

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

<b>Case No.</b>	CV 09-4957 CAS (Rcx)	<b>Date</b>	September 27, 2010
<b>Title</b>	LONNIE R. SMITH, ETC. v. CEVA LOGISTICS U.S., INC.; ET AL.		

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**Present: The Honorable** CHRISTINA A. SNYDER

CATHERINE JEANG

LAURA ELIAS

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Laurence Cagney  
Terrence Krieger

Julie Dunne  
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Dominic Messiha

**Proceedings:**      **PLAINTIFF’S MOTION FOR CLASS CERTIFICATION**  
(filed 05/26/10)

## I. INTRODUCTION

Plaintiff Lonnie R. Smith, on behalf of a class of “freight forwarders,” filed the instant suit in Los Angeles County Superior Court against defendants Ceva Logistics U.S., Inc. (“Ceva Logistics”); Ceva Freight Management International Group, Inc. (“Ceva Freight Management”); Ceva Freight, LLC (“Ceva Freight”); EGL Eagle Global Logistics LP (“EGL”), and Does 1 through 200 (collectively, “defendants”), alleging claims for (1) failure to pay overtime compensation in violation of California Labor Code § 1194(a); (2) failure to provide accurate itemized statements of wages in violation of California Labor Code § 226; (3) failure to provide meal and rest periods in violation of California Labor Code § 226.7; and (4) unlawful and unfair business practice in violation of Cal. Bus. & Prof. Code § 17200 (“UCL”).

On May 26, 2010, plaintiff filed the instant motion for class certification. On July 26, 2010, defendants filed an opposition to plaintiff’s motion for class certification, along with objections to the declarations of Rick Smith, Lawrence R. Cagney, and Jose Penate. On September 9, 2010, plaintiff filed a reply in support of plaintiff’s motion for class certification, responses to defendants’ objections to the Smith, Cagney and Penate declarations, and objections to the declaration of Dominic J. Messiha. On September 22, 2010, defendants filed objections to plaintiff’s reply. After carefully considering the

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arguments set forth by both parties, the Court finds and concludes as follows.<sup>1</sup>

## II. BACKGROUND

This case arises from plaintiff's allegation that defendants improperly denied plaintiff, and a putative class of "freight forwarders," pay for all of the hours they worked for defendants, including overtime compensation and wages for missed meal periods.<sup>2</sup> Mot. at 1. Defendants contend that plaintiff has abandoned his claim for missed rest breaks by failing to seek certification of that claim in plaintiff's motion for class

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<sup>1</sup> The Court does not address defendants' or plaintiff's objections to evidence on which the Court does not rely in the determination of this motion. Plaintiff and defendants number each objection and the Court refers to them in this way.

The Court sustains Defendants' Objections to Smith Declaration No. 21.

The Court overrules Defendants' Objections to Smith Declaration Nos. 6, 7, 8, 9, 13, 14, 15, 16, 18, 19, 20, 22, 23, 24, 25.

The Court overrules Defendants' Objections to Cagney Declaration Nos. 8, 9, 10, 11, 12, 13, 14, 15.

The Court overrules Defendants' Objections to Penate Declaration Nos. 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14.

Defendants submit 33 objections to the substance of plaintiff's reply in support of motion for class certification. See Defendants' Objections to Plaintiff's Reply in Support of Motion for Class Certification. Evidentiary objections to the substance of an opposing party's brief are simply frivolous. Accordingly, the Court overrules these objections.

<sup>2</sup> Plaintiff defines "freight forwarders" as "a person or company that organizes shipments for other companies, most often organizing shipments of cargo to an international destination." Mot. at 3 (citing Zenith Elec. Corp. v. Panalpina, Inc., 68 F.3d 197, 198 (7th Cir. 1995)).

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certification.<sup>3</sup> Opp'n at 9 n.6.

Defendants provide end-to-end design, implementation and operational capabilities for transporting oversized freight from point A to point B, along with other supply-chain management services. Opp'n at 3. Defendants maintain a number of locations in California, including freight management stations in Los Angeles ("LAX"), San Diego, Sacramento, San Francisco, Brisbane, and Ontario. Opp'n at 4. Defendants maintain and disseminate written policies regarding employee wages and hours that: (1) require non-exempt employees to "maintain a record of the total hours worked each day"; (2) require employees to certify time card summaries that "accurately reflect all regular and overtime hours worked as well as any absences, late arrival, early departures and meal breaks"; and (3) prohibit employees "from performing any 'off-the-clock' work."<sup>4</sup> *Id.* at 4-5; Ex. 16. Defendants also maintain and disseminate written policies regarding meal breaks and rest periods that provide:

Employees classified as full-time are permitted to take an unpaid thirty (30) minute or sixty (60) minute meal period that begins no later than five (5) hours after the start of the employee's workday. Meal periods are not to be taken during the employee's first or last scheduled hour of work, nor may they be combined with breaks to extend the lunch period.

The length of the meal period is determined by the Manager or Department Head. A meal period should be free of all employment-related responsibility.

Non-Exempt employees must be paid for any meal period during which the employee is not completely relieved from duty. Employees therefore are expected to leave their workstation during a meal period.

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<sup>3</sup> At oral argument, plaintiff indicated that he is no longer pursuing his rest break claims.

