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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANIEL VILLALPANDO, et al.,
Plaintiffs,
v.
EXEL DIRECT INC., et al.,
Defendants.

Case No. 12-cv-04137-JCS

**ORDER GRANTING MOTION FOR
CLASS CERTIFICATION**

Re: Dkt. No. 141

I. INTRODUCTION

Plaintiffs in this putative class action are drivers who have provided delivery services for Defendants Exel Direct Inc., DPWN Holdings (USA), Inc. and Deutsche Post Beteiligungen Holding GmbH (collectively “Exel”) in California. Plaintiffs assert wage and hour claims under California law based on the allegation that Exel has misclassified its drivers as independent contractors. Presently before the Court is Plaintiffs’ Motion for Class Certification (“Motion”), in which Plaintiffs ask the Court to certify a class under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure. The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c). A hearing on the Motion was held on Friday, November 14, 2014 at 9:30 a.m. For the reasons stated below, the Motion is GRANTED.

II. BACKGROUND

A. Factual Background

1. Exel’s Business

Exel is a federally authorized interstate motor carrier that provides transportation services to a variety of customers, including retailers. *See* Declaration of James H. Hanson in Support of Defendants’ Opposition to Plaintiffs’ Motion for Class Certification (“Hanson Decl.”), Ex. 3

1 (Declaration of Renee Albarano (“Albarano Decl.”) ¶ 2; Declaration of Joshua Konecky in
2 Support of Plaintiffs’ Motion for Class Certification (“Konecky Motion Decl.”), Ex. 2 (Dep. of
3 Renee Albarano (“Albarano Dep.”)) at 28-53 (describing types of services offered to retail
4 customers); Ex. 5 (webpages describing services of MXD Group, Inc.).¹ These services include
5 the delivery of furniture and other oversized items. Hanson Decl., Ex. 13 (Albarano Decl.) ¶ 2.

6 Exel drivers work out of either a “network hub” or a “dedicated business.” Konecky
7 Motion Decl., Ex. 2 (Albarano Dep.) at 28-29. From its network hubs, housed in buildings that
8 Exel leases, Exel provides services to multiple retail customers. *Id.* Exel drivers operating out of
9 a network hub “comingle freight on the delivery trucks” and make deliveries for multiple retail
10 customers along their route. *Id.* Thus, for example, the driver “could deliver a Pottery Barn sofa
11 to stop one, then an Office Depot pallet of paper to stop two, and then perhaps a Restoration
12 Hardware crib to stop three.” *Id.* In California, there are two network hubs: one in Oakland
13 serving the San Francisco Bay area, and one in Ontario serving the Los Angeles area. *Id.* at 30.
14 Exel provides delivery services for Crate & Barrel, Office Depot, JC Penney, Williams-Sonoma,
15 Ikea (Oakland only) and Restoration Hardware (Ontario only) out of these two hubs. Konecky
16 Motion Decl., Ex. 8 (Response to Special Interrogatories, Set Three), No. 22. A driver working
17 out of one of these hubs is likely to have delivered products for each of the Exel customers
18 serviced at the hub. *Id.*

19 An Exel “dedicated business” operates off the back of a customer’s facility rather than out
20 of a leased building and provides services only for that retail customer. Konecky Motion Decl.,
21 Ex. 2 (Albarano Dep.) at 29. Consequently, a driver working out of a dedicated business typically
22 delivers products from only one particular Exel customer on any given route. *Id.* One of Exel’s
23 “dedicated businesses” is its Sears account. Konecky Motion Decl., Ex. 2 (Albarano Dep.) at 35.

24 Exel’s policies and procedures are largely the same whether a driver works out of a
25 network hub or a dedicated business. Konecky Motion Decl., Ex. 2 (Albarano Decl.) at 44, 52-53.

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27 _____
28 ¹ On August 20, 2013, Exel Direct Inc. changed its name to MXD Groups, Inc. Konecky Motion
Decl., Ex. 6. To avoid confusion, the Court continues to refer to Defendants collectively as
“Exel.”

1 The only differences regarding Exel’s “policies and procedures applicable to the drivers, in terms
2 of the way they make the deliveries and perform their work for Exel” are: 1) those who work on
3 Exel’s account with Sears deliver and install appliances, while drivers on other retail customer
4 accounts deliver furniture and other products; and 2) the way drivers confirm deliveries or report
5 problems with a delivery (whether by inputting information in a handheld device or calling a
6 hotline) varies depending on the particular retail customer for whom the delivery is made. *Id.*

7 Exel has identified 373 individuals who were drivers for Exel in California between June
8 14, 2008 (the start of the liability period in this action) and March 11, 2014 (the date of Exel’s
9 interrogatory responses providing this information). *See* Konecky Motion Decl., Ex. 7
10 (Interrogatory Response, No. 14).

11 **2. Hiring of Exel Drivers**

12 Prospective drivers “[m]ust be personally interviewed by an Exel representative to
13 determine the driver qualifications, attitude and motivation.” Konecky Motion Decl., Ex. 10
14 (Transportation Safety & Regulatory Compliance Manual for: Contractors, Qualified Second
15 Drivers and Helpers (“Compliance Manual”)) at 4. Other requirements for Exel drivers include
16 “Exel review of [an applicant’s] Motor Vehicle Record” and a background investigation
17 “conducted by Exel’s Safety & Compliance Department using an independent third-party service
18 engaged by Exel.” *Id.* at 5-6. Other than a driver’s license, drivers are not required to have any
19 special licenses or experience to be eligible for hire. *Id.*

20 When they are hired, Exel drivers are required to complete paperwork, including an
21 “Independent Truckman’s Agreement,” which is identical for all drivers. Konecky Motion Decl.,
22 Decl., Ex. 2 (Albarano Dep.) at 83; Ex. 11 (Independent Truckman’s Agreement (“ITA”)). The
23 ITA is presented to the drivers in English only. Konecky Motion Decl., Ex. 2 (Albarano Dep.) at
24 101. Many of the drivers state in their declarations that English is not their first language, that
25 they did not understand the agreements, and that Exel did not explain the terms of the agreements
26 to them before asking them to sign them. *See, e.g.,* Villalpando Decl., ¶ 5; Aguilera Decl., ¶ 5;
27 Montes Decl., ¶ 5; Padilla Decl., ¶ 5; Sarabia Decl., ¶ 5; Alancastro Decl., ¶ 5; Delafuente Decl., ¶
28 5; Lopez Decl., ¶ 5; Miranda Decl., ¶ 5; Navarro Decl., ¶ 5; Raymundo Decl., ¶ 5; Yako Decl., ¶ 5.

1 **3. Independent Truckman’s Agreement**

2 The ITA is between Exel and the “CONTRACTOR.” Konecky Motion Decl., Ex. 11
3 (ITA). Section 1 provides that the “CONTRACTOR’s General Duties” are to “deliver consumer
4 items for [Exel’s] customers and perform such other transportation and related services as may be
5 necessary to serve [Exel’s] customers.” *Id.*, Section 1. Section 2 provides that the term of the
6 agreement is one year, with subsequent year-to-year renewal to occur automatically unless the
7 agreement is expressly terminated pursuant to the termination clause, in Section 3. The
8 termination clause permits termination of the agreement “at any time” as follows: “a) by mutual
9 consent; b) by the insolvency of CONTRACTOR . . . ; c) without cause upon either party giving
10 the other sixty (60) days written notice of termination; or d) with cause upon the breach of [the
11 ITA] by either of the parties.” *Id.*, Section 3 (emphasis in original).

12 Under the “Payment” term, the ITA provides that the “CONTRACTOR” will be paid
13 based on “hauling revenue.” *Id.*, Sections 4 & Exhibit A.² Exhibit A to the ITA provides that the
14 contractor “will receive a minimum of sixty percent (60%) of hauling revenue.” *Id.*, Ex. A. The
15 term “hauling revenue” is defined “in accordance with [Exel’s] established accounting practices
16 and past practices” and does not include “compensation for services above and beyond basic
17 delivery services.” *Id.*, Ex. A. “For example, compensation for routing and supervision,
18 overhead, customer relations, order fulfillment, prenotification, cross-dock operations,
19 transportation management, intercompany transfer and warehouse operations, among other things,
20 are not considered elements of hauling revenue.” *Id.*

21 The ITA provides that the “CONTRACTOR shall provide its own vehicle and shall pay all
22 costs attendant to its operation and maintenance.” *Id.*, Section 5. Drivers also must carry
23 insurance on their vehicles. *Id.*, Section 6. In particular, the ITA provides that “CONTRACTOR

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25 ² Exel states in its Opposition brief that the compensation term in the ITA is “in accord with 49
26 C.F. § 376.12(d). That provision (which is not expressly cited in the ITA) requires that where
27 carriers provide transportation services in vehicles that they do not own, there must be a written
28 lease that clearly states “the amount to be paid by the authorized carrier for equipment and driver’s
services,” which “may be expressed as a percentage of gross revenue, a flat rate per mile, a
variable rate depending on the direction traveled or the type of commodity transported, or by any
other method of compensation mutually agreed upon by the parties to the lease.” 49 C.F.R. §
376.12(d).

1 will carry at its own expense public liability and property damage insurance upon any vehicles or
2 other equipment used by it in carrying out its duties” under the agreement. *Id.* The ITA specifies
3 that “[t]he insurance shall be in an amount consistent with minimum Exel requirements.” *Id.*

4 Section 7 of the ITA is entitled “Labor and Hold Harmless” and provides that the
5 “CONTRACTOR shall, at its own expense . . . furnish whatever labor is necessary to provide
6 delivery services to [Exel’s] customers.” *Id.*, Section 7. It further provides that the
7 “CONTRACTOR” is “responsible for the payment of wages and social security and withholding
8 taxes for any of its employees.” *Id.*

9 Under the term entitled “Control and Exclusive Use,” the ITA provides as follows:

10 In performing services under this Agreement, CONTRACTOR will
11 direct the operation of any equipment in all respects and will
12 determine the means of performance including but not limited to
13 such matters as choice of any routes, points of service of equipment,
rest stops, and timing and scheduling of customer deliveries. The
parties intend to create an independent contractor relationship and
not an employer-employee relationship.

