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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JENNIFER BRUM and MICHAEL
CAMERO, individually, and on
behalf of other members of
the general public similarly
situated,

Plaintiffs,

v.

MARKETSOURCE, INC. WHICH WILL
DO BUSINESS IN CALIFORNIA AS
MARYLAND MARKETSOURCE, INC.,
a Maryland corporation;
ALLEGIS GROUP, INC., a
Maryland corporation; and
DOES 1 through 10, inclusive,

Defendants.

No. 2:17-cv-241-JAM-EFB

**ORDER GRANTING DEFENDANTS'
MOTION TO STRIKE**

Jennifer Brum ("Brum") and Michael Camero ("Camero")
(collectively "Plaintiffs") have sued MarketSource, Inc., and
Allegis Group, Inc., (collectively "Defendants") for various
California Labor Code and Unfair Competition Law violations.¹

¹ This motion was determined to be suitable for decision without
oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for October 3, 2017.

1 After Defendants partially prevailed on a motion to dismiss,
2 Plaintiffs filed their Second Amended Complaint ("SAC").
3 Defendants now seek to strike allegations from the SAC. For the
4 reasons set forth below, Defendants motion is GRANTED in its
5 entirety.

6
7 I. FACTUAL AND PROCEDURAL BACKGROUND

8 Defendants provide retail sales personnel to dozens of
9 Target Mobile kiosks throughout California. SAC ¶ 26. Brum
10 worked as a "Wireless Team Lead" at several Target stores in and
11 around Stockton, California. SAC ¶ 3. Camero worked as a
12 "Target Mobile Manager" at two Target stores in San Diego,
13 California. SAC ¶ 4.

14 Plaintiffs allege Defendants violated overtime, meal, and
15 rest period laws and did not properly report wage statements.
16 SAC at ¶¶ 13-19, 21-27. Plaintiffs also contend Defendants
17 required all new hires to take drug tests as a condition of
18 employment without paying them for the time to travel to and from
19 the drug testing facility and take the test, and without
20 reimbursing them for travel expenses. SAC ¶ 29.

21 Plaintiffs seek to represent one class and one subclass, but
22 have not yet filed a motion for class certification. SAC ¶¶ 20,
23 21.

24 The Court previously granted in part and denied in part
25 Defendants' motion to dismiss. Order, ECF No. 15. The Court
26 struck Plaintiffs' drug testing allegations—with leave to amend—
27 because Plaintiffs' opposition to the motion relied on facts
28 Plaintiffs failed to allege in the FAC. Order at 7, 13.

1 Plaintiffs timely filed their SAC. ECF No. 16. Now, Defendants
2 move to strike the amended allegations concerning compensation
3 and reimbursement for the drug testing. Additionally, Defendants
4 move to strike Plaintiffs' new allegations regarding compensation
5 for time spent filling out paperwork.

6
7 II. OPINION

8 A. Judicial Notice

9 Defendants seek judicial notice of an email dated January 8,
10 2017, Exh. A, ECF No. 18-3, pursuant to either Federal Rule of
11 Civil Procedure 201(b) or the doctrine of incorporation by
12 reference.

13 Under Rule 201, the Court may judicially notice a fact that
14 is not subject to reasonable dispute because it can be accurately
15 and readily determined from sources whose accuracy cannot
16 reasonably be questioned. Fed. R. Evid. 201(b)(2). The contents
17 of the January 8th email do not meet these parameters and are not
18 an appropriate subject for judicial notice under Rule 201.

19 Under the doctrine of incorporation by reference, the court
20 "may consider evidence on which the complaint 'necessarily
21 relies' if: (1) the complaint refers to the document; (2) the
22 document is central to the plaintiff's claim; and (3) no party
23 questions the authenticity of the copy attached to the [motion]."
24 Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006).

25 The January 8th email does appear central to Plaintiffs'
26 claim and is referenced, though not explicitly, in the SAC. In
27 support of their liability theory, Plaintiffs allege—and argue in
28 their opposition to the motion to strike, see Opp'n at 5-9—that

1 Defendants exercised control over the circumstances surrounding
2 the drug testing. The January 8th email communicates the drug
3 testing instructions to the new hires, which Plaintiffs refer to
4 in paragraphs 29 and 74 of the SAC. Plaintiffs' argument that
5 the email is not relevant to their claims is disingenuous, as
6 Plaintiffs' opposition to the motion to strike largely relies on
7 the control Defendants allegedly exerted over the drug testing,
8 as shown by the email.

