

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

STEVEN WAMBOLDT,

Plaintiff,

No. C 07-0884 PJH

v.

**ORDER GRANTING MOTION TO  
DECERTIFY CLASS**

SAFETY-KLEEN SYSTEMS, INC.,  
et al.,

Defendants.

Defendant’s motion to decertify the class came on for hearing before this court on July 7, 2010. Plaintiff Steven Wamboldt (“Wamboldt”), on behalf of a certified plaintiff class (collectively “plaintiffs”), appeared through counsel David Markham, Jeremy Fietz, and Donald Edgar. Defendant Safety-Kleen Systems, Inc. (“Safety-Kleen” or “defendant”) appeared through its counsel, Robert William Tollen, and Kevin Lesinski. Having read the parties’ papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court GRANTS defendant’s motion for decertification of the plaintiff class, for the reasons stated at the hearing, and as follows.

**BACKGROUND**

This action arises from defendant’s alleged failure to pay overtime wages. Plaintiff Wamboldt was formerly employed as a customer service representative (“CSR”) for defendant Safety-Kleen, which is engaged in the business of providing industrial washing services, and industrial waste and oil recycling services, to various private companies and government entities. See First Amended Complaint (“Am. Compl.”) ¶ 2. Wamboldt’s duties as a CSR included customer sales, client collections, and various telephone responsibilities, as well as on-site servicing of equipment, transportation of hazardous

**United States District Court**  
For the Northern District of California

1 waste, and driving of company vehicles in order to perform customer service calls. See id.  
2 at ¶ 8.

3 On November 17, 2006, plaintiff filed the instant action on behalf of himself, and a  
4 putative class of similarly situated CSRs “who worked in excess of eight (8) hours in a day  
5 and/or forty (40) hours in a work week [] at any time from November 17, 2002 to the  
6 present,” in Los Angeles Superior Court. Id. at ¶ 16. Defendant Safety-Kleen subsequently  
7 removed the case to the Central District, alleging federal question jurisdiction pursuant to  
8 the Class Action Fairness Act of 2005. The case was then transferred to this court, where  
9 a related case, Perez v. Safety Kleen Systems, Inc., C 05-5338 PJH, was already pending.  
10 An amended complaint was filed on May 7, 2007.

11 Generally, plaintiff alleges that Safety-Kleen unlawfully failed to pay overtime due its  
12 CSRs, as required by California Labor Code § 510 and other provisions. See Am. Compl.  
13 ¶¶ 10, 12, 27-28. Plaintiff’s complaint also contains derivative claims alleging that  
14 defendant violated California Labor Code § 202, which requires an employer to pay all  
15 wages due within 72 hours of an employee’s quitting; California Unfair Competition law,  
16 Cal. Bus. & Prof. Code §§ 17200 et seq., which prohibits unlawful withholding of wages;  
17 and the California Labor Code Private Attorneys General Act of 2004 (“PAGA”), Labor  
18 Code §§ 2698 et seq., which authorizes civil penalties. Id. ¶¶ 13, 26, 30, 33-41.

19 In August 2007, the court heard Safety-Kleen’s motion for summary judgment  
20 together with plaintiff’s motion for class certification. In support of its motion for summary  
21 judgment, Safety-Kleen contended in part that California’s overtime requirements were not  
22 applicable to Safety Kleen’s CSRs, including Wamboldt, because the California motor  
23 carrier exemption applied.

24 On August 21, 2007, the court issued its order granting in part and denying in part  
25 Safety-Kleen’s motion for summary judgment, and granting plaintiff’s motion for class  
26 certification. With respect to class certification, the court certified a class pursuant to  
27 Federal Rule of Civil Procedure (“Fed. R. Civ. Proc.”) 23(a) and (b)(3). With respect to the  
28

1 summary judgment motion, the court denied summary judgment on the issue whether  
2 California’s overtime requirements apply to Safety-Kleen, in view of a material dispute of  
3 fact regarding application of California’s motor carrier exemption. Specifically, the court  
4 found that a material dispute of fact existed as to whether and to what extent plaintiff  
5 Wamboldt drove hazardous materials, a critical issue in determining whether the motor  
6 carrier exemption applies. In view of this dispute of fact, the court also found it  
7 unnecessary to resolve whether the California motor carrier exemption, which has not often  
8 been interpreted, should follow the analogous federal motor carrier exemption.

