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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSUE SOTO, *et al.*,
Plaintiffs,
v.
DIAKON LOGISTICS (DELAWARE),
INC.,
Defendant.

Case No. 08-cv-33-L(WMC)
**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS’
MOTION FOR CLASS
CERTIFICATION [DOC. 190]**

This putative class action brought by three truck drivers—Plaintiffs Josue Soto, Ghazi Rashid, and Mohamed Abdelfattah—working for Defendant Diakon Logistics (Delaware), Inc., asserting violations of California wages-and-hours laws. Plaintiffs now move for class certification under Federal Rule of Civil Procedure 23. Defendant opposes.

The Court decides the matter on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d.1). (Doc. 188.) For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs’ motion for class certification.

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1 **I. BACKGROUND¹**

2 Defendant provides home-delivery services to various furniture and appliance retailers.
3 (FAC ¶ 12.) Plaintiffs are all truck drivers who worked for Defendant in California. (*Id.* ¶¶
4 8–10.) Each named plaintiff worked for Defendant during different though partially overlapping
5 time periods in different locations. (*Id.*) They contend that they were classified by Defendant as
6 independent contractors when they were in fact non-exempt employees. (*Id.* ¶ 1.)

7 On December 5, 2007, Mr. Soto filed a putative class-action complaint in state court
8 seeking recovery from Defendant for failure to reimburse for reasonable business expenses,
9 issue itemized wage statements and for other alleged violations of the California Labor Code
10 provisions. (Removal Notice ¶ 1.) He also alleged that Defendant violated the California
11 Business and Professions Code § 17200, *et seq.* (*Id.*) He requested damages and injunctive
12 relief. Defendant removed the action to this Court under 28 U.S.C. § 1441(a) based on diversity
13 jurisdiction under 28 U.S.C. § 1332(a)(1) and (d)(2). (*Id.* ¶ 2.) Subsequently, Plaintiffs
14 amended their complaint to add Mr. Rashid and Mr. Abdelfattah as plaintiffs to this class action.
15 (Doc. 28.)

16 Plaintiffs’ initial motion for class certification was denied without prejudice. (Doc. 117.)
17 Thereafter, the parties conducted discovery. Plaintiffs then filed a subsequent motion for class
18 certification, which was also denied without prejudice. (Doc. 156.) Plaintiffs now move for
19 class certification for a third time under Federal Rule of Civil Procedure 23. (Doc. 190.)
20 Defendant opposes.

21
22 **II. LEGAL STANDARD**

23 The class action is “an exception to the usual rule that litigation is conducted by and on
24 behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541,
25 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). In order to justify a
26 departure from that rule, “a class representative must be part of the class and ‘possess the same
27

28 ¹ The background is based on allegations in the First Amended Complaint (“FAC”) and other evidence provided by the parties.

1 interest and suffer the same injury’ as the class members.” *Id.* (citing *E. Tex. Motor Freight Sys.,*
2 *Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). In this regard, Rule 23 contains two sets of class
3 certification requirements set forth in Rule 23(a) and (b). *United Steel, Paper & Forestry,*
4 *Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int’l Union v. ConocoPhillips Co.*, 593 F.3d
5 802, 806 (9th Cir. 2010). “A court may certify a class if a plaintiff demonstrates that all of the
6 prerequisites of Rule 23(a) have been met, and that at least one of the requirements of Rule 23(b)
7 have been met.” *Otsuka v. Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 443 (N.D. Cal. 2008).
8 “The burden is on the plaintiff to establish that the [] requirements have been met.” *Id.*

9 “Rule 23(a) provides four prerequisites that must be satisfied for class certification: (1)
10 the class must be so numerous that joinder of all members is impracticable; (2) questions of law
11 or fact exist that are common to the class; (3) the claims or defenses of the representative parties
12 are typical of the claims or defenses of the class; and (4) the representative parties will fairly and
13 adequately protect the interests of the class.” *Otsuka*, 251 F.R.D. at 443 (citing Fed. R. Civ. P.
14 23(a)). “A plaintiff must also establish that one or more of the grounds for maintaining the suit
15 are met under Rule 23(b), including: (1) that there is a risk of substantial prejudice from separate
16 actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be
17 appropriate; or (3) that common questions of law or fact predominate and the class action is
18 superior to other available methods of adjudication.” *Id.* (citing Fed. R. Civ. P. 23(b)).

