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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EMILIA SANTOS,  
Plaintiff,  
v.  
UNITED PARCEL SERVICE INC.  
(OHIO),  
Defendant.

Case No. [18-cv-03177-EMC](#)

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR CLASS CERTIFICATION; DENYING DEFENDANT'S MOTION TO EXCLUDE; AND DENYING PLAINTIFF'S MOTION TO EXCLUDE**

Docket Nos. 64, 67, 90

Plaintiff Emilia Santos has filed a class action against Defendant United Parcel Service (“UPS”) asserting that UPS violated the California Labor Code by failing to provide timely and uninterrupted meal and rest periods to its non-exempt employees, including “Preload Part Time Supervisors” (“Preload PTS”). Ms. Santos alleges that Defendant had a uniform, companywide policy to deprive Preload PTS of rest breaks and force them to record meal breaks which were not actually taken. Currently pending before the Court is Ms. Santos’ motion to certify the class. Having considered the parties’ briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS in part and DENIES in part** the Motion for Class Certification.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

California Labor Code § 512(a) provides in relevant part that “[a]n employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal break of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent

1 of both the employer and the employee.” Cal. Lab. Code § 512(a). It also provides that “[a]n  
2 employer shall not employ an employee for a work period of more than 10 hours per day without  
3 providing the employee with a second meal period of not less than 30 minutes, except that if the  
4 total hours worked is no more than 12 hours, the second meal period may be waived by mutual  
5 consent of the employer and the employee only if the first meal period was not waived.” Id.

6 In her First Amended Complaint, Ms. Santos alleges that Defendant violates this statute by  
7 assigning six-hour shifts and failing to provide timely and off-duty meal periods of 30 minutes,  
8 and by instructing Preload PTS to clock out for a meal break between the fourth and fifth hour of  
9 the workday without actually taking that meal break. FAC ¶ 16.

10 The California Labor Code also requires employers to provide their employees with rest  
11 breaks. It provides, in relevant part, that “[e]very employer shall authorize and permit all  
12 employees to take rest periods, which insofar as practicable shall be in the middle of each work  
13 period. The authorized rest period time shall be based on the total hours worked daily at the rate of  
14 ten (10) minutes net rest time per four (4) hours or major fraction thereof.” See Wage Order 4-  
15 2001, 8 C.C.R. 11040, § 12(A). Though the term “major fraction” is not defined in the wage  
16 order, it “long has been understood—legally, mathematically, and linguistically—to mean a  
17 fraction greater than one-half.” *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1028  
18 (2012).

19 Ms. Santos alleges that Defendant systematically forced Preload PTS to miss one or more  
20 rest breaks, without being paid rest break premiums for each workday the rest break was not  
21 provided. FAC ¶ 17. In addition, Ms. Santos alleges that this practice (of not paying rest break  
22 premiums) occurred five times per week, with the consent of UPS managers and supervisors. Id.

23 Ms. Santos also provides additional context in her motion for class certification. During  
24 “peak season” (i.e., the time between “Black Friday” and early/mid-January), Defendant  
25 adequately anticipates increased parcel volume and provides the requisite meal breaks. Mot. at 6.  
26 The majority of the alleged labor code violations occur during “non-peak season” (i.e., the rest of  
27 the year), when Preload PTS are nominally scheduled for 5.5-hour shifts but are actually expected  
28 to work beyond their scheduled shift, for as long as needed to process all packages. Mot. at 6-8.

1 When class members work beyond their scheduled shifts, Defendant does not consider whether the  
 2 additional work time requires the provision of a meal break and, in fact, instructs putative class  
 3 members to record a meal break without taking it. Mot. at 8-10.

4 As concrete proof of these allegations, Plaintiff's counsel offers the expert declaration of  
 5 Mr. Bennett S. Berger. Mr. Berger performed an "audit trail" of class members' pay records and  
 6 concluded that 98.1% of non-peak shifts lasting for more than six hours had a 30-minute meal  
 7 break, an incredibly high rate of compliance with the meal break law. Berger Decl. ¶ 14(g). Mr.  
 8 Berger also found that 42% of analyzed shifts did not have a second or third recorded rest break on  
 9 shifts greater than 6 hours and 10 hours, respectively. See Berger Decl. ¶ 13(d), 14(c). Despite  
 10 this, no employees were paid rest break premiums. Berger Decl. ¶ 17.

