Mark R. Thierman CSB 72913, NSB 8285
THIERMAN LAW FIRM
7287 Lakeside Drive
Reno, NV 89511
Tel: (775) 284-1500 Fax: (775) 703-5027
email: laborlawyer@pacbell.net

H. Tim Hoffman, State Bar No. 49141
Arthur W. Lazear, State Bar No. 184401
HOFFMAN & LAZEAR
180 Grand Ave., Suite 1550
Oakland, CA 94612
Telephone (510) 763-5700

Attorneys for Plaintiffs

THIERMAN LAW FIRM, PC
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LILIANA SOLIS, on behalf of herself, the general public and as an "aggrieved employee" under the California Labor Code Private Attorneys General Act, Plaintiff, v. THE REGIS CORPORATION and each of their subsidiaries doing business in California under such names as Supercuts, MasterCuts, Regis Salons, Trade Secret, SmartStyle, Carlton Hair International, Mia & Maxx Hair Studio, Hair Crafters, Great Expectations, We Care Hair, HairMasters, Vidal Sassoon, and DOES 1-50, Defendants.	Case No.: C-05-03039 CRB MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION Hearing Date: May 12, 2006 Hearing Time: 10:00 a.m. Judge: Charles Breyer Courtroom 8, 19th Floor

THIERMAN LAW FIRM, PC
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

TABLE OF CONTENTS

TABLE OF CONTENTS....................i

TABLE OF AUTHORITIES....................ii

INTRODUCTION....................1

STATEMENT OF FACTS....................2

ARGUMENT....................4

I. THE CLASS SHOULD BE CERTIFIED BEFORE ANY DECISION ON THE MERITS....................4

II. PLAINTIFF HAS SATISFIED THE COMMONALITY TYPICALITY AND NUMEROSITY AS WELL AS ADEQUACY OF REPRESENTATION REQUIREMENTS OF RULE 23(a)....................5

III. PLAINTIFF HAS SATISFIED THE REQUIREMENTS OF RULE 23(b)(3) ALSO BECAUSE QUESTIONS OF LAW OR FACT COMMON TO THE MEMBERS OF THE CLASS PREDOMINATE OVER ANY QUESTIONS AFFECTING ONLY INDIVIDUAL MEMBERS, AND THAT A CLASS ACTION IS SUPERIOR TO OTHER AVAILABLE METHODS FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY....................9

A. COMMON ISSUES PREDOMINATE....................10

B. CLASS ACTION TREATMENT IS SUPERIOR....................11

CONCLUSION....................13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

TABLE OF AUTHORITIES

Cases

Afro American Patrolman's League v. Duck,
503 F.2d 294 (6th Cir. 1974) 6

Amchem Prods., Inc. v. Windsor,
521 U.S. 591, 623, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997) 12

Andrews v. Bechtel Power Corp.,
780 F.2d 124, 130 (1st Cir. 1985). 10

Baby Neal v. Casey,
43 F.3d 48, 55 (3d Cir. 1994) 7

Dura-Bilt Corp. v. Chase Manhattan Corp.,
89 F.R.D. 87, 93 (S.D.N.Y. 1981) 11

Eisen v. Carlisle & Jacquelin,
417 U.S. 156, 177, (1974 5

Hanlon v. Chrysler Corp.,
150 F.3d 1011, 1022 (9th Cir. 1998) 12

Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc,
244 F.3d 1152 (9th Cir. 2001) 11, 13

Morillion v. Royal Packing Co.,
22 Cal. 4th 575 (2000), *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785 (1999). 8

Phillips Petroleum Co. v. Shutts,
472 U.S. 797, 809, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985) 13

Rutstein v. Avis Rent-a-Car,
211 F.3d 1228, 1233 (11th Cir. 2000) 11

Six Mexican Workers v. Arizona Citrus Growers,
904 F.2d 1301 (9th Cir. 1990) 13

Skyline Homes, Inc. v. Department of Industrial Relations
165 Cal. App. 3d 239, 247(4th DCA 1985) 8

Valentino v. Carter-Wallace, Inc.,
97 F.3d 1227, 1234 (9th Cir. 1996) 12

Vizcaino v. Microsoft Corp.,
97 F.3d 1187 (9th Cir. 1996). 6

Walco Invs. v. Thenen,
168 F.R.D. 315 at 334 (D. Fla. 1996) 11

Statutes

CAL. LAB. CODE §212 6
California Labor Code 226(a) 3
California Labor Code 515(d) 8

