

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

YVONNE DALTON,  
*individually and on behalf of all others  
similarly situated*

Plaintiffs,

vs.

LEE PUBLICATIONS, INC.,

Defendant.

CASE NO. 08cv1072-GPC-NLS

**ORDER GRANTING IN  
PART AND DENYING IN  
PART DEFENDANT'S  
RENEWED MOTION TO  
DECERTIFY**

[DKT. NO. 154]

Before the Court is Defendant Lee Publications, Inc.'s renewed motion to decertify the class. (Dkt. No. 154.) Plaintiffs opposed the motion and Defendants submitted a reply to the opposition papers. (Dkt. Nos. 157, 158, 159 and 161.) A hearing was held on the motion on December 7, 2012. After careful consideration of the parties' arguments and applicable law, the Court hereby **GRANTS** in part and **DENIES** in part Defendant's renewed motion to decertify the class.

**PROCEDURAL BACKGROUND**

On August 27, 2008, Plaintiffs filed their first amended complaint which alleged nine causes of action for failure to pay minimum wage, hourly wages and overtime wages (first cause of action); failure to provide meal periods (second cause of action), failure to provide rest breaks (third cause of action); failure to reimburse

1 business expenses (fourth cause of action); unlawful withholding of wages due  
2 (fifth cause of action); failure to provide itemized wage statements (sixth cause of  
3 action); failure to keep accurate payroll records (seventh cause of action); waiting  
4 time penalties (eighth cause of action); and unfair business practices (ninth cause of  
5 action). (Dkt. No. 9.)

6 On March 12, 2010, Defendants filed a motion for partial summary judgment  
7 as to Plaintiff Hector Salgado. (Dkt. No. 53.) On March 22, 2011, the Court granted  
8 partial summary judgment in favor of Defendants and against Plaintiff Salgado on  
9 the sixth, seventh and eighth causes of action. (Dkt. No. 99 at 10). In addition, the  
10 Court granted partial summary judgment in favor of the Defendants as to meal  
11 claims and non-Sunday rest period claims. (Id.)

12 On October 4, 2012, this Court granted Defendant leave to file a renewed  
13 motion to decertify the class based on the premise that Plaintiffs were unable to  
14 present common evidence at trial under Rule 23(a)(2).<sup>1</sup> (Dkt. No. 150.) At a hearing  
15 on the motion to decertify class held on December 7, 2012, the parties stipulated  
16 that only four causes of action remain in this class action case: failure to pay  
17 minimum wage, hourly wages and overtime wages (first cause of action); failure to  
18 provide rest breaks, or compensation in lieu thereof (third cause of action); failure  
19 to reimburse reasonable business expenses (fourth cause of action); and unfair  
20 business practices (ninth cause of action). (Dkt. No. 9, Amended Complaint; Dkt.  
21 No 164, Transcript of Decert. Hearing at 3). Consequently, the Court limits its  
22 review of class certification to these four causes of action.

### 23 **FACTUAL BACKGROUND**

24 Lee Publications, doing business as North County Times (“NCT”), is a  
25 newspaper of general circulation in the San Diego area. Plaintiffs are former home-  
26 delivery newspaper carriers for NCT. Plaintiffs allege, as a group, newspaper

---

27  
28 <sup>1</sup> Defendant does not contest the other Rule 23(a) prerequisites in the motion to decertify and  
the Court does not specifically address them herein.

1 carriers delivering the NCT have been misclassified as “independent contractors,”  
2 resulting in various violations of the California Labor Code, and causing them to  
3 suffer damages in the form of unpaid regular and overtime wages, unpaid rest  
4 breaks and meal periods, improper deductions from their paychecks, and expenses  
5 incurred in discharging their duties. Defendant denies these claims, maintain that  
6 Plaintiffs are properly classified as independent contractors, and are therefore not  
7 entitled to the relief sought.

8 On July 27, 2010, Judge Moskowitz granted certification, under Rule  
9 23(b)(3), of the following class:

10 “All persons presently and formerly engaged as newspaper home delivery  
11 carriers by LEE PUBLICATIONS, INC., and for the North County Times  
12 newspaper in the State of California during the period from and including  
13 April 18, 2004, through and including the date of trial set for this action, and  
14 who, as a condition of such engagement, signed a written agreement for the  
15 home delivery of newspapers, which categorized them as independent  
16 contractors and not employees.” [Dkt. No. 76 at 15-16.]

17 In certifying the class, Judge Moskowitz found “there is ‘one significant issue  
18 common to the class’ sufficient to warrant certification. And that issue is the one  
19 central to this case: whether Defendant improperly characterized Plaintiffs as  
20 independent contractors instead of employees.”<sup>2</sup> (Dkt. No. 76, Order Certifying the  
21 Class, quoting Dukes v. Wal-Mart, Inc. 509 F.3d 1168, 1176 (9<sup>th</sup> Cir. 2007)). Judge  
22 Moskowitz found the Plaintiffs had satisfied each of the Rule 23(a) elements,  
23 including commonality requirement contained in Rule 23(a)(2). (Id. at 4.) Judge  
24 Moskowitz cited the common contracts with the Defendant, the similar duties  
25 among the carriers, and similar pay structures to find that “these common facts and  
26 issues are sufficient to satisfy the permissive commonality requirement.” Id. He  
27 further conducted a Rule 23(b)(3) analysis, focusing on whether the factors under

---

28 <sup>2</sup>The Court supports the employee status analysis conducted by Judge Moskowitz in certifying the class. Although the Court analyzes this question for purposes of commonality under Rule 23(a), Judge Moskowitz provides a sound approach to the employee status/independent contractor question for purposes of Rule 23(b)(3) “predominance” test.

