

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALICIA HARRIS,

No. C-08-5198 EMC

Plaintiff,

v.

VECTOR MARKETING CORPORATION,

Defendant.

**ORDER GRANTING PLAINTIFF’S
MOTION TO CERTIFY FLSA
COLLECTIVE ACTION; DENYING
DEFENDANT’S CROSS-MOTION TO
DECERTIFY; GRANTING IN PART
AND DENYING IN PART PLAINTIFF’S
MOTION TO CERTIFY RULE 23
CLASS ACTION; AND GRANTING IN
PART AND DENYING IN PART
DEFENDANT’S CROSS-MOTION TO
DENY CERTIFICATION**

(Docket Nos. 330, 332, 336, 337)

Plaintiff Alicia Harris has filed suit against Defendant Vector Marketing Corporation for violation of, *inter alia*, certain provisions of the Fair Labor Standards Act (“FLSA”) and California Labor Code. Ms. Harris has brought the action on behalf of herself and asks that the Court certify her FLSA claim as a collective action and her state law claims as a class action pursuant to Federal Rule of Civil Procedure 23. Currently pending before the Court are Ms. Harris’s motions to certify the FLSA collective action and Rule 23 class action and Vector’s cross-motions to decertify or deny certification.

Having considered the parties’ briefs and accompanying submissions, the oral argument of counsel, and all other evidence of record, the Court hereby **GRANTS** Ms. Harris’s motion to certify the FLSA collective action and **DENIES** Vector’s cross-motion to decertify. The Court further

1 **GRANTS** in part and **DENIES** in part Ms. Harris’s motion to certify the Rule 23 class action and
2 **GRANTS** in part and **DENIES** in part Vector’s cross- motion to deny certification.

3 **I. FACTUAL & PROCEDURAL BACKGROUND**

4 “Vector is a direct sales company that markets a line of high quality kitchen cutlery,
5 accessories, and sporting knives manufactured by Cutco Cutlery Corporation.” Docket No. 49
6 (Matheson Decl. ¶ 2). “Vector sells and markets Cutco products . . . through the use of Sales
7 Representatives.” *Id.* (Matheson Decl. ¶ 4). The parties agree that, at one point, Vector hired Ms.
8 Harris to be a Sales Representative to sell Cutco knives. *See* Docket No. 37 (Arlie Decl., Ex. E)
9 (Sales Representative Agreement for Ms. Harris); Docket No. 52 (Harris Decl., Ex. C) (same).

10 As a general matter, before Sales Representatives begin selling the Cutco knives, they attend
11 an initial training, which typically lasts three days. Trainees are not paid for their time spent in the
12 training. According to Ms. Harris, trainees should have been paid for this time, and Vector’s failure
13 to pay constitutes a failure to pay minimum wages under the FLSA, *see* 29 U.S.C. § 206, and the
14 California Labor Code, *see* Cal. Lab. Code § 1197, and further constitutes a violation of California
15 Business & Professions Code § 17200, which prohibits unfair competition. Ms. Harris also asserts
16 that, during the training, trainees were improperly coerced into buying sample knife sets (to be used
17 for sales presentations) in violation of (1) California Labor Code § 2802 (which requires an
18 employer to reimburse its employees for necessary expenses), (2) the California Labor Code Private
19 Attorney General Act (“PAGA”), *see id.* § 2698 *et seq.*, and (3) California Business & Professions
20 Code § 17200. Finally, Ms. Harris argues that Vector violated California Labor Code § 2802 by
21 failing to reimburse Sales Representatives for expenses incurred once they actually started selling
22 knives.

23 In June 2009, Vector moved for summary judgment on each of the above claims (as well as
24 other claims), noting that such claims may be asserted only by an employee and arguing that
25 trainees/Sales Representatives are not employees as defined by federal and state law. With respect
26 to the above claims, the Court denied the motion, concluding that there was a genuine dispute of
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1 material fact as to whether trainees/Sales Representatives are employees.¹ See Docket No. 71
2 (order).

3 Subsequently, in April 2010, Ms. Harris moved for conditional collective action certification
4 for her FLSA claim. The Court granted the motion, finding that Ms. Harris had made a sufficient
5 showing to warrant conditional certification. See Docket No. 176 (order). After the Court issued its
6 order granting Ms. Harris’s motion for conditional certification, a third-party administrator sent out
7 almost 48,000 notices and consent-to-join forms, of which about 5,000 were not deliverable. See
8 Docket No. 230 (Wnorowski Decl. ¶¶ 6-7). The deadline to opt-in was July 26, 2010. See *id.*
9 (Wnorowski Decl. ¶ 14). As of July 28, 2010, the third-party administrator had received and
10 processed 5,569 forms. See *id.* (Wnorowski Decl. ¶ 15). “Of this total forms filed, 86 were deemed
11 incomplete as they were not signed by the individual potential Class Member, 5,244 were deemed
12 complete, 203 were deemed duplicates of previously filed Consent to Join Forms, and 36 Consent to
13 Join Forms were submitted with a postmark after the deadline, or received via fax after the
14 deadline.” *Id.* (Wnorowski Decl. ¶ 15).

15 Subsequently, the Court permitted Vector to take the depositions of fifty of the “opt-ins.”
16 Vector did so. See Docket No. 339 (Saad Decl. ¶ 5); *id.* (Wilson Decl. ¶ 2(g)). In addition, Vector,
17 on its own accord, obtained declarations from approximately fifty other Sales Representatives
18 operating in California. Finally, Vector, on its own accord, conducted a survey of its Sales
19 Representatives operating in California. See *id.* (Saad Decl. ¶ 12). The survey was sent via e-mail
20 to approximately 40,000 people, of which about 25,000 were not deliverable. See *id.* (Saad Decl. ¶
21 12). At the close of the survey administration, 551 completed responses had been received. See *id.*
22 (Saad Decl. ¶ 12).

23 II. EVIDENTIARY OBJECTIONS

24 A. Ms. Harris’s Objections

25 In support of its motions (and oppositions to Ms. Harris’s motions), Vector has submitted (1)
26 declarations from approximately fifty Sales Representatives who state, *inter alia*, that they do not
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28 ¹ The Court did grant Vector’s motion for summary judgment with respect to other claims.

1 wish to participate in the pending lawsuit and (2) a declaration from an expert, Mr. Saad, who, *inter*
2 *alia*, prepared and conducted the above-referenced survey. Ms. Harris has objected to each of the
3 Sales Representative declarations as well as the Saad declaration.²

4 1. Sales Representative Declarations

5 With respect to the Sales Representative declarations, Ms. Harris has made various
6 objections such as lack of personal knowledge, speculation, best evidence rule, improper lay
7 opinion, legal conclusion, and hearsay. The majority of these objections have no merit.

8 For example, the Sales Representatives do have personal knowledge about their own
9 experiences. Also, whether a Sales Representative has an interest in participating in the lawsuit
10 and/or wants Ms. Harris to represent him or her is not an improper lay opinion or a legal conclusion.

11 The only objection that is a closer call is the hearsay objection. If, however, Vector is not
12 offering the evidence for the truth of the matter asserted – *e.g.*, for the effect on the Sales
13 Representatives as listeners – then the evidence is not hearsay at all, and therefore the objection
14 should be overruled. Moreover, the objection arguably should be overruled because the reported
15 communications between Vector and the Sales Representative declarants are analogous to verbal
16 acts or are part of the *res gestae*; *i.e.*, they comprise the alleged policies and practices of Vector at
17 issue. *See generally* 5-801 Weinstein’s Fed. Evid. § 801.11[3], [4] (discussing verbal acts and the
18 verbal part of acts). Finally, the evidence would be admissible under the residual hearsay exception
19 provided by Federal Rule of Evidence 807. The Court notes that the declarations of the Sales
20 Representatives have circumstantial guarantees of trustworthiness as required by Rule 807 – *i.e.*,
21 each declaration is analogous to a statement against interest.

22 2. Saad Declaration

23 With respect to the Saad declaration, Ms. Harris’s argument is, in essence, that the
24 declaration is so unreliable that it should be excluded. In particular, Ms. Harris criticizes the content

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26 ² The Court notes that the Sales Representative declarations are essentially irrelevant to the
27 parties’ FLSA motions. This is because the FLSA motions address whether the opt-ins are similarly
28 situated, and therefore what the non-opt-ins have to say is largely immaterial. Similarly, to the
extent the Saad declaration discusses the survey and its results, that information is essentially
irrelevant to the parties’ FLSA motions. Again, the issue for the FLSA motions is whether the opt-
ins – and not other trainees/Sales Representatives – are similarly situated.

1 of the survey conducted and prepared by Mr. Saad as well as the response rate to the survey. The
2 problem for Ms. Harris is that, as she herself admits in her brief, even challenges to defects in
3 methodology normally affect the weight to be accorded the survey and not its admissibility. *See*
4 Pl.’s Obj. at 9; *see also In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529-30 (6th Cir. 2008)
5 (indicating that an expert’s error in application of methodology would ordinarily go to weight of
6 expert’s testimony, although a significant error might go to admissibility); *SR Int’l Bus. Ins. Co. v.*
7 *World Trade Ctr. Props., LLC*, 467 F.3d 107, 134 (2d Cir. 2006) (stating that, “[t]o the extent that
8 there are gaps or inconsistencies in [the expert’s] testimony, those issues ‘go to the weight of the
9 evidence, not to its admissibility’”); *Kudabeck v. Kroger Co.*, 338 F.3d 856, 861-62 (8th Cir. 2003)
10 (noting that “attacks regarding the completeness of [a doctor’s] methodology go to the weight and
11 not admissibility of his testimony”); *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, No. C
12 07-03752 JSW, 2008 U.S. Dist. LEXIS 87625, at *21-22 (N.D. Cal. Oct. 16, 2008) (stating that,
13 “[i]n general, a court may admit a survey if it is conducted according to generally accepted
14 principles and if it is relevant” and that “[c]hallenges to defects in methodology normally affect the
15 weight to be accorded the survey, rather than its admissibility” – that is, unless “ the methods used
16 are so deficient”). In the instant case, the Court is not persuaded that the survey and the results are
17 so deficient that they should be excluded, and therefore overrules the objection to the Saad
18 declaration. Ms. Harris does not explain, for instance, why the weighting of the survey responses (to
19 account for the potential non-representativeness of the sample of respondents) was faulty.