<sup>4</sup> Defendants' timekeeping policy defines "off-the-clock" work as any "work performed but [not] report[ed] . . . in the timekeeping system and on the time sheet." Opp'n at 5; Ex. 16.

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Non-Exempt employees are required to clock out for lunch and clock in at the conclusion of their scheduled meal period in accordance with the Company's Timekeeping Policy.

Opp'n at 5; Ex. 16 at 13.<sup>5</sup>

Plaintiff, Lonnie R. Smith, was employed by defendant EGL, and subsequently defendant CEVA Freight, as an "export specialist" and "export agent" from 2002 until September 28, 2008 in defendants' LAX facility.<sup>6</sup> Smith Decl. ¶¶ 2–4. Plaintiff was responsible for organizing shipments of cargo for other companies by entering data and processing and reviewing documents through an established export system.<sup>7</sup> Mot. at 4; Smith Decl. ¶ 4. Plaintiff alleges that defendants' freight forwarders were too busy to take meal breaks, but were not compensated for the additional hour of work performed during meal periods. Mot. at 1–2. Additionally, plaintiff alleges that defendants imposed a policy prohibiting employees from working overtime, but fostered an employment environment that encouraged employees to work off the clock to ensure that shipment

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<sup>5</sup> Plaintiff notes that at one time defendants employed a policy of automatically deducting meal periods from employees' timekeeping schedule. Mot. at 11 n.5 (citing Ex. 10 at 122 ("At the lunch hour it is not necessary for the individual to clock out, unless they are leaving the premises.")). Plaintiff is unclear when the current policy came into effect. Id.

<sup>6</sup> Defendants assert that neither CEVA Freight Management nor CEVA Logistics employed plaintiff or any other putative class member. Opp'n at 3–4 n.2. Defendants argue that the Court should either dismiss these entities as improperly joined defendants or refuse to certify any class as to them. Id. At oral argument, plaintiff argued that it would be premature to dismiss CEVA Freight and Ceva Logistics because defendants' employees provide conflicting testimony as to whether they were employed by Ceva Freight or Ceva Logistics. The Court agrees with plaintiff that dismissal of Ceva Freight and Ceva Logistics is improper at this stage.

<sup>7</sup> The processing and review of these documents generally takes place electronically on the computers in cubicles at an employee's desk. Mot. at 5; Smith Decl. ¶ 10.

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documentation was processed in a timely manner.<sup>8</sup> *Id.* at 2–3; Smith Decl. ¶¶ 24–26, 28–31; Utter Dep. at 42:18–43:8. Plaintiffs assert that defendants’ computer data and timekeeping records allow plaintiff to track the hours that putative class members worked off the clock, and that this data can be used to calculate damages on a class-wide basis.<sup>9</sup> *Id.* at 3.

Defendants dispute plaintiff’s assertion that defendants’ employees were forced to work off the clock. Opp’n at 2. Defendants argue that plaintiff’s claims are unique to him because plaintiff performed off-the-clock work primarily to support a particular account, Apple Computer, which uniquely required that shipments be completed the same day. *Id.* at 2, 5–6 (citing Smith Dep. at 31:9–32:4; 33:4–16; 57:18–58:1; 168:7–22; 254:3–10). Moreover, defendants assert that plaintiff’s workload was uniquely demanding because he worked the second shift, and was left to complete any unfinished shipments from the first shift. *Id.* at 6 (citing Smith Dep. at 33:4–16; 168:7–22).

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<sup>8</sup> Plaintiff asserts that defendants pressured their employees to process export documents within 24 hours of receiving an order. Mot. at 8 (citing Smith Decl. ¶¶ 13–17; Penate Decl. ¶¶ 4–11, 13–15). Plaintiff also alleges that defendants pressured putative class members to not record any of their off-the-clock work. *Id.* at 10–11 (citing Smith Decl. ¶¶ 24–31; Utter Dep. at 42:18–43:8; Atuatasi Dep. at 78:4–21; Penate Decl. ¶¶ 3, 4–11, 13–15).

<sup>9</sup> Plaintiff submits the declaration of plaintiff’s counsel recalling an alleged statement by defense counsel to plaintiff’s counsel that defendants’ records show that plaintiff worked off the clock on 14 occasions. Cagney Decl. ¶ 7. Plaintiff argues that this shows that defendants’ electronic records can be used to calculate damages for potential class members. Mot. at 13. Defendants object to plaintiff’s counsel’s declaration on the grounds that it is inadmissible hearsay. Opp’n at 20 n.19. Plaintiff responds that he was forced to proffer defense counsel’s statement because the raw data produced by defendants during discovery did not contain headings and field names. Reply at 12; Cagney Decl. ¶¶ 6–7. The Court overrules defendants’ objection. A statement is not hearsay where it “is offered against a party and is . . . [made] by the party’s agent or servant concerning a matter within the scope of the agency or employment. . . .” Fed. R. Evid. 801(d)(2)(D); see *U.S. v. Swan*, 486 F.3d 260, 264–65 (7th Cir. 2007) (“an attorney may be the agent of his client for purposes of Rule 801(d)(2)(D).”) (internal quotation omitted).

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### III. LEGAL STANDARD

“Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits, and (2) to protect rights of persons who might not be able to present claims on an individual basis.” Haley v. Medtronic, Inc., 169 F.R.D. 643, 647 (C.D. Cal. 1996) (citing Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983)). Fed. R. Civ. Proc. 23 governs class actions. A class action “may be certified if the trial court is satisfied after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982).

