UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JODI SCOTT-GEORGE, individually and on behalf of other members of the general public similarly situated,

Plaintiffs,

v.

PVH CORPORATION, a Delaware corporation, and DOES 1 through 100, inclusive,

Defendant.

No. 2:13-cv-00441-TLN-DAD

ORDER GRANTING MOTION FOR CLASS CERTIFICATION

This matter is before the Court pursuant to Plaintiffs Jodi George Scott and Melissa Wiggs's (collectively referred to as "Plaintiffs") Motion for Class Certification. (ECF No. 55.) Defendant PVH Corporation ("Defendant") has filed an opposition[1] (ECF No. 68), to which Plaintiffs have filed a reply (ECF No. 78).[2] The Court has carefully considered the arguments

[1] In conjunction with Defendant's opposition, Defendant filed a motion to strike the declaration of Dakkar Hunter. (ECF No. 69.) Among other reasons, Defendant argues that Hunter was not employed during the time frame applicable in this lawsuit. Plaintiffs do not dispute this fact, but assert that Hunter's account of his experience serves as evidence of Defendant's routine practices. (Opp'n to Mot. to Strike, ECF No. 82 at 3.) The Court hereby GRANTS Defendant's Motion to Strike (ECF No. 69) because although Hunter's declaration may show a routine practice from 2004 to 2007, it does not show that the same practice existed from March 2009 to present and is thus not relevant to this Court's inquiry.

[2] Plaintiffs have moved to exclude Exhibits 11–24, 26, 27, 29–32 and 44 to Defendant's Compendium of Evidence submitted in support of Defendant's Opposition to Plaintiffs' Motion for Class Certification. (ECF No. 83.) Plaintiffs assert that Defendant never produced exhibits 11–17, 19–20, 22–24, 26, 27, 29–32, and 44 and further that although exhibits 18 and 21 were produced, they were redacted to conceal employees' names, thus rendering

raised in the parties' briefing. For the reasons set forth below, Plaintiffs' Motion for Class Certification is hereby GRANTED.

I. FACTUAL BACKGROUND

Plaintiffs and the proposed class members are retail store nonexempt employees of Defendant, an international clothing retailer. At issue is the lawfulness of Defendant's company policies on: payment of overtime/double overtime; security bag check; paycards; meal and rest periods; and wage statements. Plaintiffs seek to certify the following classes:

> (1) Overtime I Subclass (non-payment of regular overtime): All nonexempt employees who worked in excess of 8 hours (but less than 12 hours) in a workday or in excess of 40 hours in a workweek without receiving the appropriate overtime wage that is one and a half times the regular rate pay, while working for Defendant in California from March 20, 2009 to the present.
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> (2) Overtime II Subclass (non-payment of double overtime): All nonexempt employees who worked in excess of 12 hours in a workday without receiving the appropriate overtime wage that is twice the regular rate pay, while working for Defendant in California from March 20, 2009 to the present.
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> (3) Security Bag Check Subclass: All nonexempt employees who were subjected to a security bag check while working for Defendant in California from March 20, 2009 to the present.
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> (4) Paycard Subclass: All nonexempt employees who received their earned wages via the Money Network paycard system while working for Defendant in California from March 20, 2009 to the

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them useless. (ECF No. 83 at 2–3.) In response, Defendant asserts that PVH produced thousands of pages of class member wage records during the course of discovery, and explained that it would produce a sampling of class member time records. (Opp'n, ECF No. 90 at 1.) Defendans further asserts that after the parties agreed to stay discovery to focus on mediation, they agreed that PVH would produce a 20% sampling of time records in advance of the mediation. These documents were produced to Plaintiffs both with redaction and without redaction prior to the parties' first mediation in July 2014. (Opp'n, ECF No. 90 at 1.) Defendant alleges that after the failed mediation, no mention of the 151 Labor Code § 226(b) requests was made by Plaintiffs until February 2015—a year after Plaintiffs were told that the records were gathered and ten days before their reply to the class certification motion was due. (Opp'n, ECF No. 90 at 3.) Defendant alleges that PVH's counsel explained via e-mail a few days later that the records were available for copying and that Plaintiffs' counsel never responded. (Opp'n, ECF No. 90 at 3; Hansell Decl. ¶ 6.)

