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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GEORGE STICKLES and MICHELE  
RHODES,

No. C 20-9220 WHA

Plaintiffs,

v.

ATRIA SENIOR LIVING, INC. and  
ATRIA MANAGEMENT COMPANY,  
LLC,

**ORDER DENYING MOTION TO  
RECONSIDER AND MOTION TO  
MODIFY CLASS PERIOD**

Defendants.

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**INTRODUCTION**

In this wage-and-hour class action, plaintiffs move for reconsideration of the class period. Plaintiffs also move, in the alternative, to name and appoint another class representative and to modify the class period. For the reasons that follow, plaintiffs' motions are **DENIED**.

**STATEMENT**

Plaintiffs George Stickles and Michele Rhodes each worked as a "Community Sales Director" for defendants, Atria Senior Living, Inc. and Atria Management Company, LLC. Plaintiffs allege that defendants misclassified them and other CSDs as exempt employees.

A previous order certified the following class: CSDs who did not sign arbitration agreements and whom defendants classified as exempt outside salespersons from the date plaintiff George Stickles began his employment with defendants (April 9, 2018) through

1 September 29, 2019. Certification applied solely to this issue: whether defendants properly  
2 classified CSDs as exempt outside salespersons. Certification of the underlying wage-and-  
3 hour claims was held in abeyance.

4 On January 5, 2022, plaintiffs’ counsel asked defendants’ counsel whether it would  
5 stipulate to amend the complaint to name an additional class representative. On the following  
6 day, defendants’ counsel responded in the negative. On January 14, 2022, plaintiffs’ counsel  
7 moved for leave to move for reconsideration and to move for alternative relief regarding the  
8 class period. A previous order granted plaintiffs’ motion.

9 Plaintiffs now move to reconsider the class period, arguing the class period should begin  
10 four years prior to the filing of the complaint (December 18, 2016) rather than on plaintiff  
11 Stickles’ hire date.

12 In the alternative, plaintiffs move to amend the complaint and to name an additional class  
13 representative, Rellie Kirwan — a former CSD whom defendants employed from February  
14 2016 to April 2018. The deadline to amend the pleadings passed eight months ago. Plaintiffs  
15 also move to appoint Kirwan as a class representative. Plaintiffs argue that Kirwan satisfies  
16 the typicality and adequacy requirements under FRCP 23 for CSDs whom defendants  
17 employed as early as four years prior to the filing of the complaint. Thus, if Kirwan is  
18 appointed as a class representative, plaintiffs request that the class period be modified to begin  
19 on December 18, 2016, rather than on plaintiff Stickles’ hire date.

20 Additionally, plaintiffs seek to reopen discovery for the sole purpose of allowing  
21 defendants to conduct discovery regarding Kirwan’s typicality and adequacy under FRCP 23.  
22 The deadline for non-expert discovery passed two months ago.

23 This order follows full briefing.

24 **ANALYSIS**

25 **1. MOTION FOR RECONSIDERATION.**

26 Our court of appeals has stated the following regarding motions for reconsideration:

27 Although [FRCP] 59(e) permits a district court to reconsider and  
28 amend a previous order, the rule offers an “extraordinary remedy,  
to be used sparingly in the interests of finality and conservation of

1 judicial resources.” Indeed, “a motion for reconsideration should  
2 not be granted, absent highly unusual circumstances, unless the  
3 district court is presented with newly discovered evidence,  
4 committed clear error, or if there is an intervening change in the  
5 controlling law.” A Rule 59(e) motion may not be used to raise  
6 arguments or present evidence for the first time when they could  
7 reasonably have been raised earlier in the litigation.

8 *Kona Enters., Inc. v. Est. of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

9 Here, plaintiffs have not met their burden to show reconsideration of the class period is  
10 warranted. Plaintiffs have not presented newly discovered evidence. Plaintiffs merely raise  
11 arguments and evidence they raised in their motion for class certification.

12 Further, plaintiffs do not contend there has been an intervening change in the controlling  
13 law. Although plaintiffs cite earlier orders of ours certifying class periods that commenced  
14 prior to the class representative’s hire date, those orders do *not* stand for the proposition that  
15 the class period must begin before such date.

16 Moreover, here, the class period begins on plaintiff Stickles’ hire date because the record  
17 does not establish that plaintiff Stickles’ experience was typical of that of employees who  
18 worked prior to his hire date. In the absence of affirmative proof to the contrary, this order  
19 shall not extend the class period back. That the same job description was applicable to all  
20 CSDs before and after plaintiff Stickles’ hire date is not such affirmative proof. Plaintiff  
21 Stickles worked for only seventeen months and counsel wants to presume that everything  
22 workwise was the same for sixteen months preceding his arrival. A shorter extension  
23 backward might be plausible, but counsel seeks to stretch it too far.