11 As defined in the FAC, the class Ms. Santos seeks to certify consists of "[a]ll current and  
 12 former non-exempt employees of Defendant, employed in California, who, during the class period  
 13 [from four years prior to the filing of the Complaint until trial], worked in a distribution center as a  
 14 part time supervisor, or a position with similar duties and/or job titles, and who has not signed an  
 15 arbitration agreement with Defendant as of the date of the filing of this Complaint." FAC ¶ 22.

16 In her motion for class certification, Ms. Santos adds six subclasses to the proposed class  
 17 definition, consisting of all employees who:

- 18 (a) [w]ere not paid for all hours worked, in any pay period that is within the Class Period  
 19 ("The Unpaid Time Subclass"); and/or  
 20 (b) [w]orked more than 5 hours, or more than six hours if subject to a valid first meal  
 21 break waiver, and/or worked more than 10 hours, or more than 12 hours if subject to a  
 22 valid second meal break waiver, and were not provided with uninterruptable meal  
 23 periods of at least 30-minutes ("The Meal Break Subclass"); and/or  
 24 (c) [s]igned a meal break waiver when they held a different position than that of a Class  
 25 Member, and did not sign a new meal break waiver when they changed the position to  
 26 one of a Class Member ("The Meal Break Waiver Subclass"); and/or  
 27 (d) [w]ere not provided uninterruptable rest breaks of at least 10 minutes for each 4 hours  
 28 of the week ("The Rest Break Subclass"); and/or

- 1 (e) [w]ere not provided with accurately itemized wage statements listing all hours worked
- 2 and other information required to be listed under California Labor Code § 226(a) (“The
- 3 Wage Statement Subclass”); and/or
- 4 (f) [w]ere not paid all wages due and owing at the time of their separation (“The Waiting
- 5 Time Subclass”).

6 Mot. at 13.

7 Defendant moves to exclude the declaration of Mr. Berger as unreliable and  
8 methodologically flawed. Ms. Santos, in turn, moves to strike the declarations from Preload PTS  
9 upon which Defendant relies in its opposition to the Motion for Class Certification.

10 **II. DISCUSSION**

11 A. Motion for Class Certification

12 Federal Rule of Civil Procedure 23 governs class actions. Under this rule, a class action  
13 may be maintained only if (1) each of the requirements of Rule 23(a) is satisfied and (2) one of the  
14 requirements of Rule 23(b) is satisfied. Rule 23(a) provides as follows:

- 15 One or more members of a class may sue or be sued as
- 16 representative parties on behalf of all members only if:
- 17 (1) the class is so numerous that joinder of all members is
- 18 impracticable;
- 19 (2) there are questions of law or fact common to the class;
- 20 (3) the claims or defenses of the representative parties are typical of
- 21 the claims or defenses of the class; and
- 22 (4) the representative parties will fairly and adequately protect the
- 23 interests of the class.

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

25 Ms. Santos seeks to certify this class pursuant to Federal Rule of Civil Procedure 23(b)(3).  
26 Mot. at 23. Under Rule 23(b)(3), a class action may be maintained if:

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

- (A) the class members' interests in individually controlling the

1 prosecution or defense of separate actions;

2 (B) the extent and nature of any litigation concerning the  
controversy already [\*42] begun by or against class members;

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

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

6 Fed. R. Civ. P. 23(b)(3).

7 1. Unpaid Time, Meal Break, and Meal Break Waiver Subclasses

8 To be certifiable, class members' claims must depend upon a common contention "of such  
9 a nature that it is capable of classwide resolution—which means that determination of its truth or  
10 falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."  
11 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). In the wage & hour context, the  
12 California Supreme Court has held that "[c]laims alleging that a uniform policy consistently  
13 applied to a group of employees is in violation of the wage and hour laws" are the sort that are  
14 routinely certifiable for class treatment. Brinker, 53 Cal. 4th at 1033 (emphasis added).

15 One way of meeting the Brinker standard for uniformity is to identify a company policy  
16 which is, on its face, unlawful. See, e.g., In re Autozone, Inc., No. 10-MD-02159-CRB, 2016 U.S.  
17 Dist. LEXIS 105746, at \*6-7 (N.D. Cal. Aug. 10, 2016) (finding that plaintiffs "identified an  
18 Autozone [rest break] policy, which they represented was in place throughout the class period ...  
19 [and] [t]hat policy is—on its face—inadequate under Brinker"); Cruz v. Sun World Internat., LLC,  
20 243 Cal. App. 4th 367, 389 (2015) ("[w]here a written policy that arguably violated the wage laws  
21 existed, the [Brinker] requirement was met") (internal quotation marks omitted).

