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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOHN MARTINO, et al.,  
Plaintiffs,  
v.  
ECOLAB, INC.,  
Defendant.

Case No. [14-cv-04358-PSG](#)

**ORDER GRANTING MOTION FOR  
CLASS CERTIFICATION**

**(Re: Docket No. 26)**

Defendant Ecolab, Inc. distributes various cleaning and sanitizing products—think detergents, soaps and cleaning solutions—to a range of restaurant, hotel, hospital and other end users.<sup>1</sup> To help sell these products, Ecolab provides dispensers and maintenance for free, and it dispatches Territory Managers and Hospitality Territory Managers to customer locations, where they perform maintenance services.<sup>2</sup>

Starting in June 2010, Ecolab employed Plaintiffs John Martino and Adonis Amoroso, along with over 200 others, as TMs or HTMs.<sup>3</sup> For salary purposes, Ecolab classified TMs and HTMs as “outside salespersons”—meaning employees who spend more than half their time selling products or services in the field and are exempt from California regulations that might entitle them to overtime pay.<sup>4</sup> In fact, Plaintiffs allege, they and their colleagues in the same

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<sup>1</sup> See Docket No. 30-1, Ex. 3 at ¶¶ 3-7.

<sup>2</sup> See *id.* at ¶¶ 8-9, 12-15.

<sup>3</sup> See Docket No. 1-2, Ex. B at ¶¶ 6, 10; Docket No. 26-5, Ex. C at ¶ 4; *id.*, Ex. D at ¶ 4; Docket No. 26-10, Ex. I at 3-4.

<sup>4</sup> Cal. Code Regs. tit. 8, § 11040(1)(C), (2)(M); see Docket No. 1-2, Ex. B at ¶ 11.

1 positions spent most of their workdays installing, servicing and repairing Ecolab products at  
2 customer locations.<sup>5</sup> Plaintiffs therefore claim that Ecolab’s classification was inaccurate and that  
3 Ecolab owes overtime wages to all of these employees.<sup>6</sup>

4 Plaintiffs now move for class certification under Federal Rule of Civil Procedure 23(b)(3).<sup>7</sup>  
5 Ecolab opposes, mainly on the ground that common questions do not predominate across all  
6 putative class members.<sup>8</sup> After reviewing the substantial record that the parties have compiled, the  
7 court finds that Plaintiffs meet the standard for class certification set forth in Rule 23, as the  
8 Supreme Court and the Ninth Circuit have construed it. Plaintiffs’ motion is GRANTED.

9 **I.**

10 Ecolab considers its TMs and HTMs to be sales employees.<sup>9</sup> The company’s sales model  
11 focuses on three goals: retaining current customers, growing sales to those customers and gaining  
12 new customers.<sup>10</sup> Ecolab assigns each TM or HTM somewhere between 20 to 150 customer  
13 accounts.<sup>11</sup> Most of Ecolab’s products are designed to be used with custom-made dispensers that  
14 Ecolab supplies at no cost.<sup>12</sup> TMs and HTMs then visit their assigned customers regularly to  
15 check on their dispensers, and they use these opportunities to build relationships with customers

16 \_\_\_\_\_  
17 <sup>5</sup> See Docket No. 1-2, Ex. B at ¶¶ 6, 11; Docket No. 26-5, Ex. C at ¶ 5; *id.*, Ex. D at ¶ 5.

18 <sup>6</sup> See Docket No. 1-2, Ex. B at ¶¶ 9-17.

19 <sup>7</sup> See Docket No. 26.

20 <sup>8</sup> See Docket No. 30.

21 <sup>9</sup> See Docket No. 30-1, Ex. 3 at ¶ 11; Docket No. 30-3 at 170:25-171:17. TMs and HTMs differ  
22 only in the types of customers that they serve—TMs’ customers are in the food service industry,  
23 while HTMs’ customers tend to be in the hospitality or long-term care industries. See Docket No.  
26-3, Ex. B at 26:11-28:17, 30:9-32:4; *id.*, Ex. D at 42:23-43:11.

24 <sup>10</sup> See Docket No. 30-1, Ex. 3 at ¶ 10; Docket No. 30-2 at 116:13-117:3.

25 <sup>11</sup> See Docket No. 30-1, Ex. 3 at ¶ 25; Docket No. 30-4, Ex. 6 at ¶ 4; Docket No. 26-6, DeLeeuw  
26 Decl., ¶ 6.

27 <sup>12</sup> See Docket No. 30-1, Ex. 3 at ¶¶ 6-7; Docket No. 30-3 at 161:22-162:9.

1 and potentially sell them more products.<sup>13</sup> To that end, at each customer visit, the TM or HTM  
2 creates a Service Detail Report summarizing the results of the inspection and inventory.<sup>14</sup> The TM  
3 or HTM then presents the SDR to the customer’s manager, who ideally has the authority to order  
4 new or upgraded Ecolab products.<sup>15</sup> TMs and HTMs also prospect for new business through cold  
5 calls and referrals.<sup>16</sup> Their pay includes commissions based on a percentage of Ecolab’s total sales  
6 to their customers as compared to sales targets as well as bonuses calculated from growth in  
7 sales.<sup>17</sup> Ecolab grants TMs and HTMs great latitude in how they achieve these goals.<sup>18</sup>

8 Both Plaintiffs in this action were longtime Ecolab employees. Martino worked there from  
9 1980 until his retirement in 2013,<sup>19</sup> and Amoroso has worked there since 2005.<sup>20</sup> Martino was a  
10 HTM during the last few years of his employment, including the claims period starting in June  
11 2010.<sup>21</sup> Amoroso officially has held the TM job title throughout his tenure.<sup>22</sup> Ecolab has assigned  
12 Amoroso to train both TMs and HTMs, and both receive the same instruction.<sup>23</sup>

13 \_\_\_\_\_  
14 <sup>13</sup> See Docket No. 30-1, Ex. 3 at ¶¶ 16-17; Docket No. 30-3 at 130:2-131:20, 135:2-138:9, 205:19-  
15 24.

16 <sup>14</sup> See Docket No. 30-1, Ex. 3 at ¶¶ 19-20.

17 <sup>15</sup> See Docket No. 30-1, Ex. 1 at 243:22-244:3, 362:16-363:10; *id.*, Ex. 2 at 288:14-291:17,  
18 299:16-300:3.

19 <sup>16</sup> See Docket No. 30-1, Ex. 3 at ¶ 21; Docket No. 30-2 at 49:10-15, 125:10-21.

20 <sup>17</sup> See Docket No. 30-1, Ex. 3 at ¶ 26; Docket No. 30-3 at 238:20-239:1; Docket No. 30-5, Ex. 21  
21 at 30:18-31:25, 79:15-80:11, 116:9-118:14.

22 <sup>18</sup> See Docket No. 30-2 at 63:20-64:8, 117:4-12, 121:22-122:2; Docket No. 30-3 at 170:25-172:2;  
23 Docket No. 30-5, Ex. 21 at 39:3-14.