20 B. Vector’s Objections

21 In support of her motions (and oppositions to Vector’s motions), Ms. Harris has submitted a
22 declaration from an expert, Mr. Gorman, who largely provides criticisms of the declaration of Mr.
23 Saad. Vector has objected to the declaration on various grounds. Vector’s objections are essentially
24 moot because the Court need not rely on Mr. Gorman’s declaration in evaluating the pending
25 motions. In fact, most of the criticisms made by Mr. Gorman in his declaration are common sense-
26 type criticisms that the Court may consider on its own, and thus do not warrant exclusion. In any
27 event, the Gorman declaration as well as the Saad both pass muster under *Daubert v. Merrell Dow*
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1 *Pharmaceuticals., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137
2 (1999).

3 **III. FLSA MOTIONS**

4 In her FLSA motion, Ms. Harris asks the Court to grant final collective action certification
5 for a class consisting of all individuals who worked for Vector in the state of California as Sales
6 Representatives from April 15, 2006, through May 12, 2010.³ As noted above, more than 5,000
7 individuals responded to the class notice and asked to be included in the collective action. In its
8 FLSA motion, Vector asks the Court to decertify the class.

9 A. **Legal Standard**

10 Under the FLSA, employers must pay their employees a minimum wage. *See* 29 U.S.C. §
11 206(a). If an employer fails to do so, then an aggrieved employee may bring a collective action on
12 behalf of himself and others “similarly situated.” *Id.* § 216(b). Determining whether a collective
13 action is appropriate is within the discretion of the district court. *See Adams v. Inter-Com Sec. Sys.*,
14 242 F.R.D. 530, 535 (N.D. Cal. 2007) (Patel, J.).

15 “To maintain a collective action under the FLSA a plaintiff must demonstrate that the
16 putative collective action members are similarly situated.” *Murillo v. Pacific Gas & Elec. Co.*, No.
17 CIV. 2:08-1974 WBS GGH, 2010 U.S. Dist. LEXIS 20240, at *4 (E.D. Cal. Mar. 5, 2010); *see also*
18 *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1123-24 (E.D. Cal. 2009) (noting that
19 a plaintiff has the burden of proving the similarly situated requirement). Courts have generally held
20 that the “similarly situated” standard under the FLSA is not as stringent a standard as the “common
21 questions predominate” standard under Federal Rule of Civil Procedure 23(b)(3). *See O’Brien v. Ed*
22 *Donnelly Enters.*, 575 F.3d 567, 584-85 (6th Cir. 2009); *Grayson v. K Mart Corp.*, 79 F.3d 1086,
23 1096 (11th Cir. 1996).

24 _____
25 ³ In her opening brief, Ms. Harris identified the class period as April 15, 2006, through the
26 resolution of this case. *See* Pl.’s Mot. at 1. However, the Court indicated in a previous order that
27 the appropriate period is likely April 15, 2006, through May 12, 2010, as that was the period
28 specified in the class noticed that was issued. *See* Docket No. 304 (Order at 5-6); *see also* Docket
No. 230 (Wnorowski Decl., Ex. 1) (class notice). As reflected in her reply brief, Ms. Harris now
appears to have accepted this preliminary ruling of the Court. *See* Pl.’s Reply at 1 (clarifying that no
request for a second class notice – to cover individuals working for Vector after May 12, 2010 – is
being requested).

1 Unfortunately,

2 [n]either the FLSA nor the Ninth Circuit have [expressly]
3 defined “similarly situated.” [But a] majority of courts have adopted a
4 two-step approach for determining whether a class is “similarly
5 situated.” Under this approach, a district court first determines, based
6 on the submitted pleadings and affidavits, whether the proposed class
7 should be notified of the action. At the first stage, the determination
8 of whether the putative class members will be similarly situated “is
9 made using a fairly lenient standard, and typically results in
10 ‘conditional certification’ of a representative class.” District courts
11 have held that conditional certification requires only that “plaintiffs
12 make substantial allegations that the putative class members were
13 subject to a single illegal policy, plan or decision.”

14 The second-step usually occurs after discovery is complete, at
15 which time the defendants may move to decertify the class. In this
16 step, the court makes a factual determination about whether the
17 plaintiffs are similarly situated by weighing such factors as “(1) the
18 disparate factual and employment settings of the individual plaintiffs,
19 (2) the various defenses available to the defendant which appeared to
20 be individual to each plaintiff, and (3) fairness and procedural
21 considerations.” If the district court determines that the plaintiffs are
22 not similarly situated, the court may decertify the class and dismiss the
23 opt-in plaintiffs’ action without prejudice. Even when the parties
24 settle, the court “must make some final class certification finding
25 before approving a collective action settlement.”

26 *Murillo*, 2010 U.S. Dist. LEXIS 20240, at *4-6.

27 In the instant case, the Court has already determined that Ms. Harris made an adequate
28 showing at step one, *see* Docket No. 176 (order), and therefore notices were sent to the putative
collective action members. *See generally* Docket No. 230 (Wnorowski Decl.). The Court now must
decide whether Ms. Harris has made a sufficient showing at step two to obtain final certification for
her FLSA collective action.

29 B. *Donovan Test v. DOL/Portland Terminal Test*

30 As noted above, under the FLSA, employers must pay their employees a minimum wage.
31 *See* 29 U.S.C. § 206(a). If, however, Ms. Harris and the putative collective action members were not
32 employees of Vector, then they have no FLSA claim at all. Thus, at the outset of this case, the
33 parties have disputed whether Ms. Harris and the putative collective actions members were
34 employees or something else, be it independent contractors or trainees.

35 In its order granting conditional collective action certification, this Court explicitly endorsed
36 use of the *DOL/Portland Terminal* trainee test in determining whether Ms. Harris and the putative

1 collective action members were employees for purposes of the FLSA claim because they were
2 asking to be compensated for their time spent in initial training only. The Court declined to apply
3 the *Donovan* independent contractor test which considers factors such as the alleged employer’s
4 right to control the manner in which the work is to be performed. *See* Docket No. 332 (Order at 7)
5 (“find[ing] that the *Portland Terminal*/DOL analysis of trainees rather than the *Donovan* test
6 applies”). The Court also indicated that, at the end of the day, under either test, the economic
7 realities were what was most important. *See id.* (Order at 6, 10).

8 In spite of this ruling by the Court, Vector now seeks to resuscitate application of the
9 *Donovan* test, arguing that the test must be applied because Ms. Harris and the putative collective
10 action members were sent into training as independent contractors, and not employees. *See* Def.’s
11 Mot. at 3 (arguing that “[t]here is no precedent or other authority that requires payment for the
12 training of people preparing to become independent contractors under the FLSA”). In essence,
13 Vector argues that the trainees must establish they were employees under the *Donovan* test *before*
14 applying the DOL/*Portland Terminal* test. The Court rejects Vector’s argument for several reasons.

15 First, the Court’s prior ruling that the DOL/*Portland Terminal* test is applicable is the law of
16 the case. Vector has not filed a motion to reconsider.

17 Second, Vector has cited no authority supporting its contention that the *Donovan* test must be
18 applied before getting into the DOL/*Portland Terminal* test when analyzing whether a trainee is an
19 employee for purposes of the FLSA. Applying an additional layer would conflict with the stated
20 purpose of the DOL/*Portland Terminal* test which is to determine “whether trainees are employees
21 within the meaning of FLSA.” *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir.
22 1993). Moreover, as noted above, both tests ultimately are targeted at examining the economic
23 realities of the parties’ relationship. Placed in its proper context, the DOL/*Portland Terminal* is
24 nothing more than an application of the economic realities test in the context of trainees.

25 Third, even if the *Donovan* test were independently applicable, the Court would look at the
26 economic realities of the relationship between Vector and trainees, and not the relationship between
27 Vector and the Sales Representatives who had already completed the training. In other words, in
28 evaluating a *Donovan* factor such as control, the Court would not examine the control Vector

1 exercised over Sales Representatives who had already completed the training; rather, the Court
2 would be examining the control Vector exercised over the trainees during the initial training.
3 Hence, Vector’s analysis is inapposite.

4 Finally, even assuming that Sales Representatives were, once they completed the initial
5 training, independent contractors under *Donovan*, that does not necessarily bar them from getting
6 paid for their time spent in initial training – *i.e.*, they could still be considered employees for
7 purposes of FLSA for the limited purpose of the time spent in initial training. Vector cites no case
8 to the contrary.

9 C. Step Two Analysis

10 As noted above, at step two,

11 the court makes a factual determination about whether the plaintiffs
12 are similarly situated by weighing such factors as “(1) the disparate
13 factual and employment settings of the individual plaintiffs, (2) the
14 various defenses available to the defendant which appeared to be
15 individual to each plaintiff, and (3) fairness and procedural
16 considerations.”

17 *Murillo*, 2010 U.S. Dist. LEXIS 20240, at *4-6.

18 In her papers, Ms. Harris focuses on the uniform way in which trainees are interviewed and
19 hired and the uniform way in which the initial training sessions are conducted in arguing that she has
20 satisfied the step two inquiry. In turn, Vector spends much of its time arguing that even the
21 DOL/*Portland Terminal* test weighs strongly in its favor. Both of the parties’ positions have flaws.