14 *Id.*, Section 9.

15 **4. Equipment Lease Agreement**

16 All Exel drivers also are required to sign an Equipment Lease Agreement (“ELA”) as a
17 condition of the job. *See* Konecky Motion Decl., Ex. 12. The ELA mirrors the ITA in many
18 respects, and expands upon certain provisions of the ITA. The ELA, like the ITA, is between Exel
19 and “CONTRACTOR.” *Id.* It sets forth requirements regarding “LEASED EQUIPMENT,”
20 which is to be described in Exhibit A to the ELA. The form to be completed as “Exhibit A” to the
21 ELA contains columns for “YEAR,” “MAKE” and “SERIAL NUMBER,” suggesting that the
22 ELA is used for drivers’ vehicles rather than other equipment. *Id.*, Ex. A.³ The ELA provides that
23 “CONTRACTOR shall pay all costs attendant to the operation and maintenance of the LEASED
24 EQUIPMENT, including, but not limited to, the costs of fuel, fuel taxes, empty mileage, permits
25 of all types, tolls, ferries, detention and accessorial services, base plates and licenses and any
26 unused portions of such items.” *Id.*, Section 5.

27 _____
28 ³ At oral argument, Exel stipulated that the ELA is typically used in connection with the drivers’
trucks.

1 Section 4 of the ELA sets forth payment terms, which are to be in accordance with Exhibit
2 B to the ELA. *Id.*, Section 4. Exhibit B, in turn, provides for a “delivery stop charge” to be paid
3 for “network solution customer deliveries,” with compensation for all other deliveries to be paid
4 based on “hauling revenue.” *Id.*, Ex. B. As under the ITA, the term “hauling revenue” “does not
5 include compensation for “services above and beyond basic delivery services.” *Id.* Thus,
6 “compensation for routing and supervision, overhead, customer relations, order fulfillment, pre-
7 notification, cross-dock operations, transportation management, intercompany transfer and
8 warehouse operations, among other things, are not considered elements of hauling revenue.” *Id.*

9 Section 9 of the ELA provides that “CONTRACTOR will be liable for loss or damage to
10 items intended for transport which are in CONTRACTOR’S possession or under
11 CONTRACTOR’S dominion and control.” *Id.*, Section 9. In addition, Section 10 of the ELA,
12 entitled “Chargeback Items,” provides that expenses listed in Exhibit D will be “set-offs to
13 CONTRACTOR’S compensation.” *Id.*, Exhibit D. Exhibit D lists numerous types of
14 “Chargeback Items,” including deductibles for drivers who are insured under Exel’s insurance
15 programs, charges for failure to report any liability/collision claim within 24 hours and for failure
16 to comply with Exel policies and/or state or federal requirements if the driver is involved in an
17 accident, losses covered in Section 9 and expenses associated with the “cost of operation paid on
18 [the driver’s] behalf.” *Id.* Specific expenses listed as cost of operation chargebacks include
19 insurance costs (for those drivers who are insured under Exel’s programs), “[t]ruck rentals/leases
20 and repairs,” “[f]ines [and] citations,” “drug, alcohol, background and criminal checks,”
21 “[s]ervice apparel and cleaning,” “[v]ehicle washes,” “[i]n-home damage to customer’s property,”
22 “[t]elephone,” “[f]uel,” “[t]ires,” “[m]erchandise claims,” “[p]hysical examinations,” “[t]owing,”
23 “[d]elivery supplies,” “[p]ostage,” “[s]ettlement adjustments” and “[d]ebit memos, purchase
24 orders, or promissory notes with interest relative to operating or start-up costs.” *Id.*

25 The insurance provision of the ELA provides that Exel will cover insurance for “protection
26 of the public pursuant to U.S. Department of Transportation regulation under Title 49 U.S.C. §
27 13906,” while the “CONTRACTOR will carry at its own expense” the following insurance:

28 (i) commercial general liability and property damage insurance in

1 the amount of \$5,000,000 per occurrence; (ii) auto liability
2 insurance upon the LEASED EQUIPMENT used in the amount of
3 \$5,000,000 per occurrence; and (iii) cargo insurance in the amount
4 of \$100,000 per occurrence.

5 *Id.*, Section 7. Section 7 further requires that Exel must be named as “additional insured” on the
6 “CONTRACTOR’s” insurance policy. *Id.* If a “CONTRACTOR requests to be insured by
7 [Exel’s] insurer in lieu of providing its own coverage, CONTRACTOR shall be assessed charges”
8 as set forth in Exhibit C to the ELA. *Id.* Exhibit C sets forth the requirements for Exel’s
9 “Company Sponsored Insurance Coverages.” *Id.*, Ex. C.

10 The ELA also includes a “Labor and Hold Harmless” provision. *Id.*, Section 8. This
11 provision requires that “CONTRACTOR shall, at its own expense. . . furnish whatever labor is
12 necessary to operate the LEASED EQUIPMENT.” *Id.*, Sections 8. This provision also requires
13 that the “Contractor” “shall provide workers’ compensation insurance coverage for all labor
14 furnished or utilized by CONTRACTOR.” *Id.*

15 The ELA contains a “Control and Exclusive Use” provision that is almost identical to the
16 one in the ITA except that it is subject to the additional proviso that Exel “shall have such
17 possession, control and use of the LEASED EQUIPMENT and its operation as required by Title
18 49 C.F.R. § 376.12(c)(1).”⁴ *Id.*, Section 11.

19 Addendum No. 1 to the ELA, which took effect on August 1, 2011, adds terms to the ELA
20 relating to “compensation, safety and compliance with laws.” Konecky Motion Decl., Ex. 19
21 (Addendum No. 1). In particular, Addendum No. 1 states that Exel and “CONTRACTOR”
22 recognize that Exel’s “Safety Measurement System (‘SMS’) evaluation published by the Federal
23 Motor Carrier Safety Administration (‘FMCSA’) has economic value” and establishes a Driver
24 Safety Accountability Program (“DSA”) and a Safety Incentive Program whereby
25 “CONTRACTORS” are charged liquidated damages (payable to Exel) for certain types of

26 ⁴ Section 376.12 provides that an authorized carrier may provide transportation services in
27 equipment it does not own if there is a written lease agreement containing, *inter alia*, a provision
28 “that the authorized carrier lessee shall have exclusive possession, control, and use of the
equipment for the duration of the lease.” In addition, “[t]he lease shall further provide that the
authorized carrier lessee shall assume complete responsibility for the operation of the equipment
for the duration of the lease.” 49 C.F.R. § 376.12(c)(1).

1 violations and are paid additional compensation when there are no such violations reported over a
2 specific period of time. *Id.*

3 **5. Training and Procedures**

4 Exel requires all drivers to regularly participate in its “stand-up morning meetings.”
5 Konecky Motion Decl., Ex. 2 (Albarano Dep.) at 158-160. These generally happen “every day”
6 and cover subjects such as new product lines, installation techniques, and customer service. *Id.* at
7 158-159. According to the putative class members, Exel uses these regular meetings to train the
8 drivers as to its policies and procedures; teach drivers about customer service; provide feedback on
9 the performance of individual drivers; discipline or threaten discipline for drivers not performing
10 up to company expectations, and hand out routes for the day. See Compendium of Class Member
11 Decls. at ¶¶ 7-9. Certain agenda items come from corporate headquarters, which sends via email
12 daily agendas for the stand-up meetings. Konecky Motion Decl., Ex. 2 (Albarano Dep.) at 165.
13 The meetings are led by Exel management. *Id.* at 162.

14 In addition to the training provided at the mandatory stand-up meetings, Exel trains its
15 drivers through its “development” programs, implemented by “Program Development
16 Coordinators,” who work with new Exel drivers and also provide “ongoing development.”
17 Konecky Motion Decl., Ex. 2 (Albarano Dep.) at 34. Through the development programs, drivers
18 are taught Exel’s “guidelines and standards.” *Id.* at 57. These guidelines and standards are
19 generally applicable to all Exel drivers. *Id.* The only differences as to the training provided to
20 individual drivers under the development programs relate to the type of product a driver is
21 delivering; thus, a driver who works out of a Sears dedicated location, for example, will be trained
22 to install appliances whereas a driver who works out of a network hub might learn how to install a
23 crib. *Id.* at 35-36.

24 Exel also provides to its drivers “training modules” and objectives, which include both
25 paper documents and instructional videos. *Id.* at 131-132; *see also* Konecky Motion Decl., Ex. 14
26 (instructional videos offering training on “The Safer Way of Protecting Floors” and “The Safer
27 Way of Preventing Water Damage”). One of Exel’s standardized training modules is entitled
28 “Exel Direct Driver Training: US DOT Regulations.” (“Exel’s Driver Training”). *Id.*, Ex. 15.

1 This document summarizes Exel’s training of drivers on issues such as safety, driver
2 qualifications, hours of service, and what to do at the scene of an accident. *Id.* at EDV001540 -
3 001598. In addition, Exel’s Driver Training states that “[e]very driver must complete the Safer
4 Way of Defensive Driving Program,” which is an Exel program facilitated by “the Exel Direct site
5 manager.” *Id.* at EDV001561; *see also* Konecky Motion Decl., Ex. 18 (documentation for “Exel
6 Safer Way of Driving” program). Exel’s Driver Training also provides that Exel drivers must
7 submit to “post-trip” inspections and have a “Mechanic or Exel Direct Manager” verify that all
8 necessary truck repairs are made. Konecky Motion Decl., Ex. 15 (Exel’s Driver Training) at
9 EDV001584.

