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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

COURTNEY TOLBERT, et al.,

Plaintiff,

v.

ROCKET MORTGAGE, LLC, et al.,

Defendants.

Case No.: 5:23-cv-01450-MCS-PVC

CLASS ACTION

PLAINTIFF COURTNEY TOLBERT'S MOTION FOR CLASS CERTIFICATION; MEMORANDUM OF POINTS AND AUTHORITIES

Date: March 25, 2024
Time: 9:00 a.m.
Location: Courtroom 7C

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to FRCP Rule 23, Plaintiff seeks class certification of the following class and subclasses to decide common questions based on common proof:

Proposed Class

> All former and current hourly individuals employed by Defendant within the State of California, from June 21, 2019, until the date of class certification ("Class" or "Class Members").

Plaintiff seeks certification of five claims identified as:

1. "Regular Rate Subclass" defined as follows: "All Class Members who worked as mortgage bankers and received incentive/bonus pay (e.g., 'Commission', 'Rocket Booster', 'RKT RSU', 'Banking Floor', 'Bonus', 'Recognition', 'TM Referral', 'Monthly Sales Incentive', 'Loan Referral Points', 'Boomer Bucks', 'Award', 'Award Gift,' 'Award Gift Production,' 'Holiday Pay', 'Sales Floor', 'Recognition,' Professional Development,' 'Pulse Programs', 'Personal Significance Days', 'Contest')."

2. "Hours Worked Subclass" defined as follows: "All Class Members who worked as mortgage bankers where Defendant's records show hours worked for which no wages were paid."

3. "Expenses Subclass" defined as: "All Class Members who worked from home and were not reimbursed for necessary expenditures or losses incurred in furtherance of their mortgage banker duties."

4. "Wage Statement Subclass" defined as follows: "All Class Members."

5. "Waiting Time Subclass" defined as follows: "All formerly employed Class Members who were not timely paid final wages."

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II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant has employed several hundred Class Members, including Plaintiff, for the purpose of originating residential purchase and refinance residential loans collectively referred to by Defendant as "mortgage bankers," who must work out of their homes.[1] The main job of Class Members is to make/receive calls.[2] Class Members are all paid hourly -- plus incentive/performance-based wages.[3] Defendant required all mortgage bankers to set up each of their offices in their home. In addition to a physical home office, Defendant requires all mortgage bankers to provide their own internet, cell phone (text/dial) and other office overhead items necessary for the job, without reimbursement.[4]

Defendant's payroll and compensation practices have been consistently applied to all Class Members. As Defendant's FRCP 30(b)(6) designee testified:

> Q. Were the compensation policies and procedures that applied to Mr. Tolbert the same as the compensation policies and procedures that applied to other mortgage bankers in California?
> A.· Yes.

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[1] See, Decl. of R. Nathan, paras 3-5; Decl. J. Glugoski, Ex. A, Attaway, pp. 40:11 to 41:25; 42:11 to 43:16 and Exs. G-V.

[2] Decl. J. Glugoski, Ex. E, pp. 56:19 to 57:17, 60:12-16, 62:18-23.

[3] Decl. J. Glugoski, Ex. A, Attaway, pp. 35:8-19, 36:5-8, 38:1 to 43:16, 53:13 to 58:19; 36:2 to 38:7 (Attaway was the designee under FRCP 30(b)(6) for all topics but topic 5 and Ex. 1 to Attaway deposition); Exs. G-V.

[4] Decl. J. Glugoski, Ex. A, Attaway, pp.43:23 to 44:23; 46:17-21, 49:8-50:3; Exs. G-V; Def. Resp. to RFA Set 1, No. 4, Ex. X ["4: Admit that YOU did not reimburse PLAINTIFF for internet service expenditures incurred by him in direct consequence of the discharge of his duties while working from home prior to November 2020. RESPONSE TO REQUEST FOR ADMISSION NO. 4: [boilerplate objections] Upon reasonable inquiry to date, admit"].

> Q.· And how they were applied to Mr. Tolbert was consistent with how you understood they would be applied to other mortgage bankers in California?
> A.· Correct.[5]

Defendant has also used one clock in/out timekeeping system during all times relevant:

> Q.· Now, when mortgage bankers in California work they keep track of their time worked, right, in some sort of system?
>
> A.· All hourly team members, inclusive of mortgage bankers in California, would clock in and out through Workday.
>
> Q.· And how long has the company used Workday to track the time worked by its California employees?
>
> A.· Since January 2nd of 2018.[6]

Plaintiff was employed by Defendant as a mortgage banker in California from approximately July 2020 to approximately June 24, 2022.[7] During the Class period (June 21, 2019, until the date of class certification), Defendant has kept three sets of records showing hours worked by the Class. The first is a call record showing extensive time details about hours worked on telephone duty. The second record is a "punch" record of time worked maintained by Workday and subject to editing by Defendant. The third record shows log on/off dates/times on company

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[5] See, Dec. J. Glugoski, Ex. B, Defendant's FRCP 30(b)(6) payroll designee, Brady, pp. 38:8 to 39:25, 21:9 to 22:11.

