

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HOWARD DAVID PROVINE, individually
and on behalf of other persons similarly
situated,

Plaintiffs,

v.

OFFICE DEPOT, INC.,

Defendant.

No. C 11-00903 SI

**ORDER DENYING DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT
AND GRANTING PLAINTIFF’S
MOTION FOR CLASS CERTIFICATION**

Presently pending before the Court are defendant’s motion for summary judgment and plaintiff’s motion for class certification. For the reasons set forth below, the Court DENIES defendant’s motion and GRANTS plaintiff’s motion.

BACKGROUND

Defendant Office Depot has offered a program for its employees known as the Bravo Award Program since at least January 2007. Declaration of Jennifer L. Bradford (“Bradford Decl.”), Ex. 1 at 22. The Bravo Program awards employees for superior work performance. *Id.* at 30. It is administered in all of defendant’s facilities under the same general procedures described in Office Depot’s “People Manual.” *Id.* at 31. All non-management associates are eligible to participate in the Bravo Program. Bradford Decl., Ex. 9 at 4. Managers can award Bravo Cards for performance above

1 and beyond expectations. *Id.* Managers in each store have leeway over when to award Bravo Cards to
2 employees. *Id.* Bravo Program procedures outline a non-exhaustive list of areas in which employee
3 conduct may warrant the award of a Bravo Card. *Id.* at 4-5. Awarded Bravo Cards are placed in a
4 container. *Id.* at 5. At the end of the month, there is a drawing for a cash prize of \$50, which is a
5 “Bravo Award” paid in the winning employee’s next paycheck. *Id.* at 5.

6 Plaintiff Howard David Provine worked at an Office Depot retail store in Antioch, California
7 from June 2010 to December 2010. Bradford Decl., Ex. 2 at 12. During his entire employment, plaintiff
8 was paid on an hourly basis and eligible to receive Bravo Awards. *Id.* at 13. Plaintiff had no
9 expectation that he would receive any Bravo Cards, and no expectation that he would win a Bravo
10 Award if he did receive any cards. *Id.* at 18, 27. Nevertheless, plaintiff won two Bravo Awards, one
11 in July 2010, and one in November 2010. *Id.* at 23-25. Plaintiff was paid the \$50 Bravo Award in his
12 paychecks in August 2010 and December 2010. *Id.*

13 During the month of July, plaintiff worked 101.28 total hours including 0.25 hours of overtime.
14 Bradford Decl., Ex. 6; Ex. 7 at 1. During the month of November, plaintiff worked 114.02 hours
15 including 0.0667 hours (4 minutes) of overtime. Bradford Decl., Ex. 6; Ex. 8 at 1. Defendant does not
16 factor Bravo Awards into the calculation of an employee’s regular rate of pay for the purposes of
17 computing overtime. If defendant had included Bravo Awards in that calculation, plaintiff would be
18 entitled to nineteen cents of additional overtime pay for the month of June and four cents for the month
19 of November. Bradford Decl., ¶¶ 10-11. Defendant does not pay an overtime premium on Bravo
20 Awards themselves.

21 On January 19, 2011, plaintiff filed his original complaint against defendant. On July 18, 2011,
22 plaintiff amended the complaint, and on December 14, 2011, plaintiff filed the second amended
23 complaint (“SAC”). The SAC alleges five causes of action against defendant: (1) failure to pay
24 overtime wages, (2) failure to provide accurate wage statements, (3) unfair competition under the
25 California Unfair Competition Law (“UCL”), (4) failure to pay all wages owed upon termination, and
26 (5) civil penalties under the California Private Attorney General Act (“PAGA”). Defendant seeks
27 summary judgment against plaintiff on all of his individual claims, and plaintiff seeks class certification
28 of the first four claims.

LEGAL STANDARDS**I. Summary judgment**

Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however, has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at trial. The moving party need only demonstrate to the Court that there is an absence of evidence to support the non-moving party's case. *See id.* at 325.

The burden then shifts to the non-moving party to “designate specific facts showing that there is a genuine issue for trial.” *Id.* at 324. To carry this burden, the non-moving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

In deciding a summary judgment motion, the evidence is viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. *Id.* at 255. “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [when she] is ruling on a motion for summary judgment.” *Id.* Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir.1979); *see also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (observing that there is no genuine issue of fact “where the only evidence presented is ‘uncorroborated and self-serving’ testimony” (quoting *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996))). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(c). Hearsay statements found in affidavits are inadmissible. *Fong v. Am. Airlines, Inc.*, 626 F.2d 759, 762-63 (9th Cir. 1980).