24 <sup>19</sup> See Docket No. 26-5, Ex. C at ¶ 4.

25 <sup>20</sup> See *id.*, Ex. D at ¶ 4.

26 <sup>21</sup> See *id.*, Ex. C at ¶ 4.

27 <sup>22</sup> See *id.*, Ex. D at ¶ 4.

28 <sup>23</sup> See *id.* at ¶ 5.

1 In practice, despite their nominal focus on sales, Plaintiffs spent “the substantial majority  
2 of [their] working time” performing maintenance tasks—“installing, servicing and repairing  
3 commercial dispensers and related equipment.”<sup>24</sup> The equipment that Ecolab issued them  
4 reflected these duties; Plaintiffs carried safety glasses, hammers, pipe cutters, drills, hacksaws,  
5 chisels, WD-40 and a variety of other tools to each of their customer visits.<sup>25</sup> And though  
6 Plaintiffs regularly worked more than 40 hours in a work week, and they often had to work  
7 weekends too, Ecolab’s paychecks only reflected 86.67 hours worked every two weeks because  
8 the company considered them overtime-exempt sales employees.<sup>26</sup>

9 Plaintiffs filed their initial complaint in state court on June 4, 2014<sup>27</sup> and amended their  
10 complaint to add a new claim on August 21, 2014.<sup>28</sup> On September 26, Ecolab removed the action  
11 to this court.<sup>29</sup> After nearly a year of discovery and almost three months of briefing, the court  
12 heard oral arguments on the instant motion.<sup>30</sup> Plaintiffs’ amended complaint contains four causes  
13 of action: (1) failure to pay wages due under Cal. Lab. Code §§ 201 and 202; (2) failure to  
14 provide accurate itemized wage statements in violation of Cal. Lab. Code § 226; (3) unfair  
15 competition and (4) civil penalties under Cal. Lab. Code § 558 and California’s Private Attorney  
16 Generals Act.<sup>31</sup>

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19 <sup>24</sup> *Id.*, Ex. C at ¶ 5; *id.*, Ex. D at ¶ 5.

20 <sup>25</sup> *See id.*, Ex. C at ¶¶ 10-11; *id.*, Ex. D at ¶¶ 10-11.

21 <sup>26</sup> *See id.*, Ex. C at ¶¶ 6-9; *id.*, Ex. D at ¶¶ 6-9.

22 <sup>27</sup> *See* Docket No. 1-2, Ex. A; Docket No. 26-4 at ¶ 2.

23 <sup>28</sup> *See* Docket No. 1-2, Ex. B; Docket No. 26-4 at ¶ 3.

24 <sup>29</sup> *See* Docket No. 1; Docket No. 26-4 at ¶ 5.

25 <sup>30</sup> *See* Docket No. 23 at 2; Docket No. 29 at 2; Docket No. 38.

26 <sup>31</sup> *See* Docket No. 1-2, Ex. B at ¶¶ 9-53.

**II.**

This court has jurisdiction under 28 U.S.C. § 1332(d). The parties further consented to the jurisdiction of the undersigned magistrate judge under 28 U.S.C. § 636(c) and Fed. R. Civ. P. 72(a).<sup>32</sup>

**III.**

“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’”<sup>33</sup> To satisfy class certification requirements, class members’ claims must be capable of satisfaction in “one stroke.”<sup>34</sup> To satisfy the four threshold requirements of Fed. R. Civ. P. 23(a), (1) the class must be “so numerous that joinder of all members is impracticable” (numerosity); (2) there must be “questions of law or fact common to the class” (commonality); (3) “the claims or defenses of the representative parties” must be “typical of the claims or defenses of the class” (typicality) and (4) the named plaintiffs must “fairly and adequately protect the interests of the class” (adequacy).<sup>35</sup> Plaintiffs seeking class certification also must satisfy the requirements of Rule 23(b), subdivisions 1, 2 or 3, which define three different types of classes.<sup>36</sup>

Here, Plaintiffs seek certification pursuant to Rule 23(b)(3), the predominance standard.<sup>37</sup> To certify a class under Rule 23(b)(3), the party seeking class certification must establish both that (1) “questions of law or fact common to class members predominate over any questions affecting

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<sup>32</sup> See Docket Nos. 13, 16.

<sup>33</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

<sup>34</sup> *Id.* at 2551.

<sup>35</sup> *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 291 (3d Cir. 2010) (quoting Fed. R. Civ. P. 23(a)(1)-(4)); see also *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 512 (9th Cir. 2013).

<sup>36</sup> See Fed. R. Civ. P. 23(a)-(b); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998); *Leyva*, 716 F.3d at 512.

<sup>37</sup> See Docket No. 26 at 16.

1 only individual members” and that (2) a class action would be “superior to other available  
2 methods for fairly and efficiently adjudicating the controversy.”<sup>38</sup> “The shared legal or factual  
3 issues must be of sufficient importance to the case that the Court is convinced that the most  
4 efficient, fair, and sensible method of adjudication is through a class action.”<sup>39</sup> As a result, the  
5 predominance inquiry examines “whether proposed classes are sufficiently cohesive to warrant  
6 adjudication by representation.”<sup>40</sup>

7 “Rule 23 does not set forth a mere pleading standard.”<sup>41</sup> “A party seeking class  
8 certification must affirmatively demonstrate his compliance with the Rule—that is, he must be  
9 prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or  
10 fact, etc.”<sup>42</sup> This is a “rigorous analysis” that often “will entail some overlap with the merits of the  
11 plaintiff’s underlying claim.”<sup>43</sup>

12 Ecolab does not dispute that the putative class and Plaintiffs’ counsel satisfy the  
13 numerosity and adequacy requirements of Rule 23. Ecolab has disclosed at least 233 putative  
14 class members,<sup>44</sup> and it would be impractical to join so many people in a single action.<sup>45</sup> The

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16 <sup>38</sup> Fed. R. Civ. P. 23(b)(3).

17 <sup>39</sup> *Stitt v. S.F. Mun. Transp. Agency*, Case No. 12-cv-3704, 2014 WL 1760623, at \*2 (N.D. Cal.  
18 May 2, 2014) (citing Cal. Prac. Guide Fed. Civ. Pro. Before Trial Ch. 10–C § 10:274).

19 <sup>40</sup> *Hanlon*, 150 F.3d at 1022 (internal citations omitted).

20 <sup>41</sup> *Wal-Mart Stores*, 131 S. Ct. at 2551.

21 <sup>42</sup> *Id.* (emphasis in original).

22 <sup>43</sup> *Wal-Mart Stores*, 131 S.Ct. at 2551; *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160  
23 (1982) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)) (“[T]he class  
24 determination generally involves considerations that are enmeshed in the factual and legal issues  
25 comprising the plaintiff’s cause of action.”); 7AA Charles A. Wright, Arthur R. Miller & Mary  
26 Kay Kane, *Federal Practice and Procedure* § 1785 (3d ed. 2005) (noting that the court is not  
“limited to an evaluation of the pleadings in deciding whether the [Rule 23(b)(3)] standard is met”  
and that the predominance “inquiry does require an examination of the elements of the claims and  
defenses”).

