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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

IN RE TACO BELL WAGE AND HOUR  
ACTIONS

Case No. 1:07-cv-01314-SAB  
ORDER SUSTAINING DEFENDANTS'  
OBJECTION TO DAMAGES TESTIMONY  
BY DR. JONATHAN WALKER

Currently before the Court is Defendants' objection to expert testimony during the jury trial of this action. Plaintiffs have called Defendants' expert in presenting their case in chief and Defendants' have objected to having the expert testify as to damages in this action.

**I.**  
**BACKGROUND**

This action is proceeding on claims that Taco Bell failed to provide meal and rest periods and pay meal period premiums in compliance with state law. Three classes have been certified in this action.

On December 11, 2015, following briefing and a Daubert hearing, this Court issued an order granting in part Defendants' motion to exclude testimony on damages from Plaintiffs' expert, Mr. Michael O'Brien. (ECF No. 547.) Defendants moved to exclude Mr. O'Brien from offering any expert testimony regarding the raw punch data as being flawed and unreliable. (Id.

1 at 3.) The Court found that Mr. O'Brien had the foundation of knowledge, skill, and experience  
2 to proffer an expert opinion for processing and providing calculations on raw time punch data.  
3 (Id. at 4.) The Court rejected Defendants' challenges to Mr. O'Brien's opinion regarding the raw  
4 time punch data. (Id. at 4-8.)

5         However, in the December 11, 2015 order, the Court found "[t]he methodology that Mr.  
6 O'Brien used for calculating the aggregate damages figures is flawed because he used an average  
7 rate of pay for the class that he then multiplied by the number of violative shifts to calculate  
8 aggregate damages. Mr. O'Brien has not provided any support from his industry for why he  
9 used an average rate of pay instead of the actual rates of pay when calculating the amount of  
10 damages." (Id. at 9.) "Mr. O'Brien's decision to calculate the aggregate damages using an  
11 average rate of pay for class members is one that falls "outside the range where experts might  
12 reasonably differ." (Id.)

13         The court further found that:

14         Based on Mr. O'Brien's testimony, there were some shifts in the raw time punch  
15 data that had pay rates that he felt were erroneous, because they were as high as  
16 \$100. It appears that Mr. O'Brien was concerned about shifts that had erroneous  
17 pay rates or no pay information, so he used the average rate of all shifts.  
18 However, Mr. O'Brien applied the average pay rate that he calculated to all shifts  
19 and not only the shifts with erroneous or no pay information. Again, there is no  
20 explanation before the Court as to why Mr. O'Brien did not just calculate the  
21 damages figures based on the actual rates of pay for any violations that were  
22 reflected in the raw punch data. There is no explanation before the Court as to  
23 why using an average rate of pay for all of the violative shifts is an appropriate  
24 method of calculating the damages for violative shifts in this case. Therefore, the  
25 Court finds that the methodology underlying Mr. O'Brien's damages analysis  
26 does not meet the reliability threshold set forth in FRE 702 and Daubert.

27         Therefore, Mr. O'Brien's dollar figures of his aggregate damages analysis for the  
28 rest break premiums, meal period premiums, and underpaid meal premium classes  
for damages pursuant to California Labor Code Section 226.7 must be excluded.

29 (Id. at 10.)

30         A jury trial in this action commenced on February 22, 2016. During their case in chief,  
31 Plaintiffs called Defendants' expert, Dr. Jonathan Walker. Plaintiffs elicited testimony from Dr.  
32 Walker as to the raw punch data that was analyzed in this action without objection by  
33 Defendants. Defendants did object when Plaintiffs' line of questioning moved into the area of  
34 damage calculations. Defendants contend that since Dr. Walker's testimony was based on the

1 raw punch data as analyzed by Plaintiff's expert, it is not reliable and will not assist the jury. On  
2 this basis, Defendants seek to preclude Plaintiffs from questioning Dr. Walker regarding damage  
3 calculations included in his expert report.

4 **II.**

5 **EVIDENTIARY HEARING TESTIMONY**

6 On March 1, 2016, the Court excused the jury early and conducted an evidentiary hearing  
7 to determine if Dr. Walker could testify to the damages estimate set forth in his expert report.  
8 Dr. Walker testified that he was retained by Defendants to give an opinion in four areas and  
9 ultimately a fifth. He was to develop an opinion as to 1) whether the raw punch data was a  
10 reliable basis to determine the number of instances in which employees of corporate owned Taco  
11 Bell restaurants from 2003 through 2014 were not provided rest breaks prior to the fifth hour of  
12 work when they worked shifts longer than six hours;<sup>1</sup> 2) whether raw punch data was reliable for  
13 developing a list of instances in which employees who worked for more than six hours and less  
14 than seven hours were offered twenty minutes of net paid rest or were offered at least two ten  
15 minute breaks; 3) whether raw punch data was consistent with a uniform Taco Bell policy to  
16 only offer a meal break after the fifth hour of work for employees who worked more than six  
17 hours; 4) whether raw punch data was consistent with a uniform Taco Bell policy of only  
18 offering twenty minute, or alternately two ten minute, rest periods for employees working six to  
19 seven hours; 5) the reliability of Mr O'Brien's counts of the number of instances in which  
20 employees who worked these types of shifts did not receive timely meal or rest periods; and 6) to  
21 perform damage calculations in anticipation of damage calculations from Plaintiffs based on  
22 certain methodology that was provided to him.

