UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RYAN GUINN, an individual, on behalf of himself, and on behalf of all other persons similarly situated, Plaintiffs, v. SUGAR TRANSPORT OF THE NORTHWEST, INC., a California Corporation, et al., Defendants.	CIV. NO. 2:16-325 WBS EFB MEMORANDUM AND ORDER RE: MOTION FOR PROCEEDING AS COLLECTIVE ACTION AND FOR CLASS CERTIFICATION

Plaintiff Ryan Guinn brings this collective and class action suit against defendants Sugar Transport of the Northwest ("Sugar Transport"), Bronco Wine Company ("Bronco"), and Classic Wines of California ("Classic") for alleged violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216; the California Labor Code, Cal. Lab. Code §§ 201, 203, 204, and 512; and California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq. Presently before the court is plaintiff's Motion for Proceeding as a Collective Action under

the FLSA and for Class Certification pursuant to Federal Rule of Civil Procedure 23 ("Rule 23") with regard to his state law claims. (Docket No. 70.)

I. Factual and Procedural Background

From December 2002 through June 2006, and again from April 2008 through February 6, 2015, plaintiff was employed by Sugar Transport as a truck driver. (Pl. Decl. ¶3 (Docket No. 70-2).)[1] On May 1, 2008, Sugar Transport contracted with Bronco and Classic[2] to provide "hiring, training, supervising and disciplining of all drivers." (Decl. of John Riella ("Riella Decl.") ¶ 2, Ex. A.) Approximately 40 Sugar Transport drivers were assigned to the Bronco contract at a given time. (Id. ¶ 3.) Over the course of the proposed class period, Sugar Transport

[1] Sugar Transport objects to most of the documentary evidence that plaintiff offers in support of his motion, arguing that it does not satisfy the requirements of the Federal Rule of Evidence. See generally Sugar Transport's Objections to Decls. (Docket Nos. 78-1, 78-2, 78-3.) However, "evidence presented in support of class certification need not be admissible at trial." Pena v. Taylor Farms Pac., Inc., 305 F.R.D. 197, 205 (E.D. Cal. 2015), appeal dismissed (June 5, 2015), order clarified sub nom. Carmen Pena v. Taylor Farms Pac., Inc., Civ. No. 2:13-1282 KJM AC, 2015 WL 12550898 (E.D. Cal. Mar. 30, 2015), and aff'd, 690 F. App'x 526 (9th Cir. 2017) (internal citations omitted). Accordingly, the court need not address any of Sugar Transport's objections at this stage.

[2] Classic is a wholly-owned subsidiary that was a wholesaler of wines for Bronco. (Decl. of Ian A. Kass ("Kass Decl.") ¶ 6.) Throughout this memorandum, "Bronco" refers to both Bronco and Classic. Plaintiff argues that each driver was jointly employed by Sugar Transport, Bronco, and Classic. However, the court need not address the merits of plaintiff's joint employer argument because even if the court accepted this contention, it would still deny the Motion on other grounds discussed herein.

employed approximately 55 drivers. (Kass Decl. ¶ 9, Ex. IAK-2, Defs.' Resp. to Pl.'s Req. for Admis., Set No. Two (Docket No. 70-5).) At all times during the proposed class period, Sugar Transport uniformly classified all of its drivers as exempt from overtime pay. (Decl. of Mark Stephens ("Stephens Decl.") ¶ 8.)

The principal job functions of all of the drivers were the same. They began their workdays at their assigned terminal by reviewing their cargo. (Stephens Decl. ¶ 4.) After the trucks had been loaded and the cargo confirmed, the drivers would spend most of their day driving to the stores and retailers along their routes, delivering cases of wine. (Id.) Defendants scheduled the deliveries for all of the drivers. (Stephens Decl. ¶ 3; Kass. Decl., Ex. IAK-2 at 5:8-23.) Sugar Transport informed all of the drivers who serviced Bronco that, as part of their schedule, they "were required to take a 30 minute break between the 3rd and 5th hour of the workday." (Stephens Decl. ¶ 9.) Once the drivers had completed the day's deliveries, they would each return to their assigned terminal, clean their truck, and complete and submit their day-end paperwork. (Id.)

