

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ISAAC RODRIGUEZ, as an individual and  
on behalf of all others similarly situated,  
  
Plaintiff,  
  
v.  
  
NIKE RETAIL SERVICES, INC., an  
Oregon corporation; and DOES 1 through  
50, inclusive,  
  
Defendants.

Case No. 5:14-cv-01508 BLF (HRL)  
  
**ORDER RE DISCOVERY DISPUTE  
JOINT REPORT NO. 1**  
  
[Re: Dkt. 29]

In this wage-and-hour case, plaintiff Isaac Rodriguez sues for himself and on behalf of a putative class of all current and former non-exempt retail store employees of defendant Nike Retail Services, Inc. (Nike) who worked in California during the period from February 25, 2010 to the present. Rodriguez alleges that Nike has a policy or practice of forcing its employees to submit to a security inspection after they clock-out from work, leaving employees uncompensated for the time spent in these security checks. (Dkt. 27, First Amended Class Action Complaint ¶¶ 23, 32, 38). Plaintiff asserts two claims for violation of various provisions of the California Labor Code, as well as a claim for violation of California Business and Professions Code § 17200. Federal jurisdiction is premised on diversity, 28 U.S.C. § 1132, and the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). Nike says that simply having managers look in an employee’s bag as they walk out the door does not constitute compensable time.

1 At issue in Discovery Dispute Joint Report (DDJR) No. 1 is whether defendant should be  
2 compelled to provide the names, last known addresses, and telephone numbers of putative class  
3 members in response to plaintiff's Interrogatory No. 1.<sup>1</sup> The matter is deemed suitable for  
4 determination without oral argument. Civ. L.R. 7-1(b). Having considered the parties' respective  
5 arguments,<sup>2</sup> the court grants plaintiff's request for an order compelling this discovery.

6 Preliminarily, Nike contends that the instant DDJR is untimely because it was not filed  
7 within 14 days after the parties' in-person meet-and-confer, as required by the undersigned's  
8 Standing Order re Civil Discovery Disputes. Nike says that the delay was plaintiff's fault.  
9 However, defendant does not deny that, following their in-person meeting, the parties agreed to  
10 hold open the meet-and-confer process, for the purpose of conducting further negotiations after  
11 Nike's Fed. R. Civ. P. 30(b)(6) deposition. Parties are encouraged to meet-and-confer as much  
12 and as often as necessary to attempt to resolve their discovery disputes without court intervention.  
13 DDJR No. 1 was filed within 14 days after defendant confirmed in a January 30, 2015 email that it  
14 would not provide the requested discovery. Thus, while the DDJR was not filed in strict  
15 compliance with the timing requirements of the Standing Order, this court declines to find that the  
16 report is untimely.

17 Plaintiff contends that he is entitled to the contact information of all potential class  
18 members "as a matter of law." To the extent plaintiff means that he is automatically entitled to  
19 such discovery, he is wrong. In order to obtain pre-certification discovery, plaintiff bears the  
20 burden of making a prima facie showing that the class action requirements of Rule 23 are satisfied,  
21 or that discovery is likely to produce substantiation of the class allegations. Mantolite v. Bolger,

22 \_\_\_\_\_  
23 <sup>1</sup> Interrogatory No. 1 asks Nike to "Please IDENTIFY all non-exempt employees who have been  
24 employed at any retail stores owned or operated by YOU in the State of California at any time  
25 during the RELEVANT TIME PERIOD. (For purposes of these Interrogatories, 'IDENTIFY'  
26 includes stating the name and the last known address and telephone numbers. 'YOU,' 'YOUR'  
27 and 'DEFENDANT' shall refer to Defendant Nike Retail Services, Inc. 'RELEVANT TIME  
28 PERIOD' shall refer to the time period from February 25, 2010, through the present.)"

<sup>2</sup> On April 27, 2015, plaintiff filed a notice of recent decision as to a discovery order issued by  
Magistrate Judge Beeler in Case No. 3:12-cv-04474 PJH (LB) *Barreras v. Michaels Stores, Inc.*  
This court has considered plaintiff's filing, but finds the *Barreras* decision inapposite inasmuch as  
it concerned different claims and facts and does not squarely address the issues presented in this  
DDJR.