22 For example, with respect to Ms. Harris’s argument, the way in which trainees are
23 interviewed and hired is largely irrelevant. Ms. Harris suggests that, if the trainees were in fact hired
24 prior to the training (instead of at the time of signing the Sales Representative Agreements), then the
25 Court could sidestep the DOL/*Portland Terminal* test altogether. But even if the trainees were *hired*
26 prior to training, that does not establish that they were *employees* for purposes of the FLSA at the
27 time of hiring.

28 As for Vector’s argument, the ultimate merits of the case are not being determined at this
stage. What the Court is being called upon to evaluate at this juncture is whether there is enough

1 similarity between Ms. Harris and other putative collective action members such that the case should
2 proceed as a collective action.

3 Ultimately, the question for the Court is whether or not the DOL/*Portland Terminal* test is
4 capable of being evaluated on a collective basis. As Judge Conti of this District has noted, “a proper
5 collective action [under the FLSA] encourages judicial efficiency by addressing in a single
6 proceeding claims of multiple plaintiffs who share ‘common issues of law and fact arising from the
7 same alleged [prohibited] activity.’” *Velasquez v. HSBC Fin. Corp.*, 266 F.R.D. 424, 427 (N.D. Cal.
8 2010) (Conti, J.); *see also Smith v. T-Mobile USA, Inc.*, CV 05-5274 ABC (SSx), 2007 U.S. Dist.
9 LEXIS 60729, at *9 (C.D. Cal. Aug. 15, 2007) (noting that, “[w]hile a unified policy, plan, or
10 scheme of discrimination may not be required to satisfy the liberal ‘similarly situated’ requirement,
11 some identifiable facts or legal nexus must bind the claims so that hearing the cases together
12 promotes judicial efficiency”). As discussed below, for the most part, the factors making up the test
13 can be evaluated on a collective basis – *i.e.*, there is sufficient uniformity.

14 D. DOL/*Portland Terminal* Test

15 Based on *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947),

16 the Department of Labor’s Wage and Hour Division has developed a
17 test listing six criteria for determining whether trainees are employees
 within the meaning of FLSA. . . . It provides:

18 Whether trainees are employees under the Act, according to the
19 WH Administrator, will depend upon all the circumstances
20 surrounding their activities on the premises of the employer. If all six
 of the following criteria apply, the trainees are not employees within
 the meaning of the Act:

21 * The training, even though it includes actual operation of the facilities
22 of the employer, is similar to that which would be given in a
 vocational school[.]

23 * The training is for the benefit of the trainee[.]

24 * The trainees do not displace regular employees, but work under
25 close observation[.]

26 * The employer that provides the training derives no immediate
27 advantage from the activities of the trainees and on occasion his
 operations may actually be impeded[.]

28 * The trainees are not necessarily entitled to a job at the completion of
 the training period[.]

1 * The employer and the trainees understand that the trainees are not
2 entitled to wages for the time spent in training.

3 *Reich v. Parker Fire Prot. Dist.*, *supra*, 992 F.2d at 1025-26.

4 As the Court noted in its order granting conditional collective action certification, some
5 courts have adopted the DOL test. *See, e.g., Atkins v. General Motors Corp.*, 701 F.2d 1124, 1127-
6 28 (5th Cir. 1983) (giving substantial deference to Wage and Hour Administrator’s approach).
7 Others have not. *See, e.g., McLaughlin v. Ensley*, 877 F.2d 1207, 1209-10 & n.2 (4th Cir. 1989)
8 (declining to rely on DOL test and instead applying “the general test [of] whether the employee or
9 the employer is the primary beneficiary of the trainees’ labor”). Still others have taken a somewhat
10 middle position, stating that the DOL test need not be strictly or rigidly applied and that the totality
11 of the circumstances instead controls whether a trainee should be deemed an employee for purposes
12 of the FLSA. *See Reich*, 992 F.2d at 1026-27 (noting that “there is nothing in *Portland Terminal* to
13 support an ‘all or nothing approach’” and concluding that the six criteria of the DOL test “are
14 relevant but not conclusive”).

15 As noted above, the Court has adopted the DOL test but has not stated explicitly whether it
16 favors a strict application of the test or a more flexible application. Ms. Harris argues for a strict
17 application of the DOL/*Portland Terminal* test instead of a looser application of the test which
18 focuses on the economic realities. For the benefit of the parties, the Court clarifies that it adopts the
19 second approach precisely because its flexibility permits the Court to take into account all the
20 economic realities of the relationship between the alleged employer and the trainees. Also, as noted
21 by the Tenth Circuit in *Reich*, there is nothing in *Portland Terminal* itself to support an all or
22 nothing approach.

23 Below the Court discusses each of the DOL factors in assessing whether the FLSA claim is
24 capable of being resolved on a collective basis. As the Court noted at the hearing, each of these
25 factors, except for the last, is evaluated on an objective basis. In other words, the subjective
26 perceptions of the trainees are basically irrelevant; the focus of the test is on whether the policies
27 and practices of the employer are sufficiently consistent to warrant collective treatment for
28 certification purposes.

1 1. Whether Training is Similar to That Given in a Vocational School

2 Vector argues first that this factor has no application to the instant case because the factor is
3 applicable only where the training includes actual operation of the facilities of the alleged employer.
4 The Court rejects this argument. It is true that the factor formally states: “The training, even though
5 it includes actual operation of the facilities of the employer, is similar to that which would be given
6 in a vocational school.” However, as noted above, the factors of the test should not be rigidly
7 applied; rather, the question is what are the economic realities of the relationship between the
8 alleged employer and the trainees. In any event, there is no evidence that Vector’s practice in this
9 regard lacks uniformity.

10 Vector further argues that, although its training may appear Vector/Cutco specific, the skills
11 learned by the trainees are actually fungible, as demonstrated by the fact that “a number of college
12 professors . . . use the Vector training materials as the backbone of college-level courses they teach
13 in general sales and marketing.”⁴ Def.’s Mot. at 20.

14 The problem for Vector is, as discussed above, this is a merits argument. Vector does not
15 argue that its training in California dramatically differs from site to site. Indeed, Vector’s use of a
16 training manual establishes that there is enough uniformity for this factor to be evaluated on a
17 collective basis. *See* Docket No. 49 (Matheson Decl. ¶ 10) (stating that the training manual is
18 “distributed to prospective Sales Representatives before and during the Training Programs at
19 independent office locations throughout California”).

20 2. Whether Training is for Benefit of Trainee

21 This factor essentially bleeds into the first factor – *i.e.*, the more fungible the skills taught at
22 the training, the more of a benefit there is for the trainee. Thus, again, there is enough uniformity for
23 this factor to be evaluated on a collective basis.

24 In its papers, Vector argues that the trainees expressed different opinions as to what benefits
25 they obtained from training, but, as noted above, this factor turns on an objective analysis of the
26

27 ⁴ Vector also notes that at least some of the opt-ins indicated that they learned general skills.
28 *See id.* at 21. But as indicated above, the question of whether the training is similar to that offered in
a vocational school is an objective question, not a subjective one.

1 degree of consistency in Vector’s policy and practice. That is, the issue is not what the trainees’
2 subjective impressions of the training were, but rather what was the objective content of the training,
3 *i.e.*, whether it is the type of training that would benefit trainees. *See also* note 4, *supra*.

4 3. Whether Trainees Displace Regular Employees

5 There is no dispute between the parties that the trainees do not actually displace regular
6 employees, and therefore this factor is capable of resolution on a collective basis.

7 In her papers, Ms. Harris does make the contention that this factor ultimately weighs in her
8 favor because trainees are being trained to replace the soon-to-be gone Sales Representatives, whose
9 tenures with Vector tend to be very short. That, however, is ultimately a merits argument.

10 4. Whether Alleged Employer Derives Immediate Advantage from Trainees’
11 Activities

12 In her papers, Ms. Harris contends that Vector’s advantage comes from the following acts
13 that take place during training: (1) trainees buy sample knife sets; (2) trainees create potential
14 customer lists and set up appointments; and (3) trainees create potential recruit lists which are turned
15 over to their managers.

16 Although Ms. Harris has not provided evidence that Vector had any formal policy requiring
17 trainees, during training, to buy sample knife sets, create potential customer lists and set up
18 appointments, or create potential recruit lists, she has provided evidence that it was a common
19 enough practice for trainees to do so. More specifically, she has cited to the deposition testimony of
20 the opt-ins. That testimony reflects that the opt-ins with a fair amount of consistency purchased
21 sample knife sets,⁵ *see* Docket No. 340 (Humphrey Decl., Ex. 19) (deposition testimony); that most
22 opt-ins created potential customer lists and set up appointments,⁶ *see id.* (Humphrey Decl., Ex. 18)

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24 ⁵ That the opt-ins purchased sample knife sets was only reasonable given that a qualified
25 sales presentation could not be completed by a Sales Representative without having a sample knife
26 set. *See* Docket No. 49 (Matheson Decl., Ex F) (Sales Representative Agreement ¶ 6) (providing
that “Sales Reps shall obtain and utilize a sample kit for demonstration purposes”). Many, although
not all, opt-ins specified that the purchase was made during training.

27 ⁶ Notably, many of the non-opt-ins did the same. *See, e.g.*, Docket No. 335 (Ex. 1) (Adcock
28 Decl. ¶ 12) (stating that he “made phone calls to some of the people on my list of potential
customers the third day of the Training Program to begin scheduling appointments to make sales
presentations”; adding that the appointments were scheduled for a time after he had finished the

1 (deposition testimony); and that most opt-ins created potential recruit lists. *See id.* (Humphrey
2 Decl., Ex. 20) (deposition testimony). Accordingly, the Court concludes that there is sufficient,
3 albeit not complete, uniformity to suggest a common practice by Vector to ask trainees for these
4 items. Hence, this factor may be evaluated on a collective basis.