10 Many of Exel’s policies and procedures are set forth in its Compliance Manual, which is
11 provided to drivers to give them a “thorough understanding of what is expected of [them] as . . .
12 independent contractor[s]” for Exel. Konecky Motion Decl., Ex. 10 (Compliance Manual) at
13 EDV000302. The Compliance Manual sets forth Exel’s safety policy and lists the qualifications
14 for drivers. *Id.* at EDV000305. It makes clear that “[e]ach Contractor, Second Driver and helper
15 must be qualified through the Exel Delivery Specialist qualification process” and that “[a]
16 Contractor or second driver number and helper approval must be issued before a Contractor, driver
17 or helper commences service on behalf of Exel.” *Id.* at EDV000307-08. The Compliance Manual
18 describes the procedures that should be followed by Exel drivers in case of an accident, instructing
19 them, *inter alia*, that they should “never accept or place blame on any person” and that they should
20 “not sign anything.” *Id.* at EDV000320; *see also* Konecky Motion Decl., Ex. 15 (Exel’s Driver
21 Training) at EDV001593 (instructing drivers that if they are asked for a comment by news media,
22 they should respond by saying “I am not allowed to comment until the company’s representative
23 gets here and has investigated what has happened”). Exel’s Compliance Manual also sets forth
24 requirements as to how to maintain the appearance of the trucks and the equipment carried on the
25 trucks, conditions for cell phone usage “while performing services on behalf of Exel,” how to fill
26 out and submit driver logs, time records, and vehicle inspection reports, the submission of daily
27 trip reports and other documents that must be turned in “at the end of each trip,” and various
28 loading and delivery procedures. Konecky Motion Decl., Ex. 10 (Compliance Manual) at

1 EDV00304-306, 310, 317, 320-321.

2 **6. Uniforms and Logos**

3 Exel drivers (as well as second drivers and helpers) are required to wear uniforms
4 consisting of dark pants and logo shirts that carry either the Exel logo or, for drivers assigned to a
5 dedicated business, such as Sears, the logo of that business. Konecky Motion Decl., Ex. 2
6 (Albarano Dep.) at 210; *see also id.*, Ex. 13 at EDV000265 (listing what is included in “[t]he
7 standard Exel delivery uniform”). They are also required to be clean-shaven, well-groomed, have
8 their shirts tucked in, remove any earrings and cover tattoos. *See* Villalpando Decl., ¶ 18; Shekur
9 Decl., ¶ 21; Aguilera Decl., ¶ 16; Herron Decl., ¶ 17; Molina Decl., ¶ 18; Montes Decl., ¶ 18;
10 Padilla Decl., ¶ 18; Sarabia Decl., ¶ 15; Alancastro Decl., ¶ 17; Delafuente Decl., ¶ 18; Harper
11 Decl., ¶ 16; Jauregui Decl., ¶ 18; Johnson Decl., ¶ 18; Lopez Decl., ¶ 18; Marinov Decl., ¶ 17;
12 Miranda Decl., ¶ 18; Navarro Decl., ¶ 18; Raymundo Decl., ¶ 19; Roumbanis Decl., ¶ 19;
13 Velasquez Decl., ¶ 18; Yako Decl., ¶ 15. Similarly, the drivers must carry the logos for Exel or,
14 in the case of a dedicated business, for the retail customer, on their trucks. Konecky Motion Decl.,
15 Ex. 2 (Albarano Decl.) at 209-210. In their declarations, the drivers state that they were not
16 permitted to exhibit any other logo on their trucks. Villalpando Decl., ¶ 17; Shekur Decl., ¶ 20;
17 Molina Decl., ¶ 17; Montes Decl., ¶ 17; Padilla Decl., ¶ 17; Delafuente Decl., ¶ 17; Jauregui Decl.,
18 ¶ 17; Johnson Decl., ¶ 17; Lopez Decl., ¶ 17; Marinov Decl., ¶ 16; Miranda Decl., ¶ 17; Navarro
19 Decl., ¶ 17; Raymundo Decl., ¶ 18; Roumbanis Decl., ¶ 18; Velasquez Decl., ¶ 17.

20 **7. Maintenance of and Inspection of Vehicles**

21 Exel requires that all drivers provide trucks that comply with certain “Standard Truck
22 Requirements.” Konecky Decl., Ex. 16 at EDV000465 (list of “Exel Standard Truck
23 Requirements”); Ex. 2 (Albarano Dep.) at 230 (testifying that list was used by recruiters when
24 “talking to prospective contractors as to what types . . . of equipment [they] would need”). Until
25 June 2013, Exel sometimes rented vehicles for its drivers to use and deducted the costs of the
26 rental from the drivers’ compensation. Konecky Decl., Ex. 2 (Albarano Dep.) at 215. That
27 program was discontinued after June 2013, however. *Id.* As noted above, Exel’s drivers must
28 submit to “post-trip” inspections and have a “Mechanic or Exel Direct Manager” verify that all

1 necessary truck repairs are made. Konecky Motion Decl., Ex. 15 at EDV001584.

2 **8. Work Assignments and Supervision**

3 Exel requires its drivers to “operate under certain procedures and mechanisms to ensure
4 that Exel’s obligations to its customers are being carried out in the expected fashion.” Konecky
5 Motion Decl., Ex. 2 (Albarano Dep.) at 77. Exel’s site managers “provide direction and oversight
6 of the drivers, to help Exel meet whatever service metrics are in the contracts with the customers
7 and thereby prevent Exel from incurring financial penalties.” *Id.* at 78. In addition, Exel assigns
8 delivery routes to the drivers in documents called manifests, which list the delivery locations,
9 product orders, and delivery times for the routes. Compendium of Class Member Declarations at
10 ¶¶ 8-10. The drivers do not choose the stops or delivery times on the routes assigned to them.
11 Konecky Decl., Ex. 2 (Albarano Dep.) at 103. Further, Exel’s management “has the discretion
12 and authority to determine which routes go to which drivers.” *Id.* at 106. Drivers are permitted to
13 choose only which roads they take to get to the various addresses within the various delivery time
14 windows assigned to them. *Id.* at 102. According to the drivers, they frequently must work 12-
15 14 hour shifts without any breaks in order to complete their routes. *See, e.g.,* Aguilera Decl., ¶¶
16 28-29; Herron Decl., ¶ 28; Navarro Decl., ¶ 29-30; Shekur Decl., ¶¶ 43-44; Villalpando Decl., ¶¶
17 31-32.

18 Exel’s Compliance Manual instructs drivers that they “must advise Exel Management” if
19 they are unable to make deliveries in accordance with the loading and delivery times provided and
20 “notify the dispatcher as soon as possible” if they encounter any problem with the delivery.
21 Konecky Motion Decl., Ex. 10 (Compliance Manual) at EDV000320. In addition, Exel
22 management retains the authority to call the drivers throughout the day to change or add delivery
23 stops to the routes. *See* Compendium of Class Member Declarations, ¶¶ 10-11. In order to allow
24 drivers to communicate with Exel management, drivers are required to lease handheld computers
25 under an amendment to the ELA. *See* Konecky Motion Decl., Ex. 21 (Agreement to Use
26 Handheld Computer Device). Under the amendment, the “CONTRACTOR shall accept the
27 opportunity to utilize the Handheld Computer device” provided for use by Exel and is
28 “responsible for the replacement cost or cost of repair” if the device is damaged or lost. *Id.*

1 Exel also provides scripts for the drivers to use when interacting with the end-purchasers
2 of the merchandise and carrying the products into their homes. *See* Compendium of Class Member
3 Declarations, ¶¶ 11-12.

4 To ensure that drivers follow Exel’s policies, Exel’s general managers perform “ride-
5 alongs or ride behinds,” where the manager “follows the contractor” to observe performance.
6 Konecky Motion Decl., Ex. 2 (Albarano Dep.) at 177 -178.

7 **9. Helpers and Second Drivers**

8 As noted above, Section 7 of the ITA provides that the “CONTRACTOR shall, at its own
9 expense . . . furnish whatever labor is necessary to provide delivery services to [Exel’s]
10 customers.” Konecky Motion Decl., Ex. 11 (ITA), Section 7. Pursuant to this provision, Exel
11 drivers hire Second Drivers and Helpers so that they are able to complete the routes that are
12 assigned to them. Compendium of Drivers’ Declarations, ¶¶ 17-23. As noted above, the
13 Compliance Manual sets forth qualifications for drivers, including Second Drivers and Helpers.
14 Konecky Motion Decl., Ex. 10 (Compliance Manual) at EDV000305. It makes clear that “[e]ach
15 Contractor, Second Driver and helper must be qualified through the Exel Delivery Specialist
16 qualification process” and that “[a] Contractor or second driver number and helper approval must
17 be issued before a Contractor, driver or helper commences service on behalf of Exel.” *Id.* at
18 EDV000307-08. The use of a Helper or Second Driver who has not been approved by Exel is
19 considered to be a breach of contract and “any contractor who permits an unqualified driver or
20 helper to operate in Exel service is subject to immediate termination.” *Id.* at EDV000308.
21 Helpers and Second Drivers are also required to undergo the same training as the primary Exel
22 driver. *Id.* at EDV000300-322; *see also* Konecky Motion Decl., Ex. 2 (Albarano Dep.) at 132.

23 **B. The Motion**

24 Plaintiffs seek to certify the following class under Rule 23(a) and (b)(3) of the Federal
25 Rules of Civil Procedure:

26 All individuals who have provided delivery services for Defendant
27 Exel Direct in California, while being classified by Exel Direct as
28 independent contractors, at any time beginning June 14, 2008, until
resolution of this action.

1 Motion at 1. Plaintiffs ask the Court to certify this class for all of the remaining claims in the First
2 Amended Complaint, asserting that all of these claims “turn on the overarching question of
3 whether Exel has misclassified its delivery drivers as independent contractors rather than
4 employees.” *Id.* This question, according to Plaintiffs, “can be decided in ‘one stroke’ for all
5 drivers by evaluating the standardized contracts and company-wide policies that Exel admits are
6 uniform across the entire class.” *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551
7 (2011)).

