UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	EDCV 16-137-GW(KKx)	Date	July 27, 2017
Title	*Anthony Ayala v. U.S XPRESS ENTERPRISES, INC., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Katie Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
James M. Sitkin	James H. Hanson

PROCEEDINGS: **PLAINTIFF'S RENEWED MOTION FOR CLASS CERTIFICATION [102]**

Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. Plaintiff's Motion is GRANTED.

The Court sets a scheduling conference for August 3, 2017 at 8:30 a.m. Parties will file a Joint Rule 26(f) Report by noon on August 1, 2017. Telephone appearances are allowed provided notice is given to the clerk two business days prior to the hearing.

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Initials of Preparer JG

Ayala v. U.S. Xpress Enters., Inc., et al., Case No. CV-16-0137-GW-(KKx)
Tentative Ruling on Renewed Motion for Class Certification

I. Background

In this putative class action against U.S. Xpress Enterprises, Inc. ("USXE") and U.S. Xpress, Inc. ("USX") (collectively, "Defendants"), Anthony Ayala ("Plaintiff") seeks certification of a class pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(3). *See generally* Mot. for Class Cert. ("Mot."), Docket No. 102. In the Complaint, Plaintiff asserts claims for violations of the California Labor Code and California Industrial Commission Wage Orders, including (1) failure to provide meal and rest periods in violation of Labor Code §§ 226.7 and 512, and Wage Order 9-2001 §§ 11, 12; (2) failure to compensate for all hours of work performed in violation of Labor Code §§ 2221, 223, and 1194, and Wage Order 9-2001 ¶ 4; and (3) failure to provide itemized pay statements and/or maintain required wage/time records in violation of Labor Code § 226, and Wage Order 9-2201 ¶ 7-B. *See generally* Compl., Docket No. 1-1. Plaintiff also alleges one claim for unfair competition in violation of California Business & Professions Code § 17200.[1] *Id.*

USX is a subsidiary of USXE and provides delivery services, including the hauling and delivery of freight loads by truck. *Id.* ¶ 1. USX provides these services to customers in the forty-eight contiguous states. *See* Dep. of Anthony Ayala ("Ayala Dep.") at 55:7-25, Docket No. 80-1. Both Defendants are Nevada corporations with their principal place of business in Chattanooga, Tennessee. *See* Notice of Removal ¶¶ 13-14, Docket No. 1. All executive and company-wide administrative functions, including hiring and firing decisions, compensation decisions, and payroll processing, are performed at the Tennessee headquarters. *See* Decl. of Amanda Thompson ("Thompson Decl.") ¶ 5, Docket No. 80-2. USX does not manage or direct any drivers out of California, but some drivers occasionally drive within the state to complete deliveries. *See* Decl. of Tina Doud ("Doud Decl.") ¶ 2, Docket No. 80-4. Defendants' only physical presence in California is a drop yard in Fontana, California; that facility does not have an operations center or maintenance shop, but rather is merely a trucking terminal with one USX employee that maintains the building and grounds. *See* Thompson Decl. ¶ 7.

[1] On January 22, 2016, Defendants removed the action to this Court on the basis of diversity jurisdiction. *See* Notice of Removal ¶ 9, Docket No. 1.

Plaintiff is a California resident who was previously employed by USX as a truck driver. *See* Compl. ¶ 3; Notice of Removal ¶ 11. Plaintiff applied to work at USX online and submitted his application for employment to USX headquarters in Chattanooga, Tennessee, which processed his application at that location. *See* Thompson Decl. ¶ 9. Prior to beginning work for USX, Plaintiff attended a USX orientation in Dallas, Texas. *Id.* ¶ 10.

USX pays most of its drivers for completed deliveries based on the computerized miles attributable to each delivery and certain accessorial wages. *See* Doud Decl. ¶ 2; Decl. of Jaqueline Thompson ("Jacqueline Thompson Decl.") Ex. 12 at 28, Docket No. 67-7 at page 11 (USX handbook). USX maintains business records of each driver's total miles in order to determine the amount to pay each driver, and in order to calculate taxes due in each state where a given driver has traveled. *Id.* Drivers who are not paid by the mile are instead paid a flat rate for each completed trip, which closely resembles mileage pay. *See* Decl. of Diana Johnson at 16:3-18:21 ("Johnson Decl."), Docket No. 80-3. In addition, USX's records include service logs that record each driver's time entries and the location of each driver's truck when a time entry is recorded. *See* Thompson Decl. ¶ 12.

USX's records indicate that, throughout his employment, Plaintiff spent approximately 25% of his employment hours in California, and approximately 19% of his total miles were driven in California. *Id.* In addition, these records indicate that during the relevant time period, USX employed 9,860 drivers who completed deliveries that involved driving in or through California; during the relevant time period, these drivers traveled in California on a total of 262,345 occasions. *Id.* Of these drivers, approximately 11% are residents of California. *Id.* ¶ 13.

In the Complaint, Plaintiff alleges that, as a result of Defendants' policy of paying drivers based on miles driven, he and the putative Class Members were not paid for off-the-clock work, not paid minimum wage, not provided meal and rest periods or a premium in their absence, not given properly itemized pay statements or accurate and complete time and pay records, and not paid accrued wages at the end of employment, in violation of California's wage and hour laws. *See* Compl. ¶¶ 9, 17.

Plaintiff initially sought class certification, attorneys' fees and costs, pre-judgment and post-judgment interest, and other just and proper relief. *Id.* at 14:21-28. The initial proposed Class consisted of:

> [A]ll truck drivers who worked or work in California for U.S. Express after the completion of training at any time since four years from the filing of this legal action until such time as there is a final disposition of this lawsuit.

