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3 UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA
5 OAKLAND DIVISION
6

7 KHANH NIELSON, individually, and on
8 behalf of all others similarly situated,

9 Plaintiffs,

10 vs.

11 THE SPORTS AUTHORITY, and DOES 1
12 through 100, inclusive,

13 Defendants.

Case No: C 11-4724 SBA

**ORDER DENYING RENEWED
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND ORDER TO
SHOW CAUSE RE DISMISSAL**

Dkt. 32

14 Plaintiff Khanh Nielson (“Plaintiff”) brings the instant putative wage and hour class
15 action on behalf of herself and all other non-exempt employees of The Sports Authority
16 (“Defendant” or “Sports Authority”), a sporting goods retailer, claiming that they were not
17 paid in accordance with the California Labor Code. Though Plaintiff does not dispute that
18 non-exempt employees were correctly classified, she alleges that such employees were
19 subject to off-the-clock “mandatory security checks” of their personal bags whenever they
20 left the store, even when they were leaving to take a rest or meal break.

21 The Court previously denied Plaintiff’s motion for preliminary approval due to
22 various deficiencies. The parties subsequently revised their settlement and have now
23 submitted a “Stipulated Ex Parte Application” for settlement approval, which the Court
24 construes as a renewed motion for preliminary approval. Dkt. 32. Having read and
25 considered the papers filed in connection with this matter, the Court DENIES the parties’
26 motion. In addition, the Court directs the parties to show cause why the instant action
27 should not be dismissed for lack of jurisdiction and/or failure to prosecute under Federal
28 Rule of Civil Procedure 41(b).

1 **I. BACKGROUND**

2 **A. FACTUAL OVERVIEW**

3 Defendant is a retailer of athletic clothing and equipment which operates stores
4 throughout California. Nielson Decl. ¶ 4 (att'd as Ex. C to Salassi Decl.), Dkt. 32-1.
5 According to Plaintiff, Defendant has failed to comply with California wage and hour laws
6 by compelling all non-exempt store employees to undergo off-the-clock security checks,
7 presumably to ensure that they are not stealing merchandise. Plaintiff alleges:

8 During the Class Period, Defendant had a consistent policy of,
9 inter alia, (1) requiring its non-exempt retail employees,
10 including Plaintiff and Class Members, to remain at work,
11 under the control of Sports Authority, after completion of these
12 workers' ordinary duties, without paying these employees'
13 wages (including overtime wages) for all compensable time,
14 (2) requiring its non-exempt retail employees, including
15 Plaintiff and Class Members, to submit to mandatory security
16 checks of their persons and/or belongings without paying them
17 compensation (including overtime and/or other compensation
18 for working during meal and/or rest periods), (3) willfully
19 failing to pay compensation owing in a prompt and timely
20 manner to those Class Members whose employment with Sports
21 Authority has terminated, (4) willfully failing to provide
22 Plaintiff and Class Members with accurate semimonthly
23 itemized statements of the total number of hours each of them
24 worked, the applicable deductions, and the applicable hourly
25 rates in effect during the pay period, and (5) willfully failing to
26 provide meal periods and/or rest periods to Plaintiff and/or
27 Class Members.

19 Compl. ¶ 4. There is no dispute between the parties that, for purposes of this litigation, all
20 class members were properly classified. According to Plaintiff, the only issue regarding the
21 payment of wages arises from Defendant's alleged policy of subjecting employees to
22 security checks without pay. Ex Parte Appl. at 2 n.5 ("there is no misclassification issue in
23 this case. . . . The claims in this lawsuit relate to Defendant's daily mandatory security
24 checks.").

