

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 GOPI VEDACHALAM and KANGANA BERI,
5 on behalf of themselves and all
6 others similarly situated,

7 Plaintiffs,

8 v.

9 TATA CONSULTANCY SERVICES, LTD,
10 an Indian Corporation; and TATA
11 SONS, LTD, an Indian Corporation,

12 Defendants.

No. C 06-0963 CW

ORDER GRANTING IN
PART PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION,
GRANTING
PLAINTIFFS' MOTION
TO APPOINT CLASS
COUNSEL AND
GRANTING
DEFENDANTS' MOTION
FOR LEAVE TO FILE
A SECOND SUR-REPLY
(Docket Nos. 181,
185 and 272)

13 Plaintiffs Gopi Vedachalam and Kangana Beri charge Defendants
14 Tata Consultancy Services, Ltd. (TCS) and Tata Sons, Ltd., with
15 breach of contract and violations of California's Labor Code and
16 Unfair Competition Law (UCL). Plaintiffs now move for class
17 certification and appointment of class counsel. Defendants oppose
18 the motion for class certification, but do not oppose the motion
19 for appointment of class counsel. Having considered the papers
20 filed by the parties and their oral arguments at the hearing, the
21 Court GRANTS in part Plaintiffs' motion for class certification,
22 GRANTS Plaintiffs' motion for appointment of class counsel, and
23 GRANTS Defendants' motion for leave to file a second sur-reply.

24 BACKGROUND

25 Tata Sons and TCS, a division of Tata Sons, are Indian
26 corporations headquartered in Mumbai, India. TCS offers
27 information technology services to clients located worldwide.
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1 To serve its clients, TCS deploys its employees to client
2 sites worldwide on temporary assignments, known as "deputations."
3 Before an employee departs on a deputation, TCS and the employee
4 undertake several steps. TCS first files a petition for a United
5 States non-immigrant visa on behalf of the employee; in this visa
6 petition, TCS provides a sworn statement to the United States
7 government stating the amount of compensation to be paid to the
8 employee in the United States. After a visa is obtained, it is
9 TCS's policy that TCS and the employee enter into a deputation
10 agreement (DA) and deputation terms agreement (DTA). According to
11 Defendants, TCS has a "standard guideline" DTA, which they
12 describe as a form with blanks that TCS was supposed to complete
13 and have each deputed employee sign. See Hutchinson Decl. ¶ 4,
14 Ex. B, Tr. of Deposition of Ashok Mukherjee, at 143:8-144:12,
15 146:6-24.

16 The standard DTA states in part,

17 (B) Salary and Benefits in India. As stated in the
18 Deputation Agreement, you will continue to receive your
19 salary and benefits in India during the period of the
20 Deputation, subject to any tax requirements of the
21 United States and its states.

22 (C) Compensation in the United States. In addition to
23 the compensation and benefits you currently receive and
24 will continue to receive in India while on Deputation,
25 you shall receive additional compensation in the United
26 States in the gross amount of \$_____, less deductions
27 required by law or otherwise voluntarily authorized by
28 you. This compensation shall be for living and other
expenses in the United States.

(D) Total Gross Compensation. Amounts of salary paid by
TCS in India (under Paragraph 4 (b) above) and the
additional compensation in the United States (under
Paragraph 4(c) above) shall be aggregated and thus shall
be treated as your total gross compensation for purposes
of U.S. law with respect to your employment in the
United States.

1 According to Defendants, the blank space in section C was
2 completed in one of four different manners: (1) \$_____;
3 (2) \$50,000; (3) \$_____ (\$50,000); or (4) \$45,000 (\$50,000).

4 Some deputed employees also signed another form referred to
5 as the Authorization for Payroll Deductions (APDs). The APD
6 contains an overall gross wage, as well as wages to be paid in
7 India and in the United States. The APD also states certain
8 deductions that the deputed employees authorized from their United
9 States wages. For example, one APD executed within the class
10 period states in part,

11 I confirm that my rate of gross pay will be U.S.\$ 41718
12 per year during my deputation in the United States. The
13 composition of my gross pay is indicated below.

14 I hereby authorize TCS to deduct all applicable U.S.
15 Federal and State income and employment taxes from my
16 gross pay. In addition, I authorize TCS to deduct, in
17 monthly installments, the amounts listed below under
18 Voluntary Deductions from my net pay for matters for my
19 benefit. I understand that the deductions are not
20 conditions of employment and will not exceed 25% of my
21 disposable earnings in any work period.

17	I. Gross Wages:	\$ 41718
18	1. Wages paid in India	\$ 6234
19	(Indian wages to be paid in Rupees)	
20	2. Wages paid in the United States (I-I.1=I.2)	\$ 35484
21	II. Deductions from US Component of Gross Wages:	
22	1. Federal Income Tax	
23	2. State Income Tax	
24	3. Local Income Tax	
25	4. SUI/SDI	
26	5. Social security Tax	
27	6. Medicare Tax	
28	7. Total deductions from U.S. component of gross wages:	\$ 8665
	III. Net pay in the United States (I.2 minus II.7=III) :	\$ 26819
	IV. Voluntary deductions from Net pay in the U.S.	

1 Before July 2005, TCS compensated deputed employees in the
2 United States both by depositing funds into their accounts in
3 India and by issuing them paychecks in the United States. When
4 issuing paychecks in the United States, TCS deducted the amount of
5 the deputed employees' Indian wages from their United States
6 wages. TCS changed this compensation scheme in July 2005. TCS
7 employees now earn only a gross salary, paid in the United States.

8 Plaintiffs initiated this lawsuit on February 14, 2006. On
9 April 25, 2011, Plaintiffs filed this motion for class
10 certification, in which they sought certification of two classes
11 and one subclass. To prosecute their breach of contract claim,
12 Plaintiffs sought to certify under Rule 23(b)(3) a national class
13 defined as, "All non-U.S. citizens who were employed by Tata in
14 the United States at any time from February 14, 2002 through June
15 30, 2005." Mot. at 2. In their reply, Plaintiffs further limit
16 the national class definition to include only those "who were
17 deputed to the United States after January 1, 2002." Reply, at 3.
18 To prosecute their claims under California law alleging improper
19 recoupment of wages, waiting time penalties, and inaccurate wage
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1 statements,² Plaintiffs sought to certify under Rule 23(b)(3) a
2 California class defined as, "All non-U.S. citizens who were
3 employed by Tata in California at any time from February 14, 2002
4 through the date of judgment." Id.³

5 On July 13, 2011, this Court granted in part and denied in
6 part Defendants' motion for partial summary judgment. The Court
7 held, inter alia, that Plaintiffs had not alleged in their
8 complaint that Defendants' deduction of deputed employees' Indian
9 salaries from their American salaries violated California Labor
10 Code section 221 and dismissed that claim to the extent that it
11 was premised on Indian salary deductions. The Court granted
12 Plaintiffs leave to amend their complaint to seek relief on their
13 section 221 claims on these grounds.

14
15 ² Plaintiffs previously asserted a claim against Defendants
16 for failure to pay terminated employees for vested but unused
17 vacation time at the time of discharge in violation of California
18 Labor Code § 227.3. First Amended Compl. (1AC) ¶¶ 128-37. They
19 initially sought certification of the California class to pursue
20 this claim as well. Mot. at 1, n.1. After Plaintiffs filed their
21 motion for class certification, this Court granted summary
22 judgment in favor of Defendants on Plaintiff Beri's individual
23 claim for unpaid accrued vacation pay. Order Granting in Part and
24 Denying in Part Defs.' Mot. for Partial Summ. J., Docket No. 215,
25 19-22. Plaintiffs subsequently removed this cause of action from
26 their Second Amended Complaint (2AC) and clarified at the hearing
27 that they no longer seek certification to pursue this claim.

28 ³ To prosecute their claims seeking injunctive and
declaratory relief for their claim under California law regarding
inaccurate wage statements, Plaintiffs also initially sought to
certify under Rule 23(b)(2) a California current employee subclass
defined as, "All non-U.S. citizens who were employed by Tata in
California on or after February 14, 2006 through the date of
judgment." Mot. at 2. At the hearing on November 17, 2011,
Plaintiffs clarified that they were no longer seeking
certification of a Rule 23(b)(2) class.

1 On September 16, 2011, Defendants filed their opposition to
2 Plaintiffs' motion for class certification.

3 On September 20, 2011, Plaintiffs filed a second amended
4 complaint (2AC). In the 2AC, Plaintiffs remedied the deficiency
5 as to their section 221 claim based on the deduction of Indian
6 salary.