[6] Decl. J. Glugoski, Ex. A, Attaway (timekeeping designee) p. 64:14-22; 87:2-8.

[7] Decl. J. Glugoski, Ex. A, Attaway, p. 19:8-10, 58:23 to 59:2, 129:1-3; Ex. V (Tolbert Decl.).

computers. Defendant has used only Workday for payroll, failing to reconcile Defendant's time records with the existing telephone and log on/off records that document more hours worked than the Workday records.[8]

Plaintiff seeks class certification on behalf of the classes listed above because he, like the class he seeks to represent, was a) not paid required expense reimbursement,[9] b) not paid for all hours worked, c) not paid appropriate overtime due to a miscalculation of the regular rate, and d) neither provided wage statements nor accurate wage statements.[10]

III. LEGAL STANDARDS

A. Labor Code Enforcement

The analytic framework for evaluating labor code claims is as follows:

> [I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection. (Citations omitted).

Morillion v. Royal, 22 Cal. 4th 575, 592 (2000). *See also, Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 340 (2004). Hence, courts must interpret statutes governing "wages, hours or working conditions of employees" broadly "in favor of protecting employees." *Brinker Rest. v. Sup. Ct.*, 53 Cal. 4th 1004 (2012).

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[8] Decl. G. Arzumanyan.

[9] Decl. William R. Ingersoll, Ph.D.; Decl. G. Arzumanyan; Decl. J. Glugoski, Ex. V.

[10] Decl. J. Glugoski, Ex. A, Attaway, pp. 76:14-18, 80:1 to 83:24; 135:16 to 140:19; 115:8 to 124:10 (Ex. 5 DEF 620), 135:9 to 140:19 (Ex. 9 DEF 616-618); Exs. G-V.

"The IWC wage orders are to be accorded the same dignity as statutes." *Brinker Id*, at 1027. "Both the wage orders and the wage and hour laws are 'liberally construe[d] . . . to favor the protection of employees.'" *Augustus v. ABM,* 2 Cal. 5th 257, 262 (2016).

"Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hours laws are of the sort routinely, and properly, found suitable for class treatment." *Gibbs v. TWC Administration, LLC*, 2020 WL 42770, at *4 (S.D.Cal., 2020) (citing *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1033 (2012)).

B. Law Concerning Alleged Claims

a. Regular Rate Subclass:

The obligation of employers to comply with the "regular rate" requirement was recently summarized by the California Supreme Court:

> California generally follows, with few exceptions, the federal Fair Labor Standards Act (FLSA) when calculating the regular rate of pay. In most cases, the regular rate is calculated by adding all "remuneration" for employment (i.e., all compensation and earnings), except statutory exclusions, in any workweek divided by the total hours worked by that employee in the workweek. The fact that California authorities, in construing "regular rate of pay," have looked to the meaning of "regular rate" in the FLSA implies that "regular rate" is the operative term of art. [Citations omitted]; Dept. of Industrial Relations, DLSE, Chief Counsel H. Thomas Cadell, Jr., Opn. Letter No. 2003.01.29, Calculation of Regular Rate of Pay, *supra*, at p. 2, fn. 1 ["[T]he failure of the IWC to define the term 'regular rate' indicates the Commission's intent that in determining what payments are to be included in or excluded from the calculation

> of the regular rate of pay, California will adhere to the standards adopted by the U.S. Department of Labor to the extent that those standards are consistent with California law."]; *ante*, at p. 868 [citing 1994 and 1991 DLSE opinion letters and 1998 DLSE Manual].)"
>
> *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal.5th 858, 873 (Cal., 2021).

Ferra went on to note:

> "[W]e recently said that "an employee's 'regular rate of pay' for purposes of Labor Code section 510 and the IWC wage orders is not the same as the employee's straight time rate (i.e., his or her normal hourly wage rate). Regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any non-hourly compensation the employee has earned." (*Alvarado*, *supra*, 4 Cal.5th at p. 554; see *id.* at p. 569 ["Not all employees earn at a fixed pay rate throughout a pay period, and therefore regular rate of pay is a *weighted average* reflecting work done at varying times, under varying circumstances, and at varying rates."].) Consistent with the meaning of "regular rate" in the FLSA, we observed that an "attendance bonus" earned for weekend work (a form of "incentive pay") was "part of an employee's overall compensation package, and therefore ... its per-hour value must be determined so that the employee's regular rate of pay — and, derivatively, the employee's overtime pay rate — reflects all the various forms of regular compensation that the employee earned in the relevant pay period." (*Alvarado*, at p. 554.)
>
> In sum, the history above shows that the term "regular rate" in section 7(a) of the FLSA accounts for not only hourly wages but also nondiscretionary payments and that the term "regular rate of pay" as used in section 510(a) and in the IWC's earlier wage orders has the same meaning as "regular rate" in the FLSA.
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> *Ferra* at 869.