Based on the assertions made by both parties, the Court is not convinced that the situation warrants exclusion of the documents. Furthermore, to the extent that Plaintiffs assert that Defendant's 30(b)(6) witness, Ms. Buckley's testimony was contrary to documents that were produced in opposition to Plaintiffs' motion for class certification, the Court finds that Plaintiffs' characterization of the testimony is not completely accurate. Her declaration in support of PVH's Opposition to Class Certification is consistent with her deposition testimony. Ms. Buckley merely testified that she did not know why Jodi Scott-George was not paid double overtime. She was not asked questions about the wages of any other putative class members. As such, the Court hereby DENIES Plaintiffs' motion to exclude Exhibits 11–24, 26, 27, 29–32 and 44 to Defendant's Compendium of Evidence submitted in support of Defendant's Opposition to Plaintiffs' Motion for Class Certification (ECF No. 83).

present.

> (5) Meal Period Subclass: All nonexempt employees who did not receive a compliant meal period, while working for Defendant in California from March 20, 2009 to the present.
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> (6) Rest Period Subclass: All nonexempt employees who did not receive a compliant rest period, while working for Defendant in California from March 20, 2009 to the present.
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> (7) Late Pay Subclass: All nonexempt employees who worked for Defendant in California whose employment ended between March 20, 2010 and the date of certification, who did not receive all wages due at the time they were terminated or otherwise stopped working for Defendant.
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> (8) Wage Statement Subclass: All nonexempt employees who received non-compliant wage statements while working for Defendant in California from March 20, 2009 to the present.

(Mem. of P&A in Supp't of Mot. for Class Cert., ECF No. 55-1 at 1.) Plaintiff Jodi Scott-George is the Class Representative for subclass (1), (2), (5), (6) and (7). Plaintiff Melissa Wiggs is the Class Representative for the subclass (3), (4), (6), (7) and (8). The proposed class would encompass not only all nonexempt employees of PVH Corporation (which owns Van Heusen; and owned but sold G. H. Bass) but also nonexempt employees of PVH Retail, LLC (which owns Calvin Klein, Izod, and Tommy Hilfiger) because the PVH Corporation as the parent company imposes identical wage and hour policies for PVH Retail, LLC. (ECF No. 55-1 at 2.)

II. LEGAL STANDARD

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. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Telephone Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). "While the trial court has broad discretion to certify a class, its discretion must be exercised within the framework of Rule 23." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, *amended by* 273 F.3d 1266 (9th Cir. 2001) (citing *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977)); *see also Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542–43 (9th Cir. 2013). A court may certify a class if a plaintiff demonstrates that all of the prerequisites of Federal Rule of Civil Procedure 23(a) have been met and that at least one of the

requirements of Rule 23(b) have been met. Fed. R. Civ. P. 23; *see also Wal-Mart Stores, Inc.*, 131 S. Ct. at 2548–49.

Rule 23(a) states that one or more members of a class may sue or be sued as representative parties on behalf of all only if:

> (1) the class is so numerous that joinder of all members is impracticable [the "numerosity" requirement]; (2) there are questions of law or fact common to the class [the "commonality" requirement]; (3) the claims or defenses of representative parties are typical of the claims or defenses of the class [the "typicality" requirement]; and (4) the representative parties will fairly and adequately protect the interests of the class [the "adequacy of representation" requirement].

In addition, Rule 23(b) requires a plaintiff to establish one of the following: (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication. Fed.R.Civ.P. 23(b). The court has broad discretion to certify a class, and district courts are accorded "noticeably more deference" when they grant certification versus when they deny certification. *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010).

III. ANALYSIS

The Court first addresses the requirements under Rule 23(a) and then moves to Rule 23(b). Because Plaintiffs have requested certification of eight separate subclasses, the Court discusses the four Rule 23(a) factors as they pertain to the different classes.

A. Rule 23(a)

i. Numerosity

To meet the numerosity requirement of Rule 23(a), a class must be "so numerous that joinder of all members is impracticable." Rule 23(a)(1); *see also Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir.1995) ("numerosity is presumed at a level of 40 members"); *Andrews Farms v. Calcot, Ltd.*, No. CV–F–07–0464 LJO DLB, 2009 WL 1211374, at *3 (E.D. Cal. May 1, 2009); *see also* William B. Rubenstein, et al., Newberg on Class Actions,

§ 3.12 at 198 (5th ed. 2011).

Defendant asserts that: (1) Subclass I and II do not meet the numerosity requirement because PVH time records from March 2009 to May 5, 2013, indicate that only 58 non-exempt California employees worked in excess of 12 hours in one day (ECF No. 68 at 10); (2) determining class members for Subclass III is impossible because there is no way to determine which employees were subjected to bag checks (ECF No. 68 at 11); (3) Subclass IV may be mooted by the *Chavez* class action settlement (ECF No. 68 at 24);[3] and (4) Plaintiffs fail to show numerosity concerning Subclass V because they have not provided a methodology for determining how many and which people missed meal breaks involuntarily without receiving premium pay (ECF No. 68 at 21).