To certify a class action, plaintiffs must set forth facts that provide prima facie support for the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Dunleavy v. Nadler (In re Mego Fir. Corp. Sec. Litig.), 213 F.3d 454, 462 (9th Cir. 2000) (internal quotations omitted). These requirements effectively “limit the class claims to those fairly encompassed by the named plaintiff’s claims.” Falcon, 457 U.S. at 155 (quoting Califano v. Yamasaki, 442, U.S. 682, 701 (1979)). Before certifying a class, a district court must determine that the requirements of Rule 23 “are actually met, not simply presumed from the pleadings.” Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 582 (9th Cir. 2010) (en banc).

If the district court finds that the action meets the prerequisites of Rule 23(a), the court must then consider whether the class is maintainable under one or more of the three alternatives set forth in Rule 23(b). Plaintiffs seek certification under Rule 23(b)(3). A class is maintainable under Rule 23(b)(3) where “questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members,” and where “a class action is *superior* to other available methods for fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3) (emphasis added). “The Rule 23(b)(3) predominance inquiry tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation.” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998) (citing Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997)). The predominance inquiry measures the relative weight of the common to individualized claims. Id. “Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy.” Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189 (9th Cir. 2001) (citing Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996)). In

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determining superiority, the court must consider the four factors of Rule 23(b)(3): (1) the interests members in the class have in individually controlling the prosecution or defense of the separate actions; (2) the extent and nature of any litigations concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely encountered in the management of a class action. *Id.* at 1190-1993. “If the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate.” *Id.* (citing 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, Federal Practice and Procedure § 1778 at 535-39 (2d. ed. 1986) (hereinafter “Wright, Miller & Kane”)).

#### IV. DISCUSSION

##### A. Class Definition

Although it is not explicitly spelled out in Rule 23, there must be an adequate class definition before the Court will certify a class. The class definition must identify “a distinct group of plaintiffs whose members [can] be identified with particularity.” Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978). Plaintiff seeks certification of the following class: “All persons who have been employed or are currently employed by Defendants in California as Freight Forwarders, during the time specified under the following causes of action.” Mot. at 3. Plaintiff also seeks certification of the following sub-class with derivative claims arising from defendants’ alleged failure to pay wages due at termination, as required by Cal. Labor Code § 203: “All members of the Plaintiff Class whose employment with Defendants has terminated, during the time specified under the following causes of action.” *Id.*

Defendants contend that plaintiff has failed to sustain his burden of identifying an ascertainable class. Opp’n at 9 (citing Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981) (“It is axiomatic that for a class action to be certified a ‘class’ must exist.”); Rothstein & Willging, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES, p. 7 (Federal Judicial Center 2005) (“Defining the class is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled to notice in a Rule 23(b)(3) action. The definition must be precise, objective, and

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ascertainable.”); MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.14, at 217 (1995). Defendants argue that plaintiff has failed to identify an ascertainable class because the term “freight forwarder” is vague and overbroad. *Id.* Defendants contend that the term “freight forwarder” is vague because defendants do not employ anyone in the position of a “freight forwarder,” and overbroad because it would include managers and exempt employees that cannot state claims for overtime and/or meal period violations under California law. *Id.* at 10–11 (citing Wage Order 9, Transportation Industry, par. 1(A) (excluding “exempt employees” from the provisions of the California Wage Orders); Mora Decl. ¶ 3; Trowbridge Decl. ¶ 5; Mosquera Decl. ¶ 5; Avenado Decl. ¶ 4; Balo Decl. ¶ 6).

Plaintiff replies that there is an ascertainable class because defendants can identify the names of all of their non-exempt employees and can track whether these employees took meal periods and/or worked off the clock, using defendants’ electronic timekeeping system. Reply at 3. Plaintiff argues that the proposed class definition includes a geographic limitation—defendants’ employees in California—and describes the particular employees who are included in the class—“freight forwarders.” *Id.* Plaintiff also argues that because defendants removed this case to federal court with the knowledge that plaintiff intended to certify a class of “freight forwarders,” defendants cannot now claim that they do not employ anyone with such a job title. *Id.* at 3 n.4, 5. Plaintiff further contends that “the term freight forwarder is typically defined as a ‘person,’ a term that historically includes both companies and people.” *Id.* at 5. Finally, plaintiff replies that, if necessary, plaintiff is willing to include language in the proposed class definition clarifying that non-exempt employees are not members of the class. *Id.* at 5–6.

The class must be defined in a way in which all potential class members can be identified and can share common claims. Plaintiff’s proposed class and sub-class definitions are vague and overbroad. The term “freight forwarder” is vague because it is a generic term that does not refer to any specific position within defendants’ companies, and overbroad because it includes exempt employees not subject to the provisions of the California Labor Code, under which plaintiff brings his claims.

The Court finds, however, that there is an ascertainable class of plaintiffs that can allege claims on a class-wide basis. The Court therefore finds that the class may be defined as follows:

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All current and former non-exempt employees of Ceva Logistics, Ceva Freight Management, Ceva Freight, and EGL, who work or worked at any of defendants' California facilities processing documentation for freight transportation, and who, at any time during the relevant time period, worked through a meal period or worked off the clock.