1 California law used to determine whether a worker is an employee or independent  
2 contractor were susceptible to common proof. The Court considered the primary  
3 factor as to whether or not the defendant had the “right to control the manner and  
4 means of accomplishing the result desire.” (Id. at 9, quoting Cristler v. Express  
5 Messenger Sys., Inc., 171 Cal.App.4th 72, 77 (2009)). He also reviewed the 12  
6 “secondary factors” in the independent contractor/employee analysis. (Id. at 9-12.)  
7 Although certain factors were less susceptible to common proof, he ultimately  
8 concluded that “common issues predominate and it would be far more efficient to  
9 resolve the question of employment status on a classwide, rather than individual  
10 basis.” (Id. at 15.)

11 On April 24, 2012, Judge Bencivengo denied Defendant’s motion to decertify  
12 the class. (Dkt. No. 126.) In the motion to decertify, Defendant argued that  
13 discovery failed to show that the class met Federal Rules of Civil Procedure 23(a),  
14 “commonality”, and (b), “predominance and superiority.” Defendant claimed that  
15 discovery in the case, as well as the U.S. Supreme Court’s post-class certification  
16 decision in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), showed  
17 predominating individualized issues made a class action unmanageable and inferior.  
18 Defendant further argued that discovery had been completed, and still Plaintiffs  
19 could not provide a common answer to the threshold question of employee status.

20 Judge Bencivengo found that the Supreme Court decision in *Wal-Mart* did  
21 not warrant decertification of the class in this case. She found that Plaintiffs  
22 satisfied the *Wal-Mart* commonality prerequisite because there was a significant  
23 common issue central to the case: whether Defendant improperly characterized  
24 Plaintiffs as independent contractors instead of employees. Judge Bencivengo  
25 further found that Plaintiffs provided sufficient evidence through discovery that  
26 there were common answers to this question. She refused to revisit Judge  
27 Moskowitz’ determination on finding the class satisfied Rule 23(b)(3)’s  
28 predominance factor, since the Court in *Wal-Mart* did not analyze the predominance

1 factor, and the Judge was satisfied with the Plaintiffs' representations in briefing  
2 that they had methods to prove common issues on a classwide basis.

### 3 **LEGAL STANDARD**

4 "A district court's order respecting class certification is 'inherently tentative'  
5 prior to final judgment on the merits." Officers for Justice v. Civil Serv. Comm'n,  
6 688 F.2d 615, 633 (9th Cir.1982); see also Fed. R. Civ. P. 23(c)(1)(C). Thus, if the  
7 Court determines that a class was not properly certified it may modify or decertify  
8 that class. See Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982). In  
9 reviewing whether certification remains proper, the Court again applies the  
10 requirements of Federal Rule of Civil Procedure 23. O'Connor v. Boeing N. Am.,  
11 Inc., 197 F.R.D. 404, 410 (C.D.Cal.2000). The moving party bears the burden of  
12 demonstrating that class certification is no longer proper. Gonzales v. Arrow Fin.  
13 Servs. LLC, 489 F.Supp.2d 1140, 1153 (S.D.Cal.2007); Slaven v. BP Am., Inc., 190  
14 F.R.D. 649, 651 (C.D.Cal.2000). However, the decision on whether to decertify lies  
15 within the Court's sound discretion. Knight v. Kenai Peninsula Borough Sch. Dist.,  
16 131 F.3d 807, 816 (9th Cir.1997).

17 Rule 23 provides district courts with broad authority at various stages in the  
18 litigation to revisit class certification determinations and redefine or decertify  
19 classes as appropriate. Armstrong v. Davis, 275 F.3d 849, 871 n.28 (9th Cir. 2001),  
20 abrogated on other grounds by Johnson v. California, 543 U.S. 499, 504-05 (2005).  
21 In deciding this motion, the Court "is bound to take the substantive allegations of  
22 the complaint as true." In re Coordinated Pretrial Proceedings in Petroleum Prods.  
23 Antitrust Litig., 691 F.2d 1335, 1342 (9th Cir.1982) (citing Blackie v. Barrack, 524  
24 F.2d 891, 901 n. 17 (9th Cir.1975)). Nonetheless, the Court may "consider evidence  
25 which goes to the requirements of Rule 23 even though the evidence may also relate  
26 to the underlying merits of the case." Hanon v. Dataproducts Corp., 976 F.2d 497,  
27 509 (9th Cir.1992). However, weighing of competing evidence is inappropriate.  
28 Wang v. Chinese Daily News, Inc., 231 F.R.D. 602, 605 (C.D.Cal.2005) (citing

1 Staton v. Boeing Co., 327 F.3d 938, 954 (9th Cir.2003)) (abrogated on other  
2 grounds by Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935 (9th Cir.2009).