23 This hearing concentrated on Taco Bell's retaining Dr. Walker to "ascertain and develop  
24 an opinion about the reliability of Mr. O'Brien's counts of the numbers of instances in which  
25 there were employees" who did not get paid for timely meal periods or did not get twenty  
26 minutes of net rest. In developing his opinion, Dr. Walker tabulated the raw punch data and

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28 <sup>1</sup> All of the tasks assigned to Dr. Walker related to employees who worked for corporate owned Taco Bell  
restaurants from 2003 to 2014 unless otherwise noted.

1 conducted various analyses related to the data. In assessing the data, Dr. Walker determined that  
2 the raw punch data could not be relied upon to determine the number of instances that violations  
3 alleged in this action occurred. In developing an opinion in an action such as this, an economist  
4 would not rely on raw punch data to measure damages. Dr. Walker only used the raw punch data  
5 because he was instructed to do so in anticipation of the damage model that would be proffered  
6 by Plaintiffs' expert.

7 Dr. Walker testified that raw punch data is not a reliable basis to calculate damages for  
8 failure to provide rest breaks or meal periods and something he would not do nor use to form his  
9 expert opinion. Dr. Walker testified that the calculation that he did was not a damage estimate,  
10 and throughout his report he asserted that the analysis was not accurate.<sup>2</sup> Dr. Walker testified  
11 that he would not offer an opinion based on the premise that the raw punch data established  
12 violations because the raw punch data is clearly not accurate.

13 While damage calculations were provided in his report, they are the opposite of his expert  
14 opinion. None of the damage figures included in his report reflect an accurate opinion by him of  
15 damages in this action. Dr. Walker testified that it is very clear from his expert report that one  
16 cannot ascertain damages reliably based on the raw punch data. Dr. Walker opined that one  
17 could get a more accurate damages figure by relying on payroll verification reports, but even if  
18 the payroll verification reports were used, he would not put his name on any damages estimate  
19 because he could not determine whether there were missing rest or meal periods from looking at  
20 any of the records in this action.

## 21 II.

### 22 LEGAL STANDARD

23 Initially, Defendants' objection focused on Plaintiffs' ability to call the defense expert  
24 witness in Plaintiffs' case in chief to testify regarding damages. "Decisions regarding the mode  
25 and order of witness questioning lie within the district court's broad discretion." Nat'l R.R.  
26 Passenger Corp. v. Certain Temp. Easements Above R.R. Right Of Way In Providence, Rhode  
27 Island, 357 F.3d 36, 42 (1st Cir. 2004); see also Fed. R. Evid. 611(a) ("The court should exercise

28 <sup>2</sup> The Court has marked the F.R.C.P. Rule 26(a)(2)(B) Report of Jonathan Walker as Court's Exhibit No. 3.

1 reasonable control over the mode and order of examining witnesses and presenting evidence. . .  
2 .”). There is no per se rule prohibiting a party from calling the opposing party’s expert in their  
3 case in chief. Kerns v. Pro-Foam of S. Alabama, Inc., 572 F.Supp.2d 1303, 1309 (S.D. Ala.  
4 2007). Courts have found that the weight of authority favors allowing a party to introduce  
5 opinion testimony of the opposing party’s expert during their case in chief. De Lage Landen  
6 Operational Servs., LLC v. Third Pillar Sys., Inc., 851 F.Supp.2d 850, 853 (E.D. Pa. 2012).  
7 Alternatively, Courts have also found that there are reasons to preclude such testimony and such  
8 rulings have been upheld as not an abuse of discretion. See Holderbaum v. Carnival Corp., No.  
9 13-24216-CIV, 2015 WL 4945736, at \*5 (S.D. Fla. Aug. 20, 2015)(citing issues of practicality,  
10 logistics and ethics).<sup>3</sup> However, while the Court is mindful of Defendants’ initial objections that  
11 a party cannot call the opposing party’s expert in their case in chief, the Court decides this issue  
12 based upon its gatekeeping function of determining what is admissible evidence at trial. Fed. R.  
13 Evid. 104.