19 A trial court has broad discretion in making the decision to grant or deny a motion for
20 class certification. *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010). “In
21 determining the propriety of a class action, the question is not whether the plaintiff has stated a
22 cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are
23 met.” *Otsuka*, 251 F.R.D. at 444 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178
24 (1974)). This analysis requires a district court to conduct a “rigorous analysis” that frequently
25 “will entail overlap with the merits of the plaintiff’s underlying claim.” *Dukes*, 131 S. Ct. at
26 2550-51. “Although in determining whether to certify the class, the district court is bound to
27 take the substantive allegations of the complaint as true, the court also is required to consider the
28 nature and range of proof necessary to establish those allegations.” *See In re Coordinated*

1 *Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982)
2 (citations omitted).z

3 “Although there is no explicit requirement concerning the class definition in FRCP 23,
4 courts have held that the class must be adequately defined and clearly ascertainable before a
5 class action may proceed.” *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679-80 (S.D. Cal.
6 1999) (Brewster, J.). “An identifiable class exists if its members can be ascertained by reference
7 to objective criteria. A class description is insufficient, however, if membership is contingent on
8 the prospective member’s state of mind.” *Id.* (internal quotation marks omitted). “In other
9 words, it must be administratively feasible to determine whether a particular person is a class
10 member.” *Id.*

11 12 **III. DISCUSSION²**

13 Plaintiffs’ action is premised on the claim that they and the putative class members were
14 misclassified by Defendant as independent contractors, when they should have been classified as
15 non-exempt employees. Previously, Plaintiffs defined the class to include any person who had
16 signed a “Service Agreement” that categorized them as independent contractors. They narrowed
17 this definition in their subsequent motion by excluding any person who operated more than one
18 delivery vehicle for Defendant. Plaintiffs now seek to define the class even more narrowly as
19 follows:

20 All persons who performed work for Diakon Logistics (Delaware) Inc.
21 as a delivery-truck driver in the State of California between December
22 5, 2003 and the present and were designated and paid by Diakon as an
23 independent contractor rather than an employee, and who did not
employ or use other drivers to perform the work assigned to them by
Diakon.

24
25 ² Under Rule 201 of the Federal Rules of Evidence, a court may take judicial notice of a
26 fact that is not “subject to a reasonable dispute” because “it is either (1) generally known within
27 the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by
28 resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(a).
Judicial notice “may be taken at any stage of the proceeding.” Fed. R. Evid. 201(f). Further,
judicial notice is mandatory “if requested by a party and supplied with the necessary
information.” Fed. R. Evid. 201(d). Plaintiffs request that the Court to take judicial notice of
two state-court orders. (Docs. 190-24, 202-8.) Defendant has not opposed. Because the
documents are matters of public record, the Court takes judicial notice of the exhibits.

1 Despite Defendant’s contentions, the Court finds that this proposed class definition is adequately
2 defined and clearly ascertainable because it provides the objective criteria needed to determine
3 the members of the class. *See Schwartz*, 183 F.R.D. at 679-80; *see also Smith v. Cardinal*
4 *Logistics Mgmt. Corp.*, No. 07-2104, 2008 WL 4156364, at *4 (N.D. Cal. Sept. 5, 2008)
5 (granting class certification for a similarly defined proposed class of delivery-truck drivers).
6 Consequently, the Court will now proceed to the Rule 23(a) and 23(b) analyses.

7
8 **A. Rule 23(a)**

9 “Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class
10 whose claims they wish to litigate.” *Dukes*, 131 S. Ct. at 2550. “The Rule’s four
11 requirements—numerosity, commonality, typicality, and adequate representation—effectively
12 limit the class claims to those fairly encompassed by the named plaintiff’s claims.” *Id.* (internal
13 quotation marks omitted). Defendant does not oppose Plaintiffs’ typicality and adequate-
14 representation analyses. Thus, Defendant effectively concedes and thus the Court need not
15 address these requirements. *See Civ. L.R. 7.1(f)(3)(b) & (c).*

16
17 **1. Numerosity**

18 Rule 23(a)(1) requires that the class be so numerous that joinder of all members is
19 impracticable. Fed. R. Civ. P. 23(a)(1). Plaintiffs maintain that as of December 31, 2011, there
20 are approximately 345 drivers who fall within the class description. (Emge Decl. ¶ 10.) They
21 argue that trying to join several hundred drivers as separate plaintiffs is “highly impracticable,”
22 and would create undesirable, “fragmentary” enforcement of California’s labor laws. (Pls.’ Mot.
23 14:10–20.) Defendant responds by arguing that Plaintiffs do not support their number with any
24 evidence and that the number of class members cannot be known based on Defendant’s records.
25 (Def.’s Opp’n 8:16–9:8.) However, Plaintiffs’ reply points to numerous pieces of
26 evidence—including foremost Charles H. Johnson’s declaration, which is attached to
27 Defendant’s opposition brief, as well as service agreements and depositions—that provide the
28 values for the potential class size. (Pls.’ Reply 1:12–3:22.) This evidence suggests that at a

1 minimum 315 drivers (out of a maximum of 471 drivers) meet the proposed class definition.
2 (*Id.*) Therefore, Plaintiffs satisfy the Rule 23(a)'s numerosity requirement. *See* Fed. R. Civ. P.
3 23(a)(1).

