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ENDORSED
FILED
ALAMEDA COUNTY

OCT 25 2012

K. McCoy, Exec. Off./Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

DENNIS K. YAMASHIRO, individually, and
on behalf of all others similarly situated,

Plaintiffs,

v.

EWING IRRIGATION PRODUCTS, INC. and
DOES 1-50, inclusive,

Defendants.

No. RG11 575582

ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION

Date: September 28, 2012

Time: 9:00 a.m.

Dept.: 17

On September 28, 2012, in Department 17 of the above-entitled court, the Honorable Steven A. Brick presiding, the Motion of Plaintiff Dennis K. Yamashiro for Class Certification (the "Motion") came on regularly for hearing. Plaintiff appeared by J.E.B. Pickett. Defendant appeared by Lisa Aguiar.

The Court has considered all the papers filed in connection with the matter, the arguments of counsel, and, good cause appearing, HEREBY GRANTS IN PART the Motion, for the reasons set forth below.

1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 Defendant Ewing Irrigation Products, Inc. ("Defendant" or "Ewing") sells irrigation
3 products for landscaping and irrigation. It has approximately 58 branches located throughout
4 California. Plaintiff Dennis K. Yamashiro ("Plaintiff") worked during the relevant period as a
5 salaried employee in the position of Branch Manager ("BM") and seeks to represent other BMs
6 on a class basis.

7 Plaintiff alleges that Defendant misclassified its BMs as exempt, when they were in fact
8 non-exempt. Plaintiff asserts causes of action for (1) overtime (Lab. Code § 1194); (2) violation
9 of Business & Professions Code section 17203; and (3) waiting time penalties (Lab. Code §§
10 201-03). Plaintiff also seeks injunctive relief restraining Defendant from engaging in the alleged
11 unfair and unlawful business practices and a declaration that these practices are unlawful.

12 In this Motion, Plaintiff seeks to certify three classes, a class and two subclasses. The
13 proposed class is

14 (1) "All persons employed by Ewing U.S., Inc. in California as salaried Branch
15 Managers at any time between May 13, 2007 and the present."

16 The two subclasses are

17 (2) members of the class who "were not managing at least 2 or more employees or
18 the labor equivalent thereof each workweek"; and

19 (3) members of the class who "did not receive uninterrupted meal breaks of 30
20 minutes."

21 The complaint was filed on May 13, 2011. This Motion was filed on April 5, 2012.
22 Defendant filed an opposition on June 25, 2012 and Plaintiff filed a reply on September 14,
23 2012. On September 24, 2012, Defendant filed a surreply without seeking leave of Court. The
24 Court provided a tentative ruling before the hearing, inviting the parties to appear and present
25 complete arguments on all relevant issues, and requesting the parties to address particular
26 questions and concerns.

1 During the hearing, the Court granted a continuance to October 10, 2012, for Plaintiff to
2 determine whether he would seek to certify class (3), despite that he failed to plead a meal break
3 claim in the complaint, and whether he would seek to certify an additional subclass of BMs who
4 resigned or were terminated during the proposed class period. On October 2, 2012, Plaintiff's
5 counsel informed the Court that Plaintiff would not seek to certify a meal break subclass, but
6 would seek to certify a subclass of BMs who resigned or were terminated. On October 10, 2012,
7 the Court took this Motion under submission.

8 9 **II. EVIDENTIARY OBJECTIONS**

10 **A. Plaintiff's Objections**

11 The Court OVERRULES all of Plaintiff's objections. Many of Plaintiff's objections are
12 not evidentiary objections, but argument (*e.g.*, that a statement is "intentionally misleading").
13 Hearsay objections to Branch Managers' declarations regarding what they were told by regional
14 managers also lack merit; such statements are not offered for the truth of the matter asserted but
15 to show what expectations management communicated to BMs.