### 14 III.

### 15 ANALYSIS

16 In addressing the objection to Plaintiffs calling Dr. Walker in their case in chief,  
17 Defendants argue that Dr. Walker was not retained to offer an opinion on damages, but to offer  
18 rebuttal evidence based upon the expected testimony of Plaintiffs’ expert. Defendants contended  
19 that Dr. Walker would testify that the damage estimates are not his opinion of damages in this  
20 action and are based on flawed data and methodology.

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22 <sup>3</sup> Some of the courts that have addressed this issue share a concern of the “explosive” unfair prejudice that  
23 would likely result if the jury were to discover that the expert called by one party had originally been hired by the  
24 other. See Peterson v. Willie, 81 F.3d 1033, 1037 (11th Cir.1996); House v. Combined Ins. Co. of America, 168  
25 F.R.D. 236, 243 (N.D. Iowa 1996); Rubel v. Eli Lilly Co., 160 F.R.D. 458, 460 (S.D.N.Y.1995). Unlike the facts of  
26 this case, these cases are generally raised pretrial, in a motion in limine. Here, the explosive nature is reduced as  
27 Defendants’ expert was called by Plaintiffs without objection. An additional theme permeates some of these cases  
28 which is this: “Federal Rules of Civil Procedure reflect a view that it would be unfair to allow a party to benefit  
from the effort and expense incurred by the other in preparing its case. See e.g., Ager v. Jane C. Stormont Hospital,  
622 F.2d 496, 502 (10th Cir.1980). In other words, the general policy, which is not without exceptions, is that each  
side should prepare its own case at its own expense.” Rubel v. Eli Lilly Co., 160 F.R.D. 458, 460 (S.D.N.Y.1995).  
What these and other cases show is that one should not rely as a general and well-established rule that a party can  
call an opposing party’s expert. A Court is required assess each case based upon the facts and circumstances before  
it and decide the matter.

1 In this instance, Dr. Walker has been called by Plaintiffs' counsel and has testified as to  
2 his opinion of the raw punch data. However, it is clear from the testimony of Dr. Walker and his  
3 Fed. R. Civ. P. Rule 26(a)(2)(B) report that his opinion is that the raw punch data is not an  
4 accurate and reliable basis to determine if the violations alleged in this action occurred.

5 Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony  
6 in federal court.

7 A witness who is qualified as an expert by knowledge, skill, experience, training,  
8 or education may testify in the form of an opinion or otherwise if: (a) the expert's  
9 scientific, technical, or other specialized knowledge will help the trier of fact to  
10 understand the evidence or to determine a fact in issue; (b) the testimony is based  
11 on sufficient facts or data; (c) the testimony is the product of reliable principles  
12 and methods; and (d) the expert has reliably applied the principles and methods to  
13 the facts of the case.

14 "Shaky but admissible evidence is to be attacked by cross examination, contrary  
15 evidence, and attention to the burden of proof, not exclusion. In sum, the trial court must assure  
16 that the expert testimony 'both rests on a reliable foundation and is relevant to the task at hand.'  
17 " Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010), as amended (Apr. 27, 2010). The court  
18 is required "to admit or exclude evidence based on its scientific reliability and relevance." Ellis  
19 v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011).

20 Dr. Walker testified that the damage calculations are not his opinion because they do not  
21 meet the standards for expert testimony. Dr. Walker developed the estimates based upon the  
22 flawed procedure developed by Plaintiffs' expert, and an economist would not rely on the data  
23 provided to determine damages in this type of action. Dr. Walker stated that the damage  
24 estimates are not based on reliable data. As an economist, he would not rely on raw punch data  
25 in developing an opinion as to damages. In looking at the raw punch data, many of the records  
26 did not contain a pay field showing the hourly rate. Some of the fields contained numbers that  
27 were too large to be an hourly rate. Dr. Walker was directed to assume those numbers were  
28 weekly pay numbers so he divided them by 40 to get a more plausible number.

29 In deciding the admissibility of expert testimony, it is not the correctness of the expert's  
30 conclusions but the soundness of his methodology that is considered. Estate of Barabin v.  
31 AstenJohnson, Inc., 740 F.3d 457, 463 (9th Cir. 2014). Dr. Walker testified that an economist

1 would not use raw punch data to develop an opinion on damages and, if he had been asked to  
2 provide a damages estimate based upon the data that was provided, he would not have accepted  
3 the assignment. Dr. Walker stated that the data and methodology he was directed to use here are  
4 not the type that would lead to a reliable opinion on damages. The Court finds that the  
5 information sought to be elicited from the expert during this trial is not his opinion based on  
6 sufficient facts or data, nor does Dr. Walker believe that it is the product of reliable principles  
7 and methods.<sup>4</sup> For these reasons, the opinion on damages does not meet the threshold  
8 requirements of admissibility under Rule 702.