II. Class certification

Class certification is warranted where a plaintiff demonstrates that all of the requirements of Federal Rule of Civil Procedure 23(a) are satisfied and at least one of the requirements of Rule 23(b) is satisfied. *See* Fed. R. Civ. P. 23; *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011). Rule 23(a) provides that a court may certify a class only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

In addition to demonstrating that the Rule 23(a) requirements are met, plaintiff must establish one or more of the following grounds for maintaining the suit as a class action pursuant to Rule 23(b): (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication. Fed. R. Civ. P. 23(b).

DISCUSSION**I. Defendant's motion for summary judgment****A. The Bravo Awards are not discretionary**

Defendant contends that it was not required to include Bravo Awards in plaintiff's regular rate of pay because Bravo Awards are discretionary. California law requires employers to pay non-exempt employees for any hours worked in excess of eight hours in one workday and forty hours in one workweek "at the rate of no less than one and one-half times the regular rate of pay." Cal. Labor Code § 510. The parties agree that under the FLSA and California law, discretionary bonuses are excluded from the regular rate of pay. *See* 29 U.S.C. § 207(e)(3); DLSE Enforcement Policies & Interpretations Manual § 49.12 (2002) § 49.1.2.4 (3) (DLSE Manual).¹ Bonuses are discretionary if "both the fact that

¹ The California Labor Code does not define the term "regular rate of pay." The California Division of Labor Standards Enforcement ("DLSE") recommends that courts look to the Fair Labor Standards Act ("FLSA") and adopt its definition of "regular rate of pay." DLSE Manual § 49.12; *see also Advanced-Tech Security Serv., Inc. v. Superior Ct.*, 163 Cal. App. 4th 700, 707 (2008) (explaining

1 payment is to be made and the amount of the payment are determined at the sole discretion of the
 2 employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise
 3 causing the employee to expect such payments regularly.” 29 U.S.C. § 207(e)(3)(a); *see also* 29
 4 C.F.R. § 778.211 (“In order for a bonus to qualify for exclusion as a discretionary bonus under section
 5 [20]7(e)(3)(a) the employer must retain discretion both as to the fact of payment and as to the amount
 6 until a time quite close to the end of the period for which the bonus is paid.”); *see also* DLSE Manual
 7 § 49.1.2.4 (3) (“Sums paid in recognition of services performed during a given period” are discretionary
 8 if “both the fact that payment is to be made and the amount of payment are determined at the sole
 9 discretion of the employer” and “not pursuant to any prior contract, agreement or promise.”).

10 Based on the text of the FLSA and accompanying interpretive regulation, and the DLSE Manual,
 11 the Court finds that because it is undisputed that Bravo Awards are always \$50 dollars, they are not
 12 discretionary. Defendant argues that because Bravo Cards are awarded at the discretion of its store
 13 managers, and because winning a Bravo Award is contingent on winning a random drawing from the
 14 Bravo Cards, Bravo Awards are by definition discretionary. The Court agrees that “the fact that
 15 payment [of the Bravo Award] is to be made . . . [is] determined at the sole discretion of the employer
 16 at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing
 17 the employee to expect such payments regularly.” 29 U.S.C. § 207(e)(3). However, the authority cited
 18 by defendant also requires that the *amount* of payment be discretionary in order for the bonus to be
 19 excluded from the regular rate of pay. In each of the cases on which defendant relies, both the fact and
 20 the amount of payment were under the discretion of the store manager. *See Alonzo v. Maximus, Inc.*,
 21 No. 08-6755, 2011 WL 6396444, *9 (C.D. Cal. Dec. 5, 2011) (“MaxDollar bonuses were ‘spot bonuses
 22 to employees who . . . made unique or extraordinary efforts’ and were not awarded according to pre-
 23 established criteria or pre-established rates.”); *see also Zator v. Spring/United Management Co.*, No.
 24 09-935, 2011 WL 1157527, *3-5 (S.D. Cal. 2011) (holding that various benefits were not part of
 25 compensation under the FLSA and that there was no evidence of their worth or non-discretionary fact
 26 of payment); *Brown v. Nipper Auto Parts and Supplies, Inc.*, No. 08-521, 2009 WL 1437836, *7 (W.D.

