

GIBBS LAW GROUP LLP  
Attn: Tindall, Steven M.  
505 14th Street  
Suite 1110  
Oakland, CA 94612 \_\_\_\_\_

HOPKINS & CARLEY  
Attn: Malaspina, Ernest M  
70 S. First Street  
The Letitia Building  
San Jose, CA 95113-2406

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

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Romero  <p style="text-align: right;">Plaintiff/Petitioner(s)</p> <p style="text-align: center;">VS.</p> <hr/> <p>Legacy Roofing &amp; Waterproofing, Inc  Defendant/Respondent(s) (Abbreviated Title)</p>	No. <u>RG12634384</u>  Order  Motion for Class Certification Granted
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The Motion for Class Certification was set for hearing on 09/19/2017 at 02:30 PM in Department 17 before the Honorable George C. Hernandez, Jr.. The Tentative Ruling was published and has not been contested.

**IT IS HEREBY ORDERED THAT:**

The tentative ruling is affirmed as follows: The Motion of plaintiffs Miguel Romero, et al. For Class Certification ("Motion") is ruled on as follows:

**BACKGROUND:**

Plaintiffs Miguel Romero ("M. Romero"), Raul Polido Solis ("Solis") and Alfonso Garcia Andrade ("Andrade") (collectively, "original plaintiffs") filed their original complaint in this action against defendant Legacy Roofing & Waterproofing, Inc. ("Legacy") on June 13, 2012. Each of the original plaintiffs is a former employee of Legacy, having worked at and out of the Legacy facility located in Sacramento. The original complaint includes allegations of violations of various provisions of the California Labor Code ("LC"), Industrial Welfare Commission Wage Order 16 ("WO 16") and applicable California Code of Regulations ("CCR"). Notwithstanding that the original plaintiffs worked only at and from the Sacramento location, the original complaint included class action allegations that applied to all of Legacy's locations.

Original plaintiffs filed their first Motion For Class Certification on January 21, 2014, and Legacy filed an opposition thereto on July 31, 2014. On October 24, 2014, original plaintiffs filed and served a DOE amendment naming Robert B. Laubach, John G. Winslow, Rogers Legacy, LLC and LRS, Inc. as defendants. The First Amended Complaint was filed on November 7, 2014 ("FAC"), with leave of court. In addition to the inclusion of the newly named defendants, the FAC added alter ego and joint enterprise allegations, a cause of action for penalties under the Private Attorneys General Act ("PAGA"), and two additional named plaintiffs, Nestor Arriaga ("Arriaga") and Alejandro Moreno ("A. Moreno"). A second amended complaint was filed on March 22, 2016, reflecting the newly operative LC section 558.1, and the currently operative Third Amended Complaint was filed on September 28, 2016 ("TAC"). The TAC added another named plaintiff, Claudio Moreno ("C. Moreno").

The TAC sets forth causes of action for (1) Failure To Pay Overtime, (2) Failure to Pay Compensation for All Hours Worked / Breach of Contract, (3) Failure to Provide Meal And Rest Breaks, (4) Reporting Time Pay Under [WO 16], (5) Waiting time penalties, (6) Record-Keeping Violations, (7) Failure to Provide Tools [or] Reimburse Employees, (8) Unlawful Business Practices, and (9) Civil

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Order

Penalties Under [PAGA]. The court notes that the caption of the TAC does not accurately set forth the causes of action contained therein.

In light of the intervening changes to the operative pleadings, the first motion for class certification was withdrawn, and the instant Motion was filed on October 3, 2016. The new Motion and Legacy's opposition thereto continue to rely on much of the same evidence that was presented in the original motion and opposition.

The record reflects that a Stipulation and Order was entered on May 19, 2017 under which Plaintiffs agreed to submit a request for dismissal of Alejandro Moreno as a named plaintiff within 10 days, and Legacy agreed to withdraw its notice of his deposition. The record does not reflect that any such request for dismissal has been filed. Nevertheless, for purposes of this Motion, the court will assume that A. Moreno is no longer among the moving plaintiffs. Plaintiffs are reminded that Judicial Council form CIV-110 cannot be used in this situation, and that court approval must be obtained (California Rule of Court ["CRC"] 3.770). The court recommends that the request for approval of the dismissal of A. Moreno be submitted pursuant to CRC 3.1200, et seq., with a courtesy copy delivered directly to Department 17. Provided the requisite CRC 3.770(a) declaration is included, the court will rule on the papers with no need for a hearing.

#### MOTION:

Plaintiffs M. Romero, Solis, Andrade, Arriaga, and C. Moreno (collectively, "Plaintiffs") now seek certification of a class defined as "all current and former employees of Legacy Roofing & Waterproofing, Inc., who worked as hourly construction employees, performing roofing work in the State of California at any time between June 13, 2008 and the present." It is undisputed that Legacy has had more than 400 hourly construction employees during the relevant time period, including roofers, carpenters, sheet metal workers, and solar installers, and it appears that the both Plaintiffs and Legacy understand all of these "construction employees" to fall within the category of "roofers" for purposes of this class definition.

Plaintiffs assert that Legacy has maintained company-wide policies and practices of (1) altering timesheets to avoid paying overtime, (2) failing to pay for all hours worked, including time worked off the clock, travel time for both in-town and out-of-town jobs, and time worked on the jobsite; (3) failing to pay the correct prevailing wages for hours worked on public works jobs; (4) failing to pay proper minimum rates for apprentices for work on private projects; (5) failing to pay for reporting time; (6) failing to authorize and permit uninterrupted meal and rest breaks; (7) failing to furnish accurate, itemized wage statements; and (8) failing to provide uniforms, tools and safety equipment required under WO 16 (8 CCR 11160).