16 The Court agrees with Plaintiff's objections to statements in the declarations of BMs and
17 senior management personnel that are vague and ambiguous, lack foundation, and are conclusory
18 (legally or factually). Most notably, although the great majority of declarants state that they
19 spend more than 50% of their time on "managerial" tasks and the remainder on "administrative"
20 tasks, most of them do not specify what tasks the declarants view as "managerial" and what they
21 view as "administrative." Therefore, the percentage estimates the declarants give of the time they
22 spend on "managerial" tasks are meaningless.

23 During the hearing, defense counsel pointed to the declarations of Brennan (Exh. 3 ¶ 4),
24 Castellanos (Exh. 7 ¶ 8), and Freeborn (Exh. 10 ¶ 8) as examples where declarants specified
25 tasks as "managerial" or "administrative." Their declarations indicate that the "administrative"
26 tasks were cleaning, organizing, and shelving, and that the remaining tasks were "managerial."

1 The Court agrees that in these declarations the declarants' classification of certain tasks is
2 relatively clear. However, assuming that the relevance of the evidence is to show that BMs spent
3 more than 50% of their time on exempt work, the declarants' statements that they spent,
4 respectively, 65%, 80-90%, and 90% of their time on "managerial" tasks are unsupported,
5 conclusory statements, since these percentages plainly include some tasks that are non-exempt.

6 The declarations are nebulous on other important factual matters, such as the nature and
7 extent of discretion exercised by BMs in their duties, including hiring and firing, and the amounts
8 of time spent on particular tasks (using terms such as a "large portion" of my time).

9 Notwithstanding the foregoing, the Court will not sustain such objections, as it recognizes
10 vague, ambiguous, and/or conclusory statements and affords them little, if any, weight. The
11 Court likewise recognizes that senior management's declarations regarding the daily schedules
12 and tasks of BMs lack foundation to show personal knowledge, and will give those statements no
13 weight.

14 In light of the foregoing, Plaintiff's allegation that defense counsel failed to comply with
15 California Rules of Professional Conduct Rule 3-600 in obtaining BM declarations will not
16 impact the outcome of this Motion and is not addressed here.

17 **B. Defendant's Objections**

18 The Court OVERRULES all of Defendant's objections. Many constitute argument, rather
19 than evidentiary objections, and the vast majority of the evidentiary objections are frivolous.
20 Defendant's authenticity objections are baseless. Objecting on grounds of hearsay to an attorney's
21 declaration regarding work he performed himself is absurd. As noted above with respect to
22 Plaintiff's objections, the hearsay objection to BMs' testimony regarding what they were told by
23 their managers is without merit, as those statements are not offered for the truth of the matter
24 asserted. Defendant's "vague and ambiguous" objections are also meritless.

25 In the tentative ruling, the Court referred defense counsel to *Demps v. San Francisco*
26 *Housing Authority* (2007) 149 Cal.App.4th 564, 578 at n.6, regarding the practice of filing

1 "blunderbuss objections to virtually every item of evidence submitted" and whether this
2 constitutes effective advocacy. A large number of meritless objections "constitute oppression of
3 the opposing party and an imposition on the resources of the court." (*Cole v. Town of Los Gatos*
4 (2012) 205 Cal.App.4th 749, 764 n.6.) The Court invited defense counsel to "specify the
5 evidentiary objections they consider important, so that the court can focus its rulings on
6 evidentiary matters that are critical in resolving the . . . motion." (*Reid v. Google, Inc.* (2010) 50
7 Cal.4th 512, 532-33.) During the hearing, however, defense counsel did not raise any specific
8 objections.

10 **III. APPLICABLE LEGAL STANDARD**

11 Class actions in California are governed by Code of Civil Procedure section 382,
12 allowing such suits "when the question is one of a common or general interest, of many persons,
13 or when the parties are numerous, and it is impracticable to bring them all before the court."

