SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/26/2012 TIME: 03:30:00 PM DEPT: C-60

JUDICIAL OFFICER PRESIDING: Gonzalo Curiel
CLERK: Hayden Henson
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2011-00102593-CU-OE-CTL** CASE INIT.DATE: 12/16/2011
CASE TITLE: **Felczer vs. Apple Inc [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Other employment

APPEARANCES

The Court, having taken the above-entitled matter under submission on 06/15/12 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

RULING AFTER HEARING

- **Defendant Apple Inc.'s Demurrer and Motion to Strike First Amended Complaint**

The Court overrules defendant Apple Inc.'s ("defendant") general demurrer to the class action allegations in plaintiff Brandon Felczer's ("plaintiff") first amended complaint. Also, the Court overrules defendant's general demurrer to the first, second, third, fourth, and fifth causes of action of plaintiff's first amended complaint for (1) failure to provide meal breaks, (2) failure to issue lawful pay stubs, (3) failure to pay timely final pay, (4) unfair business practices, and (5) violations under the Private Attorney General Act, respectively. Finally, the Court grants, in part, and overrules, in part, defendant's motion to strike plaintiff's first amended complaint.

A demurrer admits the truth of all material facts alleged in the subject pleading, but not contentions, deductions, or conclusions of fact or law, and consider matters which may be judicially noticed, giving the complaint a reasonable interpretation in determining whether it states facts sufficient to constitute a cause of action. (*Kennedy v. Baxter Healthcare Corp., supra*, 43 Cal.App.4th 799, 807.)

a. Class Allegations
California's judicial policy is to allow potential class action plaintiffs to have their action measured on its merits to determine whether trying their suits as a class action would bestow the requisite benefits upon the litigants and the judicial process to justify class action litigation. (*Beckstead v. Superior Court* (1971) 21 Cal.App.3d 780, 783.) "In order to effect this judicial policy, the California Supreme Court has mandated that a candidate complaint for class action consideration, if at all possible, be allowed to survive the pleading stages of litigation." (*Id.* citing *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 868–869 [reversing trial court's sustaining of demurrer against class action suit]; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 816 [same]; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695,

716–717; *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 121 [affirming trial court's overruling of demurrer attacking class allegations].)

"The wisdom of allowing survival is elementary. 'Class action litigation is proper whenever it may be determined that it is more beneficial to the litigants and to the judicial process to try a suit in one action rather than in several actions.... It is clear that the more intimate the judge becomes with the character of the action, the more intelligently he may make the determination. If the judicial machinery encourages the decision to be made at the pleading stages and the judge decides against class litigation, he divests the court of the power to later alter that decision ... Therefore, because the sustaining of demurrers without leave to amend represents the earliest possible determination of the propriety of class action litigation, it should be looked upon with disfavor.' (*Beckstead, supra,* 21 Cal.App.3d at p. 783.)" *Gutierrez v. California Commerce Club, Inc.* (2010) 187 Cal.App.4th 969, 976-977.

On the other hand, "[t]rial courts properly and routinely decide the issue of class certification on demurrer..." (*Alvarez v May Dept. Stores, Co.* (2006) 143 Cal.App.4th 1223, 1231.) The Supreme Court has recognized the role of early merit challenges in "weeding out legally meritless [class] suits prior to certification...." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 440.) According to *Linder,* the "interests of fairness and efficiency" are furthered when courts hold hearings on demurrers or dispositive early motions to scrutinize "a proposed class cause of action to determine whether, assuming its merit, it is suitable for resolution on a class wide basis. Indeed, issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or *defenses." (Id.* at p. 443.)

Defendant relies on the following cases to support its argument that the class allegations are insufficient and subject to a demurrer: Silva v. Block (1996) 49 Cal.App.4th 345, 349 [excessive force]; *Rose v. Medtronics, Inc.* (1980) 107 Cal.App.3d 150, 154 [personal injury involving cardiac pacemakers]; and *Bartlett v. Hawaiian Village, Inc.* (1978) 87 Cal.App.3d 435 [exclusion from public facilities]. However, none of these cases involve wage and hour actions. Instead, in each case, the court found insufficient commonality of law and facts to support a class action.

Meanwhile, in the wage and hour case of *Gutierrez v. California Commerce Club, Inc.* (2010) 187 Cal.App.4th 969, 979-980, the court reversed a trial court's decision to sustain a demurrer without leave to amend. The court observed that judicial policy in California has long discouraged trial courts from determining class sufficiency at the pleading stage and directed that this issue be determined by a motion for class certification. In *Gutierrez,* a busboy/bartender at a casino filed a class action complaint against the casino, alleging that plaintiff and similarly situated hourly, non-union employees had been denied meal and rest breaks to which they were legally entitled to, or compensation therefor. The class included "bus boys, floor persons, chip runners, card washers, card muckers, equipment specialists, porters, food and beverage workers, food service, cooks, cooks helpers, kitchen staff, bartenders, cocktail servers, transportation workers, security officers, administrative staff, service staff, housekeepers, engineers, receiving, PBX, purchasing, surveillance, Information Technology ('I.T.') for a period of time within the four (4) years preceding the filing of this action." Plaintiffs also alleged that similarly situated class members of current and former employees were subjected to the Club's uniform practice or policy of failing to provide rest and meal breaks. The Court found that on these allegations, it was clear that the defendant's liability, if any, to the class as a whole, could be determined by reviewing a single or set of facts common to all.