Other Authorities

7A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure
§ 1779 (2d. ed. 1986) 13

Rules

Fed. R. Civ. P. Rule 23(b)(3) 10, 11

Fed. R. Civ. P. Rule 23(a) 6, 10

Fed. R. Civ. P. Rule 23(a)(1). 6

Fed. R. Civ. P. Rule 23(a)(4) 10

Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

THIERMAN LAW FIRM, PC
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

INTRODUCTION

Plaintiff is able to make this memorandum of points and authorities in support of its motion for class certification so extremely concise for three reasons: 1) the facts are not in dispute, 2) the law as it applies to these facts and class certification is well settled, and 3) the Court has indicated it wanted a "cut to the chase" format for resolution of this case, implying that there will be no adverse inference drawn from failing to belabor the obvious or embellishing that which the Court already knows and understands.[1] In no no-nonsense terms, Plaintiff seeks to be a class representative for each of three classes, each of which she is a member and both of which exceed 1000 people. The first class consists of all hourly employees employed at Supercuts stores located within the state of California within four years immediately preceding the filing of the complaint in this action until the date of judgment after trial who were paid overtime compensation based upon a matrix system which decreased the piece rate per task as the number of completed tasks were completed and which calculated the overtime rate on the basis of average piece rate over a period of time longer than a day and/or a workweek. The second class consists of all employees employed within the state of California within one year immediately preceding the filing of the complaint in this action until the date of judgment after trial or until the practice ceased, whichever was sooner, who were paid by Defendant Regis Corporation and/or Supercuts Corporate Stores Inc, with checks, script or other forms of indebtedness (other than by direct deposit into the employee's own bank account) which did not contain on the face of the instrument or in a separate piece of paper included in the pay envelope at the time of issuance of the instrument, the name and address of a place within the state of California where

[1] Plaintiff respectfully requests leave to address in supplemental briefing or a renewed motion for class certification any point that the Court feels requires further briefing, or any issue omitted which the Court feels needs to be supplemented in the record, and requests the Court not to draw any adverse inference from Plaintiff's failure to address that matter initially.

the instrument could be negotiated for cash (lawful legal tender) immediately without discount or delay as required by California Labor Code Section 212. The third class consists of all employees employed within the state of California within three years immediately preceding the filing of the complaint in this action until the date of judgment after trial or until the practice ceased, whichever was sooner, who were paid by Defendant Regis Corporation and/or Supercuts Corporate Stores Inc, a piece rate, the so-called matrix system, but were not furnished semimonthly or at the time of each payment of wages, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis as required by Labor Code 226(a). For the forgoing reasons, the classes should be certified so the case can proceed on the merits.

STATEMENT OF FACTS

There are approximately 2,000 Supercuts employees, within the State of California, all of whom were subject to the same pay practices and payroll check practices applicable to Liliana Solis and described herein. Deposition of Vicki Langan at p. 68 ll. 21-23. Plaintiff was employed by Supercuts as a hair stylist from January, 2004 through January, 2005 and regularly received paychecks which were issued by issued by Defendant's bank, La Salle National Bank located in Chicago (a copy of which is attached hereto as Exhibit "A" to the declaration of Liliana Solis filed herewith.) As can be seen from the W-2 statement attached as exhibit "B" to the Sollis declaration, these checks were issued by Defendant Regis Corporation. As seen from the deposition of Barbara Muellerleile, p. 14 ll. 3-25, Director of Payroll for Regis Corporation, [2]

[2] Q. Other than the calculation, is there any
8 difference in the process? Do they all log in, they all
9 send you the data through the screens, they all get

THIERMAN LAW FIRM, PC
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

Defendant Regis uses the same payroll process for both Supercuts employees and Regis employees, paying them all the same way from the same bank account. The only difference between Supercuts and the other Regis entities is the formula for calculation of the amount paid to the employee and the paper stock used to print the check. Deposition of Murellerleile p. 31 ll. 22-25.[3]

Hourly employees who worked at the Supercuts Stores in California were all paid under the Matrix system whereby the overtime rate would be based on the higher of either the pay scale matrix or my base wages. The more haircutting assignments the worker completed, the less the employee received per hour based on the matrix rate. Deposition of Murellerleile p. 33 ll. 1-4.[4]

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10 their checks delivered to the salons, same process for
11 all of them?
12 A. Yes.
13 Q. Are the checks all cut on the same bank for
14 each of them?
15 A. We have -- at that time, yes, they were all
16 cut on the same bank.
17 Q. That's Lafayette, was it?
18 A. LaSalle.
19 Q. LaSalle Bank in Chicago?
20 A. Yes.
21 Q. And does each of the entities have their own
22 bank account, their own payroll account at LaSalle?
23 A. No, they don't.
24 Q. So there is one common payroll account for all
25 of Regis including the subsidiaries?
1 A. That is correct.