25 Plaintiff has been employed by Defendant at its Sunnyvale and Union City locations
26 since 2007. Nieslon Decl. ¶¶ 2-3. For the time period from 2007 to March 2011, Plaintiff
27 worked as a non-exempt Operations Manager, and thereafter, assumed the position of Lead
28

1 Price Auditor Coordinator. Id.¹ In her declaration filed in support of the instant
2 application, Plaintiff states that “based on [her] understanding” Defendant maintains a
3 security inspection policy of inspecting employees’ bags whenever they exit the store, even
4 when they are taking a meal or rest break. Id. ¶ 5. She also claims, again based “on [her]
5 understanding,” that employees are not paid for missed breaks or overtime wages. Id. ¶¶ 6-
6 7. Plaintiff does not articulate the factual basis for her “understanding” that such policies
7 and practices actually exist. Perhaps more fundamentally, Plaintiff does not state in her
8 declaration that she was personally subjected to Defendant’s bag inspection policy or that
9 she was in any way harmed by that policy. Nor does Plaintiff claim that she is owed
10 overtime wages or wages for missed breaks.

11 **B. PROCEDURAL HISTORY**

12 On August 22, 2011, the law firm of Scott Cole & Associates (“SCA”) filed the
13 instant action in state court on behalf of Plaintiff, individually and on behalf of “[a]ll
14 persons who are and/or were employed as non-exempt employees by The Sports Authority,
15 Inc. in one or more of its California retail stores between August 22, 2007 and the present.”
16 Compl. ¶ 20. Defendant removed the action to this Court on September 22, 2011, on the
17 basis of diversity jurisdiction, 28 U.S.C. § 1332(a), and the Class Action Fairness Act, id.
18 § 1332(d)(2). Dkt. 1.

19 The Complaint alleges state law causes of action for: (1) failure to provide meal and
20 rest periods; (2) failure to pay wages (straight time, overtime, premium pay, and minimum
21 wage); (3) failure to provide accurate itemized or properly formatted wage statements;
22 (4) failure to pay wages upon termination or timely upon/after termination; (5) unfair
23 business practices in violation of Cal. Business and Professions Code section 17200, et
24 seq.; and (6) violation of the California Private Attorney General Act, Cal. Labor Code
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27 ¹ Unlike the Operations Manager position, Plaintiff does not specify in her
28 declaration whether the Lead Price Audit Coordinator was classified as an exempt or non-
exempt position. Nielson Decl. ¶ 2.

1 section 2699 et seq. The Complaint also seeks waiting time penalties under Labor Code
2 section 203, pre-judgment interest, and attorneys' fees and costs.

3 On February 27, 2012, the Court entered an Order for Pretrial Preparation
4 ("Scheduling Order"), pursuant to Rule 16. Order for Pretrial Prep., Dkt. 19. Among other
5 things, the Scheduling order set: May 7, 2013 as the motion cut-off date; May 28, 2013 as
6 the deadline to file pretrial documents; a pretrial conference for June 25, 2013; and a trial
7 date of July 8, 2013. Id. at 1-2, 5.

8 On August 31, 2012, Plaintiff filed a motion for preliminary approval, which sought
9 preliminary approval for a \$2.5 million settlement (with an unrestricted reversion to
10 Defendant of any unclaimed net settlement funds), conditional certification of the
11 settlement class under Rule 23(a) and (b)(3), the appointment of SCA as class counsel, the
12 appointment of Plaintiff as the class representative and authorization for Plaintiff's counsel
13 to solicit bids from prospective claims administrators. Pl.'s Mot. for Prelim. Approval at 1,
14 Dkt. 24.

15 On November 27, 2012, the Court denied Plaintiff's motion for preliminary approval
16 on several grounds. Nielson v. The Sports Authority, No. C 11-4724 SBA, 2012 WL
17 5941614 (N.D. Cal. Nov. 27, 2012), Dkt. 28. With regard to the matter of conditional class
18 certification, the Court found that Plaintiff had failed to carry her burden under Rule 23(a)
19 and (b)(3) with regard to her showing of commonality, typicality, adequacy of
20 representation, predominance and superiority. Id. at *3-5. Much of the Court's concern
21 arose as a result of Plaintiff's failure to specify the nature of her position and duties as well
22 as the alleged company policy that forms the basis of her claims. The Court further
23 concluded that Plaintiff had failed to provide sufficient information for it to assess whether
24 the proposed settlement is reasonable. Id. at *6. Finally, the Court expressed concerns
25 regarding the proposed class notice. Id.