27 <sup>44</sup> *See* Docket No. 26-10, Ex. I at 3-4.

1 named Plaintiffs have no “conflicts of interest with other class members,” and Plaintiffs’ counsel  
2 are more than qualified to “prosecute the action vigorously on behalf of the class.”<sup>46</sup> The parties  
3 disagree, however, about the remaining requirements for class certification.

4 **First**, Plaintiffs allege that all the members of the putative class were ineligible for the  
5 outside salesperson overtime exception. As indicated above, that exemption applies to employees  
6 who “customarily and regularly work[] more than half the working time away from the employer’s  
7 place of business selling tangible or intangible items or obtaining orders or contracts for products,  
8 services, or use of facilities.”<sup>47</sup> In *Ramirez v. Yosemite Water Co.*, the California Supreme Court  
9 explained that the regulation “takes a purely quantitative approach, focusing exclusively on  
10 whether the individual ‘works more than half the working time’” on the tasks above.<sup>48</sup>  
11 Furthermore, California law “does not contain any provision that reclassifies intrinsically  
12 nonexempt nonsales work as exempt based on the fact that it is *incidental* to sales.”<sup>49</sup> “The  
13 language of the state exemption only encompasses work directly involved in ‘selling . . . items or  
14 obtaining orders or contracts.’”<sup>50</sup> A particular physical task might relate to sales, in the sense that

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17 <sup>45</sup> *Cf. Jordan v. Los Angeles County*, 669 F.2d 1311, 1319-20 (9th Cir.) (“[W]e would be inclined  
18 to find the numerosity requirement . . . satisfied solely on the basis of the number of ascertained  
19 class members, i.e., 39, 64, and 71 . . .”), *rev’d on other grounds*, 103 S. Ct. 35 (1982); *Akaosugi*  
20 *v. Benihana Nat’l Corp.*, 282 F.R.D. 241, 253-54 (N.D. Cal. 2012) (citing *Rannis v. Recchia*, 380  
F. App’x 646, 650-51 (9th Cir. 2010)) (“The numerosity requirement is not tied to any fixed  
numerical threshold, but courts generally find the numerosity requirement satisfied when a class  
includes at least forty members.”).

21 <sup>46</sup> *Hanson*, 150 F.3d at 1020 (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512  
22 (9th Cir. 1978)).

23 <sup>47</sup> Cal. Code Regs. tit. 8, § 11040(1)(C), (2)(M); *id.* § 11050(1)(D), (2)(M); *id.* § 11070(1)(C),  
24 (2)(J); *see also* Cal. Lab. Code § 1171 (“The provisions of this chapter . . . shall not include any  
individual employed as an outside salesman.”).

25 <sup>48</sup> 20 Cal. 4th 785, 797 (1999) (quoting Cal. Code Regs. tit. 8, § 11070(2)(J)).

26 <sup>49</sup> *Id.*

27 <sup>50</sup> *Id.* (alteration in original) (quoting Cal. Code Regs. tit. 8, § 11070(2)(J)).

1 a failure to perform that task “would lead to loss of the customer, but that does not make [the task]  
2 a sales activity, any more than an attorney’s preparation of a legal brief in order to satisfy and  
3 thereby retain a client is a sales activity.”<sup>51</sup>

4 “In other words, under the California exemption, the only question is whether the  
5 employee spends over 50% of his or her time involved in activities directly related to sales, not  
6 including activities incidentally related to sales.”<sup>52</sup> The first step is looking into “how the  
7 employee actually spends his or her time.”<sup>53</sup> The court also should “consider whether the  
8 employee’s practice diverges from the employer’s realistic expectations, whether there was any  
9 concrete expression of employer displeasure over an employee’s substandard performance, and  
10 whether these impressions were themselves realistic given the actual overall requirements of the  
11 job.”<sup>54</sup> Exemptions to overtime pay requirements “are narrowly construed,”<sup>55</sup> and “[t]hey are  
12 applied only to those employees ‘plainly and [unmistakably] within their terms and spirit.’”<sup>56</sup>

13 As a result, deciding whether an employee qualifies for an exemption may “turn[] on a  
14 detailed, fact-specific determination” of “how the employee actually spends his or her time.”<sup>57</sup>  
15 However, “neither variation in the mix of actual work activities undertaken during the class period  
16 . . . , nor differences in the total unpaid overtime compensation owed each class member, bars  
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18 <sup>51</sup> *Id.* at 802.

19 <sup>52</sup> *Ross v. Ecolab Inc.*, Case No. 13-cv-05097, 2015 WL 5681323, at \*3 (N.D. Cal. Sept. 28,  
20 2015).

21 <sup>53</sup> *Ramirez*, 20 Cal. 4th at 802.

22 <sup>54</sup> *Id.*

23 <sup>55</sup> *Id.* at 794.

24 <sup>56</sup> *In re United Parcel Serv. Wage & Hour Cases*, 190 Cal. App. 4th 1001, 1010 (2010) (second  
25 alteration in original) (quoting *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1125 (9th Cir.  
26 2002)).

27 <sup>57</sup> *Ramirez*, 20 Cal. 4th at 790, 802.



1 class certification as a matter of law.”<sup>58</sup> “Where standardized job duties or other policies result in  
2 employees uniformly spending most of their time on nonexempt work, class treatment may be  
3 appropriate even if the case involves an exemption that typically entails fact-specific individual  
4 inquiries.”<sup>59</sup> “Individual issues do not render class certification inappropriate so long as such  
5 issues may effectively be managed.”<sup>60</sup> On the other hand, the court should not certify a class if  
6 deciding whether a group of employees qualified for an exemption would necessitate “several  
7 hundred mini-trials with respect to each [employee’s] actual work performance.”<sup>61</sup> The mere  
8 existence of a uniform exemption policy is not enough to justify class treatment if the “court[]  
9 must still ask where the individual employees actually spent their time.”<sup>62</sup>

10 Plaintiffs contend that the putative class meets the predominance requirement because  
11 Ecolab misclassified every TM and HTM under the outside salesperson exemption. In support of  
12 this claim, Plaintiffs submit dozens of declarations from putative class members, all of whom  
13 confirm that they spent most of their working time servicing customer equipment and performing  
14 other non-sales tasks.<sup>63</sup> Aside from installing, repairing and maintaining commercial dispensers  
15 on preplanned visits, these employees also spent significant amounts of time responding to  
16 emergency service calls.<sup>64</sup> Ecolab’s corporate representative agreed that installing and  
17 maintaining machines takes up “a majority of the time” that TMs and HTMs spend at customer  
18 locations.<sup>65</sup> The same representative also testified that Ecolab classifies all TMs and HTMs as

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20 <sup>58</sup> *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 335 (2004).

21 <sup>59</sup> *Duran v. U.S. Bank Nat’l Ass’n*, 59 Cal. 4th 1, 31 (2014).