9 While courts do exercise their discretion to allow a party to call the opposing party's  
10 expert at trial, the cases generally deal with actions in which both sides have obtained an expert  
11 opinion on a matter at issue in the case. In these cases, it is not disputed that the expert  
12 testimony being elicited is the opposing party's expert opinion on the issue at hand. Kerns, 572  
13 F.Supp.2d at 1304 (cause of fire); Nat'l R.R. Passenger Corp., 357 F.3d at 42 (fair market value);  
14 De Lage Landen Operational Servs., 851 F.Supp.2d at 853 (whether unjust enrichment damages  
15 were calculable and provable). Here, the opinion sought to be elicited from Dr. Walker is not his  
16 opinion as to the damages in this action, as he would not use such methodology to access  
17 damages. In this instance, the methodology used was solely to rebut the perceived testimony of  
18 Plaintiffs' expert witness. Dr. Walker never provided an opinion as to damages using a  
19 methodology to which he would subscribe. The Court finds that the evidence which Plaintiffs  
20 seek to admit through Dr. Walker in this action is distinguishable from those cases in which  
21 courts have allowed the plaintiff to call the opposing party's expert, as those cases involve  
22 experts who are opining an opinion which they believe and which they are in support.

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25 <sup>4</sup> In making these findings as to Dr. Walker and based upon the record before it, the Court is focusing on that the fact  
26 that this expert would not make this opinion but relied on parameters given to him by others- including Mr. O'Brien  
27 and counsel for the Defendants. His opinion was given in the context of a rebuttal. The fact that he arrives at figures  
28 does not say this is his opinion as to what damages should be. However, it is clear to the Court that Dr. Walker, as  
an economist, does not believe that he could rely on this data and methodology in developing an opinion on  
damages. To hold otherwise as to Dr. Walker would force him to testify to an opinion to which he does not believe.  
This aspect, including other reasons noted below, is another independent basis for exclusion of the testimony under  
Fed. R. Evid. 403 as misleading and confusing to the jury.

1 Here, Dr. Walker was not retained to develop an estimate of damages, but to determine if  
2 the raw punch data was a reliable manner of determining certain issues. In making these  
3 determinations he was requested to provide a damage analysis based on the data that was being  
4 relied on by Plaintiffs. However, throughout Dr. Walker's report, he opines that the raw punch  
5 data is not reliable and he noted the inconsistencies in the data. The damage estimate for late  
6 meal periods is prefaced by the statement "notwithstanding that late meal periods were very  
7 unusual and that the pattern of recorded meal period varied based on circumstances. . . ." He  
8 then stated the amount of damages under the assumption that a missing or late punch in the raw  
9 punch data showed liability. The Court finds that the testimony sought to be elicited by  
10 Plaintiffs as to damages is not Dr. Walker's expert opinion of the class damages in this action.  
11 At no time did Dr. Walker offer an opinion as to what damages should be based upon principles  
12 and methods he accepts as reliable.<sup>5</sup> If he did, the analysis of this Court would be much  
13 different.

14 Finally, the Court finds that the evidence should be excluded under Rules 401, 402 and  
15 403 of the Federal Rules of Evidence. Evidence is relevant if it has any tendency to make a fact  
16 more or less probable than it would be without the evidence and it is of consequence in  
17 determining the action. Fed. R. Evid. 401. Relevant evidence is admissible unless otherwise  
18 provided by the Federal Rules of Evidence. Fed. R. Evid. 402. Rule 403 provides that "[t]he  
19 court may exclude relevant evidence if its probative value is substantially outweighed by a  
20 danger of one or more of the following: unfair prejudice, confusing the issues, misleading the  
21 jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Fed. R. Evid.  
22 403.

23 To the extent that the damage estimates have some relevance in this action, Dr. Walker  
24 will testify that they are not based on reliable data, do not reflect his opinion as to the damages in  
25 this action, and were not developed in a manner consistent with his training as an economist.  
26 Allowing this evidence to be presented to the jury through Dr. Walker and then having Dr.

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28 <sup>5</sup> In fact, in seeking to exclude Plaintiff's expert, Mr. O'Brien, Defendant relied heavily on Dr. Walker's analysis to show why Plaintiff's expert methodology was flawed and why his opinion should be excluded.



1 Walker testify to the unreliability of the evidence provides a substantial risk of confusing the  
2 issues and misleading the jury. For this reason, the Court finds that the probative value of the  
3 evidence is substantially outweighed by the danger of confusing the issues and misleading the  
4 jury. Therefore the evidence is also excluded pursuant to Rule 403.

5 **IV.**

6 **CONCLUSION AND ORDER**

7 Based on the foregoing, IT IS HEREBY ORDERED that Defendants' objection to the  
8 testimony on damages sought to be offered through Dr. Walker is SUSTAINED.

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10 IT IS SO ORDERED.

11 Dated: March 2, 2016

  
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UNITED STATES MAGISTRATE JUDGE

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