5 The Court emphasizes that, in so concluding, it is not make any ruling on the merits – *i.e.*,
6 Vector is not precluded from arguing that none of the above acts constituted an *immediate* advantage
7 to Vector such that this factor ultimately weighs in its favor. *See* Def.’s Mot. at 25 (arguing that
8 “[t]he only benefit occurs when the appointment is actually fulfilled, which is invariably after
9 training, *and* if a sale is made, which again is invariably after training”) (emphasis in original);
10 Docket No. 295 (Mot. at 6-9) (arguing that there is no immediate benefit where, *e.g.*, a trainee is not
11 productive until after the training is over, or a trainee’s work is supervised on the job and does not
12 obviate the need for regular employees’ work, or a trainee’s work is a *de minimis* benefit). But
13 again, that is a merits argument, and the issue at this juncture is simply whether there is sufficient
14 uniformity such that the factor may be evaluated on a collective basis.

15 5. Whether Trainees Are Necessarily Entitled to a Job

16 In her papers, Ms. Harris contends that this factor is conducive to consideration on a
17 collective basis because all fifty opt-ins deposed by Vector testified that they were presented with a

18 _____
19 training); *id.* (Ex. 9) (Burkhardt Decl. ¶ 11) (stating that, “[d]uring the second day of the Training
20 Program, I wrote down a list of potential customers” and, “[o]n the following day of the Training
21 Program, I made phone calls to some of these people on my list to introduce myself and to begin
22 scheduling appointments to make sales presentations”); *id.* (Ex. 24) (Golding Decl. ¶¶ 11-12)
23 (stating that, “[d]uring the second day of the Training Program, I wrote down a list of potential
24 customers” and that “I made phone calls to the people on my list of potential customers after the
25 second day of training at home to practice calling up potential customers, to further refine the skill
26 of building rapport that I learned in training, and to set up my initial sales appointment with people I
27 knew well”); *id.* (Ex. 35) (Lambros Decl. ¶¶ 12-13) (stating that, “[d]uring the second day of the
28 Training Program, I created a list of prospective and potential customers” and that “I made phone
calls to the people . . . after the end of the second day of the training session to begin scheduling
appointments to make sales presentations”).

25 In its papers, Vector emphasizes that, with respect to the opt-ins, the potential customer lists
26 were not always turned over to the managers. Vector thus argues that there is not sufficient
27 uniformity. However, even if there were a lack of uniformity as to this particular fact, there would
28 still be a benefit to Vector even if customer lists were not turned over to the managers if the trainees
made appointments off these lists during training. As discussed below, the Court does not make any
determination as to whether this benefit constitutes an *immediate* advantage for purposes of the
DOL/*Portland Terminal* test, but there is evidence of some degree of consistency in this regard.

1 Sales Representative Agreement. Vector does not dispute this. It argues, however, that there is
2 “direct evidence that those who complete training do not *necessarily* become sales representatives[;]
3 [o]ver 10% of those who complete training do not become Vector Sales Reps.” Def.’s Mot. at 26
4 (emphasis in original) (citing Docket No. 151) (Matheson Decl. ¶ 5). Vector also notes that there
5 are other indications that trainees are not necessarily entitled to a job – *e.g.*, 55% of the people
6 invited to training do not show up, and 45% of the people who start training do not finish it. *See id.*
7 (citing Docket No. 151) (Matheson Decl. ¶ 5).

8 The Court concludes that there is sufficient evidence that Vector had a common practice of
9 presenting trainees who completed the training to be presented with a Sales Representative
10 Agreement. Vector’s evidence does not negate this. Even if more than 10% of the trainees who
11 finished the training did not go on to become Sales Representatives, that does not mean that Vector
12 did not offer those trainees jobs as Sales Representatives; they may have left on their own volition.
13 Vector has not provided any evidence that it rejected trainees who completed the training. Even if
14 trainees could be rejected, *e.g.*, for drug use or dishonesty as contended at the hearing, this would
15 not disprove there was a consistent practice capable of collective evaluation.

16 6. Whether Alleged Employer and Trainees Understand that Trainees Are Not Entitled
17 to Wages for Training Time

18 As noted above, this is the only DOL factor that turns on subjective, rather than objective
19 evidence. Nevertheless, at least part of this factor may be evaluated on a collective basis because
20 there is no dispute that Vector itself understood that trainees would not be entitled to wages for their
21 training time. Vector contends, however, that ultimately this factor cannot be evaluated on a
22 collective basis because, as reflected by the deposition testimony of the opt-ins, there was no
23 common understanding on the part of the trainees: 34% of the opt-ins testified that they thought they
24 would be compensated, 30% of the opt-ins testified that they would not be, and 36% testified that
25 they were not sure. *See* Docket No. 339 (Saad Decl., Ex. A2-a). In her papers, Ms. Harris concedes
26 that the testimony of the opt-ins is “inconsistent.” Pl.’s Opp’n at 18.

27 While Vector has demonstrated a lack of uniformity with respect to the understanding of the
28 trainees, the Court does not find this problem to be so overwhelming that the FLSA claim, as a

1 whole, cannot be evaluated on a collective basis. As Ms. Harris points out, this is but one factor in
2 the six-factor DOL test. Moreover, the Court notes that, even the understanding of the trainees may
3 be subject to some collective analysis because there is evidence that all trainees were given Vector’s
4 “Skills for Life” brochure, which expressly states that there is no compensation for time spent in
5 training.

6 7. Summary

7 As reflected by the above, the DOL/*Portland Terminal* factors are largely susceptible to
8 collective treatment. Moreover, even if the *Donovan* test applied, the degree of control exerted by
9 Vector over trainees during the training period – a key factor under the *Donovan* test – appears to be
10 a matter of consistent practice and policy and thus would also susceptible to collective treatment.
11 The Court therefore grants final certification with respect to the claim that Vector failed to pay
12 trainees minimum wages for the time spent in initial training in violation of the FLSA. The Court
13 notes that final certification is appropriate even taking into account that, assuming trainees are
14 employees, an inquiry must still be made under 29 C.F.R. § 785.27 as to whether the training time
15 should be counted as working time.⁷ This is because, under the regulation, four specific criteria
16 must be met in order for training time not to be counted as working time, and at least three of the
17 four criteria ((a), (c), and (d)) may be evaluated on a collective basis. Notably, in its papers, Vector

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19
20 ⁷ The regulation provides:

21 Attendance at lectures, meetings, training programs and similar
22 activities need *not* be counted as working time if the following four
criteria are met:

- 23 (a) Attendance is outside of the employee’s regular working hours;
24 (b) Attendance is in fact voluntary;
25 (c) The course, lecture, or meeting is not directly related to the
26 employee’s job; and
27 (d) The employee does not perform any productive work during
such attendance.[]

28 29 C.F.R. § 785.27 (emphasis added).

1 did not make any specific argument that the § 785.27 criteria may not be evaluated on a collective
2 basis.

3 To the extent Vector argues that fairness and procedural concerns weigh against final
4 certification, its argument is not persuasive. For example, Vector’s argument that the Court should
5 take into account that Vector’s entire business model would be nullified if Vector were found liable
6 is not convincing, especially since the case that Vector relies on, *Bateman v. American*
7 *Multi-Cinema, Inc.*, 252 F.R.D. 647 (C.D. Cal. 2008), was recently overruled by the Ninth Circuit.
8 *See Bateman v. American Multi-Cinema, Inc.*, No. 09-55108, 2010 U.S. App. LEXIS 19934 (9th Cir.
9 Sept. 27, 2010). The financial burden upon the defendant should the plaintiff prove a collective
10 FLSA violation is not a valid reason to deny certification.

11 E. Statute of Limitations

12 As a final point, the Court takes note that a new issue has been raised by Vector in its
13 opposition to Ms. Harris’s motion for final collective action certification – *i.e.*, that the class period
14 should start from August 2, 2008, rather than from April 15, 2006, as Ms. Harris desires. Vector
15 argues that August 2, 2008, is the proper beginning date for the class period because, in a FLSA
16 collective action, there is a two-year statute of limitations, and while the statute of limitations for a
17 *named* plaintiff runs from the date that the plaintiff files the complaint, the limitations period for an
18 *opt-in* plaintiff runs from the opt-in date, which here was August 2, 2010. *See* 29 U.S.C. §§ 255(a),
19 256(b). Vector concedes that a longer statute of limitations – three years – is available where there
20 is a willful violation, *see id.* § 255(a), but here, Vector asserts, there is no evidence of a willful
21 violation.

22 The Court rejects Vector’s position. As Vector admits in a footnote in its opposition brief,
23 *see* Def.’s Opp’n at 20 n.10, it entered into a stipulation (in April 2009), which was later formalized
24 as an order, providing that,

25 [f]or purposes of the statute of limitation, to the extent that Plaintiff
26 moves for conditional class certification under the Federal Fair Labor
27 Standards Act on behalf of the FLSA Class, any class conditionally
28 certified as a result of said motion shall be certified with a class period
start date of April 15, 2006.

1 Docket No. 32 (stipulation and order). Given the strict language of the stipulation, the Court holds
2 Vector to the April 15, 2006, start date.