On October 23, 2015, plaintiff filed a putative class and collective action specifically alleging that Sugar Transport had (1) failed to pay overtime wages in violation of the FLSA; (2) failed to timely pay wages in violation of California Labor Code § 204; (3) failed to timely pay wages due at termination in violation of California Labor Code §§ 201 and 203; (4) failed to provide meal and rest periods in violation of California Labor Code § 512; (5) and engaged in unlawful and unfair business practices in violation of Business and Professions Code §§ 17200.

(Docket No. 1-1.) On January 24, 2017, plaintiff filed an Amended Complaint ("FAC") that added Bronco and Classic as defendants in the lawsuit. (FAC ¶ 12 (Docket No. 51).)

II. FLSA Collective Action

A. Legal Standard

The FLSA provides recourse to an employee against an employer who fails to pay requisite overtime wages. See 29 U.S.C. § 207. Employees may bring suits for violations of the FLSA on their own behalf and on behalf of "other employees similarly situated." 29 U.S.C. § 216(b). Though one employee may maintain an FLSA collective action, each employee who wishes to join in the action must affirmatively "opt in" to the action by executing a written consent to become a party to the lawsuit. Id.; Kinney Shoe Corp. v. Vorhes, 564 F. 2d 859, 861 (9th Cir. 1977).

B. Similarly Situated

The FLSA does not define the term "similarly situated," nor has the Supreme Court or the Ninth Circuit offered further clarification. See Knight v. City of Tracy, Civ. No. 2:16-1290 WBS EFB, 2016 WL 6666812 (E.D. Cal. Nov. 10, 2016). However, the Supreme Court has indicated that a proper collective action encourages judicial efficiency by addressing in a single proceeding claims of multiple plaintiffs who share "common issues of law and fact arising from the same alleged [prohibited] activity." Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989). "A majority of courts have adopted a two-step approach for determining whether a class is 'similarly situated.'" Murillo v. Pac. Gas & Elec. Co., Civ. No. 2:08-1974

WBS GGH, 2010 WL 2889728, at *2 (E.D. Cal. July 21, 2010). Under this approach, the district court must first determine whether the proposed class should be notified of the action. It has been more than one year since this court approved the notice and thus step one is satisfied. (Docket No. 16.) During the second step, the court makes a factual determination about whether the plaintiffs are similarly situated by weighing the following factors: "(1) the disparate factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant which appear to be individual to each plaintiff, and (3) fairness and procedural considerations." Bishop v. Petro-Chemical Transport, LLC, 582 F. Supp. 2d 1290, 1294 (E.D. Cal. 2008).

Under the FLSA, employers are required to pay employees overtime for hours worked in excess of 40 hours per week. 29 U.S.C. § 207(a)(1). However, defendants argue that in this case the FLSA overtime requirement does not relate to all of the drivers because the federal Motor Carrier Act ("MCA") exemption, which exempts employees who are engaged in the interstate transportation of goods from the FLSA overtime requirement, applies to some of the drivers. See 29 U.S.C. § 213(b)(1). Defendants contend that class members' claims turn on case-by-case, fact specific analyses of whether each driver is exempt from the overtime requirement.

Plaintiff counters that, in fact, none of the drivers qualified for this exemption. As evidence, plaintiff states that, according to declarations, none of the drivers ever crossed California's state lines when driving for Sugar Transport, and

thus did not engage in interstate transportation. (Pl.'s Mem. of P. & A. at 13.) Plaintiffs further contend that, according to the Ninth Circuit, "an employee's minor involvement in interstate commerce does not necessarily subject that employee to the [MCA exemption] for an unlimited period of time . . . and if the employee's minor involvement can be characterized as de minimis, that employee may not be subject to the [exemption] at all." Reich v. American Driver Service, Inc., 33 F.3d 1145, 1155 (9th Cir. 1994). From this, plaintiff argues that more than a mere "reasonable expectation" of engaging in interstate commerce is required for the MCA exemption to apply.