8 Plaintiffs contend the requirements of Rule 23(a) are met because numerosity, typicality
9 and commonality are satisfied and the named plaintiffs are adequate representatives of the class.
10 *Id.* at 14-16. With respect to numerosity, Plaintiffs point to the fact that Exel has identified 373
11 individuals who fit the class definition, which is more than enough to establish numerosity. *Id.* at
12 14. The commonality requirement is met, Plaintiffs contend, because there is a central common
13 question in this case that is “capable of classwide resolution” through common proof, namely,
14 whether Exel misclassified its drivers as independent contractors under California law. *Id.* at 14-
15 15 (citing *Norris-Wilson v. Delta-T Group, Inc.*, 270 F.R.D. 596, 604 (S.D. Cal. 2010); *Dalton v.*
16 *Lee Publications, Inc.*, 270 F.R.D. 555, 559 (S.D. Cal. 2010); *Phelps v. 3PD, Inc.*, 261 F.R.D.
17 548, 557 (D. Or. 2009); *Smith v. Cardinal Logistics Mgmt. Corp.*, 2008 WL 4156364, at
18 *5 (N.D. Cal. Sept. 5, 2008); *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 203 (S.D.N.Y.
19 2006)). The name plaintiffs are typical, Plaintiffs contend, because they are “part of the class and
20 possess the same interest and suffer the same injury as the class members.” *Id.* at 15 (quoting
21 *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)). Further, the name
22 plaintiffs are adequate class representatives, Plaintiffs assert, because they share common interests
23 with the unnamed class members, do not have interests that are antagonistic to the unnamed class
24 members, and are represented by qualified counsel who will vigorously prosecute the interests of
25 the class. *Id.* at 16.

26 Plaintiffs argue that the proposed class also satisfies the requirements of Rule 23(b)(3),
27 which provides that a class action may be maintained if Rule 23(a) is satisfied and: 1) “the
28 questions of law or fact common to class members predominate over any questions affecting only

1 individual members”; and 2) “a class action is superior to other available methods for fairly and
2 efficiently adjudicating the controversy.” *Id.* at 16-17. Plaintiffs assert that the predominance
3 requirement is met because in a misclassification case such as this one, “the ultimate merits burden
4 is on the defendant to ‘prove, if it can, that the presumed employee[s] [are] independent
5 contractor[s].’” *Id.* at 17 (quoting *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010)).
6 According to Plaintiffs, the “principal test of an employment relationship is whether the person to
7 whom service is rendered has the right to control the manner and means of accomplishing the
8 result desired” *Id.* (quoting *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093 (9th Cir. 2014)).
9 Plaintiffs contend the evidence shows that Exel “systematically has the right to control” its drivers
10 based on uniform policies and identical contracts and therefore, this question is susceptible to
11 common proof. *Id.* at 18. Similarly, Plaintiffs assert, the “secondary” factors that are indicative of
12 an employment relationship will also turn, in large part, on these uniform policies and contractual
13 provisions and therefore should be addressed on a class-wide basis. *Id.* at 17-18 (citing *S. G.*
14 *Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341, 350-351 (1989); *Ruiz*,
15 754 F.3d at 1100-1101).

16 Plaintiffs further contend that the elements of the underlying wage and hour claims are
17 susceptible to common proof. ⁵ *Id.* at 21-23. These claims can be addressed on a class-wide basis,
18 Plaintiffs contend, because Exel has uniform policies as to what is and is not reimbursed, what
19 categories of expenses are deducted from wages under its “chargeback schedule,” the provision of
20 meal and rest breaks, and the terms of compensation for drivers. *Id.*

21 Finally, Plaintiffs argue that a class action is superior to multiple individual actions by the
22 drivers because the superiority factors in Rule 23(b)(3) are met. *Id.* at 23-25.

23 C. Opposition

24 In its Opposition brief, Exel asserts the requirements of Rule 23(a) are not met because
25

26 ⁵ Plaintiffs describe their claims as: 1) indemnification of expenses under Cal. Labor Code Section
27 2802; 2) unlawful deductions from wages and coerced purchases under Cal. Labor Code Sections
28 221, 223, 400-410, and IWC Wage Order 9-2001 § 8; 3) meal and rest period violations under
IWC Order 9-2001 § 11 and Cal. Labor Code Sections 226.7 and 512; 4) minimum wage
violations; 5) overtime violations; and 6) penalties and UCL claims.

1 commonality, typicality and adequacy of representation are not satisfied. With respect to
2 commonality and typicality, Exel points to the fact that many of the putative class members hire
3 helpers and second drivers and do not personally perform the work that gives rise to Plaintiffs'
4 claims. *Id.* at 12-15. To illustrate the lack of commonality, and to show that name Plaintiff
5 Villalpando is not typical of the class members, Exel compares the testimony of Mr. Villalpando
6 with that of another Exel driver (and putative class member), Victoriano Molina. *Id.* at 5-10.
7 According to Exel, while Mr. Villalpando worked long hours and personally performed deliveries
8 for Exel, Mr. Molina performed very few of the deliveries while under contract with Exel, instead
9 hiring others to perform most of the deliveries. *Id.* The commonality requirement is not met,
10 according to Exel, because there is a “wide gap between (a) an individual’s claim . . . and (b) the
11 existence of a class of persons who suffered the same injury as that individual.” *Id.* at 11 (quoting
12 *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). Thus, the inquiry
13 under *Borello* as to whether an *individual* is an independent contractor or an employee does not fit
14 with the circumstances of contractors like Molina, Exel argues. *Id.* at 12-14. Similarly, the
15 typicality requirement is not met, Exel argues, because there is little “overlap” between
16 Villalpando, the putative class representative, and absent putative class members like Molina. *Id.*
17 at 15-16.

18 Exel distinguishes the Ninth Circuit’s recent decision in *Alexander v. FedEx Ground*
19 *Package System, Inc.*, 765 F.3d 981 (2014), in which the court held in a wage and hour case that
20 delivery drivers were employees rather than independent contractors even though the drivers were
21 permitted to hire additional drivers and take on extra routes. *Id.* at 14. According to Exel,
22 *Alexander* does not support the conclusion that the commonality requirement is met here. *Id.* In
23 particular, Exel asserts, the Ninth Circuit reasoned in *Alexander* that because the plaintiffs drove
24 their own trucks, “it did not matter that FedEx offered them the opportunity to lease more than one
25 truck . . . and hire[] other drivers.” *Id.* at 14 (quoting *Alexander*, 765 F.3d at 993). *Alexander*
26 does not apply here, Exel argues, because the “contractor does not have to and indeed does not
27 ‘personally drive full time.’” *Id.*

28 Next, Exel asserts that the name Plaintiffs will not adequately represent the class because

1 the declarations they submitted cannot be squared with their sworn deposition testimony. *Id.* at
2 16-18. Exel cites examples of what it contends are inconsistencies between the declarations and
3 deposition testimony of Mr. Villalpando, Mr. Shakur and Mr. Molina. *Id.* It also argues that the
4 declarations are “functionally identical,” suggesting that they may be simply “boilerplate attorney-
5 drafted declarations.” *Id.*

6 Exel argues further that the predominance requirement under Rule 23(b)(3) is not met. *Id.*
7 at 18-25. Again, Exel relies on the difficulty of determining which putative class members
8 personally performed deliveries such that they might be able to assert claims for indemnification,
9 meal and rest break violations or minimum wage and overtime compensation, and which did not.
10 *Id.*

11 **D. Reply**

12 In their Reply brief, Plaintiffs argue that it is the uniform right of control over the class,
13 embodied in the contracts signed by all Exel drivers and the standardized policies and practices
14 relating to all aspects of the drivers’ work, that makes certification appropriate. Reply at 1.
15 Plaintiffs also argue that another recently-decided misclassification case involving delivery drivers
16 – *Ayala v. Antelope Valley Newspapers*, 59 Cal. 4th 522 (2014) – supports their position that
17 Exel’s uniform policies and practices with respect to its right to control its drivers make
18 certification appropriate. *Id.* Plaintiffs reject Exel’s reliance on the fact that some of the putative
19 class members are not full-time drivers but instead, have hired helpers and second drivers to make
20 deliveries. *Id.* at 2. According to Plaintiffs, the same argument was recently rejected in *Alexander*
21 *v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (2014). Plaintiffs argue that Exel’s attempt
22 to distinguish *Alexander* on the basis that the drivers in that case were *full-time* drivers fails
23 because the reasoning of *Alexander* applies regardless of whether the plaintiffs in this case worked
24 full-time or part-time. *Id.* Plaintiffs note that Exel maintains a database of the drivers’ logs and
25 thus, it is possible to identify the amount of time each class member personally provided delivery
26 services during the class period. *Id.* Plaintiffs further point out that Exel has not identified any
27 class member who did not personally provide delivery services at some point in the class period.
28

1 *Id.*⁶ At most, Plaintiffs argue, the possibility that some of the putative class members did not
2 personally make deliveries for Exel on a full-time basis is a question that goes to damages. *Id.*
3 Finally, Plaintiffs reject Exel’s attempt to “manufacture ‘credibility’ issues” by quoting drivers’
4 declarations and deposition testimony in an “incomplete and misleading way.” *Id.*

5 **III. ANALYSIS**

6 **A. General Legal Standard for Class Certification**

7 “The class action is an exception to the usual rule that litigation is conducted by and on
8 behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131
9 S.Ct. 2541, 2550 (2011) (internal quotation marks and citation omitted). “In order to justify a
10 departure from that rule, a class representative must be part of the class and possess the same
11 interest and suffer the same injury as the class members.” *Id.* “Before certifying a class, the trial
12 court must conduct a ‘rigorous analysis’ to determine whether the party seeking certification has
13 met the prerequisites of Rule 23.” *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581, 588
14 (9th Cir. 2012) (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, *as amended*
15 *by* 273 F.3d 1266 (9th Cir. 2001)). This analysis does not focus on the probable outcome on the
16 merits. *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, __U.S.__, 133 S.Ct. 1184,
17 1195 (2013). Rather, “[m]erits questions may be considered . . . only to the extent . . . that they
18 are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”
19 *Id.* (citation omitted).