At the outset, the Court notes that although not all of the nonexempt employees will be included in each class, a large percentage of those employees were all subject to the same pay structure (including overtime, paycards, meal and rest periods, etc.). As to Defendant's first contention that Subclass I and II are not numerous enough to support class certification, the Court finds Defendant's assertion that only 58 non-exempt California employees worked in excess of 12 hours in one day suspect at best. According to the declaration of PVH's Vice President of Retail and HR Administration, Carla David, PVH employed "more than 4,324 [nonexempt] individuals" during the class period. (*See* David Decl. in Supp't of Not. for Removal, ECF No. 4 at ¶ 5.) Therefore, the assertion that only 58 out of 4,324 employees worked in excess of 12 hours is suspect. However, even if Defendant's number is true, 58 class members is sufficient for numeroisty. *See Consolidated Rail Corp.*, 47 F.3d at 483 ("numerosity is presumed at a level of 40 members").

Defendant next asserts that determining class members for Subclass III is impossible

[3] Defendant has requested that this Court take judicial notice of the pending settlement in *Chavez v. PVH Corp.*, N.D. Cal. Case No. 5:13-cv-01797-LHK (the "*Chavez* case") and *Lapan v. PVH Corp*., N.D. Cal. Case No. 3:13-cv-05006-LHK (the "*Lapan* case"), pursuant to Federal Rule of Civil Procedure 201. (*See* Request for Judicial Notice, ECF No. 107.) Plaintiffs oppose Defendant's request asserting the sole basis for Defendant's request is the potential collateral estoppel effect of the *Chavez* and *Lapan* settlements. (Objections, ECF No. 108.) Rule 201(b) provides that "the court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. The documents at issue here are all court filings or matters of public record. Therefore, judicial notice is appropriate and Defendant's request is GRANTED.

because there is no way to determine which employees were subjected to bag checks. For these same reasons Defendant argues that Plaintiffs fail to show numerosity concerning Subclass V because they have not provided a methodology for determining how many and which people missed meal breaks involuntarily without receiving premium pay (ECF No. 68 at 21). The Court suspects that a large percentage of the employees would have carried bags or purses to work in order to carry their belongings, such as wallets, keys, and phone, and thus would be part of the class. Plaintiffs have correctly pointed out that membership in the security bag check and rest period subclasses can be determined through schedules, time and payroll records, and procedural tools such as surveys. (*See* Pls' Reply, ECF No. 78 at 2–3.) Moreover, Defendant's arguments fail because Plaintiffs are not required to show a method for determining the number of employees affected because Plaintiff's theory is based on a policy which applies to all of Defendant's California employees. *See In re AutoZone, Inc., Wage & Hour Employment Practices Litig.*, 289 F.R.D. 526, 533 (N.D. Cal. 2012) (holding that defendant's argument that the class was not ascertainable fails because plaintiff's theory of the case was based on a policy that applied to all of defendant's California employees); *In re Whirlpool Corp. Front Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 420 (6th Cir. 2012) (class not overbroad so long as challenged practice is "premised on a ground that is applicable to the entire class").

Lastly, Defendant argues that Subclass IV may be mooted by the *Chavez* class action settlement. (ECF No. 68 at 24.) However, Defendant's argument requires that the Northern District of California Court grant final approval of the settlement. The Court will not base its determination of whether to certify a class on the probability of what will happen in another legal matter outside of this district. In the event that the *Chavez* class action settles and the settlement subsumes the class at issue here, the Court would be willing to reconsider the matter at that time. However, denying class certification in anticipation of another court's ruling is not appropriate.

Accordingly, the Court finds that the number of plaintiffs exceeds the threshold contemplated by courts and would make joinder of all members impossible. Therefore, numerosity as to all eight subclasses is satisfied.

ii. Common Questions of Law and Fact

To meet the commonality requirement, there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a). In *Wal–Mart v. Dukes*, the Supreme Court announced that this provision requires plaintiffs to "demonstrate that the class members 'have suffered the same injury,' not merely violations of the same provision of law." 131 S. Ct. at 2551 (quoting *Gen.Tel. Co. of Sw. v. Falcon*, 457 U.S. 147,157 (1982)). Thus, "plaintiffs' claims 'must depend upon a common contention' such that 'determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Parsons v. Ryan*, No. 13–16396, 2014 WL 2523682, at *10 (9th Cir. June 5, 2014) (quoting *Wal–Mart*, 131 S. Ct. at 2551). Plaintiffs need not show that "every question in the case, or even a preponderance of questions, is capable of class wide resolution. So long as there is even a single common question, a would-be class can satisfy the commonality requirement of Rule 23(a) (2)." *Id.* at *11 (internal quotations omitted); *see also Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012) (noting that "commonality only requires a single significant question of law or fact"). "Thus, '[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists.'" *Id.* (quoting *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012)).

