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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, on behalf of its members employed by defendants, and RAUDEL COVARRUBIAS, DAVID SIMMONS AND STEPHEN S. SWADER, SR., individually and on behalf of all similarly situated current and former employees,

Plaintiffs,

v.

CONOCOPHILLIPS COMPANY and DOES 1 through 10, inclusive,

Defendants.

Case No. CV08-2068 PSG (FFMx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Hon. Philip S. Gutierrez

Date: January 12, 2009
Time: 1:30 p.m.
Place: Courtroom 790

Date Action Filed: February 15, 2008
Date Action Removed: March 27, 2008

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I. INTRODUCTION

Unless a catastrophic event or maintenance repairs shut down a facility, an oil refinery operates on a continuous basis (24 hours a day/7 days a week/ 365 days a year). The refineries at center of this case are no exception. Needless to say, a continuous operation necessitates scheduling employees on the same basis. Employees responsible for the continuous operation of an oil refinery must be on constant watch, and this fact resulted in Defendant's unlawful denial of a meal period at the three refineries covered under a contract between Defendant and Plaintiff USW.[1]

As outlined below, the Named Plaintiffs (who currently and in the past worked as operators) and the Class they seek to represent work continuous shifts. This means that they are paid for all scheduled hours and are expected to work the entire shift. Named Plaintiffs do not dispute that they and class members are allowed to eat a meal while on duty. It is also undisputed that the Defendant takes no steps to ensure that the Plaintiffs and Class members take a 30 minute meal period (*i.e.*, Defendant does not provide relief, does not track meal periods, does not require operators and lab personnel to record meal periods etc.). Thus, the central and overriding issue in this case is whether Defendant complies with California law by simply "allowing" or "permitting" Plaintiffs and Class Members to eat a meal during hours worked. Plaintiffs contend that this practice does not comply with the meal period requirement for three reasons: (1) to constitute a meal period, the employee must be relieved of all duties (*i.e.*, off duty); (2) even if the Defendant shows that the "on duty" meal in this case satisfies California law, it fails to ensure that employees take a 30 minute meal period; and (3) under the most liberal interpretation of the meal period statute and regulation, the Defendant's complete

[1]Plaintiff United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC will be referred to herein as "USW". Individual Plaintiffs Raudel Covarrubias, David Simmons, and Stephen S. Swader will be collectively referred to herein as the "Named Plaintiffs."

absence of a written policy and the practice of letting employees decide when or whether to take a meal period fails to satisfy the obligation of providing a meal period.

This action is particularly suited to class treatment given that the relevant facts are largely undisputed, and the outcome will hinge on a common legal question: whether Defendants violated California law regulating meal periods when Named Plaintiffs and Class members were only allowed to eat while they were on-duty. Though the Court should not reach this legal issue at this time, the meal period claims of Named Plaintiffs and putative class rest on the same legal theory and a common set of facts.

The USW and Named Plaintiffs seek certification of a class under Federal Rules of Civil Procedure 23(b)(2) and (b)(3) for claims asserted under California Labor Code § 226.7 ("Section 226.7"), Section 11 of the Industrial Welfare Commission Wage Order No. 1-2001 ("Wage Order 1-2001") and the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq*. ("UCL"). The Named Plaintiffs seek certification of a class consisting of the following hourly employees:

> All former, current, and future non-exempt hourly employees of Defendant ConocoPhillips who, at any time since February 15, 2004, worked as an Operator or in the laboratory on a shift schedule at a ConocoPhillips petroleum refinery located in Los Angeles, Santa Maria or Rodeo, California.

As argued below, this class definition specifies an appropriate class because all the requirements of Rule 23 (a) and Rule 23 (b)(2) and/or (b)(3) are satisfied. Indeed, given the common work schedule, common nature of the job and the common working conditions (*i.e.*, all class members are covered under the same collective bargaining agreement), a uniform resolution of the meal period issue is appropriate.

II. FACTUAL SUMMARY OF THE ACTION

ConocoPhillips, an international oil company, owns and/or operates three petroleum refineries located in Los Angeles, Santa Maria, and Rodeo, California ("the Refineries"). *See* Class Action Complaint filed February 15, 2008 ("Compl.") at ¶ 9. The Refineries operate three-hundred and sixty-five days a year, twenty-four hours a day. Covarrubias Decl. at ¶ 2 (Cantore Decl., Ex. B); Muto Decl. at ¶ 3 (Cantore Decl., Ex. G); Bowman Decl. at ¶ 2 (Cantore Decl., Ex. E); Swader Decl. at ¶ 4 (Cantore Decl. Ex. D); Prosser Depo. at 48 (Cantore Decl. Ex. H).[2]

USW is a labor organization that represents employees in the state of California and, among other things, deals with employers concerning labor disputes, wages, rates of pay, hours of work and other terms and conditions of employment. Compl. at ¶¶ 6, 6.1. USW represents all operations and laboratory employees that work at the Refineries. Muto Decl. at ¶ 2; Norris Decl. at ¶ 2 (Cantore Decl., Ex. F); Swader Decl. at ¶ 2. USW and ConocoPhillips are also parties to a series of collective bargaining agreements covering a bargaining unit of employees that are employed by ConocoPhillips at the Refineries. Compl. at ¶ 10; Collective Bargaining Agreement ("CBA") (Cantore Decl., Ex. A). All USW represented employees working at the Refineries, and all members of the proposed Class, work under the same collective bargaining agreement that sets forth the terms and conditions of employment for all covered employees. Prosser Depo. at 20:1-12; Norris Decl. at ¶ 2; Swader Decl. at ¶ 2.