Id. ¶ 8.

Plaintiff filed a motion for class certification in December 2016, which the Court denied on predominance grounds. *See* Ruling on Plaintiff's Motion of Class Certification ("Ruling"), Docket No. 83.[2] The Court denied Plaintiff's motion because the nationwide scope of the class that included drivers residing in 47 states, in addition to California, would require individualized choice-of-law analyses. Ruling at 7. ("Moreover, approximately 89% of the putative Class Members do not reside in California, and are not employed full-time in California – rather, they have only temporarily driven in or through California while performing deliveries. In light of these circumstances, it is entirely unclear whether each putative Class Member has sufficient contacts with California such that the application of California law is appropriate."). The Court's primary concern was that it would need to perform separate analyses for the class members residing in each state. *Id.* ("Plaintiff has not provided a manageable way for the Court to perform a conflict-of-law analysis for each of the 48 states that the putative Class Members reside in."). The Court held that "these [choice-of-law] issues alone [prevented] class certification." *Id.* at 9.

The Court also observed that Plaintiff's substantive claims may also require individualized inquiries that could have further undermined Plaintiff's ability to satisfy Rule 23(b)(3)'s predominance requirement. *Id.* at 9-12. The Court made this observation with the understanding that Plaintiff's only proposed method of common proof for its minimum wage and rest break claims was that: (1) Defendants paid drivers on a per mile basis, and (2) did not maintain a policy that specifically provided drivers with meal or rest breaks. *Id.* at 10 ("While there is evidence that Defendants maintain a policy of compensating drivers based on mileage, there is no evidence that Defendants maintain a policy of not paying drivers minimum wage."); *id.* at 12 ("USX's failure to maintain an affirmative policy providing for meal and rest breaks, *on its own*, is insufficient to establish a common theory of liability.") (emphasis added). The existence of these policies, without more, was insufficient to establish predominance.

Now pending before the Court is Plaintiff's renewed Motion for Class Certification

[2] The Court finalized its tentative ruling issued on December 24, 2016 in a Minute Order three days later. *See* Docket No. 84.

("Mot."). *See* Docket No. 102. Plaintiff claims to address each of the concerns raised in the Court's prior ruling by (1) amending the class definition to include only California residents, (2) providing additional evidence that he can prove his substantive claims on a class-wide basis with limited individualized inquiry, and (3) drawing the Court's attention to relevant cases published since the Court's ruling. *Id.* at 1:20-2:11. Defendants have opposed the Motion, *see* Opp'n to Mot. ("Opp'n"), Docket No. 109, to which Plaintiff has replied, *see* Reply, Docket No. 110.

II. Legal Standard

The proponent of class treatment bears the burden of demonstrating that class certification is appropriate. *See Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2361 (2013); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982). Before certifying a class, the trial court must conduct a "rigorous analysis" to determine whether the party seeking certification has met the prerequisites of Rule 23 of the Federal Rules of Civil Procedure. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996).

Rule 23 requires the party seeking certification to satisfy all four requirements of Rule 23(a)[3] and at least one of the subparagraphs of Rule 23(b).[4] *See id.* at 1234. The Court is permitted to consider any material necessary to its determination, though it should not engage in a trial of the merits. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011) (noting that the "rigorous analysis" required at class certification will "[f]requently . . . entail some overlap with the merits of the plaintiff's underlying claim"); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) ("[I]t is not correct to say a district court *may* consider the merits to the extent that they overlap with class certification issues; rather, a district court *must*

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[3] Rule 23(a) requires that the party/parties seeking certification show:

(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).

[4] Here, Plaintiff seeks certification under Rule 23(b)(3). A class may be certified under Rule 23(b)(3) where questions of law or fact common to members of the class predominate over questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *See* Fed. R. Civ. P. 23(b)(3).

consider the merits if they overlap with the Rule 23(a) requirements."); *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 949 (9th Cir. 2011) (characterizing as "a correct statement of law" the district court's determination that "although it could not 'weigh the evidence or otherwise evaluate the merits of a plaintiff's class claim,' it could 'compar[e] the class claims, the type of evidence necessary to support a class-wide finding on those claims, and the bearing of those considerations on Rule 23 certification'"); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 947 n.15 (9th Cir. 2009) ("The district court may consider the merits of the claims to the extent that it is related to the Rule 23 analysis."); *Blackie v. Barrack*, 524 F.2d 891, 900-01 & n.17 (9th Cir. 1975) (approving of class certification analysis where district judge "analyzed the allegations of the complaint and the other material before him (material sufficient to form a reasonable judgment on each requirement), considered the nature and range of proof necessary to establish those allegations, determined as best he was able the future course of the litigation, and then determined that the requirements were met at that time," and noting that a court is permitted to "request the parties to supplement the pleadings with sufficient material to allow an informed judgment on each of the Rule's requirements").

III. Analysis

Plaintiff contends his renewed motion avoids the predominance issues that plagued his first attempt because he narrows the class definition to include only drivers who reside in California. Mot. at 1:20-2:11. Plaintiff also submits additional evidence and argument that addresses his ability to prove his labor code claims on a class-wide basis. *Id.*

Defendants argue that nothing has changed, and that Plaintiff again fails to satisfy the predominance requirement of Rule 23(b)(3). Opp'n at 1:5-2:9. Specifically, Defendants maintain that individualized inquiries will still dominate common ones with regard to both choice-of-law as well as Plaintiff's legal claims. *Id.* The Court will address the predominance issue first, as Defendants do not contest Plaintiff's ability to meet the other requirements of Rule 23.