However, at this stage of the analysis plaintiff has the burden of proving that the class satisfies the "similarly situated" requirement. Vasquez v. Coast Valley Roofing, Inc., 670 F. Supp. 2d 1114, 1123-24 (E.D. Cal. 2009), citing Hipp v. Liberty Nat. Life. Ins. Co., 252 F.3d 1208, 1217 (11th Cir. 2001). Thus, the court need not determine whether each driver in fact is subject to the Motor Carrier Act exemption, but instead need only determine whether a decision to apply the exemption would require an individual analysis or whether, based on evidence presented by plaintiff, the drivers are sufficiently "similarly situated." Here, plaintiff's attempt to establish that the class is "similarly situated" is based entirely upon the fact that the drivers never crossed California state lines. However, drivers do not need to actually cross state lines in order to qualify for this exemption; it is sufficient that drivers "hauled goods in the practical continuity of movement in

interstate commerce."[3] Bishop, 582 F. Supp. 2d at 1298. Accordingly, the fact that the drivers may not have left California does not mean that none of them engaged in interstate commerce and thus that they are "similarly situated" for the purposes of this exemption.

Instead, the court would need to engage in an individualized analysis to determine which, if any, of the drivers could in fact be categorized as exempt from the FLSA. It was not uncommon for drivers to "deliver product from out of state and out of the country." (Decl. of Kimberley McKenna ("McKenna Decl.") ¶ 3 (Docket No. 79-7).) Additionally, drivers sometimes delivered wine to San Francisco International Airport or Los Angeles International Airport, clearly indicating that this product was bound for interstate transport. (Mitts Decl. ¶ 14.) Thus, the mere fact that the drivers did not leave the state is insufficient to demonstrate that they are similarly situated--the court finds it likely that some of the drivers qualified for the exemption while others did not.

Plaintiff's primary objection to defendants' argument is not that defendants misstate the law, but rather that the evidence defendants have is insufficient to establish that the

[3] "The Ninth Circuit has ruled that intrastate deliveries may be considered in the stream of interstate commerce if the property in question originated from out-of-state, and the intrastate portion of the route is merely part of the final phase of the unmistakably interstate transport." Bishop, 582 F. Supp. 2d at 1302 (citing Klitzke v. Steiner Corp., 110 F.3d 1465, 1469-70 (9th Cir. 1997).) In such instances, "the transportation is considered part of a 'practical continuity of movement' across state lines." Id.

MCA exemption applied. See Pl.'s Reply at 4-5. However, whether or not defendants are ultimately able to prove that the exemption applies is irrelevant at this point because plaintiff maintains the burden of proving that the drivers are "similarly situated." Notably, all of the cases plaintiff cites to are district court cases and are unrelated to the certification stage of the process. Rather, plaintiff relies only on unpublished cases involving summary judgment, in which the court held that there was a de minimis limitation to the MCA exemption. See, e.g., Robinson v. Open Top Sightseeing San Francisco, LLC, 2017 WL 2265464, at *7-8 (N.D. Cal. May 24, 2017); Veliz v. Cintas Corp., 2009 WL 1107702, at *4-8 (N.D. Cal. 2009).)

The fact that a defendant could not get beyond the summary judgment stage due to a failure to indicate more than de minimis interstate transport does not establish that the drivers are similarly situated. In fact, one of the cases that plaintiff himself cites states that "[d]istrict courts following Reich [a Ninth Circuit opinion] have understood the MCA exemption to apply on a driver-by-driver basis." Robinson, WL 2265464, at *7. Thus, although it is correct that at trial defendants would ultimately need to show that each driver has a more than happenstance possibility of driving product over state lines or that he "participated in more than a de minimis level of interstate activity," Veliz, 2009 WL 1107702, at *9, that rule does nothing to change the fact that an individual analysis of each driver would still be necessary in order to determine exactly which drivers engaged in sufficient interstate commerce activities such that there payment was not governed by the FLSA.