9         Subsequently, Safety-Kleen filed a motion for leave to seek reconsideration of the  
10 court’s summary judgment order – specifically as to the finding of a disputed fact regarding  
11 the transport of hazardous waste. Safety-Kleen also requested leave to file another motion  
12 for summary judgment in order to assert a new legal ground – that the California overtime  
13 requirements are not applicable because Wamboldt is exempt under federal Department of  
14 Transportation (“DOT”) regulations. On September 10, 2007, the court granted Safety-  
15 Kleen’s motion for leave to file a motion for reconsideration as to a discrepancy highlighted  
16 by defendant regarding a distinction between plaintiff Wamboldt’s participation in “parts  
17 washing” v. “industrial waste management” services while a CSR. The court also granted  
18 Safety-Kleen leave to file an additional summary judgment motion with respect to the  
19 application of the federal DOT regulations.

20         On March 17, 2008, the court denied both the motion for reconsideration, and  
21 defendant’s more recent summary judgment motion. The court denied the motion for  
22 reconsideration as to the court’s August 2007 summary judgment order, finding that a  
23 material dispute of fact continued to exist with respect to whether Wamboldt was involved  
24 in the transportation of hazardous waste, such that the California motor carrier exemption  
25 applies. The court also denied defendant’s new summary judgment motion, on grounds  
26 that there was “too much ambiguity” in the evidentiary record for the court to determine  
27 whether Wamboldt’s duties could be characterized as interstate in nature – such that the  
28

1 federal motor carrier exemption applies.

2 Now, defendant moves to decertify the previously certified class, on grounds that the  
3 class no longer meets the requirements of Fed. R. Civ. Proc. 23(b)(3) because individual  
4 issues, and not common ones, predominate.

## 5 DISCUSSION

### 6 A. Legal Standard

7 Even after an order certifying a class action is entered, the court remains free “to  
8 modify it in the light of subsequent developments in the litigation” – up to and including  
9 decertification. See Fed. R. Civ. Proc. 23(c)(1)(C); see also Gen. Tel. Co. of Sw. v. Falcon,  
10 457 U.S. 147, 160 (1982). In considering a motion to decertify, the standard is the same as  
11 in a motion to certify – i.e., plaintiffs must prove that they meet the requirements of Federal  
12 Rule of Civil Procedure 23(a) and (b). If a plaintiff can no longer meet one or more of those  
13 requirements, decertification is appropriate.

14 As is the case with a motion for class certification, the court does not make a  
15 preliminary inquiry into the merits of plaintiffs' claims in determining whether to certify a  
16 class. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). It will, however,  
17 scrutinize plaintiffs' legal causes of action to determine whether they are suitable for  
18 resolution on a class wide basis. See, e.g., Moore v. Hughes Helicopters, Inc., 708 F.2d  
19 475, 480 (9th Cir. 1983). Making such a determination “will sometimes require examining  
20 issues that overlap with the merits.” Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 581,  
21 587 (9th Cir. 2010)(en banc)(“the court must consider evidence relating to the merits if such  
22 evidence also goes to the requirements of Rule 23”). The court will consider matters  
23 beyond the pleadings, if necessary, in order to ascertain whether the asserted claims or  
24 defenses are susceptible of resolution on a class wide basis. See id. at 589; see also  
25 McCarthy v. Kleindienst, 741 F.2d 1406, 1419 n.8 (D.C. Cir. 1984).

### 26 B. Legal Analysis

27 Defendant’s motion is limited to consideration of Fed. R. Civ. Proc 23(b)(3), and  
28

1 specifically, to consideration of that subsection’s ‘predominance’ requirement. This  
2 requirement demands that a plaintiff establish that “the questions of law or fact common to  
3 the members of the class predominate over any questions affecting only individual  
4 members.”<sup>1</sup> Defendant contends that, having completed discovery, it is now clear that  
5 plaintiffs cannot continue to satisfy the requirement.

6 Defendant’s arguments focus on California’s “motor carrier exemption.” The state’s  
7 motor carrier exemption is contained in multiple Industrial Welfare Commission (“IWC”)  
8 wage orders, two of which – Wage Orders 4 and 7 – have already been found to apply in  
9 this action. The motor carrier exemption provides that overtime pay requirements are not  
10 applicable to employees whose hours of service are regulated by (1) the United States  
11 Department of Transportation (“DOT”) Code of Federal Regulations, title 49, sections 395.1  
12 to 395.13, Hours of Service Drivers; or (2) Title 13 of the California Code of Regulations,  
13 section 1200, subchapter 6.5, section 1200 and following sections, regulating hours of  
14 drivers. See, e.g., IWC Order No. 4-2001, Ex. 4 to Def. Appendix of Cal. and Fed.  
15 Authority (“Order 4”), Section 3(K). In other words, the IWC’s motor carrier exemption  
16 applies to employees whose hours of service are regulated by either (1) federal regulations  
17 regarding hours of service of drivers (i.e., the “federal motor carrier regulations”); or (2)  
18 California state regulations regarding the hours of drivers (i.e., the “California motor carrier  
19 regulations”). Defendant relies on the motor carrier exemption as its principal defense to  
20 liability for failure to pay overtime wages, arguing that its CSRs are governed by either or  
21 both sets of motor carrier regulations.