A. Predominance

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members," in addition to a finding that the class device is "superior" to other available methods for fairly and efficiently adjudicating the controversy. *See* Fed. R. Civ. P. 23(b)(3). "The predominance inquiry of Rule 23(b)(3) asks

'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (quoting *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001)).

Predominance analysis is "much more rigorous" than commonality analysis. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). It does not involve counting the number of common issues, but weighing their significance. *See, e.g., Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) (contrasting the "number and importance" of common issues with the "few" and "relatively easy" individualized issues). In addition, the predominance analysis looks, at least in part, to whether there are common issues the adjudication of which "will help achieve judicial economy," further the goal of efficiency and "diminish the need for individual inquiry." *See Vinole*, 571 F.3d at 939, 944 (quoting and citing *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001)); *see also In re Wells Fargo*, 571 F.3d at 958 ("A principal purpose behind Rule 23 class actions is to promote 'efficiency and economy of litigation.'") (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)).

1. Plaintiff's New Class Definition Eliminates the Need for Individualized Choice-of-Law Analyses

The Court's primary reason for denying Plaintiff's first motion for class certification was its concern over the need for individualized choice-of-law analyses. *See* Ruling at 9. Plaintiff argues that its new class of only California residents eliminates this need. Mot. 8:1-25. Plaintiff further argues that because each class member lives in California and only brings claims related to work performed in California that he can easily establish that California law applies to all potential class members' claims, and more importantly, that he can do so on a common basis. *Id.* at 8:24-10:10.

The Court agrees with Plaintiff that the new class definition solves the predominance issues related to choice-of-law. This is because the Court will no longer need "to perform a conflict-of-law analysis for each of the 48 states that the putative members reside in." Ruling at 7. Therefore, to the extent the Court needs to address the "complex analysis" required in order to determine whether California or Tennessee law governs, it may do so without performing the type of individualized inquiry that would destroy predominance. *Cf. Sullivan v. Oracle Corp.*,

51 Cal.4th 1191 (2011); *Utility Consumers Action Network v. Spring Solutions, Inc.*, 259 F.R.D. 484, 487-88 (S.D. Cal. 2009) (denying class certification where laws of 50 states were at issue, emphasizing that class action would not be manageable due to choice-of-law analyses); *Vengurlekar v. Silverline Techs., Inc.*, 220 F.R.D. 222, 232 (S.D.N.Y. 2003) (denying class certification because it was "far from clear that the New Jersey [labor] statute applies to all of the wage claims of the proposed class members . . . whether analyzed in terms of commonality, typicality, or predominance, the cohesiveness between plaintiffs and class members needed to justify class certification is glaringly absent"). In short, because Plaintiff's class now consists only of California residents asserting claims based solely on work performed in California, the choice of law analysis is no longer a predominance issue.

Defendants nonetheless contend that class certification remains inappropriate based on choice-of-law principles. Rather than actually attack predominance on this basis, Defendants argue that Plaintiff cannot demonstrate that California law applies to the claims of his proposed class *at all* because California lacks significant contact with the class members. Opp'n at 3:1-9:23. Defendants also argue that, even if California has a sufficient interest in Plaintiffs' claims, Tennessee's interest in adjudication of those claims is stronger than California's. *Id.* at 9:24-14:15. Defendants' argument is not well-taken.

"A federal court sitting in diversity must look to the forum state's choice of law rules to determine the controlling substantive law."[5] *Mazza*, 666 F.3d at 589 (citation omitted). "Under California's choice of law rules, the class action proponent bears the initial burden to show that California has 'significant contact or significant aggregation of contacts' to the claims of each class member." *Id.* (quoting *Wash. Mut. Bank v. Superior Court*, 24 Cal.4th 906, 921 (Cal. 2001)). "Such a showing is necessary to ensure that application of California law is constitutional. Once the class action proponent makes this showing, the burden shifts to the other side to demonstrate that foreign law, rather than California law, should apply." *Id.* (internal quotation marks and citations omitted).

As the Ninth Circuit explained in *Mazza*:

> California law may only be used on a class-wide basis if "the interests of other states are not found to outweigh California's interest in having its law applied." To determine whether the

[5] Both parties agree that *Mazza* is the appropriate analysis. *See* Mot. at 8:24-25; Opp'n at 3:1-12. However, the impact of *Mazza* is greatly diminished given that Plaintiff's class is no longer nationwide.

> interests of other states outweigh California's interest, the court looks to a three-step governmental interest test:
>
> First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different.
>
> Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists.
>
> Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be more impaired if its law were not applied.

Id. at 590 (quoting *McCann v. Foster Wheeler LLC*, 48 Cal.4th 68, 81-82 (Cal. 2010); *Wash Mut. Bank*, 24 Cal.4th at 921).