Accordingly, plaintiff has failed to satisfy the "similarly situated" requirement and his Motion to Proceed as a FLSA Collective Action must therefore be denied with regard to all defendants.[4]

III. Class Certification for State Law Claims

A. Legal Standard

To certify a class pursuant to Rule 23, plaintiff must satisfy the four requirements set forth in Rule 23(a): "numerosity," "commonality," "typicality," and "adequacy of representation." Fed. R. Civ. P. 23(a). Plaintiff must also establish an appropriate ground for bringing a class action under Rule 23(b). Fed. R. Civ. P. 23(b).

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). "[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Id. at 350-51 (citation omitted). "Frequently that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim." Id. at 351 (citation omitted). "Merits questions may be considered to the extent--but only to the extent--that they are relevant to determining whether the Rule 23 prerequisites for

[4] Plaintiff's failure to satisfy the "similarly situated" requirement is dispositive and therefore the court need not address defendants' argument to the effect that at the time the notice went out Sugar Transport was the only defendant, so that the class members were not given the choice whether or not to opt-in the suit as against the other defendants.

class certification are satisfied." Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1195 (2013).

B. Class Definitions

Plaintiff seeks to certify two different classes related to his state law claims. First, plaintiff requests certification of a class for his overtime claims ("the overtime class") consisting of:

> All persons employed by SUGAR TRANSPORT OF THE NORTHWEST, and jointly employed by BRONCO WINE COMPANY and CLASSIC WINES OF CALIFORNIA, as a driver, or any other job title the principal job functions of which are the same as those performed by its drivers, in California, and who worked more than forty hours during at least one workweek at any time on and after October 23, 2011.

(Pl.'s Notice of Mot. at 2 (Docket No. 70).)

Plaintiff also seeks certification of a class for his meal and rest break claims ("the meal and rest period class") consisting of:

> All persons employed by SUGAR TRANSPORT OF THE NORTHWEST, and jointly employed by BRONCO WINE COMPANY and CLASSIC WINES OF CALIFORNIA as a driver, or any other job title the principal job functions of which are the same as those performed by its drivers, in California, at any time on and after October 23, 2011.

(Id.)[5]

C. Rule 23(a)

[5] In his Memorandum of Points and Authorities, plaintiff defines both classes in a more general manner, stating that the classes consist of "all persons employed by SUGAR TRANSPORT OF THE NORTHWEST," and does not confine the class to those drivers who worked for Bronco or Classic. (Pl.'s Mem. of P. & A. at 4.) Accordingly, there is some debate as to the true definition of plaintiff's classes. However, the court finds that even if plaintiff were provided the opportunity to modify its class definitions, doing so would not cure all of the defects of this Motion.

1. Numerosity

Rule 23(a)(1) requires the proposed class to be so numerous that joinder of all of the class members would be impracticable. Fed. R. Civ. P. 23(a). "[N]umerosity is presumed where the plaintiff class contains forty or more members." In re Cooper Companies Inc. Sec. Litig., 254 F.R.D. 628, 634 (C.D. Cal. 2009); see also, e.g., Collins v. Cargill Meat Solutions Corp., 274 F.R.D. 294, 300 (E.D. Cal. 2011) (Wagner, J.). Plaintiff's proposed class includes 55 individuals. (See Pl.'s Mem. of P.&A. at 6; see also Defs.' Resp. to Pl.'s Req. for Admis., Set No. 2.) Accordingly, plaintiff has satisfied the "numerosity" requirement.

2. Commonality

The "commonality" requirement of Rule 23(a)(2) requires that plaintiff show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "All questions of fact and law need not be common to satisfy [Rule 23(a)(2)]. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). "What matters to class certification . . . [is] the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Dukes, 564 U.S. at 350. Class members' claims "must depend upon a common contention . . . [that is of] such a nature that it is capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of

the claims in one stroke." Id.