Plaintiff Raudel Covarrubias is employed as an Operator at the Los Angeles ConocoPhillips refinery. Covarrubias Decl. at ¶ 1. Plaintiff Stephen Swader, Sr., is employed as an Operator at the Santa Maria ConocoPhillips refinery. Swader Decl. at ¶ 1. Plaintiff David Simmons is employed as an Operator at the Los Angeles refinery, though his most recent assignment is to act as the Union's Health & Safety

[2] Patrick Prosser is the Human Resources Manager for Defendant ConocoPhillips. ConocoPhillips designated Prosser to testify on its behalf as a corporate representative pursuant to Rule 30(b)(6), Fed. R. Civ. P.

Representative. Simmons Decl. at ¶ 1 (Cantore Decl., Ex. C). All Named Plaintiffs are current employees at one of the Refineries, are members of USW, and are "employees" as defined in Wage Order 1-2001. Compl. at ¶ 7.

Because the refining of crude oil at Defendant's facilities is a continuous production process, the Defendant needs employees to operate and/or monitor the process at all times. Prosser Depo. at 61-64. The collective bargaining agreement that covers Plaintiffs' employment at the Refineries contains an Operator job classification. Prosser Depo. at 21. Individuals working as Operators at the Refineries are "shift employees" or "shift workers" as that term is defined in the collective bargaining agreement. Norris Decl. at ¶ 3; Muto Decl. at ¶ 3. Although some Operators work eight hour shifts, most of the Operators work twelve hour shifts. Norris Decl. at ¶ 3; Covarrubias Decl. at ¶ 2; Bowman Decl. at ¶ 2; Muto Decl. at ¶ 3; Swader Decl. at ¶ 3; Prosser Depo. at 48. All Operators regardless of the duration of their shifts are treated the same way with respect to meal periods. Norris. Decl. at ¶ 3.

The twelve hour shifts are from 6:00 a.m. to 6:00 p.m. (Day Shift) and 6:00 p.m. to 6:00 a.m. (Night Shift). Muto Decl. at ¶ 2; Covarrubias Decl. at ¶ 3; Norris Decl. at ¶ 3; Simmons Decl. at ¶ 2; Swader Decl. at ¶ 3 Prosser Depo. 48-49. Operators working these shifts are paid for twelve hours of work during that period of time. Prosser Depo. at 49. ConocoPhillips keeps records of the Operators' time through a software program called Schedule Express which is integrated with a timekeeping system called SAP HR CATS. Prosser Depo. at 100-101. For each shift an Operator is scheduled to work, a supervisor will enter 12 hours into the SAP HR CATS timekeeping system and the Operator is paid for the all hours scheduled. Prosser Depo. at 101-102.

The general duties of Operators are the same at all of the Refineries. Prosser Depo. at 27-28; Bowman Decl. at ¶ 2. Although there are two types of Operators at the Refineries, Console or Board Operators and Field Operators, all Operators

monitor the same equipment and processes and they essentially conduct the same type of work. Prosser Depo. at 27-28; Muto Decl. at ¶¶ 5-7; Covarrubias Decl. at ¶¶ 3-4; Norris Decl. at ¶¶ 5-7; Swader Decl. at ¶ 6. All Operators are responsible for monitoring tank, tower and oil levels, temperatures for equipment and processes, flows for processes and lubrication, and pressure readings for different processes and equipment. Covarrubias Decl. at ¶ 3; Bowman Decl. at ¶ 2; Swader Decl. at ¶ 5; Muto Decl. at ¶ 4; Norris Decl. at ¶ 4. All Operators also make adjustments to processes and equipment as needed. Norris Decl. at ¶ 4; Covarrubias Decl. at ¶ 3; Simmons Decl. at ¶ 2; Muto Decl. at ¶ 4; Swader Decl. at ¶ 5. All Operators work out of a control building where they gather and work. Prosser Depo. at 59.

The main difference between Field Operators and Board Operators is that Board Operators monitor information and make adjustments to processes from a computer console while Field Operators normally make manual adjustments to the production process from the field. Norris Decl. at ¶¶ 5-6; Covarrubias Decl. at ¶¶ 3-4; Muto Decl. at ¶¶ 5-6; Swader Decl. at ¶¶ 6-7. Specifically, Board Operators remain within the control building facility and monitor the process from within that facility. Prosser Depo. at 59. Board Operators give direction to the Field Operators, directly or by radio. Prosser Depo. at 59. Field Operators and Board Operators constantly coordinate their activities and they work together as a team to ensure that the refining process is working efficiently. Muto Decl. at ¶ 7; Swader Decl. at ¶ 8; Simmons Decl. at ¶¶ 2-3; Covarrubias Decl. at ¶ 4; Norris Decl. at ¶ 6.

All Operators working a shift schedule are under the same shift supervision, have the same work rules applied to them, are covered under the same bargaining agreement and are treated the same with respect to meal periods. Muto Decl. at ¶ 7; Swader Decl. at ¶ 10; Norris Decl. at ¶ 9; Covarrubias Decl. at ¶ 6; Simmons Decl. at ¶ 4.