22 <sup>60</sup> *Sav-on Drug Stores*, 34 Cal. 4th at 334.

23 <sup>61</sup> *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 947 (9th Cir. 2009).

24 <sup>62</sup> *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir. 2009).

25 <sup>63</sup> See Docket No. 26-6 to 26-9 (“Employee Decls.”) at ¶¶ 5-13.

26 <sup>64</sup> See *id.* at 4-5.

27 <sup>65</sup> Docket No. 26-3, Ex. B at 143:2-6.

1 outside salespeople exempt from overtime pay requirements.<sup>66</sup> In light of the uniform corporate  
2 policy and similar job responsibilities, Plaintiffs maintain, the dispute may be adjudicated on a  
3 class basis.

4 Ecolab counters that the putative class members’ experiences differed so widely that the  
5 putative class cannot satisfy the predominance requirement for class certification.<sup>67</sup> More broadly,  
6 Ecolab’s hands-off approach to TMs and HTMs means that each of them does the job differently.  
7 Ecolab also notes that the lack of reliable timekeeping records will render damages difficult to  
8 determine. Therefore, Ecolab says, individualized issues dominate despite the blanket exemption  
9 policy. The variance in workstyle is not, however, the critical question in determining  
10 commonality, typicality and predominance. Ecolab may argue that its employees’ lack of direct  
11 sales activity “diverge[d] from [Ecolab’s] realistic expectations” or that its displeasure was  
12 “realistic given the actual overall requirements of the job.”<sup>68</sup> However, these “considerations . . .  
13 are likely to prove susceptible of common proof,” and they do not preclude class certification.<sup>69</sup>

14 Individualized damages are no bar either. In this circuit, “the presence of individualized  
15 damages cannot, by itself, defeat class certification.”<sup>70</sup> Ecolab is correct that a complete absence  
16 of timekeeping records may affect predominance,<sup>71</sup> but that is not the case here. Each TM and  
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18 <sup>66</sup> See *id.* at 51:15-24.

19 <sup>67</sup> As is often the case with motions for class certification under Rule 23(b)(3), the “‘commonality’  
20 requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement  
21 that questions common to the class ‘predominate over’ other questions.” *Amchem Prods., Inc. v.*  
22 *Windsor*, 521 U.S. 591, 609 (1997). Here, the same goes for typicality. Accordingly, the court  
23 will “train[] its attention on the ‘predominance’ inquiry.” *Id.*

24 <sup>68</sup> *Ramirez*, 20 Cal. 4th at 802

25 <sup>69</sup> *Sav-on Drug Stores*, 34 Cal. 4th at 337.

26 <sup>70</sup> *Leyva*, 716 F.3d at 514; see also *Sav-on Drug Stores*, 34 Cal. 4th at 334-35 (“We have  
27 recognized that the need for individualized proof of damages is not per se an obstacle to class  
28 treatment . . .”).

<sup>71</sup> See, e.g., *Alakozai v. Chase Inv. Servs. Corp.*, Case No. 11-cv-09178, 2014 WL 5660697, at \*18  
(C.D. Cal. Oct. 6, 2014); *Rosenberg v. Renal Advantage, Inc.*, Case No. 11-cv-02152, 2013 WL

1 HTM uses a tablet or computer to fill out Service Detail Reports and Extra Service Reports for  
2 routine and emergency visits, respectively, and these SDRs and ESRs provide an estimate of how  
3 the employee actually spent his or her time.<sup>72</sup> Like all timekeeping records, these are not perfect.  
4 One named Plaintiff testified at his deposition that he did not write up ESRs about half the time,  
5 for example if a short phone call could resolve the issue or if fixing the problem were so simple  
6 that putting it in writing might embarrass the customer.<sup>73</sup> But, by and large, these documents  
7 “would enable the court to accurately calculate damages . . . for each claim” on a class-wide  
8 basis.<sup>74</sup>

9 By contrast, “[a]ny dispute over ‘how the employee actually spends his or her time’ . . . has  
10 the potential to generate individual issues.”<sup>75</sup> The court must evaluate whether individualized  
11 inquiries would be necessary to decide whether each employee in the putative class really did  
12 spend more half of his or her time on sales tasks. As it often does, the class certification inquiry  
13 thus requires the court to “resolve factual issues related to the merits.”<sup>76</sup> Here, that includes  
14 weighing the numerous declarations and depositions that the parties have offered.

15 Plaintiffs submit testimony from more than 30 employees who claim to spend over half  
16 their time on non-sales tasks.<sup>77</sup> Ecolab observes that certain of these declarants changed their

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18 3205426, at \*12 (S.D. Cal. June 24, 2013).

19 <sup>72</sup> See Docket No. 31-2, Ex. F at 39:15-43:21, 134:7-20; *id.*, Ex. I at 70:10-71:11 ;

20 <sup>73</sup> See Docket No. 30-1, Ex. 1 at 175:18-176:2, 178:16-179:15, 187:8-15.

21 <sup>74</sup> *Leyva*, 716 F.3d at 514.

22 <sup>75</sup> *Sav-on Drug Stores*, 34 Cal. 4th at 336-37 (quoting *Ramirez*, 20 Cal. 4th at 802); *see also*  
23 *Vinole*, 571 F.3d at 946-47 (affirming denial of class certification where individual issues about  
24 how employees spent their time predominated).

25 <sup>76</sup> *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 590 (9th Cir. 2010), *rev'd on other grounds*, 131  
26 S. Ct. 2541 (2011).

27 <sup>77</sup> See Employee Decls.

1 estimates during their depositions.<sup>78</sup> But most of these changes were relatively minor, and no  
2 employee crossed the 50% threshold.<sup>79</sup> More substantively, Ecolab derides these declarations as  
3 “cookie-cutter” and argues that “they fail to explain the duties they characterize as ‘non-sales.’”<sup>80</sup>  
4 Although the declarations do follow a similar format, they differ substantially in their details,  
5 reflecting a variety of job duties and work habits. More importantly, each declaration includes a  
6 litany of tasks that are not “directly involved in ‘selling . . . items or obtaining orders or  
7 contracts”<sup>81</sup>—and thus do not qualify as sales under *Ramirez*.<sup>82</sup>

8 Of course, “[t]o the extent Plaintiffs’ declarations offer legal conclusions as to what  
9 constitutes selling and what does not, the [c]ourt . . . disregard[s] such legal conclusions in the  
10 certification decision.”<sup>83</sup> But after examining each of these declarations, the court is satisfied that  
11 the declarants’ characterizations are correct. Some of the tasks that TMs and HTMs perform are  
12 unambiguously related to service and not sales. These include testing, installing, repairing and  
13 maintaining Ecolab equipment, as well as responding to emergency service calls.

14 Other tasks are closer to the line. For example, TMs and HTMs check inventory on  
15 customers’ supplies, train customers’ employees on how to use their equipment and order repair

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18 <sup>78</sup> See Docket No. 30 at 7 & n.43.

