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17 *Attorneys for Plaintiffs, ROBERT WESTFALL, DAVID E. ANDERSON, LYNN BOBBY, and*
 18 *DAVID ELLINGER*

19 UNITED STATES DISTRICT COURT
 20 EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

21 ROBERT WESTFALL, DAVID E.
 22 ANDERSON, LYNN BOBBY, and
 DAVID ELLINGER,

23 Plaintiffs,

24 v.

25 BALL METAL BEVERAGE
 26 CONTAINER CORP.,

27 Defendant.
 28

Case No: 2:16-cv-02632-KJM-CKD

**JOINT REPORT AND STIPULATION RE
 CLASS DISCOVERY; AND ORDER**

1 Plaintiffs ROBERT WESTFALL, DAVID E. ANDERSON, LYNN BOBBY, DAVID
2 ELLINGER (hereinafter, "Plaintiffs"), and Defendant BALL METAL BEVERAGE
3 CONTAINER CORP. (hereinafter, "Defendant") (hereinafter, collectively, the "Parties"),
4 hereby stipulate as follows:

5 WHEREAS, on September 25, 2018 (ECF No. 83) the Court issued an Order stating as
6 follows:

- 7 • Within fourteen (14) days of the Court's ruling on Plaintiffs' pending
8 Motion for Reconsideration (ECF No.[59], Defendant shall provide
9 Plaintiffs with a proposed class discovery plan, to include proposals
10 regarding the number, length, and anticipated topics of class member
11 depositions;
- 12 • Within fourteen (14) days of receiving the Defendant's plan, Plaintiffs
13 shall give a written response indicating whether they agree to the plan or
14 whether, if they dispute any aspect of it, and the factual basis for any such
15 dispute;
- 16 • As necessary, the Parties shall obtain input from experts qualified in
17 relevant subject matters (such as statistics) in developing their discovery
18 plan proposals;
- 19 • Following Plaintiffs' response, the Parties shall further confer, if needed,
20 and within fourteen (14) days of such response shall file a joint report to
21 the Court regarding aspects of a discovery plan that are agreed-upon, as
22 well as a description of any disputes that the Parties desire to submit to the
23 Court for resolution;
- 24 • As part of the Parties' joint submission, they shall propose a schedule for
25 completing such discovery, including any modifications to the present pre-
26 trial schedule that may be needed;
- 27 • During the course of such additional discovery, the Parties shall confer
28 regarding a reasonable time for Plaintiffs to provide a "trial plan" if one if

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agreed as being needed, and whether any motions are required in such regard; and

- The Parties’ proposals regarding such discovery plans will be for purposes of *discovery only*, and shall be without prejudice as to the Parties’ ability to seek appropriate relief from the Court to modify such plans, to seek additional discovery, to seek protective orders, for Plaintiffs to take the position that no “trial plan” is needed, for Defendant to seek to compel a “trial plan”, for Defendant to dispute the validity or adequacy of any “trial plan” (or lack thereof) under applicable law and/or for Defendant to take the position that any certified class in this action should be modified or decertified, or for the Parties to seek any other appropriate relief.”;

WHEREAS, on January 15, 2019 (ECF No. 85) the Court issued an order on the Reconsideration Motion;

WHEREAS, as a result of its ruling on the Reconsideration Motion, on January 15, 2019 (ECF No. 86) the Court issued an Order on the Joint Stipulation Regarding Class Discovery and Trial Plan by the Parties:

- Within fourteen (14) days of the Court’s ruling on Plaintiffs’ pending Motion for Reconsideration (ECF No.[59], Defendant shall provide Plaintiffs with a proposed class discovery plan, to include proposals regarding the number, length, and anticipated topics of class member depositions;
- Within fourteen (14) days of receiving the Defendant’s plan, Plaintiffs shall give a written response indicating whether they agree to the plan or whether, if they dispute any aspect of it, and the factual basis for any such dispute;
- As necessary, the Parties shall obtain input from experts qualified in relevant subject matters (such as statistics) in developing their discovery plan proposals;

