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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SANDY BELL and MARTIN GAMA,  
individually, and on behalf of  
other members of the general  
public similarly situated, and  
as aggrieved employees pursuant  
to the Private Attorneys General  
Act ("PAGA"),  
  
Plaintiffs,  
  
v.  
  
HOME DEPOT U.S.A., a Delaware  
corporation, et al.,  
  
Defendants.

MICHAEL HENRY, on behalf of  
himself, all others similarly  
situated, and the general  
public,  
  
Plaintiff,  
  
v.  
  
HOME DEPOT U.S.A., INC., a  
Delaware corporation; and DOES  
1-50, inclusive,  
  
Defendants.

Case No. 2:12-CV-02499 JAM-CKD

**ORDER GRANTING DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

This matter is back before the Court on Home Depot U.S.A.,  
Inc., and John Brooks' ("Home Depot") motion for partial summary

1 judgment on Plaintiffs' derivative claims for penalties under  
2 California Labor Code sections 203 and 226.<sup>1</sup> For the reasons set  
3 forth below, Home Depot's motion for partial summary judgment is  
4 granted.

5  
6 I. FACTUAL AND PROCEDURAL BACKGROUND

7 Home Depot previously sought, and obtained, summary  
8 adjudication on several of Plaintiffs' claims in this action. Mot.  
9 for Partial Summ. J., ECF No. 72; Order re Summ. J., ECF No. 113.  
10 However, the Court denied the motion for summary judgment on  
11 Plaintiffs' claim that Home Depot failed to pay all required  
12 overtime to employees who worked shifts over eight hours that  
13 spanned two workdays. Order re Summ. J. The Court subsequently  
14 granted class certification for "[a]ll persons who worked for  
15 Defendant Home Depot U.S.A., Inc. in California as a non-exempt,  
16 hourly paid supervisor at any time from August 14, 2009 until the  
17 date of [the class certification] order who worked at least one  
18 overnight shift that crossed midnight of more than eight hours, and  
19 who, as a result, was not paid overtime for the hours worked over  
20 eight hours during such overnight shift." Order re Class  
21 Certification, ECF No. 110. The Court also certified most of the  
22 derivative claims under the UCL and California Labor Code, to which  
23 Home Depot had not objected. The Court denied certification of  
24 Plaintiffs' derivative claim under section 226(e). Transcript re  
25 Class Certification, ECF No. 105, at 57-58.

26 On September 12, 2016, the Court consolidated Henry v. Home

27  
28 <sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for July 25, 2017.

1 Depot U.S.A., Inc., No. 2:16-cv-02102-MCE-AC ("Henry")—which had  
2 been transferred to the Eastern District from the Northern District  
3 of California—with this action, Bell v. Home Depot U.S.A., Inc.,  
4 No. 2:12-cv-02499-JAM-CKD.

5 Home Depot now seeks summary adjudication on Plaintiffs'  
6 derivative claims for penalties under sections 203 and 226 of the  
7 California Labor Code.<sup>2</sup>

8  
9 II. OPINION

10 A. Underlying Claim

11 It is undisputed that Home Depot defines its workday as the  
12 calendar day beginning at 12:00AM and ending at 11:59PM.  
13 Plaintiffs claim that Home Depot's failure to pay class members  
14 overtime wages for overnight shifts that exceeded eight hours  
15 violates section 510's daily overtime rules.

16 In denying Home Depot's motion for summary judgment on the  
17 midnight overtime claim, the Court adopted the Henry court's  
18 reasons for denying summary judgment on the same issue. See Order  
19 re Summ. J., Exh. A at 19 & 28-29; Def. Exh. E, "Order Denying  
20 Defendant's Motion for Partial Summary Judgment" in Henry ("Henry  
21 SJ Order"), ECF No. 147-5. The Henry court summarized the law as  
22 follows:

23 The California Labor Code affords an employer  
24 significant flexibility in the designation of a  
25 workweek and workday. However, the employer's  
26 designation must not be designed to evade paying  
overtime. An employer may not engage in subterfuge or  
artifice designed to evade the overtime laws.

27  
28 <sup>2</sup> All further section references are to the California Labor Code  
unless otherwise indicated.