24 Plaintiffs’ motion for reconsideration is **DENIED**.

25 **2. MOTION FOR ALTERNATIVE RELIEF.**

26 **A. PLAINTIFFS’ MOTION FOR ALTERNATIVE RELIEF IS NOT MOOT.**

27 As a threshold matter, contrary to defendants’ assertion, the motion to amend the  
28 complaint to allow intervention by Rellie Kirwan and to appoint him as another class  
representative is properly before us. That the motion was presented as an alternative to  
plaintiffs’ motion for reconsideration does not prevent this order from considering it (*see* Dkt.  
No. 45).

**B. TYPICALITY IS NOT SATISFIED.**

1 Even presuming plaintiffs could amend the scheduling order and complaint to allow  
2 intervention by Kirwan — an issue on which this order does not decide — Kirwan cannot be  
3 appointed as another class representative because he is atypical of the class he seeks to  
4 represent.

5 FRCP 23(c)(1)(C) states that “[a]n order that grants or denies class certification may be  
6 altered or amended before final judgment.” “Because class actions vary so widely in their  
7 circumstances, the trial judge is vested with broad discretionary control over the conduct of  
8 such actions, enabling the presiding judge to respond fluidly to the varying needs of particular  
9 cases.” *Officers for Just. v. Civ. Serv. Comm’n of City and Cnty. of San Francisco*, 688 F.2d  
10 615, 633 (9th Cir. 1982).

11 A class representative must satisfy the adequacy and typicality requirements of FRCP 23.  
12 As to typicality, our court of appeals has stated:

13 The purpose of the typicality requirement is to assure that  
14 the interest of the named representative aligns with the interests of  
15 the class. “Typicality refers to the nature of the claim or defense  
16 of the class representative, and not to the specific facts from which  
17 it arose or the relief sought.” The test of typicality “is whether  
18 other members have the same or similar injury, whether the action  
is based on conduct which is not unique to the named plaintiffs,  
and whether other class members have been injured by the same  
course of conduct.”

19 Several courts have held that “class certification is  
20 inappropriate where a putative class representative is subject to  
unique defenses which threaten to become the focus of the  
litigation.”

21 [A] named plaintiff’s motion for class certification should  
22 not be granted if “there is a danger that absent class members will  
23 suffer if their representative is preoccupied with defenses unique to  
it.”

24 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citations omitted).

25 As to adequacy, the class representative must fairly and adequately protect the interests of  
26 the class. Thus, the class representative and class counsel cannot have conflicts of interest with  
27 the putative class members and must prosecute the action vigorously on behalf of the class.

28 *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

1 Here, plaintiffs argue Kirwan’s experience was typical of that of the class members he  
2 seeks to represent because he was employed from February 2016 to April 2018 — before the  
3 class period began until plaintiff Stickles began his employment with defendants (Kirwan  
4 Decl. ¶ 2). Kirwan was subject to the same job description as the CSDs he seeks to represent  
5 and was classified as exempt like the other CSDs (Br. 8; Kirwan Decl., Exh. A). Moreover,  
6 plaintiffs argue Kirwan is adequate because he has no conflicts of interest with other class  
7 members, understands his obligation to actively participate, and will always consider the best  
8 interests of the class (Br. 9; Kirwan Decl. ¶¶ 9–11).

9 Defendants argue Kirwan cannot represent the class because he is subject to a unique  
10 defense (Opp. 7). Specifically, Kirwan was “terminated for falsifying entries relating to  
11 outside sales activities” in defendants’ customer relationship management database (which  
12 tracks CSD activities) (*ibid.*; Graziose Decl. ¶¶ 19–20). Defendants argue the circumstances of  
13 Kirwan’s termination demonstrate he is not credible (Opp. 7). Further, defendants assert that  
14 plaintiffs must bring a new motion for class certification to appoint a new class representative  
15 (*id.* at 6).

16 As a preliminary matter, there is no reason for plaintiffs to bring an entire motion for  
17 class certification when they seek only to appoint a new class representative. Only adequacy  
18 and typicality need be met to appoint a new class representative. As discussed above, plaintiffs  
19 argue Kirwan is adequate and typical in their motion, so plaintiffs have brought an appropriate  
20 motion to appoint a new class representative.

21 But there is a danger that class members will suffer if Kirwan is preoccupied with  
22 fighting the defense discussed above, which is unique to him. Plaintiffs’ counsel would spend  
23 time and resources defending depositions and conducting discovery that would best be devoted  
24 to the class rather than to Kirwan. And Kirwan would be at risk of putting his interests before  
25 those of the class. Plaintiffs do not rebut these arguments. Thus, this order finds Kirwan  
26 atypical of the class he seeks to represent.

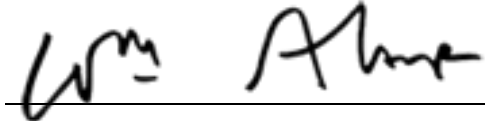
27 Plaintiffs’ motion for alternative relief is **DENIED**.

1 **CONCLUSION**

2 For the foregoing reasons, plaintiffs' motions are **DENIED**.

3 **IT IS SO ORDERED.**

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5 Dated: February 15, 2022.



6  
7 WILLIAM ALSUP  
8 UNITED STATES DISTRICT JUDGE  
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