22 Otherwise, putative classes may rely on evidence of a consistently applied policy, e.g.,  
23 through statistical sampling from a qualified expert witness. To be sure, the degree of consistency  
24 (in the absence of a facially unlawful policy) required for class certification has not been clearly  
25 identified by the courts and is likely to depend on the circumstances. The California Supreme  
26 Court has articulated a procedure whereby that determination should be made: when a trial plan  
27 "incorporates representative testimony and random sampling, a preliminary assessment should be  
28 done to determine the level of variability in the class. If the variability is too great, individual

1 issues are more likely to swamp common ones and render the class action unmanageable.” Duran  
2 v. U.S. Bank National Assn., 59 Cal. 4th 1, 33 (2014) (emphasis added). The court may therefore  
3 “conduct[] a pilot study or some other type of preliminary assessment” of the plaintiff’s sampling  
4 analysis to ensure that it is both reliable and probative of a uniform, companywide policy.  
5 Arredondo v. Delano Farms Co., No. 09-CV-01247-MJS, 2014 U.S. Dist. LEXIS 145562, at \*22  
6 (E.D. Cal. Oct. 10, 2014).

7 Important to such a preliminary assessment is the size of the sample – it cannot be too  
8 small. Duran, 59 Cal. 4th at 42 (finding a flaw in the “size of the sample group” and holding, in  
9 general, that “[t]he more diverse the population, the larger the sample must be in order to reflect  
10 the population accurately”) (internal citations omitted). The court must “determine that a chosen  
11 sample size is statistically appropriate and capable of producing valid results within a reasonable  
12 margin of error.” Id. Further, a sample must be truly random and avoid certain biases, e.g.,  
13 selection bias (which occurs when members of the sample population are selectively included or  
14 excluded based on a nonrandom criterion) and nonresponse bias (which occurs when a sample is  
15 chosen randomly from a group containing only survey respondents, thereby increasing the  
16 potential for bias because those who did not respond to the survey had no chance of being  
17 included within the group). Id. at 43.

18 Here, in response to Plaintiff’s discovery request, UPS was ordered to provide a ten-  
19 percent sampling of the “contact information, timecards, wage statements, work schedules,  
20 electronic device log-in data, and any applicable meal-break waivers” of a putative class of more  
21 than 2,000 individuals working at over 80 facilities. See Order re: Class Discovery Dispute  
22 (Docket No. 60). At oral argument, counsel for Plaintiff noted that it actually had access to about  
23 8% of the putative class, which is more than 100 potential class members. Out of approximately  
24 100 potential class members, counsel submitted the declarations of only nine individuals from 10  
25 facilities. See Mot. at 10-12. These nine individuals echo Ms. Santos’ allegations: each alleges  
26 that they were forced to record meal and rest breaks on their timecards by their Full Time  
27 Supervisors, usually during non-peak season, even if such breaks were not actually taken. See id.

28 It does not appear that class counsel conducted interviews of Full Time Supervisors, or any

1 other UPS employees who supervised Preload PTS, to confirm that this meal break practice  
2 existed. And, importantly, Plaintiff did not submit any sampling analysis. Instead, Plaintiff's  
3 sample (of apparently handpicked examples) likely suffers from selection bias. The miniscule  
4 sample size of supportive testimony (nine declarations out of a pool of 100 employees) does not  
5 permit an inference of a uniform, companywide policy of meal and rest break violations at UPS, at  
6 least in the absence of any systemic practice of such violations. Furthermore, Plaintiff's  
7 supporting declarations are contradicted by declarations of numerous Preload PTS and their  
8 supervisors. See, e.g., Defendant's Compendium of Evidence, Facts 16, 18 (testimony from  
9 numerous Preload PTS that (1) their supervisors advise them to take a meal break if the entire  
10 Preload runs for more than six hours, and (2) they were never prevented or discouraged, by their  
11 supervisors, from taking a first meal period) (Docket No. 81); Decl. of Lisa Stevenson ¶¶ 6, 7  
12 (UPS supervisor who states that when Preload PTS work for more than six hours during non-peak  
13 season, she either "instruct[s] them to take lunch between their fourth and fifth hour," or "cover[s]  
14 their area while they are on lunch," or "tell[s] them to go home before working 6 hours") (Docket  
15 No. 76); Decl. of Christine Castaldi-Inman ¶ 7 (human resources employee at UPS who states that  
16 "[i]f, occasionally, an employee works longer than six hours without being provided a lunch under  
17 UPS's policies, UPS pays the employee one extra hour of pay for the first or second meal period  
18 that was not provided. iGate is programmed to flag all non-compliant meal periods") (Docket No.  
19 73); Decl. of Gerry Flores ¶ 8 ("[i]t is my practice to instruct Preload PTS to take a 30-minute  
20 meal break between their fourth and fifth hour and a second 10-minute rest break after working 6  
21 hours and additional breaks as required or needed. If the entire preload will run longer than 6  
22 hours, the entire building will shut down for a building meal break") (Docket No. 75).