7 On November 3, 2011, Plaintiffs filed a revised reply. In
8 their reply, Plaintiffs make clear that they are seeking
9 certification to prosecute on a class-wide basis their claim that
10 Defendants' deduction of deputed employees' Indian salaries from
11 their American salaries violated California Labor Code section
12 221. See Reply, at 20.

13 DISCUSSION

14 I. Motion for Leave to File a Second Sur-reply

15 On December 2, 2011, Defendants filed a motion for leave to
16 file a second sur-reply to address certification of the class to
17 prosecute Plaintiffs' section 221 claim for deducting class
18 members' Indian salary from their United States compensation.
19 With their motion, Defendants submitted a proposed eight-page sur-
20 reply.

21 The Court GRANTS Defendants' motion for leave to file a
22 sur-reply. However, the Court will consider only those arguments
23 in the proposed sur-reply that address certification of the
24 California class to prosecute Plaintiffs' section 221 claim based
25 on the deduction of Indian salary and that Defendants could not
26 have previously made in opposition to certification of the
27 national class to prosecute Plaintiffs' breach of contract claim
28 based on the deduction of Indian salary.

1 II. Defendants' Evidentiary Objections

2 Defendants seek to strike the declarations Plaintiffs
3 submitted from putative class members, on the grounds that they
4 are "cookie cutter" declarations made without the declarants'
5 personal knowledge, that they contradict the declarants'
6 deposition testimony, and that eight declarants were not produced
7 for depositions.

8 "On a motion for class certification, the Court makes no
9 findings of fact and announces no ultimate conclusions on
10 Plaintiffs' claims" and therefore "the Court may consider evidence
11 that may not be admissible at trial." Keiholtz v. Lennox Hearth
12 Prods., Inc., 268 F.R.D. 330, 337 n.3 (N.D. Cal. 2010).

13 Defendants do not include specific evidentiary objections in their
14 opposition, as required by Local Rule 7-3, and instead make
15 general and conclusory objections to all of Plaintiffs'
16 declarations. While Defendants argue that some of the
17 declarations contradict the subsequent deposition testimony, the
18 discrepancies that they point out in their opposition appear
19 primarily because Defendants rely on excerpts of lengthy
20 depositions. The apparent contradictions are resolved or greatly
21 diminished when placed in the context of additional deposition
22 testimony. This distinguishes the declarations at issue from
23 those at issue in Evans v. IAC/Interactive Corp., 244 F.R.D. 568
24 (C.D. Cal. 2007), which contained statements that were "admittedly
25 false," were clearly "simply made up by the declarant," or "for
26 which the declarants lacked actual knowledge." Id. at 578. Even
27 in that case, the court declined to strike the declarations at
28 issue, but instead considered these factors when determining how

1 much weight to give them. Id. at 571. Defendants offer no
2 specific facts or persuasive arguments that any of the
3 declarations were made without the declarants' personal knowledge.

4 Defendants also seek to strike eight specific declarations on
5 the basis that Plaintiffs did not make the declarants available
6 for depositions. In support of their argument, Defendants only
7 cite Rojas v. Zaninovich, Inc., 2011 WL 2636071 (E.D. Cal.), in
8 which, in response to a motion to compel, the court directed the
9 plaintiffs to make "all good faith efforts" to produce a subset of
10 class members who had submitted declarations in support of class
11 certification. The court did not require the plaintiffs to
12 produce all absent class members who had done so, and warned the
13 plaintiffs that the declarations of class members who willfully
14 failed to appear for depositions would be struck. Here, however,
15 Defendants failed to subpoena six of these declarants, Shaver
16 Reply Decl. ¶ 48, and did not file a motion to compel the
17 depositions of any of them.

18 Accordingly, Defendants' request to strike is DENIED.

19 III. Plaintiffs' Evidentiary Objections

20 Plaintiffs object to the report and supplemental report of
21 Defendants' expert witness Bernard Siskin and to Defendants' 2006
22 internal audit examining DTAs executed between 2000 and 2005.
23 Defendants have addressed Plaintiffs' objections in their first
24 sur-reply.

25 Plaintiffs object to Dr. Siskin's initial report on the basis
26 that it required no expert skill and contains errors and legal
27 conclusions unhelpful to the Court and which the expert is not
28 qualified to make. Defendants respond that Dr. Siskin's report

1 contains statistical analysis for which he is qualified and that
2 his statistical summary is helpful to the Court. In his report,
3 Dr. Siskin reviews a sample of DTAs that Defendants provided to
4 Plaintiffs and provides an opinion that the typed \$50,000 figure
5 was a "sample figure" and there was "no common, consistent or
6 reliable information about what U.S. compensation was promised to
7 a TCS employee." The report also has data tables where Dr. Siskin
8 displays how frequently the blanks in DTAs were completed in
9 various ways and how the compensation amount compares to the
10 amount of compensation stated in visa applications.

11 The Court SUSTAINS in part and OVERRULES in part Plaintiffs'
12 objections to Dr. Siskin's report. The Court will consider the
13 data summaries that Dr. Siskin created, and will take into account
14 the purported mistakes that Plaintiffs point out in determining
15 how much weight to accord them, and in comparing them to the
16 corresponding data summaries prepared by Plaintiffs. However, the
17 Court excludes Dr. Siskin's opinions. In his report, Dr. Siskin
18 does not explain the basis for his opinions. He does not
19 demonstrate that he is an expert in contract interpretation or
20 determining whether a particular contract term was a sample or
21 intended term. He appears to base his opinions on several
22 factors: that the figure is "in parentheses," see Siskin Decl. ¶
23 16; that \$50,000 is typed more frequently than it is handwritten
24 and that other figures are more frequently handwritten, see id. at
25 ¶ 17; that \$50,000 rarely appears on visa petitions, see id. at ¶
26 18; and that only one of the DTAs with the figure \$50,000 had a
27 "corresponding" visa petition with a compensation amount close to
28 \$50,000, id. Dr. Siskin does not offer evidence of any scientific

1 methodology at all, let alone a reliable and valid methodology,
2 that would allow a statistician to determine that a compensation
3 amount entered on a contract did not accurately reflect what was
4 promised in that contract, even though it appeared there. Despite
5 Defendants' assertions, Dr. Siskin does not refer to correlations
6 or any other types of statistical tests that he used to compare
7 the figures on an objective basis; instead, he only presents the
8 data in descriptive terms and does not explain how he derives his
9 opinions from these descriptions.

10 Plaintiffs also object to Dr. Siskin's supplemental report,
11 filed on October 26, 2011, two days before Plaintiffs' reply
12 deadline. In this report, Dr. Siskin attempts to reconcile some
13 of his data summaries with those created by Plaintiffs, using an
14 Excel document that Plaintiffs provided to him on October 17,
15 2011. The Court SUSTAINS Plaintiffs' objection to the
16 supplemental report to the extent Dr. Siskin puts forward the same
17 opinions as in his original report and DENIES Plaintiffs'
18 objection to the extent it pertains to the data summaries
19 themselves.

20 Plaintiffs also object to the 2006 Internal Audit of DTAs and
21 other documents, on which Defendants rely to argue that many class
22 members did not enter into DTAs. Plaintiffs state that Defendants
23 cannot locate seventy-five percent of the DTAs that were examined
24 in the audit and, thus, Plaintiffs cannot verify or challenge its
25 findings. Plaintiffs also assert that Defendants have "improperly
26 concealed and withheld the audit from discovery for years," by
27 disclosing it for the first time with their opposition and not
28 turning it over in initial or revised disclosures or in response

1 to document requests and Court orders. The Court DENIES
2 Plaintiffs' objection to the 2006 Internal Audit but will consider
3 Plaintiffs' arguments in determining the amount of weight to
4 accord this evidence.

5 IV. Motion for Class Certification

6 A. Legal Standard

7 Plaintiffs seeking to represent a class must satisfy the
8 threshold requirements of Rule 23(a) as well as the requirements
9 for certification under one of the subsections of Rule 23(b).
10 Rule 23(a) provides that a case is appropriate for certification
11 as a class action if

12 (1) the class is so numerous that joinder of all
members is impracticable;

13 (2) there are questions of law or fact common to the
class;

14 (3) the claims or defenses of the representative
15 parties are typical of the claims or defenses of the
class; and

16 (4) the representative parties will fairly and
17 adequately protect the interests of the class.

