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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LEO WELTMAN,

vs.

ORTHO MATTRESS, INC.,

Plaintiff,

Defendant.

CASE NO. 08cv0840 JM(WMc)

ORDER DECLINING TO EXERCISE
SUPPLEMENTAL JURISDICTION
OVER STATE LAW CLAIMS;
DENYING MOTION FOR CLASS
CERTIFICATION

In conjunction with Plaintiff Leo Weltman’s motion for class certification, Plaintiff filed an ex parte application (“Application”) seeking a threshold determination on the issue of supplemental jurisdiction over the state law class claims. On October 30, 2009 the court issued an order requesting additional briefing on the issue of supplemental jurisdiction. The issue of supplemental jurisdiction over the state law claims is now fairly joined. For the reasons set forth below, the court declines to exercise jurisdiction over the state law class claims and denies the motion for class certification as moot.

BACKGROUND

The Second Amended Complaint (“SAC”), filed on October 1, 2008, alleges eight causes of action for (1) Unfair Competition in Violation of Cal.Bus.&Prof. Code §17200; (2) Failure to Pay Overtime Wages in Violation of Cal.Lab.Code §§510 et seq.;

1 (3) Failure to Provide Wages When Due in Violation of Cal.Lab.Code §203; (4) Failure
2 to Provide Accurate Itemized Statements in Violation of Cal.Lab.Code §226; (5) Failure
3 to Provide Meal and Rest Periods in Violation of Cal.Lab.Code §§226.7 and 512; (6)
4 Failure to Indemnify in Violation of Cal.Lab.Code §2802; (7) Failure to Pay
5 Compensation in Violation of 29 U.S.C. §201 et seq.; and (8) Labor Code Private
6 Attorney General Act, Cal.Lab.Code §2698. Plaintiff asserts federal question
7 jurisdiction based upon the alleged violation of the Fair Labor Standards Act (“FLSA”),
8 29 U.S.C. §201, et seq., and supplemental jurisdiction pursuant to 28 U.S.C. §1367 over
9 the seven state law causes of action. Plaintiff also alleges jurisdiction under the Class
10 Action Fairness Act (“CAFA”), 28 U.S.C. §1332(d).¹

11 Ortho is a nationwide company that sells bedding products and mattresses with
12 over 50 retail locations throughout California. (SAC ¶1, 2). During the Class Period,
13 defined as the period from May 7, 2004 through the present, Ortho has employed in
14 excess of 400 California salespersons. Ortho sells “big ticket” items, as identified in
15 29 C.F.R. §779.414, where “commission is the method of payment that has traditionally
16 been used to pay salespersons wages.” (Oppo. at p.1:27-28). The stores are generally
17 staffed by a store manager and another salesperson three to four days a week, typically
18 over the weekend; and staffed by a single employee during the middle of the week.
19 (Spencer Decl. ¶3). When two employees are scheduled to work on the same day, they
20 work staggered shifts, allowing the earlier arriving employee to leave work prior to
21 closing. Id.

22 Plaintiff was hired by Ortho in March 2007 and continues in its employ. (SAC
23 ¶2). Among other things, Plaintiff alleges that Ortho’s employees were wrongfully
24 classified as exempted commissioned salespersons and therefore entitled to statutory
25 mandatory overtime provisions. (SAC ¶27-30). Under the allegedly uniform
26 compensation structure adopted by Ortho, each Class member received a flat payment
27

28 ¹ In his Supplemental Brief, Plaintiff concedes that CAFA cannot serve as a basis for this court’s subject matter jurisdiction.

1 of \$100 per day plus additional compensation pursuant to the Gross Profits program
2 which was based on gross profits and not gross sales.

3 Plaintiff also claims that Ortho maintained a uniform wage statement policy
4 which violated Cal.Lab.Code §226(a) because Ortho failed to provide employees with
5 accurate wage statements showing the hours worked. The wage statements provided
6 to Class Members failed to state the hours worked. (Locker Decl. ¶29). Plaintiff further
7 claims that Ortho failed to reimburse employees for work-related mileage expenses and
8 prohibited employees from taking a meal break when they worked alone at an Ortho
9 store. (Locker Decl. ¶¶31-32).