Here Plaintiffs assert that numerous common factual and legal questions are present, including but not limited to the following:

- Does PVH's failure to pay overtime and double overtime violate California Labor Code § 510?
- Does PVH's company policy of requiring its employees to undergo security bag checks while off the clock violate California law?
- Does PVH's failure to provide a meaningful choice to receive earned wages in a form other than a paycard that charges fees (under some circumstances) violate California law?
- Does PVH's meal period policy which provides a "30 minute meal period after 5 consecutive hours" violate [California Industrial Welfare Commission ("IWC")] IWC Wage Order 7-2001, § 11?

- Does PVH's rest period policy which provides a "10 minute paid break every 4 hours worked" violate IWC Wage Order 7-2001, § 12?
- Does PVH's failure to include the beginning date of the pay period violate California Labor Code § 226?

(ECF No. 55-1 at 4.) All of the above questions hinge on the interpretation (and lawfulness thereof) of PVH's company policies.

In opposition, Defendant asserts that commonality does not exist as to: (1) Subclass III because "diversity of bag check processes in each store … [due to] employees [who] do not bring bags to work" (ECF No. 68 at 11); (2) Subclass IV because Plaintiffs do not show that a common policy of charging employees fees for use of their paycards existed (ECF No. 68 at 24); (3) Subclass V because Plaintiffs cannot show a common question concerning meal breaks (ECF No. 68 at 17); (4) Subclass VI because there is no common policy of denying rest breaks (ECF No. 22); and (5) Subclass VIII because Defendant asserts that Plaintiffs' only evidence concerning alleged non-compliant wage statements are time barred or not representative of the class (ECF No. 68 at 28). The Court addresses each one in turn.

At the outset, the Court finds Defendant's numerous assertions that Plaintiffs have not proven that employees were not adequately compensated for overtime hours is not helpful to this Court in determining whether class certification should be granted. *See In re TFT–LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 604 (N.D. Cal. 2010) ("Plaintiffs are not required to prove the merits of their case in-chief at the class certification stage.") (internal citations omitted). As to Defendant's contentions concerning Subclass III, the Court is not persuaded that the Security Bag Check Subclass is not ascertainable. As mentioned in discussing numerosity, Plaintiffs can identify employees who underwent bag checks through surveys, sampling, and representative testimony. Furthermore, any argument that there is no policy requiring off the clock searches is unpersuasive. PVH's Internal Theft Prevention policy specifically states:

> All associate carry bags, packages, etc. are to be thoroughly inspected by Store Management when any PVH associate, including management personnel, enters or exits the store. **It is to be explained to all associates that it is <u>their responsibility</u> to ensure that their packages/bags are checked both upon entering**

and prior to exiting the store.

(*See* Mot. for Class Cert, Ex. S (all emphasis in original).) The policy requires that the bags be searched upon entering or exiting the store. Unless Defendant has found a way to clock employees in at the entrance of the floor, then the policy is to search bags prior to and after employees have clocked in and out. Furthermore, Plaintiffs have submitted numerous declarations in which employees state that their bags were searched pursuant to the policy. (*See* Avina Decl. ¶ 9; Gadsby Decl. ¶ 10; Hounsley Decl. ¶ 10; Lesley Decl., ¶ 9; Pederson Decl., ¶ 10; Merrill Decl. ¶ 10; Rodriguez Decl. ¶ 7.)

Next, Defendant asserts that Subclass IV should not be certified because Plaintiffs do not show that a common policy of charging employees fees for use of their paycards existed. (ECF No. 68 at 24.) In response, Plaintiffs assert they have clearly identified the common policy, automatically issuing the pay cards when an employee was hired, and that is the legality of this policy that is being challenged. (Reply, ECF No. 78 at 12–13.) Therefore, Plaintiffs assert that this Court's decision as to the legality of that policy "would 'produce in one stroke answers that are central to the validity of [plaintiff's] claims.'" (ECF No. 78 at 13 (quoting *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013).)

