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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CRELENCIO CHAVEZ and JOSE)	Case No. CV-09-4812 SC
ZALDIVAR, on behalf of all others)	
similarly situated,)	ORDER GRANTING IN PART AND
)	DENYING IN PART PLAINTIFFS'
Plaintiffs,)	MOTION FOR CLASS
)	<u>CERTIFICATION</u>
v.)	
)	
LUMBER LIQUIDATORS, INC., and DOES)	
1 through 20, inclusive,)	
)	
Defendants.)	
)	

I. INTRODUCTION

Plaintiffs Crelencio Chavez ("Chavez") and Jose Zaldivar ("Zaldivar") (collectively, "Plaintiffs") bring this action against Defendant Lumber Liquidators, Inc. ("LLI") for failure to pay overtime wages, failure to provide meal breaks, failure to pay vested vacation wages, and failure to reimburse work-related expenses. Now before the Court is Plaintiffs' Motion for Class Certification. ECF No. 51 ("Mot."). Plaintiffs seek to certify five classes, each of which includes past and present LLI employees who worked at LLI California stores from September 3, 2005 through the present ("the Class Period"). Plaintiffs' Motion is fully briefed. ECF Nos. 66 ("Opp'n"), 76 ("Reply"). Having considered all of the papers submitted by both parties, the Court concludes

1 that the matter is appropriate for decision without oral argument.
2 As detailed below, the motion is GRANTED in part and DENIED in
3 part.

4
5 **II. BACKGROUND**

6 LLI sells flooring products, including pre-finished and
7 unfinished hardwood, laminate, glue, moldings, and cleaning kits.
8 Morrison Decl.¹ ¶ 2. LLI's presence in California has grown from
9 six retail stores in late 2005 (the beginning of the Class Period)
10 to twenty-four stores today. Id. Each retail store has a Store
11 Manager and some combination of the following positions: Assistant
12 Store Manager I, Assistant Store Manager II, Warehouse Associate,
13 Delivery Driver, and/or Product Specialist. Id. ¶ 3. Store
14 Managers are classified as "exempt" employees, meaning they are
15 exempt from overtime pay requirements. Other employees are
16 classified as "non-exempt," meaning they are eligible for overtime
17 pay.

18 Chavez worked as a Store Manager at LLI's retail store in
19 Commerce, California from 2000 to April 2009. ECF No. 56 ("Chavez
20 Decl.") ¶ 2. Chavez was classified as exempt from overtime wages,
21 but Plaintiffs allege that he was misclassified since he spent more
22 than 50 percent of his time performing non-exempt tasks. ECF No.
23 12 ("FAC") ¶ 8. Chavez estimates that he spent over 85 percent of
24 his workday on such manual duties as "checking in new material and
25 moving it into the warehouse off of trucks . . . , 'pulling' orders
26 from the warehouse for customers, driving, checking material, [and]

27
28 ¹ Robert M. Morrison, LLI's Senior Vice President of Stores and
Operations, submitted a declaration in opposition to Plaintiffs'
Motion. ECF No. 68 ("Morrison Decl.").

1 separating material and shipping material." Chavez Decl. ¶ 3.
2 Chavez also states that LLI never presented him with an itemization
3 or breakdown of how his bonuses or commissions were calculated and,
4 when he quit his job, LLI did not pay him for all of his accrued
5 vacation time. Id. ¶ 5. During his deposition, Chavez testified
6 that "we just didn't have time to have lunches," although it is
7 unclear from his testimony how often he missed meal breaks. See
8 Garcia Decl.² Ex. 1 ("Chavez Dep.") at 244. Further, Chavez states
9 that he was never reimbursed by LLI for gas and personal
10 expenditures incurred while making deposit deliveries and similar
11 trips on behalf of LLI. Chavez Decl. ¶ 6. During his deposition,
12 Chavez conceded that, while he was employed with LLI, he was not
13 aware that he could be reimbursed for mileage and, consequently,
14 never submitted any type of request for reimbursement. Chavez Dep.
15 at 189.

16 Zaldivar worked at LLI's retail store in City of Industry,
17 California from July 2007 to June 2010 as a non-exempt hourly
18 Assistant Manager. Garcia Decl. Ex. C. ("Zaldivar Dep.") at 11-12,
19 35, 41-42. Zaldivar testified that he earned a commission in
20 addition to his hourly pay, but never got a breakdown of the
21 commissions and did not understand how LLI calculated his
22 commission or bonus. Id. at 162, 183-84. From July 2007 to June
23 2010, LLI paid Zaldivar \$12,282.87 as "sales bonuses." Garcia
24 Decl. Ex. D ("Zaldivar Earnings Statement"). Zaldivar claims that
25 LLI failed to include these bonuses into his regular rate of pay
26

27 _____
28 ² David A. Garcia ("Garcia"), Plaintiffs' attorney, filed a
declaration in support of Plaintiffs' Motion. ECF No. 88 ("Garcia
Decl.").