18 Fed. R. Civ. P. 23(a). Rule 23(b) further provides that a case
19 may be certified as a class action only if one of the following is
20 true:

21 (1) prosecuting separate actions by or against
individual class members would create a risk of:

22 (A) inconsistent or varying adjudications with
23 respect to individual class members that would
establish incompatible standards of conduct for the
party opposing the class; or

24 (B) adjudications with respect to individual class
25 members that, as a practical matter, would be
dispositive of the interests of the other members
26 not parties to the individual adjudications or
would substantially impair or impede their ability
27 to protect their interests;

28 (2) the party opposing the class has acted or refused to
act on grounds that apply generally to the class, so

1 that final injunctive relief or corresponding
2 declaratory relief is appropriate respecting the class
3 as a whole; or

4 (3) the court finds that the questions of law or fact
5 common to class members predominate over any questions
6 affecting only individual members, and that a class
7 action is superior to other available methods for fairly
8 and efficiently adjudicating the controversy. The
9 matters pertinent to these findings include:

10 (A) the class members' interests in individually
11 controlling the prosecution or defense of separate
12 actions;

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

16 (C) the desirability or undesirability of
17 concentrating the litigation of the claims in the
18 particular forum; and

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

21 Fed. R. Civ. P. 23(b). Plaintiffs assert that the national and
22 California classes qualify for certification under subdivision
23 (b)(3).

24 Plaintiffs seeking class certification bear the burden of
25 demonstrating that each element of Rule 23 is satisfied, and a
26 district court may certify a class only if it determines that the
27 plaintiffs have borne their burden. Gen. Tel. Co. of Sw. v.
28 Falcon, 457 U.S. 147, 158-61 (1982); Doninger v. Pac. Nw. Bell,
Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). The court must conduct
a "'rigorous analysis,'" which may require it "'to probe behind
the pleadings before coming to rest on the certification
question.'" Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551
(2011) (quoting Falcon, 457 U.S. at 160-61). "Frequently that
'rigorous analysis' will entail some overlap with the merits of
the plaintiff's underlying claim. That cannot be helped." Dukes,
131 S. Ct. at 2551. To satisfy itself that class certification is

1 proper, the court may consider material beyond the pleadings and
2 require supplemental evidentiary submissions by the parties.
3 Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975).
4 Ultimately, it is in the district court's discretion whether a
5 class should be certified. Molski v. Gleich, 318 F.3d 937, 946
6 (9th Cir. 2003); Burkhalter Travel Agency v. MacFarms Int'l, Inc.,
7 141 F.R.D. 144, 152 (N.D. Cal. 1991).

8 B. Rule 23(a) Requirements

9 1. Numerosity

10 Defendants concede that they deputed 13,121 employees to the
11 United States between February 14, 2002 and June 30, 2005. Opp.
12 at 2. Plaintiffs have submitted evidence that there were at least
13 6,244 California class members as of March 2010. Hutchinson Decl.
14 ¶ 77, Ex. 19, 5. Defendants do not dispute that both the national
15 and California classes meet the numerosity requirement.
16 Accordingly, the Court finds that Plaintiffs have satisfied this
17 requirement.

18 2. Commonality

19 Rule 23 contains two related commonality provisions. Rule
20 23(a)(2) requires that there be "questions of law or fact common
21 to the class." Fed. R. Civ. P. 23(a)(2). Rule 23(b)(3), in turn,
22 requires that such common questions predominate over individual
23 ones.

24 The Ninth Circuit has explained that Rule 23(a)(2) does not
25 preclude class certification if fewer than all questions of law or
26 fact are common to the class:

27 The commonality preconditions of Rule 23(a)(2) are less
28 rigorous than the companion requirements of Rule
23(b)(3). Indeed, Rule 23(a)(2) has been construed

1 permissively. All questions of fact and law need not be
2 common to satisfy the rule. The existence of shared
3 legal issues with divergent factual predicates is
4 sufficient, as is a common core of salient facts coupled
5 with disparate legal remedies within the class.

6 Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

7 Plaintiffs contend that there are numerous common questions
8 of fact and law concerning Defendants' alleged illegal employment
9 practices, including the interpretation of the standard
10 compensation clauses in the form DTA entered into by all class
11 members, whether Defendants had a policy or practice of requiring
12 deputed employees to sign over their tax refund checks to
13 Defendants, and whether Defendants had a policy or practice of
14 deducting the Indian salary of deputed employees from their
15 American salaries, rather than paying deputed employees both
16 salaries. Plaintiffs cite a number of cases involving form
17 contracts, in which courts have found that the commonality
18 requirement was met.

19 Plaintiffs present evidence that, in all of the earnings
20 statements Defendants produced for the class period, Defendants
21 deducted the Indian salary from the American salary, Shaver Decl.
22 ¶ 8, and Defendants do not argue that they did not have a policy
23 and practice of deducting class members' Indian salary from their
24 United States salary. Instead, Defendants assert that this case
25 does not meet Rule 23(b)(3)'s commonality provision, because no
26 form contract exists, there is no policy or practice of requiring
27 class members to sign over their tax refund checks, and there is
28 no policy or practice of providing inaccurate wage statements.
Defendants also argue that there is no common interpretation of
the purportedly ambiguous contract language. Because Defendants

1 repeat many of their arguments in disputing that the predominance
2 requirement is met, the Court will address those arguments in its
3 discussion of predominance.

4 Defendants argue that, even though their own policies
5 required that Defendants enter into a DTA with each employee prior
6 to a deputation, many putative members of the national class did
7 not enter into any "form contract" and, thus, they do not share
8 common questions as to whether such a contract was breached.
9 Defendants point to several sources to support their contention
10 that some class members did not enter into the form DTA contracts.

11 First, Defendants point to a 2006 internal audit, which they
12 say demonstrates that they did not consistently use DTAs, because
13 between 2000 and 2006, only "62% of TCS employees deputed to the
14 United States entered into complete DTAs." Mukherjee Decl. ¶ 9.
15 The Court finds that this audit does not provide persuasive
16 evidence that Defendants did not consistently use DTAs during the
17 class period. The audit encompasses substantial time periods both
18 before and after the class period for the national class, and
19 Defendants provide no evidence which would support that the
20 thirty-eight percent of TCS employees without "complete DTAs" were
21 deputed within the class period. Instead, Plaintiffs offer
22 evidence that, of the small fraction of files that Defendants can
23 now locate from the audit, over forty percent were from 2006,
24 after the end of the national class period. Furthermore, for the
25 time period in the audit before the start of the class period,
26 which was approximately one-third of the time covered by the audit
27 in total, Defendants did not yet use DTAs for deputed employees.
28 Further, the audit summary does not state that the thirty-eight

1 percent of deputed employees without complete DTAs did not enter
2 into a DTA with Defendants at all; instead, it indicates that
3 thirty-eight percent of the deputed employees entered into a DTA
4 that was not in "total compliance." Mukherjee Decl. ¶ 9, Ex. A.
5 This included, for example, a DTA missing the date or the employee
6 number. Id.

7 Defendants also assert that documentary evidence proves that
8 many of the putative class members who submitted declarations did
9 not have DTAs. They state that, "out of the 35 declarants made
10 available by Plaintiffs for deposition, only 12 of them had DTAs"
11 that can now be located, even though Defendants acknowledge that
12 additional declarants testified that they had signed DTAs. Opp.
13 at 16. Defendants appear to base their arguments on the number of
14 DTAs that they were able to locate in their own records, excluding
15 those of the two named Plaintiffs. See Smith Decl. ¶¶ 42-54
16 (providing copies of the DTAs of twelve deponents). These numbers
17 are unpersuasive; Defendants do not provide evidence that they
18 were able to locate all DTAs that ever existed, and there is
19 evidence that they could not: in response to Plaintiffs' request
20 for the DTAs underlying the 2006 audit, Defendants have thus far
21 only located about 24.9% of the DTAs that were known to have
22 existed and were examined in the audit. Reply, at 3 and n.5. See
23 also Siskin Decl. ¶ 4 (of 466 randomly selected employees from
24 within the class period, Defendants were only able to produce 200
25 complete files). Thus, the fact that Defendants do not have these
26 documents does not mean that they did not exist at some point.