27
 28 that California law looks to FLSA to determine what is excludable from compensation when calculating
 the “regular rate”).

1 Va. May 21, 2009) (manager had “sole discretion as to whether and in what amount these bonuses were
2 paid” and therefore bonuses were discretionary). Defendant has not identified, and the Court has not
3 located, any cases in which the amount of payment was known in advance and the bonus in question
4 was held to be discretionary under the FLSA or California law.

5 Defendant also cites an Opinion Letter from the Department of Labor, evaluating a proposed gift
6 program where all employees who have had perfect attendance for a quarter are entered into a semi-
7 annual drawing in which the winner receives a new car. Department of Labor Wage & Hour Division,
8 Opinion Letter Fair Labor Standards Act (FLSA), 1996 WL 1031796 (Aug. 6, 1996). In the letter, the
9 employer asked whether the value of the car would have to be included in winning employee’s regular
10 rate used in computing overtime. *Id.* The letter explained:

11 As indicated in Section 778.331 of 29 C.F.R. Part 778 (copy enclosed) gifts or
12 prizes awarded to employees for their efforts in improving quality, quantity, efficiency
13 or attendance are paid as additional remuneration for employment. Thus, the value of
14 gifts or prizes paid to employees for “perfect attendance” would normally be included
15 in the employees’ regular rate of pay.

16 In your situation, however, the employee simply becomes eligible to participate
17 in a drawing or lottery for the prize, and we presume from the large value of the prize
18 that an employee’s likelihood of winning the prize is very small. Given these
19 circumstances, we would not assert that any prize awarded under the lottery drawing
20 conditions described in your letter would have to be included in calculating the regular
21 rate for the employee selected for the award.

22 *Id.*

23 The Court accords this opinion letter due deference as it is the Secretary of Labor’s interpretation
24 of its own regulation. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *In re Farmers Ins. Exch. Claims*
25 *Representatives’ Overtime Pay Litig.*, 481 F.2d 1119, 1129 (9th Cir. 2007). However, the opinion letter
26 does not address whether a set, known value for a bonus renders it non-discretionary under the FLSA.
27 While it is true, as defendant asserts, that the Bravo Program is “even more discretionary” as to the fact
28 of payment than the program in the letter because it involves two separate layers of discretion or chance,
the opinion letter does not state whether the value of the car is known in advance of the drawing.
Instead, the letter focused on the dichotomy between the two parts of the bonus award procedure. The
letter finds that in a situation where the method for granting a bonus is part known and part random, the
bonus is discretionary where the randomization procedure makes the fact of payment unlikely, and
therefore uncertain, that an employee will receive the bonus. To emphasize this point, the letter notes

1 that the presumed likelihood of winning the drawing is low, and hence overwhelms the non-
2 discretionary entry of the contestants into the lottery by a known procedure.

3 Accordingly, the Court concludes that even though the fact of receiving a Bravo Award is
4 discretionary, such awards are not “discretionary” under the California Labor Code because the amount
5 of payment was known to all employees in advance.

6
7 **B. *De minimis* defense**

8 Defendant asserts that even if Bravo Awards are non-discretionary, the awards were nevertheless
9 properly excluded from plaintiff’s regular rate of pay because the total amount at issue is less than fifty
10 cents. Defendant relies on 29 C.F.R. § 548.3(e), which provides that employers can exclude from an
11 employee’s regular rate of pay “additional payments in cash or in kind which, if included in the
12 computation of overtime under the Act, would not increase the total compensation of the employee by
13 more than 50 cents a week on the average for all overtime weeks (in excess of the number of hours
14 applicable under section 7(a) of the Act) in the period for which such additional payments are made.”
15 29 C.F.R. § 548.3(e).

16 Plaintiff contends that 29 C.F.R. § 548.3(e) does not apply because that section only applies to
17 calculation of overtime pay in accordance with Section 7(g)(3) of the FLSA. Plaintiff contends that
18 Section 7(g)(3) of the FLSA does not apply to employees like plaintiff with a single hourly rate of pay.
19 Section 7(g)(3) applies to employees paid at a “basic rate” that is “substantially equivalent to the
20 average hourly earnings of the employee.” 29 U.S.C. § 207(g)(3); 29 C.F.R. § 548.2. Plaintiff argues
21 that a “basic rate” under this section must necessarily be something other than a singular hourly rate of
22 pay, otherwise the “basic rate” would always be exactly equal to the employee’s “average hourly
23 earnings” and Section 7(g)(3) would have no meaning.