14 "To obtain certification, a party must establish the existence of both an ascertainable class
15 and a well-defined community of interest among the class-members." (*Linder v. Thrifty Oil Co.*
16 (2000) 23 Cal.4th 429, 435 [citing *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462].)
17 This requires an inquiry into numerosity, ascertainability, whether common questions of law or
18 fact predominate, whether the class representatives have claims or defenses typical of the class,
19 and whether the class representatives can represent the class adequately. (See *id.*) Other relevant
20 considerations include the probability that each class member will come forward ultimately to
21 prove his or her separate claim to a portion of the total recovery and whether the class approach
22 would actually serve to deter and redress alleged wrongdoing. (*Id.*)

23 The party moving for certification must show "that the class action proceeding is superior
24 to alternate means for a fair and efficient adjudication of the litigation." (*Sav-On Drug Stores,*
25 *Inc. v. Superior Court* (2004) 34 Cal.4th 319, 332.)

1 "[T]he focus in a certification dispute is on what type of questions—common or
2 individual—are likely to arise in the action, rather than on the merits of the case[.]" (See *Sav-On*,
3 *supra*, at 327; see also *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022.)
4 Analysis of class certification criteria may come close to examining the merits, because facts
5 relevant to the merits may be and are often enmeshed with class certification criteria, such as
6 commonality; but it is not a merits decision. (See *Linder, supra*, at 432.)

7 It is Plaintiff's burden to support each of the above factors with a factual showing. (See
8 *Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462.) The Court is vested with
9 discretion in weighing the concerns that affect class certification. (See *Sav-On, supra*, at 336;
10 *Brinker, supra*, at 1022.) This includes "questions as to the weight and sufficiency of the
11 evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility
12 of witnesses . . . and the determination of [any] conflicts and inconsistency in their testimony."
13 (*Sav-On* at 334 [quoting *Thompson v. City of Long Beach* (1953) 41 Cal.2d 235, 246].)

14 Each subclass must also satisfy each of the factors. (See *Betts v. Reliable Collection*
15 *Agency, Ltd.* (9th Cir. 1981) 659 F.2d 1000, 1005. See also *Brinker, supra*, at 1051 [generally,
16 applying C.C.P. § 382 criteria to three subclasses; specifically, finding that one subclass should
17 not be certified because common issues of law and fact did not predominate].)

18 19 **IV. DISCUSSION**

20 **A. Numerosity and Ascertainability**

21 There is no fixed minimum number of plaintiffs required for maintaining a class action.
22 (See *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934 [42 members was sufficient];
23 *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030 [class of 28 members was large
24 enough].) "Class members are 'ascertainable' where they may be readily identified without
25 unreasonable expense or time by reference to official records." (See *Rose, supra*, at 932
26 [citation omitted]; see also *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 135.)

1 The members of the proposed class and those of the proposed subclass of BMs who
2 resigned or were terminated during the proposed class period are ascertainable from Defendant's
3 employment records. Ewing has identified 106 members in the proposed class (Pickett Decl.
4 Exh. 5, Response to Plaintiff's Special Interrogatories) and 41 members in the proposed subclass.
5 Thus, the proposed class and subclass satisfy the numerosity and ascertainability requirements.

6 In the tentative ruling, the Court noted that the proposed class (2) of BMs who "were not
7 managing at least 2 or more employees or the labor equivalent thereof each workweek" was
8 defined in terms of the merits rather than objective terms and that Plaintiff had not addressed
9 numerosity and ascertainability of this subclass. During the hearing, Plaintiff acknowledged that
10 the subclass may not satisfy numerosity and provided no reason for creating such a subclass.
11 Therefore, the Court will not certify class (2). Plaintiff no longer seeks to certify class (3).

12 **B. Typicality and Adequacy of Plaintiff and His Counsel**

13 It does not appear that there is any genuine dispute that Mr. Yamashiro's claims are
14 typical. He held the same position as other members of the putative class and asserts the same
15 claims based upon the same theories of liability.