Plaintiff contends Defendant performed incorrect regular rate calculations by a) *excluding* altogether some nondiscretionary pay items from the regular rate,

and b) failing to perform a flat-sum bonus wage calculation using only the non-overtime hours worked.

California law distinguishes between "flat-sum bonuses" and "production bonuses," both of which may be paid on a weekly basis. *Alvarado v. Dart Container Corporation of California*, held that when calculating the regular rate for a flat-sum bonus, the employer should divide the bonus solely by the employee's *non-overtime* hours in the week. By contrast, and consistent with the federal rule, in California a production bonus—*i.e.*, a bonus that varies based on output or hours worked—may be divided by *all* hours worked in the week (both overtime and non-overtime) to arrive at the regular rate.

The legality and remedy issues on this claim can be determined entirely by a review of Defendant's records.[11]

b. "Hours Worked Subclass"

Defendant maintains three separate records showing hours worked by Class Members. First, Defendant maintains a timekeeping system known as "Workday" where employees are expected to punch in/out. Second, Defendant maintains telephone records showing the "date, time and length of all calls" when Class Members were making/receiving phone calls using Defendant's VoIP phone.

[11] Decl. G. Arzumanyan.

Third, Defendant maintains a record of when Class Members logged in/out of Defendant's computer systems for work using a unique identifier and password.[12]

By relying only on its Workday time records Defendant substantially *undercounted* hours worked. This fact has been established by comparing Defendant's Workday records with the record of calls made/received and log in/out records which are maintained by Defendant.[13] Plaintiff and declarants testify that they followed Defendant's timekeeping policies and procedures, noticed discrepancies in their hours worked, and reported the discrepancies to Defendant. Plaintiff's supervisors all testified that Plaintiff was a trustworthy employee who followed Defendant's policies.[14]

In *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 2835 (2015) the 9th Circuit held "a plaintiff may establish liability for an off-the-clock claim by proving that (1) he performed work for which he did not receive compensation; (2) that defendants knew or should have known that plaintiff did so; but that (3) the defendants stood idly by." The Court certified the hours worked claim by observing, as Plaintiff does here, that the Class Members claim can be established "through an analysis of the telephone and computer

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[12] Decl. G. Arzumanyan.

[13] Decl. G. Arzumanyan.

[14] Decl. J. Glugoski, Ex. A, Attaway, 150:4-11; Ex. B, Brickert, pp. 27, 29; Ex. C, Conway, pp. 117:16 to 118:25.

systems used by class members." *Id*. The *Jimenez* Court went on to conclude that Plaintiff's claims presented "the "glue" necessary to say that "examination of all the class members' claims for relief will produce a common answer to the crucial question[s]" raised by the plaintiffs' complaint. *Dukes*, 131 S.Ct. at 2552." *Jimenez, Id*., at 1166.

In *Corral v. Staples the Office Superstore LLC*, 2023 WL 2347445, (J. Scarsi, C.D.Cal., 2023, this Court adopted the same approach as *Jimenez* by relying on a Defendant's records to support claims for failing to pay all hours worked. In *Corral*, the predominance issue was satisfied where liability questions turned on a review of a defendant's own records. *Corral v. Staples the Office Superstore LLC*, 2023 WL 2347445, at *16)["The answer to this question is readily ascertainable through a review of Defendant's own records. Because "the same evidence will suffice for each member to make a *prima facie* showing or the issue is susceptible to generalized, class-wide proof," Plaintiff has shown common issues predominate."]

Plaintiff intends to prove the hours worked claim for the Class by using the same methodology used in *Jimenez* – a comparison of the records of hours worked (payroll) – Workday records, telephone records and computer systems maintained by Defendant -- which will show all the hours worked by the Class Members.

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c. "Expense Reimbursement Subclass"

California Labor Code section 2802 provides: "An employer shall indemnify his employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful." California Labor Code section 2804 provides: "Any contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof, is null and void, and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled under the laws of this State."[15]

Accordingly, under California law an employer may not shift or "pass through" the normal costs of operating a business to the employee it hires. Expecting employees to cover any normal operating expense of the employer is not allowed in California. Further, a contract or agreement (written or oral), which purportedly allows an employer to repudiate this statutory obligation, is void *ab initio*. "Section 2802 is designed to prevent employers from passing their operating expenses on to their employees." (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 562.)

