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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

DON CLAYTON,	)	1:11cv0735 LJO DLB
	)	
	)	
Plaintiff,	)	FINDINGS AND RECOMMENDATIONS
	)	REGARDING PLAINTIFF’S MOTION FOR
	)	CLASS CERTIFICATION
v.	)	
	)	(Document 17)
	)	
KNIGHT TRANSPORTATION, INC.,	)	
	)	
	)	
Defendant.	)	

On April 20, 2012, Plaintiff Don Clayton (“Plaintiff”), individually and on behalf of himself and all others similarly situated, filed the instant motion for class certification. The motion was heard on June 15, 2012, before the Honorable Dennis L. Beck, United States Magistrate Judge. Michael Malk appeared on behalf of Plaintiff. Ellen Bronchetti appeared on behalf of Defendant Knight Transportation, Inc. (“Defendant” or “Knight”).

**BACKGROUND**

Plaintiff filed this class action in Tulare County Superior Court on March 8, 2011, based on allegations that Defendant failed to pay its California truck drivers minimum wage for time spent during orientation. Defendant removed the action to this Court on May 6, 2011, based on the Class Action Fairness Act. 28 U.S.C. § 1332(d).

1 According to the Complaint, Plaintiff was employed by Defendant from August 2008  
2 through December 2008 as a truck driver based in Tulare, California. He alleges that from  
3 August 2008 through the end of his employment, he was not paid minimum wage for hours  
4 worked during orientation.

5 The Complaint defines the Class as:

6 All current and former truck drivers employed by Knight Transportation, Inc., who were  
7 based on the State of California, and who participated and/or attended an orientation  
8 during the period from March 9, 2007, through the present (the "Class Period").

9 The Complaint alleges that Plaintiff and members of the Class "worked for three days in  
10 connection with attending orientation" for Defendant. Complaint, ¶ 18. Defendant compensated  
11 drivers for these three days with a flat rate of \$30, and, later in the Class Period, \$50. Plaintiff  
12 alleges, however, that drivers spent 19 hours over three days and therefore were not paid  
13 minimum wage. Based on these allegations, Plaintiff alleges causes of action under state law for  
14 (1) Failure to pay minimum wage for time worked in orientation, Cal. Labor Code §§ 1194,  
15 1194.2; (2) Failure to pay wages upon separation of employment, Cal. Labor Code §§ 201-203;  
16 (3) Failure to issue accurate itemized wage statements, Cal. Labor Code §§ 226, 226.3; and (4)  
17 Unfair business practices, Cal. Bus. & Prof. Code § 17200, et seq.

18 Plaintiff filed this motion to certify the class under Rule 23(a) and 23(b)(3) on April 20,  
19 2012. Defendant opposed the motion on June 1, 2012, and Plaintiff filed his reply on June 8,  
20 2012.

### 21 **FACTUAL BACKGROUND**

22 In support of his motion, Plaintiff contends that Defendant typically conducted at least  
23 one orientation per week at each of its two California locations in Tulare and Fontana. There are  
24 no differences between the orientations conducted at the two locations. Deposition of Michael  
25 Hitchcock ("Hitchcock Dep."), 11:9-12. Although the structure of the orientation program has  
26 changed during the Class Period, the length has remained consistent at three days, "give or take  
27 one-half day." Deposition of William Johnson ("Johnson Dec."), 20:10-18; Hitchcock Dep.,  
28 32:12-15.

1 Knight requires its applicants to complete a lengthy job application, and performs a  
2 background check and investigates the accuracy of the application before applicants are invited to  
3 orientation. Hitchcock Dep. 21:8-14; 55:7-55:19. Orientation is closed to those not interested in  
4 working for Knight. Knight puts its drivers through orientation because it intends to hire them.  
5 Johnson Dep. 22:6-17. Drivers keep a log of their time at orientation, as required by the  
6 Department of Transportation (“DOT”) and they complete an application package, which  
7 includes an IRS W-2 form, a driver’s agreement, EDD paperwork and a form authorizing direct  
8 deposit. Johnson Dep., 34:24-35:9; 48:25-49:12; Hitchcock Dep., 38:8-22. The payment for  
9 attending was typically a total of \$100, but it was reduced to \$50 at some point during the class  
10 period. Johnson Dep., 58:16-22.<sup>1</sup>

11 In opposition, Defendant explains that California-based drivers are typically “based” out  
12 of Tulare or Fontana, though most of them haul freight throughout the United States. Drivers  
13 based in California do not necessarily reside in California and do not frequently haul freight in  
14 California. Declaration of Timothy Pollock (“Pollock Decl.”), ¶ 3-5. Moreover, some drivers  
15 based out of Fontana attended orientation in Phoenix, Arizona. Puneet Bawa Deposition (“Bawa  
16 Dep.”), 27:15-19, 28:3-13.