23 To be sure, Mr. Berger did some statistical analysis. He analyzed a total of 69,061 shifts  
24 for 124 UPS employees, comprising 13,630 peak and 55,431 non-peak shifts. Berger Decl. ¶¶ 12,  
25 14. With respect to meal breaks, Mr. Berger found that "98.1% of shifts analyzed for the sample  
26 class data during non-peak greater than 6 hours had a recorded 1<sup>st</sup> meal break within the first 5  
27 hours and lasting at least 30 minutes in length." Berger Decl. ¶ 14(g). Far from showing that  
28 Defendant deprived Preload PTS of meal breaks, this sampling data shows that Defendant actually



1 had a near-uniform policy of compliance with the California meal break provisions of the Labor  
 2 Code. While Plaintiff contends (1) that this compliance rate is not credible and (2) that, if  
 3 anything, it establishes widespread falsification of meal break records, Plaintiff fails to present any  
 4 evidence other than the testimony of 9 individuals out of over 2,000 workers of a widespread,  
 5 consistent practice of such falsification. Plaintiff had ample opportunities to show this via a true  
 6 sampling analysis but failed to do so. And the counter-declarations which UPS offers, from  
 7 Preload PTS and their supervisors, show that Preload PTS are consistently provided with the  
 8 requisite meal and rest break periods when they work longer than six hours (or, if not, they are  
 9 paid meal break premiums for that missed time).<sup>1</sup>

10 \_\_\_\_\_  
 11 <sup>1</sup> Ms. Santos moves to strike counter-declarations from Preload PTS on two grounds. First, she  
 12 alleges that defense counsel violated ethical grounds by failing to explain to potential class  
 13 members that Defendant's interests in this litigation are adverse to their own. See Plaintiff's  
 14 Motion to Strike at 9-10 (Docket No. 90). Second, Ms. Santos alleges that defense counsel's  
 15 interviews were conducted in a coercive and deceptive manner (e.g., Defendant failed to inform  
 16 potential class members that a class action concerning their declarations was pending, and that  
 17 execution of a declaration for Defendant could adversely affect them). See *id.* at 4-9.

18 Ms. Santos alleges that defense counsel violated California Rule of Professional Conduct 1.13(f),  
 19 which provides, in relevant part:

20 [i]n dealing with an organization's constituents, a lawyer  
 21 representing the organization shall explain the identity of the  
 22 lawyer's client whenever the lawyer knows or reasonably should  
 23 know that the organization's interests are adverse to the  
 24 constituent(s) with whom the lawyer is dealing.

25 CAL. RULES OF PROF'L CONDUCT r. 1.13(f).

26 Ms. Santos also alleges that defense counsel violated California Rule of Professional Conduct  
 27 4.3(a), which provides, in relevant part:

28 [i]f the lawyer knows or reasonably should know that the interests of  
 the unrepresented person are in conflict with the interests of the  
 client, the lawyer shall not give legal advice to that person, except  
 that the lawyer may, but is not required to, advise the person to  
 secure counsel.

CAL. RULES OF PROF'L CONDUCT r. 4.3(a).

In fact, defense counsel clearly explained its role to potential class members before each interview  
 and did not provide any legal advice. For instance, counsel provided each interviewee with an  
 explanatory document (entitled "Who We Are and Purpose of the Interview") ("WWA  
 Statements") and read the entire document verbatim before the interviews began.  
 Opposition/Response to Plaintiff's Motion to Strike at 2-3 (Docket No. 96). These WWA



1           Because counsel has not offered statistical or other systemic evidence that Defendant  
2 engaged in a companywide policy of falsifying meal breaks, the Court therefore finds, in its  
3 preliminary assessment, that Ms. Santos has failed to offer proof of a sufficiently uniform,  
4 companywide policy with respect to the Unpaid Time, Meal Break, and Meal Break Waiver  
5 Subclasses so as to permit class certification under Duran.