Operators remain "on duty" during the entirety of their shifts. Prosser Depo.

at 62; Muto Decl. at ¶ 9; Swader Decl. at ¶ 11; Norris Decl. at ¶ 10; Bowman Decl. at ¶ 3; Simmons Decl. at ¶ 5; Covarrubias Decl. at ¶ 6. Operators are also in constant "radio communication" throughout their shift so that they can respond to any problems that arise during their shift. Prosser Depo. at 66. Operators have responsibility to stay "in communication" during their shift, and are expected to have a radio with them. Prosser Depo. at 83, 95. Operators are subject to discipline for not responding to their radio. Prosser Depo. at 94. Operators must remain within their units during the entirety of their shifts unless they are given permission to leave the unit by the head operator. Prosser Dep. at 61-63, 109-110. Therefore, Operators are not allowed to leave the Refinery or even their units to take a meal break. Prosser Dep. at 62-64. Rather, if and when operators eat during their shifts, they are required to eat in their unit. Prosser Dep. at 62-64.

In addition, there are audible alarms set up on the consoles that indicate that something in the refining process may need attention. Prosser Depo. at 78. Operators must respond to these alarms to determine if something in the refining process does, in fact, need attention. Prosser Depo. at 78.

Every control building facility has kitchen facilities and an eating area in their work environment where they can eat, and the Operators decide if and when they will eat during their shift. Prosser Depo. at 68, 73, 125, 143. However, because Operators are on duty throughout the entirety of their shift, ConocoPhillips does not provide Operators with a 30 minute meal period during which they are relieved of all duties and no one ever actually times how long an operator gets to eat a meal. Muto Decl. at ¶ 9; Norris Decl. at ¶ 10; Covarrubias Decl. at ¶ 8; Simmons Decl. at ¶ 5; Swader Decl. at ¶ 13; Prosser Depo. at 81. There is no "formalized procedure" for providing Operators with either a first or second meal period. Prosser Depo. at 122. Operators working a twelve hour shift receive neither a first nor second meal period during which they are relieved of all duties. Muto Decl. at ¶ 9; Norris Decl. at ¶ 10; Bowman Decl. at ¶ 3; Simmons Decl. at ¶ 5; Swader Decl. at ¶ 11;

Covarrubias Decl. at ¶ 8. Operators working an eight hour shift do not receive a 30 minute meal period during which they are relieved of all duties. Muto Decl. at ¶ 9; Norris Decl. at ¶ 10; Simmons Decl. at ¶ 5; Swader Decl. at ¶ 11; Covarrubias Decl. at ¶ 8. No written policy exists that sets forth a meal period for Operators, ConocoPhillips does not keep any records of when Operators eat during their shifts, and there is no practice or custom of providing Operators with a 30 minute meal period during which they are relieved of all duties. Muto Decl. at ¶ 9; Swader Decl. at ¶ 12; Norris Decl. at ¶ 10; Covarrubias Decl. at ¶ 8; Bowman Decl. at ¶ 3; Simmons Decl. at ¶ 5; Prosser Depo. at 115. There is no Operator at any of the Refineries whose job it is to relieve Operators for meal periods. Prosser Depo. at 86-87.

All Operators are supervised by area supervisors or foremen. Muto Decl. at ¶ 8; Covarrubias Decl. at ¶ 7; Norris Decl. at ¶ 8 Swader Decl. at ¶ 9. There are no separate lines of supervision of Field and Console Operators and the supervisors apply the same work rules to all Operators. Muto Decl. at ¶ 8; Covarrubias Decl. at ¶¶ 6-7; Norris Decl. at ¶ 8; Swader Decl. at ¶ 9; Simmons Decl. at ¶ 4. These supervisors do not provide Operators with a 30 minute meal period during which they are relieved of all duties. Muto Decl. at ¶ 9; Swader Decl. at ¶ 11. These supervisors are not instructed to designate a time for during with employees must take breaks and meal period as the employees take their meal breaks when they find it convenient for themselves. Prosser Depo. at 143.

Laboratory employees manage the quality control of the refinery process. Prosser Depo. at 32. Laboratory employees will analyze the samples that are provided to them by Operators and run tests on those samples in the laboratories that are on-site. Prosser Depo. at 32. Laboratory employees working a "shift schedule", or a twelve hour shift, work from 6:00 a.m. to 6:00 p.m. and are paid for twelve hours of work. Prosser Depo. at 47, 51, 88-89.

ConocoPhillips has not requested that any collective bargaining unit

employees sign a document waiving any meal period or agreeing to an "on duty" or "on the job" meal period. Muto Decl. at ¶ 11; Covarrubias Decl. at ¶ 10; Swader Decl. at ¶ 14; Norris Decl. at ¶¶ 11-12. ConocoPhillips and USW have never entered into an agreement regarding "on duty" meal periods. Muto Decl. at ¶ 12; Swader Decl. at ¶ 15. No Refinery employees have ever signed any agreement to waive meal periods. Prosser Depo. at 132-133. ConocoPhillips does not post any wage orders at the Refineries. Prosser Depo. at 135.

III. ARGUMENT

A. Standards for Deciding This Motion

In ruling on a motion for class certification the district court must consider whether the party seeking class certification can establish the Rule 23 requirements, but any issues relating to "the ultimate merits of the case … 'should properly be addressed by a jury considering the merits rather than a judge considering class certification.'" *Dukes v. Wal-Mart, Inc.* ("*Dukes II*"), 509 F.3d 1168, 1177-78 (9th Cir. 2007) (quoting *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 166 (N.D. Cal. 2004)). However, evidence which "relates to the underlying merits of the case" can only be considered by the Court at the class certification stage to the extent that such evidence also "goes to the requirements of Rule 23." *Id.* at 1177 n.2. Applying these standards, the alleged facts and evidence supporting the claims demonstrate that this case is well-suited for resolution on a class-wide basis.