3 Vector argues still that the stipulation should not be given any effect given the particular
4 circumstances – *i.e.*, the stipulation was entered into only so that Ms. Harris and the potential
5 collective action members would not be prejudiced as a result of any delay associated with Vector’s
6 filing of an early summary judgment motion. Vector notes that the stipulation states that “Plaintiff
7 desires to *timely* seek conditional certification under the Federal Fair Labor Standards Act on behalf
8 of the FLSA Class,” *id.* (emphasis added), and here Ms. Harris did not timely move for conditional
9 certification after the resolution of the summary judgment motion. Therefore, according to Vector,
10 the stipulation should have no force. While Vector’s position is not without some merit, Vector
11 could have asked for relief from the stipulation based on Ms. Harris’s delay but it never did so.
12 Furthermore, Vector has not shown sufficient cause to be relieved of its stipulation with Ms. Harris.

13 F. Final Certification

14 Accordingly, the Court grants Ms. Harris’s motion for final certification and denies Vector’s
15 cross-motion to certify. The Court certifies as a collective action Ms. Harris’s FLSA claim. The
16 FLSA class is defined as all individuals who worked for Vector in the state of California as Sales
17 Representatives from April 15, 2006, through May 12, 2010.

18 **IV. RULE 23 MOTIONS**

19 In her Rule 23 motion, Ms. Harris seeks class certification for the following state claims
20 only: (1) failure to pay for initial training (California Labor Code § 1197); (2) failure to reimburse
21 expenses (California Labor Code § 2802); (3) violation of PAGA, based on the failure to reimburse
22 and the coerced purchase of the sample knife set; and (4) unfair competition based on the coerced
23 purchase of the sample knife set (California Business & Professions Code § 17200).⁸ Vector, in its
24 own Rule 23 motion, asks the Court to deny class certification.

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27 ⁸ Ms. Harris is not moving for class certification with respect to the California Labor Code
28 §§ 226 and 201/203 claims, *see* Pl.’s Mot. at 1 n.2 – apparently, not even to the extent she may have
a claim for injunctive relief (as opposed to damages which the Court dismissed at the summary
judgment phase).

1 A. Legal Standard

2 Rule 23 governs class actions. Under this rule, a class action may be maintained only if: (1)
3 each of the requirements of Rule 23(a) is satisfied, and (2) one of the requirements of Rule 23(b) is
4 satisfied. Under Rule 23(a),

5 [o]ne or more members of a class may sue or be sued as representative
6 parties on behalf of all members only if:

- 7 (1) the class is so *numerous* that joinder of all members is
8 impracticable;
- 9 (2) there are questions of law or fact *common* to the class;
- 10 (3) the claims or defenses of the representative parties are *typical*
11 of the claims or defenses of the class; and
- 12 (4) the representative parties will fairly and *adequately* protect the
13 interests of the class.

14 Fed. R. Civ. P. 23(a) (emphasis added).

15 As for Rule 23(b), Ms. Harris is asking for certification pursuant to subdivision (3),
16 presumably because the primary relief being sought on behalf of the class is damages. Under Rule
17 23(b)(3), a class action may be maintained if

18 the court finds that the questions of law or fact common to class
19 members *predominate* over any questions affecting only individual
20 members, and that a class action is *superior* to other available methods
21 for fairly and efficiently adjudicating the controversy. The matters
22 pertinent to these findings include:

- 23 (A) the class members' interests in individually controlling the
24 prosecution or defense of separate actions;
- 25 (B) the extent and nature of any litigation concerning the
26 controversy already begun by or against class members;
- 27 (C) the desirability or undesirability of concentrating the litigation
28 of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3) (emphasis added).

1 B. Claims Related to Training v. Post-Training Claim

2 Before embarking on a Rule 23(a) and (b) analysis, the Court notes, as a preliminary matter,
3 that a distinction should be made between (1) claims related to the initial training and (2) the post-
4 training claim.

5 The claims related to the initial training are as follows: the claim for failure to pay minimum
6 wages for the initial training, *see* Cal. Lab. Code § 1197; the claim for unfair competition based on
7 the failure to pay minimum wages for the initial training and for the coerced purchase of the sample
8 knife set,⁹ *see id.*; the claim for violation of PAGA based on the coerced purchase of the sample
9 knife set, *see* Cal. Lab. Code § 2698 *et seq.*; and the claim for failure to reimburse to the extent
10 based on the coerced purchase of the sample knife set. *See* Cal. Lab. Code § 2802. There is only
11 one post-training claim remaining in this action – the claim for failure to reimburse expenses
12 incurred once Sales Representatives actually started selling knives. *See id.*

13 The Court draws a distinction between the above claims because, even though certification
14 generally should be approached on a claim-by-claim basis, *see Bertulli v. Independent Ass’n of*
15 *Cont’l Pilots*, 242 F.3d 290, 296 (5th Cir. 2001) (stating that “[a] class should be certified on a
16 claim-by-claim basis”), as a practical matter, the claims related to the training may be evaluated
17 together as each involves the predicate question of whether trainees should be deemed employees
18 for purposes of California law. The post-training claim is different because, there, the issue is not
19 whether *trainees* should be deemed employees but rather whether *Sales Representatives* should be
20 deemed employees – a predicate to its substantive claim for reimbursement for expenses incurred
21 under California Labor Code § 2802.

22 With respect to the issue of whether *Sales Representatives* (as opposed to trainees) should be
23 deemed employees, the parties agree that the appropriate test to use under California law is the
24 *Borello* test, where the principal question is “whether the person to whom service is rendered has
25 the right to control the manner and means of accomplishing the result desired.” *S.G. Borello &*
26

27
28 ⁹ According to Ms. Harris, the coerced purchase of the sample knife set took place during training. Therefore, claims based on the coerced purchase relate to the initial training.

1 *Sons, Inc. v. Department of Indus. Relations*, 48 Cal. 3d 341, 350 (1989). In addition to the factor of
2 the right to control, other factors that are considered include

3 (1) whether the worker is engaged in a distinct occupation or business,
4 (2) whether, considering the kind of occupation and locality, the work
5 is usually done under the principal’s direction or by a specialist
6 without supervision, (3) the skill required, (4) whether the principal or
7 worker supplies the instrumentalities, tools, and place of work, (5) the
length of time for which the services are to be performed, (6) the
method of payment, whether by time or by job, (7) whether the work
is part of the principal’s regular business, and (8) whether the parties
believe they are creating an employer-employee relationship.

8 *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal. App. 4th 1, 10 (2007) (noting that “there
9 are a number of additional factors in the modern equation”).

10 The parties dispute, however, what the appropriate test is for the issue of whether *trainees*
11 should be deemed employees. According to Vector, the *Borello* test is still applicable. According to
12 Ms. Harris, an eleven-factor test adopted by the California Division of Labor Standards Enforcement
13 (“DLSE”) – six of which are the same as the factors used in the *DOL/Portland Terminal* test – is the
14 proper test.¹⁰ See DLSE Op. 1998.11.12, at 1-2.

15
16 ¹⁰ The five additional factors are as follow.

- 17 (6) The employer and the trainees or students understand that the
18 trainees or students are not entitled to wages for the time spent
in training.
- 19 (7) Any clinical training is part of an educational curriculum.
- 20 (8) The trainees or students do not receive employee benefits.
- 21 (9) The training is general, so as to qualify the trainees or students
22 for work in any similar business, rather than designed
23 specifically for a job with the employer offering the program.
In other words, on completion of the program, the trainees or
24 students must not be fully trained to work specifically for only
the employer offering the program.
- 25 (10) The screening process for the program is not the same as for
26 employment, and does not appear to be for that purpose, but
27 involves only criteria relevant for admission to an independent
28 educational program.

1 The Court does not agree with either Vector or Ms. Harris. Vector’s position is problematic
2 because many of the factors in the *Borello* test are largely inapplicable in a training situation. *Cf.*
3 Docket No. 176 (Order at 5) (rejecting application of *Donovan* test for FLSA claim because “some
4 of the factors make little sense in a training situation – *e.g.*, the worker’s opportunity for profit or
5 loss”). Moreover, at least one state court has characterized *Borello* as an economic realities test.
6 *See JKH Enters., Inc. v. Department of Industrial Relations*, 142 Cal. App. 4th 1046, 1054 (2006).
7 Under an economic realities approach as applied to trainees, the issue is not what are the economic
8 realities of the relationship between Vector and its Sales Representatives, but rather what are the
9 economic realities of the relationship between Vector and its trainees. As previously noted, the
10 DOL/*Portland Terminal* test uses factors geared toward the latter. For reasons similar to why the
11 Court applies the DOL/*Portland Terminal* test rather than the *Donovan* test to trainees, it refuses to
12 apply the *Borello* test to this context.

13 On the other hand, Ms. Harris’s position is not entirely correct either. Notably, in a DLSE
14 opinion letter issued approximately six months ago, the DLSE rejected the previously used eleven-
15 factor test and concluded that the DOL/*Portland Terminal* six-factor test should be used. *See* DLSE
16 Op. 2010.04.07, at 4. This Court adopts the approach of the DLSE in that recent opinion letter – *i.e.*,
17 it shall apply the DOL/*Portland Terminal* test in determining whether Vector’s trainees should be
18 deemed employees.

19 To the extent Vector argues that the DLSE’s opinion should not be given any deference, the
20 Court agrees that the opinion is not controlling. However, DLSE opinions “do constitute a body of
21 experience and informed judgment to which courts and litigants may properly resort for guidance.”
22 *Bell v. Farmers Ins. Exchange*, 87 Cal. App. 4th 805, 815 (2001) (internal quotation marks omitted);
23 *see also Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554, 563 (2007) (noting that DLSE

24
25 (11) Advertisements for the program are couched clearly in terms of
26 education or training, rather than employment, although the
27 employer may indicate that qualified graduates will be
28 considered for employment.

DLSE Op. 1998.11.12, at 2.