9 Defendants argue that Plaintiffs cannot contest the email's
10 authenticity because Plaintiffs produced the email in discovery.
11 See RFJN at 2. Plaintiffs admit they did so. Opp'n to RFJN at
12 2. Plaintiffs do, however, contest the email's authenticity,
13 pointing out that the email has not been authenticated by
14 deposition or affidavit. Opp'n to RFJN at 2-3. Plaintiffs are
15 correct. While the email appears to be authentic and Defendants
16 could easily lay a foundation for its authenticity, no such
17 foundation exists in Defendants' motion papers. Therefore, the
18 Court may not take judicial notice of this email over Plaintiffs'
19 opposition in deciding the present motion.

20 B. Analysis

21 Under Federal Rule of Civil Procedure 12(f), the Court may
22 strike from a pleading any redundant, immaterial, impertinent, or
23 scandalous matter.

24 "Motions to strike are generally regarded with disfavor[.]"
25 In re Wal-Mart Stores, Inc. Wage & Hour Litig., 505 F. Supp. 2d
26 609, 614 (N.D. Cal. 2007). "A motion to strike should not be
27 granted unless it is clear that the matter to be stricken could
28 have no possible bearing on the subject matter of the

1 litigation." Contreras, ex rel. Contreras v. Cnty. of Glenn, 725
2 F. Supp. 2d 1157, 1159 (E.D. Cal. 2010) (citation omitted). In
3 deciding the motion, the Court must view the pleadings in the
4 light most favorable to the nonmoving party. Baker v. United
5 Natural Foods, Inc., No. 2:15-cv-953-JAM-EFB, 2015 WL 5601362, at
6 *1 (E.D. Cal. Sep. 22, 2015).

7 1. Reimbursement For Drug Testing

8 Defendants' motion turns on whether Plaintiffs sufficiently
9 allege they were employees when they underwent Defendants'
10 required drug testing. If Plaintiffs were not employees at that
11 time, then those allegations are immaterial to their claims.
12 Defendants argue Plaintiffs were merely "prospective employees"
13 at testing time and Defendants therefore had no obligation to pay
14 them wages or reimburse mileage. Mot. at 6-7. Plaintiffs argue
15 the SAC's allegations demonstrate "the drug-tested individuals
16 were engaged, thereby creating a common-law employment
17 relationship, and were under Defendants' control when they were
18 tested." Opp'n at 5. They specifically point to the allegation
19 in paragraph 29 of the SAC as establishing the employment
20 relationship between the parties:

21 Upon being hired, Defendants send newly hired employees
22 a system-generated e-mail notification with "Welcome to
23 Market Source" in the subject line that provides,
24 "Congratulations on your new position with the
25 MarketSource team!" The e-mail further provides "Now
that you have accepted your position, I've created a
timeline of what you can expect in the next several
days leading up to your official start date with us."

26 SAC at ¶ 29. These new allegations tend to support Plaintiffs'
27 argument that they had accepted employment with Defendants.

28 But, Plaintiffs' allegations contain their Achilles heel:

1 "Defendants require that all new hires undergo mandatory drug
2 testing as a condition of employment." SAC at ¶ 29 (emphasis
3 added); see also ¶ 74. The drug testing is one of the "Immediate
4 Next Steps" the new hires complete prior to their "official start
5 date." SAC at ¶ 74. Plaintiffs thus admit their employment was
6 conditioned upon completing a drug test, thereby undermining the
7 "engagement" theory central to their opposition. Plaintiffs fail
8 to explain how an employment agreement formed between the parties
9 prior to fulfillment of this condition. Plaintiffs' allegations
10 do not establish such an agreement.

11 This conclusion does not terminate the inquiry. "In
12 determining the nature of the employment relationship, a primary
13 inquiry of California courts is whether the alleged employer
14 exercised or had the right to exercise control over the alleged
15 employee." Gunawan v. Howroyd-Wright Employment Agency, 997 F.
16 Supp. 2d 1058, 1063 (C.D. Cal. 2014). Defendants assert there is
17 no authority suggesting that employers must compensate
18 prospective employees for time spent in pre-employment
19 activities. But, this argument begs the question of whether
20 Defendants exercised a sufficient degree of control over the
21 prospective employees' drug testing to establish an employment
22 relationship at that time.