B. The Proposed Class Meets All the Requirements of Rule 23

Under Rule 23, the Court should certify a proposed class when the class meets all the prerequisites of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and at least one of the requirements of Rule 23(b). All four Rule 23(a) prerequisites and the requirements for class certification under Rule 23(b)(2) and (b)(3) are satisfied in this case. Because class certification is permissible under both of these sub-parts, the Court may choose to order certification under 23(b)(2) and (b)(3), or just one of those provisions. *In re*

NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 515 (S.D.N.Y. 1996) (dual certification is permissible).[3]

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." However, "[i]mpracticability does not mean 'impossibility', but only the difficulty or inconvenience in joining all members of the class." *Harris v. Palm Springs Alpine Estate, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). Plaintiff need not state the exact number of potential class members and a specific minimum number is not required. *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994).

There are approximately six hundred (600) members in the proposed Class. Prosser Depo. at 112. Therefore, the size of the Class makes joinder impracticable. *See Maddock v. KB Homes, Inc.*, 248 F.R.D. 229, 237 (C.D. Cal. 2007) (numerosity requirement satisfied where class consisted of "at minimum" 100 employees); *Jimenez v. Domino's Pizza*, 238 F.R.D. 241, 247 (C.D. Cal. 2006) (numerosity present where class consists of 160 employees); *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 607 (C.D. Cal. 2005) (numerosity present where "joinder is impractical based solely on the fact that there are over one hundred putative class members").

2. Commonality

Rule 23(a)(1) requires that "there are questions of law or fact common to the class." "Commonality focuses on the relationship of common facts and legal issues among class members." *Dukes II*, 509 F.3d at 1117. The commonality requirement

[3]When ordering dual certification, the Court can either certify separate 23(b)(2) and 23(b)(3) classes, with the 23(b)(2) class being mandatory and the 23(b)(3) class receiving class notice and an opportunity to opt out of the damages claims asserted in the case ("divided certification"), or certify a single class pursuant to 23(b)(2) but order that absent class members be notified of the class action and have an opportunity to opt out of the case ("composite certification"). *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003) (court has discretionary authority to order notice and opportunity to opt out when certifying class under 23(b)(2)); *Fisher v. Virginia Elec. and Power Co.*, 127 F.R.D. 201, 214 (E.D. Va. 2003).

is generally construed liberally as the existence of only a few common legal and factual issues may satisfy the requirement. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1320 (9th Cir. 1982) This requirement is "qualitative rather than quantitative," *Dukes II*, 509 F.3d at 1177, as "there must only be one single issue common to the class." *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 655 (C.D. Cal. 2000).

Each class member was employed in one of Defendant's Refineries and was not provided with meal periods as required under California law. As such, there are numerous questions of law and fact common to the Class including, *inter alia*, the following:

a. Whether Defendant failed to provide Named Plaintiffs and members of the Class with meal periods in accordance with California law;

b. Whether Defendant failed to provide Named Plaintiffs and members of the Class with meal periods in accordance with California law when Named Plaintiffs and members of the class are on duty during the entirety of their shift;

c. Whether Defendant maintains or has maintained common policies that failed to properly compensate Named Plaintiffs and members of the Class for missed meal periods;

d. Whether the Defendants failed to keep accurate records of the meal periods provided to Named Plaintiffs and members of the class in accordance with applicable California law; and

e. Whether the Plaintiffs and Class members are entitled to an injunction requiring Defendant to adopt a meal period policy consistent with California law.

3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties be typical of the claims or defenses of the class." This requirement is satisfied if the representatives' claims "are reasonably coextensive with those of absent class members [as] they need not be substantially identical." *Hanlon v.*

Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). As long as both the plaintiffs' and Class members' claims arise from the same course of conduct and are based on the same legal theory, typicality is shown. *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 332 (C.D. Cal. 1998).

a. Named Plaintiffs' Claims and Defenses are Typical of the Claims or Defenses of the Class.

Named Plaintiffs' claims are based upon the same facts and legal theories as the claims of all Class members. As set forth in the Complaint and the accompanying Declarations, Plaintiffs' claims and those of the Class members are all based on allegations that the Defendant did not provide them with meal periods as required under California law. These allegations fall into two groups. First, the Named Plaintiffs work or have worked as operators during the relevant period. The undisputed testimony is that during the class period, all class members worked a continuous shift (*i.e.*, there was no unpaid period during the shift).[4] As operators, the Named Plaintiffs (like all class members) worked continuous 12 hour shifts and were required to eat meals while on duty. Thus, if Defendant's conduct violates the meal period requirement because it failed to provide a 30 minute meal period during which the Named Plaintiffs and Class members were off duty, then Named Plaintiffs and other Class members suffered the same injury.

Second, it is undisputed that the Defendant did not take affirmative steps to provide Named Plaintiffs and Class members with a 30 minute meal period. The Defendant simply allows the Named Plaintiffs and Class members to determine at their discretion whether to eat a meal during the shift. There is no effort to track whether employees are taking meal periods or to provide relief so that employees can take a meal period. If the failure to affirmatively provide a meal period

[4] This is in marked contrast to the normal schedule that maintenance employees worked during the class period. Under the collective bargaining agreement, maintenance employees and all day employees have a 30 minute unpaid period during which they are relieved of all duties. Prosser Depo. at 50.

violates California's meal period statute, then the Named Plaintiffs and Class members have suffered the same injury.