16 Defendant objects to the adequacy of Mr. Yamashiro. First, Defendant challenges his
17 credibility. Upon close examination, the credibility issues are immaterial. For example, his
18 testimony regarding how many people he supervised and how much assistance he actually had is
19 truthful, even if Plaintiff apparently did not believe that an employee who was out on sick
20 leave/disability "counted" as a subordinate. Similarly, Plaintiff's belief that he had no discretion
21 to hire or fire because approval was required and his belief that there was little room for
22 flexibility because the training detailed how nearly all of the tasks should be performed go to the
23 legal effect of facts, rather than their truth or falsity. Thus, there has been no showing that
24 Plaintiff lacks credibility.

25 Defendant also argues that Plaintiff's testimony is biased and unreliable because he was
26 demoted for violating policies and procedures. There is no dispute as to the reason for Plaintiff's

1 demotion. However, there is also no evidence (such as deposition testimony) that Plaintiff
2 harbors actual animus against Defendant. This contention is thus purely speculative.

3 Plaintiff has offered admissible evidence to support the adequacy of his counsel, which is
4 not challenged by Defendant.

5 **C. Whether Common Questions of Law or Fact Predominate**

6 The determination of how much commonality is enough to warrant use of the class
7 mechanism requires a fact-specific evaluation of the claims, the common evidence, and the
8 anticipated conduct of the trial. California courts consider "pattern and practice evidence,
9 statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's
10 centralized practices in order to evaluate whether common behavior towards similarly situated
11 plaintiffs makes class certification appropriate." (*Sav-On, supra*, 34 Cal.4th at 333 [footnote
12 omitted].)

13 Commonality is determined with respect to the claims and defenses as pleaded. (*Hicks v.*
14 *Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 n.22.) The Court must also
15 consider Defendant's affirmative defenses, because Defendant may defeat class certification by
16 showing that a defense would raise individualized issues that predominate over common issues.
17 (See *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 913; *Kennedy v. Baxter Healthcare Corp.*
18 (1996) 43 Cal.App.4th 799, 811.)

19 The burden is on the employer to plead and prove the necessary facts to establish an
20 exemption at trial. (See *Donovan v. Nekton, Inc.* (9th Cir. 1983) 703 F.2d 1148, 1151; *Renfro v.*
21 *City of Emporia, Kan.* (10th Cir. 1991) 948 F.2d 1529, 1540; *Ramirez v. Yosemite Water Co.,*
22 *Inc.* (1999) 20 Cal.4th 785, 794–795.) However, in this Motion, the burden is on Plaintiff to
23 demonstrate the issues that can be litigated with reference to common evidence, and how those
24 issues predominate over those that cannot be tried on a common basis. (*Sav-On, supra*, at 326;
25 *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450 [same rule for
26 affirmative defenses].)

1 **1. Plaintiff's Case in Chief**

2 Plaintiff asserts two substantive claims: for overtime and for waiting time penalties.
3 Plaintiff must show that the elements of his case in chief as to each of these causes of action can
4 be tried on a common basis.

5 An employee must be paid overtime, equal to 1.5 times the employee's regular rate of
6 pay, for all hours worked in excess of 40 hours per week. (Lab. Code § 510; 8 C.C.R. § 11040.)
7 An employee who has not received full overtime compensation is entitled to recover the unpaid
8 balance. (Lab. Code § 1194.) If an employer willfully fails to pay any wages of an employee
9 who is discharged or who quits, the wages of the employee continue as a penalty, for up to 30
10 days, from the due date, at the same rate until paid or until an action for payment is commenced.
11 (Lab. Code § 203(a).)

12 The record indicates that it was common practice for BMs to work over 40 hours per
13 week. All of Plaintiff's BM declarants state that they worked on average over 40 hours per week,
14 except for those weeks when they were absent due to vacation, sickness, or holiday. (See
15 generally Plaintiff's Compendium of Class Member Declarations ¶ 3.) Mr. Peter Luna, Ewing's
16 Regional Director, whom Ewing designated as one of Ewing's persons most qualified deponents,
17 states that Ewing expects branch stores to be open typically from 7 am to 5 pm on weekdays and
18 from 7 am to 11 am or 8 am to 12 pm on Saturdays. (Pickett Decl. Exh. 4, Luna Dep. at 156:3-
19 15.) Most of Plaintiff's BM declarants state that they worked from opening to closing on
20 weekdays and worked some Saturdays. As to the waiting penalties claim, whether BMs
21 terminated employment and what wages were paid can be ascertained from Defendant's
22 employment records.