23 The Gunawan decision is instructive on this issue. In that
24 case, Ms. Gunawan applied for employment with a temporary
25 staffing agency ("KForce") and, after interviewing with KForce,
26 went out for an interview that KForce arranged with an outside
27 employer ("TRG"). Gunawan, 997 F. Supp. 2d at 1061. KForce
28 scheduled the interview, modified Ms. Gunawan's resume, and

1 communicated with TRG. Id. After TRG decided to hire Ms.
2 Gunawan for a temporary assignment, she completed employment
3 paperwork with KForce and became a KForce employee. Id. Ms.
4 Gunawan later sued KForce, seeking compensation for the time she
5 spent interviewing with TRG, "prior to the commencement of her
6 formal employment relationship with KForce." Id. at 1062. After
7 noting the dearth of authority on this question, the Gunawan
8 Court grappled with how to apply the California Supreme Court's
9 Martinez test to determine whether KForce was Ms. Gunawan's
10 employer during the interview. It wrote:

11 Martinez expounded on the definition of "employer"
12 under California's wage and hour laws, holding that "to
13 employ" has three alternative definitions: "(a) to
14 exercise control over the wages, hours or working
15 conditions, or (b) to suffer or permit to work, or
16 (c) to engage, thereby creating a common law employment
17 relationship." The court's test, however, is not
18 easily translated outside of the factual context in
19 which it was developed . . . [it is most applicable in
20 answering] whether the defendants in the case could be
21 considered joint employers under the law. There was no
22 question whether the employees in Martinez were
employees, nor whether they had performed compensable
work. . . . Here, in the context of determining
whether an individual is an employee at all, the test
is less directly applicable. . . . At its core, the
Martinez test suggests that an employer is an
individual that has the ability to control the terms
and conditions of an individual's work, or that has
such control over an individual so as to have the
ability to permit or prevent that individual from
working.

23 Id. at 1064 (quoting Martinez v. Combs, 49 Cal.4th 35 (2010)).
24 The Gunawan court concluded that Ms. Gunawan was not under
25 KForce's control at the time of the interview because she could
26 have opted not to attend the TRG interview without precluding
27 other assignments through KForce, and because KForce had little
28 control over the substance of the interview itself. Id. at 1063.

1 The facts that KForce scheduled the interview and controlled
2 communications between the parties did not persuade the court:
3 "That she chose [] to utilize KForce's service does not transform
4 Ms. Gunawan from an applicant for employment to an employee."
5 Id. at 1064.

6 Plaintiffs argue that Gunawan is in the minority, but
7 Plaintiffs' alternative cases are not persuasive. First, the
8 court in Sullivan v. Kelly Services, another staffing agency
9 case, did not consider whether or not the plaintiff was an
10 employee, but, instead, considered whether the time she spent
11 interviewing with outside employers was compensable work time.
12 No. C 08-3893 CW, 2009 WL 3353300 (N.D. Cal. Oct. 16, 2009). The
13 Sullivan court stated Ms. Sullivan was the defendant's employee
14 in the factual background section of the order. Id. at *1
15 ("Plaintiff's employment relationship with Defendant began on
16 March 16, 2006, which was her first day of her first temporary
17 assignment with Defendant's customer[.]"). Thus, the Sullivan
18 decision is not instructive. The Betancourt court, on the other
19 hand, did analyze the plaintiff's employee status when he went
20 out on interviews. Betancourt v. Advantage Human Resourcing
21 Inc., No. 14-CV-01788-JST, 2014 WL 4365074 (N.D. Cal. Sep. 3,
22 2014). Finding Sullivan more persuasive than Gurawan, it
23 determined the defendant exercised sufficient control over the
24 interview process to establish an employer-employee relationship.
25 Id. at *4-6. The Betancourt opinion, too, is of limited value to
26 this Court. First, the plaintiff in that case had completed a
27 "new hire" orientation, signed a form acknowledging that he and
28 the defendant were entering into an employment arrangement, and

1 completed traditional employment paperwork with defendant prior
2 to interviewing with outside employers. Id. at *1. Hence, the
3 "prospective" employee versus employee issue was not framed so
4 poignantly for that court. Second, the Betancourt court
5 bewilderingly cites Sullivan as "holding an employment
6 relationship was created" between the plaintiff and defendant in
7 that case; but, the Sullivan opinion contains no such holding
8 because the employment relationship was not in dispute. Id. at
9 *3. In light of these deficiencies, Sullivan and Betancourt have
10 little sway over this Court's analysis.

11 Each of the above-cited cases is distinguishable from the
12 present circumstances. A staffing agency that manages one's
13 interviews and work assignments and controls all communications
14 with outside employers exhibits considerably more control over
15 its (prospective) employees than an employer who conditions an
16 offer of employment on completion of a drug test. The narrow
17 question here is whether the facts that a prospective employer
18 picked the time, date, and location for, and the scope of, a drug
19 test required in order for one to commence employment exhibit
20 enough control over a prospective employee to establish an
21 employment relationship. Plaintiff has not offered any legal
22 support for this seemingly novel proposition. The Court thus
23 finds these allegations insufficient to establish an employment
24 relationship at the time of Plaintiffs' drug testing.

