Righetti Glugoski, P.C.
Attn: Righetti Esq, Matthew
456 Montgomery Street
Ste# 1400
San Francisco, CA 94104____

Sheppard Mullin Richter & Hampton LLC
Attn: Cowie, Paul
379 Lytton Avenue
Palo Alto, CA 94301____

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Curley Plaintiff/Petitioner(s) VS. Save Mart Supermarkets Defendant/Respondent(s) (Abbreviated Title)	No. RG13685740 Order Motion Granted

The Motion filed for William O'Brien and Dana Curley was set for hearing on 07/05/2017 at 02:30 PM in Department 17 before the Honorable George C. Hernandez, Jr.. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The Motion of Plaintiffs Dana Curley and William O'Brien ("Plaintiffs") to 1) Approve Trial Plan; 2) Confirm Class Certification; and 3) Approve Notice to Class Members ("Motion") is ruled on as follows:

TRIAL PLAN. Plaintiffs intend, in Phase 1 of the trial, to attempt to prove their overtime and meal period claims, as well as derivative claims for waiting time penalties and inaccurate wage statements); and defendant Savemart Supermarkets ("Defendant") will put on its exemption affirmative defenses (the administrative and executive exemptions). If Plaintiffs prove their case-in-chief and defeat Defendant's affirmative defenses, the trial would proceed to a second, restitution/damages, phase, in which class members could submit "proofs of claim," signed under penalty of perjury, and Defendant would have the option of individual challenges to those claims before a special master.

Defendant's objections to the revised Trial Plan (shown in the "redline" draft, Plaintiffs' exhibit 6) are noted. To the extent that the Plan contains argument or makes legal or factual assumptions that are disputed (see, e.g., objections on pages 2-3), the court's approval of the Trial Plan is not an adoption of those contentions. Defendant's contention that claim forms are not evidence and that there is no mechanism for determining that any class member actually worked overtime lack merit; as to the latter, Plaintiffs have offered a way to prove some degree of liability for the class, as a whole, on overtime claims, through common evidence. The objection concerning meal periods is not consistent with class action standards of proof; a showing of liability is not required for every class member. Other objections are addressed below.

AFFIRMATIVE DEFENSES. As discussed in the court's order provisionally granting class certification, in the class certification proceedings, only two elements of Defendant's affirmative defenses (the "exercise of discretion and independent judgment" and "primarily engaged in duties that meet the test of the exemption" requirements) were contested on the merits; Plaintiffs sought a ruling that both of those elements could be tried on a class basis. The court found that common issues predominated, both as to Plaintiff's case in chief and Defendant's affirmative defenses, except that, if

Defendant prevailed on the "exercise of discretion and independent judgment" issue, trial of the remaining issue, whether class members were primarily engaged in duties which meet the test of the exemption, might require individualized inquiries. Further, Plaintiffs had not demonstrated that these issues could be effectively managed (e.g., through the use of statistical methods that comport with due process requirements). Plaintiffs' intent to litigate this element, if necessary, undermined their contention that "common issues will predominate" at trial.

After several case management discussions, and feedback from Defendant and the court, Plaintiffs withdrew their request to certify the "Primarily Engaged" element for class trial. Proverbially speaking, as to the exemption defenses, Plaintiffs have elected to put all of their eggs in one basket by challenging only one element, the exercise discretion and independent judgment on matters of significance. (See Wage Orders [administrative and executive exemptions]; Combs v. Skyriver Communications, Inc. (2008) 159 Cal.App.4th 1242, 1254.)

Defendant objects to this approach, arguing (without supporting authority) that this element and the "primarily engaged" elements are inextricably intertwined. Defendant also rehashes the same arguments and evidence it presented in connection with both the class certification motion and Defendant's motion to strike class allegations. On the latter point, the court is certainly obligated to continuously monitor the proceedings and the propriety of certification; however, the evidentiary record has not changed, and Defendant relies (again) upon evidence that does not demonstrate any material variance among class members - at least as to the issues other than "counting time."

While Plaintiffs bear a continuous burden of showing that the "discretion and independent judgment" element presents common legal and factual issues, including at and after trial, Defendant will bear the burden of establishing that this element is satisfied on the merits. (See, e.g., Eicher v. Advanced Bus. Integrators, Inc. (2007) 151 Cal.App.4th 1363, 1372.) This element was discussed at length in the court's class certification order; the court will only reiterate here that the "exercise of discretion and independent judgment" consists of more than the mere application of skill, and may involve some supervision or providing recommendations (not unfettered decision-making powers); it must be exercised as to "matters of significance"; and the employee must exercise discretion on matters of significance "customarily and regularly," not just occasionally.