**B. Rule 23(a) Requirements**

**1. Numerosity**

Rule 23(a)(1) requires the members of a proposed class to be so numerous that joinder of all of the class members would be impracticable. Fed. R. Civ. P. 23(a). However, “[i]mpracticability does not mean ‘impossibility,’ but only the difficulty or inconvenience in joining all members of the class.” Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913–14 (9th Cir. 1964) (quoting Adver. Specialty Nat’l Ass’n v. FTC, 238 F.2d 108, 119 (1st Cir. 1956)).

Plaintiff argues that the class is sufficiently numerous because defendants concede in their Notice of Removal that there are an estimated 200 members of the putative class. Mot. at 14 (citing Defendants’ Notice of Removal to Federal Court, Ex. 12). Defendant responds that plaintiff has failed to advance any admissible evidence of numerosity, because defendants’ Notice of Removal simply cites and quotes plaintiff’s complaint. Opp’n at 11–12; Defendants’ Notice of Removal to Federal Court ¶ 18. Defendants argue that plaintiff cannot rely on allegations in his own complaint to prove numerosity. Id. at 12 (citing Berry v. Baca, 226 F.R.D. 398, 403 (C.D. Cal. 2005); Goldman v. County of Santa Barbara, 203 Cal. App. 2d 454, 457 (1962)). Plaintiff replies that defendants cannot avoid the admission in their Notice of Removal that there are hundreds of putative class members. Reply at 6. Plaintiff further replies that Shantreial White, the employee charged with administering defendants’ timekeeping policies, testified that she oversaw the timekeeping entries of over 250 non-exempt employees at defendants’ LAX facility alone. Id. (citing White Dep. at 15:21–16:10). Plaintiff argues that, taken together, defendants’ Notice of Removal and White’s testimony is sufficient to satisfy the numerosity requirement.

While plaintiff cannot rely on defendants’ statements in their Notice of Removal to establish numerosity, the record otherwise demonstrates that the proposed class is

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sufficiently numerous to meet Rule 23(a)(1) because plaintiff has presented admissible evidence that there are over 250 non-exempt employees at defendants' LAX facility alone.<sup>10</sup> See White Dep. at 55:6–13; see Ansari v. New York Univ., 179 F.R.D. 112, 114 (S.D.N.Y. 1998) (although there is no precise threshold to establish numerosity, “[g]enerally speaking, courts will find that the ‘numerosity’ requirement has been satisfied when the class comprises 40 or more members and will find that it has not been satisfied when the class comprises 21 or fewer.”).

## 2. Commonality

Commonality requires “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). The commonality requirement is generally construed liberally; the existence of only a few common legal and factual issues may satisfy the requirement. Jordan v. County of L.A., 669 F.2d 1311, 1320 (9th Cir. 1982). “[P]laintiffs may demonstrate commonality by showing that class members have shared legal issues but divergent facts or that they share a common core of facts but base their claims for relief on different legal theories.” Dukes, 222 F.R.D. at 145.

Plaintiff asserts a litany of common issues of law and fact that he argues are sufficient to satisfy the commonality requirement. See Mot. at 16–17. These include, for example, whether defendants promoted a work environment that effectively denied putative class members uninterrupted meal periods and overtime pay by forcing putative class members to process export documents quickly. Id. at 16. Further, plaintiff alleges that the following company-wide practices and policies discouraged employees from taking meal periods or prevented employees from being compensated for meal periods worked: (1) defendants' required employees to seek authorization to skip meal periods;

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<sup>10</sup> At oral argument, defendants asserted that plaintiff failed to demonstrate numerosity because it is possible that not all of the 250 non-exempt employees in defendants' LAX facility are involved in processing documentation for freight transportation. However, plaintiff avers that “there were approximately 40 employees in my office area and in the adjacent areas . . . processing the documents to forward freight.” Smith Decl. ¶ 10. Thus, the class is sufficiently numerous even if not all of the 250 non-exempt employees in defendants' LAX facility are involved in processing documents for freight transportation.

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(2) defendants' policies failed to notify employees of their right to a second meal period when working ten hours or more; and (3) defendants did not program their timekeeping and payroll databases to ensure that employees received wages they were owed under Cal. Labor Code § 226.7.<sup>11</sup> Id. at 16–17.

Defendants respond that plaintiff cannot offer evidence of commonality because plaintiff's claims for off-the-clock work and missed meal periods arise from facts unique to him. Opp'n at 14. Defendants offer the declarations of five CEVA employees averring that they were never required to work off the clock or through meal periods. Id. at 14–15 (citing Balo Decl. ¶¶ 13–17, 22, 23, 30; Mora Decl. ¶¶ 8–10, 15, 16; Trowbridge Decl. ¶¶ 8–9, 11–13; Avendano Decl. ¶¶ 12–15, 22, 23, 25, 30; Mosquera Decl. ¶¶ 8–10, 14, 16, 18). Defendants contend that these five declarations illustrate that plaintiff's claims are distinct from any other of defendants' employees. Id. at 15. Defendant further responds that the Court cannot find commonality based on plaintiff's assertion that defendants required their employees to process all transactions within a short amount of time because: (1) plaintiff does not offer admissible evidence to support that assertion; (2) plaintiff never raised the argument in class certification discovery, and (3) plaintiff's time pressures were the result of his unique circumstances working on the Apple Computer account. Id. at 15–16.