1 767 F.2d 1416, 1424 (9th Cir. 1985). Nevertheless, disclosure of putative class members' contact  
2 information "is a common practice in the class action context." Artis v. Deere & Co., 276 F.R.D.  
3 348, 352 (N.D. Cal. 2011); see also Bell v. Delta Air Lines, Inc., No. C13-01199YGR (LB), 2014  
4 WL 985829 at \*3 (N.D. Cal., Mar. 7, 2014) (collecting cases). Ultimately, whether or not pre-  
5 certification discovery will be permitted, and the scope of any discovery that is allowed, lies  
6 within the court's sound discretion. See Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935,  
7 942 (9th Cir. 2009) ("Our cases stand for the unremarkable proposition that often the pleadings  
8 alone will not resolve the question of class certification and that some discovery will be  
9 warranted."); Del Campo v. Kennedy, 236 F.R.D. 454, 459 (N.D. Cal. 2006) ("Prior to  
10 certification of a class action, discovery is generally limited and in the discretion of the court.").

11 This court is told that there are over 6,000 potential class members who worked in more  
12 than 31 stores over the requested five-year period from February 25, 2010 to the present. There  
13 appears to be no serious dispute that plaintiff is entitled to at least some pre-certification  
14 discovery. The crux of the parties' disagreement is whether plaintiff should be permitted the  
15 requested discovery of all putative class members (plaintiff's position) or whether he should be  
16 limited to employees at Nike's Gilroy location where plaintiff worked (Nike's contention).

17 Plaintiff maintains that he is entitled to discovery of the entire class because, in Nike's Fed.  
18 R. Civ. P. 30(b)(6) deposition, defendant's designated witness, Jeffrey McPike, confirmed that bag  
19 security checks are conducted after an employee clocks out: "There is a bag check policy that any  
20 time an employee leaves the store if they are on shift they are to get their bag checked which is a  
21 process which we just look in the bag on their way out the door." (Dkt. 29, DDJR No. 1 at 5  
22 (McPike Depo. at 50: 2-7)). According to the DDJR, McPike also testified that Nike does its best  
23 to ensure that all of its stores know and follow the company's policy. (Id. (McPike Depo. at  
24 64:17-21)).

25 Citing to Nguyen v. Baxter Healthcare Corp., 275 F.R.D. 503 (C.D. Cal. 2011), Nike  
26 argues that plaintiff has not made a sufficient showing to justify discovery of anyone beyond the  
27 Gilroy location. In Nguyen, the plaintiff alleged that defendant violated labor laws and failed to  
28 comply with company guidelines by denying adequate meal periods and issuing paycheck stubs

1 that did not reflect the hourly pay rate for shift differential pay. Id. at 504. Although the court  
2 concluded that plaintiff was entitled to conduct pre-certification discovery of defendant's  
3 employee records, plaintiff was limited to discovery from defendant's Irvine facility where she  
4 worked. Id. at 507-508. That was because plaintiff did nothing more than speculate that if  
5 supervisors at the Irvine location did not follow company guidelines, then supervisors at other  
6 locations presumably also violated those guidelines. Additionally, defendant presented plaintiff's  
7 testimony establishing that she never worked at any other location and had no knowledge of the  
8 pay issues, policies, or practices at any location other than the Irvine facility. Id.

9 Nike says that Rodriguez worked at defendant's Gilroy location as a seasonal part-time  
10 employee for a total of 10 shifts in 2011 and argues that, like the plaintiff in Nguyen, Rodriguez's  
11 testimony does not support class-wide pre-certification discovery. Pointing to excerpts of  
12 plaintiff's deposition testimony, Nike says that plaintiff did not complain about the time spent in  
13 security checks *per se*, which he agreed took less than roughly 2 seconds. (DDJR No. 1 at 11  
14 (Rodriguez Depo. at 27:7-11)). Rather, Rodriguez testified that during closing shifts, his manager  
15 would require him to clock-out (once he had finished his duties) and then wait for other employees  
16 to complete their closing duties before plaintiff could end his shift by participating in a "huddle,"  
17 during which security checks would sometimes (but not always) be conducted. Plaintiff  
18 additionally testified that the "huddle" consisted of "your goodbyes, Can I see your bag, Lift up  
19 your -- your shirts to check your waistband, and you lift up your pant legs. It was really all it was.  
20 It wasn't necessarily a game plan for the next day or not." (Id. (Rodriguez Depo. at 39:3-40:2;  
21 52:17-22; 53:6-9; 54:23-55:4)). Defendant says that huddles are supposed to be conducted on-the-  
22 clock---i.e., the company's closing procedures require managers to conduct a huddle with  
23 employees after the store has been cleaned and organized, but before employees clock-out and  
24 undergo a bag check as they walk out of the store. (Id. at 12 (McPike Depo. at 65:19-66:5)).  
25 Thus, says Nike, plaintiff is not actually challenging adherence to an off-the-clock security check  
26 policy, but rather, his manager's violation of company's policy re on-the-clock huddles. As such,  
27 defendant says that plaintiff is not entitled to class-wide discovery because, like the plaintiff in  
28 Nguyen, Rodriguez has no evidence that managers at other stores violated the on-the-clock huddle

1 policy.