17 Drivers must meet basic DOT requirements to drive a commercial truck, and at Knight,  
18 most of these basic requirements are frequently, but not always, determined during the recruiting  
19 phase of the application process. Declaration of Danielle Phillipson (“Phillipson Decl.”) at ¶¶  
20 4-5. If the applicant is not disqualified, Knight will invite the applicant to its orientation, where  
21 it will determine if the drivers are actually qualified under more detailed DOT regulations. This  
22 includes DOT mandated physical examinations, drug screen, road tests, background checks and  
23 employment verifications. Hitchcock Decl., ¶ 5, Pollock Decl., ¶ 7.

24 At orientation, drivers complete the qualification procedure and Knight determines  
25 whether to extend an offer of employment. Phillipson Decl., ¶¶ 4-5. Drivers are usually advised,  
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28 <sup>1</sup> Defendant stipulated that Plaintiff did not receive *any* payment for his orientation time “due to an error.”  
Declaration of Michael Malk, Exh. L.

1 during recruiting or orientation, that they are not hired until they satisfy all DOT requirements  
2 and complete orientation. Phillipson Dec., ¶¶ 22-23.

3 Defendant submits that orientations have changed dramatically over the proposed class  
4 period.<sup>2</sup> From 2007 to July 2008, Knight's orientation materials were based on the Driving  
5 Associates Policies and Procedures Manual, along with any other information the local terminals  
6 used. Hitchcock Decl., ¶ 7. Each terminal had a great deal of discretion on how to present this  
7 information, including content and time spent on content. Hitchcock Dep., 14:3-8; Hitchcock  
8 Decl., ¶¶ 7-8.

9 In July 2008, Knight implemented a PowerPoint presentation for orientations at  
10 California terminals. This allowed for more consistency, though local terminals continued to  
11 have discretion on how to present the materials and could add location-specific topics.  
12 Hitchcock Dep., 31:1-6.

13 In May 2011, Knight incorporated the use of an internet-based orientation course, which  
14 could be used in place of the classroom portion. Applicants can use this in any location and on  
15 their own time schedule, though they still need to go to the terminal for examinations and  
16 screenings. Phillipson Decl., ¶ 10. Applicants could also decide to attend in-class orientation at  
17 a terminal, where either the PowerPoint presentation or on-line material is used. Phillipson  
18 Decl., ¶ 11.

19 Defendant contends that the length of orientation has also changed over the class period,  
20 as has the days on which orientation takes place. Hitchcock Dep., 32:12-33:14, 33:21-34:15;  
21 Phillipson Decl., ¶¶ 15-16, 20. The length of sessions depends on class size, the experience of  
22 attendees, class needs, availability of presenters and the presentation style. Pollock Decl., ¶ 12;  
23 Hitchcock Decl., ¶ 11; Phillipson Decl., ¶ 20.

24 Moreover, Knight frequently changes the orientation schedule to meet the needs of the  
25 class, including adjusting start times and break times. Applicants have no obligation to stay or  
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28 <sup>2</sup> Defendant provides numerous declarations of prior employees/recruiters to demonstrate that the content and amount of time spent on each topic has changed repeatedly over the class period.

1 complete orientation and Knight may dismiss them if it determines that the driver will not be  
2 hired. Phillipson Decl., ¶¶ 23-24; Johnson Dep., 25:19-26:6, 70:11-19.

3 After orientation, if the driver is hired, the driver is given a code and badge, introduced to  
4 a supervisor, assigned a truck and dispatched to haul freight. This often occurs on the same day  
5 that Knight receives confirmation that the driver successfully completed all pre-hire procedures.  
6 Pollock Decl., ¶ 16; Hitchcock Decl., ¶ 13; Johnson Dep., 68:1-7.

7 Knight pays travel, lodging and meal costs for applicants who do not live in California.  
8 Those who are hired receive a one time payment for completing the orientation process. Those  
9 who are not hired, or who do not accept employment, do not receive this payment. Phillipson  
10 Decl., ¶ 25. The payment appears on the drivers' first paycheck, minus taxes. Over the class  
11 period, the payment has varied from \$50 to \$100. Pollock Decl., ¶ 17.