Defendants also respond that their meal period authorization form does not evidence a common practice of requiring employees to work through meal periods. Id. at 16. Defendants contend that they use the meal authorization form to track when employees work through meal periods to ensure that employees are fully compensated. Id. at 17. Defendants further argue that there can be no common question of fact or law based on missed meal periods because a determination of why an employee requested to skip a meal is an individualized question for the trier of fact. Id. (relying on a line of authority that holds that employers need only "provide" meal breaks to employees and need not ensure that employees actually take meal breaks. See Brown v. Fed. Express

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<sup>11</sup> "If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." Cal. Labor Code § 226.7(b).

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Corp., 249 F.R.D. 580, 586 (C.D. Cal. 2008); Salazar v. Avis Budget Group, Inc., 251 F.R.D. 529, 533 (S.D. Cal. 2008); Kenny v. Supercuts, Inc., 252 F.R.D. 641, 646 (N.D. Cal. 2008); White v. Starbucks Corp., 497 F. Supp. 2d 1080, 1088–89 (N.D. Cal. 2007); Brinker Rest. Corp. v. Superior Court, 165 Cal. App. 4th 25, 56 (2008); Faulkinbury v. Boyd & Assoc., Inc., 185 Cal. App. 4th 1363, 1384 (2010)).

Defendants also respond that there is no per se requirement that employers utilize an automated system to pay a missed meal or rest break premium to employees. Opp’n at 18. Defendants assert that if an employee misses a meal period, defendants are not automatically required to pay the employee for the missed meal period, because there are numerous reasons why an employee might miss a meal period. Id. at 19. Finally, defendants argue that employers are not obligated to cross-reference employee-certified time records with other time-stamped business records to identify employees that falsified their time records to work off the clock. Id. (citing Newton v. City of Henderson, 47 F.3d 746, 750 (5th Cir. 1995); Pforr v. Food Lion, Inc., 851 F.2d 106, 109 (4th Cir. 1988)).

Plaintiff replies that the declarations offered by defendants only show that some potential class members were not damaged.<sup>12</sup> Reply at 9. Plaintiff further replies that the Court should not discount White’s deposition testimony because White “demonstrated a penchant for keenly observing the conduct of non-exempt employees whose attendance she was . . . monitoring” and because White “was physically positioned to observe that as a result of their work load, [d]efendants’ nonexempt workers were extremely busy.” Id. at 13; White Dep. at 41:1–18.

The Court finds that plaintiff has identified common factual questions, such as whether defendants’ written and/or unwritten policies deprived putative class members of meal periods and overtime pay. The Court further finds that there are common legal questions, including defendants’ legal obligations under Cal. Labor Code §§ 226 and 226.7. The declarations defendants submit and plaintiff’s work on the Apple Computer account do not suggest otherwise. The fact that some employees worked for demanding

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<sup>12</sup> Plaintiff also contends that some of the declarations offered by defendants actually support class certification because two of the declarants state that defendants prohibit employees from skipping lunch periods for personal reasons. Reply at 8 (citing Balo Decl. ¶ 16; Trowbridge Decl. ¶ 9).

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clients, resulting in more off-the-clock work, only indicates that some class members may be entitled to more damages than other class members. See Jaimez, 181 Cal. App. 4th at 1301 (the fact that individual plaintiffs may have different damages does not preclude a finding of common factual or legal issues).

### 3. Typicality

Typicality requires a determination of whether the named plaintiff's claims are typical of those of the proposed class that they seek to represent. Fed. R. Civ. P. 23(a)(3). “[R]epresentative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.” Hanlon, 150 F.3d at 1020; Schwartz v. Harp, 108 F.R.D. 279, 282 (C.D. Cal. 1985) (“A plaintiff’s claim meets this requirement if it arises from the same event or course of conduct that gives rise to claims of other class members and the claims are based on the same legal theory”).

Plaintiff argues that his claims are typical because, like the putative class members, plaintiff has claims for defendants’ alleged failure to provide meal periods and overtime pay. Mot. at 18. Plaintiff further contends that his claims are typical because “all of the employees used the same timekeeping databases, [d]efendants prohibited or discouraged all of these employees from working overtime, and [d]efendants have the data that shows when all of these employees started and stopped working.” Id. at 18–19.

Defendants counter that plaintiff’s claims are atypical because plaintiff’s workload was substantially higher than proposed class members due to his work on the Apple Computer account. Opp’n at 12–13. Defendants also argue that plaintiff’s claims are unlike those of other potential class members because Apple Computer required same-day shipping—a requirement that was not imposed on other potential class members. Id. at 13; Smith Dep. at 168:7–22. Finally, defendants argue that plaintiff cannot fulfill the typicality requirement because plaintiff’s evidence is limited to defendants’ LAX facility, where plaintiff was employed. Id. at 13–14. Accordingly, defendants assert that “[p]laintiff’s theories about employment practices at other CEVA locations in California are purely speculative.” Id. at 14.