23 Defendant does not dispute this evidence or commonality. In particular, none of
24 Defendant's BM declarants contend that they always worked 40 hours or less per week, while
25 some of them state that their branches were open on the typical schedule Mr. Luna mentions.
26

1 (E.g. Cox Decl. ¶ 3.) Thus the Court finds that this issue can be litigated with reference to
2 common evidence.

3 **2. Affirmative Defense: Executive Exemption**

4 In opposition to the Motion, Defendant has asserted the Executive Exemption. (See
5 Industrial Welfare Commission Order No. 7-2001 (the "Wage Order") §1(A)(1), codified at 8
6 C.C.R. § 11070.)

7 The Executive Exemption exempts (from various legal protections provided to hourly
8 workers) any employee:

9 (a) Whose duties and responsibilities involve the management of the enterprise in
10 which he/she is employed or of a customarily recognized department or
subdivision thereof; and

11 (b) Who customarily and regularly directs the work of two or more other
12 employees therein; and

13 (c) Who has the authority to hire or fire other employees or whose suggestions and
14 recommendations as to the hiring or firing and as to the advancement and
15 promotion or any other change of status of other employees will be given
particular weight; and

16 (d) Who customarily and regularly exercises discretion and independent
17 judgment; and

18 (e) Who is primarily engaged in duties which meet the test of the exemption. The
19 activities constituting exempt work and non-exempt work shall be construed in
20 the same manner as such items are construed in the following regulations under
the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R.
21 Sections 541.102, 541.104-111, and 541.115-116. Exempt work shall include, for
22 example, all work that is directly and closely related to exempt work and work
23 which is properly viewed as a means for carrying out exempt functions. The work
24 actually performed by the employee during the course of the workweek must, first
and foremost, be examined and the amount of time the employee spends on such
work, together with the employer's realistic expectations and the realistic
requirements of the job, shall be considered in determining whether the employee
satisfies this requirement.

25 (f) Such an employee must also earn a monthly salary equivalent to no less than
26 two (2) times the state minimum wage for full-time employment. Full-time
employment is defined in Labor Code Section 515(c) as 40 hours per week.

1 (Wage Order § 1(A)(1).)

2 The parties do not dispute that evidence related to (a) and (f) is common. The Court
3 examines whether the remaining elements may be (dis)proven by common evidence.

4 **a. Whether BMs Customarily and Regularly Direct the Work**
5 **of Two or More Other Employees**

6 The Wage Order requires that an employee, to qualify for the Executive Exemption, must
7 supervise "two or more other employees." Under federal regulations incorporated by the Wage
8 Order, "two or more other employees" means two full-time employees or the equivalent." (29
9 C.F.R. § 541.105.) The term "equivalent" means equivalent in number of hours. (See 29 C.F.R.
10 § 541.105.)

11 There is much dispute over whether the BMs "customarily and regularly direct[ed] the
12 work of two or more employees." Plaintiff contends that "Branch Scorecards" show that BMs
13 worked with less than two employees for over 25% of all work weeks. The Branch Scorecards
14 purport to show the monthly total of hours worked by hourly employees at the branch. (See
15 Pickett Decl. Exh. 8, Gorham Dep. at 101:22-102:18.) Plaintiff also submits declarations from
16 seven BMs who state that they had only one employee for months at a time. (*E.g.*, Clench Decl.
17 ¶ 8.)