[3] Q. All the other paychecks of the entire
23 operation say Regis besides Supercuts?
24 A. Supercuts had its own check stock and it's
25 own -- it said Supercuts on it. It was the only one.

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1 Q. Everyone else said Regis?
2 A. Correct.

[4] And in California when you calculate the

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1 overtime for these other entities, you take some number
2 and you divide it by the pay period hours worked times
3 half; is that correct?
4 A. You take your hours times your rate to get

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7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

Therefore, the overtime rate decreased, even though the employee was working more hours. The overtime rate was not a function of the piece rate earned that day or even that week, but on an average piece rate over a two week pay period. And there was never any written consent to the decreasing pay per haircut as hours increased formula, because Defendant did its best to conceal from employees this aspect of the matrix pay plan. As stated by CEO Vicki Langan p. 84 ll. 15-25 p. 85 ll. 1-5:

15 Q. Is this pay plan described in the orientation
16 package in detail? I mean, what you've got is an
17 incentive program that has a decreasing amount as you
18 work more and more overtime -- or more and more hours or
19 if you work faster and faster. And I'm wondering if
20 there is any way to figure out how this thing works
21 other than backwards engineering from a bunch of
22 paychecks.
23 A. That's intentional, that we don't show or talk
24 about the fact that the pay plan leverages itself as a
25 person becomes more productive. They see that they earn

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1 a higher hourly rate, but they don't see that it's a
2 smaller percentage.
3 Q. Why don't you want them to see that it is a
4 smaller percentage?
5 A. Why would I?

AGRUMENT

I. THE CLASS SHOULD BE CERTIFIED BEFORE ANY DECISION ON THE MERITS

The quality of the merits is not the litmus test of class certification. ***Eisen v. Carlisle & Jacquelin***, 417 U.S. 156, 177, (1974); see also 5 James Wm. Moore et al., ***Moore's Federal Practice*** P 23.21[3][c] (3d ed. 1999) ("A class definition is inadequate if a court must make a

5 your total gross pay. You add in your commissions to
6 get a base number. Then you divide it by the total
7 amount of hours so you can get the premium pay.
8 Q. Right. And then you take that times the
9 number of hours over 40 or over eight?
10 A. Correct. Overtime.

THIERMAN LAW FIRM, PC
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

determination of the merits of the individual claims to determine whether a particular person is a member of the class."). But where the facts are not in dispute and the legal theory predominates over factual issues, the merits of the case controls the contours of the definition of the class. ***Vizcaino v. Microsoft Corp.***, 97 F.3d 1187 (9th Cir. 1996).

II. PLAINTIFF HAS SATISFIED THE COMMONALITY TYPICALITY AND NUMEROUSITY AS WELL AS ADEQUACY OF REPRESENTATION REQUIREMENTS OF RULE 23(a)

The first requirement of Fed. R. Civ. P. Rule 23(a) is that the class be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. Rule 23(a)(1). Each theory applies to over 2000 individuals, thus meeting the test for numerousity. ***Afro American Patrolman's League v. Duck***, 503 F.2d 294 (6th Cir. 1974) (class action in employment discrimination case proper where thirty-five plaintiffs are involved). The second and third prongs of Rule 23(a) require Plaintiffs to demonstrate that "there are questions of law or fact common to the class" and that "the claims or defenses of the representative parties are typical of the claims of the class." As set forth below, there is typicality and commonality under each main theory.

