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## I. SUMMARY OF REPLY

Plaintiff-Appellee's response brief urges that his account of his own duties as a Restaurant General Manager ("RGM") is sufficient to justify certification of a class of all RGMs under Rule 23 and any variations in duties among the class may be dealt with through discovery and, if necessary, sub-classes. This approach trivializes Rule 23's requirement that plaintiff's case be representative of all the class members such that the jury may decide all of the class's claims without hearing individualized proof from class members.

Plaintiff seeks to represent a class without proving that his account is representative of the experience of the class. Plaintiff had already completed class discovery, and all that remains in the trial schedule—which plaintiff created—is trial. Trial is for resolving the substance of plaintiff's claim, not for hearing testimony from multiple class members in order to decide what, if any, account is representative. In order to represent a class, a plaintiff must show he satisfies the requirements of CR 23 at the time of his motion for class certification. Plaintiff has not and cannot do so.

Plaintiff bases his claim to overtime pay on factual points: he claims store managers like himself were primarily production

workers and not managers and they lacked significant discretion in performing those functions. See Brief of Resp. at 10. In order to represent a class on his claim, he must demonstrate that his description of store manager functions and responsibilities is representative of the other employees in the class. Plaintiff offers literally nothing but his own conclusory speculation to prove that his account accurately describes the functions and responsibilities of other members of the class. By failing to cite any written documents or accounts of other witnesses or even basis to know what other managers did, plaintiff failed to take on his burden of proof under Rule 23. Defendant has offered unrebutted evidence including job descriptions, policy and training documents, employee surveys, and testimony of witnesses showing that plaintiff's testimony is *not* a reliable guide to the work performed by other members of the class. On this record, class certification was manifest error.

This is not like cases plaintiff relies upon in which employees challenged an express practice of the employer, generally applicable to all employees in the class. Such cases present a particular question that has a common answer that applies uniformly to the class. In this case, plaintiff does not and cannot

rely upon any of defendant's express policies and practices because those policies and practices support defendant's classification of restaurant managers as exempt. Here, plaintiff can prevail only by showing that *in his case*, defendant's policies and practices were *not* followed, and he must rely solely on his own testimony to prove his claim. He has offered no evidence that his testimony is generalizable to the other class members, and defendant offered abundant evidence that it is not. In these circumstances, plaintiff fails to meet the requirements of CR 23 and cannot represent a class.

## II. ARGUMENT

Although the trial court's decision to certify a class under Rule 23 is discretionary, this Court conducts its own review of the record to determine if the requirements of the rule have been met. "Notwithstanding the rule of liberal interpretation, it is clear that the class action rule does not contemplate automatic affirmance whenever a trial court certifies a class." *Oda v. State*, 111 Wn. App. 79, 92, 44 P.3d 8 (2002). This is particularly true where, as here, the trial court did not articulate its reasoning in its class certification order. *See Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 820-21, 64 P.3d 49 (2003) ("we will reverse a class

certification decision if the trial court made its decision without appropriate consideration *and articulate reference to* the criteria of CR 23" (emphasis in original, internal citation omitted)).

A court may not simply presume that the requirements of the rule have been met, but must undertake a "rigorous analysis" of the plaintiff's allegations and theory of recovery to determine if they are amenable to class-wide resolution. *Oda*, 111 Wn. App. at 93 (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160-61, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) ("actual, not presumed, conformance with Rule 23(a) [is] indispensable")). In conducting this analysis, the court must look beyond the pleadings to the actual facts and evidence that will be material to the claims and defenses presented. *Oda*, 111 Wn. App. at 94 (quoting *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)). There is no record of the trial court's analysis; an examination of the claims of the parties and the facts asserted to prove them shows that this case cannot be decided on a class basis.