22 According to defendant, continued class treatment of the present action is no longer  
23 proper, because analysis of whether the motor carrier exemption applies will require an  
24 intensive individualized inquiry into the daily activities performed by each member of the  
25 plaintiff CSR class. Defendant notes that the court previously clarified that the exemption’s

---

26  
27 <sup>1</sup> Fed. R. Civ. P. 23(b)(3) also requires that plaintiffs demonstrate that a class  
28 action is superior to other methods available for adjudicating the controversy at issue.  
However, defendant does not move to decertify on this ground.

1 applicability must be determined on a daily, rather than weekly basis – i.e., for each day in  
2 which the exemption applies to plaintiffs, plaintiffs are not entitled to overtime, and they are  
3 entitled to overtime for each day in which the exemption does not apply. See Order  
4 Denying Mot. for Reconsider. and Mot. for Summ. Judg. (“Reconsideration/MSJ Order”) at  
5 13-14. Moreover, defendant also notes that applicability of the motor carrier exemption –  
6 whether based on California or federal motor carrier regulations – is dependent upon the  
7 activities of individual CSRs. Further still, defendant points to variations in each CSR’s  
8 daily activities – which variations purportedly support different bases for ultimate application  
9 of the IWC’s motor carrier exemption (e.g., California motor carrier regulations v. federal  
10 motor carrier regulations).

11 Thus, argues defendant, and based on the relevant evidence in this case, the  
12 following issues must ultimately be determined for each CSR plaintiff on a daily basis, in  
13 order to determine in turn whether the motor carrier exemption applies and whether liability  
14 exists: (1) whether each CSR drove hazardous materials (California motor carrier  
15 regulations); (2) whether each CSR transported material that was moving in interstate  
16 commerce (federal motor carrier regulations); (3) whether each CSR drove a vehicle with a  
17 gross vehicle weight rating of 26,001 pounds or greater (California motor carrier  
18 regulations); and (4) whether each CSR, if no exemption applies, worked overtime on a  
19 given day.<sup>2</sup> These inquiries, concludes defendant, will necessarily require that  
20 individualized showings predominate at trial, and prohibit continued class certification.

21 Prior to turning to the merits of these arguments, there is an important preliminary  
22 issue that must first be addressed: plaintiffs’ “straight” time versus “premium” time theory.

---

23  
24 <sup>2</sup> Defendant also argues that the number of overtime hours worked by each CSR,  
25 in the event no exemptions apply and the CSR is entitled to overtime pay, must be determined  
26 on an individual basis. The court finds this to be a damages issue, however, as to which the  
27 presence of individualized inquiries does not warrant decertification of the class. See  
28 Yokoyama v. Midland Nat. Life Ins. Co., 594 F.3d 1087, 1089 (9th Cir. 2010)(“The potential  
existence of individualized damage assessments... does not detract from the action’s suitability  
for class certification”); Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir.1975)(“[t]he amount of  
damages is invariably an individual question and does not defeat class action  
treatment”)(citations omitted).

1 Plaintiffs’ principal response to defendant’s decertification argument is that defendant has  
2 essentially assumed too much, since its motion focuses on only a small subsection of  
3 plaintiffs’ overtime claims that seek compensation in the form of ‘time and a half’ wages  
4 pursuant to the Labor Code (i.e., “premium” pay claim), and ignores entirely plaintiffs’ “core”  
5 claim – that plaintiffs are hourly employees seeking overtime compensation at the regular  
6 single hourly rate of pay (i.e., “straight” pay claim). According to plaintiffs, since there is no  
7 dispute that plaintiffs were treated as hourly employees, the class is at base entitled to the  
8 basic “straight” or hourly rate of pay, for every hour of uncompensated overtime worked.  
9 This “straight” pay claim is at the heart of plaintiffs’ complaint, is responsible for at least two  
10 thirds of plaintiffs’ alleged damages, and is unaffected by the motor carrier exemption found  
11 in the IWC’s wage order, say plaintiffs. Rather, the motor carrier exemption applies only to  
12 the extent plaintiffs seek “premium” overtime pay in addition to straight pay – i.e., only to  
13 the extent plaintiffs seek an additional third of damages on top of the regular hourly rate.  
14 Thus, say plaintiffs, since litigation of the motor carrier exemption’s applicability is irrelevant  
15 to the majority of plaintiffs’ damages claims, defendant’s motion should be deemed largely  
16 irrelevant at the outset and therefore no bar to continued certification of the class.