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1 On June 7, 2013, a month after the motion cut-off had lapsed, the parties submitted a
2 24-page renewed motion for preliminary approval in the form of a document styled as a
3 “Stipulated Ex Parte Application for Order: (1) Granting Preliminary Approval of Class
4 Action Settlement; (2) Granting Conditional Certification of the Settlement Class;
5 (3) Appointing Class Counsel, Class Representative and Claims Administrator; and
6 (4) Approving First Amended Complaint, Class Notice, Claim Form, Request For
7 Exclusion Form.” Dkt. 32. In an effort to rectify the deficiencies of her first motion,
8 Plaintiff has submitted a declaration to clarify her job titles and the nature of the
9 “mandatory security policy” that underlies the claims alleged in the Complaint. Nielson
10 Decl., Dkt. 32-1. As will be set forth below, the stipulated ex parte application is an
11 improper and untimely renewed motion for preliminary approval. In addition, said motion
12 raises concerns regarding Plaintiff’s standing as well as her compliance with the Court’s
13 Scheduling Order.

14 **II. DISCUSSION**

15 **A. TIMELINESS**

16 The threshold issue presented is whether the parties’ putative renewed motion for
17 preliminary approval is timely. The Court’s Scheduling Order provides that: “All motions
18 including dispositive motions shall be heard on or before 5/7/13, at 1:00 p.m.” See Order
19 for Pretrial Prep. at 1. Once entered by the court, a scheduling order “controls the course of
20 the action unless the court modifies it.” Fed. R. Civ. P. 16(d). The Ninth Circuit has
21 emphasized the importance of complying with a district court’s scheduling order, noting
22 that it “is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded
23 by counsel without peril.” Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 610 (9th
24 Cir. 1992) (internal quotations omitted). As such, motions filed beyond the deadline set in
25 a Rule 16 scheduling order may be denied as untimely where no request to modify the
26 scheduling order has been made and granted. Id. at 608-609; e.g., Onyx Pharms., Inc. v.
27 Bayer Corp., No. C 09-2145 EMC, 2011 WL 4527402, *2 (N.D. Cal. Sept. 21, 2011)

1 (denying as untimely defendant’s motion which was filed after deadline in the court’s
2 scheduling order) (citing cases).²

3 In the instant case, the parties filed their renewed motion for preliminary approval on
4 June 7, 2013, a month after the May 7th motion cut-off date—without requesting or
5 obtaining leave of court to file the motion. Rather than seeking a modification to the
6 Scheduling Order, the parties have instead attempted to circumvent the motion deadline by
7 styling their motion as a “Stipulated Ex Parte Application”—as opposed to a motion—for
8 preliminary approval. Such tactics are unavailing. It is well settled that “[t]he
9 nomenclature the movant uses is not controlling.” Miller v. Transamerican Press, Inc., 709
10 F.2d 524, 527 (9th Cir. 1983). Rather, it is the substance of the motion and the nature of
11 the relief sought that determines how a motion or request is to be construed. Id. Here, the
12 substance of and relief sought in the parties’ ex parte application are functionally
13 indistinguishable from Plaintiff’s earlier motion for preliminary approval, which was
14 appropriately filed as a noticed motion under Civil Local Rule 7-2. Dkt. 24. As such, the
15 Court construes the parties’ ex parte application as a motion subject to the May 7 motion
16 cut-off. Since the parties failed to comply with the Court’s Standing Order and seek an
17 extension of the motion cut-off—and have not otherwise shown good cause to extend the
18 motion cut-off—the Court denies their renewed motion for preliminary approval as
19 untimely.³

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23 ² Once a Rule 16 scheduling order is entered, the schedule “may be modified only
24 for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). “Rule 16(b)’s
25 ‘good cause’ standard primarily considers the diligence of the party seeking the
26 amendment.” Johnson, 975 F.2d at 909; see also Coleman v. Quaker Oats Co., 232 F.3d
1271, 1294 (9th Cir. 2000). Where the moving party has not been diligent, the inquiry ends
and the motion should be denied. Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1087 (9th
Cir. 2002).