**A. Plaintiff Must Demonstrate He May Represent a Class Before a Class Can Be Certified, not After.**

Plaintiff argues that this case is still "in its infancy" and he should be permitted to prove the requirements of CR 23 "through

the class-wide discovery process." See Brief of Resp. at 6, 18-19. In fact, class-wide discovery, indeed virtually all discovery, has already been completed, and this case is ready for trial. The case was filed in November 2004 and was originally set for trial in October 2005. CP 223. In spring 2005, plaintiff requested an extension of nearly a full year in this trial schedule. CP 224, 231-32. Plaintiff informed the court that he was engaged in discovery of "information that reveals Defendant's common practices" and expressly requested more time to complete this discovery *before* having to file his motion for class certification. CP 225:6. The court granted plaintiff's request and set a new trial date of July 3, 2006, with a discovery cut-off of April 20, 2006. CP 235, 236. On April 7, 2006, the parties agreed to a stay pending this appeal. CP 237-38. Thus, there are only two weeks remaining for discovery, and after that, all that remains in the trial court is trial.

Over the past two years, plaintiff has had ample opportunity to take any discovery he wished to take; he has deposed two members of defendant's management and obtained all of the documents and other written discovery he requested. He does not identify anything that he could or would discover that would change the state of the evidence as it is now. From that evidence, plaintiff

found nothing that supported class certification; no policies, job descriptions, disciplinary notices, or other "formal or informal policies, practices, and procedures" that were applicable to all RGMs and tended to show they were misclassified as exempt. The only such evidence he submitted was his own conclusory, speculative declaration. CP 25-26. Defendant submitted its policies, job descriptions, disciplinary notices, training documents, employee surveys, and employee declarations, all of which show that plaintiff's essential allegations violate defendant's policies and are not applicable to other RGMs in the class. See CP 74-187. Plaintiff did not challenge any of this evidence, or even respond to it.<sup>1</sup>

Plaintiff claims he should be allowed to show *at trial* that class members perform similar tasks to him. Resp. Brief at 6. This approach places the cart before the horse. The court must decide whether plaintiff's claim can be tried on behalf of the class *before* trial; that decision cannot be put to the jury *during* trial. See *Miller*,

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<sup>1</sup> Plaintiff attempts to discredit defendant's survey results by suggesting that employees were pressured to give the "right" answers; there is no evidence that employees were even told what the purpose of the survey was, much less what answers were preferred, and the variety of their answers should dispel any doubt. CP 94-152. As one court said in similar circumstances: "The court cannot invent evidence that plaintiffs failed to supply and therefore finds no reason to doubt the validity and merit of defendant's survey results." *Alston v. Virginia High School League, Inc.*, 184 F.R.D. 574, 580 (W.D. Va. 1999).

115 Wn. App. at 820 ("Plaintiffs moving for class certification bear the burden of demonstrating that they meet the requirements of that rule"). Plaintiff's account must be the basis for litigation of the rights of absent class members. Class certification serves no purpose if trial is consumed with proof of the responsibilities of individual class members.

Plaintiff's approach is contrary to the purpose of the class action procedure. He asserts that the class's claims will be resolved based on class members' "collective duties," not on the "particulars of [plaintiff's] employment." Brief of Resp. at 11. This notion of "collective duties" turns the theory of class litigation on its head. Class certification allows the claims of absent class members to be proved through evidence of the actual duties performed by the plaintiff. The point of a class action is to enable the claims of many to be proven through the evidence of a few, or, in this case, one. If the plaintiff cannot prove the claims of the class through "the particulars of [his] employment," then he cannot represent the class, and that is precisely the case here.