There are three main legal theories in this case. The first theory is that California Labor Code 212[5] requires that employees be paid wages either in cash and if the employer does not pay

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[5] CAL. LAB. CODE §212 states:(a) No person, or agent or officer thereof, shall issue in payment of wages due, or to become due, or as an advance on wages to be earned: (1) Any order, check, draft, note, memorandum, or other acknowledgment of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the state, the name and address of which must appear on the instrument, and at the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer has sufficient funds in, or credit, arrangement, or understanding with the drawee for its payment. (2) Any scrip, coupon, cards, or other thing redeemable, in merchandise or purporting to be payable or redeemable otherwise than in money. (b) Where an instrument mentioned in subdivision (a) is protested or dishonored, the notice or memorandum of protest or dishonor is admissible as proof of presentation, nonpayment and protest and is presumptive evidence of knowledge of insufficiency of funds or credit with the drawee. (c) Notwithstanding paragraph (1) of subdivision (a), if the drawee is a bank, the bank's address need not appear on the instrument and, in that case, the instrument shall be negotiable and payable in cash, on demand, without discount, at any place of business of the drawee chosen by the person entitled to enforce the instrument.

THIERMAN LAW FIRM, PC
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

THIERMAN LAW FIRM, PC
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

in cash, it may pay wages in some sort of script (check, IOU, pay voucher) but must at the time of each payment tell the employee in writing, either on the face of the check or with a separate pay envelope memo, where the employee can convert the script into cash within the state of California without delay or any sort of fee, or discount from full face value. The factual allegation are common to everyone who received a paycheck. The common factual allegations applicable to over 2000 workers are that rather than paying wages in cash, Regis Corporation[6] issued payroll checks to a group of California employees where neither the checks nor any accompanying notice told the employees where in the State of California they could go to convert these checks into cash immediately without discount.

Since Plaintiff received such a pay check, she is typical of the class. Because defendant has engaged in the same conduct towards all the members of the proposed class, there is commonality. ***Baby Neal v. Casey***, 43 F.3d 48, 55 (3d Cir. 1994).("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.") And because Plaintiff had to pay a fee to have her check cashed locally, she was one of the people who was a victim or target of such conduct.[7] Therefore, there is typicality. "Cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." ***Baby Neal,*** 43 F.3d at 58 (citation omitted).

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[6] It does not matter if Regis was or was not the employer for his theory of violation because the statute says "no person, agent or officer thereof" The word "agent" modifies the word "person" in this sentence. Regis is both a person and admits to being an agent for Supercuts Corporate Shops, Inc, who appears to be the titular employer of Plaintiff.

[7] Although Labor Code 212 does not require the employee to have suffered any damages as a result of Defendant's failure to identify a location in California where the checks can be cashed without discount or delay, the fact that she paid a fee to cash her pay check is graphic illustration of the evil the statute was designed to prevent.

THIERMAN LAW FIRM, PC
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

The second legal theory is that the so-called matrix system is a variation of the fluctuating workweek pay plan, which is illegal under California Labor Code 515(d) which codified the holding of the California Court of Appeals in the famous case of ***Skyline Homes, Inc. v. Department of Industrial Relations*** 165 Cal. App. 3d 239, 247(4th DCA 1985) ("In view of the dissimilar language and purpose of the California statute and regulation, we conclude that the DLSE has correctly interpreted wage order 1-76 to preclude the use of the fluctuating workweek method of overtime compensation.") cf, ***Morillion v. Royal Packing Co***., 22 Cal. 4th 575 (2000), *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785 (1999). Instead of reducing the pay per hour as more hours are worked, Defendant's matrix plan decreases the amount paid per piece as more pieces are produced in overtime hourly work. It is unlawful because it averages pieces over a fifteen day period to arrive at an overtime piece rate rather than doing it daily, which would be required by California's daily rather than weekly overtime provisions and because it does not provide a penalty or disincentive to the employer for working people overtime. The definition of a fluctuating workweek is summarized by the California Division of Industrial Relations as follows:

> **Fluctuating Workweek Compensation Arrangement Defined**. Under this method, an employee is compensated by a fixed weekly salary which by agreement between the employer and employee is designed to provide basic non-overtime compensation for all hours worked. The employee's regular rate of pay, for purposes of overtime compensation, is determined by dividing the number of hours actually worked in a particular workweek into the amount of the fixed weekly salary. The result of this method is that the more hours worked, the lower the regular rate and the greater the incentive to the employer to work employees overtime. In California, the law requires that there be a "penalty" for utilizing workers in overtime situations. (Industrial Welfare Commission v. Superior Court, supra 27 Cal.3d 690) No penalty is involved in a fluctuating workweek because the rate of pay actually decreases. .