In *Mazza*, the Ninth Circuit found that California had a constitutionally sufficient aggregation of contacts to the claims of each putative class member in a false advertising lawsuit because the defendant's headquarters, the advertising agency's headquarters, and one fifth of the proposed class members were all located in California. *Id.* However, the Ninth Circuit held that the district court "abused its discretion in certifying a class under California law that contained class members who purchased or leased their car in different jurisdictions with materially different consumer protection laws." *Id.* The Circuit explained that there were material differences between the elements of a false advertising claim under the various state statutes, as well as the remedies provided. *Id.* at 591. In addition, the Circuit held that the district court had failed to adequately recognize that each foreign state had an interest in applying its law to transactions within its borders, because "if California law were applied to the entire class, foreign states would be impaired in their ability to calibrate liability to foster commerce"; moreover, the district court had failed to recognize that "California's interest in applying its law to residents of foreign states is attenuated." *Id.*

Here, all of the potential class members reside in California and all of the work that gives rise to the class claims occurred in California. Mot. at 1:13-19. These facts are enough to

establish that California has "significant contact or aggregation of contacts" to the claims of each putative Class Member. *See Mazza*, 666 F.3d at 589. Such a finding is in keeping with state and federal decisions permitting California residents to bring wage and hour claims that arise from work in the state, regardless of where their employer is located, or whether the entirety of their work is performed in California. *See e.g.*, *Bernstein v. Virgin America, Inc.*, 227 F.Supp.3d 1049, 1059-61 (N.D. Cal. 2017) ("Plaintiffs are not barred from asserting claims under California's wage and hour laws simply because they did not work exclusively or principally in California."); *Bernstein v. Virgin America, Inc.*, Case No. 15-CV-02277-JST, 2016 WL 6576621, *6 (N.D. Cal. November 11, 2016) (certifying class of flight attendants even though most of their work was performed out of state and noting "it is clear…that members of the proposed Class can recover unpaid wages for time worked within California."); *Sullivan v. Oracle,* 51 Cal.4th 1191, 1199-1200 (2011) (holding that California wage and hour laws apply to non-resident workers whose claims arise from work performed in California and that the choice-of-law analysis indicates that California's interest outweighs the interest of the employees' home states).

Courts also routinely apply California wage and hour laws in actions brought by California employees who sign out of state choice-of-law agreements. *See, e.g., Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1123-25 (9th Cir. 2012) (overturning district court's enforcement of a Georgia choice of law provision in a wage and hour action by California resident truck drivers against a Georgia based company because California's interest was materially greater than Georgia's); *DHR Int'l Inc. v. Charlson*, No. C-14-1899-PJH, 2014 WL 4808752 (N.D. Cal. September 16, 2014) (applying California law despite choice of law provision contained in contract between employee and Illinois corporation); *Pinela v. Neiman Marcus Group, Inc.*, 238 Cal.App.4th 227, 257 (2015) (finding that California's interest in enforcing its own worker protections was materially greater than Texas's interest in its employer's ability to have a uniform wage and hour regime); *Saravia v. Dynamex, Inc.*, 310 F.R.D. 412, 419 (N.D. Cal. 2015) ("California has a materially greater interest than Texas in adjudicating this dispute inasmuch as plaintiff is located in California, and the agreements at issue were executed and performed in California, while Texas's only interest in the dispute arises out of the fact that one of the defendants is headquartered there.") This Court agrees with the ample authority cited above and holds that California law can (and should) apply to all the

members of Plaintiff's proposed class because they are all California residents whose claims arise exclusively from work performed within the state.

The Court's application of California law to the potential class claims is also consistent with the recent decision in *Oman v. Delta Air Lines, Inc.*, Case No. 15-CV-00131-WHO, 2017 WL 66838 (N.D. Cal. January 1, 2017), cited by Defendants, which held that Cal. Lab. Code Section 226, which requires that employers include certain information on wage statements, did not apply to claims brought by a class of flight attendants who worked only a de minimis amount of their working time in California. *Id.* at 5-7. In so holding, Judge Orrick was careful to distinguish from both *Bernstein* and *Sullivan* on the grounds that (1) the purpose of Section 226 differs from that of other wage laws and regulations and (2) the flight attendants did not rely on their residency in their briefing.[6] *Id.* at 6-7.

Here, the proposed class members' claims are not based exclusively on Section 226, but also arise from violations of Labor Code provisions requiring payment of minimum wage and mandatory meal and rest breaks. *See generally* Compl. The proposed class members are all California residents, and drivers working for Defendants racked up 14,291,965 California miles in 2016 alone. *See* Opp'n at 8-9 (listing proportion of Defendants' business that is conducted in California). Furthermore, Plaintiff's claims arise entirely from worked performed in the state. As a result, Plaintiff's proposed class is easily distinguishable from the class in *Oman*. The Court also finds that *Vidrio v. United Airlines Inc.*, No. CV-15–7985 PSG-MRWx, 2017 WL 1034200, *4 (C.D. Cal. March 15, 2017) also cited by Defendants, is distinguishable for the same reasons. *See id.* (ruling that Section 226 did not apply to flight attendants working for an out of state airline when less than 18% of the work reflected on a given pay stub was performed inside of California).

Further, under *Mazza*, Defendants must show that Tennessee's laws are in conflict with California's, and that Tennessee's interest in applying its own wage and hour laws to California's residents performing work in California for a Tennessee based company outweighs California's interest in doing the same. Defendants have not done so.[7]

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[6] Judge Orrick observed the purpose of Section 226 was to allow employees to be able to examine their pay to make sure it was in compliance with California's broader wage protections. *Oman*, 2017 WL 66838 at 5. Presumably, that purpose is not furthered when only a de miminis amount of the work reflected on the wage statement is subject to California's more substantive wage protections.

[7] Defendants' briefing never articulates how or why Tennessee's interest is stronger than California's. Instead,

In sum, the Court finds that choice-of-law issues are no longer a basis for denying class certification on predominance and/or commonality grounds. The Court also finds that California law should apply to California residents bringing substantive Labor Code claims based on work performed exclusively in California, even if those employees also perform work for the same employer out of state. *See e.g.*, *Bernstein*, 227 F.Supp.3d at 1059-61; ("Plaintiffs are not barred from asserting claims under California's wage and hour laws simply because they did not work exclusively or principally in California."); *Bernstein*, 2016 WL 6576621 at *6; *Sullivan*, 51 Cal.4th at 1199-1200.