**B. There is No Common Issue of Law in This Case.**

Plaintiff contends class certification is proper in this case because his claim presents a common legal question, i.e., "whether

ECP has a uniform policy of unlawfully treating certain classifications of employees as 'exempt.'" Brief of Resp. at 5. This is not an "issue" at all; it is undisputed that defendant classifies all its RGMs as exempt, as do most other restaurant franchise operations. CP 60 (pp. 66-67).<sup>2</sup> On the plaintiff's logic, all overtime exemption cases would be class actions. That is clearly not the law. See, e.g., *Miller*, 115 Wn. App. at 827 (individual variations in how time spent would make class certification inappropriate).<sup>3</sup> Even in cases in which an inherently class-wide wrong is alleged, the plaintiff must show that his specific claims, evidence, and the substantive law to be applied show that adjudication of his claim will resolve those of all members of the class. See *Oda*, 111 Wn. App.

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<sup>2</sup> Cf. *Palazzolo-Robinson v. Shari's Mgmt. Corp.*, 68 F. Supp. 2d 1186, 1190 (W.D. Wash. 1999) ("within the food and beverage industry, a restaurant's assistant manager and general manager have management as their primary duty"); *Thomas v. Jones Restaurants, Inc.*, 64 F. Supp. 2d 1205, 1213 (M.D. Ala. 1999) ("The Clayton Sonic, like any restaurant, would undoubtedly have failed if someone, like Thomas, had not interviewed, selected, disciplined, and, when necessary, fired employees; set and adjusted employees' work schedules; directed the work of employees; handled employee complaints and grievances; maintained production and sales records;" etc.).

<sup>3</sup> See also *Smith v. Heartland Automotive Servs., Inc.*, 404 F. Supp. 2d 1144, 1152 (D. Minn. 2005) (store managers; overtime claim not certified as class action where their testimony was contrary to the written job description and declarations from other managers); *Holt v. Rite-Aid Corp.*, 333 F. Supp. 2d 1265, 1274-75 (M.D. Ala. 2004) (same); *Stubbs v. McDonalds Corp.*, 227 F.R.D. 661, 666 (D. Kan. 2004) (same with respect to restaurant assistant managers); see also *Mike v. Safeco Ins. Co.*, 223 F.R.D. 50, 53-54 (D. Conn. 2004) (same with respect to insurance claims representative).

at 92-93 (citing *Falcon*, 457 U.S. at 158). The defendant's decision to classify RGMs as exempt does not alone make class certification appropriate.<sup>4</sup>

Whether defendant's classification of RGMs is "lawful," depends on specific facts, and only if those facts can be proven for the whole class through plaintiff's own testimony can he represent the class.<sup>5</sup> The factual allegations upon which his claim to overtime depends are that he seldom performed management functions in

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<sup>4</sup> Plaintiff's reliance on *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602 (C.D. Cal. 2005), for this proposition is misplaced. In *Wang*, there were many common factual and legal issues, including whether defendant denied its employees meal and rest breaks, kept accurate time records, accurately itemized employee wage statements, and paid employees at termination. *Id.* at 612-13. The plaintiffs also claimed the defendant had a uniform policy of classifying certain employees as exempt, and the interpretation of the policy itself was at issue. *Wang*, 231 F.R.D. at 613. Defendant in this case does not say that each individual RGM must be separately analyzed for exemption status; defendant says—and has shown by evidence—that plaintiff's allegations are not representative of others.

The *Wang* plaintiffs also presented precisely the kind of evidence supporting class certification that plaintiff failed to present here: *three* representative plaintiffs brought suit on behalf of a class, and submitted declarations from *six* additional class members, and they all cited similar facts. *Id.* at 608 The unsupported allegations offered by plaintiff here would not have satisfied the *Wang* court. *See Wang*, 231 F.R.D. at 613 (finding that the predominance requirement was met because "[m]ost differences among putative class members . . . affect damages, not Defendant's liability").