6           2.       Rest Break and Waiting Time Subclasses

7           The Industrial Welfare Commission has issued an order on rest breaks, providing, in  
8 relevant part:

9                   Every employer shall authorize and permit all employees to take rest  
10                   periods, which insofar as practicable shall be in the middle of each  
11                   work period. The authorized rest period time shall be based on the  
12                   total hours worked daily at the rate of ten (10) minutes net rest time  
13                   per four (4) hours or major fraction thereof. However, a rest period  
14                   need not be authorized for employees whose total daily work time is  
15                   less than three and one-half (3 1/2) hours. Authorized rest period  
16                   time shall be counted as hours worked for which there shall be no  
17                   deduction from wages.

18           Wage Order 4-2001, 8 C.C.R. 11040, § 12(A) (emphasis added).

19           Though not defined in the wage order, the term “major fraction” has been interpreted to  
20 mean “a fraction greater than one-half.” See Brinker, 53 Cal. 4th at 1028. In practical terms, an  
21 employee subject to the wage order “would receive no rest break time for shifts of two hours or  
22 less, 10 minutes for shifts lasting more than two hours up to six hours, 20 minutes for shifts lasting

23           \_\_\_\_\_

24           Statements contained, inter alia, disclaimers that the interviewing attorneys represented UPS and  
25 not the witness, that participation was completely voluntary, and that the interview related to the  
26 present class action (of which the witness was a potential member). *Id.* at 3. Defense counsel  
27 confirmed that interviewees were not represented by counsel in this matter and received written  
28 confirmation of the same. *Id.* And interviewees were given the opportunity to review written  
summaries of their interviews (outside the presence of their supervisors) and make changes or  
corrections before signing the declaration. *Id.*

29           Additionally, the WWA statement (which every interviewee signed) makes clear that the  
30 interviewing attorneys may have interests that are adverse to the employees being interviewed: “I  
31 want to make sure you understand that I represent UPS and not you individually. As a potential  
32 class member, your interest in the litigation could be adverse to UPS’s interests.” *Id.* at 8-9; see  
33 also Declaration of Carlos I. Martinez-Garcia in support of Opposition/Response (Docket No. 99)  
34 (“I explained [to the interviewee] that the purpose of obtaining a declaration was to ... defend UPS  
35 against the allegations made by the Plaintiff ... [and] ... I never provided any legal advice to any  
36 of the interviewees”). The statement also explicitly states that employees would receive no benefit  
37 for participating, nor would any action be taken against them. See Full and Complete Copy of the  
38 WWA Statement, (Docket No. 99, Exhibit A).

1 more than six hours up to 10 hours, and so on.” Id. at 1029 (emphasis added).

2 The California Labor Code provides that when “an employer fails to provide an employee  
3 a meal or rest or recovery period in accordance with ... [an] order of the Industrial Welfare  
4 Commission ... the employer shall pay the employee one additional hour of pay at the employee’s  
5 regular rate of compensation for each workday that the meal or rest or recovery period is not  
6 provided.” Cal. Lab. Code § 226.7(c).

7 With respect to rest breaks, Mr. Berger found the following: “[o]ut of the 69,061 peak and  
8 non-peak shifts analyzed, 27,058 shifts (39.2%) were recorded greater than 6 hours and 1,632  
9 shifts (2.4%) were recorded greater than 10 hours. Out of the 27,058 shifts greater than 6 hours,  
10 10,133 instances did not have a recorded 2<sup>nd</sup> rest break (37.4%). Out of the 1,632 shifts greater  
11 than 10 hours, 1,406 instances did not have a recorded 3<sup>rd</sup> rest break (86.2%). When combined  
12 and only counting one instance per shift maximum, there are 11,336 shifts either greater than 6  
13 hours without a recorded 2<sup>nd</sup> rest break or greater than 10 hours without a recorded 3<sup>rd</sup> rest break  
14 representing 41.9% of all shifts greater than 6 hours.” Berger Decl. ¶ 14(c) (emphasis added).  
15 Based on Mr. Berger’s review of the data, there was “no indication ... that the defendant was  
16 paying any premium payments for rest breaks.” Berger Decl. ¶ 17.