Similarly, in *Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1325, the court observed

that class suitability should not be determined by demurrer in cases involving wage and hour claims. Other courts have reached the same result in wage and hour cases. (E.g., *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.3d 403, 204 Cal.Rptr. 422, 682 P.2d 1087 [class action proper for police officers seeking payment of overtime wages, an accounting, and declaratory relief]; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 579, 94 Cal.Rptr.2d 3, 995 P.2d 139 [class action proper for past and present agricultural employees claiming they were entitled to compensation for time spent going to and from employer's fields]; *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 105 Cal.Rptr.2d 59 [class action proper to recover for alleged nonpayment of overtime compensation]; *Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 135 Cal.Rptr.2d 90 [class action proper by group of employees alleging violations of state wage and hour laws regarding overtime compensation].)

The *Prince* court found that as long as the lead plaintiff "alleges institutional practices ... that affected all of the members of the potential class in the same manner, and it appears from the complaint that all liability issues can be determined on a class-wide basis," no more is required at the pleading stage. (*Prince v. CLS Transportation, Inc.*, 118 Cal.App.4th at 1329; see also, *Tarkington v. California Unemployment Insurance Appeals Board* (2009) 172 Cal.App.4th 1494, 1511.)

In this case, Plaintiff's first amended complaint alleges a systematic course of illegal payroll practices or policies that was applied to all non-exempt employees. (First amended complaint, ¶ 29) These allegations are precisely the type of claims which will permit Apple's liability, if any, to be determined by reviewing a single or set of facts common to all. The demurrer and motion to strike these allegations are overruled.

b. Demurrer on First through Fifth Causes of Action

Apple demurs to each cause of action on the grounds that it fails to allege sufficient facts to constitute a cause of action and is uncertain. As to each challenge, Apple relies on *Oppenheimer v. Robinson* (1957) 150 Cal.App.2d 420, 422, for the proposition that Plaintiff is required to plead facts regarding the amount of wages accrued and unpaid.

In *Oppenheimer v. Robinson* (1957) 150 Cal.App.2d 420, 422-423, the court sustained a demurrer and rejected plaintiff's contention that he need not plead facts regarding "amount of wages accrued and unpaid at time of discharge, the rate of compensation, or the number of working days for which he has not been paid". See also, *Oppenheimer v. Moebius* (1957) 151 Cal.App.2d 818, 819-820 - "a count for a statutory penalty for failure to pay wages does not state a cause of action unless it alleges facts from which the amount of the claimed penalty can be ascertained.") However, the *Oppenheimer* case focused on the specific amount unpaid for jurisdictional purposes and not for purposes of providing notice of the basis for the cause of action. Meanwhile, the instant case does not involve similar jurisdictional issues. As such, *Oppenheimer* is inapplicable and the Court finds that the first amended complaint provides sufficient facts as to the basis for wages due and facts from which the amount of penalties can be ascertained as to the named plaintiff. The demurrer is overruled.

c. Motion to Strike

Defendant's motion to strike is granted as to the reference to Labor Code § 226 at Prayer for Relief ¶ 6 and ¶ 76 of the FAC.

The remaining motions to strike are denied without prejudice for consideration on a motion for summary

adjudication, motion in limine or motion for non-suit at the appropriate time.

- Defendant Apple Inc.'s Motion to Compel Further Responses to Defendant's Special Interrogatories, Set One, and Request for Production, Set One

The Court grants defendant Apple Inc.'s ("defendant") motion to compel further responses to defendant's special interrogatories, set one, and defendant's request for production, set one. Plaintiff shall serve, within ten days of this ruling, a further response to defendant's special interrogatory, no. 1. Plaintiff shall also serve, within ten days of this ruling, responsive documents to defendant's request for production, nos. 66, 88, and 90, as well as an amended privilege log that identifies the date and people in the privileged documents.

Defendant's special interrogatory no. 1 is appropriate since it seeks information to support plaintiff's contention that his counsel is adequate class counsel, a criteria to obtain class certification. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450 – "[a]dequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation".)

Defendant's request for production no. 66 (independently-prepared witness statements and declarations pertaining to plaintiff's action) is appropriate. Independently-prepared witness statements are not attorney work product since they do not reveal counsel's evaluation of the case and are nonderivative. (E.g., *Rodriguez v. McDonnell Douglas Corp.* (1987) 87 Cal.App.3d 626, 647 - a witness statement was not work product because "written statements of a prospective witness are considered material of a nonderivative or noninterprctativc nature.")

Defendant's request for production no. 88 (counsel's communications with defendant's employees about the allegations in plaintiff's complaint) is appropriate. Plaintiff's response shall be limited to unprotected written communications with putative class members, who are third parties.

Defendant's request for production no. 90 (documents plaintiff obtained from defendant) is appropriate. The request is relevant to defendant's defenses, e.g., whether plaintiff violated plaintiff's Intellectual Property Agreement with defendant, as contended by the motion.

As for the amended privilege log, the attorney-client privilege does not protect the fact that a communication took place or the time, place and participants to the communication. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 20 at footnote 5.) Also, plaintiff has not shown that the privacy rights of the identities of the parties to the written communications outweighs defendant's need for the discovery. Further, plaintiff fails to provide support that the identities of the parties to the privileged communications are trade secrets, as contended in plaintiff's opposition. The date of the attorney-client agreement is relevant to establishing when plaintiff obtained legal representation for his claims against defendant.

The usual discovery monetary sanctions are denied as unwarranted under the circumstances.

- Plaintiff's Motion to Compel Further Responses to Plaintiff's Request for Production, Set One

The Court grants plaintiff's motion to compel further responses to plaintiff's request for production, set one. Defendant shall serve, within ten days of this ruling, responsive documents to plaintiff's request for production nos. 14, 19, 21, and 27. Plaintiff's motion establishes that these requests for production are appropriate. Defendant in responding shall redact employee private information and identification to protect the employee's right to privacy.

The usual discovery monetary sanctions are denied as unwarranted under the circumstances.

IT IS SO ORDERED.

Judge Gonzalo Curiel