18 Defendant claims that Branch Scorecards are an unreliable and under-inclusive source of
19 information of employee hours for various reasons. It also disputes three of the seven BM
20 declarations. (See Gorham Decl. ¶¶ 2-4.) Ms. Gorham, Ewing's Director of Human Resources,
21 states that two of the three always had two employees during the relevant period, while one of
22 them had two employees except for the last two months he was a BM. (*Ibid.*)

23 The merits are in dispute, but the Court believes this issue can be litigated with respect to
24 common evidence. Ms. Gorham's declaration is presumably based on Defendant's employment
25 records. Further, Ms. Gorham states that the hourly employees log their hours into the
26 computer's time-keeping system, which is imported to the computer's payroll system to determine

1 how much each employee should be paid. (Gorham Dep. at 102:15-23.) Further, although
2 Branch Scorecards do not record the number of employees who are working at a branch, they
3 record the monthly total of all non-BM employee hours. This can easily be translated into the
4 equivalent in numbers of employees, which is pertinent under the Wage Order.

5 **b. Whether BMs Have the Authority to Hire or Fire, or Made**
6 **Recommendations That Were Given Particular Weight**

7 The evidence seems to be common for substantially all BMs. This criterion is met if, at a
8 minimum, a manager's recommendations regarding personnel decisions are taken seriously.
9 Most BMs testified that their recommendations were followed. (*E.g.* Clench Dep. at 39:8-20;
10 Escobedo Dep. at 20:8-14; Byrnes Decl. ¶ 3.) All BMs were subject to the same hiring policies
11 and procedures, which involved selection of candidates, administration of Ewing's employment
12 exam, and approval by HR. (See Pickett Decl. Exh. 7.) Thus, there is no material variance
13 among the proposed class members. The legal issues are likewise common.

14 **c. Whether BMs Customarily and Regularly Exercise**
15 **Discretion and Independent Judgment**

16 The Code of Federal Regulations as incorporated by the Wage Order provides that the
17 employee must exercise discretion and independent judgment on matters of "significance" or
18 "consequence" to meet this requirement. Examples include "formulat[ing] policy within their
19 spheres of responsibility"; evaluating alternatives and making decisions or presenting
20 recommended decisions to a superior; and exercising "reasonable latitude in carrying on
21 negotiation on behalf of their employers." (See 29 C.F.R. § 541.207(d)(2).)

22 The evidence is common for substantially all class members. The BMs exercised
23 discretion and independent judgment as to the same matters and issues, and within the same pre-
24 set policy limits. BMs exercised discretion and independent judgment in managing their
25 employees, merchandising displays, tracking inventory, and executing "normal sales." (See, *e.g.*,
26 Yamashiro Dep. at 47:21-48:10, 92:7-11; Clench Dep. at 65:23-66:1; Carter Dep. at 82:12-17.)
They had to obtain approval for the same set of decisions, including giving price breaks outside

1 of a set matrix, setting sale prices outside of a set range, making changes in product
2 mix/inventory, placing special orders, increasing their labor budgets, setting their sales goals, and
3 in hosting some marketing events and education seminars. (See, e.g., Escobedo Dep. at 78:3-9;
4 Carter Dep. at 22:10-24; Luna Dep. at 105:1-15; Pickett Decl. Exh. 6 at Bates pp. 6010, 6012.)
5 Factually, there is no substantial variation in the nature and scope of discretion and independent
6 judgment exercised by BMs.

7 Nor is there any conflict in the evidence regarding whether the matters on which BMs
8 exercised discretion were "matters of significance" or "consequence." In particular, Defendant
9 has not demonstrated that some BMs exercise discretion and independent judgment on "matters
10 of significance" while others do not. On this element, common legal and factual questions
11 appear to predominate.

12 **d. Whether BMs are Primarily Engaged in Exempt Work**

13 Under the Wage Order, in contrast to federal law, an employee is "primarily" engaged in
14 exempt work if the employee spends "more than one-half of the employee's work time" engaged
15 in exempt activity. (Wage Order § 2(K); see also *Ramirez, supra*, 20 Cal.4th at 797.) This
16 involves a determination of the tasks performed by the employee, that is, whether the tasks are
17 exempt or non-exempt and how much time the employee spent performing exempt versus non-
18 exempt tasks.