B. Plaintiff Can Establish Predominance

Plaintiff also addresses the Court's previous concerns related to class-wide proof for his substantive claims. Defendants largely rest on the Court's previous ruling.

Plaintiff submits evidence that potential class members were compensated on a per mile basis without regard to time spent on certain non-productive work tasks that Plaintiff contends require compensation under California law. *See* Declaration Jacqueline Thompson ("Thompson Decl"), Docket No. 64-4 at Exs. 5, 11-13; *see also* Plaintiff's Motion For Class Certification, Docket No. 64 at pp. 2-4 (summarizing Defendants' mileage based pay structure). Plaintiff contends that this payment scheme results in Defendants' failure to pay minimum wage for all time worked by class members, including time spent waiting for loads, route planning, and other related tasks. Mot. at 16:9-21; Thompson Decl., Docket No. 64-7 at p. 40. Plaintiff argues that, because this payment structure is uniform and uniformly denies pay for time spent performing non-productive work, Plaintiff's claim is subject to common proof, and that most, if not all of the individualized inquiries needed will relate to damages, not liability. Mot. at 16:9-21.

Plaintiff also submits evidence that Defendants, as a matter of uniform policy, require drivers to (1) secure their loads at all times, and (2) respond to Drivertech messages at all times. *See* Declaration of Justin Swidler ("Swidler Decl."), Docket No. 102-2 at ¶¶ 7-9; see also *id.* Ex. 3 at USX_0004055-57; Declaration of Anthony Ayala ("Supp. Ayala Decl.") ¶ 11, Docket No.

Defendants cite to, and discuss *Oman* and *Vidrio* in the context of predominance. *See* Opp'n at 13:20-14:15. In doing so, Defendants blur the line between the predominance arguments they successfully levied against Plaintiff's first proposed class and their new contention that choice-of-law principles prohibit any California wage claims against Defendants. The result is that Defendants fail to prove Plaintiff's claims belong under Tennessee law, or that the Court will be required to engage in individualized inquiries to determine what law should apply. While it may be true that different class members spent varying amounts of work time in California, Defendants do not explain how those differences would require the type of "47 state" analyses disapproved of in the Court's previous Order.

102-3; Declaration of Richard J. Barlow, Jr. ("Barlow Decl.") ¶ 12, Docket No. 102-3; Declaration of Thomas Bryan ("Bryan Decl.") ¶ 7, Docket No. 102-3; Declaration of Russell Charette ("Charette Decl.") ¶ 13; Docket No. 102-3; Declaration of Chrie Chism ("Chism Decl.") ¶ 9, Docket No. 102-3; Declaration of Eddie Magana ("Magana Decl.") ¶ 8; Docket No. 102-3; Declaration of Monica Mendoza ("Mendoza Decl.") ¶ 7, Docket No. 102-3. Plaintiff argues that any time Defendants charge class members with these two responsibilities is working time. As a result, Class members' time is improperly logged as sleeper birth time and not compensated. *See* Mot. at 4:21-5:6; 17:4-18:2. Similarly, Plaintiff contends that while charged with performing these two tasks, class members cannot take legally compliant meal or rest breaks because they remain on duty.

1. Minimum Wage for Off the Clock Work

Plaintiff argues that California law requires piecemeal employees to be separately compensated for time spent on non-productive work tasks. Mot. 13:20-14:18. Plaintiff further argues that Defendants fail to pay class members as a result of uniform policies that require the completion of certain non-productive tasks, "such as trip planning, pre-trip and post-trip inspections, fueling, waiting to load and unload, and completing paperwork," but do not compensate drivers for that time. *Id.* at 16:9-23. As a result, Plaintiff contends that these claims can be established without performing individual inquiries into the amount of time any single class member spent on such tasks. *Id.* Defendants argue that the Court's previous ruling already addressed Plaintiff's theory and that individual issues still predominate. Opp'n at 14:26-16:14.

As an initial matter, the Court points out that Plaintiff's arguments and evidence go beyond that presented during the first round of briefing. *See*, *supra* at 11-12 (citing Plaintiff's additional evidence submitted with renewed motion). The Court also agrees with Plaintiff that *Vaquero v. Stoneledge Furniture, LLC*, 9 Cal.App.5th 98, 110 (2017), provides important clarification regarding Plaintiff's minimum wage claims. Mot. 15:19-16:8. *Vaquero* makes clear that Defendants' policy of failing to separately compensate its piecemeal employees for rest periods and other time spent on non-productive work tasks, *may* give rise to liability. *See Vaquero,* 9 Cal.App.5th at 110 (holding that employers are required to "separately compensate employees for rest periods if an employer's compensation plan does not already include a minimum hourly wage for such time."); *see also Bluford v. Safeway Stores, Inc.*, 216