19 <sup>79</sup> See *id.* The largest difference came from the testimony of one employee who said that he spent  
20 less than 20% of his customer visits on sales but revealed at his deposition that he tried to set aside  
21 one day a week for prospecting, depending on what emergencies arose. See Docket No. 26-6,  
Diaz Decl. at ¶¶ 13, 19; Docket No. 30-4, Ex. 11 at 49:10-51:15. Even including the prospecting,  
this employee did not spend more than 50% of his time on sales tasks.

22 <sup>80</sup> Docket No. 30 at 16.

23 <sup>81</sup> *Ramirez*, 20 Cal. 4th at 797 (quoting Cal. Code Regs. tit. 8, § 11070(2)(J)).

24 <sup>82</sup> Stated otherwise, “the tasks discussed in both defendant’s and plaintiffs’ submissions comprise  
25 a reasonably definite and finite list,” and the court therefore has enough information to classify  
them according to the *Ramirez* standard. *Sav-on Drug Stores*, 34 Cal. 4th at 330-31.

26 <sup>83</sup> Docket No. 30 at 16 n.85 (citing *Mireles v. Paragon Sys., Inc.*, Case No. 13-cv-00122, 2014 WL  
27 4409822, at \*2-3 (S.D. Cal. Sept. 8, 2014)).

1 parts and testing materials as necessary. But because the court must construe the exemption  
 2 narrowly,<sup>84</sup> these too fall outside the sales category. Checking inventory may contribute to sales,  
 3 but it does not directly lead to new orders.<sup>85</sup> In the same vein, training or talking with lower-level  
 4 employees who have no authority to purchase products only indirectly gives rise to sales. And  
 5 repairing dispensers, dishwashing machines and other equipment is ancillary to the company’s  
 6 stated primary goal of selling cleaning and sanitizing products. Placing orders for repair parts,  
 7 therefore, also is not directly involved in sales.<sup>86</sup> Alternatively, because “one who *only* performed  
 8 these . . . tasks could not be considered a salesperson,” none of them—taking inventory,  
 9 interacting with low-level employees or repairing equipment—is “a sales activity in the  
 10 conventional meaning of the word.”<sup>87</sup>

11 Ecolab’s declarations tell a different story.<sup>88</sup> As an initial matter, as the parties’ papers

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12 <sup>84</sup> See *Ramirez*, 20 Cal. 4th at 794.

13 <sup>85</sup> See *Ross*, 2015 WL 5681323, at \*3-6 (accepting plaintiffs’ contention that “checking inventory  
 14 on the client’s supply” was a non-sales task); *cf.* 29 C.F.R. § 541.503(c) (providing that checking  
 15 inventory is not in itself sales work under the analogous federal exemption).

16 <sup>86</sup> *Cf. Keyes Motors, Inc. v. Div. of Labor Standards Enforcement*, 197 Cal. App. 3d 557, 563-64  
 17 (1987) (holding that mechanics responsible for repairing vehicles were not “involved principally  
 18 in *selling* a product or service” even though they were “essential to the sale of both parts and  
 service”).

19 <sup>87</sup> *Ramirez*, 20 Cal. 4th at 802; *see also Pablo v. ServiceMaster Global Holdings, Inc.*, Case No.  
 20 08-cv-03894, 2011 WL 2470093, at \*5-6 (N.D. Cal. June 20, 2011) (applying this language from  
*Ramirez* in deciding whether certain tasks were sales or non-sales).

21 <sup>88</sup> See Docket No. 30-1, Ex. 4 at ¶ 14 (“90% of my working hours are sales-related activities that  
 22 directly or indirectly result in new sales or allow me to continue to sell products to existing  
 23 customers.”); Docket No. 30-4, Ex. 6 at ¶ 23 (“I spend, on average, at least 70% of my work time  
 24 each week devoted to sales and the remaining time on service and installations.”); *id.*, Ex. 7 at  
 25 ¶¶ 16-17 (“I would estimate that I spent seventy to eighty percent of my time on almost all of my  
 26 calls as an HTM, selling Ecolab products. . . . I would estimate that I spent only about twenty to  
 27 thirty percent of my time on any visit doing ‘service work.’”); *id.*, Ex. 8 at ¶ 19 (“I spent at least  
 28 50% of my time in each visit doing sales and sales related tasks.”); *id.*, Ex. 9 at ¶ 15 (“100% of my  
 daily activities at Ecolab are sales or sales-related activities. Even when a customer thinks I am  
 doing just ‘service,’ I really am selling and they don’t know it.”); *id.*, Ex. 10 at ¶ 20 (“I spend  
 more than 50% of my time in each visit doing sales and sales related tasks which do not in any  
 way involve any physical, service task.”); Docket No. 30-5, Ex. 20 at ¶ 24 (“I view absolutely

1 demonstrate, courts vary in their treatment of these so-called “happy camper” declarations—  
 2 statements that an employer obtains from employees to prove their insusceptibility to class  
 3 adjudication.<sup>89</sup> Because “the absent class member and the defendant are involved in an ongoing  
 4 business relationship, such as employer-employee, any communications are more likely to be  
 5 coercive.”<sup>90</sup> Especially where the employer has hidden its intentions or otherwise misled  
 6 employees, some courts have held that this risk of coercion is so great that it limits or entirely  
 7 eliminates any probative value these declarations might have.<sup>91</sup>

8 The declarations in this case, however, are more reliable because Ecolab’s counsel did not  
 9 obtain them “through a coercive or misleading procedure.”<sup>92</sup> When interviewing employees to

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11 everything I am doing as sales-related and all of my time is spent related to sales, so if I work an  
 12 eight hour day, I spent all eight hours doing sales-related work, regardless of the task.”); *id.*, Ex.  
 13 23 at ¶ 18 (“[O]verall I spend about fifty-five plus percent of my time involved in sales activities  
 14 . . . .”).

14 <sup>89</sup> *E.g.*, *Villalpando v. Exel Direct, Inc.*, Case No. 12-cv-04137, 2015 WL 5179486, at \*24 (N.D.  
 15 Cal. Sept. 3, 2015); *Kellgren v. Petco Animal Supplies, Inc.*, Case No. 13-cv-00644, 2015 WL  
 16 5167144, at \*6 (S.D. Cal. Sept. 3, 2015); *Casida v. Sears Holding Corp.*, Case No. 11-cv-01052,  
 2012 WL 3260423, at \*6 (E.D. Cal. Aug. 8, 2012); *Creely v. HCR ManorCare, Inc.*, 789 F. Supp.  
 2d 819, 840 (N.D. Ohio 2011).

17 <sup>90</sup> *Belt v. Emcare, Inc.*, 299 F. Supp. 2d 664, 668 (E.D. Tex. 2003) (citing *Kleiner v. First Nat’l*  
 18 *Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985); *Hampton Hardware, Inc. v. Cotter & Co.,*  
*Inc.*, 156 F.R.D. 630, 633 (N.D. Tex. 1994)).