27 Finally, Defendants assert that the deposition testimony of
28 six declarants establishes that they did not sign DTAs and imply

1 that the testimony contradicts information in some of their
2 declarations. The Court is not persuaded that the deposition
3 testimony establishes that the putative class member declarants
4 did not sign DTAs during the class period.⁴ The deposition
5 testimony to which Defendants point only shows either that the
6 declarants did not sign a DTA prior to the start of the class
7 period or that the declarants signed various contracts with
8 Defendants during the class period and could not remember
9 specifically what each agreement was called.

10 Defendants also argue that the DTA was not a form contract
11 because of variation in how the blank was completed in the section
12 of the DTA entitled, "Compensation in the United States," quoted
13 above, and because the interpretation of the agreement could
14 require consideration of extrinsic evidence. However, the DTA is
15 a form contract drafted by Defendants and the executed DTAs are
16 identical in regards to almost every material term, including the
17 provision stating that the employees would be paid a United States
18 salary "in addition to" the amount they are paid in India and the
19 reference to "gross compensation." See In re Chase Bank USA, N.A.
20 "Check Loan" Contract Litigation, 274 F.R.D. 286, 291-92 (N.D.
21 Cal. 2011) (where terms of agreements were "materially similar,"
22 even though there was variation in the specific text, and "the
23

24 ⁴ Plaintiffs state that, after submitting the declaration of
25 Sridhar Venkateswaran, they learned that he was in fact not a
26 putative class member, because he was not employed by Defendants
27 and was instead employed only by a separate entity, Tata Infotech,
28 which is not a party to this case. Because Venkateswaran is not a
putative class member, whether or not he signed a DTA during the
class period is irrelevant here.

1 amount of damages incurred by any particular class member may
2 differ," the differences do not defeat certification under the
3 commonality prong, "even where individualized evidence may be
4 necessary for purposes of a damages calculation"). Even if
5 Defendants could establish some ambiguity with extrinsic evidence,
6 the ambiguous contract terms would interpreted against them, as
7 the drafters of the form contract. See Restatement (Second) of
8 Contracts § 206 ("In choosing among the reasonable meanings of a
9 promise or agreement or a term thereof, that meaning is generally
10 preferred which operates against the party who supplies the words
11 or from whom a writing otherwise proceeds."); Cal. Civ. Code
12 § 1654 ("In cases of uncertainty not removed by the preceding
13 rules, the language of a contract should be interpreted most
14 strongly against the party who caused the uncertainty to exist.");
15 Tahoe National Bank v. Phillips, 4 Cal. 3d 11, 20 (1971) ("Since
16 the alleged ambiguities appear in a standardized contract, drafted
17 and selected by the bank, which occupies the superior bargaining
18 position, those ambiguities must be interpreted against the
19 bank."). Further, when there is a form contract of adhesion at
20 issue, as there is here, "the agreement 'is interpreted wherever
21 reasonable as treating alike all those similarly situated, without
22 regard to their knowledge or understanding of the standard terms
23 of the writing.'" Ewert v. eBay, Inc., 2010 WL 4269259, at *7
24 (N.D. Cal.) (quoting Restatement (Second) of Contracts § 211(2)).
25 "[C]ourts in construing and applying a standardized contract seek
26 to effectuate the reasonable expectations of the average member of
27 the public who accepts it.'" Id. (quoting Restatement (Second) of
28 Contracts § 211(2), at Comment e) (formatting in original).

1 Accordingly, in construing the form contract between Defendants
2 and class members, the Court need not delve into the actual
3 knowledge of individual class members. Because Defendants do not
4 dispute that there are at least some identical material contract
5 provisions, their arguments about the amounts in the compensation
6 blank go more properly to whether individual questions
7 predominate.

8 Defendants rely heavily on Wal-Mart Stores, Inc. v. Dukes,
9 131 S. Ct. 2541 (2011), to argue that commonality cannot be found
10 here. In Dukes, the Supreme Court found that the party seeking
11 certification had not provided evidence sufficient to find that
12 there was a company-wide discriminatory pay and promotion policy.
13 Id. at 2555-57. However, here, Plaintiffs have provided
14 persuasive evidence that Defendants had a policy of requiring
15 deputed employees to sign form DTAs, which materially varied only
16 in the amount of additional compensation, and Defendants have not
17 produced convincing evidence to disprove this. There was an
18 undisputed policy that Defendants deducted Indian salary from
19 deputed employees' American paychecks during the class period.
20 There was an undisputed policy that Defendants sent income tax
21 refund checks to deputed employees, stamped to pay to the order of
22 Defendants. Accordingly, here, a class-wide proceeding will
23 generate common answers regarding whether Defendants engaged in
24 practices that violated the parties' agreements and California
25 law.

26 Thus, the Court finds that Plaintiffs have satisfied their
27 burden to meet the commonality requirement.

28

1 3. Typicality

2 Rule 23(a)(3)'s typicality requirement provides that a "class
3 representative must be part of the class and possess the same
4 interest and suffer the same injury as the class members."
5 Falcon, 457 U.S. at 156 (quoting E. Tex. Motor Freight Sys., Inc.
6 v. Rodriguez, 431 U.S. 395, 403 (1977)) (internal quotation marks
7 omitted). The purpose of the requirement is "to assure that the
8 interest of the named representative aligns with the interests of
9 the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th
10 Cir. 1992). Rule 23(a)(3) is satisfied where the named plaintiffs
11 suffered the same or similar injury as the unnamed class members,
12 the action is based on conduct which is not unique to the named
13 plaintiffs, and other class members have been injured by the same
14 course of conduct. Id. Class certification is inappropriate,
15 however, "where a putative class representative is subject to
16 unique defenses which threaten to become the focus of the
17 litigation." Id. (quoting Gary Plastic Packaging Corp. v. Merrill
18 Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d Cir.
19 1990).

20 Defendants' arguments against typicality overlap
21 substantially with their arguments against commonality and
22 predominance. Defendants do not dispute that they acted in the
23 same way toward Plaintiffs and the other putative class members or
24 that Defendants applied common policies to both. Instead, they
25 argue that named Plaintiffs and the DTAs that they signed are not
26 typical of the class because there are no form contracts shared by
27 all class members. The Court addresses this argument in
28 discussing the commonality and predominance requirements.

1 Defendants also argue that Plaintiff Beri is not typical of
2 the class, because Defendants may be able to develop a mutual
3 mistake affirmative defense against her regarding the amount of
4 compensation proven. However, this does not defeat typicality.
5 First, the availability of this defense is speculative at this
6 point; Defendants do not assert that they have any evidence in
7 support of this defense, but rather state that they will develop
8 the defense through additional discovery. Opp. at 21. Plaintiff
9 Beri maintains that she herself was not mistaken about the
10 additional compensation amount. Defendants have not argued that
11 they will be able to prove a unilateral mistake defense. This
12 defense would not be unique to Plaintiff Beri; Defendants claim
13 that they will assert the mutual mistake defense against other
14 class members, though again they make this claim in a speculative
15 way. Further, even if mutual mistake rendered the compensation
16 term ambiguous, Defendants drafted the contract, so the ambiguous
17 term would be construed in favor of Plaintiff Beri and the other
18 class members.

19 Thus, the Court finds that the interests of the named
20 Plaintiffs are reasonably co-extensive with the absent class
21 members and that the typicality requirement has been met.

22 4. Adequacy

23 Rule 23(a)(4) establishes as a prerequisite for class
24 certification that "the representative parties will fairly and
25 adequately protect the interests of the class." Fed. R. Civ. P.
26 23(a)(4). Defendants do not dispute Plaintiffs' assertion that
27 they satisfy the adequacy requirement, and the Court finds that
28 Plaintiffs have met their burden on this prong.

1 C. Rule 23(b)(3) requirements

2 1. Predominance

3 "The predominance inquiry of Rule 23(b)(3) asks whether
4 proposed classes are sufficiently cohesive to warrant adjudication
5 by representation. The focus is on the relationship between the
6 common and individual issues." In re Wells Fargo Home Mortgage
7 Overtime Pay Litig., 571 F.3d 953, 957 (9th Cir. 2009) (internal
8 quotation marks and citations omitted). "'When common questions
9 present a significant aspect of the case and they can be resolved
10 for all members of the class in a single adjudication, there is
11 clear justification for handling the dispute on a representative
12 rather than on an individual basis.'" Hanlon, 150 F.3d at 1022
13 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane,
14 Federal Practice & Procedure § 1777 (2d ed. 1986)). A court must
15 make "some prediction as to how specific issues will play out in
16 order to determine whether common or individual issues predominate
17" In re New Motor Vehicles Canadian Export Antitrust
18 Litig., 522 F.3d 6, 20 (1st Cir. 2008) (citation and internal
19 quotation marks omitted).