Finally, if Named Plaintiffs prove Defendant is liable, they are entitled to the same remedies to which all Class members are entitled under the relevant California statutes and any injunctive relief will affect them in a similar manner. As each Class member's claims arise from the same course of factual events and involve similar legal arguments to establish Defendant's liability, plaintiffs clearly satisfy the typicality requirement. *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001).

b. USW, as an Organizational Plaintiff, Meets the Typicality Requirements for Certification

USW, as an organizational plaintiff, meets the typicality requirement for class certification. A Union has standing to sue as a representative of union members, and the fact that USW is not, strictly speaking, a "member" of the class does not prevent the union from satisfying the typicality requirement. *Social Servs. Union, Local 535, Serv. Employees Int'l. Union, AFL CIO v. County of Santa Clara*, 609 F.2d 944 (9th Cir. 1979) (union met requirements to serve as class representative for class of union employees bringing claims for sex and wage discrimination); *California Rural Legal Assistance v. Legal Services Corp.*, 727 F. Supp. 553, 554-55 (N.D. Cal. 1989). USW meets the typicality requirements because it has general associational standing. Any organization (including a labor union) has association standing where: (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n.*, 432 U.S. 333, 343 (1977); *Associated Builders and Contractors, Inc. v. San Francisco County Bldg. & Constr. Trades Counsel*, 87 Cal. Rptr. 2d 654, 659 (Cal. 1999) (citing *Brotherhood of Teamsters v.*

Unemployment Ins. Appeals Bd., 190 Cal. App. 3d 1515, 1522 (1987) as the basis for adopting the *Hunt* associational standing test as California's associational standing test).

In *Teamsters*, the court held that the union met the associational standing test set forth in *Hunt* and was allowed to pursue a lawsuit challenging the denial of unemployment benefits to their members. 190 Cal. App. 3d at 1518. The court reasoned that the first prong of the *Hunt* test was satisfied because the members would clearly have had standing to make such a challenge. *Id.* at 1522. The court then reasoned that benefiting union members was necessarily germane to the interests of the unions, and that therefore the second prong of the *Hunt* test was likewise satisfied. *Id*. The court then found that the third prong too was satisfied because the remedy that union was seeking did not require individual participation. *Id*. at 523. The court therefore concluded that the unions had associational standing to pursue the action. *Id*.

The USW has associational standing to pursue their members' claims in this case because it satisfies the *Hunt* test. As in *Teamsters*, the first two prongs are easily satisfied because the USW's members would have standing to file a Section 226.7 claim and USW is acting for the member's benefit which is necessarily germane to USW's interest. Likewise, here the "no participation of individual plaintiffs required" prong is also satisfied. The monetary relief the USW seeks can be proven without individual participation by simply applying the predetermined damage prescribed by section 226.7 (one hour pay per missed meal period) to ConocoPhillips own employment records.[5]

[5] In *United Union Roofers*, the Court held that the third prong of the *Hunt* test could not be satisfied because the proof of monetary damages would require "individual Union members [to] participate at the proof of damages stage." *United Union Roofers v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990). However, the court held that "courts have not generally declared a *per se* rule against granting an association standing to seek money damages." *Id.* Unlike *United Union Roofers*, the third element of the *Hunt* test is satisfied even though monetary damages are sought because the amount of damages sought by USW is fixed by statute.

c. Typicality is Satisfied Where Injunctive and Declaratory Relief is Sought

The typicality requirement is also satisfied in a case like this one, where injunctive and declaratory relief is a significant component of the case. Obtaining equitable relief is an important component of this litigation, particularly in terms of declaring the rights and responsibilities of the parties under their obligations pursuant to the UCL. *See Nicholson v. Williams*, 205 F.R.D. 92, 99 (E.D.N.Y. 2001) ("Typicality may be assumed where the nature of the relief sought is injunctive and declaratory.") This is true even where, as here, the relief sought includes a damages component. *See Dukes II*, 509 F.3d at 1186-89 (holding that the size of plaintiffs' damages request and request for back-pay did not undermine plaintiffs' claim that injunctive and declaratory relief predominate).

3. Adequacy of Representation

Rule 23(a)(3) permits class certification if "the representative parties will fairly and adequately represent the interests of the class." This element of class certification has two parts: (1) the plaintiffs' interests must not conflict with those of absent class members, and (2) counsel for plaintiffs must vigorously prosecute the action on behalf of the class. *Dukes II*, 509 F.3d at 1185.

There are no irreconcilable conflicts of interest or antagonistic interests between Plaintiffs, counsel and Class members. Plaintiffs and each Class member have a strong interest in establishing Defendant's liability and determining whether Defendant violated California law by failing to provide Named Plaintiffs and members of the class with meal periods as required by California law. All Class members share interests both in being compensated for unpaid wages and in deterring such conduct in the future.

USW also meets the adequacy of representation requirement. The Ninth Circuit has held a union to be adequate class representative. *See Social Services Union, Local 535*, 609 F.2d at 947. Here, USW has the same interest as Named

Plaintiffs in vigorously prosecuting this action to obtain a favorable judgment that ConocoPhillips has violated California law regarding meal breaks. *See e.g., id.* at 948 (holding union adequate representative of class of employees female employees suing for sex and wage discrimination even though union had both male and female employees given that the union had consistently sought equal pay for equal work on behalf of its members, and there was no evidence of conflict between the economic interests of male and female union members). Likewise, USW does not have any conflicts which would prohibit it from acting as a class representative.

Since there is no evidence that this lawsuit is collusive or of any substantial antagonism between the Class members, Plaintiffs are adequate class representatives. *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)

Plaintiffs have also retained highly capable counsel with extensive experience in prosecuting class litigation and/or labor and employment litigation. *See* Cantore Decl. at ¶¶ 10-11 and the firms resumes attached thereto (Cantore Decl., Exs. I & J) . All Plaintiffs' counsel meet the requirements of Rule 23(g). Plaintiffs' counsel have shown they are capable of, and have committed substantial resources to, representing the Class and are fully committed to vigorously prosecute this action on the Class' behalf. Cantore Decl. at ¶¶ 10-11.

