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

MICKEY LEE DILTS, RAY RIOS,
and DONNY DUSHAJ, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

vs.

PENSKE LOGISTICS, LLC,
PENSKE TRUCK LEASING CO.,
L.P.,

Defendants.

CASE NO. 08-cv-318-CAB (BLM)
ORDER

Plaintiffs Mickey Lee Dilts, Ray Rios and Donny Dushaj (hereinafter “the Plaintiffs”) brought a complaint against defendants Penske Logistics, LLC and Penske Truck Leasing Co. L.P., (jointly “Penske”), on behalf of themselves and others similarly situated, for alleged violations of California Labor laws. [Doc. No. 1, Ex. A.] Following motion practice for class certification and summary judgment, Plaintiffs’ case proceeded to a bench trial on claims of illegal wage deductions, failure to reimburse for necessary tool expenditures, failure to provide accurate itemized wage statements, and unfair business practices. [Pretrial Order, Doc. No. 191.] Trial began on January 13, 2014, and after four days of testimony, plaintiffs rested on January 16, 2014. The trial recessed until January 21, 2014.

On January 20, 2014, Penske filed a motion for judgment in its favor, pursuant

1 to Fed. R. Civ. P. 52(c), on plaintiffs' claim for illegal wage deductions asserted on
2 behalf of the absent class. [Doc. No. 258.] Plaintiffs filed an opposition on January 21,
3 2014. [Doc. No. 263.] The Court heard argument on the motion when trial resumed
4 on January 21, 2014. Having considered the submissions of the parties, the arguments
5 of counsel and evidence before the Court, Penske's motion is Granted In Part and
6 Denied In Part.

7 **The Court's Findings and Conclusions**

8 The Court heard and weighed the testimony and evidence presented at the trial.
9 The Court observed the demeanor of the witnesses, evaluated their candor and
10 credibility, and reviewed transcripts, trial exhibits and the Court's trial notes. Having
11 done so, the Court makes the following findings of fact and conclusions of law pursuant
12 to Fed. R. Civ. P. 52(a).

13 The Plaintiffs and the absent class members are appliance delivery drivers and
14 installers in California who were assigned to Penske's state-wide Whirlpool account,
15 from January 18, 2004 to May-June, 2009. The Plaintiffs and absent class members
16 were all hourly employees. These employees clocked in at the start of their shift and
17 clocked out at the conclusion of their shift.

18 Penske stipulated that it deducted 30 minutes from every shift over six hours to
19 account for the off-duty meal breaks Penske assumed each employee took. The
20 evidence established that Penske kept no accurate records for each individual employee
21 reflecting that the employee took a 30-minute off-duty break during the employee's
22 shift. The evidence also established that Penske provided no means for an employee
23 to recover the deducted time, in whole or part, if the employee did not take a full
24 30-minute off-duty break.

25 The Plaintiffs testified that they were not able to take a full 30 minutes of
26 off-duty time for every six-hour shift they worked. Dilts testified he was unable to take
27 a full 30-minute off-duty break once or twice a week during his employment from July,
28 2006 until he left Penske's employment in 2008. Rios testified that he was unable to

1 take a full 30-minute break once or twice a week between 2004 and 2008. Dushaj
2 testified that from January, 2004, until his employment ended with Penske in
3 September, 2004, he was unable to take a full 30-minute off-duty break once or twice
4 a week. Each testified they were never instructed on a method of recovering time they
5 worked that was subject to the 30-minute deduction, and never received compensation
6 for those hours worked.

7 The Plaintiffs also testified that they had no personal knowledge of the
8 experiences of other drivers and installers regarding break time. The evidence
9 established that when drivers and installers left the Penske warehouse for the day's
10 deliveries and installations, their schedules varied and there was no set routine or
11 pattern that could be inferred to the absent class members from the Plaintiffs' personal
12 experience. Plaintiffs did not establish that their personal experiences were in fact
13 representative of the absent class members' collective experience.

14 Plaintiffs asserted that there were company policies and practices that prohibited
15 the class from taking 30-minute off-duty breaks, but the evidence did not support this
16 allegation. Company policy required the employees to legally park and secure the truck
17 and cargo before taking a break. Plaintiffs testified that this policy did not prohibit
18 them from leaving their truck and cargo and taking lunch in a restaurant. Company
19 policy prohibited the employees from taking the company truck home, using it for
20 personal matters, or leaving the truck at an establishment that might tarnish the
21 reputation of the company. Plaintiffs did not provide credible evidence that these
22 restrictions prohibited them personally or any member of the absent class from taking
23 an off-duty break.