Plaintiff replies that courts have found the typicality requirement satisfied irrespective of any differences among class members in customers served, days and hours worked, and job titles. Reply at 14 (citing Dukes, 603 F.3d at 613; Morton v. Valley

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Farm Transp., Inc., 2007 WL 1113999, at \*4 (N.D. Cal. April 13, 2007)). Plaintiff further replies that the fact that he served one of defendants’ larger customers does not destroy typicality because the time constraints and pressures on the named plaintiff were “reasonably coextensive” with the pressures on other putative class members. Id. at 16.

Notwithstanding the asserted differences between plaintiff and members of the proposed class, plaintiff’s claims are based on an alleged common course of conduct whereby defendants fostered a time-pressured work environment that encouraged employees to work off the clock, effectively denying putative class members uninterrupted meal periods and overtime pay. The fact that plaintiff only worked at defendants’ LAX facility does not change the Court’s analysis. In addition to plaintiff’s anecdotal evidence, which is limited to defendants’ LAX facility, plaintiff asserts a series of uniform policies and practices that apply across all of defendants’ California facilities. These practices—such as requiring employees to seek authorization to skip meal periods, failing to notify employees of their right to a second meal period when working ten hours or more, and opting against programming timekeeping and payroll databases to ensure that employees receive wages when they miss meal periods—may reasonably contribute to an employment culture in all of defendants’ California facilities that encourages employees to perform work off the clock. See Mot. at 16–17. Therefore, plaintiff’s claims arise from the “same event or course of conduct” as those of the various class members, as required under Rule 23(a)(3), and are typical of the claims of the proposed class.

#### 4. Adequacy of Representation

The adequacy of representation requirement of Rule 23(a)(4) involves a two-part inquiry: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” Hanlon, 150 F.3d at 1020.

##### a. Named Plaintiff

Plaintiff argues that he will adequately represent the proposed class because he has diligently participated in the litigation to date. Mot. at 19. Further, plaintiff maintains that there are no actual or potential conflicts of interest between plaintiff and the class members. Id. Defendants respond that plaintiff is an inadequate class representative

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because his actions demonstrate that he is not committed to the litigation. Opp'n at 23–24. Defendants assert that plaintiff canceled at the last minute two scheduled depositions. *Id.* at 23. Further, defendants dispute that plaintiff has taken an active role in the litigation to date, pointing to plaintiff's deposition testimony where defendants claim that plaintiff "disclaimed any knowledge of the alleged practices cited in his discovery responses that supposedly forced him and other employees to work off-the-clock." *Id.* at 24 (citing Smith Dep. 10:1–13:12). Plaintiff replies that there were extenuating circumstances that caused him to cancel his first two scheduled depositions.<sup>13</sup> Reply at 23.

The Court finds that plaintiff is adequate to represent the proposed class. Regarding plaintiff's failure to appear at two depositions, plaintiff's absences are sufficiently explained by his declaration. *See* Smith Decl. II ¶¶ 2–3. Insofar as defendants contend that plaintiff is unfamiliar with the contents of discovery responses, lead plaintiffs are not required to be conversant in every single event and document in the case.<sup>14</sup> What matters is that the lead plaintiff is cognizant of the nature of the claim and

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<sup>13</sup> Plaintiff avers that he was forced to cancel the first deposition because he was suffering from the stomach flu. Reply at 23; Smith Decl. II ¶ 2. Plaintiff was unable to attend the second deposition because he was forced to care for a disabled friend, for whom plaintiff is the court-appointed conservator, when a substitute care provider unexpectedly cancelled on the morning of the deposition. *Id.* at 24; Smith Decl. II ¶ 3. Plaintiff's counsel arranged for plaintiff to appear for the deposition on the following day. *Id.*; Cagney Decl. II ¶ 6.

<sup>14</sup> Furthermore, the Court has reviewed plaintiff's deposition testimony, and it does not suggest that plaintiff is unfamiliar with his discovery responses. *See* Smith Dep. 10:1–13:12. On the contrary, plaintiff explicitly states that he is aware of the practices cited in his discovery materials:

- Q: In page 10 of your responses, you reference an alarm of some sort that was triggered at defendant's headquarters when somebody would work in excess of 12 hours a day.
- A: Yes.
- Q: Is there really any such alarm?
- A: Yes. . . .

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apprised as to the status of the case. Thus, the Court finds that plaintiff can adequately represent the proposed classes.<sup>15</sup>

**b. Qualified Counsel**

Plaintiff argues that his counsel is a qualified law firm with extensive experience in labor law litigation. Mot. at 19; Cagney Decl. ¶¶ 23–25. Defendants counter that plaintiff’s counsel is inadequate because counsel is the driving force behind plaintiff’s claims. Opp’n at 22–23. To support their argument, defendants cite two prior cases where plaintiff’s counsel, Westrup Klick, LLP, was disqualified from representing classes. *Id.* at 21–22 (citing Bodner v. Oreck Direct, LLC, 2007 U.S. Dist. LEXIS 30408, at \*3–4, 7 (N.D. Cal. April 25, 2007) (denying motion for class certification where counsel placed an advertisement in local newspaper soliciting plaintiffs, the named plaintiff never read the complaint and first met counsel the day before his deposition, and counsel had already attempted, and failed, to bring the action in another district); Apple Computer, Inc. v. Superior Court, 126 Cal. App. 4th 1253, 1273–74 (2005) (class counsel disqualified where lawyer served as both class representative and as class counsel)). Plaintiff replies that defendants’ argument that Westrup Klick, LLP is inadequate class counsel is incredible because defendants’ counsel has supported Westrup Klick, LLP’s adequacy in other proceedings. Reply at 19–20. Further, plaintiff argues that defendants’ reliance on Bodner and Apple Computer is misplaced because neither case “bears any

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Smith Dep. at 10:1–7.