#### PLAINTIFFS' EVIDENCE:

In support of the Motion, Plaintiffs have submitted the declarations of named Plaintiffs M. Romero, Solis, Andrade, C. Moreno and A. Moreno. No declaration was provided by Arriaga. M. Romero, Solis and Andrade worked only from the Sacramento yard. A. Moreno and C. Moreno worked from both the Salinas and the San Jose yards. As noted above, A. Moreno is no longer a moving plaintiff, and he was not deposed.

Also submitted by Plaintiffs were the declarations of 25 other roofers, 9 of whom worked only from the Sacramento yard, 10 of whom worked only from the San Jose yard, 2 of whom worked only from the Salinas yard, 3 of whom worked from both the Salinas and the San Jose yard, and 1 of whom worked from both the Sacramento and the San Jose yards. (Collectively, "Plaintiffs' Declarants".)

Plaintiffs also submitted transcript excerpts from the depositions of Legacy management personnel, Robert Laubach, Barbara Laubach, John Winslow, Jr., Robert Ruiz, Jerrod Cortez, and Manuel Garcia, the depositions of 3 of the named Plaintiffs, M. Romero, Solis and Andrade, and 9 of Legacy's declarants, as well as copies of various documents.

#### SUMMARY OF PLAINTIFFS' ARGUMENTS:

Plaintiffs begin by setting forth a fairly detailed discussion regarding the nature of the relationships between the various entity and individual defendants, the essence of which is the assertion that Legacy is

a family enterprise that does not observe corporate formalities. The evidence in support of this discussion and these assertions is largely in the form of the testimony of Robert Laubach from the second round of person most knowledgeable ("PMK") and individual depositions conducted in August, 2016 (Molteni Declaration, Exhibits 12 and 13).

Plaintiffs next assert that Legacy's three locations, San Jose, Salinas, and Sacramento, have operated under similar terms, and under the same top level management. Payroll, timekeeping and personnel files for all employees are located at the San Jose branch, and all discipline, hiring and firing of field employees is done by one person, Bob Ruiz. (Molteni Declaration, Exhibit 6, p.165:15-16.) Plaintiffs argue that Legacy's structural organization and chain of command resulted in "uniform policies and practices" and roofer's common work experience at all three locations.

#### All Hours Worked -

While Plaintiffs have only identified two common questions of law and fact that fit within this category of practices, i.e., "whether Legacy's policy and practice of requiring roofers to report to the yard and failing to pay wages for this time violates Californian law" and "whether the time Legacy's roofers spent traveling to worksites in company vehicles should be compensated," Plaintiffs also assert that (a) Legacy has a policy to not allow roofers to write down all of the hours that they worked, but instead to have the timesheets filled in and edited by superintendents who would regularly record fewer hours than the worker indicated they had worked, (b) that requiring the roofers to sign blank timesheet was a common practice, and (c) workers did not complain about being shorted on hours paid because they feared retaliation.

Plaintiffs assert that roofing employees consistently confirm both that they were requested to report to the yard each morning and that they were not paid for that time, and that Legacy's common practice was to start paying its roofers when the workers were actually on the roof at the jobsite.

Plaintiffs also assert that Legacy required its workers to travel to the worksite with their crews, but only paid the persons driving the company vehicles for travel time, and that Legacy has no written policy about travel time.

As Plaintiffs do not claim that any overtime hours that actually appeared on the workers' timesheets were not properly compensated, it appears that their overtime claims are an extension of their all hours worked claims.

#### Prevailing Wages -

Plaintiffs assert that Legacy's policy during the relevant time period has been to rely solely on the wages specified in the contract for construction projects and not pay the correct prevailing wages when roofers were entitled to them. Plaintiffs evidence in support of this "policy" consists of a statement made by Robert Laubach in deposition that "the obligation to pay prevailing wages are dictated by the contract."

Plaintiffs further assert that the testimony of Barbara Laubach, Legacy's payroll administrator, establishes that when prevailing wages were paid to journeymen, improper "apprenticeship contributions" were deducted.

#### Minimum Wages for Apprentices -

8 CCR section 208(c)(1) sets forth a minimum starting wage requirement for apprentices participating in approved apprenticeship programs when working on non-prevailing wage projects. Plaintiffs have presented evidence in the form of exemplar apprentice agreements with program sponsor Independent Roofing Contractors of California, Inc. UAC. (Molteni Declaration, Exhibit 21) together with the deposition testimony of Robert Ruiz, Legacy's human resources ("HR") person in charge of hiring, firing and discipline to the effect that no consideration appears to have been given to the regulatory requirements (Molteni Declaration, Exhibit 9, pp.294:13-296:24.)

#### Reporting Time -

Plaintiffs argue that roofers were required to report to their respective yards every morning to receive their assignments, were often not assigned to any project, and were not paid anything for reporting time.

(WO 16, section 5(B).)

#### Rest and Meal Periods -

Legacy has no written policy regarding rest and meal periods. Plaintiffs argue that roofers rarely, if ever, received a discrete 10-minute rest period per four hours of work, and they were not informed that they were entitled to them. Also, some roofers reported that rest breaks were only authorized if taken with the lunch period.

As to meal periods, Plaintiffs argue that roofers were rarely, if ever, provided a second meal period when they worked more than 10 hours in a day, which occurred frequently. Plaintiffs also present the deposition testimony of Robert Laubach that "[i]n the event that a workday exceeds 12 hours, you get a second break." No missed meal period premiums were ever paid.