Cal.App.4th 864, 872 (2013) (failing to provide separate pay for ten-minute rest periods "is akin to averaging pay to comply with the minimum wage law . . . [which] is not allowed under California labor law"). *Vaquero* also approved of federal district cases holding the same. 9 Cal.App.5th at 110, (citing cases); *see also Perez v. Sun Pac. Farming Copp., Inc.*, No. 1:15-CV-00259-KJM-SKO, 2015 WL 3604165, *5 (E.D. Cal. June 5, 2015) (citing and analyzing federal court cases interpreting California Wage orders to require separate compensation for time spent on work tasks for employees compensated on a piecemeal basis). Not only does *Vaquero* indict Defendants' compensation structure generally, it also suggests that Plaintiff's minimum wage claim is susceptible to class wide resolution. This is because Plaintiff must only prove that Defendants' per mile pay scale does not adequately compensate class members for all the tasks they perform. Plaintiff will not need to prove that any individual employee was ever paid less than minimum wage in a given hour, only that Defendants' uniform policy denied compensation for tasks that require compensation. The only individual inquiries necessary will concern the exact amount of non-compensated work performed by each class member, and will thus relate only damages, and not liability. *See Leyva v. Medline Indus.* Inc., 716 F.3d 510, 513-514 (9th Cir. 2013) ("[T]he amount of damages is invariably an individual question and does not defeat class action treatment.").

Several courts in this Circuit have granted certification for wage claims like Plaintiff's, brought by piecemeal employees whose employers did not separately compensate for non-productive work time. *See e.g.*, *Ridgeway v. Wal-Mart Stores Inc.*, No. C-08-05221-SI, 2014 WL 4477662 (N.D. Cal. September 2014); *Taylor v. FedEx Freight, Inc.*, No. 13-CV-1137-LJO-BAM, 2015 WL 2358248 (E.D. Cal. May 15, 2015) (certifying class because plaintiff's theory that "Defendant's mileage pay plan systematically [failed] to separately compensate employees for non-driving activities did not require "identify[ing] specific hours that were not compensated below minimum wage for each class member"); *Mendez v. R+L Carriers, Inc.*, No. C-11-2478-CW, 2012 WL 5868973 (N.D. Cal. November 19, 2012); *cf. Sali v. Universal Health Servs. of Rancho Springs, Inc.*, No. CV-14-985-JPRx, 2015 WL 12656937 (C.D. Cal. June 3, 2015) (denying certification for meal and rest break class where formal lawful policies existed and liability depended upon proving employees were pressured to voluntarily waive their breaks); *Washington v. Joe's Crab Shack*, 271 F.R.D. 629, 641 (N.D. Cal. 2010) ("A plaintiff must do more than show that a meal break was not taken to establish a violation . . . he must show that the

employer impeded, discouraged, or prohibited him from taking a proper break."); *Ordonez v. Radio Shack, Inc.*, No. CV 10-7060-CAS (JCGx), 2013 WL 210223, at *7 (C.D. Cal. Jan. 17, 2013) ("[I]n the absence of a uniform corporate policy, there is no common issue capable of resolution on a classwide basis.").

The present case is factually similar to *Ridgeway* and *Taylor*. In *Ridgeway*, a class of Wal-Mart truck drivers sought certification for claims based on Wal-Mart's failure to compensate for all work tasks, including pre-trip and post-trip inspections; rest breaks; fueling the tractors; washing the tractors; weighing the tractors; completing mandatory paperwork; wait time; and layover periods. *Ridgeway*, 2014 WL 4477662 at 7-9. Pursuant to Wal-Mart guidelines the drivers were paid piecemeal, in addition to receiving pay for some tasks that were deemed compensable, but not for all tasks for which compensation was required. *Id.* The class was certified despite Wal-Mart's contention that each driver's work day would need to be individually scrutinized to determine if working tasks were completed without compensation. *Id.* The court rejected Wal-Mart's arguments and held that several common issues would predominate, specifically "whether Wal-Mart's piece-rate pay plan violate[d] California's minimum wage laws; whether drivers remained under Wal-Mart's control during layovers, rest breaks, and wait-times; and whether Wal-Mart's drivers are entitled to payment of at least minimum wages for all hours worked." *Id.* Certification was granted on similar facts in *Taylor*, where the court found that common issues predominated, including whether Fedex's "mileage pay formula adequately compensate[d] drivers for tasks that are not included in mileage pay… whether FedEx drivers [were] entitled to payment of at least minimum wages for all hours worked…and whether non-driving activities occurring during time set aside for fixed rate activities satisfie[d] the minimum wage requirement for those tasks." *Taylor*, 2015 WL 2358248 at 12.

Here, like in *Ridgeway* and *Taylor*, Plaintiff contends that Defendants maintain a per mile compensation rate that fails to compensate employees for time spent on non-productive work tasks. Plaintiff contends that Defendants not only fail to pay class members for time spent performing these tasks, but Defendants also require that class members perform certain tasks *all of the time*, including when they are on meal and rest breaks or during sleeper berth time. *See* Mot. at 17:19-18:2; 19:7-20. As a result, several common issues emerge that make resolution of the core of Plaintiff's claims amenable to class-wide proof.

Defendants rely too heavily on *Burnell v. Swift Transp. Co of Ariz., LLC*, No. 10-809-VAP, 2016 WL 2621616 (C.D. Cal. May 4, 2016). In *Burnell* "plaintiffs [provided] no evidence demonstrating that [defendant] had a general policy not to pay drivers minimum wage for all work completed pursuant to a general policy." *Id.* at 3. *Burnell* also assumed that the employer could potentially build its compensation for non-productive tasks into its mileage based scheme. *Id.* As addressed above, California law has since been clarified on this point, such that Defendants may still be liable for any uncompensated working time, regardless of the amount of time each Plaintiff spent completing uncompensated tasks. *See*, *supra* at 12-13 (discussing applicable law as clarified in *Vaquero*). Thus, unlike in *Burnell*, Plaintiff's minimum wage claim will not require extensive individualized inquiries until the damages phase.