19 The questions appear to be common. First, BMs generally had the same responsibilities
20 and performed the same tasks. Whether each task is managerial or non-managerial is a common
21 legal question. (Defendant's argument that the "mindset" of the BM while performing the task
22 affects the nature of the work performed is without merit. (See 29 C.F.R. § 541.108(e), (g)
23 (2001); compare 29 C.F.R. § 541.115 (b) [training example].))

24 Second, with respect to how much time each BM spent on each task, this appears to have
25 varied (e.g., Escobedo Dep. at 66:17-19); the pertinent question, however, is whether the
26 variance is material. Regardless of the individual makeup of each BM's workweek, substantially

1 all BMs testified that, on average, they spent well over half their working hours on the same
2 types of tasks that their subordinates performed—sales, customer service, stocking, cleaning,
3 pulling orders, etc. (See generally Plaintiff's Compendium of Class Member Declarations ¶ 4.)
4 As noted above in Section II, Defendant's contrary evidence is generally vague, ambiguous,
5 conclusory and/or without foundation and thus does not demonstrate any material variation.
6 Indeed, when specifics are provided, Defendant's evidence appears to be consistent with
7 Plaintiff's, since these BMs included all sales and customer service in managerial tasks. (*E.g.*
8 Castellanos Decl. ¶¶ 7-8; Freeborn Decl. ¶ 8.)

9 Third, and finally, Plaintiff has presented evidence supporting a common factual theory
10 for why BMs allegedly spent a significant amount of time performing sales, which Plaintiff
11 contends is non-managerial work: Defendant's singular emphasis on sales, which permeated
12 BMs' training, evaluation and general firm culture, combined with Defendant's policies and
13 practices regarding staffing resources, pushed BMs to spend more than half their time on sales
14 and other non-managerial tasks designed to boost sales. (See, *e.g.*, Luna Dep. at 129:10-16;
15 Pickett Decl. Exhs. 12, 19 at Bates page 5472; Clench Dep. at 50:20-51:2; Martin Dep. at 121:7-
16 13; Yamashiro Dep. at 96:13-18.) This theory is based upon common evidence.

17 Based on the evidence with respect to the Executive Exemption and Plaintiff's case in
18 chief, the Court finds that questions of law or fact common to the proposed class predominate
19 over questions affecting the individual class members.

20 **D. Superiority and Manageability**

21 In view of the foregoing, the benefits of litigating Plaintiff's claims on a class basis appear
22 to be great. Doing so will obviate the far greater burden that many individual trials on
23 substantially the same issues would impose on the State (either in state court or before the
24 DLSE). Trying the claims on a class basis will provide more uniform guidance regarding
25 enforcement of Defendant's legal obligations. The law recognizes that employees may be
26 reluctant to pursue Plaintiff's claims, and here there is no evidence that any other class member

1 has filed a similar claim. Few, if any, material, individualized issues have been identified by
2 Defendant. Based upon the record, the Court believes that any such issues can be managed by
3 using one or more of the "innovative tools" that have been approved by California courts.
4

5 **V. CONCLUSION**

6 Based upon the foregoing, the Motion for Class Certification is GRANTED IN PART.
7 The Court hereby certifies a class consisting of all persons employed by Ewing in California as
8 salaried Branch Managers at any time between May 13, 2007 and December 31, 2012 and a
9 subclass of members of the class who resigned or were terminated during that time period. The
10 Court declines to certify for the two subclasses originally sought. Defendant's surreply is
11 STRICKEN for failure to seek leave of Court and failure to show that the surreply was justified
12 or necessary.
13

14 **VI. FURTHER PROCEEDINGS**

15 **A. Proposed Class Notice**

16 Plaintiff has not submitted a proposed notice. The notice should be drafted and formatted
17 in a consumer-friendly format, such as the question and answer format used by the Federal
18 Judicial Center. (See, *e.g.*, The Federal Judicial Center's "Illustrative" Forms of Class Action
19 Notices at <http://www.fjc.gov/>.¹) It should comply with the standards in the S.E.C.'s plain
20 English rules. (17 C.F.R. § 230.421.) Information should be conveyed in the simplest possible
21 terms. The notice should contain a prominent non-retaliation statement.
22
23
24

25 ¹ The FJC form notices include important information about how class actions work, as well as
26 explanations of the choices class members may have and their consequences. One of the model
notices is formatted for trial (as opposed to settlement) purposes.

