applied uniform rounding policy is illegal. The legal standard for this determination was established in *See's Candy Shops, Inc. v. Sup. Ct.* (2012) 210 Cal.App.4th 889. An employer is entitled to use the nearest-tenth rounding policy if the rounding policy is fair and neutral on its face and it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." (*Id.* at 903). The class rounding claims in this case

turn on the issues of (1) whether Defendant's rounding, tardiness, and attendance policies, considered together, violate the requirement of a facially neutral rounding policy, and (2) whether the rounding, tardiness and attendance policies, considered together, disproportionately favor Defendant to the detriment of employees receiving wages. No individual inquiry is necessary for these determinations to be made by the trier of fact. Plaintiff further argues that if the trier of fact finds the policies on their face and as applied to establish Defendant's liability, the remaining derivative causes of action for wage statements, late pay, and restitution under the UCL would also be established.

PLAINTIFF'S EVIDENCE:

In support of the Motion Plaintiff has submitted transcript excerpts from the depositions of Defendant's persons most knowledgeable ("PMK"), Lisa Overton, TIME System Manager, and Carol Crawford, Group Leater, HR Consultant, as well as Kimberly Slater, TIME System Supervisor, and Maryann Malzone-Miller, Senior Director of Human Resources. Plaintiff has also submitted a number of documents and discovery responses produced by Defendant regarding its time keeping policies and systems, the Declaration of [Plaintiff] and qualifications declarations of Plaintiff's counsel.

Plaintiff also relies on the Declaration of and report created by Kevin M. Taylor, MBA, CFE, self-described as an accountant and consultant with expertise in the examination of data for the purpose of converting, analyzing, and reporting such data ("Taylor"). Taylor analyzed data from the payroll records produced by Defendant for the purposes of ascertaining the potential impact of Defendant's rounding policy and quantifying the potential dollar amount of that impact, concluding that the total economic loss to the putative class was approximately $74.9 million of regular pay and $38.3

million of unpaid overtime, for a total of $113.2 million.

SUMMARY OF DEFENDANT'S OPPOSITION ARGUMENTS:

In opposition, Defendant asserts that its system does not "round off" time, but rather establishes "shift tolerance windows" that permit employees to clock in and out during a window of up to six minutes before and after the scheduled shift time, and that its policy and practice is that the employees are not to begin work until the shift start time, and not to work past the shift end time, without permission, and tardiness policies and practices vary considerably from department to department. Defendant also uses the term "grace period" to describe the shift tolerance windows.

Defendant further asserts that employees are required to take full 30-minute meal periods and may clock in up to six minutes early without needing to work until the full 30 minutes has elapsed, that managers regularly permit employees to leave work early and the shift tolerance window ensures that they are still paid to the end of their scheduled shift, and that there are significant variations in timekeeping practices generally.

Defendant argues that Plaintiff's theory of liability, i.e., that Defendant's shift tolerance window is a rounding policy that results in the underpayment of employees, is factually and legally incorrect. Time spent by employees is only compensable if the employee is actually performing work or is otherwise under the control of the employer.

In Defendant's view, individualized issues predominate. The testimonial and expert evidence shows that liability, causation and damages all hinge on individual issues of fact, such as whether, why and to what extent an employee actually performed work during the shift tolerance windows.

Defendant further argues that even if its policy were to be considered a "rounding"

policy, because employees are not to perform work before the shift start time or after the shift end time, the rounding feature should only operate to add to the employee's work time, and that different members of the putative class may be subject to substantially different "hours worked" standards depending on which Wage Order applies.

Defendant also argues (in a footnote) that its shift tolerance windows have been in place for so long that they have become "an implied term of the various collective bargaining agreements."

Finally, Defendant asserts that Plaintiff is not an adequate class representative.

DEFENDANT'S EVIDENCE:

The centerpiece of Defendant's evidentiary presentation is the Declaration of and report prepared by Dr. Edward Lazear ("Lazear"), Professor of Human Resources Management and Economics at Stanford University's Graduate School of Business and Senior Fellow at the Hoover Institution. The Lazear report answers a series of five principal questions, enumerated in numbered paragraph 19 therein.