19 <sup>91</sup> *See, e.g.*, *Longcrier v. HL-A Co., Inc.*, 595 F. Supp. 2d 1218, 1227-30 (S.D. Ala. 2008) (striking  
 20 declarations because employer’s conduct in obtaining them “unfairly and irrevocably tainted” the  
 21 evidence); *Morden v. T-Mobile USA, Inc.*, Case No. 05-cv-02112, 2006 WL 2620320, at \*3 (W.D.  
 22 Wash. Sept. 12, 2006) (discounting declarations obtained by an employer “because of the risk of  
 bias and coercion inherent in that testimony”).

23 <sup>92</sup> *Soto v. Castlerock Farming & Transport, Inc.*, Case No. 09-cv-00701, 2013 WL 6844398, at \*4  
 24 (E.D. Cal. Dec. 23, 2013); *see also Villa v. United Site Services of Cal., Inc.*, Case No. 12-cv-  
 25 00318, 2012 WL 5503550, at \*14-15 (N.D. Cal. Nov. 13, 2012) (denying motion to strike  
 26 employee declarations because there was no evidence of coercion by employer, even though  
 27 employer’s “conduct in approaching the potential class members was not exemplary”); *Rosales v.*  
*El Rancho Farms*, Case No. 09-cv-00707, 2011 WL 6153212, at \*4-6 (E.D. Cal. Dec. 12, 2011)  
 (declining to strike employee declarations because employer’s counsel had done nothing wrong);  
*Kerce v. W. Telemarketing Corp.*, 575 F. Supp. 2d 1354, 1366-67 (S.D. Ga. 2008) (same).

1 solicit declarations, Ecolab’s counsel gave each employee a two-page consent form clearly stating  
2 that the employee’s cooperation was voluntary and that it could affect the employee’s potential  
3 claims against Ecolab.<sup>93</sup> Plaintiffs particularly object to the testimony of Leo Gonzalez, an Ecolab  
4 TM who submitted a declaration in support of Ecolab’s position<sup>94</sup> but now alleges that he “felt  
5 pressured to cooperate” because he was “concerned about [his] job and [his] livelihood.”<sup>95</sup>  
6 Gonzalez does not say, however, that Ecolab’s counsel misled him in any way except, arguably,  
7 about how much of Gonzalez’ work qualified as sales<sup>96</sup>—a legal conclusion that does not affect  
8 the import of his declaration. Gonzalez also claims that Ecolab’s counsel changed the substance  
9 of his testimony.<sup>97</sup> But Gonzalez himself specified the time allocation figures that appear in his  
10 declaration; Ecolab’s counsel only adjusted them to add up to 100%.<sup>98</sup> Nothing about Ecolab’s  
11 conduct in obtaining declarations, even as Gonzalez characterizes it, justifies disregarding them in  
12 their entirety.

13 Even if the court considers Ecolab’s declarations, however, they do not defeat class  
14 certification. A number of these declarants make conclusory statements about how much time  
15 they spend on sales without providing any details.<sup>99</sup> For the same reason that the court cannot take

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17 <sup>93</sup> See Docket No. 36-1, Ex. 1.

18 <sup>94</sup> See Docket No. 30-5, Ex. 23.

19 <sup>95</sup> Docket No. 31-1, Ex. A at ¶ 16. Plaintiffs also obtained a declaration from Gonzalez in support  
20 of their initial motion for class certification. See Docket No. 26-7, Gonzalez Decl. The latter  
21 contains some different figures but is not fundamentally inconsistent, aside from legal  
22 conclusions, with the declaration that he gave Ecolab’s counsel. Compare *id.*, with Docket No.  
23 30-5, Ex. 23.

24 <sup>96</sup> See *id.* at ¶¶ 11, 13-15, 17.

25 <sup>97</sup> See *id.* at ¶ 12.

26 <sup>98</sup> See *id.* at ¶¶ 10-11; *id.*, Ex. 2; Docket No. 36-1 at ¶ 9; *id.*, Ex. 5.

27 <sup>99</sup> See Docket No. 30-1, Ex. 4 at ¶ 14 (“90% of my working hours are sales-related activities that  
28 directly or indirectly result in new sales or allow me to continue to sell products to existing  
customers.”); Docket No. 30-4, Ex. 6 at ¶ 23 (“I spend, on average, at least 70% of my work time  
each week devoted to sales and the remaining time on service and installations.”); *id.*, Ex. 8 at ¶ 19

1 Plaintiffs’ declarants’ conclusions at face value, it must discount this testimony too. Of those  
 2 declarants that did break down their time estimates, all of them misclassified some of the non-  
 3 sales tasks discussed above as sales, and none specifically included emergency service requests in  
 4 their time allocation figures.<sup>100</sup> Two Ecolab declarants also testified at deposition that they had  
 5 counted non-sales tasks in the percentage of time they reported spending on sales.<sup>101</sup> In *Ross*, a

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7 (“I spent at least 50% of my time in each visit doing sales and sales related tasks.”); *id.*, Ex. 9 at  
 8 ¶ 15 (“100% of my daily activities at Ecolab are sales or sales-related activities. Even when a  
 9 customer thinks I am doing just ‘service,’ I really am selling and they don’t know it.”); Docket  
 10 No. 30-5, Ex. 20 at ¶ 24 (“I view absolutely everything I am doing as sales-related and all of my  
 time is spent related to sales, so if I work an eight hour day, I spent all eight hours doing sales-  
 related work, regardless of the task.”).

11 <sup>100</sup> See Docket No. 30-4, Ex. 7 at ¶ 16 (counting inventory checks and discussions with all  
 12 customer employees, including those not involved in decision-making, as “selling Ecolab  
 13 products”); *id.*, Ex. 10 at ¶¶ 18, 20, 23 (considering checking equipment and training customer  
 14 employees as sales tasks); Docket No. 30-5, Ex. 23 at ¶ 18 (counting inventory and training as  
 15 sales activities).

16 <sup>101</sup> One employee, Vito Mastromarco, wrote in his declaration that he “spen[t], on average, at least  
 17 70% of [his] work time each week devoted to sales” without elaborating further. Docket No. 30-4,  
 18 Ex. 6 at ¶ 23. At his deposition, however, Mastromarco testified that, when he reviewed and  
 19 signed the declaration, he did not know what qualified as a sales task, and he considered inventory  
 20 to be, at least in part, sales. See Docket No. 31-2, Ex. B at 79:11-80:2; Docket No. 36-1, Ex. 2 at  
 21 101:6-9. In fact, his deposition reveals that on a typical customer visit lasting several hours, he  
 22 spent less than an hour on sales tasks. See Docket No. 31-2, Ex. B at 27:5-34:24. Only 20% of  
 23 Mastromarco’s customers actually placed orders with him; the rest ordered supplies directly from  
 24 Ecolab or through a distributor. See *id.* at 31:21-32:4. And on only 15% of his visits did  
 Mastromarco speak to a customer employee authorized to purchase products. See Docket No. 36-  
 1, Ex. 2 at 73:12-74:8. Mastromarco also dealt with about one emergency service request a day,  
 which took up 30 to 60 minutes on average. See Docket No. 31-2, Ex. B at at 40:23-41:1, 42:20-  
 43:13. At the end of an emergency call, he would spend 5 to 15 minutes speaking to the customer.  
 See *id.* at 45:8-46:10. In addition to visiting existing customers, Mastromarco sought out new  
 ones. He devoted one day a week to prospecting as well as spending 15% of his time on most  
 days visiting potential customers. See Docket No. 31-2, Ex. B at 55:18-23; Docket No. 36-1, Ex.  
 2 at 95:24-96:25. But overall, Mastromarco’s deposition testimony does not substantiate his claim  
 that he spent more than 50%, much less 70%, of his working time on sales.