### 3 DISCUSSION

4 The Court’s July 27, 2010 order certifying a class focused on the threshold  
5 question of whether the class members were employees or independent contractors.  
6 The Court reaffirms the finding that the question of employee status may be  
7 resolved on a classwide basis. On this central issue, the existence of a uniform  
8 contract in addition to other available evidence generates “common answers apt to  
9 drive the resolution of the litigation.” Wal-Mart, Inc. v. Dukes, 131 S. Ct. 2541,  
10 2550 (2011).

11 While employee status may be determined on a classwide basis through  
12 common proof, the Court concludes that certain causes of action are not amenable  
13 to class treatment. Upon review of Plaintiffs’ proposed trial plan and applicable  
14 law, the Court affirms class certification under Rule 23(c)(4) for the following  
15 claims: failure to reimburse for reasonable expenses and unfair business practices.  
16 Meanwhile, the Court finds individual issues predominate on questions of liability  
17 and damages for the claims of failure to pay overtime wages, failure to pay  
18 minimum wage, and failure to provide rest breaks. As such, these claims are  
19 decertified.

#### 20 **1. Employee Status Can Be Resolved on a Classwide Basis**

21 The threshold issue in this case is whether Defendant improperly classified  
22 Plaintiffs as independent contractors. Defendant asserts that commonality is lacking  
23 because Plaintiffs lack the capacity to generate common answers. If trial were to  
24 proceed, “individualized inquiries would predominate, precluding common answers  
25 to the questions that Plaintiffs’ claims raise.” (Dkt. No. 154 at 1.) Defendant  
26 contends there is no ability to generate common answers in one stroke, and that the  
27 multiple pronged test to determine whether Plaintiffs were improperly classified as  
28 independent contractors yield many different answers. As a result, “a finder of fact

1 could not analyze these factors and then reach a common answer resolving this  
2 issue on a classwide basis.” (Id. at 2.)

3 Plaintiffs respond that the uniform contract and comprehensive records  
4 regarding the performance of the carriers work provides sufficient commonality.  
5 (Dkt. No. 157 at 9-14.) Plaintiffs dispute the claim that the proposed trial plan  
6 demonstrates that individualized issues will predominate and undermine  
7 commonality. (Id.) Instead, the evidence to be admitted at trial reflects “how the  
8 terms of the contracts translate into the daily practices of the parties adds clarity and  
9 definition to the express terms of the contracts by showing how the Defendant  
10 asserted its right to control the carriers pursuant to the contracts’ terms.” (Id. at 3.)

11 Under California law, “the principal test of an employment relationship is  
12 whether the person to whom service is rendered has the right to control the manner  
13 and means of accomplishing the result desired.” Tieberg v. Unemployment Ins.  
14 App. Bd., 2 Cal. 3d 943, 946 (1970). The secondary indicia are derived from the  
15 Restatement Second of Agency. Id. at 949. These additional factors are (a) whether  
16 or not the one performing services is engaged in a distinct occupation or business;  
17 (b) the kind of occupation, with reference to whether, in the locality, the work is  
18 usually done under the direction of the principal or by a specialist without  
19 supervision; (c) the skill required in the particular occupation; (d) whether the  
20 principal or the workman supplies the instrumentalities, tools, and the place of work  
21 for the person doing the work; (e) the length of time for which the services are to be  
22 performed; (f) the method of payment, whether by the time or by the job; (g)  
23 whether or not the work is a part of the regular business of the principal; and (h)  
24 whether or not the parties believe they are creating the relationship of employer-  
25 employee. Rest. Agency § 220.

26 Here, the newspaper carrier contracts and additional information about the  
27 carriers’ duties provide substantial evidence to determine Defendant’s level of  
28 control over the carriers. The contract includes terms that dictate how each carrier

1 should conduct the work, including the time and manner of delivery of the  
2 newspapers. The contract also includes (1) the duration of the contract, which is for  
3 a period of time; (2) the amount of money the Defendant is required to pay the  
4 carrier for each paper; (3) the amount of money the carrier will be fined if the  
5 Defendant is required to redeliver a paper;(4) the requirement that the carrier pay a  
6 rental fee of \$6.00 if he or she chooses to prepare their papers at the Defendant's  
7 facility loading dock; and (6) a uniform termination provision. (Dkt. No. 157 at 9;  
8 Exhibit A, Contract Agreement.) Under the agreement, the carriers are required to  
9 pay for all the supplies used in performance of their duties, including car expenses,  
10 plastic bags, and rubber bands. (Id.) Additional evidence indicates Defendant  
11 controlled the delivery process by managing complaints from the subscribers. (Dkt.  
12 No. 157 at 11-12.) Defendant managed complaints by leaving instructions called  
13 "toppers" on the newspaper bundles, which directed the carrier to make changes  
14 regarding delivery to a particular location or stop a certain delivery for vacations.  
15 (Id.) Further evidence indicating the level of control includes Defendant's practice  
16 of monitoring complaints, levying penalties, and conducting "spot checks" to ensure  
17 that the papers were delivered on time.(Id.) In addition, Defendant provided the  
18 newspapers to the carriers each morning, thereby dictating the time in which  
19 Plaintiffs could begin folding and delivering papers.(Id.) This evidence suggests  
20 there is significant common proof to show the level of control Defendants had over  
21 each carrier and commonality predominates over any questions affecting only  
22 individual members. Cf. Estrada v. FedEx Ground Package System, Inc., 154 Cal.  
23 App.4th 1, 13-14 (2007)(drivers' claims suitable for class certification based on  
24 operating agreement and anecdotal evidence regarding interpretation of agreement).  
25 Overall, the Court finds there is significant commonality as to the question of  
26 control.