This Court agrees. The legality of Defendant's policy—which entails automatically issuing paycards to its employees and puts the burden on the employees to request a different option—is common to all proposed Subclass IV members. The policy is an issue "central to the validity of each one of the claims." *See Wal–Mart Stores, Inc. v. Dukes*, 131 S. Ct. at 2551.

Defendant next argues that Plaintiffs cannot show a common question concerning meal breaks or rest breaks and thus commonality does not exist as to Subclass V (ECF No. 68 at 17) or Subclass VI (ECF No. 22).

Defendant acknowledges, that PVH has a policy that provides for a "30 minute meal period after every 5 consecutive hours" and a "10 minute paid break for every 4 hours worked." (Pls' Ex. LL.) The meal period policy and the rest period policy were distributed to store managers via memos from Defendant's Human Resources department with instructions to review

the policy with all employees, and it was reviewed with new hires. (Bae Decl. ¶¶ 22–23, Exs. O–P, X.) Plaintiffs aver that both policies are facially defective: "This policy is defective on its face as a matter of law because PVH's employees will receive a meal period only after having completed 5 hours of work, instead of receiving a meal period "no later than the end of the employees' fifth hour of work." (ECF No. 55-1 at 12.) Similarly, Plaintiffs argue that "[t]he rest period policy, by its own terms, does not authorize or permit rest periods for employees who work between 3.5 and 4 hours or those employees who work between 6 and 8 hours because it only allows a rest period "for every 4 hours worked." (ECF No. 55-1 at 14.) The Court finds that this is sufficient to meet the commonality requirement.

Finally, Defendant asserts that commonality does not exist for Subclass VIII because Plaintiffs' only evidence concerning alleged non-compliant wage statements are time barred or not representative of the class. (ECF No. 68 at 28.) Plaintiffs assert that a common issue of law and fact exists as to Subclass VIII —whether the wage statements provided to the putative class members have complied with California Labor Code § 226(a). (ECF No. 55-1 at 16.) Specifically, Plaintiffs argue that PVH's wage statements are not compliant because they fail to state: the total hours worked; the inclusive dates of the pay period; and all applicable hourly rates. (*See* ECF No. 55-1 at 16 (citing CAL. LAB. CODE §§ 226(a) (2), (6) & (9)).) In Plaintiffs' reply, they clarify that the their theory of liability as to this subclass is derivative of the claims for Subclasses I, II, and III because it is the overtime infractions and off-the-clock security bag checks that create inaccuracies as to the number of hours worked. (ECF No. 78 at 13.) Based on this theory of liability, members of Subclasses I, II and III would likely be members of Subclass VIII, and as a result, Defendant's concerns about a lack of evidence concerning class members that are not time barred is unwarranted.

For the foregoing reasons, the Court finds that common factual and legal questions are present and should be adjudicated using common proof applicable to the entirety of Plaintiffs' proposed Subclass. The answers to the questions of law provided by Plaintiffs present a common answer to the claims of each Subclass. Accordingly, commonality under Rule 23(a)(2) as to all eight Subclasses is met.

iii. Typicality

"The [Rule 23(a)(3)] 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." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "Under the rule's permissive standards, representative claims are "typical" if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). It is sufficient that the class representative is "part of the class and possess[es] the same interest and suffer[s] the same injury as the class members." *General Telephone Co. of Southwest*, 457 U.S. at 156.

Plaintiffs assert that they were subjected to the same company policies as the other putative class members, including employees of PVH Retail, LLC. In response, Defendant asserts that: (1) as it pertains to Subclass I, Scott-George, as the class representative, is not typical of the other putative class members (ECF No. 68 at 10); (2) Plaintiff Wiggs's alleged bag check experience (waiting 4–10 minutes to have her bag checked in a hectic store managed by employees who were not always available to conduct bag checks) is not typical of other putative Subclass III members (ECF No. 68 at 16); and (3) Named Plaintiffs' alleged rest break experiences differ greatly from other assistant managers and thus typicality does not exist for Subclass VI (ECF No. 68 at 21).