27 ³ The Court also notes that the renewed motion is 24-pages long which is in excess
28 of the 15-page limit set forth in the Court’s Standing Orders. Case Management Order for
Reassigned Cases at 5, Dkt. 16. The parties neither sought nor obtained leave to file an
oversized brief.

1 **B. STANDING**

2 Separate and apart from the matter of the timeliness, the Court finds that there are
3 serious questions regarding whether Plaintiff has standing. Under Article III of the United
4 States Constitution, standing is a threshold requirement in every civil action filed in federal
5 court. U.S. Const., art. III, § 2, cl. 1; Elk Grove Unified Sch. Dist. v. Newdow, 524 U.S. 1,
6 11 (2004) (“In every federal case, the party bringing the suit must establish standing to
7 prosecute the action.”). Constitutional standing is established by showing: (1) an injury in
8 fact, which is a violation of a protected interest, that is both (a) concrete and particularized
9 and (b) actual or imminent; (2) a causal connection between the injury and the defendant’s
10 conduct; and (3) a likelihood that the injury will be redressed by a favorable decision.
11 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). “Standing is determined as of
12 the commencement of litigation.” Biodiversity Legal Found. v. Badgley, 309 F.3d 1166,
13 1170 (9th Cir. 2002). The party seeking relief “bears the burden of showing that he has
14 standing for each type of relief sought.” Summers v. Earth Island Inst., 555 U.S. 488, 493
15 (2009).

16 The standing requirement applies to a class representative, who, in addition to being
17 a member of the class he purports to represent, must establish the existence of a case or
18 controversy. O’Shea v. Littleton, 414 U.S. 488, 494 (1974). A “class representative must
19 be part of the class and possess the same interest and suffer the same injury as the class
20 members.” Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982) (quotation omitted);
21 “If the litigant fails to establish standing, he may not ‘seek relief on behalf of himself or any
22 other member of the class.’” Nelsen v. King County, 895 F.2d 1248, 1250 (9th Cir. 1990)
23 (quoting O’Shea, 414 U.S. at 494); Cornett v. Donovan, 51 F.3d 894, 897 n.2 (9th Cir.
24 1995) (“if the representative parties do not have standing, the class does not have
25 standing.”); see also Douglas v. U.S. Dist. Court for Cent. Dist. of Calif., 495 F.3d 1062,
26 1069 (9th Cir. 2007) (holding that a plaintiff whose individual claim was rendered moot by
27 an arbitration award “would lose his status as class representative because he would no
28 longer have a concrete stake in the controversy.”). “[S]ubject matter jurisdiction cannot be

1 waived, and the court is under a continuing duty to dismiss an action whenever it appears
2 that the court lacks jurisdiction.” Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir.
3 1983).

4 Here, it is apparent that Plaintiff has not suffered any injury resulting from
5 Defendant’s security policy or any other wage-related conduct. In her declaration filed in
6 support of the instant motion, Plaintiff states:

7 I brought these claims based on my understanding of Sports
8 Authority’s policies relating to timekeeping, meal/rest breaks,
9 and security inspections (under which employee’s bags are
10 inspected when they exit the store, including for a meal or rest
11 break). With respect to the security inspection policy, it is my
12 understanding that Sport’s Authority’s policy is to 1) not record
time spent in security inspections (they are conducted after an
employee clocks out), 2) not compensate employees for
inspection time and 3) not add a corresponding amount of time
to employees’ meal or rest break or pay a meal or rest break
premium.

13 Nielson Decl. ¶ 5 (emphasis added). She further claims that “it is [her] understanding” that
14 employees are not paid overtime wages and are not paid for missed breaks. Id. ¶¶ 6-7.