17 Although this showing approaches the kind of systemic evidence necessary to show a  
18 consistent practice, Mr. Berger’s rest break findings do not carry much probative value because  
19 UPS does not require the recording of rest breaks.<sup>2</sup> See Opp’n at 24; Castaldi Decl. ¶ 4 (“Preload

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21 <sup>2</sup> Defendant contends that Mr. Berger is not a qualified expert because “[h]e pursued no post  
22 undergraduate studies” and “has no specialized training related to California meal and rest period  
23 law.” Memo ISO Defendant’s Motion to Exclude Berger Declaration (“Berger Opp’n”) at 11.  
24 Defendant also attacks Mr. Berger’s declaration as (1) based on a flawed methodology that fails to  
25 consider meal period waivers that may have exempted putative class members from meal period  
26 requirements (Berger Opp’n at 12); (2) based on a flawed application of the law to the facts,  
27 because employers are not required to police employees’ meal or rest breaks to ensure no work is  
28 performed (Berger Opp’n at 13-14); and (3) irrelevant, because it does not speak to a uniform  
policy of discouraging putative class members from taking meal or rest breaks (Berger Opp’n at  
15).

First, Rule 702 does not require post-graduate education as a prerequisite to certification as an  
expert. See Fed. R. Evid. 702 (providing that an individual can qualify as an expert by  
“knowledge, skill, experience, training, or education ...”); see also *Rogers v. Raymark Industries,*  
Inc., 922 F.2d 1426, 1429 (9th Cir. 1991) (“[a] witness can qualify as an expert through practical  
experience in a particular field, not just through academic training”). Mr. Berger has

1 PTS must accurately record all time they work, including the time they start and stop working and  
 2 the times they start and end their meal periods, in the PTRS system...[t]he policy does not require  
 3 Preload PTS to record the start and end of rest breaks”). Contrary to Plaintiff’s assertions,  
 4 Defendant has not admitted in deposition testimony that rest breaks are required to be recorded.  
 5 Rather, Defendant has merely admitted that “[t]here are rest breaks that are recorded in PTRS.”  
 6 Johnson Decl. at 115 (Docket No. 64-2, Exhibit 4). That admission does not establish that it was  
 7 UPS’s policy to require such recordation, or that such recordation was done consistently as a  
 8 matter of practice. Although this fact might have been established by a valid sampling study, none  
 9 was presented by Plaintiff. In fact, Defendant offered numerous counter-declarations from Preload  
 10 PTS who testified that they are provided with a 10-minute rest break after the first two hours of  
 11 their shift, another 10-minute rest break on days that they worked more than six hours, and a third  
 12 10-minute rest break on days that they worked more than 10 hours. See Defendant’s Compendium  
 13 of Evidence, Facts 32, 33, 34 (Docket No. 81). Crucially, these same Preload PTS testified that  
 14 they did not always record their second and third rest breaks. See *id.*, Fact 38.

15 Thus, the statistics cited by Mr. Berger provide limited probative value in demonstrating a  
 16 pattern of violations; instead, determining the frequency of rest break violations will likely require  
 17 detailed inquiry and examination of, e.g., timecards of each Preload PTS as well as examination of  
 18 individual witnesses to determine whether the absence of a rest break was truly indicative of  
 19 Defendant’s failure to authorize and permit such breaks. *Brinker*, 53 Cal. 4th at 1033 (“[a]n  
 20 employer is required to authorize and permit the amount of rest break time called for under the

21 \_\_\_\_\_  
 22 demonstrated that he possesses the skills (e.g., the ability to use formulas and equations to analyze  
 23 payroll records) and experience (e.g., as a partner and senior data analyst at a consulting group that  
 24 specializes in this work) to meet this low threshold. See Berger Decl. ¶¶ 3-4. Defendant’s  
 25 methodological attack carries more force because Mr. Berger’s two central findings (i.e., with  
 respect to meal and rest breaks) are (1) not probative of a uniform, companywide policy of meal  
 break deprivation, and (2) not necessarily probative of a uniform, companywide policy of rest  
 break deprivation (since Preload PTS are not required to record rest breaks).

26 However, the statistical sampling that produced the 41.9% figure (with respect to rest breaks)  
 27 could be corroborated (through, e.g., testimony from Full Time Supervisors) to pass a preliminary  
 28 assessment under Duran. Thus, while Mr. Berger’s methodology is not inherently flawed, it lacks  
 probative value given the UPS policy for rest break recordation. Instead of excluding Mr.  
 Berger’s findings altogether, the Court will allow Defendant to make these methodological  
 arguments for the trier of fact.

1 wage order for its industry”). The absence of a rest break from a timecard could have a lawful  
2 explanation (e.g., the employee took the rest break but merely forgot to record it, since they were  
3 not required to) or an unlawful explanation (e.g., Defendant never authorized such rest breaks in  
4 the first place).