20 Under Rule 23 of the Federal Rules of Civil Procedure, a party seeking certification must
21 demonstrate that: “(1) the class is so numerous that joinder of all members is impracticable; (2)
22 there are questions of law or fact common to the class; (3) the claims or defenses of the
23 representative parties are typical of the claims or defenses of the class; and (4) the representative
24 parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). In
25 addition, a party seeking class certification must demonstrate that one of the subsections of Rule
26

27 ⁶ At oral argument, Exel conceded that it could not point to any evidence in the record that there is
28 any putative class member who *never* personally provided delivery services at any time while that
individual was working for Exel.

1 23(b) applies. Plaintiffs in this action invoke Rule 23(b)(3), which provides that a class that meets
2 the requirements of Rule 23(a) may be certified where “questions of law or fact common to class
3 members predominate over any questions affecting only individual members, and that a class
4 action is superior to other available methods for fairly and efficiently adjudicating the
5 controversy.” Fed. R. Civ. P. 23(b)(3).

6 **B. California Law Governing Existence of Employment Relationship**

7 Under California law, an individual who comes forward with evidence that he or she
8 provided services for an employer is presumed to be an employee. *Narayan v. EGL, Inc.*, 616
9 F.3d 895, 900 (9th Cir. 2010) (citing *Robinson v. George*, 16 Cal.2d 238, 243 (1940)). “The
10 burden then shifts to the employer to ‘prove, if it can, that the presumed employee was an
11 independent contractor.’” *Ruiz*, 754 F.3d at 1100 (citing *Cristler v. Express Messenger Sys., Inc.*,
12 171 Cal.App.4th 72, 83 (2009)). The California Supreme Court has identified a number of factors
13 that courts should consider in making this determination, the most important of which is “whether
14 the person to whom service is rendered has the right to control the manner and means of
15 accomplishing the result desired. . . .” *S. G. Borello & Sons, Inc. v. Department of Industrial*
16 *Relations*, 48 Cal.3d 341, 350 (1989). The *Borello* court instructed that this test should not be
17 applied rigidly, however, and that courts should also consider several “secondary” indicia of the
18 nature of a service relationship. *Id.* The secondary factors listed in *Borello* are:

- 19 (a) whether the one performing services is engaged in a distinct
20 occupation or business; (b) the kind of occupation, with reference to
21 whether, in the locality, the work is usually done under the direction
22 of the principal or by a specialist without supervision; (c) the skill
23 required in the particular occupation; (d) whether the principal or the
24 worker supplies the instrumentalities, tools, and the place of work
for the person doing the work; (e) the length of time for which the
services are to be performed; (f) the method of payment, whether by
the time or by the job; (g) whether or not the work is part of the
regular business of the principal; and (h) whether or not the parties
believe they are creating the relationship of employer-employee.

25 *Id.* at 351. “Generally, . . . the individual factors cannot be applied mechanically as separate tests;
26 they are intertwined and their weight depends often on particular combinations.” *Id.* (quoting
27 *Germann v. Workers’ Comp. Appeals Bd.*, 123 Cal. App. 3d 776, 783 (1981)). Further,
28 “the label that parties place on their employment relationship ‘is not dispositive and will be

1 ignored if their actual conduct establishes a different relationship.” *Ruiz*, 754 F.3d at 1101
2 (quoting *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal. App. 4th 1, 10-11 (2007)).⁷

3 **1. *Ruiz v. Affinity Logistics Corp.***

4 In *Ruiz*, the court applied the *Borello* factors in a case involving delivery drivers who
5 alleged that they were misclassified as independent contractors. 754 F.3d 1093 (9th Cir. 2014).
6 The drivers alleged that because they were actually employees, they were entitled to sick leave,
7 vacation, holiday and severance pay and should not have been charged for workers’ compensation
8 insurance. *Id.* at 1095. The plaintiffs in the putative class were drivers for Affinity Logistics,
9 which provided delivery services for home furnishing retail stores. *Id.* at 1096. To be hired, the
10 drivers were not required to have any special license; they “simply had to have a driver’s license,
11 sign the [Independent Truckman’s Agreement] and [Equipment Lease Agreement], and pass a
12 drug test and physical exam.” *Id.* at 1097. As in this case, the Independent Truckman’s
13 Agreement and Equipment Lease Agreement stated that the drivers were independent contractors
14 rather than employees. *Id.* Under these agreements, the drivers were paid a “flat per-stop rate.”
15 *Id.*

16 The drivers in *Ruiz* were also required to follow uniform procedures “regarding loading
17 trucks, delivering goods, installing goods, interacting with customers, reporting to Affinity after
18 deliveries, and addressing returns and refused merchandise, damaged goods, and checking in with
19 Affinity after deliveries.” *Id.* at 1097. These procedures were set forth in the Affinity Contractor
20 Procedures Manual. *Id.* Drivers were encouraged to lease their trucks from Affinity (in which
21 case, the cost was deducted from their compensation) but could lease a truck from an outside
22 source. *Id.* In either case, the drivers were required to paint the trucks white; only Affinity’s
23

24 ⁷ Exel notes in passing that the *Borello* test “was developed in a worker’s compensation case.”
25 Opposition at 1. While it is true that *Borello* involved workers’ compensation claims, it is well
26 settled that the test set forth in *Borello* also applies in wage and hour cases. See *Ayala*, 59 Cal. 4th
27 522 (2014) (looking to *Borello* factors to determine whether class certification was appropriate in
28 misclassification case in which plaintiffs asserted claims under the California Labor Code);
Alexander, 765 F.3d 981 (9th Cir. 2014) (looking to *Borello* factors to determine whether delivery
drivers were misclassified in a case asserting claims under California Labor Code); *Ruiz*, 754 F.3d
1093 (9th Cir. 2014) (same). Thus, there is no authority to support the suggestion that *Borello*
may not be the applicable framework for evaluating Plaintiffs’ misclassification claim in this case.

1 name and the Sears logo were permitted on the trucks. *Id.* The drivers were required to wear
2 uniforms. *Id.* at 1098. Similar to the drivers in this case, the drivers in *Ruiz* were required to
3 report to one of Affinity’s warehouses every day to attend a morning “stand-up” meeting and
4 receive their route manifests. *Id.* at 1098. Drivers were not permitted to change the order of the
5 deliveries listed on the manifest route. *Id.* They were required to report frequently to dispatchers
6 throughout the day using a “specific type of mobile telephone.” *Id.* Drivers were also required to
7 have a helper or secondary driver on the truck. *Id.* at 1097. The secondary drivers and helpers had
8 to submit to a background check and be approved by Affinity. *Id.* Affinity supervisors sometimes
9 conducted “follow-alongs” in which they “followed a driver for a few stops to ensure that the
10 driver was wearing the uniform and using proper delivery techniques.” *Id.*

11 Following a bench trial, the district court in *Ruiz* entered judgment in favor of Affinity on
12 the basis that the plaintiffs were independent contractors. The Court of Appeals, however,
13 reversed, finding that consideration of the *Borello* factors supported the opposite conclusion, that
14 is, that the drivers were employees rather than independent contractors. *Id.* at 1101. First, the
15 court addressed the “most important” consideration, the right to control the details of the drivers’
16 work. *Id.* Based on the undisputed facts, the court found that this factor “indicate[d]
17 overwhelmingly that the drivers were Affinity employees.” *Id.* at 1103. The court cited the
18 evidence that Affinity controlled the drivers’ “rates, schedules and routes,” as well as the
19 equipment they used and their appearance and that Affinity “closely monitored and supervised its
20 drivers.” *Id.* at 1102. The court also pointed to the fact that the Independent Truckman’s
21 Agreement permitted Affinity to terminate the drivers without cause with sixty days notice. *Id.*

22 The Ninth Circuit specifically rejected the conclusion of the district court that the drivers
23 were independent contractors because they could hire helpers and secondary drivers. *Id.* The
24 court reasoned that the district court had “overlooked the fact that often the reason drivers hired
25 helpers was that they were required to do so by Affinity” and further pointed to the fact that
26 “Affinity retained ultimate discretion to approve or disapprove of those helpers and additional
27 drivers.” *Id.* at 1102.

28 The Ninth Circuit in *Ruiz* also found that “most of the secondary factors outlined in

1 *Borello*” supported the conclusion that the drivers were employees. First, the court found that the
2 district court had erred in finding that the “distinct occupation or business factor” supported the
3 conclusion that the drivers were independent contractors. *Id.* at 1103-1104. In particular, the
4 court found that the district court had placed too much weight on the fact that the drivers “had the
5 ability to expand their businesses by hiring more employees, operating multiple trucks, and
6 making managerial decisions regarding the employment and performances of the employees
7 hired.” *Id.* The district court had not placed enough weight, the court found, on “the fact that
8 Affinity required drivers to create these businesses as a condition of employment.” *Id.*

9 The second and third *Borello* factors – whether “the work is usually done under the
10 direction of the principal or by a specialist without supervision” and “the skill required in the
11 particular occupation” – also supported the conclusion that the drivers were employees, the court
12 found. *Id.* As to this factor, the court again found that the district court had erred, holding that it
13 placed too much weight on the fact that drivers installed appliances without supervision, which the
14 district court opined required “substantial skill.” *Id.* at 1104. This conclusion was incorrect, the
15 Ninth Circuit found, given that the drivers were not required to have any work experience or
16 special licenses to be hired and that Affinity “closely supervised the drivers’ work through various
17 methods.” *Id.* Thus, these factors supported the conclusion that the drivers were employees of
18 Affinity. *Id.*

19 The court found that the fourth *Borello* factor supported the same conclusion. *Id.* The
20 fourth factor asks “whether the principal or the worker supplies the instrumentalities, tools, and
21 the place of work for the person doing the work.” *Id.* The district court concluded that this factor
22 supported the conclusion that the drivers were independent contractors because the drivers paid to
23 lease their trucks and mobile telephones from Affinity. *Id.* The Ninth Circuit, however, held that
24 the district court’s conclusion was clearly erroneous because it failed to take into account the fact
25 that “Affinity supplied the drivers with the major tools of the job by encouraging or requiring that
26 the drivers obtain the tools from them through paid leasing arrangements.” *Id.*

27 Next, the court addressed the *Borello* factor that considers “the method of payment,
28 whether by the time or by the job.” *Id.* The court explained that payment “by the time” supports

1 a finding of employee status whereas payment “by the job” supports independent contractor status.
2 *Id.* Citing evidence that drivers performed approximately eight deliveries a day and that the
3 drivers’ daily pay therefore “essentially remained the same,” the court concluded that the method
4 of compensation was by the time rather than by the job. *Id.* In reaching this conclusion, the court
5 rejected the district court’s reasoning that the flat per-delivery rate was more like “by the job”
6 compensation because the time it took to complete each delivery varied and the drivers did not
7 work “set hours.” *Id.*

8 As to the *Borello* factor that asks courts to consider whether or not the parties believe they
9 are creating the relationship of employer-employee, the court noted that both parties believed that
10 they were entering an independent contractor relationship but that ““the parties’ label is not
11 dispositive and will be ignored if their actual conduct establishes a different relationship.”” *Id.* at
12 1105 (quoting *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal. App. 4th 1, 11 (2007)).