<sup>15</sup> Defendants also assert that plaintiff is an inadequate class representative because his individual claims are subject to dismissal on the grounds that plaintiff was compensated for the hours plaintiff reported that he worked off the clock, and because he never complained about working off the clock or working through meal periods. Opp’n at 24–25. Defendants’ argument is unavailing because, at this stage, the Court is not permitted to “conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974); United Steel, Paper & Forestry, Rubber Mfg. Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO, CLC v. ConocoPhillips Co., 593 F.3d 802, 808–09 (9th Cir. 2010) (district court abused its discretion when it denied plaintiff’s motion for class certification by “judg[ing] the validity of plaintiffs’ . . . claims”) (internal quotations omitted).

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resemblance to the circumstances here, and neither supports a conclusion that Westrup Klick is inadequate counsel.” Id. at 20–22. Finally, plaintiff argues that even if the Court disqualifies Westrup Klick, LLP as class counsel, the Court should not deny class certification because co-counsel, Krieger & Krieger, is adequate to carry on as sole class counsel. Id. at 23.

The Court finds that defendants have provided an insufficient basis for disqualifying class counsel in this case. Plaintiff’s counsel establish that they have been lead counsel in similar cases, have a substantial understanding of wage and hour litigation, and have been approved as class counsel in numerous class actions. See Cagney Decl. ¶¶ 23–24. Accordingly, the Court finds that plaintiff has demonstrated sufficiently that its class counsel will represent the proposed class adequately.

**C. Rule 23(b)(3) Requirements**

Certification under Rule 23(b)(3) is proper “whenever the actual interests of the parties can be served best by settling their differences in a single action.” Hanlon, 150 F.3d at 1022 (internal quotations omitted). As noted above, Rule 23(b)(3) calls for two separate inquiries: (1) do issues common to the class “predominate” over issues unique to individual class members, and (2) is the proposed class action “superior” to other methods available for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). The latter requirement requires consideration of the difficulties likely to be encountered in the management of this litigation as a class action, including, especially, whether and how the case may be tried. In making these determinations, the Court does not decide the merits of any claims or defenses, or whether the plaintiffs are likely to prevail on their claims. Rather, the Court must determine whether plaintiff has shown that there are plausible class-wide methods of proof available to prove their claims. Nevertheless, as the Ninth Circuit recently made clear in Dukes, when considering a class certification motion, district courts “must[] perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this analysis will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims.” Dukes, 603 F.3d at 594.

**1. Predominance and Commonality**

“Implicit in the satisfaction of the predominance test is the notion that the

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adjudication of common issues will help achieve judicial economy.” See Valentino, 97 F.3d at 1234. Thus, the Court must determine whether common issues constitute such a significant aspect of the action that “there is a clear justification for handling the dispute on a representative rather than on an individual basis.” 7A Wright, Miller, & Kane, Federal Practice & Procedure § 1778 (3d ed. 2005). For the proponent to satisfy the predominance inquiry, it is not enough to establish that common questions of law or fact exist, as it is under Rule 23(a)(2)’s commonality requirement—the predominance inquiry under Rule 23(b) is more rigorous. Amchem Prods., Inc., 521 U.S. at 624. The predominance question “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” Id. at 623. The Court, therefore, must balance concerns regarding the litigation of issues common to the class as a whole with questions affecting individual class members. Abed v. A. H. Robins Co. (In re Northern District of California, Dalkon Shield IUD Products Liability Litigation), 693 F.2d 847, 856 (9th Cir. 1982).

The crucial questions in this case are: (1) whether plaintiff has shown that every potential class member was subjected to a time-pressured work environment that encouraged employees to work off the clock and work through meal periods; and (2) the existence of a plausible class-wide method for proving liability and damages.

Plaintiff maintains that all potential class members were subjected to work pressures that forced defendants’ employees to work off the clock and skip meal periods. Mot. at 20. Plaintiff argues that defendants uniformly failed to compensate potential class members for their missed meal periods and overtime work. Id. Plaintiff asserts that the Court can calculate damages on a class-wide basis by comparing defendants’ timekeeping records with other time-stamped business records. Id. at 11–12.

Defendant responds that plaintiff’s evidence is insufficient to establish that common questions predominate because: (1) defendants’ policies complied with California law; (2) no manager ever instructed plaintiff to work off the clock; (3) plaintiff was instructed to submit all time worked for payment; (4) plaintiff was actually paid for all the time he submitted; and (5) plaintiff worked for one of defendants’ most demanding clients, which required him to work more than other employees. Opp’n at 20–21.

In his reply, plaintiff disputes a number of defendants’ arguments, including defendants’ assertion that their policies comply with the law and that plaintiff was paid

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all wages he was owed. Reply at 17–18.