1 **B. Trial Plan**

2 No trial date has been set. The parties should meet and confer regarding their mutual
3 availability for trial and shall be prepared to propose appropriate dates at the December 11, 2012
4 CCMC. One hundred twenty days before trial, Plaintiff shall file a trial plan that demonstrates
5 that there can be an effective class trial of common issues that will provide due process to the
6 absent class members and Defendant while respecting the time of the Court and/or jury. The trial
7 plan must identify the common factual and legal issues and identify the specific documents and
8 witnesses that Plaintiff will present to prove the common factual issues. For each witness,
9 Plaintiff must describe their testimony in 3 - 4 sentences and estimate the hours of direct
10 testimony. (See *Tate v. Kaiser* (RG07 318416) 4/28/09 Order; Workman Decl. filed 6/25/09.) It
11 should also propose specific methods to manage any individualized issues.

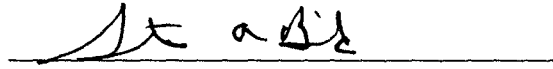
12 The trial plan is not a substitute for Local Rule 3.35 and will not bind the Plaintiff to the
13 precise witnesses and documents that he can present at trial. The trial plan must, however, give
14 the Court a factual basis for confirming that the trial will be manageable and for determining the
15 length of the trial.

16 **C. Next CCMC**

17 The Court has continued the Case Management Conference set for October 10, 2012 to
18 December 11, 2012 at 3:00 p.m. to consider the proposed class notice and to set a trial date or
19 dates. On or before November 14, 2012, Plaintiff shall file a proposed notice, submit a courtesy
20 copy directly to Department 17 via electronic mail (PDF) and hand delivery (hard copy), and
21 serve it on Defendant at the time of filing. The parties shall consider any changes proposed by
22 Defendant. The parties shall also confer regarding the scheduling of any additional motions,
23 mediation or settlement conference, pretrial and trial, and report their agreement, or respective
24 positions, in their joint CCMC statement, to be filed (and a courtesy copy hand-delivered directly
25 to Department 17) by December 4, 2012.

1 If they have not done so already, the parties are strongly encouraged to consent to
2 electronic service (see C.R.C. 2.251(a)) so that, going forward, all documents may be served on
3 and among the parties in that manner.
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5 Dated: October 25, 2012
6



7 Steven A. Brick
8 Judge of the Superior Court
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**Superior Court of California
Alameda County**

Case # RG11 575582

Case Name: Yamashiro vs. Ewing Irrigation Products, Inc.

Document: Order Granting In Part Plaintiff's Motion for Class Certification

**CLERK'S CERTIFICATE OF
MAILING
(CCP 1013a)**

I certify that the following is true and correct:

I am a Deputy Clerk employed by the Alameda County Superior Court. I am over the age of 18 years. My business address is 1221 Oak St. Oakland, California. I served this **Order** by placing copies in envelope(s) addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at **Oakland**, California, following standard court practices.

Edward J. Wynne, Esq.
J.E.B. Pickett, Esq.
Wynne Law Firm
100 Drakes Landing Road, Ste. 275
Greenbrae, CA 94904

Lisa E. Aguiar, Esq.
Candice S. Petty, Esq.
Ropers, Majeski, Kohn & Bentley
50 West San Fernando Street, Suite 1400
San Jose, CA 95113-2429

Date: 10/25/12

Executive Officer/Clerk of the Superior Court

By 

Kimberly McCoy, Deputy Clerk