C. Certification is Warranted Under Rule 23(b)(3)

Once the requirements of Rule 23(a) are satisfied, Rule 23(b)(3) permits class certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Both these requirements are satisfied in this action.

1. Common Issues Predominate

The Rule 23(b)(3) predominance inquiry tests whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d

1152, 1162 (9th Cir. 2001). "To establish predominance of common issues, a party seeking class certification is not required to show that legal and factual issues raised by the claims of each class member are identical." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, No. 06-1770, 2007 WL 3045995, *6 (N.D. Cal. Oct. 18, 2007). Rather, predominance focuses on "the notion that the adjudication of common issues will help achieve judicial economy." *Zinser v. Accufix Research Inst. Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (internal quotations omitted). To determine whether common issues predominate, the "Court must first examine the substantive issues raised by Plaintiffs and second inquire into the proof relevant to each issue." *Jiminez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 251 (C.D. Cal. 2006).

a. Common Issues Predominate With Respect to Plaintiffs' Claims asserted under Section 226.7 and Wage Order 1-2001.

Plaintiffs allege that Defendant failed to provide Named Plaintiffs and Class members with meal periods as required under California law. The applicable law is set forth in the California Labor Code and in Wage Orders promulgated by the Industrial Welfare Commission ("IWC").[6] California Labor Code Section 226.7 provides:

> (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
>
> (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

[6]The IWC is a quasi-legislative body authorized by statute to promulgate orders regulating wages, hours, and conditions of employment for employees throughout California. *Nordquist v. McGraw-Hill Broadcasting Co., Inc.*, 32 Cal. App. 4th 555 (1995). The IWC has promulgated seventeen different "wage orders" that apply to various groups of employees. Cal. Code Regs. Tit. 8, §§ 11010-11170. IWC wage orders are "quasi-legislative regulations that are to be interpreted in the same manner as statutes." *Watkins v. Ameripride Servs.*, 375 F.3d 821, 825 (9th Cir. 2004).

Subdivision 11 of Wage Order 1-2001 provides in relevant part:

> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee. In the case of employees covered by a valid collective bargaining agreement, the parties to the collective bargaining agreement may agree to a meal period that commences after no more than six (6) hours of work.
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> (B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
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> (C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
>
> (D) If an employer fails to provide an employee a meal period in accordance with the applicable provision of this order, the employer shall pay the employee (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.

Common issues predominate as to the claims asserted on behalf of the Class under Section 226.7 and Wage Order 1-2001 as the claims asserted can be proven on a class wide basis with proof that is common to all class members. First, as noted above, it is undisputed that Named Plaintiffs and Class members are required to eat meals while on duty. If this practice violates California law, then Defendant is liable to Named Plaintiffs and all Class members and owes them the one hour wage specified in the statute.

Moreover, the declarations and testimony establish all that operators and lab employees work under the same shift supervision, have the same work rules applied to them, and are treated the same with respect to meal periods. The Named Plaintiffs and Class members work a continuous shift and are required to remain in

their units while eating. They are not allowed to turn off radios and must remain in communication during the entire shift (including while eating a meal). Indeed, the employer maintains kitchen facilities in the control buildings of each unit; a practice which allows employees to respond quickly in the event they are needed while eating. Finally, they are required to respond to interruptions involving routine work assignments. *See Perez v. Safety-Kleen Sys., Inc.*, 253 F.R.D. 508, 516 (N.D. Cal. 2008) (holding that there was a triable issue of fact with regard to whether Plaintiffs were relieved of all duty during their breaks or whether they were required to be available to work at all times). Because these common facts show that Named Plaintiffs and Class members are required to eat meals while on-duty, the alleged violation of California's meal period results from the Defendant's uniform practice. As a result, common issues predominate over any individual issues. *See Brown v. Federal Express Corp.*, 249 F.R.D. 580, 584 (C.D. Cal. 2008) (holding that Plaintiffs can prevail on motion for class certification if "they demonstrate that [defendant's] policies deprived them of [meal] breaks.").

Second, it is undisputed that the Defendant does not track whether any of the proposed class members take a meal period. There is no requirement that an employee or supervisor record meal periods. Nor is there a policy or procedure in place governing meal periods. It is undisputed that all class members eat meals when they can and that they have complete discretion as to when (or even whether) to take a meal period during a shift. This practice is uniform for all class members.

The Named Plaintiffs contend that the practice violates California law because employers subject to Section 226.7 and Wage Order 1-2001 have a mandatory obligation to provide qualifying employees with meal periods specified. There is no dispute that the Defendant is subject to Section 226.7 and Wage Order 1-2001. *See Salazar v. Avis Budget Group, Inc.*, 251 F.R.D. 529, 533 (S.D. Cal. 2008) (stating that employers have a "mandatory duty to provide the meal period."); *Brown v. Federal Express Corp.*, 249 F.R.D. 580, 586 (C.D. Cal. 2008) (holding

that employers have "an obligation to make [meal] breaks available") (citing *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 962-63 (2006)); *Perez v. Safety-Kleen Systems*, No. 05-5338, 2007 WL 1848037, *7 (N.D. Cal. June 27, 2007) ("At the very least, … the Wage Order requires the employer to affirmatively provide a meal break and provide the opportunity for the employee to be 'relieved of all duty during a 30 minute period.'"). Indeed, in *Cicairos*, the court held that an employer has an "obligation to provide plaintiffs with an adequate meal period [that] is not satisfied by assuming that the meal periods were taken, because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.'" 133 Cal. App. 4th at 962 (quoting Dept. of Industrial Relations, DLSE, Opinion Letter No. 2002.01.28 (Jan. 28, 2002) p. 1).