Thus, Defendant's burden, at trial, will be to identify those tasks and duties performed by assistant managers which prove the exemption, and to show that these tasks and duties (a) involve the exercise of discretion and independent judgment ("DIJ") (b) on matters of significance and (c) are normal and recurrent duties of assistant managers (not just occasional). The first two issues are plainly common and do not implicate individualized issues, as they are akin to "task classification." That is, whether a duty or task involves the exercise of discretion will not change depending upon which member of the class performs it. Similarly, whether the duty or task concerns a "matter of significance" - as opposed to a matter of little consequence (29 CFR §§ 541.207(d)(2) [explaining that the discretion must be regularly applied to decisions made by persons who "participate in the formulation of policy" or "exercise authority within a wide range to commit their employer in substantial respects financially or otherwise"]) - constitutes an inquiry into the nature of a duty, responsibility or task and its relation to Defendant's overall business operations. The inquiry will not vary among individual class members.

Defendant's argument that the frequency with which assistant managers exercise discretion on matters of significance is the same as the "primarily engaged" element lacks merit. For one thing, if true, it would render the "customarily and regularly" language as surplusage. "Customarily and regularly" has its own independent meaning: that is, the exercise of discretion on consequential matters must be normal and recurrent, not just occasional. (See 29 CFR § 541.207(g) ["customarily and regularly" means "greater than occasional" but "less than constant".) Whether something is "normal and recurrent" is subjective, not quantitative; there is no authority to suggest that a jury requires a "counting time" exercise or laserlike precision to determine whether, in a given job classification, the exercise of discretion on matters of consequence occurs normally and regularly, as opposed to just occasionally. This issue can be determined based upon common evidence, such as the assistant manager job description, general duties, the employer's expectations, and the testimony of as many class members as time will allow. As to the latter issue, to the extent that how individual class members spend their time is relevant, the court has determined that extrapolation from individual witnesses to the class comports with due process because the record at class certification showed virtually no variation among individual class members' testimony on this point. In the court's view, no credible declarant testified to facts showing that s/he regularly exercised discretion on any matter of consequence.

It also bears repeating that class certification is a fact-intensive inquiry, and highly dependent upon the record in the case before the court. In its opposition, Defendant has cited many authorities which state general principles applicable to certification questions, including the litigation of these affirmative defenses, but which are factually inapposite. Here, the court carefully considered the record at class certification and found there no evidence that any assistant manager ever exercised discretion as to any matters of consequence. The record overwhelmingly demonstrated that this element can be tried based upon common evidence and, at this stage, supports Plaintiffs' decision to stake their entire case on disproving just one element of Defendant's affirmative defenses.

That said, the court is not pre-judging the record as it will exist at trial. If Defendant develops and presents new evidence evidencing significant variation among class members in this respect, decertification may be warranted. Otherwise, the issue will be tried, and if Plaintiffs prevail on this element of the affirmative defense, there will be no need to address the "counting time" element. If Defendants prevail on this element, they will have shown that class members were properly classified as exempt and the case will likely be decertified. Under no circumstance will the "counting time" issue be tried on a class basis. As such, this is a trial plan which either allows the validity of Defendant's affirmative defenses to be resolved in "one stroke" or requires decertification. (Wal Mart Stores v. Dukes (2011) 564 U.S. 338, 350.) Under no circumstances will the court attempt to try individualized issues on a class basis.

MEAL BREAK CLAIM. Defendant's argument that the meal period claim "defies logic" ("either AMs are exempt from the meal period requirements, or they are non-exempt employees and as such subject to Save Mart's lawful meal period policies applicable to non-exempt employees", Opp. at 12) itself defies logic. An employer must "provide" uninterrupted, duty-free meal periods to non-exempt employees; the claim will not turn on whether Defendants called AMs exempt or nonexempt, but whether it in fact "provided" breaks, by relieving AMs of all duty for 30 minutes, after no more than 5 hours of work, each day. (Brinker Rest. Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1040-41 [the employer satisfies this duty if it "relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so"].) Defendant seems to suggest that it should not be penalized for failing to communicate meal period rights to its employees because it had designated them as exempt from such protections. However, the duty to provide meal periods does not arise simply because an employer deems employees to be nonexempt, but due to the job requirements, the employers' reasonable expectations and whether the employer expressed displeasure when an employee failed to meet those expectations, and the nature of the work performed. (Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 802.)

Defendant also suggests that there is too much variation within the class on how Defendant's lack of a policy impacted them (or, put another way, that Defendant's management practices varied among stores); however, this contention is not supported by the evidentiary record reviewed by the court at class certification. As the court observed at the time, the Defendant's AM declarations were so devoid of necessary details to support their claims that they in fact regularly took meal periods, that they lacked any evidentiary value whatsoever. Since then, Defendant has not supplied any new evidence on this point.