THIERMAN LAW FIRM, PC
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

Defendant's piece work rate violates the provisions of the California Labor Code because it predicates the "regular rate" on the total number of pieces during a fifteen day period and because it artificially decreases the rate per piece the more pieces that are produced. According to the California Division of Labor Standards Enforcement, one of two methods can be used to pay overtime to a piece rate worker: Compute the regular rate by dividing the total earnings for the week, including earnings during overtime hours, by the total hours worked during the week, including the overtime hours. For each overtime hour worked, the employee is entitled to an additional one-half the regular rate for hours requiring time and one-half and to an additional full rate for hours requiring double time or using the piece or commission rate as the regular rate and paying one and one-half times this rate for production during overtime hours.[8] Defendant's matrix system does not fit within either methodology because it basis its piece rate on a 15 day average and because it reduces the rate per piece as the amount of pieces increase.

The class is defined as every person who, like Plaintiff, was paid under the matrix plan during the applicable statute of limitations. The actions complained about were common for all employees who worked as hourly employees in Supercuts hair salons in California. Because the Plaintiff was a member of the class who was the target or was injured by Defendant's conduct to the class as a whole, she satisfies the commonality and typicality requirements. The numerosity requirement is satisfied because about 2000 people are in the proposed class.

The third and final, major theory of liability here is the failure to put the piece rate on the check stub. Plaintiff did not know her piece rate was decreasing in part because the Defendant deliberately failed to disclose this aspect of the matrix. Such concealment is reprehensible. Had

[8] DLSE Opinion Letters 1993.02.22-1, 1988.06.15, 1988.03.28, 1994.06.17-1; 1988.07.14, 1987.02.17) (cited at paragraph 49.2.9.1 of the DLSE Manual, http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf) and generally available at http://www.dir.ca.gov/dlse/OpinionLetters-byDate.htm).

THIERMAN LAW FIRM, PC
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

the actual piece rate been posted on the check stub, and its calculation shown as required by law, Plaintiff could have taken action sooner. Either Plaintiff would have negotiated a different wage rate or she would have adjusted her overtime work when the salon was presumably very busy so as not to dilute her regular time rate of pay for times when she was required to report to work but were not busy. In other words, if she was told her real compensation per piece was decreasing, she would soon see when she was going to work overtime for nothing, and simply refuse to work those hours. Again, there is commonality and typicality because this was a common employer action aimed at all 2000 employees on the matrix system.

Finally, Rule 23(a)(4)'s requirement of adequate representation has three elements. The Court must inquire whether the named Plaintiffs have the ability and the incentive to represent the claims of the class vigorously, that they have obtained adequate counsel, and that the named Plaintiffs do not have interests adverse to the class. ***Andrews v. Bechtel Power Corp.***, 780 F.2d 124, 130 (1st Cir. 1985). There is nothing to indicate that the Plaintiff lacks the ability to serve as class representative. She states in her declaration that has read and agrees to the requirements of a class representative to put the interests of the class above her own. As demonstrated by the Declaration of Mark R. Thierman filed herewith, she has selected a lawyer with extensive experience in wage hour class action litigation with sufficient educational and professional attainments to justify acting as class counsel. Therefore, there is adequacy of representation.

III. PLAINTIFF HAS SATISFIED THE REQUIREMENTS OF RULE 23(b)(3) ALSO BECAUSE QUESTIONS OF LAW OR FACT COMMON TO THE MEMBERS OF THE CLASS PREDOMINATE OVER ANY QUESTIONS AFFECTING ONLY INDIVIDUAL MEMBERS, AND THAT A CLASS ACTION IS SUPERIOR TO OTHER AVAILABLE METHODS FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY

In addition to meeting the requirements of Rule 23(a), Plaintiff also maintains it meets the requirements for a Rule 23(b)(3) class. Specifically, the issues of law which are common to all

employees predominate over any facts and a class action is superior to both 2000 separate law suits and vastly superior to letting Defendants profit from their illegal conduct. Class action treatment is superior in this case to individual adjudications because none of the Rule 23(b)(3) criteria for judging superiority are in Defendant's favor. As stated in ***Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.***, 244 F.3d 1152, 1163 (9th Cir. 2001)

> A Rule 23(b)(3) class action must also be "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3) provides a non-exhaustive list of factors to consider in determining superiority:(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.