<sup>5</sup> Plaintiff misstates the applicable law: he cannot prove his claim simply by showing he performed production work such as making pizzas, taking telephone orders, etc. a significant portion of the time he worked, because restaurant managers regularly do such work without compromising their exempt status. *See, e.g., Murray v. Stuckey's, Inc.*, 939 F.2d 614, 618 (8th Cir. 1991) (quoting *Donovan v. Burger King Corp.*, 672 F.2d 221, 227 (1st Cir. 1982)). Nor is it enough to simply show that he reported to an Area Coaches who had "oversight and control" over him (Brief of Resp. at 14); almost everyone has a boss, including exempt restaurant managers. *See id.* at 619.

his restaurant, and his Area Coach made most or all of the discretionary decisions concerning the operation of his restaurant. CP 25-26. The evidence is unequivocal that plaintiff's allegations as to those specific facts are not representative of the class. CP 74-187.

*Sav-On Drug Stores, Inc., v. Superior Court*, 96 P.3d 194, 34 Cal. 4th 319 (2004), relied upon by the plaintiff, is a good example of a claim which *does* present common issues of law. In *Sav-On*, a group of drug store managers claimed to be improperly classified as exempt. In upholding class certification, the court observed that, unlike here, the plaintiffs' theories of recovery depended on resolution of common issues, not individual ones. *Id.* at 201. The dispute in that case was not about *what tasks* the managers performed but about *whether* those tasks were, as a matter of law, properly characterized as "managerial" or not. *Id.* at 202 ("the only difference between Defendant's declarations and Plaintiff's evidence is that the parties disagree on whether certain identical work tasks are 'managerial' or 'non-managerial.'"); see also *id.* at 211 (Brown, J., concurring) ("the trial court could reasonably conclude that the proper classification of these tasks, when

combined with the classifications agreed upon by the parties, will largely resolve the issue" of whether the managers were exempt).

Whether a particular task, such as "merchandising," qualifies as "exempt" or "nonexempt" is a question of law, and the answer is equally applicable to all employees. See *id.* at 211 n. 1 (Brown, J., concurring). Here, however, there is no dispute between the parties over which tasks are exempt. Compare, e.g., CP 25, ¶¶ 3-4 with, e.g., CP 94, 155. Rather, plaintiff's claim depends entirely on the individual questions of what tasks he actually performed, how he performed them, and how often. *Id.*

The plaintiffs in *Sav-On* also submitted abundant evidence to support their class-wide theories of liability, including job descriptions, performance reviews, and training materials, depositions and interrogatory responses from the defendant, and several declarations of store managers. *Sav-On*, 96 P.3d at 201.<sup>6</sup> The court found that this was "substantial evidence that common issues of law and fact will predominate over individual issues." *Id.* The plaintiff here, in contrast, presents no common evidence; he

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<sup>6</sup> The plaintiffs also relied on the fact that the defendant had categorically changed all class members from "exempt" to "nonexempt" in the middle of the class period. *Sav-On*, 96 P.3d at 201 n. 2. This powerful evidence of misclassification applied equally to all class members.

does not rely on any the documents related to his job as a manager, or any other generally-applicable evidence, but instead cites only his own two-page declaration, which contains only one tentative and conclusory sentence concerning the similarity of his claim to that of others. CP 26 ¶ 20. *Cf. Sav-On*, 96 P.3d at 201. ("The evidence is substantial because it is not qualified, tentative, and conclusionary." (internal quotations omitted)).<sup>7</sup> This evidence, in light of the contrary evidence submitted by defendant, cannot possibly establish, "by a preponderance of the evidence," that common issues would predominate in this case. *Sav-On*, 96 P.3d at 199.