#### Uniforms and Tools -

Plaintiffs assert that Legacy had a policy and practice of deducting amounts for "Uniform - LR&W" each weekly pay period, presenting 8 examples of paystubs that show such a deduction. Plaintiffs further assert that workers were required to purchase shirts, sweatshirts, and caps with the Legacy logo.

Plaintiffs also assert that Legacy requires workers to purchase their own tools and safety equipment and does not reimburse them for those purchases.

#### Inaccurate Wage Statements -

In addition to asserting that wage statements were inaccurate because they did not reflect all of the hours that should have been paid or the correct pay rates for public work projects and for apprentices, Plaintiffs also assert that paystubs lack the proper hourly prevailing wage rate and amounts deducted as training contributions and health and welfare employer contributions. Plaintiff presents deposition testimony of Barbara Laubach to support this argument.

Plaintiffs also argue that the pay stubs were confusing. This argument is supported by brief statements by 4 of Plaintiffs' Declarants to the effect that they sometimes could not understand the paystubs.

#### LEGACY'S OPPOSITION EVIDENCE:

In support of its opposition, Legacy submitted the Declarations Robert Laubach and Barbara Laubach, as well as transcript excerpts from their depositions.

Legacy also submitted the declarations of sixteen putative class members (Exhibits AA-OO to the Declaration of Shirley E. Jackson), all of whom were current employees at the time their declarations were signed in July, 2014. ("Legacy's Declarants".) Four of Legacy's Declarants, Juan Chavez, Rogelio Chavez, Juan De La Rosa, and Salvador De La Rosa, worked in Sacramento, one primarily in Salinas, eight in San Jose, and two in both Salinas and San Jose. Many of Legacy's Declarants work or worked as foremen.

The Sacramento yard was closed at in late 2014 (Declaration of Robert Laubach, paragraphs 3 and 6). Subsequently, three of the four Legacy Declarants who had worked in Sacramento, Juan Chavez, Rogelio Chavez and Juan De La Rosa, provided declarations to Plaintiffs' counsel, effectively recanting most of the contents of their earlier declarations. These declarations were filed as Exhibits 12, 13 and 14 to the reply Declaration of Cristina Molteni.

Legacy also submitted transcript excerpts from the deposition of Jerrod Cortez and from the depositions of 23 of Plaintiffs' Declarants.

#### SUMMARY OF LEGACY'S OPPOSITION ARGUMENTS:

Legacy argues in opposition that Plaintiffs are attempting to certify a disparate class of employees from three physically distinct roofing yards from which workers were dispatched pursuant to approximately 10,000 different contracts of work orders to perform a variety of roofing jobs ranging from large developments where the job lasted for months, to maintenance, service or repair work that lasted for a

few hours to a few days.

Through the Declaration of Robert Laubach, Legacy lays out a detailed overview of its operations, its yards in San Jose, Salinas and Sacramento, the breakdown of work orders, roof contracts and job assignments, and role of foremen, who are also putative class members, and the role of superintendents.

Legacy not only admits that there was no written policy covering meal periods, rest breaks, starting times, yard reporting, uniforms, tools or time cards, it argues that the evidence shows that the schedule, frequency and duration of meal periods and rest breaks were generally decided by the foreman or crew leader for the project and that practices varied significantly.

#### Rest Breaks -

Legacy observes that it is "established construction industry practice that crews take breaks in the morning and in the afternoon," and asserts that the timing and duration of rest breaks are left entirely to the foreman or crew leader of each project. Legacy argues that the evidence regarding rest breaks differs radically among the putative class members depending on the yard from which they were dispatched, the type of roof installation or repair, the type of work being performed by the individual, the foreman or lead roofer of the crew, weather and other schedule issues. Legacy further argues that the absence of a formal written policy does not necessarily imply the existence of a uniform policy or widespread practice of depriving employees of their breaks. (Citing, *Daily v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 1002 ["Daily"].)

#### Meal Periods -

The bulk of Legacy's arguments regarding meal periods are misdirected to the claim for which Plaintiffs are not seeking certification, i.e., that the timing and duration of the first meal period of each day did not comply with applicable code and WO requirements. The only meal period claim for which Plaintiffs seek certification is their claim that a second meal period was never provided when roofers worked more than 10 hours in a day.

#### Yard Reporting and Travel -

Legacy asserts that the hiring packet for each roofer contains a document that references "ride sharing," and all of the declarants who have been deposed have authenticated their signatures on this document. Legacy also argues that the evidence about yard reporting and travel to job sites reflects a wide variety of practices among the three yards and by individual roofers, foremen and superintendents. There is no established practice preventing roofers from driving to the job site directly, and some individual roofers prefer riding from the yard to save on gas and wear to their personal vehicles.

Legacy argues that the premise of Plaintiffs' claim, i.e., that the policy has been to require roofers to go to the yard each morning, is demonstrably false. The evidence shows that not all workers report to the yard every day. Legacy also points out that Plaintiffs only claim that employees "frequently" went back to the yard at the end of the day, which in itself is insufficient to prove commonality, and that the evidence does not show such frequency.

Legacy also points out that there is significant variation in the evidence as to start times, including contradictions between declarations and deposition testimony, clearly showing that roofers were coming to particular yards at different times for different reasons, not based on a fixed reporting requirement.