2 To the extent plaintiff is complaining about *huddles* being conducted off-the-clock, there  
3 may be a disconnect with the alleged violation asserted in his complaint, i.e., off-the-clock *security*  
4 *checks*. Nevertheless, his testimony does not contradict his allegations that Nike violated labor  
5 laws through a policy requiring off-the-clock security checks. Whether the security checks  
6 occurred during off-the-clock huddles or whether they occurred in accordance with defendant's  
7 acknowledged policy re security checks, all security checks plaintiff complains about occurred  
8 off-the-clock. In view of Nike's testimony that it has a company-wide policy requiring off-the-  
9 clock security checks, this court finds that "[t]he better and more advisable practice for a District  
10 Court to follow is to afford the litigants an opportunity to present evidence as to whether a class  
11 action [is] maintainable." Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1313 (9th Cir.  
12 1977). "And, the necessary antecedent to the presentation of evidence is, in most cases, enough  
13 discovery to obtain the material, especially when the information is within the sole possession of  
14 the defendant." Id. The requested discovery is likely to produce substantiation of the class claims,  
15 and this court declines to limit discovery to the Gilroy location or to a particular sampling.

16 Nike nevertheless maintains that disclosure of the requested contact information violates  
17 the putative class members' privacy rights. Plaintiff's need for the requested information must be  
18 balanced against defendant's asserted objections, including the privacy rights of potential class  
19 members. Artis, 276 F.R.D. at 352-53. As discussed above, plaintiff has a legitimate need for the  
20 requested contact information. The right to privacy is not absolute; and, the contact information  
21 sought here generally is considered less sensitive than "more intimate privacy interests such as  
22 compelled disclosure of medical records and personal histories." Id. at 353; see also Tierno v.  
23 Rite Aid Corp., No. C05-02520TEH, 2008 WL 3287035 at \*3 (N.D. Cal., July 31, 2008)  
24 (concluding that disclosure of class members' job position and contact information was not a  
25 serious invasion of privacy, especially where a protective order was in place to ensure that the  
26 information is not misused.).


27 While no protective order has been entered in this case, the parties each suggest other  
28 means of protecting the privacy of potential class members, particularly those who may not wish

1 to be contacted at all. In his April 27 filing, plaintiff alludes to use of an opt-out Belaire-West<sup>3</sup>  
2 notice. Nike suggests that production of the contact information be made to a third-party  
3 administrator who will oversee the process. Because the instant DDJR focuses primarily on what  
4 scope of pre-certification discovery should be allowed, it appears that the parties may not have  
5 fully discussed the particulars of how the production should occur. The court therefore directs the  
6 parties to meet-and-confer in good faith to attempt to agree on the best means of obtaining the  
7 requested information, while protecting the privacy of potential class members.

8 Additionally, the parties are encouraged to meet-and-confer on the terms of a protective  
9 order to protect any sensitive or private information that is produced. Meanwhile, any contact  
10 information that is produced shall be kept confidential and used solely for purposes of this  
11 litigation. The parties shall not further disclose any potential member's contact information,  
12 absent consent from the particular putative class member in question. To further minimize the  
13 possibility for abuse, the court reminds the parties that their communications must be fair and  
14 accurate and that misleading, intimidating, or coercive communications are prohibited.

15 **SO ORDERED.**

16 Dated: April 29, 2015

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19 HOWARD R. LOYD  
20 UNITED STATES MAGISTRATE JUDGE

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27 <sup>3</sup> See Belaire-West Landscape Inc. v. Super. Ct., 149 Cal.App.4th 554, 57 Cal.Rptr.3d 197 (2007).  
28 A "Belaire-West notice" opt-out procedure involves providing potential class members with  
written notice advising them of the lawsuit and giving them the opportunity to opt-out if they do  
not want their contact information disclosed.

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5:14-cv-01508-BLF Notice has been electronically mailed to:

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