Here, plaintiff contends that common questions of law and fact exist with regard to whether defendants failed to provide meal breaks and rest periods for the drivers, failed to provide them with overtime pay, and whether these practices are unlawful under California law and constitute violations of California's Labor Code and the UCL. "Plaintiff's claims, as pled, share a common question of law--whether any of the practices [defendants are] alleged to have engaged in constitute violations of California law--and at least some of the facts to be analyzed with respect to this question are the same." Washington v. Joes Crab Shack, 271 F.R.D 629, 636 (N.D. Cal. 2012). Accordingly, the court can resolve this central question once for all class members, and thus plaintiff has met the "commonality" requirement.

3. Typicality

The "typicality" requirement of Rule 23(a)(3) requires that plaintiff have claims "reasonably coextensive" with those of proposed class members. Hanlon, 150 F.3d at 1020. The test for "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) (citation omitted). "Some degree of individuality is to be expected in all cases, but that specificity does not necessarily defeat typicality." Stanton v. Boeing Co., 327 F. 3d 938, 957 (9th Cir. 2003).

Here, plaintiff alleges that defendants did not provide him and the proposed class with the requisite overtime pay or sufficient breaks during their shifts. (See Pl.'s Mem. of P.&A. at 12-13.) Even if plaintiff and members of the class did not suffer the same damages from the alleged violations, they, according to plaintiff, suffered the same injuries (i.e., breach of labor laws and business code provisions) from the same action (i.e., defendants' failure to provide proper working conditions and payment) and seek to recover pursuant to the same legal theories. From this, the court concludes that plaintiff's claims are "sufficiently parallel [to other members' claim] to insure a vigorous and full presentation of all claims for relief." California Rural Legal Assistance, Inc. v. Legal Servs. Corp., 917 F.2d 1171, 1175 (9th Cir. 1990). Accordingly, because plaintiff has demonstrated that he "possess[es] the same interest[s] and suffer[s] the same injury as the class members," Gen. Tel. Co. of Sw v. Falcon, 457 U.S. 147, 156 (1982), he has satisfied the "typicality" requirement.

4. Adequacy

Rule 23(a)(4) requires that the class representative "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23. This inquiry involves two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Hanlon, 150 F.3d at 1020. Adequacy of representation is generally satisfied if the representative's individual interests are the same or similar to the other class

members. Falcon, 457 U.S. at 157.

Here, plaintiff's claims are similar to those of other class members and he is unaware of any conflicts with them. (Pl.'s Decl. ¶¶ 15-16.) Moreover, plaintiff has committed significant resources to this case already, including, but not limited to, engaging in numerous communications with counsel, assisting counsel with conducting the investigation, and attending depositions. (Id. ¶ 17.) Plaintiff is committed to pursuing the case through to its resolution for the sake of all prospective class members. (Id.)

Plaintiff's counsel are experienced attorneys who have knowledge of class actions and of wage and hour and employment-related claims. (Kass Decl. ¶¶ 2-5.) The court finds no reason to doubt that plaintiff's counsel are qualified to conduct this litigation and will vigorously prosecute the action on behalf of class members. See Hanlon, 150 F.3d at 1021 ("Although there are no fixed standards by which 'vigor' can be assayed, considerations include competency of counsel."). Accordingly, the court finds that plaintiff and plaintiff's counsel are adequate representatives of the class, and therefore that plaintiff has satisfied all of the requirements set forth in Rule 23(a).

D. Rule 23(b)

Plaintiff seeks to certify a class pursuant to Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the

controversy." Fed. R. Civ. P. 23(b)(3).

1. Predominance

The "predominance" inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997). "Because Rule 23(a)(3) already considers commonality, the focus of the Rule 23(b)(3) predominance inquiry is on the balance between individual and common issues." Murillo v. Pac. Gas & Elec. Co., 266 F.R.D. 468, 476 (E.D. Cal. 2010) (citing Hanlon, 150 F.3d at 1022). This rule "requires a district court to formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." Dukes v. Wal-Mart Stores, Inc., 603 F. 3d 571, 593 (9th Cir. 2010), rev'd on other grounds, 564 U.S. 338 (2011). The "predominance" requirement is "far more demanding" than the commonality requirement of Rule 23(a). Amchem Prods., 521 U.S. at 623.