#### Overtime -

Legacy argues that Plaintiffs' evidence does not show an unlawful uniform practice with respect to their theory that superintendents reported fewer hours than roofers actually worked. Payroll data show that many of the putative class members were paid overtime, and no evidence shows a uniform company policy or practice to not pay overtime.

#### Uniforms and Tools -

Legacy asserts that the evidence does not demonstrate any pattern or practice of requiring the purchase of Legacy shirts, or any consistent requirement that Legacy shirts be worn. Despite having access to all

of Legacy's payroll records, Plaintiffs have only submitted 6 payroll stubs (Exhibit 24 to Declaration of Cristina Molteni), and two of the persons named on the payroll stubs have submitted declarations to the effect that there is no requirement that Legacy shirts be purchased or worn. Nor have Plaintiffs' Declarants given consistent testimony on this issue.

As to tools, Legacy asserts that it has no policy or practice of requiring roofers to purchase their own tools, and that it makes tools available for check-out from the roofing yards, provides extra tools in company trucks at the job sites, and allows its workers to bring their own tools, which many prefer. Legacy also points out inconsistencies between the declarations of Plaintiffs' Declarants and their deposition testimony on the tools issue.

Legacy also points out that Plaintiffs have ignored the fact that many roofers meet the exception set forth in WO 16 Section 8(B).

#### Prevailing Wages -

Legacy argues that after having been given access to all of its project files for the relevant time period, Plaintiffs have only presented incomplete documents regarding six alleged public works projects, have failed to offer evidence that the projects qualify as public works projects or that Legacy actually paid any putative class member at a lower private rate.

With respect to Plaintiffs' claim that "apprentice contribution" were incorrectly used, Legacy argues that Barbara Laubach did not concede in her deposition testimony that any contribution rate used was improper, and Plaintiffs have not otherwise offered any evidence that would establish a uniform practice of making higher deductions than those allowed under California law..

#### Apprentice Pay -

Legacy does not deny that it has engaged apprentices who fall within the scope of 8 CCR section 208(c)(1). Nor does it offer any evidence that it has set the pay rate for newly hired apprentices according to that regulation. Rather, Legacy argues that Plaintiffs have chosen not to submit any evidence showing the number of putative class members affected by the alleged illegal practice, or that such class members are ascertainable, and that Plaintiffs have not submitted any evidence to show how the pay rates received by M. Romero, Solis and Andrade compare to the minimum amount required under the regulation.

#### Adequacy -

Legacy argues that because no declaration was submitted by Arriaga, he has not shown that he can be an adequate class representative.

Legacy also argues that C. Moreno cannot be an adequate class representative because he demonstrated in his deposition an inability to recall any pertinent facts upon which this case is predicated.

#### Attacks on Plaintiffs' Evidence -

Legacy argues that because A. Moreno was not deposed, his declaration should not be considered.

Legacy further argues that the declarations of two of Plaintiffs' Declarants, Manuel Guerrero and Raul Zavala Garcia, should not be considered because Guerrero testified that he did not remember seeing, reading or signing his declaration, that he did not write it, and that he did not read it before he signed it, and Garcia testified that he did not recall seeing his declaration, did not remember if he read it before he signed it, and did not have an understanding of what it was when he signed it.

Legacy also attacks all of the declarations of all of Plaintiffs' Declarants for lack of foundation, including voluminous detailed evidentiary objections.

#### Alter Ego -

Legacy argues that Plaintiffs' alter ego and integrated business enterprise theories of liability are not certifiable causes of action. They are theories of recovery as against the Non-Legacy Defendants.

## PLAINTIFFS' REPLY EVIDENCE:

With their Reply, in addition to the Declarations of J. De La Rosa, J. Chavez and R. Chavez, noted above, Plaintiffs also submitted additional transcript excerpts from the depositions of named plaintiff C. Moreno and 8 of Plaintiffs' Declarants, as well as from the depositions of two of Legacy's Declarants, Ignacio Alcaraz and Mauricio Alvarez.

## LEGAL STANDARDS:

Class actions in California are governed by Code of Civil Procedure §382, authorizing such suits "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (*Fireside Bank v. Sup. Ct.* (2007) 40 Cal.4th 1069, 1078; *City of San Jose v. Sup. Ct.* (1974) 12 Cal.3d 447, 458.) "[T]he party advocating class treatment must demonstrate [a] the existence of an ascertainable and sufficiently numerous class, [b] a well-defined community of interest, and [c] substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004 at 1021 [citing *Fireside Bank* at 1089; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; and *City of San Jose* at 459].) The community of interest requirement embodies three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Ibid.*)

Ascertainability is achieved by defining a class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when the identification becomes necessary. (*Bomershein v. Los Angeles Gay & Lesbian Center* (2010) 184 Cal.App.4th 1471, 1483 [citing *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915].)

The test of typicality is whether the action is based on conduct which is not unique to the named plaintiffs, and whether the other putative class members have been injured by the same course of conduct. (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375.) The adequacy inquiry serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent, and often comes into play when the party opposing certification brings forth evidence indicating widespread antagonism to the class suit. (*Ibid.*)

"The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants'" (*Brinker v. Sup. Ct.*, supra, 53 Cal.5th at 1021 [citing *Collins v. Rocha* (1972) 7 Cal.3d 232, 238, and *Sav-On Drug Stores, Inc. v. Sup. Ct.* (2004) 34 Cal.4th 319, 326]), the answer to which "hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.'" (*Ibid.*) Class certification is, however, "essentially a procedural [question] that does not ask whether an action is legally or factually meritorious" (*id.*, at 1023 [citing *Sav-On* at 326 and *Linder* at 439]), and "the focus in a certification dispute is on what type of questions - common or individual - are likely to arise in the action, rather than on the merits of the case." (*Sav-On* at 327.) Generally, "if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Brinker* at 1022 [citing *Hicks v. Kaufman & Broad Home Corp.*, supra, 89 Cal.App.4th at 916].)

Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing. (*Linder* at 435.) In addition, the trial court may assess the advantages of alternative procedures for handling the controversy (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 660-662), and must address whether a class action is superior to available alternatives, including individual lawsuits. (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1204.) The court is vested with discretion in weighing the concerns that affect class certification. (*Sav-On* at 336.) "[B]ecause group action also has the potential to create injustice, trial courts are required to 'carefully weigh respective benefits and burdens and to allow maintenance of the class-action only where substantial benefits accrue both to litigants and the courts.'" (*Linder* at 435.) It is, of course, plaintiff's burden to support each of the above factors with a factual showing. (*Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462.)

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Order

With these standards in mind, the court now turns to the issues presented.

#### DISCUSSION:

Plaintiffs have demonstrated that the proposed class is sufficiently numerous and ascertainable, and Legacy does not argue otherwise. The court so finds. Legacy purports to raise a challenge to typicality, but its arguments in this regard conflate typicality with commonality. The court finds that Plaintiffs' claims are typical of the claims of the putative class.

As to adequacy, however, the court agrees with Legacy that the failure of Arriaga to submit any testimony in support of class certification renders him unsuitable as a class representative. Legacy's challenge to the adequacy of C. Moreno as a class representative, however, is not well taken. Failure of memory in deposition may have an effect on the weight to be given to his declaration, but it does not warrant his disqualification as a class representative.

Whether Plaintiffs seek certification of claims for which common issues of law and fact predominate will be further addressed, below.

#### EVIDENTIARY ISSUES:

As already noted, Legacy has submitted over 200 pages of evidentiary objections to the declarations of Plaintiffs' counsel and the declarations of all of Plaintiffs' Declarants. Among these objects is an objection to the Declaration of A. Moreno in its entirety (Objection 105) on the basis that he was not made available for deposition. This objection is SUSTAINED. The A. Moreno declaration will not be considered.

The vast majority of the remainder of the objections are for Lack of personal knowledge/Lack of Foundation, Hearsay, and Improper legal conclusion. In the context of a class certification motion, where no findings of fact, ultimate conclusions regarding Plaintiffs' claims, or determinations of the existence of triable issues of fact are made, this level of attack on admissibility is totally unwarranted. (See, e.g., *Gonzales v. Millard Mall Services, Inc.*, 281 F.R.D. 455, 459-460 (S.D. Cal. 2012) [citing, inter alia, *Alonzo v. Maximus, Inc.*, 275 F.R.D. 513, 519 (C.D. Cal. 2011)].) Accordingly, the court OVERRULES Legacy's evidentiary objections as going to weight, rather than admissibility. This ruling also applies to the request made by Legacy in its opposition brief that the declarations of Manuel Guerro and Raul Zavala Garcia be completely disregarded.

As noted above, the declarations of three of Legacy's Declarants, all of whom worked primarily in Sacramento, has been thoroughly recanted by their subsequent declarations. In addition, Plaintiffs deposed two others, both of gave testimony regarding the process by which their declaration were obtained by Legacy, including their interactions with Legacy's legal counsel. The substance of both the declarations of J. De La Rosa, J. Chavez and R. Chavez and the deposition testimony of I. Alcaraz and M. Alvarez casts a long shadow on the credibility of the declarations of all of the Legacy's Declarants. While the court declines Plaintiffs' request that such testimony be entirely disregarded, the court concludes that the probative value of the testimony of Legacy's Declarants is significantly diminished by the coercive manner in which it was obtained and the failure of Legacy's counsel to provide more detail about the instant lawsuit, the purpose of declarations, and the nature of his relationship with Legacy.

#### COMMONALITY:

The court begins its analysis by noting those aspects of Plaintiffs' claims that Legacy's opposition fails to address. First, no mention is made by Legacy of mandatory safety meetings. Plaintiffs' Declarants consistently testified that safety meetings were held once a week and that no one was paid for attending those meetings. The record is less clear, however, on when this practice ended. For example, C. Moreno testified in his declaration that "the safety meetings in the yard have been discontinued since the filing of this class action," but the evidentiary trail otherwise runs cold on this issue. Nevertheless, whether mandatory weekly safety meetings were conducted at all three locations, whether putative class members were paid for attending those meetings, and whether they were subsequently paid for their travel time to that day's job assignments after the mandatory safety meetings, are all common issues that are suitable for class treatment.



Second, no mention is made by Legacy of Plaintiffs' reporting time claim (WO 16, section 5(B)). Some of Plaintiffs' Declarants testified that they were sometimes not sent to projects after the safety meeting, but sent home without payment, and some testified that they reported to the yard every morning, or almost every morning, but were sometime sent home after waiting for an assignment, without receiving any pay for the time spent waiting. There is no evidence in the record that Legacy ever paid for reporting time, and Legacy's failure to argue otherwise serves as a concession that none of the exceptions to the requirements of WO 16, section 5(B) set forth in section 5(C) apply in this case. In sum, Plaintiffs' evidence is sufficient to demonstrate that whether Legacy had a policy and practice of failing to pay for reporting time is suitable for class treatment.