Again, the Defendant's practice of simply permitting or allowing Named plaintiffs and class members to eat a meal is a uniform practice. Thus, even if the Court determines that the Defendant's practice of requiring Named Plaintiffs and Class members to eat meals while on duty is consistent with California law, a class is still appropriate given the Defendant's uniform failure to affirmatively provide meal periods.

The Defendant will likely rely on the "logic" of *Brinker Restaurant Corp. v. Superior Court*, 165 Cal. App. 4th 25 (2008), *review granted and opinion superseded* (Oct. 22, 2008) for the proposition that a class cannot be certified because individual issues predominate. First, as to Plaintiffs' first legal theory (*i.e.*, an on duty meal period does not comply with the law), the *Brinker* decision has no import even if the Court were inclined to still follow the opinion. There are no individualized issues on this theory because all class members were denied an off-duty meal period on every continuous shift they worked. The Plaintiffs are contending that the meal breaks provided to class members are not "meal periods" under California law.

With respect to the second theory, Plaintiffs recognize that their reasoning

conflicts with the reasoning used in *Brinker*. The key to the *Brinker* decision, however, was the holding that California law only requires an employer to permit or allow employees to take a meal period. Because it was undisputed that the employer allowed employees to have a meal period (as defined under California law), the issue of whether an employee actually took a meal period was determined to be too individualized. However, if *Brinker* was incorrectly decided and the *Cicairos* case had it right, then class certification is appropriate because the focus is on the Defendant's conduct. In this case, it is undisputed that the Defendant took no affirmative steps to provide class members with the appropriate number of meal periods during their shifts.

Finally, even if the Court decides that the California Supreme Court will adopt the outcome and reasoning in *Brinker*, common issues still predominate over individualized ones because, unlike the employer in *Brinker*, the Defendant has not "made available" a 30 minute meal period. Even if the Defendant is not required to **ensure** that class members take the appropriate number of meal periods (*e.g.*, two meal periods for a 12 hour shift), the Defendant is required to provide a defined 30 minute meal period. In the case at bar, the Defendant has failed to even meet *Brinker*'s less demanding interpretation.

In *Brinker*, the Defendant had a written policy that was signed by employees and which clearly stated that employees were entitled to a thirty minute meal break when working a shift lasting longer than five hours. *Brinker*, 165 Cal. App. 4th at 32.[7] The *Brinker* court noted that this fact, among others, distinguished the *Perez v. Saftety-Kleen Systems*, 2007 WL 1848037 (N.D. Cal.) case from the facts in *Brinker*. The failure to promulgate a written policy and to inform employees of their right to take a 30 minute meal period for every 5 hours worked supported the

[7] In *Brinker*, the meal period dispute largely centered around the timing of the meal period. Employees complained that the employer forced them to take a meal period during the first hour of their shift. In this case, the Defendant does not force employees to take a meal period. Indeed, the Defendant is not even aware when or if class members take a meal period.

conclusion that the employer has not "made available" a meal period under California law.

Unlike the employer in *Brinker*, the Defendant has no policy or procedure for providing meal periods. The Defendant also does not require supervisors or employees to record meal periods, the effect being that the Defendant does not know whether employees are taking meal periods. Telling employees that they can eat when their duties permit does not satisfy the requirement of making a 30 minute meal period available. In effect, this means that employees decide whether the Defendant is complying with California law, a scenario clearly at odds with the employer's obligation to provide a 30 minute meal period. Thus, even if *Brinker*'s interpretation is ultimately adopted, it does not preclude a finding of predominance in this case.[8]

b. Common Issues Predominate With Respect to Plaintiffs' UCL Claims.

UCL claims are appropriate for class treatment as the California Supreme Court has repeatedly held that relief under the UCL is available without "individualized proof of deception, reliance, and injury[.]" *Bank of the West v. Sup. Ct.*, 2 Cal. 4th 1254, 1267 (1992) (citing *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 198 (1983)); *Mass. Mut. Life Ins. Co. v. Sup. Ct.*, 97 Cal. App. 4th 1282, 1289-95 (2002) (certifying UCL and CLRA claims arising out of deceptive product sales based on omissions of material facts even where transactions involved face-to-face sales presentations). The UCL's unlawful prong borrows violations of other statutes such as the California Labor Code and orders of the California Industrial Welfare Commission and makes them independently actionable. *See Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d

[8] An important factor in *Brinker* that precluded certification was the finding that each individual restaurant implemented individualized practices to ensure compliance with meal period break policies. In this case, all three refineries are under the same practice; namely, class members decide whether to take a meal period.

1042, 1048 (9th Cir. 2000); *Stevens v. Sup. Ct.*, 75 Cal. App. 4th 594, 606 (1999) (statutory violations may form basis under UCL). Because the UCL "borrows" violations of other statutes, if Plaintiffs prove that Defendant's violated Section 226.7 and Wage Order 1-2001 in failing to provide required meal breaks, Plaintiffs will have also proven that Defendant violated the UCL.