27 The secondary factors are also sufficiently similar such that common answers  
28 may be assessed to determine employee status. Here, the parties vigorously



1 disagree as to whether the secondary factors raise individualized inquiries.  
2 Plaintiffs assert that newspaper delivery is not “distinct” like plumbing or  
3 contracting, which require unique skills. Defendant counters that the trier of fact  
4 must look to a variety of factors including whether a carrier used subcontractors or  
5 worked for other companies at the same time to determine whether the occupation is  
6 distinct. (Dkt. No. 154 at 6.) Regarding supervision and skill, Plaintiffs cite to cases  
7 that have certified classes of delivery workers despite some variation in work  
8 among deliverers. See Toyota Motor Sales, U.S.A. Inc. v. Superior Court, 220 Cal.  
9 App. 3d 864 (1990). Defendant points to variances in proof on a number of  
10 secondary factors, including the level of supervision and interaction, length of time  
11 for which the services were performed, and whether the parties believed that they  
12 were creating an employer-employee relationship. Defendant asserts that these  
13 variances require individualized inquiries that predominate over questions that can  
14 be decided with common proof. (Dkt. No. 154 at 15-17.)

15       The slight differences among the experiences of each carrier are insufficient  
16 to defeat certification on the question of employee status. The Court underscores  
17 the approach taken by the California Appellate Court in Ayala v. Antelope Valley  
18 Newspapers, which held that the independent contractor-employee issue may be  
19 determined on a classwide basis. In assessing whether individualized variations  
20 precluded commonality on the question of employee status, the Court stated:

21           Those variations do not present individual issues  
22           that preclude class certification. Instead, because all  
23           of the carriers perform the same job under virtually  
24           identical contracts, those variations simply  
25           constitute common evidence that tends to show  
26           Defendant's lack of control over certain aspects of  
27           the carriers' work. Similarly, the so-called  
28           “secondary factors” that must be considered when  
          determining the primary issue in this case—whether  
          Defendant improperly classified the carriers as  
          independent contractors rather than  
          employees—also may be established for the most  
          part through common proof, since almost all of those  
          factors relate to the type of work involved, which is  
          common to the class. Ayala v. Antelope Valley

1                    Newspapers, Inc., 210 Cal. App. 4th 77 (2012)  
2                    review granted and opinion superseded sub nom.  
3                    Ayala v. Antelope Valley Newspapers, 292 P.3d 181  
                      (Cal. 2013).

4 Likewise, even assuming that some of the secondary factors in this case result in  
5 individualized inquiries, common questions and answers drive the thrust of the  
6 employee status analysis.

7            Thus, the Court finds the multiple-pronged analysis to determine employee status  
8 on a classwide basis satisfies Rule 23(a)(2) in which “commonality requires the  
9 plaintiff to demonstrate that the class members ‘have suffered the same injury.’” Wal-  
10 Mart at 2551, quoting Falcon, 457 U.S. at 157. Id. As such, commonality depends on  
11 “the capacity of a classwide proceeding to generate common answers apt to drive the  
12 resolution of the litigation.” Id. The Court finds the carriers have allegedly suffered the  
13 same injury of mis-classification as independent contractors. As detailed above,  
14 Plaintiffs have sufficiently proven they can demonstrate this issue on a classwide basis.  
15 The common evidence available would allow a jury to determine the threshold issue  
16 of employment status on a classwide basis. This evidence includes: 1) the four corners  
17 of the employment contract; 2) information regarding Defendant’s control over the  
18 carriers; and 3) substantial, although not precisely uniform, evidence on each of the  
19 secondary factors. When reviewed in totality, the Court finds that there is sufficient  
20 commonality on this issue to satisfy Rule 23(a)(2) and Rule 23(b)(4).

21            **2. Individual Causes of Action**

22            Plaintiffs contest the need for common proof to prove liability on each claim and  
23 contend the issue of liability is limited to whether the carriers are employees or  
24 independent contractors. Plaintiffs claim that if the jury determines they are employees,  
25 the Defendant is therefore liable for damages for each claim as set forth in the  
26 California Labor Code. (Dkt. No. 157 at 18.) Plaintiffs assert that they will submit  
27 claims for damages individually incurred as part of the second phase of the trial and  
28 rely on extensive data maintained by the Defendant to calculate damages during the

1 post-judgement claims process.

2 As a legal matter, Plaintiffs are incorrect in claiming that liability ends upon  
3 determination of employee status. Under Rule 23(b) a class action may be certified if  
4 the court finds that questions of law or fact common to class members predominate  
5 over any questions affecting only individual members, and that a class action is  
6 superior to other available methods for fairly and efficiently adjudicating the  
7 controversy. As articulated by the California Supreme Court in assessing  
8 predominance, trial courts must “determine whether the elements necessary to establish  
9 liability are susceptible of common proof or, if not, whether there are ways to manage  
10 effectively proof of any elements that may require individualized evidence.” Brinker  
11 Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1024 (2012)(internal citation omitted).