Third, no mention is made by Legacy of the portion of Plaintiffs' wage statement claim that is distinct from those alleged inaccuracies that derive from Plaintiffs' claims for failure to pay for all hours worked and overtime. Plaintiffs have submitted evidence that certain deductions that were made from wages were not reflected on paystubs (Molteni declaration, exhibit 11, pages 279:24-282:8) and that Legacy utilized a confusing system of payment codes on the wage statements to identify projects, rates of pay and hours worked. (Molteni declaration, exhibit 11, pages 10:25-106:21; S. Lopez declaration, paragraph 9; A. Luques declaration, paragraph 9; B. Pacis declaration, paragraph 9; R. Ruiz declaration, paragraph 10.) Plaintiffs' evidence is sufficient to demonstrate that whether Legacy's pay statement practices were compliant with applicable legal requirements is suitable for class treatment.

#### Altering Timesheets -

This subset of Plaintiffs' "all hours worked" claims lacks substantial evidentiary support. Plaintiffs' evidence of timesheets being "altered" is limited to excerpts from the deposition of Jerrod Cortez (Molteni declaration, exhibit 8, pp. 201:13-207:14). Upon close review, however, this testimony does not support the claim that timesheets were improperly altered.

#### Hours On The Roof -

There is undisputed evidence that at certain times in certain locations putative class members' timesheets were filled out by superintendents, and that putative class members were sometimes asked to sign blank timesheets. There is also consistent testimony by Plaintiffs' Declarants that they "regularly worked more than 8 hours on the roof and were only paid for 8 hours" and Legacy has not presented any contradictory deposition testimony from Plaintiffs' Declarants on this issue. These hours also fall within Plaintiffs' claims for overtime. Most of Legacy's Declarants, all of whom are or were foremen or lead roofers, also testified consistently that work typically stops with sufficient time to clean up and secure the worksite and tools, but this testimony carries little weight, for the reasons set forth above.

#### Yard And Travel Time -

Beyond the fact that they were required to attend weekly safety meetings, the testimony of those of Plaintiffs' Declarants who worked from the Sacramento yard was consistent with respect to the requirement that all workers were to report to the yard in the morning rather than to go directly to a work site. Given that three of the four of Legacy's Declarants who worked in Sacramento recanted their original declarations, the only remaining Sacramento worker among Legacy's Declarants is S. De La Rosa (Declaration of Shirley Jackson, Exhibit MM). While S. De La Rosa, who worked as a foreman in July, 2014 when he signed his declaration, testified that he, as a foreman, would be told in advance by the superintendent about job site changes and would tell his crew, and that "on local jobs, it is the roofer's option whether they drive themselves to the jobsite or catch a ride in the company truck" (Jackson declaration, exhibit MM, p.2:18-27), he stops short of stating directly that there was no requirement to show up at the yard first, and he also states that "[s]ometimes when roofers have no assignments because there is no work, the roofers come to the yard to check for work." (Ibid.)

The testimony of Plaintiffs' Declarants who worked in and from the San Jose and Salinas yards is similarly consistent as to the fact that their work days always started at one of the yards, though they are not consistent with respect to the time at which they were required to appear. The court also notes that C. Moreno testified in his declaration that "[f]rom approximately the end of 2015, the company established a system in which they notified through text message the previous day which project each worker would be sent to and the person could choose to go to the yard so he could use the company truck, or go directly to the project in his own vehicle." (C. Moreno declaration, page2:17-20.) It is undisputed that Legacy only pays travel time to those putative class members (typically foremen) who

drive a company truck from the yards to the worksites.

Predictably, the Legacy Declarants who worked in and from San Jose and Salinas consistently conform with Legacy's assertion that roofers are only required to show up at the yard if they wish to avail themselves of free transportation to the respective work sites, but this testimony has little probative value. Legacy also relies heavily on the fact that the hiring packet for each Legacy roofer contains a document entitled Employee Information And Compliance Agreement that references "ride sharing" (Declaration of Barbara Laubach, paragraph 2) and the testimony of Plaintiffs' Declarants confirming their initials on copies of this document. The existence of this document, however, has little, if any, bearing on the issue of whether an appearance at a yard was mandatory.

Legacy has also submitted the deposition testimony of two of Plaintiffs' Declarants regarding the fact that on certain long term jobs they drove directly to the job site (Jackson declaration, exhibit I, page 39:2-4; exhibit U, pages 87:2-15 and 89:3-22), and otherwise focuses heavily on the inconsistency in the testimony regarding the hour at which the witnesses claim they were required to report. This is all part of Legacy's overall argument that the differences from yard to yard, and worksite to worksite, render class treatment impossible, or at least impractical. The court disagrees.

Having carefully reviewed the record in its entirety, the court agrees with Plaintiffs that the evidence is sufficient to demonstrate that the issues of whether Legacy had a company-wide policy and practice of requiring roofers to begin and end their work day at one of the three yards, and whether it consistently paid only for "on the roof" time, are suitable for class treatment. The evidence of occasional exceptions to this requirement and variations in actual meeting times at the respective yards is not sufficient to defeat commonality. (Jones v. Farmers Ins. Exchange (2013) 221 Cal.App.4th 986, 996.) Many of these hours also form the basis for Plaintiffs' overtime claims.

#### Prevailing Wages, Improper Deductions, and Minimum Wages For Apprentices -

Legacy's opposition to certification of Plaintiffs' claim that Legacy failed to pay wages at the required rates for public works jobs rests on its argument that Plaintiffs' evidentiary showing is insufficient. Legacy submits no evidence of its own on this issue. Legacy acknowledges that Plaintiffs have identified a few public works projects, but argues that they have not established how many projects are at issue, how frequently the practice of not paying prevailing wage occurred and how many putative class members were affected. Nor have they presented evidence that Legacy actually paid any of the named Plaintiffs, or any putative class member, at less than the prevailing wage on any of the projects identified. For their part, Plaintiffs argue that the testimony of Robert Laubach that prevailing wages are paid on a particular project "when it's stipulated in the contract" is a common fact that is sufficient to present legal issues susceptible to class-wide resolution.