20 a. Breach of Contract (National Class)

21 To assert a cause of action for breach of contract, a
22 plaintiff must plead: (1) the existence of a contract; (2) the
23 plaintiff's performance or excuse for non-performance; (3) the
24 defendant's breach; and (4) damages to the plaintiff as a result
25 of the breach. Armstrong Petrol. Corp. v. Tri-Valley Oil & Gas
26 Co., 116 Cal. App. 4th 1375, 1391 n.6 (2004).

27 Plaintiffs argue that common issues will predominate, because
28 the issue central to this claim is the interpretation of specific

1 provisions in a form contract applicable to all class members.
2 Plaintiffs' breach of contract claim is premised on three separate
3 types of violations: (1) that Defendants deducted class members'
4 Indian salaries from their American salaries, even though the
5 contract stated that the American salary would be "in addition to"
6 the Indian salary; (2) that Defendants required class members to
7 sign over their tax refunds; and (3) that Defendants did not pay
8 class members the specific amount of additional United States
9 compensation that they were contractually obliged to pay.

10 Defendants argue that individual issues would predominate in
11 determining their liability under the first type of violation,
12 because some class members authorized Defendants to deduct their
13 Indian wage from their gross wage. Under California law, any
14 deductions not otherwise authorized by state or federal law must
15 be "expressly authorized in writing by the employee." Cal. Lab.
16 Code § 224. Thus, Defendants must have written authorization of
17 such a deduction. Defendants argue that some class members signed
18 APDs in which they authorized the deduction of their Indian
19 salaries from their United States wages. However, these APDs do
20 not demonstrate that individual issues will predominate for
21 several reasons. First, while the specific monetary amounts and
22 formatting of the forms differ, the APDs are uniform in their
23 material terms and, thus, the determination of whether class
24 members who signed the APDs authorized the deduction of their
25 Indian salary from their United States salary can be made on a
26 class-wide basis.

27 Second, contrary to Defendants' contentions, neither the two
28 APDs produced by Defendants from within the class period, nor the

1 APDs from outside the class period that they proffered,
2 demonstrate that class members authorized this deduction.
3 Defendants argue that, because the APDs show that wages paid in
4 the United States are calculated by subtracting the Indian salary
5 from the deputed employee's "Gross Wages," the employees
6 authorized the deduction of their Indian salary from their United
7 States compensation amount. See, e.g., Defs.' Suppl. Brief, at 6.
8 However, Defendants' conclusion conflates the total gross wages
9 and the gross wages paid in the United States and ignores that the
10 contracts that they drafted use the word "gross" in multiple
11 contexts. The APDs put in evidence show that the deputed
12 employee's "Gross Wages" is the total of the "Wages paid in India"
13 and "Wages paid in the United States." This is consistent with
14 the language in the form DTAs. The DTAs state that deputed
15 employees will receive, "in addition to the compensation and
16 benefits you currently receive and will continue to receive in
17 India," an "additional compensation in the United States in the
18 gross amount of \$ [blank], less deductions required by law or
19 otherwise voluntarily authorized by you." They also state that
20 "Total Gross Compensation" is the aggregate of the "amounts of
21 salary paid by TCS in India" and "the additional compensation in
22 the United States." The APDs thus authorize subtraction of the
23 Indian salary from the total gross compensation in order to
24 calculate the United States compensation--just as the employees
25 authorized in the DTA--but do not authorize subtraction of the
26 Indian salary from the United States compensation, which is what
27 Plaintiffs allege that Defendants did. Further, the fact that
28 Defendants may have contracted to pay class members a net salary

1 that was calculated after specific mandatory and voluntary
2 deductions were withheld from the contracted-for gross salary does
3 not mean that Defendants could make additional deductions from the
4 gross salary beyond those which were specifically authorized, as
5 Defendants appear to argue.

6 Defendants also argue that individual issues predominate as
7 to the second type of violation, because "there is no uniform
8 policy or practice regarding tax refunds." Opp. at 24-25.
9 Defendants claim that the Court would have to hold mini-trials to
10 determine whether each individual employee signed a tax refund
11 check over to Defendants in a given year. However, Defendants'
12 Rule 30(b)(6) witness, Ramakrishnan Venkataraman, testified that,
13 during the class period, Defendants' policy and practice was that
14 "when the tax refunds are received, they have been sent to the
15 employee with a request that the tax refunds are signed and sent
16 back to the company." Hutchinson Decl. ¶ 7, Ex. E, Tr. 223:9-12.
17 He also agreed that Defendants' "practice" was to mark "the back
18 of deputed employees' tax refund checks with a stamp that read,
19 "Pay to the order of [Defendants]." Id. at 223:23-224:1.
20 Defendants also do not dispute Plaintiffs' evidence that one
21 hundred percent of the tax refund checks that Defendants produced
22 from the period relevant to the class, with a copy of the back of
23 the check, were stamped in this way. Shaver Decl. ¶ 9. See also
24 Summ. J. Order, at 16 (noting that Defendants presented evidence
25 that their "Overseas Deputation Manual stated that employees on
26 deputation were required to sign over their income tax refund
27 checks to Defendants"). Although Defendants state that Plaintiffs
28 "misconstrue" their policy, they do not explain how. Instead,

1 Defendants argue that this policy was not always uniformly
2 applied, because, for example, some class members did not comply
3 with the policy--did not return the signed tax refund--or
4 sometimes Defendants did not receive a refund check for a class
5 member. Opp. at 25. However, Defendants cannot disprove the
6 existence of their own acknowledged policy by asserting that
7 isolated employees failed to comply with it. See Kurihara v. Best
8 Buy Co., 2007 U.S. Dist. LEXIS 64224, at 29-30 (N.D. Cal.) ("Where
9 a plaintiff challenges a well-established company policy, a
10 defendant cannot cite poor management to defend against class
11 certification."). Further, these arguments primarily relate to
12 the amount of damages, which "is invariably an individual question
13 and does not defeat class action treatment." Blackie v. Barrack,
14 524 F.2d 891, 905 (9th Cir. 1975) (citations omitted).

15 Defendants argue that individual issues will predominate as
16 to the third type of violation, because there is no form contract
17 in that there were variations in how the blank in the
18 "Compensation in the United States" section was or was not filled
19 in. Defendants argue that these variations create ambiguity and
20 mean that individual inquiries will need to be conducted to
21 ascertain how much additional compensation Defendants had promised
22 to each class member in order to determine if Defendants breached
23 this obligation.

24 Defendants rely primarily on Sacred Heart Health Sys., Inc.
25 v. Humana Mil. Healthcare Serv., Inc., 601 F.3d 1159 (11th Cir.
26 2010). However, in that case, there were significant variations
27 in multiple contract clauses that were material to the dispute,
28 including at least thirty-three material variations of the payment

1 clauses, which could not be adequately addressed through
2 sub-classes. Id. at 1171-76. In contrast, here there is
3 variation only in one material contract term. Even for that
4 term--the specific amount of additional compensation promised--
5 there is much less variation here than in Sacred Heart. As stated
6 above, Defendants identify several variations in how this blank is
7 completed. Defendants concede that a substantial percentage of
8 the DTAs were unambiguous and included a "reliable, intended, and
9 agreed compensation amount." Opp. at 18.⁵ For these DTAs,

12 ⁵ Defendants state at several points in their opposition that
13 fifty-nine percent of sample DTAs examined had ambiguous terms and
14 that forty-one percent had unambiguous terms, citing the
15 declaration of Dr. Siskin, which contains a summary of a sample of
16 194 DTAs executed between 2002 and 2005 that they produced to
17 Plaintiffs following a court order. In his summary, Dr. Siskin
18 created eight categories of DTAs, based on how the compensation
19 field was completed, and assigned each DTA to a category. Siskin
20 Decl. ¶ 14, Chart A; Siskin Suppl. Decl. Chart A. To calculate
21 the number of DTAs that Defendants concede have unambiguous
22 compensation terms, Dr. Siskin appears to have added up the number
23 of DTAs in four of his categories in which there was a figure in
24 the blank other than a typed \$50,000, including three DTAs in
25 which \$50,000 was written in by hand. Id. Dr. Siskin included in
26 this figure DTAs in which the number in the blank was followed by
27 a typed \$50,000 in parentheses--(\$50,000)--which he describes as a
28 sample instruction on how to complete the field. Id. This
totaled eighty-two DTAs. Id.