12 Defendant contends that no method of common proof exists to allow classwide  
13 resolution on liability or damages for the remaining claims. Defendant points to  
14 Plaintiffs’ proposed trial plan which relies on a wide range of individualized  
15 experiences to support their claims. (Dkt. No. 154 at 3-4.) Defendant contends that the  
16 pretrial documents indicate Plaintiffs will rely on experiences of individual class  
17 members, rather than classwide evidence. Given that individual evidence at trial is  
18 inevitable, Defendant asserts that individual issues, not common ones, will  
19 predominate. As required by Rule 23(c)(4), the Court will review the factual elements  
20 of the remaining claims and proposed proof to determine eligibility for class treatment.

#### 21 **A. Overtime Hour Claims**

22 A cause of action under §1194 for overtime wages has the following elements:  
23 (1) plaintiff performed work for defendant; (2) plaintiff worked overtime hours; (3)  
24 plaintiff was paid less than the overtime rate for some or all of the overtime hours  
25 worked; and (4) the amount of overtime owed. Labor Code §11010(3)(A)(1) (overtime  
26 pay required for “[e]mployment beyond eight (8) hours in any work day or more than  
27 six (6) days in any workweek”).

28 To prove this claim, Plaintiffs must show they either worked more than eight

1 hours in one day or worked seven consecutive days. Plaintiffs do not claim any carrier  
2 worked more than eight hours per day pursuant to their contract with the Defendant.  
3 As to the seventh day overtime, the Plaintiffs rely on the contract which required  
4 delivery of newspapers every day of the work week. The contract states, in relevant  
5 part:

6 Contractor agrees to meet the following minimum performance  
7 results standards: A reasonable level of customer satisfaction will  
8 mean, as set forth herein and reasonably requested by the  
9 subscriber, delivery of a dry readable newspaper, with all  
10 attachments or inserts provided by Company, of each subscriber  
no later than \_\_\_ A.M. each Monday thru Friday, and no later  
than \_\_\_ A.M. each Saturday and Sunday. (Dkt. No. 154, Ex. 70,  
North County Time Independent Contract Agreement, Provision  
12, "Standards of Performance.")

11 According to Plaintiffs' counsel, "We will show that the carrier had a common policy  
12 of not paying overtime. We know they didn't pay overtime...They were aware these  
13 contracts, [obligated the signatory] to work [sic] seven days a week, and they weren't  
14 paying them overtime." (Decert. Hrg. Trans. at 16.)

15 While acknowledging the Plaintiffs were required to deliver newspapers seven  
16 days per week, Defendant points to the fact that many carriers did not work seven  
17 consecutive days as a result of the contractual right to hire employees to deliver  
18 newspapers. One such provision states:

19 Contractor has the right to hire employees of his choosing and to  
20 contract with others to fulfill Contractor's obligations under this  
21 contract. Contractor shall have the right to engage in any other  
22 business, including the delivery of other newspapers. Contractor  
23 understands and agrees that it is his/her obligation to effect  
delivery of the newspaper each day it is published. (Id. at  
Provision 1, "Independent Contractor Status.")

24 Together, these contract provisions indicate that while the carrier is obligated to  
25 deliver papers in a certain condition seven days a week or each day the newspaper is  
26 published, the carrier may also assign that duty to another individual.

27 It is undisputed that class members used substitutes and/or helpers to perform  
28 their obligations under the contract. Indeed, the record confirms that many distributors

1 utilized substitutes and Plaintiffs themselves confirm that they used substitutes or  
2 helpers to perform their work. (Dkt. No. 154, Statement of Facts at 11-12.)<sup>3</sup> Given that  
3 an undetermined number of class members have employed substitutes to perform  
4 duties, the Court finds that the contract alone fails to show the carrier worked more  
5 than six days a week to be entitled to overtime pay. Therefore, Plaintiffs must show  
6 additional evidence to prove the element that Plaintiffs worked more than six days a  
7 week. Plaintiffs fall short of providing any further evidentiary support for this claim  
8 and the proposed trial plan also fails to propose proof of this essential element during  
9 the liability phase of the trial.

10 In assessing wage and hour violations on a classwide basis, the California  
11 Appellate Court has observed that liability is beyond a mere calculation issue, and has  
12 denied class certification where “each class member would be required to litigate  
13 ‘substantial and numerous factually unique questions to determine his or her individual  
14 right to recover.’” Wilens v. TD Waterhouse Group, Inc., 120 Cal. App. 4th 746, 756  
15 (2003), quoting Acree v. General Motors Acceptance Corporation 92 Cal.App.4th 385,  
16 397 (2001). Here, absent common proof to determine which carriers worked seven  
17 consecutive days, there is the likelihood of individually litigating factually unique  
18 questions to determine a right to recover for seventh day overtime.

19 As an additional matter, Defendant’s right to offer a defense magnifies the  
20 potential for individualized inquiries at the liability phase of the trial. As held by the  
21 Supreme Court, the defendant has the “right to raise any individual affirmative defenses  
22 it may have,” and is “entitle[d] to litigate its statutory defenses to individual claims.”