1 advice and opinion letters are “entitled to no deference” but adding that “this court may adopt the
2 DLSE’s interpretation if we independently determine that it is correct”). Here, the DLSE reasonably
3 adopted the DOL/*Portland Terminal* test because “the similar definitions for ‘employee’ and
4 ‘employ’ under the FLSA and State law manifest a consistency which warrants similar
5 interpretation.” DLSE Op. 2010.04.07, at 4.

6 C. Certification for Claims Related to Training

7 For the claims related to the initial training, the Court concludes that certification is
8 appropriate. Both the Rule 23(a) and 23(b) requirements have been met.

9 1. Rule 23(a)

10 As noted above, the Rule 23(a) requirements are (1) numerosity, (2) adequacy, (3) typicality,
11 and (4) commonality.

12 a. Numerosity

13 In the instant case, Vector has not contested numerosity. *See* Def.’s Mot. at 2 (stating that
14 “[t]he only [Rule 23(a) requirement Ms. Harris] can meet is numerosity”). Moreover, there is
15 sufficient evidence supporting numerosity – *i.e.*, the number of FLSA class notices that were issued,
16 not to mention the number of FLSA opt-ins. *See James v. City of Dallas*, 254 F.3d 551, 570 (5th
17 Cir. 2001) (stating that, “[t]o satisfy the numerosity prong, a plaintiff must ordinarily demonstrate
18 some evidence or reasonable estimate of the number of purported class members”) (internal
19 quotation marks omitted). Although the Rule 23 motion is for the state claims only, and not the
20 FLSA claim, the FLSA claim provides a good benchmark for numerosity, particularly because the
21 state claim for unpaid training time is based on the same set of facts as the FLSA claim for unpaid
22 training time.

23 b. Adequacy

24 Here, Vector contests both the adequacy of Ms. Harris and her counsel. Vector’s challenge
25 to Ms. Harris is based on her alleged lack of credibility. Vector’s challenge to Ms. Harris’s counsel
26 is based on “their blatant failure to verify the veracity of [Ms.] Harris’[s] statements and/or their
27 implicit condoning of her false statements.” Def.’s Mot. at 11. Vector also makes an argument that,
28

1 even if Ms. Harris’s credibility is not a problem, she is still an inadequate representative with respect
2 to Sales Representatives who were younger than eighteen years old during the relevant period.

3 i. Credibility of Ms. Harris

4 The Court agrees with Vector that Ms. Harris’s credibility may be a relevant consideration
5 with respect to the adequacy analysis. As noted by one court, “[t]he honesty and credibility of a
6 class representative is a relevant consideration when performing the adequacy inquiry ‘because an
7 untrustworthy plaintiff could reduce the likelihood of prevailing on the class claims.’” *Searcy v.*
8 *eFunds Corp.*, No. 08 C 985, 2010 U.S. Dist. LEXIS 31627, at *15 (N.D. Ill. Mar. 31, 2010); *see*
9 *also In re Computer Memories Secs. Litig.*, 111 F.R.D. 675, 682 (N.D. Cal. 1986) (Lynch, J.)
10 (stating that “it is self-evident that a Court must be concerned with the integrity of individuals it
11 designates as representatives for a large class of plaintiffs”). Furthermore, “[a] class is not fairly
12 and adequately represented if class members have antagonistic or conflicting claims,’ and a plaintiff
13 with credibility problems may be considered to have interests antagonistic to the class.” *Ross v. RBS*
14 *Citizens, N.A.*, No. 09 CV 5695, 2010 U.S. Dist. LEXIS 107779, at *13 (N.D. Ill. Oct. 8, 2010).

15 That being said, “[c]redibility problems do not automatically render a proposed class
16 representative inadequate.” *Ross*, 2010 U.S. Dist. LEXIS 107779, at *14; *see also In re Computer*
17 *Memories*, 111 F.R.D. at 682 (stating that “questions of personal integrity are but one factor the
18 Court must consider in making the adequacy determination.”). “Only when attacks on the credibility
19 of the representative party are so sharp as to jeopardize the interests of absent class members should
20 such attacks render a putative class representative inadequate.” *Lapin v. Goldman Sachs & Co.*, 254
21 F.R.D. 168, 177 (S.D.N.Y. 2008) (internal quotation marks omitted). There is “inadequacy only
22 where the representative’s credibility is questioned on issues directly relevant to the litigation or
23 there are confirmed examples of dishonesty, such as a criminal conviction for fraud.” *Ross*, 2010
24 U.S. Dist. LEXIS 107779, at *14; *see also Gooch v. Life Investors Ins. Co. of Am.*, 264 F.R.D. 340,
25 349 (M.D. Tenn. 2009) (stating that “[a]ny issues of the Plaintiff’s credibility should be tied to his
26 claims in this action”; adding that the inquiry “‘into the representatives’ personal qualities is not an
27 examination into their moral righteousness, but rather an inquiry directed at improper or
28 questionable conduct arising out of or touching upon the very prosecution of the lawsuit”); *Del*

1 *Campo v. American Corrective Counseling Servs., Inc.*, No.: C 01-21151 JW (PVT), 2008 U.S. Dist.
2 LEXIS 106837 (N.D. Cal. May 12, 2008) (stating that, “[g]enerally, unsavory character or
3 credibility problems will not justify a finding of inadequacy unless related to the issues in the
4 litigation”).

5 In the instant case, Vector argues that there are credibility issues with Ms. Harris that are
6 directly relevant to the litigation. According to Vector, Ms. Harris has lied about, in particular, (1)
7 Vector’s level of control over her (no telephone calls with her managers, no reading from the
8 manual, and not calling her managers during the presentations) and (2) the people to whom she
9 made presentations (never made several presentations). Notwithstanding Ms. Harris’s arguments to
10 the contrary, there are credibility problems here, as discussed below. But these credibility problems
11 are not directly relevant *to the claims related to the training*. As discussed above, the Court is not
12 applying the *Borello* test – where the right to control is a key factor – to the claims related to the
13 training. Both (1) and (2) above are not directly relevant to the claims related to the training because
14 they concern Ms. Harris’s conduct post-training. Therefore, credibility problems regarding Vector’s
15 level of control does not render Ms. Harris an inadequate representative.

16 For the claims related to training, therefore, the Court does not find there to be a credibility
17 problem that should bar Ms. Harris from being a fair and adequate representative. Moreover, the
18 Court concludes that Ms. Harris has made an adequate showing that she will be a fair and adequate
19 representative as to these claims. She has participated in this litigation, and there do not appear to be
20 any conflicts between Ms. Harris and the putative class.

21 To the extent Vector argues that Ms. Harris cannot be a fair and adequate representative for
22 Sales Representatives who were younger than eighteen during the relevant period, the Court
23 disagrees. Ms. Harris would be an inadequate representative only if there were a conflict between
24 her interests and those of Sales Representatives younger than eighteen. *See Corley v. Entergy Corp.*,
25 220 F.R.D. 478, 483 (E.D. Tex. 2004) (noting that “[d]ifferences between named plaintiffs and
26 class members render the named plaintiffs inadequate representatives only if those differences create
27 conflicts of interest between the named plaintiffs’ interests and the class members’ interests”);
28

1 *Cobell v. Norton*, 213 F.R.D. 43, 45 (D.D.C. 2003) (indicating that inadequate representation issues
2 arise where there is a potential or actual conflict between the representative and the class members).

3 Here, there is no evidence that there would be any conflict. For example, for the claims for
4 failure to reimburse, violation of PAGA, and unfair competition (all based on the coerced purchase
5 of the sample knife set), there is absolutely no difference between Ms. Harris’s interests and the
6 interests of Sales Representatives younger than eighteen.

7 As for the claim for failure to pay for initial training, there is no conflict either. It is true that
8 California “state minimum wage laws specifically exclude outside salesmen from coverage,” *Grubb*
9 & *Ellis Co. v. Spengler*, 143 Cal. App. 3d 890, 897 (1983), and outside salesperson has been defined
10 as “any person, 18 years of age or over, who customarily and regularly works more than half the
11 working time away from the employer’s place of business selling tangible or intangible items or
12 obtaining orders or contracts for products, services or use of facilities.” *Ramirez v. Yosemite Water*
13 *Co.*, 20 Cal. 4th 785, 795 (1999) (quoting Wage Order No. 7-80, 2(I)). But as Ms. Harris points out,
14 she is not asking for compensation for time spent working as a Sales Representative; rather, she is
15 seeking only compensation for time spent in training and therefore the outside salesperson
16 exemption is irrelevant.

17 ii. Competence of Ms. Harris’s Counsel

18 Because Ms. Harris’s credibility problems do not render her inadequate for the claims related
19 to the training, the Court reject Vector’s argument that her counsel is also inadequate. The Court
20 also deems counsel adequate based on the information provided by Ms. Harris regarding counsel’s
21 experience. For example, the Marlin & Saltzman law firm has represented plaintiffs in class actions
22 and complex litigation for some fifteen years. Many of these cases were employment-related actions
23 and involved a significant settlement in favor of the class. *See* Docket No. 329 (Saltzman Decl. ¶¶
24 3-4, 7).

25 c. Commonality/Typicality

26 The commonality and typicality requirements of Rule 23(a) tend to
27 merge. Both serve as guideposts for determining whether under the
28 particular circumstances maintenance of a class action is economical
and whether the named plaintiff’s claim and the class claims are so

1 interrelated that the interests of the class members will be fairly and
2 adequately protected in their absence.

3 *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 158 n.13 (1982).

4 For the claims related to the initial training, the commonality/typicality requirements are
5 easily met. These claims all share a common question of law -- *i.e.*, whether the trainees should be
6 deemed employees under California law. Moreover, the facts to be analyzed with respect to this
7 legal question are largely the same, as discussed above with respect to the FLSA motions.