2. Common Issues Predominate for Plaintiff's Remaining Claims

Plaintiff contends that California law requires Defendants to compensate drivers for all time spent under their "control" – time that Plaintiff argues includes any time drivers are required to secure their load and respond to Drivertech system alerts. Plaintiff argues this policy leads to illegal "on call" breaks. *See Augustus v. ABM Security, Inc.*, 2 Cal.5th 257, 271 (2016) (holding that California law prohibits employers from requiring employees to "to shoulder an affirmative responsibility to remain on call, vigilant, and at the ready during their rest periods"). Plaintiff presents evidence that Defendants require all class members to shoulder the affirmative responsibilities of securing their loads and responding to system alerts at all times. *See* Swidler Decl. Ex. 3 at USX_0004055- 57, Ex. 7 at 65:8-66:15; Ex. 6 at 32:14-33:9; Supp. Ayala Decl. ¶ 11; Barlow Decl. ¶ 12; Bryan Decl. ¶ 7; Charette Decl. ¶ 13; Chism Decl. ¶ 9, Magana Decl. ¶ 8; Mendoza Decl. ¶ 7. As such, liability will turn on whether "securing the load" and responding to alerts messages rises to the level of employee control that would turn any break periods provided into impermissible on call breaks, that would consequently require compensation. *See Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 587 (2000) (finding that "plaintiffs' compulsory travel time, which include[d] the time they spent waiting for Royal's buses to begin transporting them, was compensable"). Defendants argue that the *Augustus* holding should not affect the Court's predominance analysis because some drivers dispute whether or not Defendants required them to perform these tasks. Opp'n 23:7-18. The Court disagrees. *See Bartoni v. American Medical Response West*, 11 Cal.App.5th 1084, 1103 (2017) (reversing denial of class certification of meal and rest break period in light of the *Augustus* decision). While the details of the individual

drivers' experiences may inform this inquiry, whether or not individual class members actually performed these tasks is secondary to whether Defendants' policies placed the type of affirmative burden prohibited by *Augustus*. *See Morillion*, 22 Cal.4th at 583 ("An employee who is subject to an employer's control does not have to be working during that time to be compensated.").

Several of Plaintiff's remaining claims rely on this theory. First, Plaintiff argues Defendants' requirement that class members secure their loads and respond to alerts during time spent in their sleeping berths means Defendants owe, but have not paid compensation for that time. Mot. at 17:4-18:2. Plaintiff also argues that because class members remain under Defendants' control when required to perform these tasks, they are by definition denied their mandatory ten-minute, paid breaks, as well as their unpaid meal breaks *because they are always on duty*. *Id.* at 18:23-19:20; *see Augustus*, 385 P.3d at 833. The Court need not address the full merits of Plaintiff's application of *Augustus* to the facts presented, the Court only asks whether Plaintiff's theory will live or die on a class-wide basis. Because all sleeper berth time claims, and meal and rest break claims turn on a single issue-whether Defendants exert "control" over class members pursuant to *Augustus* by requiring them to secure their loads and respond to Drivertech messages – the Court would find that all of these claims are subject to common proof.[8] Defendants may challenge, and ultimately prevail on this crucial issue, but cannot do so at the certification stage.[9]

Rule 23(b)(3) is also satisfied because a class action is the superior method for resolving Plaintiff's and the class's claims. The class members' interests in individually controlling . . .

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[8] *Burnell's* holding with respect to meal and rest breaks is similarly distinguishable from the present case because here, unlike in *Burnell*, Plaintiff intends to show Defendants' policy of requiring certain tasks to be performed at all times, precluded class members from ever taking an actual, legally compliant break. 2016 WL 2621616 at 37. *Burnell* did not involve allegations, or evidence that drivers were, as a matter of uniform policy or practice forced to return messages and secure their load at all times. *See id.* ("Plaintiffs have not shown Swift had a general policy of not providing meal and rest breaks, and there is evidence in the record of drivers taking meal and rest breaks without interference from Swift.") Even if the Court ultimately concludes that the "tasks" Plaintiff contends prevented them from taking legally compliant breaks are not the same as those at issue in *Augustus*, such a determination can be made on a class-wide basis.

In other words, either Defendants required tasks that interfered with breaks, or they did not. *Burnell's* denial of class certification was in large part based on an assumption that the defendant had no policy that required work during breaks. *Id.* It was also entered in the absence of the type of evidence Plaintiff provides that Defendants placed certain affirmative burdens on class members at all times.

[9] Defendants devote a large segment of their Opposition to an attack on the merits of Plaintiff's claims. *See* Opp'n at 15:26-20:18. This argument is premature and better suited for a motion for summary judgment or at trial.

separate actions," Fed. R. Civ. P. 23(b)(3)(A), must be considered through the lens of the employer-worker relationship. There are "strong disincentives" for employees to step forward with claims against a current or former employer. *Rutti v. Lojack Corp.*, No. SACV 06-350 DOC (JCx), 2012 WL 3151077, at *5 (C.D. Cal. July 31, 2012). Class action litigation effectively deters and redresses violations of wage-and-hour statutes, consistent with the strong remedial policies embodied in those statutes for employee protection. *See, e.g., Sav-on Drug Stores, Inc. v. Super. Ct.*, 34 Cal.4th 319, 339-40 (2004); *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1537-38 (2008). This case involves hundreds of class members with claims against USX based on the same unlawful policies and practices. Consolidation of these claims will conserve judicial resources. *See, e.g., Pole v. Estenson Logistics, LLC*, No. CV 15-07196 DDP (Ex), 2016 WL 4238635, at *9 (C.D. Cal. Aug. 10, 2016).