25 Another Ecolab employee, Sander Nygaard, wrote in his declaration that he “spent seventy to  
 26 eighty percent of [his] time on almost all of [his] calls . . . selling Ecolab products.” Docket No.  
 27 30-4, Ex. 7 at ¶ 16. Unlike Mastromarco, Nygaard did break down his time more granularly, and  
 the bulk of that 70-80% consisted of inventory checks and conversations with lower-level  
 employees that do not qualify as sales tasks, as discussed above. See *id.* His deposition was



1 similar class action against Ecolab in this district, Chief Judge Hamilton recently denied Ecolab’s  
2 motion to decertify the class because it had “failed to present evidence that even one [employee]  
3 spent more than 50% of his or her time, on a purely quantitative basis, involved in sales.”<sup>102</sup>  
4 Ecolab has come closer to the mark here, but again it has fallen short.

5 **Second**, Ecolab argues in the alternative that the applicability of another overtime  
6 exemption, for employees who receive commissions, also requires an individualized examination  
7 and thus defeats predominance. This exemption appears in Wage Orders 4 and 7 from  
8 California’s Industrial Welfare Commission, and it covers employees whose “earnings exceed one  
9 and one-half (1 1/2) times the minimum wage if more than half of that employee’s compensation  
10 represents commissions.”<sup>103</sup> Wage Order 4 regulates “all persons employed in professional,  
11 technical, clerical, mechanical, and similar occupations,”<sup>104</sup> while Wage Order 7 applies to “all  
12 persons employed in the mercantile industry.”<sup>105</sup> Notably, however, the commissioned  
13 salesperson exemption does not appear in Wage Order 5, which applies to “all persons employed  
14 in the public housekeeping industry.”<sup>106</sup> The order defines the “public housekeeping industry” as  
15 “any . . . business . . . providing maintenance services . . . in [a covered] establishment,” including  
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17 largely consistent with his declaration. *See* Docket No. 31-2, Ex. C at 31:17-36:19, 61:16-66:17;  
18 Docket No. 36-1, Ex. 9 at 154:4-21, 169:7-171:3. The only new information from Nygaard’s  
19 deposition was his testimony that he spent most of every Wednesday prospecting for new  
20 customers if no emergency service calls arose. *See* Docket No. 36-1, Ex. 9 at 100:14-102:17.  
21 However, this was not sufficient to take him over the 50% threshold.

22 <sup>102</sup> *Ross*, 2015 WL 5681323, at \*13.

23 <sup>103</sup> Cal. Code Regs. tit. 8, § 11040(3)(D); *id.* § 11070(3)(D).

24 <sup>104</sup> *Id.* § 11040(1).

25 <sup>105</sup> *Id.* § 11070(1). The “mercantile industry” is defined as “any industry, business, or  
26 establishment operated for the purpose of purchasing, selling, or distributing goods or  
27 commodities at wholesale or retail; or for the purpose of renting goods or commodities.” *Id.*  
28 § 11070(2)(H).

<sup>106</sup> *Id.* § 11050(1).

1 restaurants, bars, hotels, hospitals and other such locations.<sup>107</sup> “To determine which order is  
2 applicable, one must look at the main purpose of the business being examined.”<sup>108</sup>

3 Plaintiffs assert that all TMs and HTMs fall under Wage Order 5 and therefore cannot  
4 qualify for the commissioned salesperson exemption. While Ecolab believes that they are covered  
5 by Wage Order 4 or 7, the court need not decide the issue now. The applicability of a particular  
6 wage order turns on the main purpose of Ecolab’s business as a whole, and that question is  
7 undoubtedly suited for class adjudication.

8 If Wage Order 4 or 7 does cover the putative class, however, Ecolab argues that the court  
9 should not certify the class because the requirements for the commissioned salesperson exemption  
10 are not amenable to class treatment. As above, the exemption applies if an employee’s “earnings  
11 exceed one and one-half (1 1/2) times the minimum wage if more than half of that employee’s  
12 compensation represents commissions.”<sup>109</sup> Although the wage order itself does not explain  
13 exactly what “commissions” means, the California Supreme Court has looked to another statute  
14 that defines the term as “compensation paid to any person for services rendered in the sale of [an]  
15 employer’s property or services and based proportionately upon the amount or value thereof.”<sup>110</sup>  
16 This definition “sets up two requirements, both of which must be met before a compensation  
17 scheme is deemed to constitute ‘commission wages.’”<sup>111</sup> “First, the employees must be involved  
18 principally in selling a product or service, not making the product or rendering the service.”<sup>112</sup>  
19 “Second, the amount of their compensation must be a percent of the price of the product or

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21 <sup>107</sup> *Id.* § 11050(2)(P).

22 <sup>108</sup> *Wamboldt v. Safety-Kleen Sys., Inc.*, Case No. 07-cv-00884, 2007 WL 2409200, at \*6 (N.D.  
23 Cal. Aug. 21, 2007).

24 <sup>109</sup> Cal. Code Regs. tit. 8, § 11040(3)(D); *id.* § 11070(3)(D).

25 <sup>110</sup> *Ramirez*, 20 Cal. 4th at 803-04 (quoting Cal. Lab. Code § 204.1).

26 <sup>111</sup> *Id.* at 804 (quoting *Keyes Motors*, 197 Cal. App. 3d at 563).

27 <sup>112</sup> *Id.* (quoting *Keyes Motors*, 197 Cal. App. 3d at 563).

1 service.”<sup>113</sup>

2 Common proof can satisfy both of these requirements. In fact, in *Ross*, Judge Hamilton  
3 granted class-wide summary judgment against Ecolab on the applicability of the commissioned  
4 salesperson exemption.<sup>114</sup> As she noted, the first prong of the exemption—whether an employee  
5 is “involved principally in selling a product or service”<sup>115</sup>—implicitly invokes the same  
6 quantitative test used to decide the applicability of the outside salesperson exemption.<sup>116</sup> The  
7 court already has found that this question may be decided on a class basis. As for the second  
8 prong, Judge Hamilton interpreted the commissioned salesperson exemption to require that the  
9 commissions be calculated based on sales that the employees make themselves.<sup>117</sup> The court finds  
10 her reasoning persuasive and consistent with *Ramirez*. Like the Ecolab employees who brought  
11 the suit in *Ross*, all TMs and HTMs earn commissions based on total sales to their assigned  
12 customers, regardless of how the customer actually ordered Ecolab products.<sup>118</sup> No individualized  
13 inquiries are necessary to determine whether a particular employee qualifies for the commissioned  
14 salesperson exemption.