1 when calculating his overtime rate.³ ECF No. 54 ("Zaldivar
2 Decl."). Zaldivar also testified that he rarely, if ever, was
3 given a full, thirty-minute lunch break. Zaldivar Dep. at 100-06.

4 On September 8, 2009, Plaintiffs filed this putative class
5 action in California state court. ECF No. 1 ("Not. of Removal").
6 LLI removed under 28 U.S.C. § 1441(b), and Plaintiffs subsequently
7 filed a First Amended Complaint ("FAC") in federal court. Seven
8 causes of action are asserted in the FAC: (1) & (2) failure to pay
9 overtime wages in violation of California Labor Code ("Labor Code")
10 § 1194 and 29 U.S.C. § 207; (3) failure to pay meal period wages in
11 violation of Labor Code § 226.7; (4) failure to pay vested vacation
12 wages in violation of Labor Code § 227.3 et seq.; (5) failure to
13 reimburse work-related expenses in violation of Labor Code § 2802;
14 (6) failure to keep accurate payroll records in violation of Labor
15 Code § 226; and (7) violation of California Business and
16 Professions Code § 17200 et seq. (the "Unfair Competition Law" or
17 "UCL").

18 Plaintiffs now seek to certify five classes, each of which is
19 limited to persons who were employed at LLI's California retail
20 stores during the Class Period, September 3, 2005 through the
21 present: (1) the "Misclassif[ied] Unpaid Overtime Class,"
22 represented by Chavez; (2) the "Unpaid Overtime Class," represented
23 by Zaldivar; (3) the "Missed Meal Break Class," represented by
24 Chavez and Zaldivar; (4) the "Unpaid Vacation Class" represented by
25 Chavez; and (5) and the "Unpaid Reimbursement Class," represented
26 by Chavez and Zaldivar. Mot. at 1.

27 _____
28 ³ It is unclear from the earnings statement provided by Plaintiffs
whether or not this is actually the case.

1 **III. LEGAL STANDARD**

2 "The class action is an exception to the usual rule that
3 litigation is conducted by and on behalf of the individual named
4 parties only." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541,
5 2550 (2011) (internal quotations and citations omitted). "In order
6 to justify a departure from that rule, a class representative must
7 be part of the class and possess the same interest and suffer the
8 same injury as the class members." Id. (internal quotations and
9 citations omitted).

10 Under Rule 23(a), four prerequisites must be satisfied for
11 class certification:

- 12 (1) the class is so numerous that joinder of all members
13 is impracticable;
- 14 (2) there are questions of law or fact common to the
15 class;
- 16 (3) the claims or defenses of the representative parties
17 are typical of the claims or defenses of the class; and
- 18 (4) the representative parties will fairly and adequately
19 protect the interests of the class.

20 Fed. R. Civ. P. 23(a).

21 A plaintiff also must satisfy one or more of the separate
22 prerequisites set forth in Rule 23(b): (1) there is a risk of
23 substantial prejudice from separate actions; (2) declaratory or
24 injunctive relief benefiting the class as a whole would be
25 appropriate; or (3) common questions of law or fact predominate and
26 the class action is superior to other available methods of
27 adjudication. Fed. R. Civ. P. 23(b).

28 "Rule 23 does not set forth a mere pleading standard. A party

1 seeking class certification must affirmatively demonstrate his
2 compliance with the Rule -- that is, he must be prepared to prove
3 that there are in fact sufficiently numerous parties, common
4 questions of law or fact, etc." Dukes, 131 S. Ct. at 2551
5 (emphasis deleted). Analysis of these factors "generally involves
6 considerations that are enmeshed in the factual and legal issues
7 comprising the plaintiff's cause of action." Id. at 2552 (internal
8 quotations and citations omitted). "Nor is there anything unusual
9 about that consequence: The necessity of touching aspects of the
10 merits in order to resolve preliminary matters, e.g., jurisdiction
11 and venue, is a familiar feature of litigation." Id.