17         The problem with plaintiffs’ premium v. straight time theory, is that the court finds no  
18 support for it. As defendant points out, plaintiffs submit no legal authority – statutory or  
19 otherwise – affirmatively recognizing plaintiffs’ distinction between premium and straight  
20 pay (e.g., which distinction effectively takes the concept of “time and a half” and divvies up  
21 overtime pay into “time,” and separately, “half” time). Labor Code §§ 204 and 226, to the  
22 extent plaintiffs rely on them, do not distinguish between straight time claims and premium  
23 claims for overtime, nor do these sections expressly provide that an employer must pay its  
24 employees at a straight time rate for overtime hours worked. See Cal. Lab. Code § 204  
25 (regulating timing of payment of wages by employer); id. at § 226 (requiring employer to  
26 provide accurate itemized wage statements). Plaintiffs also point to the IWC’s Wage Order  
27 for support, noting that Section 3 of the IWC’s Wage Order supports application of the  
28

1 motor carrier exemption to claims for premium overtime pay only. However, as defendant  
2 correctly notes, Section 3(A) of the relevant Wage Order – which contains the governing  
3 overtime requirements for employers, and provides that employees who work “more than  
4 eight (8) hours in any workday or more than 40 hours in any workweek” receive “one and  
5 one-half (1 ½) times” the employee’s regular rate of pay – does not distinguish between  
6 straight time and premium time specifically. See Order 4, § 3(A). Moreover, even if  
7 Section 3(A) could be read to support a clear distinction between overtime at rates “one  
8 time” the regular rate of pay *and* separately, rates at “one-half times” the regular rate of  
9 pay, defendant nonetheless correctly points out that Section 3(K) of the Wage Order  
10 provides that the Wage Order is “*not applicable* to employees whose hours of service are  
11 regulated by” California or federal motor carrier safety regulations (emphasis added). See  
12 id., § 3(K). Thus, the Wage Order’s motor carrier exemption would apply to plaintiffs’  
13 claims, whether based on claims for straight time pay or premium pay.

14 In sum, there is no support for the premium v. straight time theory espoused by  
15 plaintiffs, and even if such support could be found, the governing Wage Order upon which  
16 the motor carrier exemption is premised provides that this exemption applies to both  
17 straight time pay and premium pay. Accordingly, the court does not find litigation of the  
18 motor carrier exemption to be, as plaintiffs urge, irrelevant to the majority of plaintiffs’  
19 claims. Rather, litigation of the motor carrier exemption goes to the whole of plaintiffs’  
20 claims for unpaid overtime wages and bears directly on defendant’s liability for these  
21 claims.

22 The court now turns to the merits of defendant’s arguments regarding the existence  
23 of individual issues among members of the class, in relation to the motor carrier exemption.  
24 Specifically, the court analyzes whether the inquiries upon which the motor carrier  
25 exemption’s applicability is based – i.e., whether the CSR class members’ hours were  
26 regulated by either California or federal motor carrier regulations – require too much  
27 individualized proof to support continued certification of the plaintiff class.

28



1           1.       Whether Each CSR Drove Hazardous Materials

2           The California motor carrier regulations contain certain provisions that limit the  
3 driving time of drivers of various vehicles – which vehicles are listed in California Vehicle  
4 Code § 34500, and include “trucks ... transporting hazardous materials.” See 13 Cal. Code  
5 of Reg. §§ 1200 et seq.; Cal. Vehicle Code § 34500. Here, defendant argues that its CSRs  
6 regularly drive trucks transporting hazardous materials, such that its CSRs are governed by  
7 the California motor carrier regulations, and are exempt from overtime requirements under  
8 the IWC Wage Order’s motor carrier exemption. Plaintiffs, for their part, assert that CSRs  
9 transported hazardous waste materials only on certain days.

10           In its March 2008 order denying defendant’s motion for reconsideration and second  
11 motion for summary judgment, the court held, upon consideration of the parties’ competing  
12 evidence on this issue, that a material dispute of fact exists as to whether plaintiff  
13 Wamboldt was engaged in the regular duty of transporting hazardous waste. Specifically,  
14 the court found that, while Wamboldt did transport hazardous material on at least some  
15 days, there is a dispute as to the nature and percentage of hazardous waste he actually did  
16 transport, and as to whether Wamboldt was regularly engaged in the transportation of  
17 hazardous waste. See Reconsideration/MSJ Order at 7-11.