13 The court next addressed the “right to terminate at will factor.” *Id.* The Ninth Circuit, like
14 the district court, found that the mutual termination provision in the Independent Truckman’s
15 Agreement was “consistent with either an employer-employee or independent contractor
16 relationship.” *Id.*

17 Finally, the court found that the “length of time for performance of services” favored an
18 employer-employee relationship because “there was no contemplated end to the service
19 relationship when the drivers signed their contracts, and drivers often stayed with Affinity for
20 years.” *Id.*

21 Based on the fact that Affinity had the right to control the details of the drivers’ work and
22 because the totality of the secondary factors supported the conclusion that the drivers were
23 employees of Affinity, the Ninth Circuit reversed the district court’s holding that the drivers were
24 independent contractors and remanded to the district court for further proceedings. *Id.*

25 **2. *Alexander v. FedEx Ground Package System, Inc.***

26 In *Alexander*, the Ninth Circuit again addressed the question of whether delivery drivers
27 had been misclassified as independent contractors under California law. 765 F.3d 981 (9th Cir.
28 2014). In that case, numerous related cases involving FedEx delivery drivers were consolidated

1 for multidistrict litigation (MDL) proceedings. In the MDL, the court certified a class as to the
2 California state law claims and then granted summary judgment in favor of FedEx, finding, as a
3 matter of law, that the plaintiffs were independent contractors. *Id.* at 988. The Ninth Circuit
4 reversed, finding that the under the *Borello* factors, the plaintiffs were employees rather than
5 independent contractors. *Id.*

6 The facts in *Alexander* are, in many respects, very similar to the facts in *Ruiz*. Like the
7 drivers in *Ruiz*, the drivers in *Alexander* entered into a contract with FedEx (“the Operating
8 Agreement”) providing that they were independent contractors. *Id.* at 984. The Operating
9 Agreement allowed drivers to operate more than one vehicle and route, but only with the consent
10 of FedEx; it also permitted the driver to hire third parties to help perform their work, but the third
11 party helpers were required to be qualified under federal, state and municipal safety standards, as
12 well as FedEx’s own safety standards. *Id.* at 985-986. The Operating Agreement specified an
13 initial term of one, two or three years, with automatic renewal for one-year terms unless either
14 party gives notice of its intent not to renew. *Id.* at 986. The Operating Agreement provided that
15 the parties could terminate by mutual consent, for cause, including breach of the agreement, if
16 FedEx stopped doing business in the driver’s service area, or upon thirty days written notice by the
17 driver. *Id.*

18 FedEx imposed numerous requirements on the drivers as to how they performed their
19 work. *Id.* This included making deliveries on every day that FedEx was open for business,
20 delivering packages within the window of time negotiated between FedEx and its customers,
21 wearing a FedEx uniform and adhering to FedEx personal grooming rules, using an electronic
22 scanner (purchased from FedEx) to send information to FedEx after each delivery, and adhering
23 to FedEx standards and procedures regarding safety and customer interactions. *Id.* at 985. FedEx
24 policy permitted a driver’s manager to conduct up to four ride-along performance evaluations a
25 year to ensure that drivers were adhering to FedEx standards. *Id.* Under the Operating
26 Agreement, the drivers were required to provide and maintain their own trucks, which had to be
27 approved by FedEx. *Id.* The drivers were required to pay the costs associated with maintaining
28 and operating the trucks. *Id.* The trucks, as well as the shelving inside the trucks, were required to

1 have specific dimensions. *Id.* They had to be painted with the FedEx colors and carry the FedEx
2 logo. *Id.*

3 Applying the *Borello* factors, the court concluded that FedEx’s policies allowed it to
4 “exercise a great deal of control over the manner in which its drivers do their jobs” and therefore,
5 that this factor strongly supported the position of the drivers that they were employees. *Id.* at 989.
6 The court pointed to FedEx’s policies governing uniforms and grooming, the appearance of the
7 drivers’ trucks, the times the drivers worked, and the way the deliveries were performed. *Id.* at
8 990. The court acknowledged that there were “details of its drivers work” that FedEx did not
9 control but found that these details were insignificant in comparison to the extensive control
10 exercised over the drivers overall. *Id.*

11 The court also rejected FedEx’s argument that the drivers were not employees in light of
12 the “flexibility and entrepreneurial activities” they were given and, in particular, “the ability to
13 take on multiple routes and vehicles and to hire third-party helpers.” *Id.* at 991, 993. The court
14 began its analysis of this question by examining *Borello*, in which the California Supreme Court
15 held that “[a] business entity may not avoid its statutory obligations by carving up its production
16 process into minute steps, then asserting that it lacks ‘control’ over the exact means by which one
17 such step is performed by the responsible workers.” *Id.* (quoting *Borello*, 48 Cal. 3d at 357).
18 There, a commercial produce grower hired agricultural workers under sharefarmer agreements to
19 harvest the crops in the plots assigned to them, with the assistance of their families. *Id.* at 991
20 (citing *Borello*, 48 Cal. 3d at 357). Although the sharefarmers used their own tools, set their own
21 hours and were free to decide when to pick the crop to maximize profit, the court found that the
22 workers were employees because the grower exercised a great deal of control over the business as
23 a whole and exercised “all necessary control” over the work of the sharefarmers. *Id.* According to
24 the *Alexander* court, California courts have applied the “all necessary control” test of *Borello* to
25 delivery drivers, recognizing that delivery drivers may be employees, despite operating with some
26 degree of autonomy, because the employer exercises “all necessary control.” *Id.* at 991-992
27 (citing *JKH Enterprises, Inc. v. Department of Industrial Relations*, 142 Cal.App.4th 1046, 48
28 Cal.Rptr.3d 563, 568 (2006) and *Air Couriers Intern. v. Employment Development Dept.*, 150

1 Cal.App.4th 923, 931-932 (2007)).

2 The *Alexander* court went on to reject FedEx’s reliance on a D.C. Circuit case, *FedEx*
3 *Home Delivery v. National Labor Relations Board*, 563 F.3d 492 (D.C.Cir.2009). *Id.* at 993. In
4 that case, the court noted, the D.C. Circuit shifted away from the control inquiry in favor of a test
5 that asks whether the “putative independent contractors have significant entrepreneurial
6 opportunity for gain or loss.” *Id.* Because California has not adopted such a test, the *Alexander*
7 court found, FedEx’s reliance on that case was misplaced. *Id.* The court also noted that its
8 conclusion was consistent with *Ruiz*, in which the Ninth Circuit “found that drivers were
9 employees where the company ‘retained ultimate discretion to approve or disapprove of those
10 helpers and additional drivers.’” *Id.* at 994 (quoting *Ruiz*, 754 F.3d at 1102).

11 Next, the court in *Alexander* examined the secondary factors under *Borello*. The court
12 found that the first factor, the right to terminate at will, “slightly favor[ed] FedEx” because the
13 Operating Agreement did not give FedEx an unqualified right to terminate. *Id.*

14 The court found that the second factor, whether the plaintiffs were engaged in a “distinct
15 occupation or business,” favored the plaintiffs because “the work performed by the drivers is
16 wholly integrated into FedEx’s operation [and] [t]he drivers look like FedEx employees, act like
17 FedEx employees, [and] are paid like FedEx employees.” *Id.* (quoting *Estrada v. FedEx Ground*
18 *Package System, Inc.*, 154 Cal. App. 4th 1, 9 (2007)).

19 The court concluded that the third factor, whether the work is performed under the
20 principal’s direction, “slightly favor[ed] plaintiffs” because “although drivers retain freedom to
21 determine several aspects of their day-to-day work, FedEx also closely supervises their work
22 through various methods.”

23 The fourth factor –skill required in the occupation – also favored the plaintiff, according to
24 the court, because “FedEx drivers ‘need no experience to get the job in the first place and [the]
25 only required skill is the ability to drive.’” *Id.* (quoting *Estrada*, 154 Cal. App. 4th at 12).

26 The court found that the fifth factor, the provision of tools and equipment, only slightly
27 favored FedEx. *Id.* In particular, although the drivers provided their own trucks and were not
28 required to get other equipment from FedEx, this factor did not strongly support FedEx’s position

1 because FedEx was “involved in the purchasing process, providing funds and recommending
2 vendors.” *Id.* (quoting *Estrada*, 154 Cal. App. 4th at 9).