12
13 **IV. DISCUSSION**

14 **A. Preliminary Matters**

15 In support of their briefs, both Plaintiffs and LLI submitted
16 a number of declarations from current and former employees. ECF
17 Nos. 53-57, 59-62 ("Pls.' Emp. Decls."); 67 ("LLI Emp. Decls.").
18 Plaintiffs have also submitted declarations by Chavez and Zaldivar.
19 Plaintiffs' employee declarants state that Store Managers worked
20 overtime and performed non-exempt tasks, that employees often
21 worked through meal breaks, and that LLI failed to reimburse
22 employees for work-related expenses and unused vacation time. In
23 contrast, LLI's employee declarants state that Store Managers
24 primarily performed non-exempt tasks and that LLI complied with the
25 law with respect to meal breaks, expense reimbursement, and
26 vacation time.

27 These employee declarations have triggered a number of
28 objections on both sides. LLI submitted forty-seven pages of

1 objections to Plaintiffs' employee declarations and additional
2 objections to evidence submitted by Plaintiffs in support of their
3 reply brief. ECF No. 72 ("LLI Objs."); 86 ("LLI Reply Objs.").
4 The Court notes that most of LLI's objections lack merit. For
5 example, LLI frequently objects that an employee declarant's
6 statement concerning his or her own job responsibilities "lacks
7 foundation." These repetitive and lengthy objections might have
8 been better presented as affirmative (and succinct) arguments in
9 LLI's opposition brief. In any event, the Court need not and does
10 not address each individual objection because they were filed in
11 violation of the page limits set forth in the Civil Local Rules.
12 Moreover, to the very limited extent that the evidence targeted by
13 LLI is in fact objectionable, the Court does not rely on it.

14 Plaintiffs have objected to LLI's employee declarants on the
15 grounds that they started working for LLI sometime after 2009 and,
16 therefore, are somehow irrelevant to class certification. ECF No.
17 78 ("Pls.' Objs."). This argument lacks merit since all of
18 Plaintiffs' proposed classes include employees who worked for LLI
19 from 2005 through the present. If, as Plaintiffs suggest, LLI
20 changed its policies to comply with the law sometime after 2009,
21 then Plaintiffs should not have extended the class period "through
22 the present."

23 The parties also dispute the veracity of various declarations
24 filed by Carlos Alva, a LLI Store Manager who happens to be
25 Chavez's brother-in-law. Alva initially filed a declaration in
26 support of LLI's opposition to class certification, but later
27 recanted, claiming that he was intimidated into signing this first
28 declaration. ECF No. 67-1 ("Alva 1st Decl."); ECF No. 73 ("Alva

1 2nd Decl."). Plaintiffs filed a second and then a third
2 declaration by Alva in support of their Motion, both of which
3 differ significantly from Alva's first declaration. See Alva 2nd
4 Decl.; ECF No. 74 ("Alva 3rd Decl."). On March 14, 2012, LLI took
5 Alva's deposition, a transcript of which has been filed with the
6 Court.⁴ ECF No. 90-1 ("Alva Dep."). LLI also filed a declaration
7 by the attorney who allegedly intimidated Alva, which paints a
8 vastly different picture of the events surrounding Alva's first
9 declaration. ECF No. 89. Having reviewed all of these
10 declarations, as well as Alva's deposition testimony, it is
11 altogether unclear whether any wrongdoing actually took place. In
12 light of the other dispositive evidence submitted by the parties,
13 as well as the inconsistencies in Alva's various accounts, the
14 Court need not and does not rely on any of the statements made by
15 Alva to resolve this motion for class certification.

16 **B. The Misclassified Unpaid Overtime Class**

17 Plaintiffs define the Misclassified Unpaid Overtime Class as:
18 "All of [LLI's] past and present California employees who formerly
19 worked or are currently working for [LLI] in the position of 'Store
20 Manager' from September 3, 2005 through the present." Mot. at 1.
21 Plaintiffs estimate that at least forty-three LLI employees may
22 fall within this class. Id. at 12. Plaintiffs' theory is that
23 LLI's uniform policy of classifying Store Managers as exempt from
24 overtime wages violates Labor Code § 1194 since Store Managers
25 often worked more than forty hours per week and spent more than 50
26 percent of their time performing non-exempt tasks. FAC ¶ 32.

27 _____
28 ⁴ Curiously, Alva stated during his deposition that he only signed
one declaration in support of Plaintiffs' Motion, not two. See
Alva Dep. at 255.

1 LLI argues that the Court should not certify the proposed
2 Misclassified Unpaid Overtime Class since it does not present
3 common questions of law or fact under Rule 23(a) and because
4 Plaintiffs have failed to demonstrate that common questions
5 predominate over individualized questions under Rule 23(b)(3).
6 Opp'n at 16-17. The Court agrees with LLI.