8 2. Rule 23(b)(3)

9 For Rule 23(b)(3), Ms. Harris must make a sufficient showing of (1) predominance and (2)
10 superiority.

11 a. Predominance

12 “The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently
13 cohesive to warrant adjudication by representation.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
14 1022 (9th Cir. 1998). “Implicit in the satisfaction of the predominance test is the notion that the
15 adjudication of common issues will help achieve judicial economy.” *Valentino v. Carter-Wallace,*
16 *Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). “When common questions present a significant aspect of
17 the case and they can be resolved for all members of the class in a single adjudication, there is clear
18 justification for handling the dispute on a representative rather than on an individual basis.” *Hanlon*,
19 150 F.3d at 1022.

20 In the instant case, common questions predominate for the claims related to the initial
21 training. As noted above, for all of these claims there is a common question of law – *i.e.*, whether
22 the trainees should be deemed employees under California law – and the facts to be analyzed with
23 respect to this legal question are largely the same. As to nearly all the six DOL/*Portland Terminal*
24 factors, common questions predominate. Even though the predominance requirement of Rule
25 23(b)(3) is more rigorous than the “similarly situated” test of the FLSA, based on the above analysis
26 of the DOL/*Portland Terminal* factors, the Court concludes the Rule 23(b)(3) requirement is met.

1 b. Superiority

2 Finally, given the predominance of a common question of law and facts, the Court concludes
3 that a class action is superior to other available methods for fairly and efficiently adjudicating the
4 claims related to the initial training.

5 In its papers, Vector argues that a superior way of proceeding would be to deny Rule 23
6 certification and to have the state law claims (including the claims related to the initial training)
7 prosecuted as part of the FLSA collective action – in effect, there would be no Rule 23 certification
8 with its opt-out procedure under Rule 23(b)(3). The main opinion relied upon by Vector is Judge
9 Walker’s opinion in *Leuthold v. Destination Am.*, 224 F.R.D. 462 (N.D. Cal. 2004).

10 While some courts have followed Judge Walker’s approach in *Leuthold*, *see, e.g.*,
11 *Campanelli v. Hershey Co.*, No. C 08-1862 BZ, 2010 U.S. Dist. LEXIS 92364, at *15 (N.D. Cal.
12 Aug. 13, 2010), a number of courts have allowed both a FLSA collective action and a Rule 23 class
13 action for any state law claims. *See Lindsay v. Government Emples. Ins. Co.*, 251 F.R.D. 51, 57
14 (D.D.C. 2008) (citing cases).

15 Having considered the various decisions, this Court declines to follow *Leuthold* in this case.
16 First, the parties do not dispute that the FLSA claim here does not preempt the state law claims. Yet
17 if the Court were to require this case to be prosecuted solely under the FLSA, it would in practical
18 terms have a preemptive effect on the state law claims. *See Cortez v. Nebraska Beef, Ltd.*, 266
19 F.R.D. 275, 294 (D. Neb. 2010). To the extent Vector disputes this effect on the ground that the
20 state law claims are still substantively preserved, only procedurally altered, it ignores the fact that
21 the procedural difference between the FLSA and Rule 23 is significant. Given the likely difference
22 in class sizes between an opt-in FLSA class and an opt-out Rule 23 class, the rights of the class as a
23 whole to prosecute the state claims would be substantially diminished were Rule 23 class
24 certification denied as a result of FLSA certification. The likely practical effect of denial of Rule 23
25 certification is that the state wage claims, which are substantively different and broader than the
26 FLSA claim, will be dropped.

27 Second, were FLSA certification to bar Rule 23 certification of state claims, claimants with
28 rights under both the FLSA and state law would be faced with a trilemma. They must either: (1)

1 forego their FLSA claims altogether in contravention of the remedial purposes of the FLSA; (2)
2 forego their state wage claims in violation of the spirit of the savings claims of the FLSA, *see* 29
3 U.S.C. § 218(a) (permitting states and municipalities to enact stricter wage and hour laws); or (3)
4 split their claims and prosecute their state claims via class action in state courts while maintaining
5 their FLSA claims in federal court, resulting in a multiplicity of actions. It is highly doubtful that
6 Congress in establishing the FLSA certification procedure would have intended such perverse
7 consequences.

8 Third, a paradoxical result would obtain if the Court were to deny Rule 23 certification
9 simply because of the existing FLSA claim. Plaintiffs bringing *only* state claims under Rule 23
10 would be afforded greater rights than those who bring both state claims *and* FLSA claims. That
11 paradox cannot be fully rationalized by the contention that those employees who fail to opt-in under
12 FLSA have indicated their conscious refusal to participate in a Rule 23 class action. As the court in
13 *Cortez* noted, “there may be a number of reasons the employees failed to opt-in to the action that had
14 nothing to do with a belief they were not actually aggrieved.” *Id.* Here, the state law claims are
15 substantively more expansive than the FLSA claim – *i.e.*, they go beyond the failure to pay wages
16 for the initial training. Therefore, a Sales Representative’s decision not to opt-in to the FLSA claim
17 is not necessarily an indication that he or she does not want to participate in a lawsuit involving
18 different substantive claims. Furthermore, inadvertence, as opposed to a conscious decision not to
19 participate, is a likely factor in opt-in situations. Fear of retaliation is another possibility.

20 Fourth, *Leuthold* notably rests in part on Judge Walker’s determination that there was
21 significant hostility to the lawsuit amongst the potential class members. But, in the instant case,
22 there is at most hostility exhibited by the Sales Representatives whose declarations Vector
23 submitted. It is hard to say that, based on these fifty plus declarations, there is significant hostility
24 with respect to the class as a whole, which numbers over 40,000 people.

25 Fifth, with more than 5,000 opt-ins to the FLSA class, it is hard to argue that the state law
26 claims so predominate that supplemental jurisdiction should be rejected – another part of the
27 reasoning underpinning Judge Walker’s decision in *Leuthold*. The number of opt-ins here is
28 substantial. Moreover, the question of whether state law claims predominate for purposes of

1 supplemental jurisdiction ultimately turns on “the type of claim, not the number of claimants.”
2 *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 162 (S.D.N.Y. 2008); *see also Lindsay*, 448 F.3d at
3 425 n.12 (stating that, “[i]f ‘state issues substantially predominate, whether in terms of proof, of the
4 scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may
5 be dismissed without prejudice and left for resolution to state tribunals”).

6 Finally, the Court notes that at least some courts have rested their decisions on whether to
7 certify on whether the state law claims were originally brought in state court. If the state law claims
8 were originally brought in state court, then that would favor certification of a Rule 23 class. As
9 explained by one court:

10 Origination of the suit is an important factor because of the difference
11 between Rule 23’s “opt-out” requirement and Section 216(b)’s
12 “opt-in” requirement. In *Riddle*, the Court was concerned that such a
13 difference would create a scenario in which “the Rule 23 class would
14 likely dwarf the FLSA class, making the state law claims dominate the
15 federal suit.” This result would undermine Congress’ intent in
16 enacting the FLSA’s opt-in requirement by letting plaintiffs into
17 federal court through the state law wage claims, even when plaintiffs
18 did not take action to get there. Here, the plaintiffs brought their
19 IMWL and IWPCA claims in federal court rather than state court,
20 thereby creating the potential for the scenario we were concerned
21 about in *Riddle*.

22 *Ervin v. OS Rest. Servs.*, No. 08 C 1091, 2009 U.S. Dist. LEXIS 56062, at *5-6 (N.D. Ill. Mar. 2,
23 2009). In the instant case, Ms. Harris initially filed in state court. In view of this fact and the
24 number and breadth of the state claims asserted herein, to deny Rule 23 certification because of
25 FLSA certification would allow the FLSA tail to wag the state claim dog.

26 Vector has raised an objection based on manageability. While manageability is a concern
27 where there is both an opt-in and an opt-out procedure and an attendant risk that class notices might
28 be perceived as contradictory, the confusion can be dealt with by a carefully worded Rule 23 class
notice. The fact that the FLSA class notice has already issued in the instant case will substantially
lessen the confusion.

29 3. Certification

30 For the foregoing reasons, the Court concludes that, for all claims related to the initial
training, Ms. Harris has made an adequate showing that the requirements of Rule 23(a) and 23(b)(3)

1 have been satisfied. Accordingly, the Court grants the request for certification of a Rule 23(b)(3)
2 class with respect to the claims related to the training period. The class is defined as all individuals
3 who worked for Vector in the state of California as “Sales Representatives” from October 15, 2004
4 through the date of the class notice. *Cf.* Docket No. 304 (Order at 5-6) (agreeing with approach of
5 Judge Armstrong to end the class period on the date of the class notice).

6 D. Certification for Post-Training Claim

7 While, for the reasons stated above, the Court certifies for class action treatment the claims
8 related to the initial training, the Court denies certification with respect to the post-training claim,
9 *i.e.*, that part of the § 2802 claim based on expenses incurred as a Sales Representative. For the
10 post-training claim, the Court concludes that there are problems with adequacy, commonality,
11 predominance, and superiority.