5 Counsel for Ms. Santos relies on *Safeway, Inc. v. Superior Court*, 238 Cal. App. 4th 1138  
6 (2015), to argue that “UPS does not have a system/policy to pay – nor does it pay – rest break  
7 premiums, which violates California [labor] law.” Mot. at 19. At oral argument, counsel  
8 explained that the alleged breach of duty is Defendant’s establishment of a software system that  
9 prevents the California rest break premium statutes from ever being complied with. See *Safeway*,  
10 238 Cal. App. 4th at 1158 (finding that, to demonstrate the propriety of class certification under  
11 California’s Unfair Competition Law, plaintiffs had to show “deep, system-wide error” in  
12 Safeway’s system for paying meal and rest break premiums).

13 The Court does not preclude the possibility that putative classes may rely upon the  
14 Safeway theory of deep, system-wide error for a showing of classwide certifiability. But in  
15 Safeway, Plaintiffs offered testimony from supervisory employees (who worked for Defendant)  
16 stating that Defendant had no mechanism for paying meal break premiums over a six-year period.  
17 See *id.* at 1150 (“Terri Buller, a Vons human resources manager, testified that prior to June 2007,  
18 there was no mechanism or procedure by which the premium pay related to meal breaks was  
19 calculated or determined when due”). Counsel for Ms. Santos has not offered any statistical  
20 evidence which would allow the Court to make the preliminary assessment that such deep,  
21 systemic error exists in UPS’s timekeeping system which resulted in a pattern of unreported meal  
22 and rest break violations. A handful of hand-selected declarations does not suffice, particularly  
23 where Defendant offers counter-declarations which tend to show that UPS did have a system for  
24 monitoring the required meal and rest break periods for Preload PTS.

25 The Court therefore finds, in its preliminary assessment of Mr. Berger’s statistical  
26 sampling analysis, that Ms. Santos has failed to offer proof of a uniform, companywide policy  
27 with respect to the Rest Break Subclass. Consequently, the Waiting Time Subclass, which is a  
28 derivative subclass (i.e., membership in the subclass is contingent upon a finding of certifiability

1 with respect to the Unpaid Time, Meal, and Rest Break Subclasses) is also not certified.

2 3. Wage Statement Subclass

3 That leaves the Wage Statement Subclass. California Labor Code § 226(a) provides, in  
4 relevant part:

5 An employer, semimonthly or at the time of each payment of wages,  
6 shall furnish to his or her employee, either as a detachable part of  
7 the check, draft, or voucher paying the employee’s wages, or  
8 separately if wages are paid by personal check or cash, an accurate  
9 itemized statement in writing showing (1) gross wages earned, (2)  
10 total hours worked by the employee, except as provided in  
11 subdivision (j), (3) the number of piece-rate units earned and any  
12 applicable piece rate if the employee is paid on a piece-rate basis,  
13 (4) all deductions, provided that all deductions made on written  
14 orders of the employee may be aggregated and shown as one item,  
15 (5) net wages earned, (6) the inclusive dates of the period for which  
16 the employee is paid, (7) the name of the employee and only the last  
17 four digits of his or her social security number or an employee  
18 identification number other than a social security number, (8) the  
19 name and address of the legal entity that is the employer and, if the  
20 employer is a farm labor contractor, as defined in subdivision (b) of  
21 Section 1682, the name and address of the legal entity that secured  
22 the services of the employer, and (9) all applicable hourly rates in  
23 effect during the pay period and the corresponding number of hours  
24 worked at each hourly rate by the employee and, beginning July 1,  
25 2013, if the employer is a temporary services employer as defined in  
26 Section 201.3, the rate of pay and the total hours worked for each  
27 temporary services assignment.

17 Cal. Lab. Code § 226(a).

18 Additionally, Wage Order 9 has a section entitled “[r]ecords,” which lists information that  
19 an employer is responsible for keeping in an accurate manner, including “[t]ime records showing  
20 when the employee begins and ends each work period. Meal periods, split shift intervals and total  
21 daily hours worked shall also be recorded. Meal periods during which operations cease and  
22 authorized rest periods need not be recorded.” See Wage Order 9-2001, 8 C.C.R. 11090, § 7(A)(3)  
23 (emphasis added).

24 Ms. Santos alleges that Defendant violated these statutes by sharing the Meal Break Code  
25 with other “Unpaid Work” time in the PTRS. Mot. at 5. Thus, it is impossible for an employee  
26 “to confirm from UPS’s records if a recording under this code is in fact a meal break, or some  
27 other entry. For example, [Santos’] records show instances of ‘non work’ time exceeding 30  
28 minutes, and it is unknown if this means a meal break, or some other unpaid time.” Mot. at 3.