24 The drivers were provided with cell phones to enable the Penske dispatchers and
25 supervisors to reach them while the employees were out making deliveries. The
26 evidence established that the drivers were instructed to keep their company phone on
27 at all times. The evidence also established that calls to drivers could and did go to
28 voicemail. Any disruption during a break by a phone call was de minimis and did not

1 demonstrate a company policy or practice that resulted in an inability of the employees
2 to take off-duty breaks during their shifts.

3 Company policy required that employees follow the directions of the dispatchers,
4 but the Plaintiffs produced no evidence that this policy resulted in the employees being
5 prohibited from taking off-duty breaks. It may have resulted in an occasional
6 interruption of a break or a missed break, but the evidence did not establish that
7 class-wide it prohibited employees from taking breaks.

8 Plaintiffs also alleged that their supervisors and dispatchers demanded they finish
9 deliveries and installations before taking breaks. Even as to the Plaintiffs, this directive
10 was dependent on the daily schedule of the individual driver or installer. While this
11 evidence tends to support Plaintiffs' claims as to their individual experiences, it does
12 not establish a uniform policy that demonstrates each absent class member was unable
13 to take off-duty breaks at any time during the shift.

14 California law requires employers pay employees for all hours worked. Cal.
15 Labor Code §221. The California Code of Regulations defines "hours worked" as "the
16 time during which an employee is subject to the control of an employer, and includes
17 all the time the employee is suffered or permitted to work, whether or not required to
18 do so." 8 C.C.R §11090(2)(G). Plaintiffs have demonstrated in their case-in-chief that
19 they personally experienced shifts in which they worked without a 30-minute off-duty
20 break and were not paid for that time in violation of California labor law.

21 Plaintiffs have not, however, demonstrated their personal experiences are
22 representative of the absent class members. At class certification, Plaintiffs asserted
23 they could show common policies and practices that applied to the class as a whole.
24 They have established that each member of the class was subject to the automatic
25 deduction for a six-hour shift. They have established that Penske did not provide a
26 method to recover the deduction if no off-duty break was taken. The Court does not
27 find that these common facts establish that class-wide employees worked without
28 compensation.

1 Plaintiffs have not established a common policy or practice that prohibited the
2 class from taking their off-duty breaks. The determination as to whether the class in
3 fact performed work without compensation has not been established by common
4 evidence. It is in fact an individualized inquiry as to each employee. Plaintiffs have not
5 provided evidence that demonstrates that the class as a whole was controlled in a
6 manner that establishes they worked without compensation.

7 Absent a common policy or practice, Plaintiffs need to prove work was in fact
8 performed that was not properly compensated and to do so on a class-wide basis. In
9 this case the evidence produced at trial failed to demonstrate a class-wide performance
10 of work without compensation. Unlike those cases in which employees have the
11 common experience of doing pre-shift or post-shift tasks for which they are not
12 compensated, this case requires a finding as to each absent class member that the
13 employee in fact worked during the deducted time and was not compensated. It has not
14 been established by representative evidence. The Court would be speculating as to
15 which employees in fact performed work that was not properly compensated.

16 Plaintiffs argue the Court should rely on the burden-shifting rule that results
17 when an employer does not keep accurate records. The failure of the defendant to keep
18 accurate records as to the time the employees worked allows the employee to prove the
19 amount of work by inference. *Amaral v. Cintas*, 163 Cal. App. 4th 1157, 1189 (2008).
20 As part of the Plaintiffs' liability case it is still the Plaintiffs' burden to demonstrate that
21 the off-duty work was in fact performed by the class. In this case, Plaintiffs' class
22 action was certified on the basis that Plaintiffs would establish at trial by common
23 evidence that the absent class members worked without compensation. That evidence
24 did not materialize.

25 Plaintiffs did not prove that their experience was representative and the evidence
26 did not established a common policy or practice that prohibited the class from taking
27 off-duty breaks.

28 For the reasons set forth above and as stated on the record at argument, Penske's

1 motion pursuant to Rule 52(c) is Granted in part. The Court finds that the Plaintiffs'
2 failure-to-pay-wages claim was not proper for certification as a class action. The action
3 is therefore decertified as to this claim and the class claim is dismissed without
4 prejudice.

5 **IT IS SO ORDERED.**

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7 DATED: January 21, 2014

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10 **CATHY ANN BENCIVENGO**
11 United States District Judge
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