For the following reasons, the Court finds Defendant's arguments unavailing. Defendant's assertion that Scott-George's experience was not typical of the other putative Subclass I members is based on the belief that the store Scott-George worked in had unique issues with its manager, who apparently had substance abuse problems and missed shifts without warning. (ECF No. 68 at 10.) Although this may be true, the Court is not convinced that this would mean that Scott-George's lack of overtime payment is not typical. Defendant has not shown that the manager's alleged substance abuse somehow changed Defendant's pay policy or hour calculations. Similarly, Defendant's arguments concerning Subclass V fail. Defendant argues that Named Plaintiffs' experiences concerning rest breaks were unique to them. However,

Plaintiffs are challenging the written policy that applied to all of the nonexempt employees. Therefore, Plaintiffs' facial challenge of the policy is not affected by Defendant's arguments that the experiences differed. Lastly, as to Defendant's argument that Plaintiff Wiggs's bag check experience is not typical of other putative Subclass III members (ECF No. 68 at 16), the same issue exists. Defendant attempts to argue that typicality is overcome by different experiences with the policy. However, Defendant fails to acknowledge that Named Plaintiffs are typical of Subclass III, since all putative members were subjected to the same policy. The Court declines to scrutinize the facts in such a detailed way as to make any small difference in class members' experiences destroy the overall similarity that binds them. To do so would make any class action litigation inapplicable. Plaintiffs' Subclasses possess the same interest and arguably suffer the same injury because they were all subjected to the same policy. *See General Telephone Co. of Southwest*, 457 U.S. at 156. Thus, the Court finds that Plaintiffs have met their burden of showing typicality as to all eight Subclasses under Rule 23(a).

iv. Adequate Class Representation

The requirement of adequate representation asks whether the representative "will fairly and adequately protect the interests of the class." *See* Fed. R. Civ. P. 23(a)(4). Courts are to inquire (1) whether the named plaintiffs and counsel have any conflicts of interest with the rest of the class, and (2) whether the named plaintiff and counsel will prosecute the action vigorously for the class. *See Hanlon*, 150 F.3d at 1020.

Plaintiffs' interests in this litigation are co-extensive with the interests of the class. They have allegedly been injured in the same manner by Defendant and seek the same relief. They have devoted considerable time to this litigation, including initiating the case by searching for a lawyer, consulting with counsel to aid in the investigation, responding to written discovery, gathering documents responsive to discovery requests and subpoena, traveling for depositions, and have asserted that they will continue to do so. (*See* Scott-George Decl. ¶ 14; Wiggs Decl. ¶ 13.) Likewise, the Court finds that Plaintiffs' counsel will adequately represent the class, as they are experienced in prosecuting wage and hour class actions. (*See* Bae Decl. ¶¶ 66–72.)

The only argument that Defendant raises as to the adequacy of representation concerns

Plaintiff Wiggs's adequacy in representing Subclass III on the bag check claims. (ECF No. 68 at 16.) Specifically, Defendant asserts that because of "the significant differences between Wiggs's claimed personal experience and that of other putative class members, her claims are not typical of other class members, and therefore, she cannot be an adequate representative." (ECF No. 68 at 17.) This argument is really more akin to a typicality challenge than a representation challenge and has already been rejected by this Court.[4] As such, the Court finds that Plaintiffs have met their burden of showing adequate class representation.

B. Rule 23(b)

Plaintiffs assert that class certification is appropriate pursuant to Federal Rule of Civil Procedure 23(b)(3). Rule 23(b) provides that a class action may be maintained if Rule 23(a) is satisfied and if:

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
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> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
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> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
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> (D) the likely difficulties in managing a class action.

While Rule 23 states that these factors are pertinent to the assessment of predominance and superiority, most courts analyze the Rule 23(b)(3)(A)–(D) factors solely in determining whether a class suit will be a superior method of litigation. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1191 (9th Cir.) *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001).

i. Predominance

"Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Id.* at 1189. Class certification under Rule

[4] *See supra* Section III(A)(iii).

23(b)(3) is proper when common questions constitute a significant portion of the case. *See Hanlon*, 150 F.3d at 1022. For establishing predominance, the applicable inquiry is "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Id.* at 625.

Plaintiffs assert that each subclass is predominated by the same issues of law because each subclass is predicated on a specific policy that applied to each subclass member. Defendants raise issues concerning Subclasses III, IV, V, and VI. Because the Court finds that all eight Subclasses are based on Defendant's uniform policies and practices and thus the same issues predominate, the Court limits the inquiry below to the arguments raised by Defendant concerning predominance.[5]

As previously discussed in this Court's examination of commonality, the same questions of fact are at issue in the proposed class's Subclaims.[6] Essentially the same arguments that Defendant posed for commonality are also alleged as reasons why the predominance factor is not met under Rule 23(b), i.e. the same issues do not predominate over: Subclass IV because Plaintiffs do not adequately explain how common questions predominate over claims concerning the use of paycards (ECF No. 68 at 26); and Subclass V because managers have discretion as to the precise time an employee is scheduled for a meal break, and thus common questions do not predominate over the subclass (ECF No. 68 at 19). Additionally, Defendant asserts that common questions of law do not predominate Subclass III's claims because an individualized inquiry is required to determine whether time spent undergoing bag checks is compensable and to determine whether the *de minimus* defense is applicable. (ECF No. 68 at 12–14). Defendant also argues that Subclass VI's claims do not predominate because PVH's policies were applied in accordance with California law (ECF No. 68 at 23).