---

23  
24 <sup>3</sup> See Statement of Facts, Section V. “Outsourcing of the Independent Contractor Work –  
25 Substitutes.” (NCT and Distributor Declarations: Henschen Declaration ¶ 18 (identifying numerous  
26 distributors who use substitutes and helpers); Kintz Decl. ¶ 17 (identifying several distributors that use  
27 substitutes); Arroyo Decl. ¶ 21 (identifying several distributors that use substitutes); Thomas Decl. ¶  
28 10 (has used substitutes about 4 times); Tyler Decl. ¶ 18 (has never used a substitute); Valencia Decl.  
¶ 13 (occasionally uses substitutes). See also Named Plaintiffs’ Depositions: Gonzalez Dep. 35:15-20  
(brother has substituted for her; Garza Dep. 65:20-3 (rarely uses substitute); E. Salgado Dep. 14:9-12  
(husband substitutes on one of her routes every day); Dalton Dep. 79:15-20 (daughter substituted for  
her on Tuesdays); Sanchez Dep. 46:3-6 (has used wife as substitute); Hughen Dep. 84:9, 111:4-7  
(mother has substituted for her about 70 times))

1 Wal-Mart, 131 S. Ct. 2561 (internal citation omitted). Although the Supreme Court  
2 was dealing with a class action that proposed “trial by formula,” the same substantive  
3 obstacle of providing reliable information exists in this case. Plaintiffs cannot prove  
4 the number of days worked as a result of the substitute and helper issue. As such,  
5 individualized inquiries and determinations must be made to ascertain each carrier’s  
6 eligibility to the claims. See also Newton v. Merrill Lynch, Pierce, Fenner & Smith,  
7 Inc., 259 F.3d 154, 192 (3d Cir. 2001) (vacating certification in part because  
8 “defendants have the right to raise individual defenses against each class member”).

9 The issue of substitutes and helpers also creates individualized issues to  
10 determine damages. Plaintiffs intend to rely on the Henschen spreadsheets to prove  
11 monies owed for unpaid overtime, rest breaks and minimum wage violations.  
12 (Plaintiffs’ Proposed Trial Plan, Dkt. No. 138 at 5). There is no dispute that the  
13 Henschen spreadsheets do not reflect the use of helpers or substitutes. As such, the  
14 Plaintiff’s method of proof does not even try to identify the occasions when substitutes  
15 were used. Without more, the Plaintiffs’ methodology is inaccurate and over inclusive  
16 thereby requiring individualized damage inquiries.

17 Upon review of these issues, the Court finds that Plaintiffs have failed to provide  
18 common, reliable proof needed to establish liability for the overtime claims. As such,  
19 individualized issues of fact predominate, thereby making class action treatment an  
20 inferior method to adjudicate these claims. Accordingly, the Court vacates class  
21 certification as to all of Plaintiffs’ overtime claims.

### 22 **B. Minimum Wage Claim**

23 A cause of action under Labor Code §1194 seeking the minimum wage requires  
24 a plaintiff to prove (1) plaintiff performed work for defendant; (2) plaintiff was paid  
25 less than the minimum wage by defendant for some or all hours worked; and (3) the  
26  
27  
28

1 amount of wages owed.<sup>4</sup>

2 A §1194 minimum wage claim requires proof of the total amount of earnings and  
3 hours worked during a payroll period. As to hours worked, Plaintiffs rely on  
4 “Henschen spreadsheets,” newspaper delivery data collected by the Defendant, to prove  
5 hours and days worked by each carrier. To create the “Henschen spreadsheets,”  
6 Plaintiffs explain the “carriers provided [Defendant] the mileage of their routes as well  
7 as the length of time it took to complete the route. [Defendant] also compiled these  
8 detailed statistics by having employees drive the routes to determine mileage as well  
9 as record the time it took to complete the routes.” (Dkt. No. 157 at 19-20.) Each carrier  
10 then received a pay stub detailing their pay, per piece rate and draw of newspapers. (Id.  
11 at 20.) With respect to the total amount of earnings, Plaintiffs cite payment statements  
12 and expense calculations that rely on profit statements, deductions and mileage data.

13 Defendant asserts that the spreadsheet data does not reflect actual miles traveled,  
14 hours worked, or use of substitutes or helpers. Indeed, the manager who developed  
15 these spreadsheets explained that “estimations of newspaper assembly time, distribution  
16 time and mileage associated with each route were added...for the purpose of having  
17 some information from which to draw in terms of estimating expenses and resources.”  
18 (Dkt. No. 154, Ex. 50, Decl. of M. Henschen, dated Aug. 31, 2012 ¶8). Mr. Henschen  
19 states that this information was never “independently verified” nor did the company  
20 “measure, collect, or keep track of actual hours worked or actual mileage driven by  
21 [carrier contractors].” (Id. at ¶10.) Defendant further argues that the spreadsheet data  
22 does not account for the use of substitutes or helpers, and erroneously leads to the  
23 assumption that the class members actually delivered the routes themselves. (Dkt. No.  
24 154 at 19.)

25 Ultimately, the minimum wage claim fails for the same reasons as the overtime

---

27 <sup>4</sup> Under California law, Plaintiffs must show the number of hours or days worked Cal.Code  
28 Regs., tit. 8 § 11010 4(B)(“Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period”).