1 Additionally, Ms. Santos claims that “meal premium payments are displayed on employee wage  
2 statements in a lump dollar sum, and wage statements do not show the hours or number of  
3 premiums paid, and corresponding rate.” Plaintiff’s Memorandum in Reply to Defendant’s  
4 Objections and Response to Plaintiff’s Trial Plan at 9-10 (Docket No. 89).

5 Ms. Santos argues that the failure to provide accurate wage statements has two  
6 implications. First, it affects the burden-shifting scheme established by the U.S. Supreme Court in  
7 *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). *Mot.* at 3. *Mt. Clemens* was a  
8 workplace suit, brought by factory employees under the Fair Labor Standards Act, seeking  
9 compensation for preliminary activities (e.g., walking to work areas and preparing pottery  
10 equipment) that their employer had subtracted from their timecards. *Id.* at 682-85. The Court held  
11 that employees could recover damages under the FLSA even where “the employer’s records are  
12 inaccurate or inadequate and the employee cannot offer convincing substitutes.” *Id.* at 687. In  
13 such a situation, an employee meets his burden if he “proves that he has in fact performed work  
14 for which he was improperly compensated and if he produces sufficient evidence to show the  
15 amount and extent of that work as a matter of just and reasonable inference.” *Id.* The burden  
16 “then shifts to the employer to come forward with evidence of the precise amount of work  
17 performed” or to show that the employee’s approximations are inaccurate. *Id.* at 687-88.

18 Counsel for Ms. Santos attempts to apply this burden-shifting scheme to missed meal and  
19 rest breaks under California labor law by citing Justice Werdegar’s concurring opinion in *Brinker*:  
20 “[i]f an employer’s records show no meal period for a given shift over five hours, a rebuttable  
21 presumption arises that the employee was not relieved of duty and no meal period was provided.”  
22 *Brinker*, 53 Cal. 4th at 1053 (J. Werdegar concurring). This burden shifting, however, would not  
23 help Plaintiff with respect to its meal break claim. UPS’s records show that meal breaks are  
24 uniformly present on putative class members’ timecards. The vast majority of analyzed time shifts  
25 (98.1%) did show a meal break on shifts greater than five hours. As to meal break claims, Justice  
26 Werdegar’s concurrence in *Brinker* is of no help. The Wage Order does not require recordation of  
27 rest breaks. Thus, burden shifting is not mandated, since UPS’s timekeeping system is not  
28 “inaccurate or inadequate” simply because it does not require that employees record their rest



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1 breaks. Moreover, as noted above, there is no evidence of a uniform or even pervasive policy of  
2 requiring employees to work through rest breaks and not paying rest break premiums.

3 The second implication of the wage statement violation is more direct. The failure to  
4 provide the requisite specificity can violate the Labor Code and Wage Order. For purposes of  
5 class certification, whether UPS’s time records comply with the Wage Order presents a common  
6 question of fact which predominates over individual issues. The form of the wage statement is  
7 uniform for all members of the putative class. Whether the form is sufficiently clear and specific  
8 as to satisfy Labor Code § 226(a) and Wage Order 9 is a matter that can be adjudicated in one  
9 stroke. Plaintiff has offered sufficient evidence on this matter at the class certification stage (i.e.,  
10 evidence that wage statements of Preload PTS are potentially ambiguous because PTRS does not  
11 distinguish between Meal Breaks and other “Unpaid Work” time). The Wage Statement Subclass  
12 is therefore suitable for certification.

13 It remains to be seen how damages will be calculated, on a classwide basis, if the trier of  
14 fact finds a uniform practice of ambiguous timecard entries. Counsel for Ms. Santos should  
15 provide a specific trial plan for classwide aggregation of damages for violations of California  
16 Labor Code § 226(a) and Wage Order 9.

17 **III. CONCLUSION**

18 For the foregoing reasons, Ms. Santos’ motion to certify the six proposed subclasses is  
19 **GRANTED in part and DENIED in part.** The Court certifies the following subclass only: all  
20 employees who were not provided with accurately itemized wage statements listing all hours  
21 worked and other information required to be listed under California Labor Code § 226(a) and

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1 Wage Order 9. Defendant's motion to exclude the declaration of Mr. Bennett S. Berger is  
2 **DENIED**, and Ms. Santos' motion to exclude the declarations of potential class members is  
3 **DENIED**.

4 This order disposes of Docket Nos. 64, 67, and 90.

5  
6 **IT IS SO ORDERED.**

7  
8 Dated: November 18, 2020

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11 EDWARD M. CHEN  
12 United States District Judge

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