25 2. Reimbursement Under the UCL

26 Plaintiffs seek relief under California's Unfair Competition
27 Law ("UCL") for Defendants' failure "to pay the costs of
28 mandatory physical examinations and drug testing in violation of

1 California Labor Code section 222.5." SAC at ¶ 121(e). Under
2 the statute, an employer may not "require any prospective
3 employee or applicant for employment to pay[] any fee for, or
4 cost of, any pre-employment medical or physical examination taken
5 as a condition of employment[.]" Cal. Labor Code § 222.5.

6 Defendants argue that, based on the plain language of the
7 statute, "cost" does not include compensation for the time
8 involved in taking the exam, traveling to and from the exam, or
9 for travel mileage. Mot. at 11. Plaintiffs respond that there
10 is no case law supporting Defendants' interpretation and suggests
11 the more reasonable interpretation of "cost" would accord with
12 Labor Code section 2802, which requires reimbursement for "all
13 necessary expenditures or losses incurred by the employee in
14 direct consequence of the discharge of his or her duties, or of
15 his or her obedience to the directions of the employer[.]" Opp'n
16 at 10. According to Plaintiffs, an employee may recover
17 reimbursement for mileage under section 2802. Id. (citing
18 Vasquez v. Franklin Mgmt. Real Estate Fund, Inc., 222 Cal. App.
19 4th 819 (2013)).

20 Defendants have the stronger argument. The two Labor Code
21 sections have substantially distinct wording and the Court will
22 not read the sections to carry the same meaning without authority
23 militating such an interpretation. That section 222.5 is limited
24 to "cost" and section 2082 includes "all necessary expenditures
25 or losses incurred" supports a narrower reading of the statute.
26 Accordingly, Plaintiffs' drug testing allegations cannot support
27 their UCL claim.

1 3. Paperwork Allegations

2 Defendants argue that Plaintiffs' allegations in support of
3 their new theory of liability should be stricken because the
4 Court's previous order only granted leave to amend the drug
5 testing reimbursement allegations. Mot. at 13. Plaintiffs
6 respond that Defendants read the Court's order too narrowly,
7 contending that "leave to amend was granted as they relate to the
8 causes of action regarding off-the-clock work such as drug
9 testing" and they could permissibly amend their allegations to
10 add this additional theory in support of their second cause of
11 action for unpaid minimum wages and eighth cause of action for
12 unlawful business practices. Opp'n at 12.

13 The Court granted Defendants' motion to strike Plaintiffs'
14 allegations regarding reimbursement for drug testing with leave
15 to amend. See Order at 13:27-28. Plaintiffs' new allegations
16 exceed the scope of the Court's leave and are ordered stricken.
17 See Freeney v. Bank of Am. Corp., No. CV 15-02376 MMM (PJWx),
18 2015 WL 4366439 (C.D. Cal. July 16, 2015) ("Plaintiffs may not
19 plead additional claims, add additional parties, or add
20 allegations that are not intended to cure the specific defects
21 the court has noted. Should any amended complaint exceed the
22 scope of leave to amend granted by this order, the court will
23 strike the offending portions under Rule 12(f)"). Because these
24 new allegations are stricken, the Court need not consider their
25 merit and will not do so at this time.

26 C. Sanctions

27 In their Reply, Defendants suggest that Plaintiffs used a
28 condensed font to circumvent this Court's Order re Filing

1 Requirements, ECF No. 2-2. Rep. at 1. The Court has reviewed
2 Plaintiffs' filing. It appears that Plaintiffs used a standard
3 12 point font with condensed character spacing (-0.2), though it
4 is not clear how many pages this saved Plaintiffs. The Court
5 declines to issue sanctions at this time. Henceforth, however,
6 all memoranda submitted in this action shall conform to a 12
7 point font size and standard (zero) character spacing.

8
9 III. ORDER

10 For the reasons set forth above, the Court GRANTS
11 Defendants' Motion to Strike in its entirety. Plaintiffs'
12 allegations concerning the drug testing and paperwork are ORDERED
13 stricken from the Second Amended Complaint. Because Plaintiffs
14 have already had an opportunity to amend the Complaint and
15 further amendment appears futile, leave to amend is not
16 permitted. Defendants shall file their Answer to the Second
17 Amended Complaint within twenty days of this Order.

18 IT IS SO ORDERED.

19 Dated: October 26, 2017

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21 
22 JOHN A. MENDEZ,
23 UNITED STATES DISTRICT JUDGE
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