7 As the Supreme Court explained in Dukes: "Commonality requires
8 the plaintiff to demonstrate the class members have suffered the
9 same injury." Dukes, 131 S. Ct. at 2551 (internal citations and
10 quotations omitted). That is, "[t]heir claims must depend upon a
11 common contention That common contention, moreover, must
12 be of such a nature that it is capable of classwide resolution --
13 which means that determination of its truth or falsity will resolve
14 an issue that is central to the validity of each one of the claims
15 in one stroke." Id. at 2545. The Supreme Court noted: "What
16 matters to class certification . . . is not the raising of common
17 questions -- even in droves -- but, rather the capacity of a
18 classwide proceeding to generate common answers apt to drive the
19 resolution of the litigation. Dissimilarities within the proposed
20 class are what have the potential to impede the generation of
21 common answers." Id. at 2551 (internal quotations and citations
22 omitted).

23 Here, Plaintiffs assert that LLI's uniform policy of
24 classifying Store Managers as exempt presents a common question.
25 Mot. at 12-13. Plaintiffs also contend that the following
26 questions are common to the class: "Plaintiff's job requirements,
27 Defendant's realistic expectations regarding Store Managers' job
28 requirements, whether Defendant had a policy and practice of having

1 Store Managers work without overtime pay, which of the tasks
2 performed by Plaintiff are 'managerial' . . . , whether Plaintiff
3 is exempt from overtime as a 'Manager'" Id. at 14.

4 Several courts, including this one, have denied class
5 certification in the face of similar "common questions." In In re
6 Wells Fargo Home Mortgage, 571 F.3d 953 (9th Cir. 2009), the Ninth
7 Circuit reversed a district court's order certifying a class of
8 employees who were subject to Wells Fargo's blanket application of
9 overtime exemption status. The Ninth Circuit found that Wells
10 Fargo's overtime exemption policy "d[id] nothing to facilitate
11 common proof on the otherwise individualized issues" since "courts
12 must still ask where the individual employees actually spent their
13 time." In re Wells Fargo, 57 F.3d at 959. Shortly after it
14 decided In re Wells Fargo, the Ninth Circuit again addressed class
15 allegations concerning overtime exemption status in Vinole v.
16 Countrywide Home Loans, Inc., 571 F.3d 935 (9th Cir. 2009). In
17 Vinole, the Ninth Circuit upheld a district court's denial of class
18 certification, finding that "Plaintiffs' claims require a fact-
19 intensive, individual analysis of each employee's exempt status."
20 571 F.3d at 947. The Ninth Circuit also affirmed the district
21 court's reasoning that "in cases where exempt status depends upon
22 an individualized determination of an employee's work, and where
23 plaintiffs allege no standard policy governing how employees spend
24 their time, common issues of law and fact may not predominate."⁵

25 ⁵ See also Marlo v. United Parcel Serv., Inc., 639 F.3d 942 (9th
26 Cir. 2011) (employer's expectation that employees follow certain
27 procedures "does not establish whether they are 'primarily' engaged
28 in exempt activities during the course of the workweek"); Cruz v.
Dollar Tree Stores, Inc., No. 07-2050 SC, 2011 WL 2682967, at *6-9
(N.D. Cal. July 8, 2011) (representative employee testimony,
evidence of centralized operational and human resources hierarchy,

1 Id. at 946-47.

2 The Court finds that none of the "common questions" offered up
3 by Plaintiffs are capable of class-wide resolution. The only
4 class-wide policy identified by Plaintiffs -- the classification of
5 Store Managers as exempt -- is insufficient to raise a common
6 question. See In re Wells Fargo, 571 F.3d at 959. As Plaintiffs
7 have offered no common proof that Store Managers' job requirements
8 are consistent from day to day or from store to store, the Court
9 would need to engage in an individualized, fact-intensive analysis
10 to determine how each Store Manager spends his or her time.

11 In their reply brief, Plaintiffs raise a number of additional
12 "common questions." These new arguments do nothing to change the
13 Court's analysis. First, Plaintiffs argue that LLI's "planograms,"
14 detailed schematics which dictate "where products are placed on the
15 shelf, how many items are placed there, and how much space the
16 product takes up," may serve as common proof. Reply at 6.
17 However, there is no indication that these planograms have anything
18 to do with Store Managers' job responsibilities. Next, Plaintiffs
19 argue that "whether more than 50% of the employees' [sic] time is
20 spent on nonexempt tasks may be subject to common resolution based
21 on the testimony of LLI regional managers, volume of sales per
22 store, LLI's employment records of staffing stores." Id. This
23 argument is also unavailing. Plaintiffs appear to be pointing to
24 individualized proof, not common evidence. LLI has twenty-four
25 retail stores in California. The Court cannot analyze Store
26 Managers' responsibilities at each individual location without

27
28 and uniform training did not provide sufficient common proof to
support class certification).