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[5] Defendant also asserts that Subclass VII is derivative of Plaintiffs' other Subclasses and thus fails because Plaintiffs other subclasses are allegedly not certifiable. (ECF No. 68 at 29.) Because this Court finds that Plaintiffs' Subclasses are indeed certifiable, the Court need not address this argument.

[6] *See supra* Section III(A)(ii).

a. Subclass III

Defendant asserts that common questions of law do not predominate Subclass III's claims because an individualized inquiry is required to determine whether time spent undergoing bag checks is compensable and to determine whether the *de minimus* defense is applicable. (ECF No. 68 at 12–14.) First, the Court has already discussed that the bag check policy was a universal policy that was applied to all employees who brought purses or bags to work. Any required inquiries can be made through surveys, sampling, and representative testimony. Furthermore, the fact that different employees' time or wages will require an individualized inquiry does not defeat commonality. *See In re Taco Bell Wage & Hour Actions*, No. 07–1314, 2012 WL 5932833, at *6 (E.D. Cal. Nov. 27, 2012) (where defendants admitted that there was a uniform policy but argued that "as a matter of practice, the policy is carried out in a variety of ways," the court relied on *Brinker* and found that it was sufficient that there was "a corporate policy that was equally applicable to all employees").

Next, even assuming the *de minimis* defense applies, the question of whether it is a valid defense is a common question that will generate a class-wide answer. Moreover, should the question arise, it will arise in the damages context. *See Otsuka v. Polo Ralph Lauren*, 251 F.R.D. 439, 448, n. 2 (N.D. Cal. 2008) (finding the common question predominated even after assuming that defendant is correct that application of *de minimus* rule might require inquiries into the individual experiences of class members because these individual questions will only arise after significant common questions of law and fact have been answered). As such, the Court finds that common issues of law predominate Subclass III.

b. Subclass IV

Defendant argues that the paycards are a legal form of payment pursuant to California Labor Code section 212. (ECF No. 68 at 26.) Defendant asserts that their pay program provides employees with multiple methods to receive earned wages, and thus one must look at each employee to determine how that employee chose to use the program each time she withdrew any money from her account. (ECF No. 68 at 27.) Therefore, Defendant concludes that the subjective inquiry into each employee destroys predominance.

In response, Plaintiffs assert they have clearly identified the common policy- automatically issuing the pay cards when an employee was hired- and it is the legality of this policy that is being challenged. (Reply, ECF No. 78 at 12–13.) Plaintiffs assert that "this Court's determination as to the legality of Defendant's policy in question would "produce in one stroke answers that are central to the validity of [plaintiff's] claims." (ECF No. 78 at 13 (citing *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013)).)

This Court agrees. The legality of Defendant's policy—which entails automatically issuing paycards to its employees and thus puts the burden on the employees to request a different option—does not require this Court to delve into each employees' subjective perception, as Defendant asserts. The policy is an issue "central to the validity of each one of the claims" and thus predominates Subclass IV. *See Wal–Mart Stores, Inc. v. Dukes*, 131 S. Ct. at 2551.

C. Subclasses V and VI

Defendant next argues that managers have discretion as to the precise time an employee is scheduled for a meal break, and thus common questions do not predominate Subclass V. (ECF No. 68 at 19.) Defendant states that "in practice, shifts – especially managerial shifts – are often staggered to make breaks available at appropriate times. Such variability shows there is no widespread failure to make meal breaks available." (ECF No. 68 at 20.) Moreover, Defendant claims that "merely showing that an employee worked over five hours and did not clock out for a meal break would not be determinative, especially since employees are permitted to waive meal breaks if they work no more than six hours and there is mutual consent." (ECF No. 68 at 20.) Defendant asserts that variations among employee experiences preclude class certification. Essentially, Defendant makes the same arguments as to Subclass VI, i.e., that the variation in how managers and employees utilize or employ PVH's policies concerning rest period breaks is varied and thus requires individual inquiries that defeat commonality.