10 In his motion for class certification, Plaintiff seeks to pursue the seven law state
11 claims on a class-wide basis and to pursue the single federal claim on an individual
12 basis. Prior to the hearing date on the motion for class certification, Plaintiff filed the
13 Application seeking to clarify the scope of the court's supplemental jurisdiction over
14 the state law claims. On October 20, 2009, the court requested additional briefing on
15 the basis for this court's subject matter jurisdiction. The issues are now fairly joined
16 for decision.

17 DISCUSSION

18 Supplemental Jurisdiction Over Class Claims

19 This court is authorized by 28 U.S.C. §1367(a) to exercise supplemental
20 jurisdiction over state law claims whenever the relationship between the federal and
21 state claims is such that they “form part of the same case or controversy under Article
22 III of the United States Constitution.” 28 U.S.C. §1367(a). However, 28 U.S.C.
23 §1367(c) provides:

24 (C) The district courts may decline to exercise supplemental jurisdiction
25 over a claim under subsection (a) if - -

26 (2) the claim substantially predominates over the claim or claims over
27 which the district court has original jurisdiction,

28 28 U.S.C. §1367(c). As noted by the Supreme Court, supplemental “jurisdiction is a
doctrine of discretion.” City of Chicago v. International College of Surgeons, 522 U.S.

1 156, 172 (1997). The court may decline to exercise jurisdiction over state law claims
2 “depending on a host of factors . . . including the circumstances of the particular case,
3 the nature of the state law claims, the character of the governing state law, and the
4 relationship between the state and federal claims.” Id. at 173; Executive Software v.
5 U.S. Dist. Court, 24 F.3d 1545, 1555-57 (9th Cir. 1994) (holding that factors of
6 economy, convenience, fairness and comity inform the court’s decision to exercise
7 supplemental jurisdiction).

8 The Claims

9 The only federal claim, brought individually and not as a class claim, alleges that
10 Defendant wrongfully characterized him as exempt from overtime compensation.
11 Plaintiff alleges that Defendant violated (1) Section 207(i) of FLSA by, among other
12 things, paying him less than one and one half times the minimum wage or applying the
13 commissioned salesperson exemption to Plaintiff and (2) Section 213(a)(1) by
14 improperly characterizing the scope of employment as executive, administrative, or
15 professional in order to avoid paying overtime compensation. (SAC ¶¶108-123).

16 As represented by Plaintiff, the seven state law claims broadly encompass claims
17 that (1) Ortho misclassified its employees as exempt from overtime wages (essentially
18 the same as the FLSA claim), (Motion at p.1:20 - 3:17); (2) the wage statements
19 received from Ortho uniformly failed to show the hours worked in violation of
20 Cal.Lab.Code §226(a), (Motion at p.3:18-24); (3) Ortho failed to reimburse Class
21 Members for work-related mileage expenses in violation of Cal.Lab.Code §2802,
22 (Motion at p.4:9:17), and (4) Ortho denied meal breaks to employees who were working
23 alone at its stores, (Motion at p.4:18-25).

24 Common Nucleus of Operative Facts

25 In the main, Plaintiff’s claims arise from a “common nucleus of operative facts.”
26 United Mine Workers v. Gibbs, 383 U.S. 715, 723 (1966), in the sense that all claims
27 arise from Ortho’s alleged employment practices. More specifically, Plaintiff’s federal
28 FLSA claim arises from the alleged wrongful characterization of Plaintiff as an

1 exempted employee for purposes of overtime compensation. This is also the essence
2 of Plaintiff's claims for violation of Cal. Lab. Code §510 et seq. and violation of Cal.
3 Bus and Prof. Code §17200 et seq. The court need not precisely determine whether
4 Plaintiff's other state law claims may be loosely characterized as arising from Ortho's
5 employment practices, because, for the reasons set forth below, the court concludes that
6 the state law class claims substantially predominate over the single straight-forward
7 federal FLSA claim.