To establish a violation of Section 2802, a plaintiff must demonstrate: (1) that he incurred expenses as an employee of the defendant; (2) that those expenses

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[15] Waivers against a California employee's right to reimbursement under Labor Code section 2802 are against public policy. *Edwards v. Arthur Anderson LLP*, 44 Cal. 4th 937, 951 (2008).

were reasonably necessary to the discharge of his duties; and (3) that the employee did not reimburse the plaintiff. *Espinoza v. W. Coast Tomato Growers, LLC*, No. 14-CV-2984 W (KSC), 2016 WL 4468175, at *4 (S.D. Cal. Aug. 24, 2016) (citing *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568-69 (2007). Section 2802 "focuses not on whether an employee makes a request for reimbursement but rather on whether the employer knows or has reason to know that the employee has incurred a reimbursable expense." *Stuart v. RadioShack Corp.*, 641 F.Supp.2d 901 (N.D. Cal. 2009). As a matter of public policy, not only is an employee barred from waiving her right to reimbursement under California Labor Code section 2802 (*see* Cal. Labor Code § 2804), but the employee need not request reimbursement:

> If the California legislature had intended to insert an employer notice requirement into § 2802, it could have done so. It did not. The duty to reimburse does not need to be triggered by notice, actual or constructive. It exists so long as the uncompensated employee expenditures or losses are reasonably necessary to the work.
>
> *Espinoza v. West Coast Tomato Growers, LLC* (S.D. Cal. Aug. 24, 2016) 2016 WL 4468175, *4 n.2.); s*ee Cochrane v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1144–45.

Here, Defendant has required Plaintiff and the Class to provide and maintain a home office to perform their mortgage banker duties. Defendant is liable to Plaintiff and the Class for failure to reimburse home office related expenses, including cell phone expenses. Defendant admits it did not reimburse Plaintiff or Class Members for expenses they incurred in providing and maintaining home offices. See, fn. 4. In approximately November 2020, as a company policy,

Defendant began auto-reimbursing $40 per month ($18.46 per pay period) to Plaintiff and Class Members' as "Internet Reimbu." When questioned at deposition about how the $18.46 amount was determined Defendant refused to answer.[16] In addition to un/under-paid internet expense, Class Members incurred unreimbursed expenses in providing and maintaining home offices.

In *Richie v. Blue Shield of California*, Blue Shield required its "telecommuting claims processors to maintain a phone line as a requirement for telecommuting." (*Richie v. Blue Shield of California* (N.D. Cal. Dec. 9, 2014) 2014 WL 6982943, *19.) The court found "Blue Shield had 'reason to know' that its telecommuting claims processors were incurring an expense . . . [triggering Blue Shield's] duty to exercise 'due diligence' and ensure that reimbursement was made." (*Id.*; *see Cochrane*, 228 Cal.App.4th at 1144–45 ("If an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense for purposes of section 2802. . . To show liability under section 2802, an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed.").) Similarly, Defendant has required Class Members (all working from home) to provide and maintain a cell phone and a home office. Once employed and teams are formed, Defendant instructs Team Leaders to create group chats using Class

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[16] Decl. J. Glugoski, Ex. F, Skorupski (FRCP 30(b)(6) designee on internet reimbursement), pp. 7:1 to 11:7, 26:9 to 27:7, 27:8 to 28:15, 30:25 to 32:2, 32:13 to 36:3, 40:3-9, 42:1 to 45:15, 49:7 to 58:10, 59:21 to 62-12, 42:20 to 45:15, 74:4 to 77:24, 80:24 to 81:21, 108:22 to 110:7, 111:17 to 112:8.

Members' cell phones, which are used to communicate by calls and texts.[17] This triggers a California Labor Code section 2802 reimbursement obligation.

In reversing a trial court's denial of class certification, the *Cochrane* Court held:

> If an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense for purposes of *section 2802*. It does not matter whether the phone bill is paid for by a third person, or at all. In other words, it is no concern to the employer that the employee may pass on the expense to a family member or friend, or to a carrier that has to then write off a loss. It is irrelevant whether the employee changed plans to accommodate work-related cell phone usage. Also, the details of the employee's cell phone plan do not factor into the liability analysis. Not only does our interpretation prevent employers from passing on operating expenses, it also prevents them from digging into the private lives of their employees to unearth how they handle their finances vis-à-vis family, friends and creditors. To show liability under *section 2802*, an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed.
>
> *Cochran*, *id*, at 1144–45 (2014)

Defendant has required Class Members to provide the workspace, internet, utilities, desk, and chair. Even when Defendant implemented a policy and practice of paying $18.46 per pay period for internet while this litigation was pending, it under-reimbursed the Class for internet expenses. And, Defendant is *still* not reimbursing any amount for Defendant's use of employees' home offices, desks, chairs, cell phone, and utilities.