15 Notably absent from the record is any evidence that Plaintiff was personally
16 subjected to Defendant’s security inspection policy while she was on a rest or meal break,
17 or that she otherwise was not fully and properly compensated by Defendant. Moreover, the
18 fact that Plaintiff prefaces all of her representations regarding Defendant’s alleged practices
19 with statement that “it is my understanding” (or words to that effect) shows that she has no
20 personal knowledge of the conduct that forms the basis of this lawsuit. See Bank Melli Iran
21 v. Pahlavi, 58 F.3d 1406, 1412-13 (9th Cir. 1995) (declaration made by opposing counsel
22 based on information and belief shows lack of personal knowledge); Sterling Acceptance
23 Corp. v. Tommark, Inc., 227 F. Supp. 2d 454, 459 (D. Md. 2002) (striking statement in an
24 affidavit prefaced with the words “my understanding,” finding that such words indicated a
25 lack of personal knowledge).

26 In the absence of a showing that Plaintiff suffered any actual injury, she has no
27 standing to maintain this action either individually or as a class action. See Black Faculty
28 Ass’n of Mesa College v. San Diego Cmty. College Dist., 664 F.2d 1153, 1157 (9th Cir.

1 1981) (vacating judgment for lack of standing where plaintiffs were not members of the
2 class); Wuest v. Cal. Healthcare W., No. 3:11-CV-00855-LRH-VPC, 2012 WL 4194659,
3 *5 (D. Nev. Sept. 19, 2012) (“Since Plaintiff has not suffered the relevant injury in fact
4 under the waiting-time statutes, Plaintiff lacks standing to claim waiting-time penalties . . .
5 for herself or as a representative of the class”); See In re Flash Memory Antitrust Litig., No.
6 C 07-0086 SBA, 2010 WL 2465329, *6 (N.D. Cal. June 10, 2010) (finding that plaintiff
7 who did not purchase any of the flash memory products at issue in his antitrust class action
8 lacked standing to sue). Because it appears that Plaintiff lacks standing to maintain this
9 action, the Court therefore directs her to show cause why the instant action should not be
10 dismissed for lack of subject matter jurisdiction. In re Flash Memory Antitrust Litig., 2010
11 WL 2465329, *6 (N.D. Cal. June 10, 2010); see also Fed. R. Civ. P. 12(h)(3) (“If the court
12 determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the
13 action.”).

14 **C. FAILURE TO COMPLY WITH COURT’S SCHEDULING ORDER**

15 “Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an
16 action for failure to comply with any order of the court.” Ferdik v. Bonzelet, 963 F.2d
17 1258, 1260 (9th Cir. 1992). “In determining whether to dismiss a claim for failure to
18 prosecute or failure to comply with a court order, the Court must weigh the following
19 factors: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need
20 to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the availability
21 of less drastic alternatives; and (5) the public policy favoring disposition of cases on their
22 merits.” Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002).

23 In the instant case, Plaintiff has violated the Scheduling Order in at least two
24 significant respects. First, as discussed above, Plaintiff failed to file her renewed motion
25 for preliminary approval until well after the motion cut-off date had passed. Instead, she
26 attempted to circumvent that deadline by styling her motion as a stipulated ex parte
27 application. Second, Plaintiff has failed to comply with the deadline for filing pretrial
28 documents, which were due by May 28, 2013. By seeking to circumvent the Court’s

1 Scheduling Order, Plaintiff's actions have unnecessarily consumed "valuable time that [the
2 court] could have devoted to other major and serious criminal and civil cases on its docket."
3 Ferdik, 963 F.2d at 1261.

4 **III. CONCLUSION**


5 For the reasons set forth above,

6 IT IS HEREBY ORDERED THAT:

- 7 1. The parties' renewed motion for preliminary approval is DENIED.
- 8 2. By no later than seven (7) days from the date this Order is filed, Plaintiff shall
9 show cause, in writing, why the instant action should not be dismissed for (a) lack of
10 subject matter jurisdiction and (b) failure to comply with a court order. Defendant shall file
11 its response, if any, within seven (7) days after Plaintiff files her brief. The parties'
12 respective memoranda shall not exceed ten (10) pages in length. The Court will deem the
13 matter under submission upon the filing of Defendant's memorandum.
- 14 3. This Order terminates Docket 32.

15 IT IS SO ORDERED.

16 Dated: July 5, 2013


SAUNDRA BROWN ARMSTRONG
United States District Judge

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