1 claim. Plaintiffs cannot provide common, reliable proof that the carrier - not a  
2 substitute or helper - performed the work; this an essential element to determine  
3 liability. Thus, individualized inquiries as to whether the Plaintiffs actually performed  
4 the work would predominate during the liability phase of the trial. For these reasons,  
5 the Court finds this claim is not amenable for class action treatment and the Court  
6 decertifies the class on the minimum wage claim.

### 7 **C. Rest Break Claims**

8 To prove liability for a denial of rest breaks, a plaintiff must prove (1) defendant  
9 employed plaintiff; (2) plaintiff worked for at least 3 ½ hours; and (3) plaintiff was not  
10 provided with a rest break of not less than 10 minutes. If an employer fails to provide  
11 an employee a rest period, an employee is entitled to one hour of pay at the employee’s  
12 regular rate of compensation for each workday that the rest period is not provided.  
13 Labor Code § 226.7; 8 Cal.Code.Reg. § 11010(12)(A-B)(“a rest period need not be  
14 authorized for employees whose total daily work time is less than three and one-half  
15 (3 1/2) hours”).

16 Plaintiffs are unable to offer common proof to establish liability of this claim.  
17 Again, Plaintiffs rely on the Henschen spreadsheets for common proof to establish  
18 liability. A review of the spreadsheets discloses a wide variation in the number of  
19 hours worked by the carriers. The spreadsheets indicate a large percentage of carriers  
20 do not work 3 ½ hours per day from Monday through Saturday, while another large  
21 percentage work slightly more than 3 ½ hours on those days.<sup>5</sup> Given these differences,  
22 individual inquiries for a large number of carriers would be required as part of the  
23 defense to this claim. In addition, the hourly estimates do not identify the specific day  
24 of the week when a carrier worked more than 3 ½ hours. These facts lead to the

---

25  
26  
27 <sup>5</sup> Plaintiffs’ counsel acknowledged this conclusion. “If you go down and look at the routes and  
28 tally up the total number [on the Henschen spreadsheet], where it shows the carrier identified the route  
taking at least three and a half hours to complete...it is a fraction of about a third-ish...most take two  
and half hours, two, 1.5 [hours to complete the route].) (Dkt. No. 164, Transcript of Renewed Motion  
to Decertify the Class Hearing, hereinafter “Decert. Hrg. Trans.,” at 9, 12.)



1 conclusion that individualized determinations as to work hours will predominate at trial  
2 and there is insufficient common proof to establish liability for rest break claims.

3 Defendant also argues that Plaintiffs lack common proof to show they were  
4 denied rest breaks on days they worked more than 3 ½ hours. Class representatives  
5 testified that Defendants did not affirmatively deny them an opportunity to take a break.  
6 However, Plaintiffs point to the limited window of time to complete delivery as  
7 effectively denying carriers a rest break. Cf., Jaimez v. Daiohs USA, Inc., 181  
8 Cal.App.4th 1286 (2010)(carriers unable to take rest breaks due to delivery schedule  
9 requirements to complete deliveries within eight hours); Amalgamated Transit Union  
10 Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc., 2009 WL 249888, at p.6  
11 (common issue existed whether defendant scheduled bus routes in a manner that  
12 deprived workers of opportunity to take rest breaks). Plaintiffs allege they had a  
13 limited time frame to pick up, fold and deliver the newspapers on time. (See Dkt. No.  
14 154, Ex. 55, Deposition of Sharon Hughen at 212. “[W]e’re required to be in and out  
15 of the warehouse [to pick up newspapers] before 4:00 a.m. [and on a weekday, delivery  
16 is expected] by 6:00 a.m.”). While the Court finds common proof exists to prove denial  
17 of rest breaks, there is no such common proof on the issue of hours worked.

18 After careful consideration of these factors, the Court finds common issues do  
19 not predominate to show liability on the rest break claim. Thus, a class action is not  
20 superior to other available methods to fairly and efficiently adjudicate this claim. The  
21 Court therefore vacates class certification as to Plaintiffs’ rest break claims.

#### 22 **D. Unreimbursed Expenses Claim**

23 In order to prove a claim for unreimbursed expenses, the plaintiff must show: (1)  
24 plaintiff was employed by defendant; (2) plaintiff made expenditures or incurred losses  
25 in direct consequence of the discharge of their duties as a newspaper carrier; (3) the  
26 expenditures or losses were not reimbursed to plaintiff by defendant. California Labor  
27 Code §2802(a) provides in pertinent part: “An employer shall indemnify his or her  
28 employee for all necessary expenditures or losses incurred by the employee in direct

1 consequence of the discharge of his or her duties, or of his or her obedience to the  
2 directions of the employer, even though unlawful, unless the employee, at the time of  
3 obeying the directions, believed them to be unlawful.” Wage Order 1-2001, Section  
4 8, provides that: “No employer shall make any deduction from the wage or require any  
5 reimbursement from an employee for any cash shortage, breakage, or loss of  
6 equipment, unless it can be shown that the shortage, breakage, or loss is caused by a  
7 dishonest or willful act, or by the gross negligence of the employee.”