3 The court found that the sixth factor, “length of time for performance of services,”
4 supported the plaintiffs’ position. *Id.* at 996. The court’s conclusion is based on the terms of the
5 Operating Agreement, which provides for an initial term of one to three years and automatic
6 renewal for successive one-year terms if there is no notice of non-renewal by either party. *Id.*

7 The court held that the “method of payment” factor was neutral. According to the court,
8 “FedEx pays its drivers according to a complicated scheme that includes fixed and variable
9 components and ties payment to, among other things, packages, stops, and the ratio of driving time
10 to deliveries. This payment method cannot easily be compared to either hourly payment (which
11 favors employee status) or per job payment (which favors independent contractor status).” *Id.*

12 The court held that the eighth factor, “whether the work is part of the principal’s regular
13 business,” favored the plaintiffs because the work they performed – the pickup and delivery of
14 packages – was “essential to FedEx’s core business.” *Id.* (quoting *Estrada*, 154 Cal. App. 4th at
15 9).

16 Finally, the court found that the parties’ beliefs as to the nature of the relationship being
17 formed slightly favored FedEx to the extent the Operating Agreement provides some evidence that
18 both FedEx and the drivers believed they were forming an independent contractor’s relationship.
19 *Id.* As in *Ruiz*, however, the court noted that “neither [FedEx]’s nor the drivers’ own perception of
20 their relationship as one of independent contracting” is dispositive. *Id.* (citations omitted).

21 The court in *Alexander* concluded that the secondary factors did not strongly favor either
22 employee status or independent contractor status but that the primary factor of the right to control
23 test strongly favored the plaintiffs and therefore, that the drivers were employees as a matter of
24 law under California’s right-to-control test. *Id.* at 1105.

25 **C. Rule 23(a)**

26 **1. Numerosity**

27 Plaintiffs satisfy the numerosity requirement if “the class is so large that joinder of all
28 members is impracticable.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

1 Although the requirement is not tied to any fixed numerical threshold, courts have routinely found
2 the numerosity requirement satisfied when the class comprises 40 or more members. *See E.E.O.C.*
3 *v. Kovacevich “5” Farms*, 2007 WL 1174444, at *21 (E.D. Cal. Apr. 19, 2007). Because Exel
4 has identified 373 individuals who fit the class definition, the numerosity requirement is satisfied.

5 **2. Commonality**

6 The commonality requirement of Rule 23(a)(2) is met where “the class members’ claims
7 ‘depend upon a common contention’ such that ‘determination of its truth or falsity will resolve an
8 issue that is central to the validity of each [claim] with one stroke.’” *Mazza*, 666 F.3d at 588
9 (internal citation omitted) (citing *Wal-Mart*, __ U.S. __131 S.Ct. at 2551). Thus, plaintiffs seeking
10 to certify a class must “demonstrate ‘the capacity of classwide proceedings to generate common
11 answers’ to common questions of law or fact that are ‘apt to drive the resolution of the litigation.’”
12 *Id.* (citing *Wal-Mart*, __ U.S. __131 S.Ct. at 2551). “[C]ommonality only requires a single
13 significant question of law or fact.” *Id.* at 589 (citing *Wal-Mart*, __ U.S. __131 S.Ct. at 2556).
14 “The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion
15 requirements of Rule 23(b)(3).” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).
16 “The existence of shared legal issues with divergent factual predicates is sufficient, as is a
17 common core of salient facts coupled with disparate legal remedies within the class.” *Id.*

18 Here, Plaintiffs assert there is a threshold issue as to all of their claims, namely, whether
19 they are independent contractors or employees of Exel. The Court agrees, with the clarification
20 that class members must have personally made deliveries for Exel at some point during the class
21 period to be part of the class; an individual who *never* made deliveries would not be able to
22 establish violations of at least some (if not all) of the wage and hour laws that are at issue in this
23 case. For example, an individual who never actually made deliveries for Exel, instead hiring
24 others to drive the trucks and make the deliveries, could not recover damages for lost meal and rest
25 breaks on their own behalf. With this clarification, the Court finds that the question of whether
26 Plaintiffs are independent contractors or employees of Exel is susceptible to classwide treatment
27 because of Exel’s uniform policies and practices as to its drivers. Therefore, this common legal
28 issue is sufficient to meet the commonality requirement. *See Norris-Wilson v. Delta-T Group*,

1 *Inc.*, 270 F.R.D. 596, 604 (S.D. Cal., 2010) (holding that question of whether workers who were
2 hired by the defendant and classified as independent contractors under the same agreement were
3 independent contractors or employees was sufficient to meet commonality requirement under Rule
4 23(a)(2)).

5 **3. Typicality**

6 In assessing typicality, under Rule 23(a)(3), courts consider “whether other members have
7 the same or similar injury, whether the action is based on conduct which is not unique to the
8 named plaintiffs, and whether other class members have been injured by the same course of
9 conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992); *see also Wal-Mart*
10 *Stores, Inc. v. Dukes*, __ U.S. __, 131 S.Ct. 2541, 2550 (2011) (“a class representative must be
11 part of the class and possess the same interest and suffer the same injury as the class members”).
12 The typicality and commonality requirements “tend to merge” because “[b]oth serve as guideposts
13 for determining whether under the particular circumstances maintenance of a class action is
14 economical and whether the named plaintiff’s claim and the class claims are so interrelated that the
15 interests of the class members will be fairly and adequately protected in their absence.” *Wal-Mart*
16 *Stores, Inc. v. Dukes*, __ U.S. __, 131 S.Ct. 2541, 2551 n. 5 (2011) (citing *General Telephone Co.*
17 *of Southwest v. Falcon*, 457 U.S. 147, 157-158, n. 13 (1982)).

18 Here, the typicality requirement is satisfied – again, with the clarification discussed above
19 – because all of the putative class members allege the same injury, namely, that they were denied
20 the protections of California’s wage and hour laws on the basis that they were misclassified as
21 independent contractors. Further, the alleged injury results from a uniform course of conduct that
22 affects all drivers, namely, the requirement that all drivers must sign the same ITA classifying
23 them as independent contractors.

24 **4. Adequacy of Representation**

25 Rule 23(a)(4), which requires that the class representatives “fairly and adequately protect
26 the interests of the class,” is satisfied if the proposed representative plaintiffs do not have conflicts
27 of interest with the proposed class and are represented by qualified and competent counsel. *Ellis*
28 *v. Costco Wholesale Corp.*, 285 F.R.D. 492, 535 (N.D. Cal., 2012). Exel does not dispute that
Plaintiffs are represented by qualified counsel. It contends, however, that the submission of “19

1 functionally identical declarations”⁸ and various discrepancies between the declarations and the
2 deposition testimony indicate that the name plaintiffs have interests that are antagonistic to the
3 class. *See* Opposition at 17-18 (citing *Kaplan v. Pomerantz*, 132 F.R.D. 504, 510 (N.D.Ill.,1990)
4 (holding that case could not continue as a class action where name plaintiff had given false
5 deposition testimony and class counsel had “encouraged plaintiff’s false testimony,” leading court
6 to conclude that adequacy of representation requirement was not satisfied). The Court finds
7 Exel’s position to be unpersuasive.

8 First, even a cursory review of the declarations reveals that Exel mischaracterizes the
9 record when it states that they are “functionally identical.” While there is significant overlap,
10 there are also differences between the declaration, indicating that these declarations are not mere
11 boilerplate but rather, reflect both common experiences and certain variations in the drivers’
12 experiences. For example, Mr. Villalpando describes asking for a Spanish language version of the
13 ITA and being told by his manager, “You’re in America now, you need to learn to speak and read
14 English.” Villalpando Decl., ¶ 5. Mr. Shekur recounts that a recruiter named “Maria” presented
15 the ITA to him and that the only explanation offered by Exel personnel was that the paperwork
16 would allow Exel to take \$214/week out of his paycheck for a bond or he could pay \$250 up-front
17 for any property damage he might cause. Shekur Decl., ¶ 6. Mr. Herron states that when Exel
18 presented the ITA to him no one explained what it meant *and* he was not provided sufficient time
19 to review the documents. Herron Decl., ¶ 5. Mr. Alancastro describes asking a supervisor about
20 the reimbursement rate he had received for mileage and being told it was because he was an
21 independent contractor. Alancastro Decl., ¶ 27. The Court rejects Exel’s suggestion that the
22 declarations are so similar that they are not credible.

23 Second, the Court does not find that the deposition testimony offered by Exel as to
24 Plaintiffs Shekur, Molina and Sarabia,⁹ *see* Opposition at 16-18, suggests that these Plaintiffs’
25 declarations contain any false statements. Rather, a comparison of the statements in the
26 declarations and the cited deposition testimony indicates Exel has, again, mischaracterized the

27 ⁸ Plaintiffs submitted 21 declarations from putative class members. It does not appear that Exel
28 intends to suggest that two of the declarations were *not* similar to the others; rather, it appears this
is simply a clerical error.

⁹ In the declaration, Mr. Sarabia’s name is spelled with a “b” while the parties spell his name with
a “v” in their briefs. The Court follows the spelling used in the sworn declaration.

1 record, offering snippets of deposition testimony to suggest that the plaintiffs have made false
2 statements in their declarations even though the quoted testimony is, when read in context,
3 consistent with the declarations.

4 Therefore, the Court concludes that the adequacy of representation requirement is satisfied.

5 **D. Rule 23(b)(3)**

6 The predominance test of Rule 23(b)(3) is “far more demanding” than the commonality
7 test under Rule 23(a)(2). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). “The Rule
8 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant
9 adjudication by representation.” *Hanlon*, 150 F.3d at 1022 (quoting *Windsor*, 521 U.S. 591, 117
10 S.Ct. 2231, 2249). “When common questions present a significant aspect of the case and they can
11 be resolved for all members of the class in a single adjudication, there is clear justification for
12 handling the dispute on a representative rather than an individual basis.” *Id.*; *see also Mazza*, 666
13 F.3d at 589. The Court finds that this requirement is met because the threshold question as to all
14 of Plaintiffs’ claims – whether they are employees or independent contractors – is susceptible to
15 common proof, at least with the clarification that all class members must have personally made
16 deliveries for Exel at some point during the class period. In addition, the elements of the specific
17 wage and hour claims asserted by Plaintiffs lend themselves to class treatment because of the
18 common policies and practices that apply to all drivers. Finally, Exel has not demonstrated that
19 any individual issues that may need to be addressed in adjudicating Plaintiffs’ claims will be so
20 significant as to outweigh the benefits of class treatment.