Defendant has also presented transcript excerpts from the depositions of Plaintiff, Taylor, Overton, Crawford and Malzone-Miller, the declarations of multiple department managers, administrators or directors, and the declaration of Kaiser Foundation Health Plan's Executive Director, National Labor Relations, Operations ("Defendant's Declarants").

DISCUSSION:

The employer defendant in *See's Candy* asserted two different affirmative defenses, one based on its "nearest-tenth rounding policy" and the other based on its "grace period policy," and the *See's Candy* court included a clear description of both in

the Factual and Procedural Background section of its decision. The trial court certified a class to pursue challenges to both policies (*See's Candy* at 892-894.) The issue on appeal, however, was not whether class certification was appropriate, but rather whether the employer was entitled to summary adjudication of its rounding defense. The grace period defense had not been the subject of a motion for summary adjudication.

Fundamental to Defendant's opposition is its characterization of its time keeping practice as a "grace period" rather than "rounding" which, if correct, would obviate the need to subject the policy to the analysis based on the Department of Labor ("DOL") rounding standard as discussed and applied by the court in *See's Candy*. (*See's Candy* at 901, et seq.) A determination of whether Defendant's policy is a "grace period," however, is a merits question, weighing on the "common issue" side of the certification balance.

Try as it might, Defendant has not succeeded in shifting the focus of Plaintiff's claims in this case away from the time keeping and pay policy itself. It is basically undisputed that the shift start and end times are used for pay purposes whenever the time punch (typically done by telephone rather than time clock) falls with the 6 minute window before and after. It is likewise undisputed that the end of meal periods, for pay purposes, is not based on the punch time. While the record reflects that there has been some variation of these basic facts between northern and southern California at certain times, those variations do not pose significant manageability issues.

The court concludes that the issues of whether Defendant's time keeping policy operates as a "grace period" rather than "rounding" and, if the latter, whether the rounding policy violates the requirement of facial neutrality and disproportionately favors

Defendant, are issues that are common to the entire putative class. While the resolution of these issues will require the examination of evidence of internal differences in how tardiness, departure before shift end times and pre-shift expectations regarding working are treated, such as that presented by Defendant in opposition to this Motion, the predominant question will remain whether all the evidence establishes that the policy is facially neutral. These issues clearly predominate over individual issues.

At the hearing Defendant challenged the foregoing analysis regarding predominance, but time and again it did so in ways that made it clear that it believed it would prevail on the merits. Defendant may be right in that regard; however, the fact that its position on the merits may ultimately be borne out by the evidence does not change the court's assessment of whether or not common issues predominate.

Turning to other issues, the court agrees with Plaintiff that certification of a rounding claim is not contingent on a showing by Plaintiff that the putative class members were actually performing work during the clocked-in time that was deleted for pay purposes, and nothing in the *See's Candy* decision establishes or implies otherwise.

The court further concludes that Plaintiff's claims are typical of the class and that he is an adequate class representative. Defendant's assertion that he is inadequate lacks evidentiary support. None of Defendant's other arguments provides a basis for the denial of class certification.

Finally, the court finds that Plaintiff's proposed trial plan is sufficient to demonstrate that a class action is the superior method by which to challenge Defendant's time keeping and pay policies.

RULING:

The Motion is GRANTED. The court HEREBY CERTIFIES the class proposed by Plaintiff, with some modification, as follows: all individuals employed by Defendant in California as hourly employees whose time clock hours have been rounded for payment purposes at any time from June 15, 2007, to the date notice is sent to the class. This class is certified for the purpose of pursuing the 1st and 2nd causes of action in the operative Complaint, as well as the 3rd, 4th and 5th causes of action to the extent they are derivative of the alleged violations upon which the 1st and 2nd causes of action are based. The court also certifies a subclass of all class members who are former employees of Defendant, for purposes of pursuing the 4th cause of action only. It is not clear to the court what purpose Plaintiff's other proposed subclasses would serve, and Plaintiff has provided no explanation. If either party believes that further subclassing is necessary, a separate motion must be filed.