18           Defendant now contends that this material dispute must be resolved with respect to  
19 each and every one of the 304 CSRs who are members of the class, and that such  
20 resolution would require impermissibility individualized proof. Defendant submits, in  
21 support, the declarations of Billy Ross – Safety-Kleen’s Vice President of Environmental  
22 Health and Safety for Branches, Distribution Centers and Accumulation Centers – and  
23 Kevin Lesinski – defense counsel – who testify: that each CSR’s territory, route and  
24 schedule is different; the CSRs’ routes and schedules change daily, depending on  
25 customer needs; that the types, quantities and hazardous nature of materials and waste  
26 transported to and from customers by each CSR changes daily; that a determination as to  
27 the transportation of hazardous waste by CSRs requires examination of records that were  
28

1 on the CSR's truck each day, as well as records identifying the hazardous waste picked up  
2 by the CSR; that those records identify various hazardous materials and waste according to  
3 codes designated by the Environmental Protection Agency, Department of Transportation  
4 and the State of California Department of Toxic Substances Control – which codes may  
5 differ on a given day. See generally Declaration of Billy Ross ISO Mot. to Decert. (“Ross  
6 Decl.”). Defendant also notes that, as an evidentiary matter, proof of hazardous waste  
7 delivery will require introduction of Daily Trip Reports, Bills of Lading, Uniform Hazardous  
8 Waste Manifests, consolidated Uniform Hazardous Waste Manifests, customer invoices,  
9 customer receipts and other documents; and that it will also require witness testimony from  
10 customers and CSRs. See generally Declaraton of Kevin Lesinski ISO Mot. to Decert.  
11 (“Lesinski Decl.”); Ross Decl., ¶ 4. Accordingly, concludes defendant, determining the  
12 portion of time overall spent on transporting hazardous waste by members of the class, will  
13 require a detailed inquiry of each and every CSR's multiple daily records, and will be highly  
14 individualized, not to mention time consuming.

15 Plaintiffs, in opposition, do not substantively contend that common issues  
16 predominate over individualized ones at trial, but rather, assert that the issue whether an  
17 individual CSR transported hazardous waste on given days may be proven through the use  
18 of summary evidence and stipulated facts. To that end, plaintiffs have agreed to stipulate  
19 to each CSR's transport of hazardous waste, for all days for which defendant can prove  
20 such transport took place. Plaintiffs also suggest that defendant can submit its  
21 documentary evidence regarding each CSR's transport of hazardous waste in summarized  
22 exhibit form, so as to facilitate the streamlined introduction of evidence in a manner that is  
23 common to the class.

24 On balance, the court is persuaded that individual issues are likely to predominate  
25 over common ones at trial as to whether members of the plaintiff class drove hazardous  
26 waste material on any given day. In order for the court to determine that the plaintiff CSR  
27 class is regulated by California motor carrier regulations, and that the motor carrier  
28

1 exemption therefore applies, defendant must establish that each CSR transported  
2 hazardous materials on any given day as a regular part of his/her duties.<sup>3</sup> Given  
3 defendant's testimony, however, that each CSR had divergent routes, divergent customers,  
4 and divergent products – not all of which may necessarily constitute hazardous waste – to  
5 be transported on any given day, such an inquiry would in essence require the equivalent  
6 of numerous mini-trials for each plaintiff as to the same issue. In other words,  
7 individualized issues do predominate.

8 To the extent, moreover, that plaintiffs have offered to stipulate to the applicability of  
9 the exemption as long as defendant provides some documentary evidence that some  
10 CSRs carried hazardous waste material on given days, this offer to stipulate in reality only  
11 addresses the efficiency concerns that would otherwise arise in fully litigating the  
12 hazardous waste issue for each individual CSR. It does not address the fundamental  
13 problem that defendant's argument points out – i.e., that an individualized determination  
14 must nonetheless be made with respect to *each* CSR.<sup>4</sup> The same holds true with plaintiffs'  
15 suggestion that defendant present its evidence by way of summarized exhibits: while such  
16 summarization may, indeed, streamline the trial process and facilitate a more efficient trial  
17 with respect to the 304 CSRs who form a part of the plaintiff class, summarization of  
18 evidence in no way directly counters defendant's objection that the evidence to be  
19 summarized is itself highly individualized among the class members.

20 Finally, to the extent plaintiffs rely on Gomez v. Lincare, 173 Cal. App. 4th 508  
21 (2009) for support for a finding of predominance, this case is wholly inapposite to the issue  
22

---

23 <sup>3</sup> It is useful to note that under the federal case law interpreting the federal  
24 analogous motor carrier exemption, the Supreme Court has found that 4% total driving time  
25 and driving as a "principal employment" duty satisfies the exemption. See, e.g., Morris v.  
26 McComb, 332 U.S. 422 (1947); see also Kerr v. Jeans, 193 F.2d 572, 573 (5th Cir. 1952). As  
the court noted in connection with defendant's last summary judgment motion, however, the  
parties dispute how much time plaintiff Wamboldt spent driving. This dispute is likely to repeat  
itself with respect to each member of the class.