8 The Predominance of the State Class Action Claims

9 With respect to class-wide treatment of Plaintiff's state law claims, the court
10 concludes that individualized issues seriously undermine the viability of the class action
11 procedure. For example, Ortho has come forward with undisputed evidence that certain
12 similarly situated employees to Plaintiff earned substantially in excess of the one and
13 one half minimum wage requirement of Section 207(i) of FLSA, (Spencer Decl. ¶8),
14 and therefore would be exempt from certain overtime compensation. In such a case,
15 individualized determinations will likely predominate over class-wide issues. Another
16 concern relates to the meal period subclass. The limited factual record before the court
17 presently reveals individualized issues concerning whether a particular manager
18 violated Ortho's written company policy to allow employees to close the store and leave
19 the premises for their meal break. For example, Mr. Holt declares that he was instructed
20 to remain in the store and that he never took a formal lunch break. (Holt Decl., Exh.
21 13). He does not declare that he never took an uninterrupted lunch breach in the store,
22 conduct permitted by California law pursuant to Wage Order 7-2001, California Code
23 of Regulations, Title 8, Section 11070(11)(e) (stating that an employer may require on
24 premises meal periods). Mr. Aldava declares that he worked alone about 80% of the
25 time and not permitted to take a lunch break. Mr. Butski declares that he "regularly"
26 did not take meal breaks. Ms. Unitas-Smith declares that she was unable to take a full
27 lunch break about 20% of the time. These individualized proof determinations - - all
28 involving state law class claims - - would likely predominate over Plaintiff's single

1 federal claim.

2 Courts have routinely found that such individualized determinations weigh
3 against class certification. In Johnson v. TGF Precision Haircutters, Inc., 2005 WL
4 1994286 (S.D. Tex. Aug. 17, 2005) the court decertified a FLSA collective action, in
5 large part because whether each class member satisfied the wage requirements of
6 Section 207(i) of FLSA presented individualized issues not suitable for class action
7 treatment. In Wong v. HSBV Morg. Corp., 2009 WL 151014 (Jan. 21, 2009) the
8 district court declined to exercise supplemental jurisdiction over state law claims
9 brought against an employer in a FLSA action. The plaintiff alleged that the employer
10 failed to comply with California state law by providing adequate meal and rest periods.
11 The district court concluded that “plaintiffs’ ten state laws claims substantially
12 predominate over plaintiffs’ relatively straightforward FLSA claim and present novel
13 issues of state law. Put another way, if said state law claims remain joined with the
14 federal claim herein, the ‘federal tail’ will ‘wag what is in substance a state dog.’” Id.
15 at *3.

16 Here, the court declines to exercise supplemental jurisdiction over the state law
17 class claims because the state law claims substantially predominate over the relatively
18 straight-forward FLSA claim. The anticipated economies and convenience anticipated
19 by the class action device do not apply under the circumstances given the individualized
20 determinations required to assess the state law class claims. See Executive Software,
21 24 F.3d at 1555-57. Further, the state law claims implicate no federal interest yet
22 California courts have a strong interest in enforcing state law labor claims, like those
23 asserted by Plaintiff herein.

24 In sum, the court declines to exercise jurisdiction over the state law class claims.

25 **Supplemental Jurisdiction Over Plaintiff’s Individual State Law Claims**


26 At the time of oral argument, Plaintiff’s counsel requested that Plaintiff be
27 permitted to pursue his state claims in state court and that the court decline to exercise
28 jurisdiction over the state claims. Plaintiff further represented that he desires to pursue

1 the state claims on an individual and class-wide basis. As factors of economy,
2 convenience, fairness, and comity support Plaintiff's ability to pursue his state court
3 claims in state court, the court declines to exercise subject matter jurisdiction over the
4 state law claims on an individual basis.²

5 In sum, the court declines to exercise supplemental jurisdiction over the state law
6 claims and denies the motion for class certification as moot.

7 **IT IS SO ORDERED.**

8 DATED: December 10, 2009

9 
10 Hon. Jeffrey T. Miller
United States District Judge

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12 cc: All parties
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28 ² At the time of oral argument Plaintiff suggested that a stay of the FLSA claim pending resolution of the state law claims may be appropriate. Any such request should be presented by means of joint motion or by noticed motion brought within 90 days of entry of this order.