8 For the reasons set out below, the Court finds that common issues predominate  
9 to determine liability, and that class action is a superior method to adjudicate the claim  
10 for unreasonable business expenses. See cf. Estrada v. FedEx Ground Package System,  
11 Inc., 154 Cal.App.4th at 14 (class seeking reimbursement of expenses for drivers was  
12 ascertainable and manageable). Plaintiffs allege the carriers are entitled to recover  
13 unreimbursed expenditures and losses in relation to their job performance. Plaintiffs  
14 allege each carrier was required to provide his or her own vehicle to deliver newspapers  
15 and incurred additional expenses for gasoline, maintenance, and insurance. (Amended  
16 Complaint at 14-15.) Plaintiffs further allege Defendant made deductions from the  
17 carriers’ wages for customer complaints, redelivery fees, costs for plastic bags,  
18 insurance, and excess or undelivered newspapers. (Id.) Plaintiffs also allege Defendant  
19 required carriers to pay distribution center charges when they utilized the warehouse  
20 center to fold and bag the newspapers. (Id.) Defendant argues the data Plaintiff offers  
21 as evidence fails to prove actual mileage, and all other evidence is faulty and  
22 unreliable. (Dkt. No. 154 at 22.)

23 The Court finds Plaintiffs’ proposed evidence is sufficiently common and  
24 reliable to show Defendant’s liability for unreimbursed expenses. To prove liability,  
25 Plaintiffs will offer evidence that the carriers made necessary expenses or incurred  
26 losses as a direct result of performing their duties. As previously discussed, the  
27 “Henschen spreadsheets” show mileage for each route. Plaintiffs will show gasoline  
28 expenditures by using this mileage multiplied by the Internal Revenue Service standard

1 mileage allowance (or some other permitted method) times the number of days that  
2 newspapers were delivered. Plaintiffs will also offer the NCT Carrier Data spreadsheet  
3 (different from the Henschen spreadsheet) which reflects the costs Defendant withheld  
4 from the carriers earnings for these expenditures. “A review of this spreadsheet  
5 show[s] how uniform the charges to all the carriers are, and that over 80% are charged  
6 the \$6.00 monthly fee for folding and bagging their papers at the facility. In addition,  
7 all charges to the carriers for costs that plaintiffs allege are improper are saved  
8 electronically and can be manipulated with the defendants two software systems,  
9 Vision and Falcon.” (Dkt. No. 158, Ex. 1, Declaration of Keith Greer at ¶ 3.) These  
10 carrier statements reveal that the Defendant itemized “miscellaneous charges and  
11 credits” for each carrier. This miscellaneous section breaks out distribution center  
12 charges, dispatch redelivery charges, as well as charges for plastic bags. (Dkt. No. 158,  
13 Ex. D “Carrier Statement”.)

14 The Court is satisfied individualized inquires would not be necessary to  
15 determine liability for unreimbursed expenses. Unlike the previous claims, the issue  
16 of substitutes and helpers does not impede Plaintiffs’ ability to show common proof of  
17 liability. Based on common evidence, Plaintiffs can show the essential elements of the  
18 claim: that the carrier was an employee, incurred necessary expenses to perform his  
19 duties, and Defendant deducted those expenses from the carriers’ earnings.

20 Any issues regarding damages are minimal and insufficient to defeat class  
21 certification of this claim. As proposed by Plaintiffs, during the damages phase of the  
22 trial, testimony from the Defendant’s employees can establish that the data “identifies  
23 with specificity every deduction taken from class members’ pay checks, and that data  
24 is easily tabulated electronically to identify the total amount of deductions from each  
25 class members’ pay during the class period.” (Dkt. No. 138 at 5.) To the extent there  
26 are questions regarding the mileage for a particular route, Defendant will have the  
27 opportunity to cross examine the witnesses who provided this information and call  
28 witnesses who calculated a different mileage. Any additional concerns regarding the

1 reliability of the data can also be presented by the Defendants, but do not necessitate  
2 inquiries as to every expenditure by each individual carrier.

3 Ultimately, the Court is satisfied that the class action claim for unreasonable  
4 business expenses is manageable at the liability and damages phases of the trial and  
5 that class treatment is superior to individually adjudicating each reimbursement claim.

6 **E. Unfair Business Practices**

7 Business and Professions Code §17200 proscribes unlawful, unfair and  
8 fraudulent business practices. §17200 “borrows” violations of other laws and treats  
9 them as unlawful practices independently actionable under §17200. Farmers Ins.  
10 Exchange v. Sup.Ct., 2 Cal.4th 377, 383 (1992). To the extent that the Court has  
11 certified the unreimbursed expenses cause of action under Labor Code statutes, the  
12 Court finds that a class action may proceed as to this claim for available remedies under  
13 §17200.

14 **CONCLUSION**

15 Based on the foregoing, the Court hereby **GRANTS** in part and **DENIES** in  
16 part Defendant’s renewed motion to decertify the class. Accordingly, the Court  
17 affirms class designation for the claim of unreimbursed expenses and unfair labor  
18 practices. The Court decertifies the following class claims: failure to pay minimum  
19 wage, failure to provide rest breaks, and failure to pay overtime wages.

20 **IT IS SO ORDERED.**

21 DATED: May 20, 2013

22   
23 HON. GONZALO P. CURIEL  
24 United States District Judge  
25  
26  
27  
28