a. The Meal and Rest Period Class

In a class certification motion, "the crucial issue with regard to the meal break claim is the reason that a particular employee may have failed to take a meal break." Washington v. Joe's Crab Shack, 271 F.R.D. 629, 641 (N.D. Cal. 2010). Here, plaintiff has not identified a specific policy that precluded the drivers from taking a break. In fact, to the contrary, Sugar Transport had a policy that required its drivers to take their lawful breaks and shared this policy with drivers through written notices, verbal discussions, and posted wage orders. (Mitts Decl. ¶ 15.) "In the absence of any common

policy, an individualized inquiry will be required to determine whether any single employee failed to take a meal break," and the reasoning behind such failure. Joe's Crab Shack, 271 F.R.D. at 641.[6] Accordingly, the determination of whether a break was missed, and why, would involve an individual analysis into the daily behavior of each particular driver.

In this case, each driver was assigned to deliver different product, to different customers, in different areas of California. (Patterson Decl. ¶ 3, Ex. B.) Drivers' schedules could be changed for a variety of reasons, including traffic, problems with the truck, or an issue with a particular customer. Moreover, the drivers themselves have expressed various reasons for choosing to skip meal breaks, including wanting to finish their deliveries more quickly so they could go home. (Id. ¶ 4, Ex. C; ¶ 5, Ex. D.) "[P]laintiff must do more than show that a meal break was not taken to establish a violation. Instead, he must show that [defendants] impeded, discouraged, or prohibited [drivers] from taking a proper break." Joe's Crab Shack, 271 F.R.D. at 641. Although plaintiff argues that Sugar Transport's delivery schedules impeded the ability of drivers to take meal and rest breaks, the evidence indicates that in fact the drivers themselves had discretion to decide when and if to take such a break. In order for plaintiff to establish otherwise, the court

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[6] Notably, "courts have not hesitated to grant summary judgment where plaintiffs have skipped breaks of their own accord due to pressure they feel to complete their job in a given amount of time, absent evidence that their employer took action to prevent or impede employees from taking their meal or rest breaks." Cleveland Grocerworkeres.com LLC, 200 F. Supp. 3d 924, 946 (N.D. Ca. 2016).

would need to analyze each particular driver and determine whether or not, and why, he missed breaks. Accordingly, with regard to plaintiff's meal and rest claims, plaintiff has not satisfied the predominance component and therefore cannot comply with Rule 23(b).

b. The Wage Class

Plaintiff's wage claim, which he brings under both the FLSA--as discussed above in reference to the collective action--and the Business and Professions Code §§ 17200, et seq., centers around whether the drivers were exempt from overtime pay. Section 17200 prohibits any unfair competition, which is defined as "any unlawful, unfair or fraudulent business act or practice." Cal-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 (1990). Section 17200 "borrows violations of other laws and treats them as unlawful practices" that then become independently actionable. Id. Here, plaintiff borrows from the provisions of the FLSA to bring a state claim under § 17200. Thus, plaintiff is essentially attempting to certify two separate actions based on the FLSA: (1) a collective action based on allegations that Sugar Transport failed to pay the drivers overtime, and (2) a Rule 23 class action based upon the same alleged violations.

As discussed above, determining whether the drivers were exempt from the FLSA overtime requirement would entail an individualized analysis and determination as to which of the drivers, if any, engaged in interstate transportation. Therefore, for the same reason that plaintiff did not satisfy the "similarly situated" requirement necessary to maintain a FLSA

collective action, he has also failed to demonstrate that common issues would predominate over individual questions with regard to his state law overtime claim as well.[7]

IT IS THEREFORE ORDERED that plaintiff's Motion for Proceeding as a Collective Action under the FLSA and for Class Certification pursuant to Federal Rule of Civil Procedure 23 be, and the same hereby is, DENIED.

Dated: December 20, 2017

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

[7] Rule 23(b)(3) also requires that a class action be the superior means of adjudication. However, plaintiff's failure to satisfy the predominance requirement is dispositive and therefore the court need not address the superiority requirement.