- 1 • Following Plaintiffs’ response, the Parties shall further confer, if needed,
2 and within fourteen (14) days of such response shall file a joint report to
3 the Court regarding aspects of a discovery plan that are agreed-upon, as
4 well as a description of any disputes that the Parties desire to submit to the
5 Court for resolution;
- 6 • As part of the Parties’ joint submission, they shall propose a schedule for
7 completing such discovery, including any modifications to the present pre-
8 trial schedule that may be needed;
- 9 • During the course of such additional discovery, the Parties shall confer
10 regarding a reasonable time for Plaintiffs to provide a “trial plan” if one if
11 agreed as being needed, and whether any motions are required in such
12 regard; and
- 13 • The Parties’ proposals regarding such discovery plans will be for purposes
14 of *discovery only*, and shall be without prejudice as to the Parties’ ability
15 to seek appropriate relief from the Court to modify such plans, to seek
16 additional discovery, to seek protective orders, for Plaintiffs to take the
17 position that no “trial plan” is needed, for Defendant to seek to compel a
18 “trial plan”, for Defendant to dispute the validity or adequacy of any “trial
19 plan” (or lack thereof) under applicable law and/or for Defendant to take
20 the position that any certified class in this action should be modified or de-
21 certified, or for the Parties to seek any other appropriate relief.”;

22 WHEREAS, on January 28, 2019, Defendant provided Plaintiffs with a proposed
23 discovery plan, including input from an expert qualified in statistical class sampling, that based
24 on the expert’s opinion, 121 class members randomly selected from the total class of 169
25 individuals must be deposed to meet the minimum requirement to provide statistically
26 significant evidence that there is liability for violation of California meal or rest period rules on
27 a class-wide basis, as set forth in *Duran v. U.S. Bank Nat. Assn.*, 59 Cal.4th 1, 13 (Cal. 2014);

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1 WHEREAS, on February 11, 2019, Plaintiffs provided a written response to Defendant's
2 proposed discovery plan, absent input from any expert, that only 10% of the putative class (total
3 of 16 persons) should be deposed;

4 WHEREAS, on February 19, 2019, Defendant provided Plaintiffs with a rebuttal expert
5 report responding to Plaintiffs' proposed discovery plan, taking the position that Plaintiffs'
6 proposal was wholly inadequate as Plaintiffs' proposed sample size was less than the size
7 established precedent for statistical sampling to establish wage and hour violations across a
8 putative class has already found too small such that it violates a defendant's due process rights;

9 WHEREAS, accordingly, a discovery dispute has arisen between the Parties concerning
10 the number, extent, and nature of class member depositions to be taken;

11 WHEREAS, on February 25, 2019, the Parties, through counsel, met and conferred by
12 telephone regarding the dispute over the method and percentage of class sampling, and in turn,
13 the number of depositions to be conducted of the putative class, to comply with Defendant's due
14 process rights. The Parties, through counsel, were unable to resolve such discovery dispute
15 through meet and confer;

16 WHEREAS, the Parties agree that resolution of the discovery dispute by the Court is
17 necessary to determine the exact nature and scope of the additional discovery, including class
18 member depositions, that is warranted;

19 NOW THEREFORE, pursuant to the Court's Order on the Joint Stipulation Regarding
20 Class Discovery and Trial Plan (ECF No. 86), the Parties hereby submit the Joint Report,
21 regarding aspects of a discovery plan that are agreed-upon, describing their respective positions
22 on the discovery dispute, and proposing a schedule for completing such discovery:

23 **1. Aspects of the discovery plan that are agreed upon:**

24 The Parties agree that additional discovery, including class member depositions is
25 warranted. The Parties further agree that they have met and conferred as required by Civil Local
26 Rule 251(b) in a good faith effort to resolve the outstanding dispute regarding the additional
27 discovery without court action. Pursuant to the Court's February 7, 2017 "Status (Pretrial
28 Scheduling) Order: Class Certification Phase" (ECF No. 015) (directing that all discovery