27 <sup>4</sup> If anything, plaintiffs' offer to stipulate is relevant to the superiority element of  
28 23(b)(3) – an issue that has not been raised before the court here.

1 before the court. While Gomez did deal with application of the motor carrier exemption via  
2 proof that plaintiff drivers were governed by California motor carrier regulations, the Gomez  
3 court considered the issue on summary judgment, and did not discuss any issues related to  
4 class certification, let alone the predominance requirement. Indeed, Gomez was not even  
5 a class action. Moreover, the Gomez court explicitly noted that defendant had offered  
6 undisputed evidence that plaintiffs’ duties included transporting hazardous materials, and  
7 that such materials were *a/ways* carried in the vans driven by plaintiffs. That is simply not  
8 the case here. Material disputes of fact exist as to what hazardous materials were carried  
9 by which CSRs, and when. And it is precisely the variation among class members in  
10 answering these questions that prevent a finding of predominance as to the issue.

11 In sum, no amount of summarized material and stipulated facts will obviate the  
12 court’s need to make individualized determinations as to whether each CSR, on a case by  
13 case basis, transported hazardous materials on a given day – such that they were  
14 regulated by the California motor carrier regulations, and exempt from overtime regulations  
15 by the motor carrier exemption. The court therefore concludes that individual questions  
16 predominate as to this issue.

17 2. Whether Each CSR Transported Material that was Moving in Interstate  
18 Commerce

19 Defendant also asserts a defense to overtime liability on the basis that its CSRs’  
20 driving hours were regulated by the federal motor carrier regulations. In other words,  
21 defendant argues that the hours of its CSRs are regulated by the United States Department  
22 of Transportation Code of Federal Regulations, title 49, sections 395.1 to 395.13, Hours of  
23 Service of Drivers. Part 395, in turn, defines “motor carriers” as persons who provide  
24 transportation of “property” by “commercial motor vehicle,” and a “driver” is a person who  
25 operates a “commercial motor vehicle.” See 49 C.F.R. § 390.5. A “commercial motor  
26 vehicle” is in turn defined as a motor vehicle “used on a highway in interstate commerce to  
27 transport ... property....” See id. Defendant contends that its CSRs were regulated by the  
28

1 federal motor carrier regulations because they were engaged in transporting property in  
2 “interstate commerce.” Specifically, each CSR picked up waste product from defendant’s  
3 customers in California, which waste product was pre-routed and shipped to locations  
4 outside the state. Accordingly, defendant asserts, plaintiffs are exempted from overtime  
5 requirements.

6 The court previously considered the merits of defendant’s argument and noted that,  
7 in order to determine whether a CSR is a qualifying “driver” engaged in operating a vehicle  
8 used in “interstate commerce,” the court must “examine the character of the shipments [the  
9 driver is] charged with delivering, and the intent of the shippers as to the ultimate  
10 destination of the goods.” See Reconsideration/MSJ Order at 16-17; see also Watkins v.  
11 Ameripride Servs., 375 F.3d 821, 875 (9th Cir. 2004). The court held that here, disputed  
12 issues of material fact exist with respect to the ultimate character of the shipments that  
13 plaintiff Wamboldt was delivering, and whether Wamboldt’s deliveries could properly be  
14 characterized as within the ‘practical continuity of interstate movement.’ See  
15 Reconsideration/MSJ Order at 17-18.

16 In moving for decertification, defendant – as it did in connection with the foregoing  
17 issue regarding CSRs’ transportation of hazardous waste – again points to evidence  
18 demonstrating variations in the degree to which each CSR transported property in  
19 interstate commerce on a given day. Defendant notes: that each CSR has a different route  
20 on any given day, different customers, and different parts and products to transport; each  
21 hazardous waste storage facility to which CSRs dropped off waste at the end of each work  
22 day are merely transfer stations, not final destinations for the waste; and the final  
23 destinations for the waste are waste treatment facilities – the majority of which are located  
24 outside California, including defendant’s facilities in Texas and Kentucky. See Ross Decl.,  
25 ¶¶ 5, 9, 22-25. Thus, in order to determine whether, on any given day, a CSR was  
26 transporting material that ended up in interstate commerce, the court will have to examine  
27 the voluminous daily records filled out by each CSR, along with the testimony of  
28

1 defendant's witnesses concerning the type and quantity of waste picked up by the CSRs,  
2 and the ultimate destination of such material. Based on these facts, defendant contends  
3 proof of the exemption will require overly individualized evidence.