24 The Court agrees with plaintiff. As explained in 29 C.F.R. § 548.100(a),

25 The purpose of Section 7(g)(3) of the act, and subpart A of this part, is to provide an
26 exception from the requirements of computing overtime at the regular rate, and to allow,
27 under specific conditions, the use of an established “basic” rate instead. Basic rates are
28 alternatives to the regular rate of pay under section 7(a), and their use is optional. The
use of basic rates is principally intended to simplify bookkeeping and computation of
overtime pay.

1 29 C.F.R. § 548.100(a). The regulations provide numerous requirements that an employer must satisfy
2 in order to use a basic rate. For example Section 548.3, titled “Authorized basic rates,” sets forth
3 numerous conditions that “will be regarded as being substantially equivalent to the average hourly
4 earnings of the employee . . . and may be used in computing overtime compensation for purposes of
5 section 7(g)(3) and section 548.2.” For example, one authorized basic rate is “a rate per hour which is
6 obtained by dividing a monthly or semi-monthly salary by the number of regular working days in each
7 monthly or semi-monthly period or hours in the normal or regular workday.” 29 C.F.R. § 548.3(a).

8 Defendant has not cited any authority for the proposition that an employee earning a single
9 hourly rate is an employee paid at a “basic rate” under Section 7(g)(3). The cases cited by defendant
10 do not involve application of Section 7(g)(3) to an employee with a single hourly rate of pay. Further,
11 the Court notes that even if Section 7(g)(3) and 29 C.F.R. § 548.3(e) applied to employees earning a
12 single hourly rate, the regulations state that *de minimis* amounts can be excluded from the computation
13 of overtime “upon agreement or understanding with the employee.” Section 548.305, titled “Excluding
14 certain additions to wages,” states:

15 Section 548.3(e) permits the employer, upon agreement or understanding with the
16 employee, to omit from the computation of overtime certain incidental payments which
17 have a trivial effect on the overtime compensation due. Examples of payments which
18 may be excluded are: modest housing, bonuses or prizes of various sorts, tuition paid by
19 the employer for the employee’s attendance at the school, and cash payments or
20 merchandise awards for soliciting or obtaining new business.

21 29 C.F.R. § 548.305(b); *see also id.* § 548.305(e) (“There are many situations in which the employer
22 and employee cannot predict with any degree of certainty the amount of bonus to be paid at the end of
23 the bonus period. . . . In such situations the employer and employee may agree prior to the performance
24 of the work that a bonus will be disregarded in the computation of overtime pay if the employee’s total
25 earnings are not affected by more than \$.50 a week on the average for all overtime weeks during the
26 bonus period.”). Here, defendant has not submitted any evidence showing that plaintiff and defendant
27 agreed or understood that Bravo Awards would be excluded from the computation of overtime pay.

28 Accordingly, the Court denies defendant’s motion for summary judgment on plaintiff’s first
claim for relief.

1 **C. UCL and civil penalties under PAGA**

2 Defendant moves for summary judgment on plaintiff’s UCL claim and claim for civil penalties
3 under PAGA on the ground that those claims depend entirely on a finding that defendant violated the
4 Labor Code by failing to include the Bravo payment into the regular rate calculation. Accordingly, for
5 the reasons stated above, the Court denies defendant’s motion for summary judgment as to those claims.

6
7 **D. Failure to pay all wages owed upon termination**

8 In the fourth claim for relief, plaintiff seeks waiting time penalties under California Labor Code
9 § 203 as a result of the purported failure to pay all of the overtime to him upon employment termination.
10 Defendant moves for summary judgment on this claim, contending that a good faith dispute exists over
11 whether the Bravo Award must be included in the regular rate calculation.