1 conducting mini-trials.

2 For these reasons, the Court declines to certify Plaintiffs'
3 proposed Misclassified Unpaid Overtime Class.

4 **C. Unpaid Overtime Class**

5 Plaintiffs define the Unpaid Overtime Class as:

6 [A]ll past and current retail store employees of [LLI]
7 classified by [LLI] as non-exempt employees (including,
8 but not limited to, assistant store managers, sales
9 associates, and warehouse associates), and employed in
10 California from September 3, 2005 through the present,
11 who were paid overtime wages and were also paid
12 commission wages and/or other non-discretionary pay or
13 bonuses.

14 Mot. at 1. Plaintiffs' theory is that LLI failed to account for
15 non-discretionary pay or bonuses when calculating class members'
16 overtime. See id. at 15. Under California law, non-exempt
17 employees are entitled to "no less than one and one-half times the
18 regular rate of pay for an employee" for any work in excess of
19 eight hours in one workday or forty hours in any one workweek.
20 Cal. Lab. Code § 510(a). Plaintiffs contend that non-discretionary
21 pay and bonuses were not factored into their "regular rate of pay"
22 for the purposes of overtime calculations.⁶ Mot. at 15.

23 The Court finds that the Unpaid Overtime Class meets all of
24 the requirements set forth by Rule 23. As an initial matter, Rule

25 _____
26 ⁶ Plaintiffs' initial definition of the Unpaid Overtime Class is
27 limited to "non-exempt employees." Mot. at 1. However,
28 Plaintiffs' moving papers suggest that the class also includes
Store Managers. See id. at 2 ("Plaintiffs' claims are typical of
up to 43 'Store Managers'"). It would make little sense to include
Store Managers in the Unpaid Overtime Class since Store Managers
were classified as exempt from overtime wages and their claims
could not possibly be predicated on a miscalculation of their
regular pay. Accordingly, the Court excludes Store Managers from
the Unpaid Overtime Class.

1 23(a)'s numerosity requirement is satisfied since the Unpaid
2 Overtime Class is comprised of at least 130 current and former
3 nonexempt LLI employees.

4 Rule 23(a)'s commonality requirement is satisfied because
5 Plaintiffs' claim is capable of class-wide resolution and is
6 subject to common proof since Plaintiffs have identified a uniform
7 policy or practice. LLI's Rule 30(b)(6) deponent indicated that,
8 prior to May 2010, it was LLI's nationwide practice to pay time-
9 and-a-half at an employee's regular hourly rate, without regard to
10 bonuses that an employee may have earned during the relevant pay
11 period. Garcia Decl. Ex. A ("Morrison Dep.").⁷ Accordingly, the
12 Court need not rely on individualized proof to assess the merits of
13 Plaintiffs' unpaid overtime claim. For these same reasons, the
14 Court finds that, under Rule 23(b)(3), questions of law and fact
15 common to the class members predominate over questions affecting
16 only individual members.

17 Zaldivar's claims are typical of the 130 non-exempt employees'
18 claims because all were subject to the common pay practices of LLI.
19 Zaldivar has stated that he regularly worked more than forty hours
20 per week and that he received \$12,282.87 in sales bonuses that were
21 not incorporated in his regular rate of pay for the purposes of
22 calculating his overtime rate. Zaldivar Decl. ¶¶ 4-5. LLI objects
23 that Zaldivar has failed to prove that his overtime was ever
24 calculated incorrectly. Opp'n at 25. Plaintiffs respond that LLI
25 has failed to produce adequately detailed records and LLI's

26 _____
27 ⁷ LLI designated Morrison to testify on its behalf under Federal
28 Rule of Civil Procedure 30(b)(6). Morrison's depositions were
taken on November 11, 2010 and December 16, 2011. Garcia Decl. ¶
6.

1 argument is not relevant to whether class certification is
2 appropriate. Reply at 10. The Court concludes that the evidence
3 presented by Plaintiffs is sufficient for the purposes of class
4 certification. At this stage, it is enough that Plaintiffs have
5 shown that LLI had a uniform practice for calculating overtime pay,
6 that LLI's uniform practice did not account for bonuses and other
7 non-discretionary pay, and that Zaldivar received \$12,282.87 in
8 bonuses and claims to have worked more than forty hours per week on
9 several occasions. "In determining the propriety of a class
10 action, the question is not whether the plaintiff[s] . . . have
11 stated a cause of action or will prevail on the merits, but rather
12 whether the requirements of Rule 23 are met[.]" United Steel,
13 Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv.
14 Workers Int'l Union v. ConocoPhillips Co., 593 F.3d 802, 808 (9th
15 Cir. 2010) (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156,
16 177-78 (1974)).