21 **1. Whether Class Members are Employees or Independent Contractors**

22 The question of whether Plaintiffs are employees or independent contractors under
23 California law turns on the application of the *Borello* factors, discussed above. At the certification
24 phase, the relevant inquiry is not whether or not the specific factors support a finding that
25 Plaintiffs are employees of Exel. Rather, the question is “one step . . . removed” from the merits
26 question. *See Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 533 (2014). “A court
27 evaluating predominance ‘must determine whether the elements necessary to establish liability
28 [here, employee status] are susceptible to common proof or, if not, whether there are ways to

1 manage effectively proof of any element that may require individualized evidence.” *Id.* (quoting
2 *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1024 (2012)). Thus, as to the most
3 important *Borello* factor, right of control, the Court must ask, “Is [Exel’s] right of control over its
4 [drivers], whether great or small, sufficiently uniform to permit classwide assessment?” *Id.*
5 Similarly, in evaluating the secondary factors, the Court “must identify whether the factor will
6 require individual inquiries or can be assessed on a classwide basis.” *Id.* at 538. For the reasons
7 stated below, the Court concludes the answer to both questions is “yes.”

8 With respect to Exel’s right to control, Plaintiffs rely heavily upon the contractual
9 agreements drivers are required to sign, the ITA and the ELA. Such uniform contracts are a
10 significant focus of the “right to control” inquiry. *See Alexander*, 765 F.3d at 989-994; *Ruiz*, 754
11 F.3d at 1102. Moreover, to the extent *all* drivers are required to sign the same contracts, “the
12 degree of control [the contracts] spell[] out is uniform across the class.” *Ayala*, 59 Cal. 4th at 534.
13 Plaintiffs also rely on Exel’s policies as to safety, vehicle maintenance, grooming, the assignment
14 of delivery routes, and communications with customers, among other things, to show that the
15 degree of control Exel exercised over the class members makes them employees rather than
16 independent contractors. Again, these were considerations that the courts in *Alexander* and *Ruiz*
17 found were highly relevant to the “right to control” test under *Borello*. Further, Exel does not
18 dispute that these policies are the same for all class members. Finally, while Exel points to the
19 ability to hire second drivers and helpers as evidence that the class members are independent
20 contractors, it does not dispute that all of the drivers are subject to the *same* rules and requirements
21 with respect to the hiring of second drivers and helpers. Consequently, even the implications of
22 Exel’s policies with respect to the hiring of helpers and second drivers is suitable for treatment on
23 a classwide basis. As the “right to control” test is the most significant part of the *Borello* inquiry,
24 the fact that the evidence in this case on that issue lends itself to class treatment weighs in
25 Plaintiffs’ favor as to the predominance inquiry.

26 In addition, many of the secondary factors in *Borello* are appropriate for treatment on a
27 classwide basis. To the extent the drivers are performing the same type of work, the “distinct
28 occupation or business” factor can be decided on a classwide basis. Similarly, to the extent that

1 Exel has a uniform policy as to drivers’ qualifications, set forth in the Compliance Manual, the
2 “kind of occupation” factor, which asks whether work is done under the direction of a principal or
3 by a specialist without supervision, can also be decided on a classwide basis. Many other factors
4 turn on (or are heavily influenced by) the provisions of the ITA and the ELA, including the length
5 of time for which the services are to be performed, the method of payment, whether by the time or
6 by the job, and Exel’s right to terminate. Thus, these factors as well are susceptible to class
7 treatment.

8
9 **2. Whether other Requirements Specific to Individual Claims Are Susceptible
to Common Proof**

10 In addition to the threshold question of employee status, other issues relating to Plaintiffs’
11 wage and hour claims are likely to be amenable to class treatment as well.

12 First, Plaintiffs’ claim for reimbursement of expenses under Cal. Labor Code §2802, which
13 provides that “[a]n employer shall indemnify his or her employee for all necessary expenditures or
14 losses incurred by the employee in direct consequence of the discharge of his or her duties,” lends
15 itself to class treatment to the extent that Exel has a uniform policy as what is reimbursed and
16 what is not.

17 Similarly, Plaintiffs’ claims for unlawful deductions from wages and coerced purchases
18 under Second, Cal. Labor Code §§221, 223, 400-410, and IWC Wage Order 9-2001 §8, are
19 susceptible to common proof. These provisions “prohibit deductions from an employee’s wages
20 for . . . business losses that may result from the employee’s simple negligence.” *Hudgins v.*
21 *Neiman Marcus Group, Inc.*, 34 Cal.App.4th 1109, 1118-19 (1995). For all class members, the
22 chargeback schedule in Exhibit D to the ELA will play an important part in establishing liability
23 on these claims.

24 The meal and rest break claims also are susceptible to common proof. Under IWC Wage
25 Order 9-2001, §11, and Cal. Labor Code §§226.7 and 512, employers must provide employees
26 with a reasonable opportunity to take off-duty meal periods during which they are completely
27 relieved of duty for at least 30 minutes by every 5 hours of work, and must not impede or
28 discourage them from taking such breaks. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th

1 1004, 1040 (2012). Employers must also “authorize and permit” ten minutes of rest for every four
2 hours worked or “major fraction thereof.” *Id.* at 1028. Plaintiffs rely, in part on Exel’s lack of a
3 policy to permit meal and rest breaks, which itself is an issue susceptible to common proof. *See*
4 *Bradley v. Networkers International, LLC*, 211 Cal. App. 4th 1129, 1150 (2012) (holding that
5 meal and rest break claims based on employers’ *lack* of a policy involved companywide conduct
6 suitable for class treatment). Plaintiffs also point to companywide practices with respect to
7 scheduling of deliveries that they contend make it difficult or impossible for drivers to take breaks.
8 These issues can be effectively addressed on a class-wide basis.

9 Plaintiffs’ minimum wage and overtime claims also will raise issues that can be resolved
10 on a classwide basis. In particular, the compensation provisions of the ITA and ELA, which apply
11 to all class members, specifically exclude pay for “non-hauling” activities, potentially resulting in
12 classwide minimum wage and overtime violations. Further, certain classwide policies and
13 practices – such as the requirement that drivers participate in a daily stand-up meeting (which
14 presumably is a non-hauling activity) – may give rise to common questions on the merits as to
15 whether drivers were denied minimum wage and overtime pay.

16 **3. Individualized Inquiries**

17 While key issues relating to Plaintiffs’ claims may be resolved on a classwide basis,
18 Plaintiffs’ claim raise some individual issues as well, primarily relating to damages. For example,
19 if liability is established, it will be necessary to determine the amount of time each driver
20 personally performed deliveries for Exel as opposed to having a second driver and/or helper
21 perform the work. There will also be individual issues related to determining how many hours
22 were worked at a rate below the minimum wage rate and, where applicable, the overtime rate.
23 Similarly, as Plaintiffs concede, there may be individual issues related to the reimbursement
24 claims because tools and supplies were purchased outside of Exel and do not show up on weekly
25 pay records. *See Reply* at 13 n. 18. However, “the presence of individualized damages cannot, by
26 itself, defeat class certification under Rule 23(b)(3).” *Leyva v. Medline Industries Inc.*, 716 F.3d
27 510, 514 (9th Cir. 2013). Further, evidence maintained by Exel in the form of daily logs,
28 timesheets and manifests, will assist in the determination of damages.

1 The Court concludes that the issues that are amenable to class treatment predominate over
2 the individual issues that may arise in this case and therefore, that the predominance requirement
3 of Rule 23(b)(3) is met.

4 **4. Superiority**

5 In evaluating superiority, a court considers the following non-exhaustive factors:

6 (A) the class members' interests in individually controlling the
7 prosecution or defense of separate actions;

8 (B) the extent and nature of any litigation concerning the
9 controversy already begun by or against class members;

10 (C) the desirability or undesirability of concentrating the litigation
11 of claims in the particular forum; and

12 (D) the likely difficulties in managing a class action.

13 Fed. R. Civ. P. 23(b)(3). Here, there is no indication that the class members have an interest in
14 controlling the litigation; moreover, Plaintiffs contend the cost of individual actions is
15 "prohibitively high" and that some drivers may fear reprisal. Plaintiffs are not aware of any other
16 litigation already begun nor has Exel pointed to any. Further, concentrating the litigation in this
17 forum will be beneficial to the parties because the Court has developed familiarity with the facts of
18 this case. Finally, the Court does not anticipate any significant difficulties in managing this class
19 action: the size of the class is relatively modest and the claims asserted involve the law of only one
20 state. To the extent there are individual issues related to damages, the Court may bifurcate
21 liability and damages (although the Court does not decide that issue here). And both sides are
22 represented by experienced counsel who are well-versed in handling the case management issues
23 associated with litigating class actions.

24 **IV. CONCLUSION**

25 For the reasons stated above, the Motion is GRANTED. The Court certifies the following
26 class under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure:

27 All individuals who have personally provided delivery services for
28 Defendant Exel Direct in California while being classified by Exel
Direct as independent contractors, at any time beginning June 14,
2008 until resolution of this action. Any individual who has signed
the Independent Truckman's Agreement with Exel Direct but has

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provided delivery services exclusively through the use of hired second drivers and who has *never* personally made deliveries for Exel is excluded from the Class.

A Case Management Conference shall be conducted on December 12, 2014 at 10:30 am. The parties shall meet and confer and submit to the Court an updated Case Management Statement, including a proposed schedule for the remainder of the case, one week in advance of the Case Management Conference.

IT IS SO ORDERED.

Dated: November 20, 2014



JOSEPH C. SPERO
United States Magistrate Judge