12 In order to recover waiting time penalties, the Court must find that the defendant “willfully”
13 withheld wages. Cal. Labor Code § 203. “A willful failure to pay wages within the meaning of [that
14 section] occurs when an employer intentionally fails to pay wages to an employee when those wages
15 are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time
16 penalties under Section 203.” Cal. Code Regs. Tit. 8, § 13520 (2012). A “good faith dispute . . . occurs
17 when an employer presents a defense, based in law or fact which, if successful, would preclude any
18 recovery on the part of the employee.” *Id.* “The fact that a defense is ultimately unsuccessful will not
19 preclude a finding that a good faith dispute did exist.” *Id.* However, “[d]efenses presented which, under
20 all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith,
21 will preclude a finding of a ‘good faith dispute.’” *Id.*

22 Defendant contends that a good faith dispute exists because “the statutes, regulations, and cases
23 that govern the calculation of an employee’s regular rate of pay suggest that payments like the Bravo
24 prizes are properly excluded from the regular rate, as both the fact that the payments were made in the
25 amount of the payments were matters of Office Depot’s sole discretion.” Motion at 15:10-14.
26 Defendant asserts that Office Depot’s decision not to factor the value of the Bravo Awards into
27 plaintiff’s regular rates was based on a reasonable, good-faith interpretation of the applicable law.

28

1 The Court finds that defendant has not demonstrated that it is entitled to summary judgment on
2 this ground. Neither party has submitted any evidence regarding the reasonableness of Office Depot's
3 decision not to factor Bravo awards into the regular rate of pay, and thus the Court cannot conclude on
4 this record that a good faith dispute exists.

5 Defendant also moves for summary judgment on the ground that the amount of waiting time
6 penalties purportedly owed to plaintiff is unconstitutional. Section 203 provides for a penalty of up to
7 thirty days continued wages for any willful failure to pay wages owed at the time of termination. Cal.
8 Labor Code § 203(a). Defendant asserts that the amount of unpaid overtime at issue is \$.23, and that
9 the purportedly owed waiting time penalties is unconstitutionally excessive (\$2,016, assuming an eight
10 hour workday or \$1,008, assuming a four-hour workday). Defendant cites cases for the proposition that
11 a statutory penalty violates due process where “the penalty prescribed is so severe and oppressive as
12 to be wholly disproportioned to the offense and obviously unreasonable.” *United States v. Citrin*, 972
13 F.2d 1044, 1051 (9th Cir. 1992) (quoting *St. Louis, Iron Mt. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-
14 67 (1919)).

15 Plaintiff argues that the possibility of excessive damage award does not provide defendant with
16 a defense to liability and that the Court need not resolve this question at this time. The Court agrees.
17 Prior to a determination of defendant's liability, it is premature to analyze whether the potential penalty
18 owed is unconstitutional. The Court has not held that defendant “willfully” withheld wages, nor has the
19 Court precluded the possibility of a finding of a good faith dispute. Accordingly, the Court denies
20 defendant's motion on this ground without prejudice to renewal in the event defendant is found liable.

21
22 **E. Failure to provide accurate wage statements**

23 Plaintiff alleges Office Depot violated California Labor Code Section 226 because the wage
24 statements he received during his employment did not reflect the additional overtime due to him as a
25 result of winning Bravo Awards. Defendant moves for summary judgment on this claim, contending
26 that Section 226 does not create a penalty for nonpayment or late payment of wages, but rather simply
27 requires that employers accurately describe the monies that are being paid “at the time of each payment
28 of wages.” Cal. Labor Code § 226(a). As support, defendant cites a DLSE opinion letter, which states

1 that the purpose of Section 226 “is to provide transparency as to the calculation of wages” and “to allow
2 employees to maintain their own records of wages earned, deductions, and pay received”). *See*
3 2006.07.06 DLSE Opinion Letter at 2. Plaintiff responds that wage statements violate Labor Code
4 Section 226 when they do not state the correct amount of wages “earned,” and that this section does not
5 simply impose the requirement to accurately state the correct amount of wages actually paid.

6 The plain language of Section 226 requires that wage statements set forth the correct amount of
7 wages “earned” by employees. Contrary to defendant’s assertions, it is not obvious from either the
8 language of Section 226 or the DLSE Opinion Letter that Section 226 simply requires a statement of
9 the wages actually paid to an employee where there is a dispute regarding whether overtime pay was
10 earned. In the absence of on point authority supporting defendant’s interpretation of Section 226, the
11 Court declines to adopt defendant’s construction.

12 Defendant also contends that it is entitled to summary judgment on this claim because plaintiff
13 testified at his deposition that he was not harmed as a result of receiving inaccurate wage statements.
14 Plaintiff asserts that a review of his deposition testimony shows that he made no such concession, and
15 that plaintiff’s deposition testimony is not inconsistent with the statement in plaintiff’s declaration in
16 which he stated that as a result of the inaccurate wage statements he could not determine the correct
17 amount of overtime wages owed. The Court finds that whether or not plaintiff suffered an injury as a
18 result of receiving allegedly inaccurate wage statements is a disputed question of fact, and therefore that
19 summary judgment on this ground is not appropriate.