**C. There is No Standardized Policy or Other Common Fact Supporting Plaintiff's Claim.**

Plaintiff acknowledges that class certification requires that a claim be based on a "particular course of conduct by the employer that gives rise to claims of other class members." Brief of Resp. at 10. In other words, the claim must rely not on what the plaintiff himself claims he did, but on what the defendant allegedly did, systematically, to all class members. Thus, plaintiff repeatedly

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<sup>7</sup> The concurrence in *Sav-On* pointed out that, had plaintiffs failed to put additional evidence into the record concerning the duties of absent class members and relied (as Plaintiff here does) on only their own conclusory declarations, class certification would have been in appropriate. *Sav-On*, 96 P.3d at 211 (Brown, J., concurring).

invokes defendant's "formal and informal policies, practices, and procedures" that "affect all class members." *Id.* at 6, 7, 8, 10. But, plaintiff has not identified a single such policy, practice or procedure. He merely speculates, without any evidence or foundation, "to the best of [his] knowledge," that other RGMs performed the same job duties and had the same supervisory authority as he. CP 26.

Plaintiff not only does not rely on any actual employer policies, he *contradicts* them, along with all the other evidence including class member surveys and class members' declarations. That evidence establishes that even if the plaintiff's testimony is true as to him, it does not describe a "common course of conduct" by defendants which caused all class members (or, for that matter, any class members) to perform the job in the same manner as plaintiff alleges he did. Instead, plaintiff alleges facts which are unique to him, and any adjudication of his claim will not accurately or fairly determine the claims of absent class members.

Plaintiff fails to distinguish *Miller v. Farmer Bros. Co.*, 115 Wn. App. at 827. He acknowledges that, according to that court, material factual variance between class members may defeat class certification, and states that the issue in that case was "whether

each employee customarily and regularly engaged in sales activities." Brief of Resp. at 17. Likewise, here, the issue is whether each employee customarily and regularly performed managerial tasks. Defendant has shown that class members did not perform the job of RGM in the manner plaintiff contends he did, and class certification was therefore inappropriate.

### **III. CONCLUSION**

The class action procedure was designed to permit cases in which multiple factual or legal issues common to a class of claimants can fairly and efficiently be resolved in one proceeding, based on the testimony and evidence of class representatives. Class actions permit juries to generalize findings to absent class members based upon the trial testimony of representative class members. In order to justify departing from the general principle that each litigant must establish the merits of his or her own claim, the representative plaintiff or plaintiffs must demonstrate that resolution of their claims will categorically resolve the claims of the class. Plaintiff in this case has done literally nothing to demonstrate this, or to rebut the defendant's evidence that he is not representative of the class, and the facts he alleges in support of

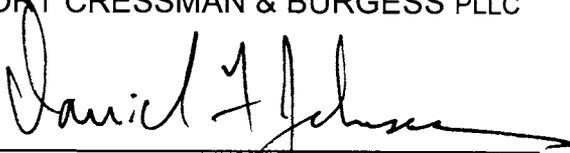
his claim, even if true, will not fairly or accurately determine the status of other members of the class.

When a particular question has a common answer that pertains uniformly to the class, such as when an employer refuses to pay for time spent "donning and doffing" work clothes, or denies employees meal or rest breaks, the answer the jury reaches based on the testimony of trial witnesses is likely to correspond to the verdict it would reach if it tried the claims of each class member individually. When the class-wide application of a particular practice is not proven except by the testimony of individual class members, then certifying a class action makes little sense, and can cause substantial harm, particularly where there is evidence that many or all of the class members did not perform the job in the manner that the named plaintiff alleges.

The trial court erred in certifying plaintiff's claims for class treatment under CR 23, and the Court should reverse and remand for trial of plaintiff's individual claim.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of August  
2006.

SHORT CRESSMAN & BURGESS PLLC

By 

Paul J. Dayton, WSBA No. 12619  
Daniel F. Johnson, WSBA No. 27848  
Attorneys for Appellant, Emerald City  
Pizza LLC

**CERTIFICATE OF SERVICE**

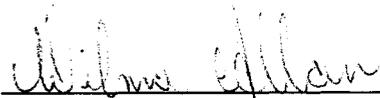
The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

Will Aitchison  
Mark Crabtree  
Aitchison & Vick, Inc.  
3021 N.E. Broadway  
Portland, OR 97232

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- via U.S. mail**
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Wilma Allan