Similarly, with respect to Plaintiffs' claim that Legacy incorrectly used the "apprenticeship contribution" amount rather than the "training contribution" amount, Legacy correctly points out that Plaintiffs have offered no substantial evidence that any of the named Plaintiffs were subjected to this alleged practice. The court also concludes that Plaintiffs' assertion that Barbara Laubach, Legacy's payroll and contract administrator, "admitted that mistakes were made ..." is not supported by the cited portion of the deposition transcript. (Molteni declaration, exhibit 11, pages 283:8-285:23; 286:12-292:11.)

With respect to Plaintiffs' claim that Legacy failed to pay apprentices registered with the Independent Roofing Contractors of California, Inc. ("I.R.C.C.") the correct minimum wage on private projects, Legacy points out that Plaintiffs have not submitted any evidence showing the number of putative class members affected, or that such putative class members are ascertainable. Plaintiffs' evidence on this issue consists of copies of the apprenticeship agreements of three of the named Plaintiffs (Molteni declaration, exhibit 21), and reference to a document that was withdrawn by Plaintiff (Molteni declaration, exhibit 20), identified in the Molteni Declaration as "a list of putative class members, identifying names, contact information, and other employment information." Presumably the "other employee information" in the now withdrawn exhibit had to do with wage rates, which rates are also set forth in the declarations of Plaintiffs. Plaintiffs "hang their hat," so to speak, on the deposition testimony of Robert Ruiz regarding the mechanisms used by him to determine a new apprentice's beginning wage rate (Molteni declaration, exhibit 9, page 294:13-295:12; 296:18-24), and the brief testimony of John Winslow, Jr. regarding the entry level rate paid to new field employees in Salinas (Molteni declaration, exhibit 7, pages 132:23-133:12.) While this testimony appears to reflect that neither Ruiz nor Winslow considered the requirements of 8 CCR section 208(c)(1) when setting pay rates for new apprentices,

Legacy correctly points out that neither of these witnesses were directly asked about setting pay rates for persons who were enrolled in apprenticeship programs. Furthermore, there is no attempt by Plaintiffs (a) to show what the proper rate should have been, or (b) to show that any of the named Plaintiffs were actually paid less than the appropriate amount. Plaintiffs otherwise assert in general fashion that "apprentices and journeymen are ascertainable from Legacy's payroll records."

While Plaintiffs observe in a footnote that "California courts have routinely used subclasses as a tool for managing class actions," they have not moved for certification of any subclasses. Also, even assuming, *arguendo*, that Plaintiffs are correct that California law does not require strict adherence to Federal Rule of Civil Procedure section ("FRCP") 23 for subclasses, they have offered no authority for the proposition that a subclass may be certified without a representative. In other words, a showing must be made that at least one of the named Plaintiffs is a member of any proposed subclass, and there is no evidence to support such a showing here.

In sum, the court agrees with Legacy that Plaintiffs' evidence falls short of showing that Legacy had uniform policies or practices regarding the payment of prevailing wages, improper deductions, or appropriate wage rates for qualified apprentices, or otherwise demonstrating that common issues predominate with respect to these claims.

#### Rest Periods -

"During required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." (Augustus v. ABM Security Services (2016) 2 Cal.5th 257, 260 [citing Brinker, at 1038-1039].) The essence of Plaintiffs' arguments regarding rest periods, as summed up in their reply, is that "Plaintiffs' evidence here presents the common question of whether Defendants' policy and practice of inaction - that is, by neither 'discouraging' nor 'preventing' employees from taking breaks and leaving the issue up to the foremen - is sufficient to meet its affirmative obligation to authorize and provide meal and rest breaks." (Citing, *inter alia*, Benton v. Telecom Network Specialists, Inc. (2013) 220 Cal.App.4th 701, 729.)

There is consistent testimony from Plaintiffs' Declarants that they rarely, if ever, received 10-minute rest periods, and it is undisputed that Legacy never paid compensation for missed rest periods. There is also evidence that Legacy did not train its management personnel or foremen on the legal requirements regarding rest periods or meal periods. (E.g., Molteni declaration, exhibit 9, pages 85:8-86:2; exhibit 6, pages 115:1-16; 116:2-15.)

For its part, Legacy itself relies on the fact that there was no written policy and no training provided in its attempt to essentially pass the buck to its foremen, who are also putative class members. Legacy also attempts to demonstrate that rest break procedures varied widely from worksite to worksite by relying again on the testimony of the Legacy Declarants that has been found to carry little weight.

The court concludes that Plaintiffs have successfully demonstrated that the issue of whether Legacy's policies and practices regarding rest periods are sufficient to meet its affirmative obligations is suitable for resolution on a class-wide basis. Common issues predominate.

#### Meal Periods -

As already noted, Legacy's opposition arguments regarding meal periods were largely misdirected to claims regarding the first meal period of each workday, which claims are not included in this Motion. With respect to the requirement that a second meal period be provided for work shifts of 10 hours or more, Legacy offers no evidence of its own, and attempts to distance itself from Robert Laubach's "second break after 12 hours" testimony by pointing out that this testimony was given in his individual capacity, rather than in his capacity as its PMK. It remains undisputed that no payments were ever made by Legacy for missed second meal periods.