1 Henry SJ Order at 3 (citing Cummings v. Starbucks Corp., No. cv 12-  
2 06345-MWF FFMX, 2013 WL 2096435, at \*4 (C.D. Cal. May 14, 2013);  
3 Seymore v. Metson Marine, Inc., 194 Cal. App 4th 361, 370 (2011);  
4 Jakosalem v. Air Serv Corp., No. 13-cv-05944-SI, 2014 WL 7146672,  
5 at \*4 (N.D. Cal. Dec. 15, 2014); Huntington Mem'l Hosp. v. Super.  
6 Ct., 131 Cal. App. 4th 893, 910 (2005)) (quotation marks omitted).  
7 It then adopted and applied the Jakosalem court's holding that  
8 although employers are not "required in all instances to define  
9 each employee's workday to begin with that employee's shift," an  
10 employer may not implement a workday "designed primarily to evade  
11 overtime compensation." Id. (citing Jakosalem, 2014 WL 7146672).  
12 In deciding Home Depot's initial motion for summary judgment, this  
13 Court followed Henry and held it could "not conclude as a matter of  
14 law that [Home Depot's] workday designation was not designed to  
15 evade overtime law since there [were] disputed issues of material  
16 fact, and the evidence before the Court [gave] rise to competing  
17 inferences." Order re Summ. J., Exh. A at 29. The overtime claim  
18 and derivative claims thus remain in dispute.

19 B. Applicable Law

20 Home Depot argues that a good faith dispute with respect to  
21 the overtime claim precludes imposition of penalties under section  
22 203 and 226(e).

23 Section 203 imposes penalties on an employer that willfully  
24 fails to pay an employee wages due at the time the employee quits  
25 or is discharged. "A willful failure . . . occurs when an employer  
26 intentionally fails to pay wages to an employee when those wages  
27 are due." Cal. Code Reg. tit.8, § 13520. "However, a good faith  
28 dispute that any wages are due will preclude imposition of waiting

1 time penalties under Section 203." Id.

2 A "good faith dispute" that any wages are due occurs  
3 when an employer presents a defense, based in law or  
4 fact which, if successful, would preclude any  
5 recover[y] on the part of the employee. The fact that  
6 a defense is ultimately unsuccessful will not preclude  
7 a finding that a good faith dispute did exist.  
8 Defenses presented which, under all the circumstances,  
9 are unsupported by any evidence, are unreasonable, or  
10 are presented in bad faith, will preclude a finding of  
11 a "good faith dispute."

12 Id. Similarly, Section 226(e) imposes penalties when an employee  
13 suffers injury due to the "knowing and intentional failure" of an  
14 employer to provide accurate wage statements. Courts have extended  
15 the "good faith dispute" rule to Section 226, "even though Section  
16 226 contains a 'knowing and intentional' standard rather than the  
17 'willfully' standard of Section 203." Woods v. Vector Mktg. Corp.,  
18 No. C-14-0264 EMC, 2015 WL 2453202, at \*3 (N.D. Cal. May 22, 2015).  
19 Thus, penalties under either section are precluded if there is a  
20 good faith dispute over whether wages are due.

21 C. Good Faith Dispute

22 The Court finds there is a good faith dispute warranting  
23 summary judgment on the section 203 and 226 derivative claims.  
24 The factual disputes and proffered evidence regarding the overtime  
25 claim are sufficient for determining the instant motion. However,  
26 the Court does not express an opinion on Home Depot's asserted  
27 legal defenses to the underlying claim and this Order should not be  
28 read as such.

29 The Court denied summary judgment on the midnight overtime  
30 claim because triable issues of fact remained for a jury to  
31 determine. The evidence now before the Court supports the  
32 conclusion that Home Depot, at minimum, has a good faith factual

1 defense to the overtime wages claim. In contrast, Plaintiffs have  
2 failed to show that this defense is unsupported, unreasonable, or  
3 presented in bad faith.