4 5 **2. Commonality**

6 Under Rule 23(a)(2), Plaintiffs must demonstrate that there are "questions of law or fact
7 common to the class." The Supreme Court has held that plaintiffs must demonstrate "the
8 capacity of a classwide proceeding to generate common answers" to common questions of law
9 or fact that are "apt to drive the resolution of the litigation." *Dukes*, 131 S. Ct. at 2551 (internal
10 quotations marks omitted). However, "[a]ll questions of fact and law need not be common to
11 satisfy this rule." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "The
12 existence of shared legal issues with divergent factual predicates is sufficient, as is a common
13 core of salient facts coupled with disparate legal remedies within the class." *Id.*

14 Plaintiffs present a list of seventeen purported common issues of fact to show that they
15 satisfy the commonality requirement. (Pls.' Mot. 15:4–16:12.) They also provide legal authority
16 that states that "District Courts throughout this circuit have found that commonality is met when
17 the proposed class of plaintiffs asserts that class members were improperly classified as
18 independent contractors instead of employees." *Guifu Li v. A Perfect Franchise, Inc.*, No. 10-
19 CV-01189-LHK, 2011 WL 4635198, at *7 (N.D. Cal. Oct. 5, 2011) (citing *Norris-Wilson v.*
20 *Delta-T Grp., Inc.*, 270 F.R.D. 596, 604 (S.D. Cal. 2010) (Burns, J.); *Breeden v. Benchmark*
21 *Lending Corp.*, 229 F.R.D. 623, 629 (N.D. Cal. 2005)); *see also* *Campbell v. First Investors*
22 *Corp.*, No. 11-CV-548, 2012 WL 5373423, at *2 (S.D. Cal. Oct. 29, 2012) (Benitez, J.) (finding
23 that "whether [the class members] were inappropriately classified as independent contractors
24 and, as a result, not paid in accordance with the California Labor Code" is an issue that satisfies
25 the commonality requirement). Accordingly, the Court also concludes here that Plaintiffs satisfy
26 the commonality requirement under Rule 23(a). *See* Fed. R. Civ. P. 23(a)(2).

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1 **B. Rule 23(b)**

2 “Where a putative class satisfies all four requirements of Rule 23(a), it must still meet at
3 least one of the three additional requirements outlined in Rule 23(b) in order to be eligible for
4 certification.” *United Steel*, 593 F.3d at 806. Plaintiffs seek certification under Rule 23(b)(3),
5 which provides that a class action may be maintained if Rule 23(a) is satisfied and if:

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

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

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

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

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

18 Fed. R. Civ. P. 23(b)(3). Defendant argues that the class cannot be certified under Rule 23(b)(3)
19 because the questions of law or fact common to class members do not predominate over the
20 questions affecting individual members. Furthermore, it argues that a class action is not a
21 superior vehicle for bringing Plaintiffs’ claims. The Court addresses these arguments below.
22
23

24 **1. Predominance**

25 “The predominance inquiry focuses on the relationship between the common and
26 individual issues and tests whether proposed class are sufficiently cohesive to warrant
27 adjudication by representation.” *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944
28 (9th Cir. 2009) (internal quotation marks omitted).

 Rule 23(b)(3)’s predominance and superiority requirements were added
to cover cases in which a class action would achieve economies of time,
effort, and expense, and promote . . . uniformity of decision as to
persons similarly situated, without sacrificing procedural fairness or
bringing about other undesirable results. Accordingly, a central
concern of the Rule 23(b)(3) predominance test is whether adjudication
of common issues will help achieve judicial economy.

Id. (internal quotation marks and citations omitted). Plaintiffs’ first class-certification motion

1 was denied primarily because they failed to sufficiently address and make a proper showing
2 under Rule 23(b)(3). Class certification was denied a second time after Plaintiffs did not discuss
3 the change in the definition of the class to satisfy Rule 23(b)(3). Plaintiffs now further narrow
4 the definition of the class to apply to a more specific subset of Defendant’s drivers.

5 Plaintiffs’ action is premised on the misclassification of this subset as independent
6 contractors, rather than non-exempt employees. The case can proceed to determine whether
7 Plaintiffs’ rights under California wages-and-hours laws were violated if they were erroneously
8 considered to be independent contractors. As noted in the previous order denying class
9 certification, the Service Agreement, which each plaintiff and putative class member signed in
10 substantially the same form, states that the contracting driver was Defendant’s independent
11 contractor.³ The California Labor Code does not define the terms “employee” and “independent
12 contractor” for the purposes of the claims that Plaintiffs assert. *See Estrada v. FedEx Ground*
13 *Package Sys., Inc.*, 154 Cal. App. 4th 1, 10 (2007). The relevant determination is fact-intensive:

14 The essence of the test is the “control of details”—that is, whether the
15 principal has the right to control the manner and means by which the
16 worker accomplishes the work—but there are a number of additional
17 factors in the modern equation, including (1) whether the worker is
18 engaged in a distinct occupation or business, (2) whether, considering
19 the kind of occupation and locality, the work is usually done under the
20 principal’s direction or by a specialist without supervision, (3) the skill
required, (4) whether the principal or worker supplies the
instrumentalities, tools, and place of work, (5) the length of time for
which the services are to be performed, (6) the method of payment,
whether by time or by job, (7) whether the work is part of the
principal’s regular business, and (8) whether the parties believe they are
creating an employer-employee relationship.