#### 12 DISCUSSION

13 By this motion, Plaintiff seeks to certify the following Classes:

- 14 (A) Orientation Pay Class: defined as “all current and former truck drivers employed  
15 by Knight Transportation, Inc., who were based in the State of California, and  
16 who participated and/or attended an orientation during the period from March 9,  
17 2007 through the present (the “Class Period”);
- 18 (B) Cal. Labor Code § 203 Class: consisting of former employees of the Orientation  
19 Pay Class;
- 20 (C) Cal. Labor Code § 226 Class: consisting of members of the Orientation Pay Class  
21 who attended orientation within one-year before this lawsuit was filed; and
- 22 (D) Cal. Bus. & Prof. Code §17200 Class: co-extensive with the Orientation Pay  
23 Class.

24 During the hearing, Plaintiffs agreed to narrow the definition to those drivers “based in  
25 the State of California, and who participated and/or attended an orientation in California” during  
26 the time period at issue.

27 To qualify for class certification, Plaintiff must satisfy all of the requirements of Rule  
28 23(a) of the Federal Rules of Civil Procedure and any one of the requirements of Rule 23(b).  
Rule 23(a) requires (1) impracticability of joinder due to numerosity; (2) commonality of  
questions of law or fact; (3) typicality of claims; and (4) adequacy of representation.

1 The burden is on the party seeking to maintain the class action. In this case, Plaintiff  
2 must establish a prima facie showing of each of the elements of Rule 23(a) prerequisites and the  
3 appropriate 23(b) ground for a class action. Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270  
4 (10th Cir. 1975), *overruled on other grounds by* Ruckelshaus v. Sierra Club, 463 U.S. 680  
5 (1983). The burden, however, is slight. Plaintiff need only present sufficient proof to allow the  
6 court to come to a “reasonable judgment” on each requirement. Blackie v. Barrack, 524 F.2d  
7 891, 901 (9th Cir. 1975).

8 A. 23(a) Requirements

9 1. Numerosity

10 The class must be so numerous that joinder of all members individually is  
11 “impracticable.” Fed.R.Civ.P. 23(a)(1). No specific numerical threshold is required; each case  
12 must be examined. General Tel.C. v. E.E.O.C., 446 U.S. 318, 330, 100 S.Ct. 1698 (1980).  
13 Generally, 40 or more members will satisfy the numerosity requirement. Consolidated Rail  
14 Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2nd Cir. 1995).

15 Plaintiff contends that the class size of approximately 2,500 drivers is sufficiently  
16 numerous. Knight hires approximately 200 to 250 drivers for each of its two California facilities  
17 per year, all of whom attend orientation in California. Due to frequent turn-over, approximately  
18 2,500 drivers have attended orientation in California since the Class Period began in March 2007.  
19 Hitchcock Dep. 52:3-13; Johnson Dep. 72:4-7.

20 Defendant does not oppose numerosity.

21 2. Commonality

22 There must be questions of law or fact common to the class. Fed.R.Civ.P. 23(a)(2). A  
23 “common nucleus of operative facts” is usually enough to satisfy the commonality requirement.  
24 Rosario v. Livaditis, 963 F.2d 1013, 1017-18 (7th Cir. 1992).

25 Plaintiff contends that commonality is satisfied because the conduct that violates  
26 California law is mandated by Defendant’s state-wide policies, and has therefore affected all  
27 members of the putative Class. For example, common issues include: (1) whether Plaintiff and  
28 the Class were employees during the three day orientation; (2) whether Plaintiff and the Class

1 were entitled to be paid minimum wage for time spent at orientation; (3) whether the failure to  
2 pay minimum wages violated Labor Code section 1194; (4) whether the failure to provide former  
3 employees with all wages upon termination violated Labor Code section 203; and (5) whether  
4 Defendant's issuance of inaccurate paystubs, which showed an incorrect total amount of  
5 orientation pay, violated Labor Code sections 226 and 226.3.

6 The Court agrees that this action involves common questions of law, the most basic of  
7 which are whether those who attended orientation were (1) employees, and (2) entitled to  
8 minimum wage. However, a discussion of whether commonality exists also requires an  
9 examination of the three different orientations utilized over the class period.

10 As explained above, from 2007 to July 2008, orientation involved classroom instruction,  
11 as well as screenings and driving tests. During this period, teaching was based mainly on the  
12 Driving Associates Policies and Procedures Manual. In July 2008, to allow for more  
13 consistency, Defendant implemented a PowerPoint presentation for classroom instruction.  
14 Despite the change to PowerPoint, the orientations involved roughly the same amount of time in  
15 the classroom, and the same screenings and driving tests, as before. Therefore, during these two  
16 periods, the duration of the orientations remained consistent, as did Defendant's control over  
17 dates and schedules. The main factors that will undoubtedly be analyzed in determining whether  
18 attendees were employees were therefore consistent.