4 Although Home Depot has not submitted direct evidence of a  
5 *bona fide* business purpose for its initial workday designation,  
6 Home Depot has presented circumstantial evidence tending to show  
7 the company did not design the workday for the purpose of evading  
8 overtime wages. Home Depot's declarant, Christina Barnaby,  
9 Director of Human Resources, attests that Home Depot established  
10 its workday in the 1980s, that this designation has never changed,  
11 that this designation has always applied on a company-wide basis,  
12 that the first California store opened in 1985, and that Home Depot  
13 had never, prior to this litigation, analyzed the impact that its  
14 workday definition has on the overtime the company saved or paid.  
15 Barnaby Decl., ECF No. 146-1; see also Barnaby Depo. III at 18:5-7,  
16 19:16-19 ("A: [The workday] was established when we were the  
17 company opened its first store doors, which was prior to  
18 1981. . . . Q: When did Home Depot first have stores in a state  
19 that paid overtime on a daily basis? A: When we opened stores in  
20 California."); Jakosalem, 2014 WL 7146672, at \*6 ("FLSA has no  
21 provision requiring daily overtime pay."). This history of  
22 company-wide practice is relevant because it shows Home Depot  
23 defined the workday before it was subject to daily overtime laws in  
24 California and maintains the same workday in places that do not  
25 regulate daily overtime. The fact that Home Depot had not analyzed  
26 the impact of the workday definition on overtime savings or  
27 payments further indicates a lack of purposeful design.  
28 Additionally, Home Depot's workday lines up with the default

1 workday in the California DLSE Manual (§ 48.1.3.1), which also  
2 suggests neutrality. These facts constitute substantial evidence  
3 in support of Home Depot's defense that the company did not define  
4 the workday for the purpose of evading its daily overtime  
5 obligations.

6 Plaintiffs have not shown that Home Depot's defense is  
7 unsupported, unreasonable, or presented in bad faith. See Cal.  
8 Code Reg. tit.8, § 13520; Woods, 2015 WL 2453202, at \*4 ("Here,  
9 this Court has already found that the classification issue raises  
10 genuine disputes of material fact. In turn, Plaintiffs have  
11 pointed to no cognizable evidence that raises a genuine material  
12 dispute of fact regarding whether Vector's defenses are unsupported  
13 by any evidence, unreasonable, or presented in bad faith so as to  
14 preclude a finding of a good faith dispute.") (citations and  
15 quotation marks omitted). Plaintiffs' objections to Home Depot's  
16 evidence are also insufficient to defeat summary judgment.

17 On a motion for summary judgment, the Court looks to the facts  
18 contained in the cited evidence, not the form of that evidence.  
19 Norse v. City of Santa Cruz, 629 F.3d 966, 973 (9th Cir. 2010). If  
20 the content would be admissible at trial, the Court may consider it  
21 for the summary judgment motion. Fraser v. Goodale, 342 F.3d 1032,  
22 1036-37 (9th Cir. 2003).

23 Plaintiffs' objections to Ms. Barnaby's Declaration based on  
24 hearsay and lack personal knowledge do not preclude the Court's  
25 consideration of her statements. See Pls.' Objections to Barnaby  
26 Decl., ECF No. 153-3. Home Depot's declarant, Ms. Barnaby, is the  
27 Director of Human Resources Operations and her declaration "is  
28 based on her personal knowledge and/or review of pertinent Home

1 Depot documents and records." See Barnaby Decl. ¶ 1. Although her  
2 statements concerning the history of the company's workday  
3 definition are based, in part, on hearsay, they are also based on  
4 her personal knowledge of company policies and practices. See  
5 Barnaby Depo. III at 16:21-18:7, 40:1-22; Def. Rep. to Pls.' Resp.  
6 to Statement of Undisputed Facts, ECF No. 156-2. Additionally, if  
7 she cannot testify to those facts at trial, the facts still appear  
8 to be subject to other forms of proof—i.e. testimony from her  
9 predecessors—that would be admissible. The Court otherwise finds,  
10 contrary to Plaintiffs' assertions, Ms. Barnaby's declaration is  
11 consistent with the deposition testimony Plaintiffs submitted. See  
12 Pls.' Objections to Barnaby Decl; Barnaby Depo. III. The facts  
13 attested to are thus proper grounds for granting summary judgment.

14 In sum, although a jury presented with the totality of the  
15 evidence may still find Home Depot liable on the overtime claim—  
16 hence, the reason the Court denied summary judgment—Home Depot has  
17 presented a good faith defense to such liability. Summary judgment  
18 on the section 203 and 226 penalties claims is thus appropriate.

19  
20 III. ORDER

21 For the reasons set forth above, the Court GRANTS Home Depot's  
22 Motion for Summary Judgment.

23 IT IS SO ORDERED.

24 Dated: September 7, 2017

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26   
27 JOHN A. MENDEZ,  
28 UNITED STATES DISTRICT JUDGE