23 In his supplemental declaration, Dr. Siskin corrected the
24 percentage obtained by dividing eighty-two by 194 from fifty-nine
25 percent to fifty-eight percent. Siskin Suppl. Decl. ¶ 3. He also
26 reassigned two DTAs to a different category and assigned eleven
27 DTAs to categories, which he stated he had previously been unable
28 to do. Id. at ¶¶ 5-8. He also stated that, if he limited his
analysis to the 143 DTAs he found to be executed within the class
period, he would characterize approximately twenty-nine percent of
the DTAs as unambiguous. Id. at ¶ 5.

1 extrinsic evidence of intent would be inadmissible, and thus gross
2 wages could be determined on a common basis, supporting a finding
3 of predominance.

4 For the remaining DTAs, Defendants argue that there is
5 ambiguity in the amount of compensation promised, which would
6 necessitate individualized inquiries into the intent of the
7 parties to ascertain the intended amount. These DTAs have
8 compensation fields completed in the following three manners:
9 (1) _____;⁶ (2) \$50,000; (3) _____ (\$50,000). Defendants also
10 assert that this term is ambiguous for class members for whom DTAs
11 cannot be located. Defendants contend that, for the class members
12 with ambiguous compensation terms, individual extrinsic evidence
13 will be required to determine the parties' intent and thus
14 individual issues would predominate.

15 Extrinsic evidence is only admissible if contract terms are
16 ambiguous. Under California law, the interpretation of a contract
17 involves a two-step process. Wolf v. Superior Court, 114 Cal.
18 App. 4th 1343, 1351 (2004). First, the court provisionally

19
20 In their analysis of the same sample, Plaintiffs calculated
21 that thirty-three percent of the 172 DTAs executed within the
22 class period had a compensation term other than \$50,000 in the
relevant blank. Shaver Decl. ¶ 11.

23 Thus, the parties agree that approximately a third or more of
the DTAs contain an unambiguous additional compensation amount.

24 ⁶ Dr. Siskin separates DTAs in which the fields are completed
25 in the following two ways: _____ and _____(_____). See Siskin
26 Decl. ¶ 14, Chart A; Siskin Suppl. Decl. Chart A. In their
27 opposition brief, Defendants do not draw an analytical distinction
between these categories, and the Court finds none. Accordingly,
28 the Court considers these variations to be the same for the
purposes of its analysis.

1 receives all credible evidence concerning the parties' intentions
2 to determine if there is an ambiguity. Id.; Pac. Gas & Elec. Co.
3 v. G.W. Drayage & Rigging Co., Inc., 69 Cal. 2d 33, 39-40 (1968).

4 Thus, the court will examine the proffered evidence concerning the
5 parties' intentions in order to determine whether the disputed
6 terms are ambiguous. If, in light of the extrinsic evidence, the
7 court determines the language of the contract is ambiguous, the
8 extrinsic evidence is admitted to aid in the second step:

9 interpreting the contract. Id. However, as previously noted,
10 where a form contract of adhesion is at issue, the court will,
11 wherever reasonable, interpret the agreement "as treating alike
12 all those similarly situated, without regard to their knowledge or
13 understanding of the standard terms of the writing" in order to
14 "effectuate the reasonable expectations of the average member of
15 the public who accepts it." Ewert v. eBay, Inc., 2010 WL 4269259,
16 at *7 (N.D. Cal.) (quoting Restatement (Second) of Contracts
17 § 211(2) & Comment e).

18 Defendants argue that all contracts that fall into the second
19 and third category (approximately forty-two percent of the sampled
20 DTAs) are ambiguous, because the typed \$50,000 is a sample amount,
21 not the amount that the parties intended as compensation.

22 Defendants do not proffer persuasive evidence that \$50,000, when
23 typed, is a sample amount. Defendants cite only Dr. Siskin's
24 conclusory declaration. However, neither Defendants nor Dr.
25 Siskin demonstrate that he is an expert in contract interpretation
26 or in determining whether a particular contract term was a sample
27 or intended term. Neither has offered evidence of any scientific
28 methodology at all, let alone a reliable and valid one, that would

1 allow a statistician to determine that a compensation amount
2 entered on a contract did not accurately reflect what was promised
3 in that contract, even though it appeared there. Dr. Siskin also
4 substantially reduced any persuasive force that his declaration
5 may have had by testifying in his deposition that, for a
6 particular DTA with which he was presented, he did not believe
7 \$50,000 was a sample amount. See Hutchinson Reply Decl., Ex. A,
8 Tr. 103:3-9.

9 Defendants also argue that some unknown fraction of contracts
10 in the second and third category may be rendered ambiguous because
11 they may present evidence that class members signed other
12 documents stating a different compensation amount. The only such
13 documents that Defendants allude to are APDs. However, Defendants
14 do not present evidence that the compensation amounts in the APDs
15 ever differed from those in the corresponding DTAs. Defendants
16 also argue that they may present evidence that some class members
17 did not believe that \$50,000 was the correct amount of their
18 additional compensation, even though this was the only figure
19 shown in the DTA. In support, Defendants assert that some class
20 members' visa petitions had a different compensation amount than
21 that on their DTAs and that certain class members testified that
22 they thought they would be compensated the amount in their visa
23 petitions. However, this argument does not demonstrate that
24 individual issues will predominate for a variety of reasons.
25 First, Defendants do not offer credible evidence that the terms in
26
27
28

1 the deponents' visa petitions differed from those in their DTAs.⁷
2 Further, even if they did, the visa petitions were not contracts
3 between deputed employees and Defendants, but instead were sworn
4 petitions prepared and submitted by Defendants to the United
5 States government without the participation of the deputed
6 employee. Additionally, as previously stated, given that the DTA
7 was a form adhesion contract, the understanding of the individual
8 class members of its terms is not relevant. Instead, the Court
9 will effectuate the reasonable expectations that an employee would
10 have of the meaning of the contract.

11 Further, as previously recognized, the Court will construe
12 ambiguous terms against Defendants, as the drafting parties.
13 Thus, if there were evidence of ambiguity in the DTAs in the
14 second and third categories, the Court must take into account that
15 Defendants drafted all the documents signed by the class members,
16 introduced any ambiguity into the documents, and were in a
17 superior bargaining position to the class members at the time that
18 the documents were signed.

19 Plaintiffs concede that there is ambiguity as to the
20 compensation term for the class members with DTAs that are
21 completely missing a number--less than fifteen percent of the
22

23 ⁷ The Court accords little or no weight to Dr. Siskin's
24 testimony comparing salaries on the visa petitions in a sample of
25 employment records to salaries on the DTAs in those records. Dr.
26 Siskin "matches" DTAs and visa petitions to one another based on
27 which of these documents is "closest in date," as long they are
28 dated less than a year apart. Siskin Decl. ¶ 10. However, he
also acknowledges in his declaration that "the dates on the visa
petitions and DTAs are rarely the same," and that many employees
have multiple visa petitions and DTAs. Id.

1 sample of DTAs produced, according to the data summaries prepared
2 by both parties--and for class members without an DTA that can be
3 currently located. It is not clear what percentage of the
4 putative class falls into the latter category. Defendants point
5 only to two specific sources of extrinsic proof, both documents
6 that contain some figure for the amount of gross salary: an APD,
7 which some class members signed, and the visa petitions, which
8 Defendants filed on behalf of each deputed employee. Opp. at 9,
9 23-24.⁸ These are standard forms that are susceptible to proof on
10 a class-wide basis as well. See Menagerie Prods. v. Citysearch,
11 2009 U.S. Dist. LEXIS 108768, at *37 (C.D. Cal.) (where the
12 extrinsic evidence relevant to interpreting an ambiguous contract
13 can be established on a class-wide basis, "it cannot be said that
14 individual issues predominate" as to the breach of contract
15 claim).

16 Accordingly, the Court finds that Plaintiffs have met their
17 burden to demonstrate that issues for the breach of contract claim
18 common to the national class predominate over issues affecting
19 only individual members.

20 b. Wrongful Collection of Wages (Cal. Labor Code
21 § 221) (California Class)

22 California Labor Code section 221 provides, "It shall be
23 unlawful for any employer to collect or receive from an employee
24 any part of wages theretofore paid by said employer to said
25

26 ⁸ While Defendants point to deposition testimony as well,
27 they do so only to support that visa petitions may be an extrinsic
28 source of information about the intended amount of compensation.
Opp. at 24.