The evidence presented by Plaintiffs to support their assertion that working more than 10 hours in a day "occurred frequently" is the identical passage in the declarations of roughly 20 of Plaintiffs' Declarants that "on the many days that I worked more than 10 hours, I was never provided a second, thirty-minute meal period, nor was I informed that I had a right to take a second meal period." In this regard, it appears to the court that the meal period claims for which Plaintiffs seek certification are effectively derivative of their all hours worked claims. That is, without a finding that the putative class members

are entitled to pay from the time that they are required to arrive at their respective yards through the time when they return to those yards, Plaintiffs will be unable to show that 10 hour work days occurred with any regularity, if at all. The missed second meal period claims will therefore be certified as a derivative claims.

#### Uniforms and Tools -

With respect to Plaintiffs' claim for reimbursement of their expenses for "uniforms," i.e., company T-shirts, the court's review of the record reveals reasonably consistent testimony from Plaintiffs' Declarants regarding the requirement that putative class members wear company T-shirts on the job, for at least a substantial portion of the class period. The universe of such testimony was expanded by Plaintiffs with transcript excerpts from the depositions of some of Plaintiffs' Declarants (Molteni reply declaration, exhibits 1, 4, 5, 6, 7, 8, 9 and 11), as well as testimony from one of Legacy's Declarants (Molteni reply declaration, exhibit 2). The evidence that the costs of the company T-shirts was deducted from paychecks is in the form exemplars of paystubs showing such deductions. While Legacy argues that 8 exemplars are insufficient for these purposes, it does not assert that such deductions were atypical. The bulk of Legacy's opposition evidence on this issue comes, again, from the testimony of the Legacy Declarants. The court concludes that unreimbursed uniform expense issue is suitable for class treatment. Common issues predominate.

On the issue of reimbursement for tools and equipment, however, Plaintiffs failed in their opening papers to mention the fact that WO 16 includes an exception regarding tools and equipment customarily required by a particular trade or craft that applies to employees whose wages are at least two (2) times the minimum wage, and while they did acknowledged the existence of this exception in their reply (Reply, page 16:13-15), Plaintiffs have made no attempt to differentiate in their arguments or evidentiary presentation between those putative class members to whom the exception applies and those to whom it does not. On this issue, even without considering the testimony of Legacy's Declarants, the court concludes that Plaintiffs' evidence does not show a uniform policy regarding the purchase of tools and safety equipment that is suitable for class treatment. Individual issues predominate.

#### Alter Ego and Integrated Business Enterprise -

Plaintiffs clarify in their reply that they do not seek to certify a "cause of action" for alter ego or integrated business enterprise because there are no such causes of action or claims for substantive relief. The court concludes that whether the relationships between the named defendants may ultimately be determined to provide a basis for vicarious liability is not be included in the analysis as to whether common issues predominate for purposes of class certification. That is to say, only substantive claims against the employer of record, Legacy Roofing & Waterproofing, Inc., will be certified for class treatment.

#### Trial Plan -

The court has reviewed the trial plan submitted by Plaintiffs together with their reply (Molteni reply declaration, exhibit 16) and concludes that Plaintiffs have sufficiently addressed the manageability issues raised by Legacy regarding Plaintiffs' all hours worked and overtime claims. While the plan must be developed in greater detail as the case progresses towards trial, its apparent viability is sufficient for class certification purposes.

#### RULING:

The Motion is **GRANTED** in part. The court **HEREBY CERTIFIES** a class defined as follows:

All current and former employees of Legacy Roofing & Waterproofing, Inc. who worked as hourly construction employees, performing roofing work in the State of California at any time between June 13, 2008 and the date of notice to the class that a class has been certified.

This class is certified for the purpose of pursuing the claims embraced in the 1st, 2nd, 3rd, 4th, 6th and a 7th causes of action in the TAC, as more thoroughly described above, as well as the claims embraced in the 5th, 6th and 8th causes of action to the extent they are derivative of the other certified claims. Certification is **DENIED** as to the claims based on allegations regarding failure to pay prevailing wages on public works projects, improper deductions for apprenticeship and/or training contributions, failure

to pay wages at the appropriate rate to qualified apprentices, and failure to provide or reimburse for tools and safety equipment.


The court finds that certification of these claims carries with it substantial benefits that render proceeding as a class superior to the alternatives.

Miguel Romero, Raul Polido Solis, Alfonso Garcia Andrade and Claudio Moreno are appointed as class representatives.

Cristina Molteni of Molteni Employment Law and Steven M. Tindall of Rukin Hyland Doria & Tindall LLP are appointed as class counsel.

Plaintiffs shall promptly comply with CRC 3.766(b), after which the parties shall meet and confer in a good faith effort to arrive at a stipulation regarding the form of notice and all aspects of the notice procedure. If the parties are unable to arrive at a stipulation, all contested notice issues must be presented by Plaintiffs in the form of a notice motion. A stipulation or noticed motion must be filed within 60 days of the date of this order.

Dated: 09/19/2017

 facsimile

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Judge George C. Hernandez, Jr.

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Order

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ADDITIONAL ADDRESSEES

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RUKIN HYLAND LLP

Attn: Rukin, Peter

100 Pine Street

Suite 2150

San Francisco, CA 94111\_\_\_\_

MOLTENI EMPLOYMENT LAW

Attn: Molteni, Cristina

100 Pine Street

Suite 2150

San Francisco, CA 94111\_\_\_\_

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Order