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[17] Dec. J. Glugoski, Exs. G-V.

Plaintiff contends Defendant knew its employees incurred these unreimbursed expenses because Defendant *required* these items as a condition of the jobAt a minimum, Defendant constructively knew their employees incurred these expenses, which mandates that Defendant "exercise due diligence to ensure that each employee is reimbursed," (*McLeod v. Bank of Am., N.A.* (N.D. Cal. Dec. 13, 2017) Case no. 16-cv-03294-EMC, 2017 U.S. Dist. LEXIS 205273, *18, 2017 WL 6373020, quoting *Stuart v RadioShack Corp.* (N.D. Cal. Apr. 30, 2009) 641 F.Supp.2d 901, 903.)

The application of California Labor Code section 2802 to expenses incurred by employees working from home as required was discussed in *Thai v. International Business Machines Corporation*, 93, Cal.App.5th 364 (2023). IBM was sued in a class action based on its failure to reimburse employees for expenses incurred while working from home, including expenses such as internet and data usage, telephone charges, computer equipment and various accessories. The trial court dismissed the lawsuit agreeing with IBM that it was not required to reimburse employees for such expenses. The Court of Appeal reversed holding that section 2802 is designed to protect workers from bearing the costs of business expenses that were incurred doing their jobs. The Court explained that section 2802 does not contain a causation requirement. Rather, the statute requires reimbursement of all expenses incurred by employees that are necessary to perform their job duties. The Court's decision was consistent with prior cases which held employers must reimburse employees for the business use of their personal vehicle (*Gattuso v.*

Harte-Hanks Shoppers, Inc., 42 Cal.4th 554 (2007)) and personal cell phones (*Cochran, Id.)*

d. "Wage Statement Subclass"

i. Duty to Provide Wage Statements:

The California Labor Code requires employers to furnish employees with accurate wage statements. Cal. Lab. Code § 226(a). *Morgan v. United Retail Inc.*, 186 Cal. App. 4th 1136, 1149 (2010) ("[t]he purpose of the wage statement requirement is to provide transparency as to the calculation of wages ... [and] [a] complying wage statement accurately reports most of the information necessary for an employee to verify if he or she is being properly paid in accordance with the law") (quoting DLSE Opn. Letter No. 2006.07.06 (July 6, 2006) p. 2). "The Legislature enacted section 226 to ensure an employer "document" the basis of the employee compensation payments to assist the employee in determining whether he or she has been compensated properly." *Soto v. Motel 6 Operating, L.P.*, 4 Cal. App. 5th 385, 390 (2016).

With respect to *how* employers must "furnish" (i.e., provide) the wages statements to employees, Section 226(a) states:

> An employer, semimonthly or at the time of each payment of wages, shall ***furnish*** to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement ***in writing*** . . . . *Id.* (emphasis added).

To ameliorate the requirements placed on employers with respect to the "furnishing" mandate, "[i]n 2006 the California [Division] of Labor Standards Enforcement ("DLSE") issued an opinion letter approving a plan to implement an electronic wage-statement system, subject to certain conditions." *Evans v. Wal-Mart Stores, Inc.*, 2020 WL 6253695, *4 (C.D. Cal. Sept. 14, 2020) (quoting *Derum v. Saks & Co.*, 95 F. Supp. 3d 1221, 1226 (S.D. Cal. 2015) (citing 2006 DLSE Letter). "Although the letter is not binding authority, it appears to be the primary state-law authority" on electronic wage statements. *Evans*, 2020 WL 6253695, *4 (quoting *Derum*, 95 F. Supp. 3d at 1226; and citing *Apodaca*, 2012 WL 12336225, at *2 (noting, in holding that provision of electronic wage statements by employer was permissible, that "[a]lthough not binding, the [2006 DLSE Letter] is 'entitled to consideration and respect'")) (quoting *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 1105 n.7 (2007)).

> Through this opinion letter, even though electronic wage statements are not provided for explicitly in section 226(a), the DLSE permitted employers to use electronic wage statements so long as they fulfilled the ultimate purpose of the wage statement requirement, which is to "provide [employees] transparency as to the calculation of [their] wages." *Evans*, 2020WL 6253695, *4 (citing 2006 DLSE Letter at 2 and *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1337 (2018) ("The purpose of section 226 is to document the paid wages to ensure the employee is fully informed regarding the calculation of those wages."). "Although DLSE policies are not necessarily entitled to deference, a reviewing court may adopt the DLSE's interpretation if independently persuaded it is correct." *Evans*, 2020 WL 6253695, *4 (quoting *Liday v. Sim*,40 Cal. App. 5th 359, 373 (2019) (citing

Alvarado v. Dart Container Corp. of California, 4 Cal. 5th 542, 561 (2018)).