20 Finally, defendant contends that there is no evidence of a knowing and intentional violation of
21 Section 226 because there is a good faith dispute as to whether the Bravo Award should be included in
22 the regular rate calculation. For the reasons set forth above, the Court finds that the record is
23 insufficient to grant summary judgment on this ground.

24

25 **II. Plaintiff’s motion for class certification**

26 Plaintiff seeks classification of the first through fourth claims for relief. For the failure to pay
27 overtime wages, failure to provide accurate wage statements, and UCL claims, plaintiff seeks to certify
28 the following class:

1 All persons who, at any time since [January 19, 2008 for the overtime wage claim;
2 January 19, 2010 for the failure to provide accurate wage statements claim; and January
3 19, 2007 for the UCL claims] worked in California as a non-exempt employee of
4 Defendant and earned a Bravo Award bonus for a month in which the employee worked
5 more than eight hours in a workday or more than forty hours in a workweek.

6 For the failure to pay wages upon termination claim, plaintiff seeks to certify the following class:

7 All persons whose employment with Defendant ended at any time since January 19,
8 2008 who worked in California as a non-exempt employee of Defendant and earned a
9 Bravo Award bonus for a month in which the employee worked more than eight hours
10 in a workday or more than forty hours in a workweek.

11 Plaintiff seeks appointment as the representative for all the classes, and plaintiff's counsel
12 Gregory N. Karasik seeks appointment as class counsel.

13 **A. Rule 23(a)**

14 **1. Numerosity**

15 According to defendant, as of July 30, 2011 there were 5,940 Bravo Awards since January 2007,
16 4,958 awards since January 2008, and 2,672 awards since January 2010. Karasik Decl. ¶ 3, Ex. B.
17 Defendant has stipulated to numerosity for purposes of class certification, *id.* at ¶ 4, and the Court finds
18 that plaintiff has established this element.

19 The proposed classes are also readily ascertainable from both defendant's records and by
20 potential class members themselves. Because defendant has the ability to identify which employees won
21 Bravo Awards, a notice can be sent out to all winners, asking them to identify whether they are in the
22 class. *Id.* Ex. B at 54. Defendant also has the ability to determine whether or not an employee worked
23 overtime hours during any month. *Id.* The list of employees who have won Bravo Awards and the list
24 of employees who worked overtime can be cross-referenced to find all class members. Accordingly,
25 the Court finds that the proposed classes are readily ascertainable.

26 **2. Commonality**

27 Defendant contends that plaintiff cannot establish Rule 23(a) commonality. "Commonality
28 requires the plaintiff to demonstrate that class members 'have suffered the same injury[.]' [internal
citations omitted]. This does not mean merely that they have all suffered a violation of the same
provision of law." *Dukes*, 131 S. Ct. at 2551. "Their claims must depend upon a common

1 contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That
2 common contention, moreover, must be of such a nature that it is capable of classwide
3 resolution—which means that determination of its truth or falsity will resolve an issue that is central to
4 the validity of each one of the claims in one stroke.” *Id.*

5 Here, all of class members’ claims revolve around the central contention that defendant was
6 required to factor Bravo Awards into the calculation of their regular rate of pay for the purposes of
7 computing overtime. Plaintiff asserts that “[s]ince there is no factual dispute about how the Bravo
8 Award Program operates, whether or not defendant was required to factor Bravo Awards into the
9 calculation of the regular rate of pay presents a purely legal question that is clearly capable of classwide
10 resolution.” Plf. Mot. For Class Certification at 5.

11 Defendant counters that because each store operates differently in terms of how often Bravo
12 Cards are awarded, any determination as to whether Bravo Awards are discretionary must be made on
13 an employee-by-employee basis, making class adjudication unsuitable for this case. Defendant
14 emphasizes the fact that employees had no expectation of receiving Bravo Cards, the contingent nature
15 of winning a Bravo Award, and the fact that the timing and occurrence of the drawings themselves
16 varied by facility. According to defendant, the above factors make each prospective class members’
17 experience in receiving a Bravo Award so disparate from the others that class adjudication is not
18 warranted.