19 In May 2011, however, these consistencies ended for certain attendees. At that point,  
20 Defendant incorporated the use of an internet-based orientation course, which could be used in  
21 place of the classroom portion. Applicants could either (1) use the on-line course, in any location  
22 and on their own time schedule, and then go to the terminal for examinations and screenings; or  
23 (2) attend in-class orientation at a terminal, where either the PowerPoint presentation or on-line  
24 material is used. The on-line course, depending on the applicant's computer ability, takes  
25 anywhere from five to ten hours to complete and substantially reduces the time spent in the  
26 classroom. Johnson Dep., 17:18-20. After May 2011, Defendant no longer had control over  
27 applicants who chose the on-line course, in terms of when they took the course, where they took  
28 it, and how much time it involved.

1 Defendant attempts to defeat commonality as to all attendees by asserting that answering  
2 the question of whether attendees are employees will require “highly individualized inquiries”  
3 based on a multi-factor test. Opposition, at 12. Relying on Wal-Mart Stores, Inc., v. Dukes, 131  
4 S.Ct. 2541 (2011), Defendant contends that there is no commonality, despite the existence a  
5 common question, where there are no issues capable of common answers. Yet Defendant’s  
6 contention that common answers do not exist is based on its incorrect assumption that the  
7 attendees differ so significantly that employee status cannot be determined without individual  
8 scrutiny. As explained above, with the exception of the those choosing the on-line course after  
9 May 2011, the factual circumstances of the attendees are sufficiently common to allow for  
10 common answers.

11 The Court finds that commonality exists for those attending classroom orientation, but  
12 not for those who chose to substitute classroom teaching with the on-line course. Based on the  
13 proposed class definitions, Plaintiff has failed to carry his burden of demonstrating commonality  
14 for those opting for on-line orientation.

15 3. Typicality

16 Rule 23(a)(3) requires that “the claims or defenses of the representative parties [be]  
17 typical of the claims or defenses of the class.” In General Tele. Co. of the Southwest v. Falcon,  
18 457 U.S. 147, 102 S.Ct. 2364 (1982), the Court noted “[t]he commonality and typicality  
19 requirements of Rule 23(a) tend to merge.” 457 U.S. at 157 n. 13, 102 S.Ct. 2364. A named  
20 plaintiffs’ claim is “typical” under Rule 23 if it arises “from the same event or practice or course  
21 of conduct that gives rise to the claims of the other class members and his or her claims are based  
22 on the same legal theory.” Ballard v. Equifax Check Services, 186 F.R.D. 589, 595 (E.D.Cal.  
23 1999).

24 Plaintiff argues that his claims are typical because he, like his fellow drivers: (1) attended  
25 orientation for 3 days, (2) was not paid minimum wages for this time; (3) was not paid all wages  
26 due upon termination; and (4) received a first itemized wage statement that did not include  
27 minimum wages for having attended orientation. Clayton Dep., 112:15-17.

1 Defendant does not oppose typicality and the Court finds that Plaintiff's claims are  
2 typical of the attendees attending classroom orientations.

3 4. Adequacy of Representation

4 The person representing the class must be able "fairly and adequately to protect the  
5 interests" of all members in the class. Fed.R.Civ.P. 23(a)(4). The representation is "adequate" if  
6 the attorney representing the class is qualified and competent and the class representatives are not  
7 disqualified by interests antagonistic to the remainder of the class. Lerwill v. Inflight Motion  
8 Pictures, Inc., 582 F.2d 597, 512 (9th Cir. 1978).

9 Plaintiff asserts that because his claims and those of the Class are "virtually coextensive,"  
10 there is no legally cognizable conflict. Moreover, Defendant has stipulated that Plaintiff's  
11 attorneys are adequate to serve as Class Counsel. Declaration of Michael Malk, ¶ 3.