15 ***Third***, the parties dispute whether a class action would be “superior to other available  
16 methods for fairly and efficiently adjudicating the controversy.”<sup>119</sup> Rule 23 sets out four factors to  
17 guide this analysis.<sup>120</sup> Two are not relevant here. Neither party has identified any other “litigation

18 \_\_\_\_\_  
19 <sup>113</sup> *Id.* (quoting *Keyes Motors*, 197 Cal. App. 3d at 563).

20 <sup>114</sup> *See Ross*, 2015 WL 5681323, at \*7-9.

21 <sup>115</sup> *Ramirez*, 20 Cal. 4th at 804 (quoting *Keyes Motors*, 197 Cal. App. 3d at 563).

22 <sup>116</sup> *See Ross*, 2015 WL 5681323, at \*7 (citing *Ramirez*, 20 Cal. 4th at 804).

23 <sup>117</sup> *See id.* at \*8.

24 <sup>118</sup> *See* Docket No. 30-1, Ex. 3 at ¶ 26; Docket No. 30-3 at 238:20-239:1; Docket No. 30-5, Ex. 21  
25 at 30:18-31:25, 79:15-80:11, 116:9-118:14.

26 <sup>119</sup> Fed. R. Civ. P. 23(b)(3).

27 <sup>120</sup> *See id.*

1 concerning the controversy already begun by or against class members.”<sup>121</sup> And because all the  
2 claims arise under California law, “concentrating the litigation of the claims in [this] particular  
3 forum” makes perfect sense.<sup>122</sup>

4 As to the first factor, “the class members’ interests in individually controlling the  
5 prosecution or defense of separate actions,”<sup>123</sup> Ecolab notes that one of the named Plaintiffs seeks  
6 \$225,000.<sup>124</sup> Where each class member seeks a large amount of damages—in relative terms—this  
7 factor does cut against class certification.<sup>125</sup> But the \$225,000 figure comes from a back-of-the-  
8 envelope calculation by a single class member<sup>126</sup>—one who evidently felt aggrieved enough to file  
9 suit. Not all of his fellow class members may be similarly situated or motivated. The sheer  
10 number of potential class members also suggests that it would be too burdensome for each of them  
11 to file suit individually. Moreover, their claims for relief raise legal questions that overlap  
12 considerably. Even if each class member does seek substantial damages, class adjudication is still  
13 superior.

14 That leaves the fourth factor, “the likely difficulties in managing a class action.”<sup>127</sup> Ecolab  
15 makes much of the fact that Plaintiffs have not yet set out a plan for how to conduct a trial.  
16 However, the Ninth Circuit has rejected “grafting a requirement for a trial plan” onto Rule 23.<sup>128</sup>

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18 <sup>121</sup> Fed. R. Civ. P. 23(b)(3)(B).

19 <sup>122</sup> Fed. R. Civ. P. 23(b)(3)(C).

20 <sup>123</sup> Fed. R. Civ. P. 23(b)(3)(A).

21 <sup>124</sup> See Docket No. 30-1, Ex. 2 at 332:17-335:18.

22 <sup>125</sup> See *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001).

23 <sup>126</sup> See Docket No. 30-1, Ex. 2 at 332:17-335:18.

24 <sup>127</sup> Fed. R. Civ. P. 23(b)(3)(D).

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26 <sup>128</sup> *Chamberlain v. Ford Motor Co.*, 402 F.3d 952, 961 n.4 (9th Cir. 2005). Only in a case  
27 potentially involving the law of 48 states has the Ninth Circuit asked plaintiffs seeking  
28 certification to demonstrate “a suitable and realistic plan for trial of the class claims.” *Zinser*, 253  
F.3d at 1189 (quoting *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 454 (D.N.J. 1998)); see also

1 And, as discussed above, liability here does not depend on the individual experiences of the  
2 potential class members to the extent that individual issues predominate over the common ones.

3 “Litigation by class action has long been recognized as a superior method of resolving  
4 wage and hour claims in California.”<sup>129</sup> More specifically, “[t]he theory of liability—that [Ecolab]  
5 has a uniform policy, and that that policy, measured against wage order requirements, allegedly  
6 violates the law—is by its nature a common question eminently suited for class treatment.”<sup>130</sup>

7 This case is no exception.

8 **IV.**

9 “An order that certifies a class action must define the class and the class claims, issues, or  
10 defenses.”<sup>131</sup> Clearly delineating the contours of the class provides the parties with clarity and  
11 assists class members in understanding their rights and making informed opt-out decisions.<sup>132</sup> If  
12 class members are impossible to identify without extensive and individualized fact-finding or  
13 “mini-trials,” then a class action is inappropriate.<sup>133</sup> No such difficulties arise here.

14 The court therefore certifies a class of persons described as: “All current and former  
15 employees of Ecolab Inc., in its Institutional Division in California who have held one or more of

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16  
17 *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (“A district court’s duty to  
18 determine whether the plaintiff has borne its burden on class certification requires that a court  
19 consider variations in state law when a class action involves multiple jurisdictions.”).

20 <sup>129</sup> *Martinez v. Joe’s Crab Shack Holdings*, 231 Cal. App. 4th 362, 367 (2014) (citing *Brinker*  
*Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1033 (2012)).

21 <sup>130</sup> *Brinker*, 53 Cal. 4th at 1033.

22 <sup>131</sup> Fed. R. Civ. P. 23(c)(1)(B); *see also Wachtel v. Guardian Life Ins. Co.*, 453 F.3d 179, 187-88  
23 (3d Cir. 2006) (“[T]he text of the order or an incorporated opinion must include (1) a readily  
24 discernible, clear, and precise statement of the parameters defining the class or classes to be  
25 certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to  
26 be treated on a class basis.”).

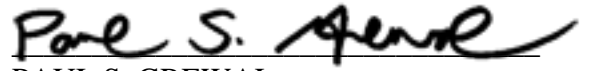
27 <sup>132</sup> *See Wachtel*, 453 F.3d at 187.

28 <sup>133</sup> *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1303 (D. Nev. 2014) (quoting  
William B. Rubenstein, *Newberg on Class Actions* § 3:6 (5th ed. 2013)).

1 the following job titles at any time from June 4, 2010 to the present: Territory Manager, and/or  
2 Hospitality Territory Manager.” The court certifies the causes of action alleged in Plaintiffs’ First  
3 Amended Complaint<sup>134</sup> as appropriate for class treatment. The court further certifies the named  
4 Plaintiffs as the representatives of the aforementioned class and their counsel of record as counsel  
5 for the class.

6 **SO ORDERED.**

7 Dated: February 16, 2016

  
8 PAUL S. GREWAL  
9 United States Magistrate Judge

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<sup>134</sup> See Docket No. 1-2, Ex. B.