As a preliminary matter, it is legally uncertain whether defendants’ policies satisfy the requirements of Cal. Labor Code § 226.7. The law is unsettled on whether employers need only “provide” meal breaks to their employees, or whether employers have an “affirmative obligation” to ensure that workers are actually relieved from duty. See Jaimez, 181 Cal. App. 4th at 1303 (describing the uncertain legal landscape surrounding Cal. Labor Code § 226.7). That issue is presently before the California Supreme Court in Brinker Restaurant v. Superior Court, 196 P.3d 216 (Cal. 2008). At this stage, however, the Court need not adjudicate the legal or factual merits of plaintiff’s claims, and must proceed as best it can. Jaimez, 181 Cal. App. 4th at 1303 (“we cannot and need not try to predict the outcome of the Supreme Court’s review, as we are not, at this stage, charged with adjudicating the legal or factual merits of [plaintiff’s] causes of action”); Dilts v. Penske Logistics, LLC, 267 F.R.D. 625, 638 (S.D. Cal. 2010) (“The legal uncertainty about [employer’s obligations with respect to meal periods under California law] has been a recent source of heartburn for courts. Although it is presently before the California Supreme Court in [Brinker], until that decision has issued this Court must proceed as best it can.”).

Defendants’ argument that common issues do not predominate because their written policies instruct workers to accurately submit time records indicating all time worked is unavailing. The issue is not whether defendants’ official policies comply with the law. Rather, as plaintiff’s contend, the appropriate inquiry is whether defendants enforced unwritten policies that encouraged workers to skip meal periods and work off the clock.<sup>16</sup> The bulk of plaintiff’s evidence on this point is anecdotal, consisting of the deposition testimony of the timekeeper at defendants’ LAX facility, White Dep. at 39:18–41:20, two managers at defendants’ LAX facility, Utter Dep. at 42:18–43:8; Atuatasi Dep. at 73:18–75:11, as well as plaintiff’s own declaration and the declaration of a fellow employee, Smith Decl. ¶¶ 13–17, 24–26, 28–31; Penate Decl. ¶¶ 4–11, 13–15.<sup>17</sup>

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<sup>16</sup> Similarly, as discussed above, the fact that plaintiff worked on the Apple Computer account does not demonstrate that common questions do not predominate.

<sup>17</sup> The fact that defendants submit declarations of employees that contradict plaintiff’s declarations does not change the Court’s analysis. At this stage, the Court must only determine whether common issues predominate, not whether plaintiff’s claims

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Plaintiff also offers evidence that defendants' official policies may have contributed to employees skipping meal periods and performing work for which they were not compensated. For example, plaintiff submits evidence that employees were required to seek permission to skip meal periods and that defendants had the capability to, but did not, program their timekeeping and payroll databases to ensure that employees received wages when they did not clock out for meal periods. Moreover, there appears to be no debate that defendants' written policies did not advise employees of the statutorily mandated second meal break when employees worked ten hours or more. The Court is convinced that, using defendants' records, policies, and representative testimony, plaintiff can attempt to prove that every potential class member was subjected to the same time-pressured work environment.

The Court is not convinced, however, that there is a plausible class-wide method of proving damages. At oral argument, plaintiff clarified that it is possible to prove damages for defendants' employees who did not clock out for meal periods using defendants' KRONOS electronic timekeeping database. Plaintiff states that the KRONOS database tracks when all employees clock in and out, and that electronic records are available for the entire class period. Plaintiff argues that the KRONOS database provides a plausible method for proving damages for a large swath of potential class members because it enables plaintiff to determine whether potential class members took meal periods.

Plaintiff also states that potential class members include employees who punched out and punched back in during meal periods. Plaintiff's explanation for proving damages for this group of employees is more speculative. At oral argument, plaintiff indicated that he *intends* to prove damages for employees who punched out and punched back in using statistical sampling by an expert witness. However, plaintiff has failed to present the Court with such statistical evidence. Moreover, plaintiff failed to present a comprehensive plan to calculate damages for employees who performed off-the-clock work and may be entitled to overtime pay. The Court is unconvinced that comparing potential class members' timekeeping records with other time-stamped business records is a plausible class-wide method for proving overtime damages.

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have merit. Eisen, 417 U.S. at 177.

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The Court is not prepared to say at this stage that plaintiff has a plausible method for proving damages on a class-wide basis. Thus, the Court concludes that plaintiff fails to satisfy the predominance requirement.<sup>18</sup>

**2. Superiority**

Because plaintiff fails to make out a sufficient showing to satisfy Rule 23(b)(3)'s predominance requirement, the Court need not consider whether the superiority requirement is met.

**V. CONCLUSION**

In accordance with the foregoing, the Court DENIES plaintiff's motion for class certification without prejudice. The Court ORDERS defendants to produce relevant electronic timekeeping records and other electronic business records for putative class members. The Court further ORDERS defendants to produce relevant documents that describe the databases and programs used by putative class members.

IT IS SO ORDERED.

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Initials of VRV for CJ  
Preparer \_\_\_\_\_

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<sup>18</sup> At oral argument, plaintiff stated that a barrier to demonstrating a plausible method for proving damages on a class-wide basis was limited discovery regarding defendants' electronic timekeeping database and other electronic records. To the extent that plaintiff was not permitted full discovery of defendants' electronic timekeeping database records and other relevant electronic records during discovery for class certification, the Court orders defendants to produce such records to provide a meaningful opportunity for plaintiff to attempt to show a plausible method for proving damages on a class-wide basis.