1 employee." "'Wages' for this purpose 'includes all amounts for
2 labor performed by employees of every description, whether the
3 amount is fixed or ascertained by the standard of time, task,
4 piece, commission basis, or other method of calculation.'" Prachasaisoradej v. Ralphs Grocery Co., Inc., 42 Cal. 4th 217, 226
5 (2007) (quoting Cal. Lab. Code § 200(a)). Section 221 "was
6 adopted to prevent the use of secret deductions or 'kickbacks' to
7 make it appear the employer is paying a required or promised wage,
8 when in fact it is paying less." Prachasaisoradej, 42 Cal. 4th at
9 231 (citing Kerr's Catering Serv. v. Dep't of Indus. Relations, 57
10 Cal. 2d 319, 328 (1962)). Plaintiffs contend that Defendants
11 violated section 221 in two ways: (1) by deducting their Indian
12 salary from their United States compensation and (2) by requiring
13 them to sign over their tax refund checks to Defendants. Many of
14 Defendants' arguments against predominance for Plaintiffs' section
15 221 claim are already addressed above regarding breach of
16 contract.

17
18 Defendants argue that Plaintiffs cannot prove the intended
19 compensation amount on a class-wide basis. However, proof of
20 total compensation is not relevant to this claim, which simply
21 requires proof that Defendants deducted their Indian salary from
22 their United States salary, that Defendants required class members
23 to sign over their tax refund checks and that class members did
24 not give express authorization for these deductions. See Cal.
25 Lab. Code § 224 (deductions not otherwise authorized by state or
26 federal law must be "expressly authorized in writing by the
27 employee").
28

1 Defendants contend that some declarants signed APDs in which
2 they gave Defendants express authorization to take deductions from
3 their wages. Opp. at 28. While this may be true, these
4 declarants did not expressly authorize Defendants to keep the
5 over-withheld tax deductions or to deduct their Indian salary from
6 their United States salary. Thus, the APDs do not provide proof
7 that individual issues will predominate.

8 Accordingly, Plaintiffs have met the predominance requirement
9 for their section 221 claim predicated on unlawful collection of
10 tax refunds and deduction of Indian salary.

11 c. Failure to Provide Accurate Itemized Wage
12 Statements (Cal. Labor Code § 226(a))
(California Class)

13 California Labor Code section 226(a) mandates, in pertinent
14 part, "Every employer shall furnish each of his or her employees
15 . . . an accurate itemized statement in writing showing (1) gross
16 wages earned, . . . (4) all deductions, provided that all
17 deductions made on written orders of the employee may be
18 aggregated and shown as one item, (5) net wages earned"
19 Section 226(e) provides, "An employee suffering injury as a result
20 of a knowing and intentional failure by an employer to comply with
21 subdivision (a)" is entitled to certain statutory compensation for
22 each pay period in which the violation occurred and an award of
23 costs and attorneys' fees.

24 Plaintiffs argue that Defendants violated section 226 by
25 (1) inaccurately reporting the number of tax exemptions for class
26 members; and (2) inaccurately reporting the gross and net incomes
27 of class members by failing to disclose class members' payments to
28

1 the company in tax refund checks and the money that Defendants
2 deducted for class members' Indian salary.⁹

3 Defendants contend that section 226 does not require them to
4 list tax exemptions on the wage statements. Opp. at 29. In their
5 reply, Plaintiffs do not contend that section 226 requires that
6 exemptions be accurately reported on wage statements, and instead
7 argue that "inaccurately reporting tax exemptions . . . resulted
8 in inaccurate deductions of Class members' salary for federal and
9 state taxes," which is a violation of section 226. Reply, at 23.
10 However, while Plaintiffs have alleged that Defendants commonly
11 changed class members' exemptions, Plaintiffs have not submitted
12 proof that these changes were incorrect or resulted in inaccurate
13 withholding that was common to the California class. Plaintiffs
14 primarily rely on the declaration of Anne Shaver, in which she
15 summarizes changes in exemptions found in a small number of sets
16 of earnings statements produced by Defendants.¹⁰ Ms. Shaver
17 asserts that over half of the sets of earnings statements examined
18 show that there was a change of two or more in the number of
19 exemptions from month-to-month or year-to-year; however, Ms.
20 Shaver acknowledges that there is no evidence as to why these

21 ⁹ At the hearing, Plaintiffs' counsel stated that this claim
22 was also premised on the failure to pay the full amount of
23 additional salary promised; however, this was not alleged in the
24 complaint or argued in the motion for class certification.
Accordingly, the Court does not reach this argument.

25 ¹⁰ While Defendants produced 197 sets of monthly earning
26 statements, only thirty-three listed the number of exemptions and
27 thus Ms. Shaver's summary is based on only those thirty-three sets
28 of earning statements. Shaver Decl. ¶ 10.

1 changes were made, that they were inaccurate, or that they were
2 made without authorization. Shaver Decl. ¶ 10 & n.2. Further,
3 the class member declarations that Plaintiffs submit show that the
4 number of exemptions changed for only some class members, that it
5 changed in different ways, and that the change was sometimes
6 accurate and sometimes inaccurate. Plaintiffs' proposed trial
7 plan also recognizes that these changes may have been proper in
8 individual cases. Pls.' Proposed Trial Plan, at 6. Thus, the
9 Court finds that Plaintiffs have not established that common
10 issues would predominate as to their section 226 claim based on
11 inaccurate reporting of the number of tax exemptions for class
12 members.

13 However, to the extent that Plaintiffs' section 226 claim is
14 predicated on Defendants' failure accurately to report gross and
15 net wages and deductions, by failing to reflect class members'
16 payments to the company in tax refund checks and the money that
17 Defendants deducted for Indian salaries, the predominance
18 requirement has been met. Plaintiffs argue that this can be shown
19 through the same common proof as the breach of contract and
20 section 221 claims, addressed above. Defendants respond that the
21 wage statements accurately show the net pay to the class members;
22 however, the fact that wage statements showed the amount on the
23 pay checks is irrelevant to Plaintiffs' arguments that Defendants
24 paid deputed employees an incorrect amount. Defendants also argue
25 that Plaintiffs cannot show the proper gross compensation through
26 common proof; this is also irrelevant, because if Plaintiffs prove
27 that deputed employees were improperly required to pay Defendants
28 back their wages, the wage shown on the statements would be

1 inaccurate regardless of amount. Finally, relying on Price v.
2 Starbucks Corp., 192 Cal. App. 4th 1136, 1142-43 (2011),
3 Defendants argue that Plaintiffs "fail to demonstrate any injury
4 suffered by putative class members due to the allegedly inaccurate
5 wage statements." However, Price is inapplicable; there, the
6 California Court of Appeal held that the mere omission of one of
7 the required terms, without an allegation that the information was
8 inaccurate, was insufficient to allege injury. The court
9 distinguished cases where the plaintiffs had "to engage in
10 discovery and mathematical computations . . . to determine if they
11 were correctly paid." Id. at 1143. Further, the Court has
12 already rejected this argument. See Order on Mot. to Dismiss, 12
13 (rejecting Defendants' argument that "plaintiffs fail to allege
14 injury suffered as a result of defendants' violation of section
15 226," because "failure to provide accurate wage statements alone
16 has been held to be an injury to employees").

17 Accordingly, the Court finds that Plaintiffs have met their
18 burden to establish predominance for their section 226 claim
19 predicated on Defendants' failure to account for class members'
20 payments to the company in tax refund checks or the Indian salary
21 deduction, but not for Defendants' inaccurate reporting of the
22 number of tax exemptions.

23 d. Waiting Period Penalties (Cal. Labor Code
24 §§ 201-203) (California Class)

25 California Labor Code section 201(a) provides, "If an
26 employer discharges an employee, the wages earned and unpaid at
27 the time of discharge are due and payable immediately."

28 California Labor Code section 203 provides that employees "not

1 having a written contract for a definite period of time" who quit
2 employment are entitled to payment of wages either at time of
3 quitting if they have given seventy-two hours previous notice or
4 within seventy-two hours thereafter if they have not given such
5 notice. Section 203 further provides, "If an employer willfully
6 fails to pay . . . in accordance with Sections 201, 201.5, 202,
7 and 205.5, any wages of an employee who is discharged or quits,
8 the wages of the employee shall continue as a penalty from the due
9 date thereof at the same rate until paid or until an action
10 therefor is commenced; but the wages shall not continue for more
11 than 30 days."