17 As to adequacy, for the time being, the Court is satisfied
18 that Plaintiffs and their attorneys will fairly and adequately
19 protect the interests of the class. There is no indication that
20 Zaldivar has interests antagonistic to the rest of class or that he
21 will be unable to prosecute this action vigorously through
22 qualified counsel. See Lerwill v. Inflight Motion Pictures, Inc.,
23 582 F.2d 507, 512 (9th Cir. 1978).

24 Accordingly, the Court certifies the proposed Unpaid Overtime
25 Class.

26 **D. Missed Meal Period Class**

27 Plaintiffs define the Missed Meal Period Class as: "All past
28 and current California employees of LLI classified by LLI as non-

1 exempt employees (including, but not limited to assistant store
2 managers, sales associates, and warehouse associates) who worked
3 more than 6 hours in any shift from September 3, 2005 through the
4 present." Mot. at 1.

5 Under Section 512 of the Labor Code, employers are required to
6 provide a thirty-minute meal period to employees who work more than
7 five hours per day. Cal. Lab. Code § 512(a). If an employee works
8 no more than six hours per day, the meal period may be waived by
9 mutual consent of the employer and employee. Id. Employees who
10 work more than ten hours per day are entitled to a second thirty-
11 minute meal period. Id. Further, under Section 226.7 of the Labor
12 Code, employers are prohibited from requiring employees to work
13 during meal periods and, if an employer fails to provide a required
14 meal period, the employer must pay the employee for one additional
15 hour of work at the employee's regular rate of compensation. Id. §
16 226.7.

17 Plaintiffs allege that LLI regularly required employees to
18 work through their thirty-minute meal periods and that LLI failed
19 to compensate those employees for one additional hour of work in
20 accordance with Section 226.7 of the Labor Code. FAC ¶¶ 48-51. In
21 their moving papers, Plaintiffs claim that these missed meal
22 periods were the result of understaffing and a statewide policy
23 that required employees to remain on the premises and close to the
24 showroom throughout their shifts so that they could respond to
25 phone calls and customer questions. Mot. at 18. In other words,
26 Plaintiffs claim that LLI employees were constantly "on-duty," even
27 during their meal breaks. See id.

28 Zaldivar has testified that LLI rarely provided him with a

1 thirty-minute meal period and that "most of the time it was
2 working, eating, working, eating." Zaldivar Dep. at 102. Chavez
3 testified: "We just didn't have time to have lunches." Chavez Dep.
4 at 244. Additionally, Plaintiffs submitted declarations from seven
5 other LLI employees, each of whom stated: "During my workday I
6 never got a meal break of 30 minutes free to eat without
7 interruption from work or customers. I could never leave the Store
8 for at least 30 minutes of my own free time due to my job duties."
9 Pls.' Emp. Decls. ¶ 10.

10 LLI asserts that it has implemented a uniform meal policy in
11 compliance with California Law. Opp'n at 12. LLI's employee
12 handbook requires non-exempt employees to record the time they
13 begin and end each meal period and states that "employees are
14 expected to take [their] lunch/meal times within the time limits
15 set by [their] supervisor." Matherne Decl.⁸ Ex. 11 ("LLI Employee
16 Handbook") §§ 401, 704. LLI has also submitted declarations from a
17 number of other LLI employees, including Store Managers and non-
18 exempt employees, who state that LLI provides meal periods in
19 compliance with the Labor Code. See, e.g., ECF Nos. 67-2
20 ("Angenent Decl.") ¶ 10, 67-3 ("Biehl Decl.") ¶ 13, 67-5
21 ("Daigneault Decl.") ¶ 20.

22 The Court finds that the Missed Meal Period class fails to
23 meet the predominance requirements of Rule 23(b). LLI has a lawful
24 meal break policy and the Court would need to engage in individual
25 factual inquiries to determine whether certain stores or Store
26 Managers deviated from that policy. Specifically, for each alleged

27 ⁸ E. Jean Matherne ("Matherne"), LLI's Senior Vice President of
28 Human Resources, submitted a declaration in opposition to
Plaintiffs' Motion. ECF No. 69 ("Matherne Decl.").