> The 2006 DLSE letter states, "an electronically stored wage statement which is accessible by an employee may be read on a screen or printed and read as a "hard copy" and thus "qualif[ies] as a 'statement in writing.'" (2006. DLSE Letter at 2.)
>
> The 2006 DLSE Letter further explains that: [t]he apparent intent of both forms of wage statements described in [s]ection 226(a) is to allow employees to maintain their own records of wages earned, deductions and pay received. The Division [of Labor Standards Enforcement] in recent years has sought to harmonize the "detachable part of the check" provision and the "accurate itemized statement in writing" provision of Labor Code section 226(a) by allowing for electronic wage statements ***so long as each employee retains the right to elect to receive a written paper stub or record and that those who are provided with electronic wage statements retain the ability to easily access the information and convert the electronic statements into hard copies at no expense to the employee.*** (*Id*. at 2-3 (emphasis added).)

The *Evans* court held that, to comply with section 226(a), an employer's electronic wage statement policy should (1) give employees the opportunity to elect to receive paper wage statements at any point, (2) provide employees easy access to electronic wage statements where available, and (3) facilitate the conversion of electronic wage statements into paper wages statements at no cost to the employee. *Evans*, 2020 WL 6253695, *5.

Defendant does not meet the standard set by *Evans* in two respects. First, Defendant's FRCP 30(b)(6) (Attaway) confirmed that all Class Members are presented, via Workday, with a standard form to be filled out to make deposit

elections. The forms (Exs. 5 and 9 to the Attaway deposition, see fn. 10) do not contain any right/election/option to receive a written paper stub or record. This is a violation of LC 226(a). Nor did Defendant provide a means for Class Members – all who worked remotely -- to convert the electronic statements into hard copies at no expense to the Class Members. While electronic wage statements could be viewed by navigating a series of steps, Defendant did not provide a means for Class Members to convert the electronic statements into hard copies at no expense to the employee. Defendant did not provide Class Members the ability to print out written wage statements without incurring time and expense because they all worked remotely and Defendant did not provide them with a computer, paper, or ink/toner.[18]

ii. Duty to Provide *Accurate* Wage Statements

In addition, the California Labor Code requires employers to furnish employees *accurate* wage statements including nine categories of information,

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[18] See, fn. 10; Attaway was designated to testify on topics 3 and 4 of the deposition notice: "3. Deponent's policies, practices, and procedures for "new hire" onboarding pertaining to Plaintiff, including: a. All information provided to Plaintiff when Plaintiff was hired; b. All information showing Deponent's payroll process, policies, and guidelines used when setting up payroll for Plaintiff, including all information pertaining to Plaintiff's election to be paid via any direct deposit process; c. All information showing attempts by Defendant to comply with Labor Code 226a pertaining to Plaintiff. 4. Steps, methods, and processes Plaintiff needed to take to obtain the wage statement information required by Labor Code 226(a)." Dec. J. Glugoski, Ex. A, Attway p. 76:14-18, 38:1-7, 76:14-18, 80:1-85:15, 115:14 to 124:19, 135:9 to 140:19 (including Exs. 5 and 9, Bates 616 to 618); Exs. G-V.

such as gross and net wages earned, total hours worked, and all hourly rates in effect during the pay period. Cal. Lab. Code § 226(a). *Morgan v. United Retail Inc.*, 186 Cal. App. 4th 1136, 1149 (2010) ("[t]he purpose of the wage statement requirement is to provide transparency as to the calculation of wages ... [and] [a] complying wage statement accurately reports most of the information necessary for an employee to verify if he or she is being properly paid in accordance with the law") (quoting DLSE Opn. Letter No. 2006.07.06 (July 6, 2006) p. 2).

Class Members' wage statements are *facially* inaccurate. In addition to the fact that the wage statements do not accurately record either the regular rate or the hours worked, the wage statements show incorrect dates attributed to when wages were earned and incorrect information about hours worked ("0") and rate of pay ("0"). The wage statements are so confusing that Defendant's own FRCP 30(b)(6) designee changed his testimony after his deposition concerning interpretation of how the regular rate and overtime were calculated.[19] Additionally, Defendant's failure to pay all wages owed created inaccuracies in wage statements as to the correct regular rate and the number of hours worked. The policies, procedures, and practices used by Defendant are identical amongst the Class on the wage statement

[19] Defendant's FRCP 30(b)(6) designee for payroll, Brady, made substantial and material changes to his deposition testimony concerning calculation of Class Members' regular rate. See, Decl. J. Glugoski, Ex. B, Brady, 22:3-11, 93:3 to 96:3, 103:19 to 104:18 (and see Brady Errata changing testimony at pp. 93 and 115).

issue. There are two common issues that predominate; first, whether Defendant's direct deposit onboarding forms are sufficient to meet the standard set forth in *Evans*, and second, whether Defendant's wage statements are "accurate" per LC 226.

e. "Waiting Time Subclass"

A portion of this claim is derivative of other wage claims discussed above. However, a review of Plaintiff's and other Class Members' wage statements show consistent failures to pay final wages timely as required by law. Decl. J. Glugoski, Exs. G-U.