12 1. Adequacy

13 With respect to the post-training claim, there are significant credibility problems with Ms.
14 Harris. As noted above, for the post-training claim, the *Borello* test is applicable, and, under the
15 *Borello* test, the principal question is “whether the person to whom service is rendered has the right
16 to control the manner and means of accomplishing the result desired.” *Borello*, 48 Cal. 3d at 350.
17 During her deposition, Ms. Harris testified about Vector’s level of control over her, stating, *e.g.*, that
18 every day either she would call her manager or her manager would call her, with each conversation
19 lasting five to ten minutes. *See* Docket No. 339 (Wilson Decl., Ex. M-2) (Harris Depo. at 87). But
20 Ms. Harris was never able to provide any telephone records supporting this testimony. As Vector
21 points out, her T-Mobile phone records show no calls being made to or received from her managers.
22 *See id.* (Wilson Decl. ¶ 3). Ms. Harris’s suggestion that she could have used a Boost Mobile phone
23 to communicate with her managers is not substantiated. *See id.* (Sprint Custodian of Records Decl.
24 ¶¶ 5-6) (stating that no account existed for Ms. Harris). While there is evidence that Ms. Harris
25 exchanged text messages with her managers via her T-Mobile phone, she did not testify about the
26 text messages, which are a far different matter from a five- to ten-minute phone calls. Moreover,
27 there was no text messaging on a daily basis. *See* Docket No. 343 (Humphrey Decl., Ex. 34) (text
28 messaging records). Furthermore, there were credibility issues raised about her testimony regarding

1 her sales presentations. For example, Vector obtained testimony from persons to whom Ms. Harris
2 allegedly made presentations. Several of these persons testified that Ms. Harris never made
3 presentations to them; others testified that she never, during the presentations, read word-for-word
4 from the training manual or called her managers, as she claimed during her deposition.

5 2. Commonality

6 Another issue is whether there is sufficient commonality with respect to the *Borello* test, in
7 particular, the right-to-control factor. The Court agrees with Ms. Harris that “it is the right to
8 control, not the exercise of the right, which bears on the status of the work arrangement.” *Borello*,
9 48 Cal. 3d at 357 n.9. However, the Court does not agree with Ms. Harris that there is sufficient
10 commonality simply because the Sales Representative Agreement gives Vector the authority to
11 terminate the Agreement for good cause. *See* Docket No. 37 (Arlie Decl., Ex. D) (Sales
12 Representative Agreement ¶ 8). The analysis is more complex.

13 First, in *Borello*, the California Supreme Court looked at an employer’s right to discharge as
14 one indicia of whether or not there was an employment relationship – *i.e.*, criteria separate and apart
15 from the right to control. *See Borello*, 48 Cal. 3d at 350 (stating that “the right to control work
16 details is the ‘most important’ or ‘most significant’ consideration” but that there are “‘secondary’
17 indicia of the nature of a service relationship,” such as the right to discharge at will). *But see*
18 *Isenberg v. California Employment Stabilization Comm’n*, 30 Cal. 2d 34, 39 (1947) (in case
19 predating *Borello* by several decades, stating that “[s]trong evidence of this right [to control] is
20 shown by the right of the principal to discharge the worker”).

21 Second, Vector’s theoretical right to terminate, as part of its right to control, it is not
22 necessarily dispositive. Under California law, “[o]ne of the means of ascertaining whether or not
23 this right to control exists is the determination of whether or not, if instructions were given, they
24 would have to be obeyed.” *Toyota Motor Sales U.S.A. v. Superior Court*, 220 Cal. App. 3d 864, 875
25 (1990) (internal quotation marks omitted). Thus, even if “it is not the control actually exercised, but
26 that which may be exercised which is determinative,” *id.*, the control that is actually exercised may
27 be informative of the control that may be exercised. The right to terminate alone does not establish
28 control over the details of the mode and manner of work where the documentation is ambiguous as

1 to the mandatory nature of the employer’s directives and whether and how they would be enforced.
2 *See Dahl-Beck Elec. Co. v. Rogge*, 275 Cal. App. 2d 893, 900-01 (1969) (stating that, “where no
3 express agreement is shown as to the right of the claimed employer to control the mode and manner
4 of doing the work, the existence or nonexistence of the right must be determined by reasonable
5 inferences drawn from the circumstances shown”) (internal quotation marks omitted). In this
6 respect, the Court notes that there is evidence of significant variation regarding the actual level of
7 control exercised over Sales Representatives. The evidence presented by the parties indicates that,
8 at the outset, Sales Representatives were more likely to communicate with their managers on a
9 frequent basis but that, over time, as the Sales Representatives became more experienced, that
10 communication – and therefore control – decreased.¹¹ Thus, while the law appears somewhat
11 nebulous, the actual exercise of control may have some bearing in the analysis here.¹²

12 Ms. Harris points out that most Sales Representatives worked for Vector for only short
13 periods of time and thus argues that there is sufficient commonality of experience. But even if most
14 Sales Representatives worked for Vector for limited periods of time, the fact remains that the class
15 that Ms. Harris seeks to have certified extends to all Sales Representatives working for Vector and
16 the longer-working Sales Representatives do not appear to be an insignificant number. At the
17 hearing, Ms. Harris suggested that there could be subclasses depending on how long a Sales
18 Representative worked for Vector, but this poses substantial manageability problems. Ms. Harris
19 has not suggested a clear, administrable, and principled way to divide the Sales Representatives into
20 subclasses, particularly in a way that would align with a variety of control levels.

24 ¹¹ For example, the opt-ins generally testified about frequent communication with the
25 managers but the survey respondents and the Sales Representatives who submitted declarations in
26 support of Vector indicated that communications with their managers was much more variable. *See*,
27 *e.g.*, Docket No. 339 (Saad Decl., Ex. A14).

28 ¹² While the court in *Toyota Motor* noted that “[p]erhaps no single circumstance is more
conclusive to show the relationship of an employee than the right of the employer to end the service
whenever he sees fit to do so,” *Toyota Motor*, 220 Cal. App. 3d at 875 (internal quotation marks
omitted), the Sales Representative Agreement allowed Vector to terminate for good cause only, not
at will.

1 3. Predominance and Superiority

2 Even assuming commonality were not a problem because the right to control is a dominant
3 factor in the *Borello* analysis, Rule 23(b)(3) requires that common questions predominate.
4 Regarding predominance, Vector correctly points out that, for the post-training claim, there may be
5 substantial variance as to what kind of expenses were even incurred by Sales Representatives in the
6 first place. Some Sales Representatives may have used a personal car; others may not have (*e.g.*,
7 they may have taken a bus or walked). Some Sales Representatives may have used a cell phone;
8 others may not have (*e.g.*, used a phone at the Vector local office). And even if all Sales
9 Representatives used cell phones, the plans likely differed (*e.g.*, some may have had a flat rate, while
10 others may have incurred extra charges). Furthermore, some Sales Representatives may have
11 incurred expenses the necessity of which is likely to be challenged (*e.g.*, purchasing clothing).
12 California Labor Code § 2802 provides that “[a]n employer shall indemnify his or her employee for
13 all *necessary* expenditures or losses incurred.” Cal. Lab. Code § 2802 (emphasis added). Ms. Harris
14 has not demonstrated that there were common types of expenses incurred by Sales Representatives,
15 *see generally* Docket No. 333 *et seq.* (Humphrey Decl.) (not including deposition testimony about
16 common expenses). More important, she has not demonstrated that evaluation under § 2802 of the
17 “necessity” of various expenses incurred in a variety of contexts may be done on a relatively
18 uniform basis.

19 The Court acknowledges that, arguably, Vector had a uniform policy or practice of not
20 reimbursing for any expenses and that the different expenses incurred would simply be an issue of
21 individualized damages, which, under Ninth Circuit law, should not alone defeat certification. *See*
22 *Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) (stating that “damage
23 calculations alone cannot defeat certification”; “[t]he amount of damages is invariably an individual
24 question and does not defeat class action treatment”). But the Ninth Circuit has suggested that a
25 relevant factor in the predominance analysis is whether damages calculations would be
26 straightforward. For example, in *Local Joint Executive Board of Culinary/Bartender Trust Fund v.*
27 *Las Vegas Sands, Inc.*, 244 F.3d 1152 (9th Cir. 2001), the Ninth Circuit commented:

1 Individualized issues are few, and most of them are likely to be
2 relatively easy. For example, the damages for individual class
3 members will entail a straightforward calculation of which days and
4 how many hours they would have worked, and how much they would
5 have earned in tips. Because dealers’ tips were counted and divided in
6 the casino cashier’s cage, Sands has detailed written records of the tips
7 employees earned in the past. Because Sands required its dealers to
8 pool tips, there is no variation in tip earnings based on individual
9 performance. We recognize that there may be some variation among
10 the individual employees, as well as some potential difficulty in proof,
11 in demonstrating that they would have worked on July 4th. But given
12 the number and importance of the common issues, we do not believe
13 that this variation is enough to defeat predominance under Rule
14 23(b)(3).

9 *Id.* at 1163. *See also Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 402 (C.D. Cal. 2008) (noting
10 that “[d]ifferences in wages and hours often do not prevent class certification, if there are ways to
11 avoid testimony by every class member”; adding that “the Ninth Circuit has suggested that variation
12 in actual wages is a relatively easy issue, where the employer has payroll records that would indicate
13 the actual compensation that each employee received”). Determining the necessity of the variety of
14 expenses incurred by Vector Sales Representatives appears to involve qualitative as well as
15 quantitative analysis, not a “straightforward calculation.”

16 Even if the individualized damages would not defeat the predominance requirement, at the
17 very least, they should be considered on the issue of superiority – more specifically, manageability.
18 As the court in *Ortega v. J.B. Hunt Transp., Inc.*, 258 F.R.D. 361 (C.D. Cal. 2009) acknowledged,
19 “[t]he amount of damages is invariably an individual question and does not defeat class action
20 treatment” but “the Court should consider whether and how such individual determinations would
21 need to be made in evaluating ‘the difficulties likely to be encountered in the management of a class
22 action.’” *Id.* at 370-71. *See also Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301,
23 1304 (9th Cir. 1990) (stating that the “‘manageability’ requirement includes consideration of the
24 potential difficulties in notifying class members of the suit, calculation of individual damages, and
25 distribution of damages”). Based on the difficulty of calculating individual damages, the Court has
26 serious concerns about the manageability of the post-training claim under § 2802 under the facts of
27 this case.