1 motions be filed with the assigned magistrate) and its December 14, 2018 order reassigning this
2 matter to Judge Carolyn K. Delaney (ECF No. 084), the Parties agree to submit the discovery
3 dispute referenced herein for resolution by Judge Delaney pursuant to Civil Local Rule 251. For
4 purposes of compliance with Local Rule 251(b) (Requirement of Confering), the Parties
5 stipulate that they have met and conferred. Pursuant to Judge Kimberley J. Mueller’s Standing
6 Order regarding “Discovery matters (including motions) and other Magistrate Judge Referrals”
7 (hereinafter “Judge Mueller’s Standing Order”), the Parties agree that Judge Delaney may
8 modify the discovery cutoff to allow resolution of the discovery dispute. The Parties agree that
9 following Judge Delaney’s resolution of such dispute, the Court should set a Case Management
10 Conference to re-set pre-trial deadlines. The Parties agree to the following schedule for a
11 discovery motion before Judge Delaney:

- 12 • Deadline for Defendant to provide its draft of a Joint Statement re Discovery
13 Disagreement pursuant to Civil Local Rule 251(c): March 15, 2019;
- 14 • Deadline for Plaintiffs to respond with their portions of such joint statement:
15 March 29, 2019.
- 16 • Upon completion of such joint statement, Defendant will file it with Judge
17 Delaney for hearing before her.

18 **2. Description of Dispute regarding Discovery Plan:**

19 **a. Defendant’s Position**— In a certified wage and hour class action case, to the
20 extent Plaintiffs seek to introduce class-wide evidence based on testimony from a limited number
21 of witnesses, Plaintiffs must submit a “trial plan” supported by sound statistical science
22 according to which the trial may be conducted based on such limited evidence without inhibiting
23 the defendant’s due process rights. (*Duran v. U.S. Bank Nat. Assn.*, 59 Cal.4th 1, 13 (Cal. 2014).)
24 Defendant should have the opportunity to impeach Plaintiffs’ proposed trial plan. (*Id.*) United
25 States District Courts have adopted the concept set forth in *Duran* as an important component of
26 affording a defendant with due process. (*In Re: Autozone, Inc.*, No. 3:10-md-02159-CRB, 2016
27 WL 4208200 (N.D. Cal. Aug. 10, 2016).)

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1 Defendants submitted a proposed class discovery plan to Plaintiffs, including an expert
2 report supported by statistical science, proposing 121 class members be randomly selected from
3 the total class size of 169 persons, to provide statistically significant evidence that there is
4 liability for violation of California meal or rest period rules on a class-wide bases, given the
5 various job titles and conflicting facts with Plaintiffs' theory among class members. Depositions
6 of the randomly selected 121 class members would last approximately 2-3 hours each, with
7 approximately five (5) days of such depositions taking place every calendar month until
8 completed.

9 In response, Plaintiffs proposed a class discovery plan, without expert input,
10 recommending depositions of 10% of the putative class with a two-hour limit on each
11 deposition. It is Defendant's position that Plaintiff's proposed sample of 17 class members is
12 smaller than the sample size that was deemed *too small* by the California Supreme Court in
13 *Duran*, such that it violated the defendant's due process rights in producing an unreasonably
14 inaccurate estimate of class wide liability. (*Duran*, 59 Cal.4th at p. 42) Accordingly, Defendant's
15 due process rights are directly implicated and may be violated by Plaintiff's inadequate proposed
16 sample size. The Parties have met and conferred regarding the proposed sample size and relief
17 from the 10-deposition limit pursuant to Fed. R. Civ. Proc. 30 (a)(2)(A)(i), and have been unable
18 to resolve it. Thus, the Parties cannot proceed and the issue is ripe for court resolution.