19 The Court disagrees. Plaintiff defines all four classes in this case to include only those
20 employees who have received a Bravo Award. The slight variance in the procedure for receiving those
21 awards is irrelevant to determining whether defendant should have included the Bravo Awards in
22 calculating the regular rate of pay for purposes of overtime compensation. Similarly, because it is
23 undisputed that Bravo Awards were never included in the calculation of the regular rate of pay, whether
24 defendant willfully withheld wages or whether there is a good faith dispute can also be determined on
25 a classwide basis. The fact that Bravo Awards may have been more difficult to win at certain facilities
26 than others does not affect the class claims alleged here. The Court finds that the prospective class
27 members raise claims based on a “common contention . . . such that determination of its truth or falsity
28 will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Dukes*, 131

1 S. Ct. at 2551. Accordingly, the Court finds that plaintiff has satisfied the commonality element of Rule
2 23(a).

3
4 **C. Typicality**

5 Rule 23(a)(3) requires that the representative plaintiff have claims “typical of the claims . . . of
6 the class.” FRCP 23(a)(3). Defendant does not dispute that plaintiff’s claims are typical, and the Court
7 finds that plaintiff has established this element.

8
9 **D. Adequate Representation**

10 Rule 23(a)(4) permits class certification only if “the representative parties will fairly and
11 adequately protect the interests of the class.” Adequate representation requires the class representatives
12 to “prosecute the action vigorously on behalf of the class,” and to avoid conflicts of interest with other
13 class members. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Defendant argues that
14 plaintiff is not an adequate representative of the class for three reasons. First, defendant argues that
15 plaintiff cannot represent the class because he is not familiar with Office Depot policies at other
16 facilities, does not know of any other Office Depot employee who supports him bringing this lawsuit,
17 and does not know if any other employee was injured by Office Depot’s policy. Second, defendant
18 argues that the fact that plaintiff is subject to unique defenses (specifically a *de minimis* defense) renders
19 him incapable of adequately representing the class. Finally, defendant argues that plaintiff’s credibility
20 is severely compromised because he arrived at his deposition unable to provide testimony due to
21 medication he had taken that morning.

22 The Court is not persuaded by these arguments. The fact that plaintiff is not aware of Office
23 Depot policies at other facilities or of others employees who may have been injured does not suggest
24 that plaintiff has a conflict of interest with other class members, nor does it prevent plaintiff from
25 vigorously prosecuting the class. Second, as discussed *supra*, the Court finds that plaintiff is not subject
26 to the *de minimis* defense. Finally, the fact that plaintiff could not answer questions at his first
27 deposition date due to medical issues does not diminish his credibility as a class representative. The
28 Court finds plaintiff an adequate class representative.

1 **II. Rule 23(b)**

2 Having satisfied the Rule 23(a) requirements, plaintiff must satisfy one of the three prongs of
3 Rule 23(b). Plaintiff seeks certification under Rule 23(b)(3) which requires showing that “questions of
4 law or fact common to class members predominate over any questions affecting only individual
5 members, and that a class action is superior to other available methods for fairly and efficiently
6 adjudicating the controversy.” Fed. R. Civ. Proc. 23(b)(3).

7
8 **A. Predominance**

9 Plaintiff must establish that common questions of law or fact predominate for each claim in
10 which he seeks to certify a class. The Court finds that this requirement is met because the claims for
11 which plaintiff seeks certification hinge on whether defendant was required to include Bravo Awards
12 in employees’ regular rate of pay to calculate overtime.

13 Defendant contends that determination of the overtime rate would be individualized to each
14 employee for each Bravo Award. However, “[t]he amount of damages is invariably an individual
15 question and does not defeat class action treatment.” *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir.
16 1975). Defendant also argues that the Court should not certify plaintiff’s waiting time penalties claim
17 under Cal. Labor Code § 203 because each individual penalty “is unconstitutionally confiscatory.”
18 Def’s. Opp’n. at 22. As discussed supra, the Court finds that it is premature to decide whether potential
19 penalties in this case would be unconstitutional, and in any event this issue does not defeat
20 predominance.

21 Finally, defendant argues that individual issues predominate with regard to plaintiff’s claim
22 regarding inaccurate wage statements because Labor Code Section 226(e) requires a showing of injury.
23 For certification plaintiff must show that class members suffered the same injury as a result of receiving
24 non-complaint wage statements. “The injury requirement in section 226, subdivision (e), cannot be
25 satisfied simply if one of the nine itemized requirements in section 226, subdivision (a) is missing from
26 a wage statement.” *Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136, 1142 (2011). “By employing the
27 term ‘suffering injury,’ the statute requires that an employee may not recover for violations of section
28 226, subdivision (a) unless he or she demonstrates an injury arising from the missing information.