1 violation, the Court would need to determine, among other things:
2 (1) whether an employee actually took a meal break; (2) whether
3 that employee worked more than a five- or six-hour shift; (3)
4 whether LLI forced that employee to work through the meal break;
5 and (4) whether that employee was compensated for the missed meal
6 period in accordance with Section 226.7 of the Labor Code.

7 Plaintiffs argue that these individual questions are trumped
8 by common questions concerning staffing levels and LLI's
9 requirement that on-duty employees remain available to work during
10 meal breaks. Reply at 12. The Court disagrees. There is no
11 indication that LLI's staffing levels are uniform from store-to-
12 store. To determine whether staffing levels resulted in missed
13 meal periods, the Court would need to engage in individualized
14 questions concerning the staffing requirements at each of LLI's
15 twenty-four California locations. Additionally, these staffing
16 requirements could vary from day to day. Likewise, there is no
17 indication that LLI implemented a uniform policy that required
18 employees to remain on duty throughout their meal breaks. The
19 Court is unwilling to infer the existence of such a uniform policy
20 from the declarations of a handful of employees from a fraction of
21 LLI's twenty-four California locations. Moreover, Plaintiffs'
22 assertion that this policy was uniform is undercut by the employee
23 declarations submitted by Defendants.⁹

24 _____
25 ⁹ Other district courts in this circuit have also declined to
26 certify missed meal period classes in the face of similar
27 allegations. See Hadjavi v. CVS Pharmacy, Inc. No. 10-4886 SJO,
28 2011 WL 3240763, at *8 (C.D. Cal. July 25, 2011) ("In order to
establish Defendants' liability, the Court would be forced to
proceed store-by-store and employee-by-employee to determine
whether Defendants' effectively violated California labor laws,
despite hav[ing] written policies permitting meal and rest breaks .
. . ."); Washington v. Joe's Crab Shack, 271 F.R.D. 629, 641 (N.D.

1 Plaintiffs also argue that the Ninth Circuit's decision in
2 United Steel mandates certification in the instant action. Reply
3 at 11. In that case, the plaintiffs alleged that because they
4 "c[ould] not leave their units during their meal breaks and [were]
5 subject to interruptions to which they must respond, their meal
6 periods [were] 'on duty' within the meaning of California law."
7 United Steel, 593 F.3d at 804. The district court denied class
8 certification, finding "if Plaintiffs' 'on duty' theory fails, then
9 common questions will no longer predominate over individual ones."
10 Id. at 807. The Ninth Circuit found that the district court abused
11 its discretion by denying certification based on the possibility
12 that the plaintiffs would not prevail on the merits. Id. at 808.
13 In contrast, in the instant action, the Court need not and does not
14 evaluate the merits of Plaintiffs' claims to determine whether
15 common questions predominate.

16 For the reasons set forth above, the Court DENIES Plaintiffs'
17 motion for class certification with respect to the Missed Meal
18 Period Class.

19 **E. Unpaid Vacation Class**

20 Plaintiffs define the unpaid vacation class as: "All past
21 employees of [LLI] employed in California from September 3, 2005
22 through the present who accrued vacation wages that were not cashed
23 out or used." Mot. at 1. Under California Law, employers are
24 required to pay employees for vested vacation time upon termination
25

Cal. 2010) ("In the absence of any common policy, an individualized
26 inquiry will be required to determine whether any single employee
27 failed to take a meal break because he/she was too busy");
28 Mateo v. V.F. Corp., No. 08-5313 CW, 2009 WL 3561539, at *6 (N.D.
Cal. Oct. 27, 2009) (finding that individual issues predominated
where employees had to work through meal breaks due to lack of
minimum staffing).

1 of employment. Cal. Lab. Code § 227.3. Chavez, the class
2 representative for Plaintiffs' unpaid vacation claim, asserts that
3 LLI failed to pay him for all vacation time owed after he quit in
4 April 2009. Chavez Decl. ¶ 5.

5 As LLI points out, it is unclear whether Chavez suffered an
6 injury and, thus, whether he has standing to bring this claim. See
7 Opp'n at 24. During his deposition, Chavez admitted that he has
8 "no idea" how much vacation he is owed from LLI and that he never
9 tried to calculate the exact amount. Chavez Dep. at 318-320.
10 Further, LLI payroll records show that LLI paid Chavez over \$3,600
11 from 2007 to 2008 for accrued, unused vacation. Matherne Decl. ¶
12 9, Ex. 16. Plaintiffs argue that this does not account for all the
13 vacation time Chavez accrued, but they offer no evidence to support
14 the contention. See Reply at 15.