12 Plaintiffs allege that Defendants have violated Labor Code
13 sections 201 through 203 by failing properly to compensate deputed
14 employees at the time of discharge for: (1) the Indian wages that
15 Defendants deducted from their United States wages; (2) the wages
16 that Defendants required deputed employees to sign over to them
17 through the tax refund checks; and (3) the amount of unpaid
18 additional compensation promised in the DTAs. Because these
19 violations are predicated on the breach of contract and section
20 221 claims, Plaintiffs assert that common questions predominate
21 over individual questions for the same reasons.

22 In response, Defendants again argue that Plaintiffs cannot
23 establish the amount of compensation that class members were
24 promised through common proof. This is addressed above, and is
25 not relevant to all of the theories of liability. Defendants also
26 argue that common questions do not predominate, because Defendants
27 may be able to file counter-claims against some class members who
28

1 "absconded from TCS and did not fulfill their post-deputation
2 obligations." Opp. at 30.

3 However, "the existence of counterclaims . . . will not
4 usually bar a finding of predominance of common issues." 2
5 Newberg § 4:26. Defendants have not filed any counter-claims,
6 have not identified any actual putative class members who have
7 absconded and have not provided an estimate of how many class
8 members may have done so. As Plaintiffs point out, counter-claims
9 against most class members would be barred by the four year
10 statute of limitations. Defendants have not cited any cases to
11 support the proposition that mere speculation about possible
12 counter-claims will bar certification.

13 Thus, Plaintiffs have satisfied their burden as to
14 predominance of common issues in their waiting period penalties
15 claim to the same extent as with the underlying violations.

16 e. UCL Claim (California Class)

17 California's Unfair Competition Law (UCL) prohibits any
18 unlawful, unfair or fraudulent business act or practice." Cal.
19 Bus. & Prof. Code § 17200. The UCL incorporates other laws and
20 treats violations of those laws as unlawful business practices
21 independently actionable under state law. Chabner v. United of
22 Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000).
23 Violation of almost any federal, state or local law may serve as
24 the basis for a UCL claim. Saunders v. Superior Court, 27 Cal.
25 App. 4th 832, 838-39 (1994). Plaintiffs' UCL claim is premised on
26 Defendants' alleged violations of California Labor Code § 221.
27 Thus, the predominance of common questions for this claim mirrors
28 that of the section 221 claim.

1 2. Superiority

2 Defendants' only argument that class action treatment is not
3 superior is that class members "who were deputed to the U.S. in
4 multiple years" would likely have claims worth "tens of thousands
5 of dollars" and, thus, class members have sufficient monetary
6 incentive to bring individual suits. Opp. at 31. Notably,
7 Defendants do not argue that all putative class members would have
8 what they characterize as "large" claims. There is evidence in
9 the record that some class members were deputed to the United
10 States for less than a year during the class period. See, e.g.,
11 Gunalan Decl. ¶ 3 (deputed for less than a year of the class
12 period); Karmakar Decl. ¶¶ 3-4 (deputed for less than six months
13 of the class period); Malnedi Decl. ¶¶ 3 (deputed, over the course
14 of two deputations to the United States, for less than a year of
15 the class period). While the court in Zinser v. Accufix Research
16 Inst., Inc., 253 F.3d 1180 (9th Cir. 2001), found that the
17 superiority factor weighed against class certification when
18 damages suffered by each class member were large, in that case,
19 the court found that the damages for each class member exceeded
20 \$50,000. Id. at 1190-91. Here, Defendants acknowledge that one
21 of the named Plaintiffs seeks under \$25,000 in damages. See also
22 Smith v. Cardinal Logistics Mgmt. Corp., 2008 U.S. Dist. LEXIS
23 117047, at *32 (N.D. Cal.) (where "full recovery would result in
24 an average amount of damages of \$25,000-\$30,000 per year of work
25 for each class member" and "not all of the putative class members
26 worked for the entire class period of approximately five years,
27 the Court cannot conclude that the damages sought are large enough
28 to weigh against a class action").

1 Further, Plaintiffs have argued that many class members fear
2 retaliation from Defendants if they file individual suits and that
3 many class members currently reside in India, which would pose
4 substantial barriers to bringing individual actions. Defendants
5 have not disputed these arguments.

6 Thus, the Court finds that Plaintiffs have demonstrated that
7 class treatment is superior to litigating individual cases.

8 V. Appointment of Class Counsel

9 Rule 23(g)(1) of the Federal Rules of Civil Procedure
10 provides in part:

11 Unless a statute provides otherwise, a court that certifies a
12 class must appoint class counsel. In appointing class
counsel, the court:

13 (A) must consider:

14 (i) the work counsel has done in identifying or
investigating potential claims in the action;

15 (ii) counsel's experience in handling class
actions, other complex litigation, and the types of
claims asserted in the action;

16 (iii) counsel's knowledge of the applicable law;
and

17 (iv) the resources that counsel will commit to
18 representing the class;

19 (B) may consider any other matter pertinent to counsel's
20 ability to fairly and adequately represent the interests
of the class;

21 (C) may order potential class counsel to provide
information on any subject pertinent to the appointment
22 and to propose terms for attorney's fees and nontaxable
costs;

23 (D) may include in the appointing order provisions about
the award of attorney's fees or nontaxable costs under
24 Rule 23(h); and

25 (E) may make further orders in connection with the
appointment.

26 Fed. R. Civ. P. 23(g)(1).

27 Plaintiffs represent that their counsel, the law firms of
28 Rukin, Hyland, Doria & Tindall, LLP (RHDT) and Lieff, Cabraser,

1 Heimann & Bernstein, LLP (LCHB), have invested significant time
2 and resources to investigating and developing the legal claims in
3 this case thus far, that they are seasoned and experienced in
4 handling class actions of this nature, that they are knowledgeable
5 of the relevant law, and that they will continue to commit ample
6 resources to representing the class. Plaintiffs have submitted
7 declarations and other evidence in support thereof. See Tindall
8 Decl. ¶¶ 1-20 (describing his and RHDT's experience litigating
9 class action employment matters, the efforts of Plaintiffs'
10 counsel on behalf of the class thus far and their commitment to
11 continue to represent the class vigorously in the future); Dermody
12 Decl. ¶¶ 1-5 (describing her experience litigating class action
13 employment matters and providing a firm resume for LCHB).
14 Defendants do not oppose the appointment of their attorneys as
15 class counsel.

16 Accordingly, the Court GRANTS Plaintiffs' motion for
17 appointment of their counsel as class counsel.

18 CONCLUSION

19 For the foregoing reasons, Plaintiffs' motion for class
20 certification (Docket No. 185) is GRANTED IN PART and DENIED IN
21 PART. The Court certifies a national class, defined as
22 "all non-U.S. citizens who were employed by Tata in the United
23 States at any time from February 14, 2002 through June 30, 2005
24 and who were deputed to the United States after January 1, 2002."
25 This class may prosecute Plaintiffs' breach of contract claims.
26 The Court certifies a California class, defined as "all non-U.S.
27 citizens who were employed by Tata in California at any time from
28 February 14, 2002 through June 30, 2005 and who were deputed to

1 California after January 1, 2002."¹¹ This class may prosecute
2 Plaintiffs' claims for wrongful collection of wages, failure to
3 provide accurate itemized wage statements, waiting period
4 penalties and violation of the UCL, except to the extent that
5 Plaintiffs' section 226 claim is based on the inaccurate reporting
6 of the number of tax exemptions. The Court APPOINTS the law firms
7 of Lief, Cabraser, Heimann & Bernstein, LLP and Rukin Hyland
8 Doria & Tindall LLP as class counsel.

9 The parties shall appear for a case management conference to
10 set future deadlines in this case on Wednesday, April 25, 2012 at
11 2:00 p.m. The parties shall submit a joint case management
12 statement by April 18, 2012.

13 IT IS SO ORDERED.

14
15 Dated: 4/2/2012


16 CLAUDIA WILKEN
17 United States District Judge

18
19
20
21
22
23 ¹¹ Plaintiffs have requested that the California class include
24 individuals employed by Tata through the date of judgment.
25 Because Defendants changed their policies regarding income tax
26 returns and deduction of the Indian salary from the United States
27 salary in July 2005, the Court limits the California class to
28 include only individuals who were employed by Tata through June
30, 2005. However, the class may pursue claims for waiting time
penalties that accrued after June 30, 2005 for failure to pay
wages that were earned before that date or that were improperly
deducted before that date.