Moreover, a class action is a superior method for resolving this dispute because this litigation will be manageable as a class action. Fed. R. Civ. P. 23(b)(3)(D). "The greater the number of individual issues to be litigated, the more difficult it will be for the court to manage the class action." *Hootkins v. Chertoff*, No. CV 07-5696 CAS (MANx), 2009 WL 57031, at *8 (C.D. Cal. Jan. 6, 2009). As discussed above, the Court finds that common questions predominate over individual questions. The Court agrees with Plaintiff that calculation of damages in this case will be relatively straightforward. Thus, the litigation will be manageable as a class action, and a class action is the superior method for adjudication.

In sum, the Court would find that Plaintiff's berth time, rest break claims, and derivative failure to pay premium wages claims are amenable to class resolution.[10] The Court would find that the predominance and superiority elements of Rule 23(b) are satisfied.

C. Plaintiff Satisfies the Remaining Certification Elements

Defendants do not substantively contest the remaining certification factors. The Court must nonetheless perform a searching analysis before it can certify the class.

1. The Class Is Sufficiently Numerous that Joinder is Impracticable

Rule 23(a) requires that "the class be so numerous that joinder of all members is

[10] Common questions also predominate with regard to Plaintiff's wage statement claims, which depend on evaluating Defendants' uniformly issued wage statement on an objective standard. *See* § 226(e)(2)(C); *Perez v. Safety-Kleen Sys., Inc.*, Nos. C 05-5338 PJH, C 07-0886 PJH, 2007 WL 1848037 at *9 (N.D. Cal. June 27, 2007). The same is true for Plaintiff's UCL claims, which are derivative of other certifiable claims. *See Mendez*, 2012 WL 5868973, at *19.

impracticable." *See* Fed. R. Civ. P. 23(a)(1); *See Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964); *Aarons v. BMW of N. Am., LLC*, No. CV 11-7667 PSG (CWx), 2014 WL 4090564, at *6 (C.D. Cal. Apr. 29, 2014). According to USX, 596 drivers worked in California during the class period and had residences in California. *See* Docket No. 41-2 at 6. Joinder of 596 employees would be impracticable. *See, e.g., Thomas v. Baca*, 231 F.R.D. 397, 400 (C.D. Cal. 2005). The Court would find that the numerosity element is met.

2. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact [which are] common to the class." This commonality requirement has been permissively construed. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Although there must be common questions of law or fact, it is not necessary that all questions of law or fact be common. *See id.* ("The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."); *see also Staton v. Boeing Co.*, 327 F.3d 938, 953-57 (9th Cir. 2003). "[O]ne significant issue common to the class may be sufficient to warrant certification." *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 (9th Cir. 2007).

The Ninth Circuit has made clear that Rule 23(a)(2) is more lenient than the related requirement in Rule 23(b)(3) that common questions of fact or law predominate. *Hanlon*, 150 F.3d at 1019; *see also Perry v. U.S. Bank*, No. C-00-1799-PJH, 2001 U.S. Dist. LEXIS 25050, at *20 (N.D. Cal. Oct. 17, 2001) (finding that Rule 23(a)(2) was satisfied but Rule 23(b)(3) was not). For purposes of Rule 23(a)(2), the common questions need only exist, even if they are not the predominant questions in the case.

As detailed above in the Court's predominance analysis, common questions exist pertaining to the legality of Defendants' failure to pay for non-productive work time, as well as whether Defendants sufficiently relinquished control over class members during meal and rest breaks and during time spent in sleeper berths. *See, supra* Section III.B (finding Plaintiff can demonstrate predominance). Plaintiff has established the commonality element.

3. Typicality

Rule 23(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "Typicality refers to the nature of the

claim or defense of the class representative, and not to the specific facts from which it arose." *Id.* (citation and internal quotation marks omitted). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Id. (citation and internal quotation marks omitted). In practice, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

A claim is typical if it: (1) arises from the same event or practice or course of conduct that gives rise to the claims of other class members; and (2) is based on the same legal theory as their claims. *See Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). The representative plaintiffs' claims need not be identical to those of the class, but rather need only be "reasonably co-extensive with those of absent class members." *Hanlon*, 150 F.3d at 1020. As with the commonality requirement, therefore, typicality is liberally construed.

Here, the Class Plaintiff's claims are reasonably co-extensive with the claims of the individuals he seeks to represent. Typicality is met.

4. Adequacy

Class Plaintiff has demonstrated that he has selected qualified counsel and that he and said counsel do not suffer from interests antagonistic to the remainder of the class. *See Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir.), *cert. denied sub nom., Las Vegas Sands, Inc. v. Local Joint Executive Bd. of Las Vegas*, 534 U.S. 973 (2001).

Swartz Swidler LLC (by Justin Swidler, and Richard Swartz), Law Offices of James M. Sitkin (by James M. Sitkin), and Goldstein, Borgen, Dardarian & Ho (by David Borgen, James Kan, and Raymond Wendell) seek appointment as Class Counsel pursuant to Rule 23(g). For the reasons fully set forth in their previously filed declarations (Docket Nos. 67-1, 67-2, 67-3), and in the absence of any argument from Defendants, the Court would find that Plaintiff's counsel are adequate and would appoint these law firms and specifically the identified attorneys as Class Counsel pursuant to Rule 23(g).

IV. Conclusion

For all of the foregoing reasons, the Court would GRANT Plaintiff's Motion for Class Certification.