Jose F. Andino is appointed as class representative, and the firms of Cohelan Khoury & Singer and Law Offices of Sahag Majarian II are appointed as class counsel.

Plaintiff shall comply with California Rule of Court 3.766(b) forthwith, after which the parties shall meet and confer with the goal of reaching a stipulation regarding the form and content of the notice and the notice procedure. If the parties are unable to reach a stipulation, Plaintiff shall place all notice issues before the court by way of a regularly noticed motion. Either a stipulation or a noticed motion must be filed before the next Case Management Conference.

EVIDENTIARY RULINGS:

Defendant's challenge to the Taylor report by way of a motion in limine is misplaced. While Defendant is correct that a motion for class certification must be

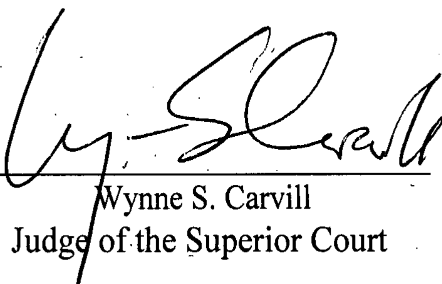
supported by admissible evidence, it has otherwise submitted no authority for the use of a motion in limine in connection with a motion for class certification. As there are no findings of fact to be made in this context, the question of whether the subject report would assist the trier of fact does not arise. The motion in limine is DENIED.

Similarly, Defendant's evidentiary objections to specific portions of the Taylor report, and Plaintiff's general and specific objections to the declarations of Defendant's Declarants, are unnecessary in this context. (See, e.g., *In re Conagra Foods, Inc.* (C.D. Cal. 2015) 90 F.Supp.3d 919, 965, fn.147 [citing, inter alia, *Alonzo v. Maximus, Inc.* (C.D. Cal. 2011) 275 F.R.D. 513, 519].) These objections, at most, go to weight rather than admissibility, and are OVERRULED on that basis.

If the trier of fact ultimately discredits all of Plaintiff's expert's conclusion and credits all of Defendant's expert's conclusions, then Defendant will prevail on the issue of whether its policy, called "rounding" or called "shift tolerance windows," complies with California law, and Plaintiff will lose. That does not change the fact, however, that for class certification purposes it is Defendant's policy that is under scrutiny and attack, and that the lawfulness of that policy is the predominant issue.

IT IS SO ORDERED.

Nov. 23, 2015
Date



Wynne S. Carvill
Judge of the Superior Court

Superior Court of California
Alameda County

Case # RG11 580548
Case Name: Andino vs. Kaiser Foundation Hospitals
Document: Order Granting Class Certification

CLERK'S CERTIFICATE OF SERVICE

I certify that the following is true and correct:

I am a Deputy Clerk employed by the Superior Court of California, County of Alameda. I am over the age of 18 years. My business address is 1221 Oak St. Oakland, California. I served this **Order Granting Class Certification** by:

☒ **First Class Mail (CCP 1013a) -** Placing copies in envelope(s) 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 in Oakland, California, following standard court practices.

☐ **Electronic Service (CCP1010.6(C)(3) CRC 2.251(j)) -** Emailing copies to the email addresses as shown below, following standard court practices.

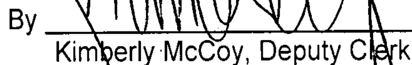
☐ **FAX (CCP 1013e CRC 2.306 (c)) -** Faxing copies to the fax numbers as shown below on the date stated below, following standard court practices.

Timothy D. Choelan, Esq.
Isam C. Khoury, Esq.
Michael D. Singer, Esq.
Kimberly D. Neilson, Esq.
Cohelan Khoury & Singer
605 C Street, Suite 200
San Diego, CA 92101

Christian Rowley, Esq.
Catherine Dacre, Esq.
Kerry Friedrichs, Esq.
Seyfarth Shaw LLP
560 Mission Street
San Francisco, CA 94105

Date: 11/24/15

Chad Finke
Executive Officer/Clerk of the Superior Court

By 
Kimberly McCoy, Deputy Clerk