Defendants mischaracterize the court's conclusions at the certification stage with regard to these claims. To reiterate, the court concluded that these claims present primarily common issues:

Plaintiffs' theory of liability appears to be that Defendant left meal periods entirely to chance, failing to enact or communicate a meal period policy for AMs and failing to relieve AMs of their job duties for 30 uninterrupted minutes; further, Defendant's staffing, budgeting, and store operations policies made it difficult if not impossible for AMs to take a bona fide meal period, undermining the de facto break practice touted by Defendant. Plaintiff has demonstrated that it can try this theory based largely upon common evidence about Defendant's common policies and procedures, which prevented AMs from taking code-compliant meal periods or at least had the effect of pressuring AMs into foregoing breaks. (Brinker, supra, at 1040 [even where a formal break policy exists, "an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks"].) By contrast, Defendant has not shown any variation, material or otherwise, in how the actions and omissions of its management affected the putative class. (Compare Benton v. Telecom Network Specialists, Inc. (2013) 220 Cal.App.4th 701 [where ultimate employer had no policy

authorizing meal breaks, the fact that some class members were able to take breaks due to the different work they performed for different staffing companies that followed their own break practices was not a basis for denying certification; theory that defendant violated wage and hour requirements by failing to adopt policy was predominate]; Bradley v. Networkers Int'l, LLC (2012) 211 Cal.App.4th 1129 [certification was appropriate where employer had no break policy, did not communicate any such policy to workers, did not know whether breaks were in fact taken and did not maintain records].)

OVERTIME CLAIM. Defendant's opposition fails to address this claim, which plainly turns on predominantly common issues. All AMs were subject to the same scheduling policy which required them to work five ten-hour days, and none of them were paid overtime. To the extent there are individualized issues, they concern damages, and can be easily managed through an accounting process. Individualized mini-trials would not be required.

DERIVATIVE CLAIMS. These claims will not require litigation of any issues other than those implicated in the primary claims and defenses, discussed above.

RESTITUTION/DAMAGES. The court does not believe that the individualized issues potentially presented by the proofs of claim Defendant chooses to dispute are necessarily unmanageable. Defendant also complains about potential issues with "fair distribution" of individual damages, but the distribution among class members (unlike the aggregate damages award) is not Defendant's concern. Plaintiffs' more detailed proposal for this phase of trial, set forth in the new Trial Plan filed May 15, 2017, is generally acceptable. Although Plaintiffs' proposed claim forms may require additional wordsmithing to ensure that they ask clear questions in a way that laypersons can understand, so that class members' proofs of claim are as accurate and reliable as possible, that issue need not be resolved at present.

The revised procedural framework for resolving Defendant's disputes of individual proofs of claim is generally acceptable, except that the court agrees that the proposed timeframes may be unrealistic, and should be subject to further discussion and revision, if necessary. To the extent that there are due process challenges to certain details of the plan, the court has carefully considered them and believes that those can be resolved; however, from the standpoint of judicial economy, these issues are better deferred unless and until there is a finding of liability in favor of the class.

SUPPLEMENTAL BRIEFING. At Defendant's request, the court granted Defendant leave to file a final supplemental brief specifically aimed at the latest version of Plaintiffs' trial plan, which brief was filed on June 26, 2017. Having carefully reviewed this latest, and final, submission on this topic, the court concludes that nothing therein persuades the court to change its tentative ruling. The evidence that is already in the record was carefully reviewed by the court before the class was conditionally certified, and Defendant's arguments regarding its perceived need for the testimony of an expert witness before the class is finally certified ignores the fact that Plaintiffs no longer intend to utilize statistical evidence in support of their claims during the liability phase of the trial. Unlike the trial plan in Duran, under which the defendant was foreclosed from litigating its affirmative defenses (Duran v. U.S. Bank National Assoc. (2014) 59 Cal.4th 1, 34), Plaintiffs' trial plan imposes no restrictions on the evidence that Defendant will be permitted to present at trial.

RULING. With respect to the trial plan and the confirmation of class certification, the Motion is GRANTED.

FURTHER ORDERS. On its own motion, the court HEREBY BIFURCATES the class liability claims arising under Business & Professions Code sections 17200, et seq. ("UCL") from all other claims. These claims will be tried to the court as Phase 1. (See, e.g., Hoopes v. Dolan (2008) 168 Cal.App.4th 146, 156-158.) Inherent in this bifurcation is the entitlement of Plaintiffs to move under Code of Civil Procedure section 437c to adjudicate liability issues separately from restitution or damages issues (see, e.g., Dept. of Industrial Relations, Div. of Labor Standards Enforcement v. UI Video Stores, Inc. (1997) 55 Cal.App.4th 1084, 1097) if they determine that it is realistic to do so. Whether and to what extent jury issues remain after Phase 1 is concluded will be addressed at that time.

CLASS CERTIFICATION ORDER. Plaintiffs shall re-submit their proposed Revised Class Certification Order in a form suitable for entry. An electronic version (Microsoft Word readable and modifiable) of the proposed order should be submitted via email attachment to dept17@alameda.courts.ca.gov.

CLASS NOTICE. Plaintiffs proposed notice program is approved. A separate CLASS NOTICE ORDER will be issued.

Dated: 07/06/2017

facsimile

Judge George C. Hernandez, Jr.

ADDITIONAL ADDRESSEES

JONES LAW FIRM
Attn: Jones, Charles A.
9585 Prototype Court
Suite B
Reno, NV 89521

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

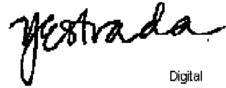
Case Number: RG13685740
Order After Hearing Re: of 07/06/2017

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 07/07/2017.

Chad Finke Executive Officer / Clerk of the Superior Court

By 

Deputy Clerk