IV. CLASS CERTIFICATION

To obtain class certification, a plaintiff must satisfy the four requirements of Federal Rule of Civil Procedure 23(a) and the requirements of one of the Rule 23(b) subdivisions. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001); *Davidson v. O'Reilly Auto Enterprises, LLC*, 968 F.3d 955, 967 (9th Cir. 2020)["Parties seeking class certification bear the burden of satisfying each of the four requirements of Rule 23(a) of the Federal Rules of Civil Procedure and at least one of the requirements of Rule 23(b)."]. Rule 23(a) requires that (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). Essentially, "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 349 (2011).

Here, Plaintiff seeks class certification under Rule 23(b)(3), which requires Plaintiff to show that (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Although resolving class certification may overlap with the merits, " '[w]hether class members could actually prevail on the merits of their claims' is not a proper inquiry in determining the preliminary question 'whether common questions exist.' " *Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1112 (9th Cir. 2014) (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011)):

> While some evaluation of the merits frequently "cannot be helped" in evaluating commonality, *id.*, that likelihood of overlap with the merits is "no license to engage in free-ranging merits inquiries at the certification stage." (citation omitted). Instead, as the Supreme Court clarified last year, "[m]erits questions may be considered to the extent—*but only to the extent*—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen v. Connecticut Ret*., 568 U.S. 455, 466 (emphasis in original). "[W]hether class members could actually prevail on the merits of their claims" is not a proper inquiry in determining the preliminary question "whether common questions exist." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n. 8 (9th Cir.2011).

Stockwell v. City and Cnty. of San Francisco, 749 F.3d 1107, 1111–12 (9th Cir., 2014)

1. Numerosity

A proposed class meets Rule 23(a)'s numerosity requirement where the class "is so numerous that joinder of all members is impracticable." Fed R. Civ. P. 23(a)(1). Courts have routinely found numerosity where the putative class contains forty or more members. *See id.* (citing *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)).

Plaintiff's proposed Class consists of several hundred current and former employees.[20] Plaintiff has satisfied the numerosity requirement as to the proposed Class.

2. Typicality

"Typicality is a 'permissive standard[ ].'" *Johnson v. City of Grants Pass*, 72 F.4th 868, 888 (9th Cir. 2023). It "refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014). "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon* at 1020. Plaintiff meets

[20] See, Decl. of R. Nathan, paras. 3-5.

the typicality standard because the nature of the injury suffered by Plaintiff is the same as that suffered by the Class. As well, there are no defenses which would be unique to the Plaintiff.[21]

3. Adequacy of Representation

Rule 23(a) also requires that the representative parties be able to "fairly and adequately protect the interests of the class." Representation is adequate if the named plaintiff (1) does "not have conflicts of interest with the proposed class" and (2) the class is "represented by qualified and competent counsel." *Dukes v. Wal-Mart Stores, Inc*., 603 F.3d 571, 614 (9th Cir. 2010) rev'd on other grounds, 564 U.S. 338. Plaintiff meets the adequacy standard because he understands his obligations, has no conflicts and is represented by experienced legal counsel.[22]

4. Commonality

The commonality requirement of Rule 23(a) is met if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "What matters to class certification ... is not the raising of common 'questions'-- even in droves -- but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350. The common questions for each subclass frame the central disputes in this litigation. Resolution

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[21] Decl. J. Glugoski, Ex. V, C. Tolbert; Decl. of Righetti.

[22] Decl. J. Glugoski, Ex. V, C. Tolbert; Decl. of Righetti.

of these common questions will no doubt generate the kinds of common answers necessary to resolve this litigation.

Common Questions for Regular Rate Subclass.

Two common questions are evident for this subclass:

- When Defendant calculated the 'regular rate' for overtime pay did it include all non-discretionary incentive pay wages paid as required by law (e.g., 'Commission', 'Rocket Booster', 'RKT RSU', 'Banking Floor', 'Bonus', 'Recognition', 'TM Referral', 'Monthly Sales Incentive', 'Loan Referral Points', 'Boomer Bucks', 'Award', 'Award Gift,' 'Award Gift Production,' 'Holiday Pay', 'Sales Floor', 'Recognition,' Professional Development,' 'Pulse Programs', 'Personal Significance Days', 'Contest')?"

- When Plaintiff and the Class received flat sum bonus payments did Defendant use only "non-overtime hours" when calculating the regular rate?