This Court is not convinced. As Defendant acknowledges, the policy provides for a "30 minute meal period after every 5 consecutive hours" and a "10 minute paid break for every 4 hours worked." (Pls' Ex. LL.) The meal period policy and the rest period policy were distributed to store managers via memos from Defendant's Human Resources department with instructions to

review the policy with all employees, and it was reviewed with new hires. (Bae Decl. ¶¶ 22–23, Exs. O-P, X.) Plaintiffs aver that both policies are facially defective. (ECF No. 55-1 at 12.) There is nothing ambiguous about the language of Defendant's policy.

In *Kurihara v. Best Buy Co., Inc.*, No. 06–1884 MHP, 2007 WL 2501698, at *6, (N.D. Cal. Aug. 30, 2007), Judge Patel was confronted with the same issue in the context of a uniform inspection policy. There, he explained that "courts' discomfort with individualized liability issues is assuaged in large part where the plaintiff points to a specific company-wide policy or practice that allegedly gives rise to consistent liability." *Id.* at *9–*10. Although he acknowledged that "a mere allegation of a company-wide policy does not compel class certification," he noted that the plaintiff there had "provided substantial evidence of a company-wide policy where employees are subject to inspections, and are not compensated for the time spent on those inspections." *Id.* at 10. He concluded that "[a]lthough Plaintiff has submitted little or no evidence as to the implementation of that policy, the detailed nature of the policy itself, and the reasonable inferences which can be drawn from them, constitute sufficient evidence to satisfy plaintiff's burden as to the predominance of common questions." *Id.*

Similarly, other courts have likewise held that claims based on a uniform policy are entitled to class certification. *See, e.g., Brinker Restaurant Group v. Superior Court*, 53 Cal. 4th 1004, 1020, 1033 (2012) (finding, despite the fact that "Brinker submitted hundreds of declarations in support of its opposition to class certification," that "[c]laims alleging that a uniform policy consistently applied to a group of employees in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment."); *Vedachalam v. Tata Consultancy Servs., Ltd.*, No. 06–0963, 2012 WL 1110004, at *12–*13 (N.D. Cal. April 2, 2012) (rejecting defendants' argument that "this policy was not always uniformly applied"); *In re Taco Bell Wage & Hour Actions*, No. 07–1314, 2012 WL 5932833, at *6 (E.D. Cal. Nov. 27, 2012) (where defendants admitted that there was a uniform policy but argued that "as a matter of practice, the policy is carried out in a variety of ways," the court relied on *Brinker* and found that it was sufficient that there was "a corporate policy that was equally applicable to all employees"); *In re AutoZone, Inc., Wage & Hour Employment Practices Litig.*, 289 F.R.D. 526, 534 (N.D. Cal.

2012) (finding that a subclass's claims were based entirely on the legality of the defendant's uniform written rest break policy, and thus common questions predominated). Thus, the Court finds that Plaintiffs have met their burden of showing that company-wide policies exist concerning meal and rest breaks and that the legality of those policies predominates over both Subclasses V and VI.

ii. Superiority

The second prong of the analysis under Rule 23(b)(3) also requires a finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). "Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

Given the small size of each class member's claims in this situation, class treatment is not merely the superior, but the only manner in which to ensure fair and efficient adjudication of the present action. *See Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 537 (C.D. Cal. 2011) (finding superiority where the proposed class member's individual claims were minimal); *Pecover v. Elec. Arts Inc.*, No. C 08–2820, VRW 2010 U.S. Dist. LEXIS 140632, at *68, 2010 WL 8742757 (N.D.Cal. Dec. 21, 2010) ("[T]he modest amount at stake for each purchaser renders individual prosecution impractical. Thus, class treatment likely represents plaintiffs' only chance for adjudication.") Furthermore, "each member of the class pursuing a claim individually would burden the judiciary, which is contrary to the goals of efficiency and judicial economy advanced by Rule 23." *Bruno*, 280 F.R.D. at 537–38*; see also Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009) ("The overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy."). Therefore, the Court finds that a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

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IV. CONCLUSION

For the foregoing reasons, the Court hereby orders as follows:

(1) Plaintiffs' Motion for Class Certification (ECF No. 55) is GRANTED

(2) Defendant's Motion to Strike the Declaration of Dakkar Hunter (ECF No. 69) is GRANTED; and

(3) Plaintiffs' Motion to Exclude Defendant's Exhibits 11–24, 26, 27, 29–32, and 44 (ECF No. 83) is DENIED.

IT IS SO ORDERED.

Dated: November 19, 2015

Troy L. Nunley
United States District Judge