4 Plaintiffs oppose defendant's argument by contending that it is irrelevant whether an  
5 individual CSR transported waste to another state. Rather, the focus of the inquiry is  
6 simply on whether *defendant* ultimately transports its aggregated waste to another state.  
7 Thus, there is no need for an individualized inquiry among class members. Furthermore,  
8 plaintiffs note that no CSR ever crossed state lines, and so do not qualify as drivers  
9 engaged in the interstate transport of property.

10 Defendant is ultimately correct. As noted above, this court already held that, in order  
11 to determine whether a CSR plaintiff is a qualifying "driver" engaged in interstate commerce  
12 under the federal regulations, courts must examine the "character" of the shipments  
13 delivered by the drivers, and defendant's intent as to the *ultimate destination* of the goods.  
14 The court also found that this is a determination that can only be made "after considering  
15 the entire panoply of facts and circumstances surrounding the transportation." Watkins,  
16 375 F.3d at 825. Thus, regardless whether a CSR drives a portion of a route that ultimately  
17 transported goods out of state, or whether the CSR him or herself ultimately crosses state  
18 lines, the court's inquiry must be rooted in the facts and circumstances surrounding the  
19 *drivers'* transportation of shipments, as well as the shipments' ultimate destination. And  
20 since defendant has demonstrated with testimony that the facts and circumstances of each  
21 driver's transportation of shipment, and each shipment's ultimate destination, varies on a  
22 given day, the court must necessarily engage in a highly individualized inquiry for each  
23 member of the class, to determine whether that driver's hours were, in fact, regulated by  
24 the federal motor carrier regulations on a given day.

25 Defendant's reliance on Bishop v. Petro-Chemical Transport, LLC, 582 F.Supp.2d  
26 1290 (E.D. Cal. 2008), is also instructive. In Bishop, the named plaintiff worked as a truck  
27 driver for his former employer and brought suit against defendant employer on behalf of a  
28

1 class, contending that he regularly worked in excess of forty (40) hours per week, but had  
2 been unlawfully denied overtime. Plaintiff sought certification of two classes based on  
3 defendant’s purportedly unlawful failure to pay overtime: a FLSA class, and a California  
4 class alleging violations of the state’s unfair competition law. Similar to plaintiffs here,  
5 defendant in Bishop sought to defend against the merits of the action by arguing that the  
6 federal motor carrier exemption applied. Defendant there also argued – as here – that the  
7 classes at issue were improper because an intensive individualized inquiry would have to  
8 be performed to determine whether the motor carrier exemption applied.

9 In declining to certify either class, the Bishop court cited Watkins, and noted that the  
10 federal motor carrier defense can be established by (1) showing that a driver can  
11 reasonably be expected to drive across state lines, or (2) drivers hauled goods in “the  
12 practical continuity of movement” in interstate commerce. The court distinguished wage  
13 and hour violations from the policies inherent in employment discrimination cases, and  
14 concluded that with respect to Rule 23 specifically, neither commonality nor predominance  
15 had been satisfied. See 582 F. Supp. 2d at 1308-09.

16 Although the Bishop court’s analysis took factors into account that are not relevant  
17 here, the result is nonetheless similar. The court finds that, for the reasons stated,  
18 individualized issues will likely predominate at trial as to whether the plaintiff class  
19 transported property in interstate commerce, such that their hours were regulated by the  
20 federal motor carrier regulations, and thus exempt from overtime requirements.

21 3. Whether Each CSR Drove a Vehicle with a Gross Vehicle Weight Rating  
22 (“GVWR”) of 26,001 Pounds or Greater

23 Defendant also asserts a second ground for concluding that the hours of its  
24 employees are regulated by California motor carrier regulations: that on many days, its  
25 CSRs drove trucks with gross vehicle weight ratings (“GVWR”) of 26,001 pounds or more.  
26 See 13 C.C.R. § 1200 (regulations apply to vehicles listed in Vehicle Code § 34500, which  
27 includes commercial motor vehicles with a GVWR of “26,001 or more pounds”). As with  
28

1 the preceding issues, defendant contends that this inquiry will require a highly  
2 individualized showing at trial, such that the predominance factor can no longer be  
3 satisfied.

4 Defendant points out that plaintiff Wamboldt testified that at times he drove a truck  
5 with a GVWR rating of 33,000 pounds, and at times he drove a truck with a GVWR of up to  
6 25,999 pounds. See Declaration of Robert W. Tollen ISO Mot. to Decert. (“Tollen Decl.”),  
7 Ex. A at 10:14-17; cf. id., Ex. A at 10:19-20. In addition, Mr. Ross testifies that over the  
8 course of the period covered by the present action, defendant provided various types of  
9 trucks for its CSRs to drive. See Ross Decl., ¶ 34. Some have GVWR ratings of 26,001 or  
10 more pounds, but others have lower GVWR ratings. Id. Thus, concludes defendant,  
11 depending on the weight of the particular truck that an individual CSR was driving on a  
12 particular day, that CSR may have been regulated by the California motor carrier  
13 regulations, or not. A determination of this issue would require an individualized analysis  
14 for each CSR, covering all days on which that given CSR worked.