19 **b. Plaintiff's Position**— Plaintiff's theory of liability rests on a system wide
20 practice/policy that affects all putative class members. The primary gist of the dispute is that
21 when the employees used the Suitable Resting Facilities they did so on the condition that they
22 remained vigilant and continued to work by monitoring pages much like the security guards in
23 California's recent California Supreme Court decision in *Augustus v. ABM Security Services*
24 *Inc.*, 2 Cal.5th 257 (2016) . This constant monitoring deprived them of meal and rest periods
25 "free from all duties". It is Plaintiffs' contention that BALL's use of the public address system
26 and its requirement that employees listen to the communications to see if they applied to them
27 and respond if necessary commonly affected all plaintiffs and class members. Plaintiffs therefore
28 oppose Defendant's trial plan which seeks to depose 121 of the 169 putative class members as

unnecessary and overly burdensome for a system wide practice/policy. Defendant has access to records that cover many of the subjects that they seek to examine the putative class including.

3. Proposed Schedule for Completing Discovery, and Modifications to Other Pre-Trial Deadlines

The Parties agree that all pre-trial dates should be vacated, to be re-set based on the outcome of Judge Delaney’s resolution of the discovery dispute set forth herein. However, below are the respective dates that the Parties propose should each of them prevail on the dispute.

a. Defendant’s Proposed Schedule

- Deadline to complete fact discovery—July 31, 2020;
- Expert Disclosure Deadline—August 28, 2020;
- Supplemental Expert Disclosure Deadline—September 25, 2020;
- Completion of Expert Discovery—October 23, 2020;
- Deadline for filing dispositive motions—November 27, 2020.

b. Plaintiff’s Proposed Schedule

Plaintiffs are in agreement with Defendant's proposed schedule above.

NOW THEREFORE, the Parties stipulate as follows:

- The Parties shall submit their dispute concerning discovery set forth in the above stipulation to Judge Delaney pursuant to Civil Local Rule 251;
- Defendant shall send to Plaintiffs its portion of the Joint Statement re Discovery Disagreement pursuant to Civil Local Rule 251(c), by March 15, 2019;
- Plaintiffs shall provide Defendant with their portion of such joint statement by March 29, 2019;
- By April 3, 2019, Defendant shall file a motion in relation to the matters set forth in such joint statement, for hearing pursuant to Judge Delaney’s published procedures for same on the earliest then-available date.

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- All current deadlines not referenced herein should be vacated, to be re-set at a case management conference following Judge Delaney’s ruling on the Parties’ dispute referenced herein. The Parties should submit a joint report re pre-trial schedule within fourteen (14) days of Judge Delaney’s ruling, to include dates for fact and expert discovery cutoff, motion cutoffs, and trial;

Dated: February 25, 2019

FISHER & PHILLIPS LLP

By: /s/ Erin J. Price
 JOHN K. SKOUSEN
 CHRISTOPHER M. AHEARN
 JOHN T. LAI
 ERIN J. PRICE

Attorneys for Defendant
 BALL METAL BEVERAGE CONTAINER
 CORP.

Dated: February 25, 2019

EASON & TAMBORNINI, ALC

By: /s/ Erin M. Scharg (as authorized on 2/25/19)
 MATTHEW R. EASON
 ERIN M. SCHARG

Attorneys for Plaintiffs

ROBERT WESTFALL, DAVID E.
 ANDERSON, LYNN BOBBY, and DAVID
 ELLINGER

1 **ORDER**

2 Pursuant to the foregoing stipulation and joint report, and good cause appearing therefor,

3 IT IS ORDERED that:

- 4 • The Parties shall submit the discovery dispute¹ referenced in the above stipulation,
5 for resolution by Magistrate Judge Carolyn K. Delaney pursuant to Civil Local
6 Rule 251;
- 7 • All current pre-trial deadlines are vacated; and
- 8 • Within fourteen (14) days of Judge Delaney’s ruling on the Parties’ discovery
9 dispute, the Parties shall submit a joint report re pre-trial schedule, to include
10 dates for fact and expert discovery cutoff, motion cutoffs, and trial.

11 DATED: February 28, 2019.

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14 UNITED STATES DISTRICT JUDGE
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28 ¹ The court accepts the stipulation without deciding the question of whether the parties’ dispute regarding the method and percentage of sampling qualifies as a “discovery dispute,” and noting the parties’ ability to seek reconsideration in this court of any decision by the magistrate judge.