12 Therefore, the Court finds that both Plaintiff and his attorneys are adequate to represent  
13 the class.

14 B. 23(b) Requirements

15 Plaintiff requests that the Court certify the class under Rule 23(b)(3), which provides for  
16 certification when:

17 (3) the court finds that the questions of law or fact common to the members of the class  
18 predominate over any questions affecting only individual members, and that a class action  
19 is superior to other available methods for the fair and efficient adjudication of the  
20 controversy. The matters pertinent to the findings include: (A) the interest of members of  
21 the class in individually controlling the prosecution or defense of separate actions; (B) the  
22 extent and nature of any litigation concerning the controversy already commenced by or  
23 against members of the class; (C) the desirability or undesirability of concentrating the  
24 litigation of the claims in the particular forum; (D) the difficulties likely to be  
25 encountered in the management of a class action.

22 1. *Commonality*

23 Common questions of law and fact predominate over individual questions, satisfying the  
24 first component of the Rule 23(b)(3) inquiry, where "the issues in the class action that are subject  
25 to generalized proof, and thus applicable to the class as a whole, ... predominate over those issues  
26 that are subject only to individualized proof." Ortega v. J.B. Hunt Transport, Inc., 258 F.R.D.  
27 361, 366 (C.D. Cal. 2009) (citing Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. (In re Visa  
28 Check/MasterMoney Antitrust Litig.), 280 F.3d 124, 136 (2001)). In evaluating predominance,

1 the Court looks to whether the focus of the proposed class action will be on the words and  
2 conduct of the defendants rather than on the behavior of the individual class members. Id.

3 “Considering whether ‘questions of law or fact common to class members predominate’  
4 begins, of course, with the elements of the underlying cause of action.” Stearns v. Ticketmaster  
5 Corp., 655 F.3d 1013, 1020 (9th Cir. 2011) (citing Erica P. John Fund, Inc., v. Halliburton Co.,  
6 131 S.Ct. 2179, 2184 (2011)).

7 The parties argue extensively about which test the Court should ultimately apply to  
8 determine whether those who attended orientation are employees. The Court need not decide the  
9 test at this point, however. Regardless of the test used, individual issues do not predominate.  
10 Defendant would have this Court believe that employment status cannot be determined on a non-  
11 individualized basis, but for the reasons discussed above, common questions of law and fact  
12 predominate. In other words, for attendees attending classroom orientation, employment status  
13 can be determined on a group-wide basis because the relevant facts are the same for the group.  
14 Defendant exerted control over the times and places of orientation and the daily schedule, and the  
15 time spent at orientation was generally consistent.<sup>3</sup> Similarly, assuming attendees are employees,  
16 the consistency in time spent at orientation will allow for determination of whether the  
17 employees would be entitled to minimum wage. See eg., Ortega v. J.B. Hunt Transport, 258  
18 F.R.D. 361 (C.D. Cal. 2009).

19 2. *Superiority*

20 Finally, Plaintiff contends that a class action is superior because the relatively small  
21 amounts at issue for each driver make it impracticable and inefficient for each driver to file  
22 individual cases.

23 Defendant opposes superiority based mainly on its argument that commonality does not  
24 exist. The Court has disposed of this argument, however, and finds that a class action is superior  
25 to resolve the issues presented.

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28 <sup>3</sup> Any slight variations in time spent at orientation can be accounted for after the class certification issues  
have been resolved.

1 **RECOMMENDATION**

2 The Court recommends that Plaintiff's Motion for Class Certification be GRANTED and  
3 that the following classes be CERTIFIED:

- 4 (A) Orientation Pay Class: All current and former truck drivers employed by Knight  
5 Transportation, Inc., who were based in the State of California, and who  
6 participated and/or attended a classroom orientation in the State of California  
7 during the period from March 9, 2007, through the present (the "Class Period"),  
8 excluding those who participated in the on-line course in place of classroom  
9 training;
- 10 (B) Cal. Labor Code § 203 Class: consisting of former employees of the Orientation  
11 Pay Class;
- 12 (C) Cal. Labor Code § 226 Class: consisting of members of the Orientation Pay Class  
13 who attended orientation within one-year before this lawsuit was filed; and
- 14 (D) Cal. Bus. & Prof. Code §17200 Class: co-extensive with the Orientation Pay  
15 Class.

16 These Findings and Recommendations are submitted to the Honorable Lawrence J.  
17 O'Neill, United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636  
18 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,  
19 Eastern District of California. Within thirty (30) days after being served with a copy, any party  
20 may file written objections with the Court and serve a copy on all parties. Such a document  
21 should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The  
22 Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The  
23 parties are advised that failure to file objections within the specified time may waive the right to  
24 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

25 IT IS SO ORDERED.

26 **Dated: July 15, 2012**

27 **/s/ Dennis L. Beck**  
28 UNITED STATES MAGISTRATE JUDGE