15 Plaintiffs, in response, again fail to dispute the individualized nature of the requisite  
16 showing per se, relying instead once more on an offer to stipulate to the applicability of  
17 California motor carrier regulations and the motor carrier exemption, upon summarized  
18 proof that a given CSR drove a truck with the requisite GVWR on a given day.

19 For all the same reasons already discussed in connection with plaintiffs’ stock  
20 response – namely, the insufficiency of the response to adequately rebut the individualized  
21 nature of the inquiry that must be undertaken at trial – plaintiffs fail to demonstrate that the  
22 predominance requirement is satisfied here, in the face of defendant’s evidence suggesting  
23 that, indeed, individualized issues and not common ones are likely to predominate at trial  
24 with respect to the inquiry at bar.

25 Accordingly, the court finds that the predominance requirement is not satisfied as to  
26 whether defendant’s CSRs are regulated by the California motor carrier regulations on any  
27 given day, such that defendant is exempted from overtime liability.

28



1           4.       Whether Each CSR Worked Overtime on a Given Day

2           Finally, defendant has argued that, even assuming that the court were satisfied that  
3 the foregoing grounds for application of the motor carrier exemption may be demonstrated  
4 by common proof, there is yet another individualized inquiry that the court would have to  
5 undertake in order to determine whether a plaintiff was entitled to overtime on a given day  
6 (assuming that the proof at trial demonstrates that no exemption from overtime applies on  
7 that given day). Namely, the court will need to make an individual determination for each  
8 CSR as to what days they did and did not work beyond eight hours, such that defendant is  
9 obliged to pay overtime compensation.

10           Plaintiffs contend that, in order to determine how many hours of overtime were  
11 worked by the CSRs, an estimate can be used to arrive at the amount of hours worked by  
12 each CSR. Plaintiff submits the declaration of its expert statistician, Dr. Jim Lackritz, on  
13 this point. Dr. Lackritz testifies that based on 43 class members' declarations, he can  
14 predict with 95% confidence that the estimated mean shift length was 10.33 hours and is  
15 accurate to within +0.22 hours. See Declaration of James Lackritz ISO Opp. Mot. to  
16 Decert. ("Lackritz Decl."), ¶¶ 6-8.

17           Defendant is generally correct that a determination as to a plaintiff's entitlement to  
18 overtime on a given day/week is an issue that goes to liability, and that an analysis as to  
19 each and every CSR's daily payroll records to calculate hours worked depends upon  
20 necessarily individualized proof. However, given that plaintiffs' expert, upon examination of  
21 43 declarations from members of the class, has applied a statistical methodology to  
22 estimate a mean shift length of more than ten hours for the class as a whole, the court finds  
23 that plaintiffs have presented a methodology through which a determination as to whether  
24 class members in fact worked overtime on a given day, may be determined with reference  
25 to class-wide proof.

26           This is not to say that plaintiffs' overtime damages may be calculated with reference  
27 to class-wide proof. Indeed, the specific amount of overtime that each individual CSR  
28

1 worked on any given day, is a matter that must be determined on an individual basis,  
2 before each CSR may be awarded damages. As mentioned at the outset, however,  
3 individual variations as to the amount of damages among CSRs “does not detract from the  
4 action's suitability for class certification.” Yokoyama, 594 F.3d at 1089.

5 At any rate, the court’s ruling on this point is not dispositive for purposes of  
6 defendant’s decertification motion. Because for the reasons already discussed above,  
7 there are simply too many individualized issues that arise in connection with application of  
8 the motor carrier exemption to plaintiffs’ overtime claim, such that the individual issues will  
9 predominate over common ones at trial. Collectively, these issues argue against continued  
10 certification of the plaintiff class under Rule 23(b)(3).

11 C. Conclusion

12 For the foregoing reasons, the court GRANTS defendant’s motion for decertification  
13 of the plaintiff class. No further motions will be entertained. It is time to set this case for  
14 trial. The parties shall appear at a case management conference for that purpose on  
15 October 21, 2010 at 2:00 p.m.

16

17 **IT IS SO ORDERED.**

18 Dated: September 20, 2010



19 \_\_\_\_\_  
20 PHYLLIS J. HAMILTON  
21 United States District Judge  
22  
23  
24  
25  
26  
27  
28