Common Questions for Hours Worked Subclass.

- Do Defendant's records show hours worked for which Class Members were paid no wages?

Common Questions for Expenses Subclass.

- Did Defendant fail to provide expense reimbursement required by Labor Code Section 2802?

Common Questions for Wage Statement Subclass.

Two common questions are evident for this subclass:

- Did Defendant provide an election to either receive a written wage statement or the ability to easily access and convert electronic statements into hard copies at no expense to the employee?

- Did Defendant provide *accurate* information on wage statements as required by Labor Code 226(a)?

Common Questions for Waiting Time Subclass.

- Did Defendant willfully fail to pay all wages due when employees were quit or were discharged?

5. Predominance

Under Rule 23(b)(3), the party seeking class certification must show that common questions of law or fact predominate over questions affecting individual members. Fed. R. Civ. P. 23(b)(3). The Rule 23(b)(3) predominance inquiry asks whether a proposed class is "sufficiently cohesive to warrant adjudication by representation." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009); *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016); *accord Owino v. CoreCivic, Inc.*, 60 F.4th 437, 444 (9th Cir. 2022). "This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case." *Tyson Foods, Inc.*, 577 U.S. at 453.

"The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Id.* "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative

defenses peculiar to some individual class members.'" *Id.* "If common questions 'present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication,' then a 'clear justification' exists for 'handling the dispute on a representative rather than on an individual basis,' and the predominance test is satisfied." *Krueger v. Wyeth, Inc.*, 310 F.R.D. 468, 479 (S.D. Cal. 2015). Predominance "begins . . . with the elements of the underlying cause of action." *Olean*, 31 F.4th at 665. Yet, "Rule 23(b)(3) does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." *Amgen*, 568 U.S. at 469.

Here, Plaintiff's claims each turn on the examination of both pay/compensation and "hours worked" policies/practices that were the same for the Class and were consistently *applied* to the Class for the entire class period. Examination of those two policies and practices are at the heart of the litigation.

Finally, even assuming the Court were to reject the damages methodology proposed by Plaintiff's expert -- premised on a review of Defendant's records -- that rejection would not lead to denial of certification but, instead, to subsequent administerial proceedings to determine damages, as "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013); *accord Olean*, 31 F.4th 651, 681-82; *accord Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979,

986-88 (9th Cir. 2015) ("[D]amage calculations alone cannot defeat certification."). Because the core liability issues on each of Plaintiff's claims will drive the resolution of this litigation, the predominance requirement is satisfied.

6. Superiority

The class action method is superior if "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). The alternative to resolution of the common issues in a class proceeding would be for courts to repeatedly adjudicate relatively small claims involving the common questions in dozens of separate cases/trials. Plaintiff believes class certification would promote judicial efficiency and avoid the risk of inconsistent adjudications.

V. CONCLUSION

Where, as here, the class claims are relatively small, courts are cognizant that violations of the law would go without remedy absent a class action. *Hannon*, 31 Fed. Cl. at 103-04. Employers should not be allowed to "litigate each individual case which is filed seeking to obtain a favorable determination and, at the same time, hop[e] that few of the potential claimants will even file suit." *O'Meara v. United States* (N.D. Ill. 1973) 59 F.R.D. 560, 567. Where the sheer size of the class itself makes joinder impracticable a class action permits the court to entertain "large, medium, and small claimants" in one forum. *In re Folding Carton Antitrust*

Litig. 75 F.R.D. 727, 732 (N.D. Ill. 1977); 5 James Wm. Moore, *Moore's, Federal Practice* § 23.22[3][a], at 23-63 (large number of plaintiffs itself establishes that joinder is impracticable without examining additional factors such as size of claim). Lastly, "[t]he risks entailed in suing one's employer are such that the few hardy souls who come forward should be permitted to speak for others when the vocal ones are otherwise fully qualified." *Ste. Marie v. Eastern R.R. Ass'n* (S.D.N.Y. 1976) 72 F.R.D. 443, 449; *Horn v. Associated Wholesale Grocers Inc.* (10th Cir. 1977) 555 F.2d 270, 275 (court should have taken judicial notice that employees are apprehensive about job loss, welfare of families, and offending employer); *Simmons v. Kansas City* (D. Kan. 1989) 129 F.R.D. 178, 180 (certification appropriate where it would minimize risk of retaliation).

For the foregoing reasons, Plaintiff respectfully requests that the Court grant this motion for class certification.

Respectfully Submitted,

DATED: January 17, 2024

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CERTIFICATE OF WORD COUNT

The undersigned, counsel of record for Plaintiff, Courtney Tolbert certifies that this brief contains 6982 words, which complies with the word limit of L.R. 11-6.1.

DATED: January 17, 2024

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