1 [internal citations omitted] Thus, the deprivation of that information, standing alone is not a cognizable
2 injury.” *Id.* at 1142-43. However, a “mathematical injury that requires computations to analyze whether
3 the wages paid in fact compensated [the employee] for all hours worked” is sufficient to establish injury.
4 *Id.* (citing *Jaimez v. DAIHOS USA, Inc.*, 181 Cal. App. 4th 1286, 1306 (2010)). “While there must be
5 some injury in order to recover damages [under § 226(e)], a very modest showing will suffice.” *Jaimez*,
6 181 Cal. App. 4th at 1306; *see also Elliot v. Spherion Pac. Work, LLC*, 572 F. Supp. 2d 1169, 1181
7 (C.D. Cal. 2008) (injuries under § 226(e) include “possibility of not being paid overtime, employee
8 confusion over whether they received all wages owed them, difficulty and expense involved in
9 reconstructing pay records, and forcing employees to make mathematical computations to analyze
10 whether the wages paid in fact compensated them for all hours worked.”).

11 Plaintiff contends that all class members suffered from the “same inability to determine, from
12 the wage statements owed to them by defendant when they won Bravo Awards, the correct amount of
13 overtime wages owed to them, and they thus had a resulting need to engage in discovery and
14 mathematical calculation to determine exactly how much in overtime wages they were owed.” Plf’s.
15 Mot. at 10. By alleging a “mathematical injury” and the possibility that prospective class members have
16 not received all wages owed to them, plaintiff has made the “modest showing” required under § 226(e).

17 18 **B. Superiority**

19 Under Rule 23(b)(3) plaintiff must also show “that a class action is superior to other available
20 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. Proc. 23(b)(3).
21 “Typically, a class action is superior if the case presents a large volume of individual claims that could
22 strain judicial resources if tried separately and if each potential plaintiff’s recovery may not justify the
23 cost of individual litigation.” *McKenzie v. Fed. Exp. Corp.*, 275 F.R.D. 290, 301 (C.D. Cal. 2011).
24 Courts will look to the following factors listed in Rule 23(b)(3) when determining superiority: “(A) the
25 class members’ interests in individually controlling the prosecution or defense of separate actions; (B)
26 the extent and nature of any litigation concerning the controversy already begun by or against class
27 members; (c) the desirability or undesirability of concentrating the litigation of the claims in the
28 particular forum; and (D) the likely difficulties in managing a class action.” Fed. R. Civ. Proc. 23(b)(3).

1 Here, all of these factors lead the Court to conclude that a class action is superior to any other
2 method of adjudication in this case. All of the prospective class claims revolve around a question of law
3 common to all prospective class members – whether defendant should have included Bravo Awards in
4 class member’s regular rate of pay when computing overtime pay. The Court is not aware of any
5 prospective class member’s individual interest in controlling prosecution of separate actions, or of any
6 litigation concerning the issues at hand other than this case. Finally, managing this case as a class action
7 will be far easier than addressing all of the prospective class member’s claims individually. Each
8 prospective class member would allege the same set of common facts to answer the same question of
9 law. Class adjudication of this question of law is markedly more efficient than addressing it individually
10 for each class member. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

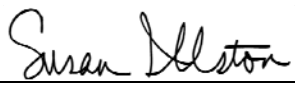
11 12 CONCLUSION

13 For the reasons set forth above, the Court DENIES defendant’s motion for summary judgment
14 and GRANTS plaintiff’s motion for class certification. Docket Nos. 31 and 42. The Court GRANTS
15 plaintiff’s motion to strike defendant’s unauthorized separate statement of facts. *See Civ. Local Rule*
16 *56-2. Docket No. 49-1.*

17 Plaintiff’s motion for class certification did not include a proposed notice to be sent to the class.
18 The parties are directed to meet and confer regarding the form of notice, and to submit the proposed
19 notice to the Court within 14 days of the filing date of this order.

20
21 **IT IS SO ORDERED.**

22
23 Dated: July 6, 2012

24 
25 _____
26 SUSAN ILLSTON
27 UNITED STATES DISTRICT JUDGE
28