A. COMMON ISSUES PREDOMINATE

To say that common questions of law or fact predominate over individualized questions means that "the issues in the class action that are subject to generalized proof and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." ***Rutstein v. Avis Rent-a-Car***, 211 F.3d 1228, 1233 (11th Cir. 2000)(citations omitted). In deciding whether common questions predominate under Rule 23(b)(3), courts generally focus on whether there are common liability issues which may be resolved efficiently on a class-wide basis. See, e.g., ***Dura-Bilt Corp. v. Chase Manhattan Corp.***, 89 F.R.D. 87, 93 (S.D.N.Y. 1981). Not all questions of law or fact need be in common. ***Walco Invs. v. Thenen***, 168 F.R.D. 315 at 334 (D. Fla. 1996). The existence of a few individual questions will not negate the predominance of common issues. Id. Unanimity among class members is not required; rather, Rule 23(b)(3) only requires that the common issues predominate over the individual issues. Id.

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7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

The facts in this case are simply stated and the issues of law are universal for all class members: Defendant's payroll polices violate California law in three ways: 1) the paychecks do not indicate any location within California where they can be cashed without charge or discount and without delay, 2) the rate of overtime payment is incorrect and unlawful under California law and 3) there is no itemization of piece rate on the pay check as required by California law. The only requirements for being a member of the class is to have a pay check issued that doesn't state it can be cashed in California without discount or delay, work overtime under Defendant's so-called Matrix system, and 3) receive a pay stub that omits the piece rate information required by law. Every employee meets the first and third class, and most meet the second as well (the Matrix system is illegal only when applied to overtime hours).

With almost no individualized factual issues, common questions of law must predominate. Rule 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." ***Amchem Prods., Inc. v. Windsor***, 521 U.S. 591, 623, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997) (citation omitted). As stated in ***Hanlon v. Chrysler Corp.***, 150 F.3d 1011, 1022 (9th Cir. 1998) (internal quotation omitted).

> In contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship between the common and individual issues. When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.

B. CLASS ACTION TREATMENT IS SUPERIOR

An action may be maintained as a class action if the court finds that: (1) common questions of law and fact predominate over questions affecting individual members, and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); ***Valentino v. Carter-Wallace, Inc.***, 97 F.3d 1227, 1234 (9th Cir. 1996) "Implicit in the satisfaction of the predominance test is the notion that the

THIERMAN LAW FIRM, PC
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

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7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

adjudication of common issues will help achieve judicial economy." ***Zinser v. Accufix Research Inst., Inc.***, 253 F.3d 1180, 1189 (9th Cir. 2001) A class action is superior to individual claims in most cases, especially the claims by workers who fear retaliation if they sue individually for wages or working conditions. ***Six Mexican Workers v. Arizona Citrus Growers***, 904 F.2d 1301 (9th Cir. 1990). Wage practice cases are particularly well suited for class action treatment because they depend mostly on a set of facts applicable to every class member by virtue of the employer's conduct to all employees within a particular and identifiable group. See, e.g. ***Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc***, 244 F.3d 1152 (9th Cir. 2001).

Finally, none of the criteria suggested for judging superiority by Rule 23(b)(3) weigh against class treatment. The claims are sufficiently small that individual claimants are unlikely to pursue their own claims with competent counsel, and existing employees are unlikely to stand up and be counted in any event. Plaintiff is unaware of any management problems unique to this case as compared to many other class actions. Although the dollar amounts might be slightly different, the following statement in the Las Vegas Sands case applies here as well:

> This case involves multiple claims for relatively small individual sums. Counsel for the would-be class estimated that, under the most optimistic scenario, each class member would recover about $ 1,330. If plaintiffs cannot proceed as a class, some--perhaps most--will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover. "**Class actions** ... may permit the plaintiffs to pool claims which would be uneconomical to litigate individually." ***Phillips Petroleum Co. v. Shutts***, 472 U.S. 797, 809, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985); see also 7A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 1779 (2d. ed. 1986) ("If a comparative evaluation of other procedures reveals no other realistic possibilities, this [superiority] portion of Rule 23(b)(3) has been satisfied.").

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THIERMAN LAW FIRM, PC
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email laborlawyer@pacbell.net www.laborlawyer.net

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CONCLUSION

For these reasons, the court should certify the three classes requested.

Respectfully submitted,

By: /s/
Mark R. Thierman