If Defendant has violated the UCL, Plaintiffs and Class members' right to restitution automatically flows from that violation. Defendant retains and should be able to access information regarding the number of hours worked during each shift for each member of the Class. Norris Decl. at ¶ 14. Such a restitutionary disgorgement remedy is available under the UCL and appropriate on a class-wide basis to redress such conduct. *Kraus v. Trinity Mgmt. Servs.*, 23 Cal. 4th 116, 127 (2000). Such remedy is appropriate, since the purpose of the UCL is to foreclose a defendant from retaining any of its ill-gotten gains obtained as a result of their illegal business practices. *Bank of the W. v. Sup. Ct.*, 2 Cal. 4th 1254, 1267 (1992) ("The Legislature considered this purpose so important that it authorized courts to order restitution without individualized proof of deception, reliance, and injury if necessary to prevent the use or employment of an unfair practice. . . . One requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom.") (citations omitted). The appropriate measure of such a restitutionary remedy is another predominant common question for resolution at trial.

Whether Defendant's conduct was unlawful, fraudulent, or unfair will not be decided based on facts peculiar to each Class member but based on a single set of facts applicable to all since knowledge of the wrongful conduct is not relevant under the UCL. *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 453 (1979). The UCL claims therefore raise predominant common issues.

2. A Class Action is Superior to Individual Adjudication

a. Superiority is Present

Finally, Rule 23(b)(3) provides that certification is appropriate if class treatment "is superior to other available methods for the fair and efficient adjudication of the controversy." The test here is not whether class cases are superior to hundreds of individual actions (though in this case they are), but whether it is superior compared to other group-wide methods of resolution available to adjudicate this controversy. *NASDAQ*, 169 F.R.D. at 527.

Because this action rests primarily upon Defendant's failure to provide the requisite meal breaks mandated under California law, individual Class members will have little or no interest in individually controlling the prosecution of this action. *See* Fed. R. Civ. Proc. 23(b)(3)(A). As no Notice of Related Case has been filed, this action is the only one presently proceeding to enforce the rights and remedies available against Defendant. *See* Fed. R. Civ. Proc. 23(b)(3)(B). Because all of the Refineries where the class members are employed are located within the state of California, concentration of the litigation in this forum is desirable. In addition, Plaintiffs' claims will completely or largely resolve the claims of other Class members, rendering duplicative actions wasteful and inefficient. *See* Fed. R. Civ. Proc. 23(b)(3)(C).

The relevant consideration for this aspect of class certification is not a group claims versus no claim being prosecuted. As the Court held in *Hanlon*, 150 F.3d at 1023, "from either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." The same conclusion applies with equal force here. The proposed Class satisfies all the requirements of Rule 23(b)(3).

b. Trial of the Class Claims Would be Manageable

This case can be efficiently tried on a class-wide basis. The focus of this trial will be exclusively on ConocoPhillips and its conduct. As set forth above, this action does not present varied individual factual issues. Indeed, the facts in this

case are largely undisputed. Rather, common issues predominate and the claims of all class members are subject to common proof. Indeed, requiring each of the hundreds of class members to pursue an individual action on their own behalf simply to prove the same facts would result in duplicative litigation that would create significant inefficiencies and manageability issues. Because proof in this litigation in terms of Defendant's liability will come from Defendant and little if any information will be required from the individual Class members, resolution of this action on a class-wide basis is manageable. *See* Fed. R. Civ. Proc. 23(b)(3)(D).

D. Certification is Also Warranted Under Rule (b)(2)

Rule 23(b)(2) provides for certification where a defendant has "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." A (b)(2) class should be certified for equitable relief claims "if the class members complain of a pattern or practice that is generally applicable to the class as a whole." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998).

This is precisely what Plaintiffs allege here. Defendant's failure to provide class members with meal periods as required under California law is a pattern of conduct applicable to the Class as a whole. That uniform pattern of conduct is sufficient to entitle Named Plaintiffs to a declaration that of their rights and the obligations of Defendant under California law. The uniform pattern of conduct also gives rise to plaintiffs' claim for an injunction prohibiting Defendant from failing to provide Named Plaintiffs and Class members with meal breaks in violation of California law and failing to pay them premium rates for meal periods worked.

That Plaintiffs also seek damages and restitution is not an impediment to certifying a (b)(2) class. Class certification under Rule (b)(2) in an action that seeks both injunctive and monetary relief is appropriate where the claim for damages is "incidental" to the claims for injunctive and/or declaratory relief. *See Zinser*, 253 F.3d at 1195. In this case, once a violation of the relevant law is determined to

have occurred, monetary damages will automatically flow from that violations, thus justifying (b)(2) certification.

Rule (b)(2) certification is also appropriate because Plaintiffs here would bring suit to obtain injunctive relief even in the absence of possible monetary recover. In *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 615 (C.D. Cal. 2005), the Court certified both a (b)(2) and (b)(3) class where plaintiffs alleged that Defendant refused to comply with California wage and hour laws. The court found that the plaintiffs would bring suit to obtain injunctive relief even in the absence of possible monetary recover and that injunctive relief was necessary and appropriate to protect defendant's employees. *Id.* at 611-12. Therefore, the Court held, because "the monetary relief claims do not predominate in this case but rather appear to be on equal footing with the claims for injunctive relief, the Court certifies the class pursuant to Rule 23(b)(2)." *Id*. at 612.

Likewise, in this case, even in the absence of possible monetary recovery, plaintiffs here would bring suit to obtain injunctive relief to prevent Defendant from uniformly failing to provide meal periods required under California law to plaintiffs and class members. Injunctive relief is also reasonably necessary and appropriate to protect the Plaintiffs and Class members from future harm. Therefore, this case can thus also be certified to proceed as a class action pursuant to Rule 23(b)(2).

IV. CONCLUSION

Plaintiffs request this Court certify this case to proceed on behalf of the Class, and appoint Plaintiffs as the class representatives and their counsel as class counsel.

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Respectfully submitted,

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