15 While the Court may not assess the merits of Chavez's claim at
16 this stage of the litigation, the evidence before the Court
17 indicates a lack of typicality, commonality, and predominance under
18 Rule 23. Chavez's claims are not typical because they are subject
19 to a unique defense, specifically, that Chavez has already been
20 paid for accrued vacation time. See Hanon v. Dataproducts Corp.,
21 976 F.2d 497, 508 (9th Cir. 1992). As to commonality and
22 predominance, Plaintiffs have not pointed to any uniform policy
23 which has resulted in the denial of vacation pay. In fact, the
24 record indicates that LLI has adopted a uniform policy which
25 provides for the "payment of all accrued but unused [paid time
26 off]." Matherne Decl. Ex. 14 ("LLI Paid Time Off Policy") § 4.9.2.

27 Plaintiffs argue that "[p]roof of the vacation pay claims
28 requires only comparison of LLI's records reflecting the amount of

1 vacation pay owed against LLI's records reflecting the amount of
2 wages owed at termination." Reply at 15. However, the dispute
3 over Chavez's vacation pay indicates that the factual inquiry will
4 be much more complicated than Plaintiffs make it out to be. LLI's
5 records show that Chavez was paid for all of the vacation time he
6 was owed. Accordingly, evaluation of Chavez's vacation claim will
7 require the Court to determine the accuracy of those records
8 through testimony or other evidence -- a highly individualized
9 inquiry that would need to be repeated for each class member if the
10 Court were to certify the class.

11 For these reasons, the Court DENIES certification for
12 Plaintiffs' Unpaid Vacation Class.

13 **F. Unpaid Reimbursement Class**

14 Plaintiffs define the Unpaid Reimbursement Class as: "All past
15 and current employees of Defendants who were employed in California
16 from September 3, 2005 through the present who were not reimbursed
17 for all work-related expenses." Mot at 2. This class is tied to
18 Plaintiffs' claim under Section 2802 of the Labor Code, which
19 provides that an employer must indemnify an employee "for all
20 necessary expenditures or losses incurred by the employee in direct
21 consequence of the discharge of his or her duties." Cal. Lab. Code
22 § 2802(a). Plaintiffs assert that Chavez and Zaldivar, along with
23 a number of other LLI employees who filed declarations in support
24 of Plaintiffs' Motion, used their personal vehicles and cellular
25 phones to perform their jobs, without any reimbursement from LLI.
26 Mot. at 21.

27 The Court finds that certification is inappropriate for the
28 Unpaid Reimbursement Class because, under Rule 23(b), common issues

1 do not predominate. Plaintiffs have not shown that LLI instituted
2 a uniform policy resulting in the denial or reimbursement requests.
3 In fact, LLI's Travel and Entertainment policy (T&E Policy) allows
4 for reimbursement of a number of business-related expenses,
5 including mileage. Matherne Decl. Ex. 13 ("LLI T&E Policy") §
6 4.7.5. Accordingly, to assess the merits of Plaintiffs'
7 reimbursement claim, the Court would need to scrutinize each class
8 member's claimed expenses. Specifically, the Court would need to
9 make individualized factual determinations concerning: (1) whether
10 the claimed expenses were "necessary" and incurred in direct
11 consequence of the discharge of the employee's duties; (2) whether
12 the employee actually sought reimbursement from LLI for the
13 expenses; and (3) whether LLI reimbursed the employee for the
14 expense. See Ruiz v. Affinity Logistics Corp., No. 05-2125 JLS,
15 2009 WL 648973, at *7-8 (S.D. Cal. Jan. 29, 2009) (class
16 certification denied "because of the difference in expenses
17 incurred across the class, reasonability of those expenses, and
18 defendant's compensation of those [class members]"). The second
19 inquiry appears to be critical since some class members may not
20 have sought reimbursement. See Chavez Dep. at 189.

21 Accordingly, the Court DENIES Plaintiffs' motion for class
22 certification with respect to the Unpaid Reimbursement Class.

23

24 **V. CONCLUSION**

25 For the reasons set forth above, the Court GRANTS in part and
26 DENIES in part Plaintiffs Crelencio Chavez and Jose Zaldivar's
27 Motion for Class Certification. The Court CERTIFIES Plaintiffs'
28 proposed Unpaid Overtime Class, and DENIES certification of the

1 Misclassified Unpaid Overtime Class, the Missed Meal Break Class,
2 the Unpaid Vacation Class, and the Unpaid Reimbursement Class.

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IT IS SO ORDERED.

Dated: March 26, 2012


UNITED STATES DISTRICT JUDGE