21 *Id.* (citing *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal.3d 341, 350-51 (1989),
22 among others). A contract such as the Service Agreement, which designates a party as an
23 independent contractor, does not necessarily negate a finding of an employment relationship.
24 *See Estrada*, 154 Cal. App. 4th at 10; *see also Borello*, 48 Cal.3d at 349 (1989) (“label placed by
25 the parties on their relationship is not dispositive”).

26
27 ³ It is undisputed that although the Service Agreements were revised by Defendant during
28 the proposed class period, the agreements remained substantially the same in the matters
pertinent to class certification.

1 Defendant argues, as it did in the first two motions, that a class cannot be certified
2 because the factors relevant to the employment analysis cannot be established on a class-wide
3 basis. Plaintiffs' initial motion was denied because Defendant presented evidence that the
4 drivers operated multiple trucks, as well as other evidence of class fragmentation. Based on the
5 record before the Court at that time, it was unclear whether the employment factors could be
6 considered on a class-wide basis to meet Rule 12(b)(3)'s predominance requirement. Plaintiffs
7 were given another opportunity to renew the motion with appropriate evidentiary support
8 addressing the issue of "prevalence among the putative class members of drivers operating
9 multiple trucks and not personally performing delivery services, and to what extent such
10 individuals should be included in the proposed definition of the class." The parties were further
11 instructed to "focus their evidence on the factors relevant to the employment analysis and
12 address the issues (1) whether and to what extent the factors can be addressed on a class-wide
13 basis; (2) whether dividing the putative class into subclasses would remedy any shortcomings;
14 and (3) whether any groups of individuals should be excluded from the proposed class
15 definition." However, in their second motion, Plaintiffs did not adequately address the issues
16 previously highlighted by the Court, but they were given another opportunity to renew the
17 motion based on indications that Defendant was not forthcoming with discovery efforts.

18 Plaintiffs have now tailored the class definition to remove many of the previous
19 fragmentation issues. Specifically, Plaintiffs' proposed class now specifically excludes any
20 drivers who hired other drivers to drive their routes. Defendant argues that there may be other
21 reasons why the drivers within the proposed class did not hire another driver, but this is a
22 secondary question to the larger questions that can be answered by a class, and therefore does
23 not preclude class certification. *See Otsuka*, 251 F.R.D. at 447.

24 Further, Plaintiffs have dismissed many of the claims that provided the greatest class
25 fragmentation. They also present substantial evidence addressing Defendant's "right to control
26 the manner and means" of the deliveries Plaintiffs carry out for their clients. *See Borello*, 48
27 Cal. 3d at 350. For example, the Service Agreement, Defendant's advertising (Pls.' Exs. A &
28 R), the deposition testimony of Defendant's President (Pls.' Ex. B), and his affidavit (Johnson

1 Decl.) present adequate evidence suggesting that all drivers who signed the Service Agreement
2 were treated by Defendant in the same manner. Plaintiffs also identify evidence that suggests
3 Defendant exercised control over the manner in which Plaintiffs operate, including Plaintiffs'
4 uniforms, performance monitoring and evaluations, method of payment, scheduling, meetings
5 and training of new drivers, skill set required, type of delivery, and retains the ability to
6 terminate their drivers at will. (*See generally* Pls.' Mot. 10:20–20:25; Pls.' Reply 5:20–13:6.)
7 Similar facts have prompted the certification of a class almost identical to Plaintiffs' proposed
8 definition. *See Smith*, 2008 WL 4156364, at *9; *see also Air Couriers Int'l v. Emp't Dev. Dep't*,
9 150 Cal. App. 4th 923, 937 (2007).

10 “Federal courts have recognized that individual issues will likely be present during class
11 actions, but that such issues should not prevent class certification so long as they do not override
12 the common question.” *Smith*, 2008 WL 4156364, at *10; *see also Chun-Hoon v. McKee Foods*
13 *Corp.*, No. C 05-0620, 2006 WL 3093764, at *5 (N.D. Cal. Oct. 31, 2006) (stating “even though
14 individual issues exist, they do not bar class certification”). Defendant points out variations in
15 the facts listed above depending on the region. But minor differences, such as the variation in
16 frequency of ride-behinds, are not enough to preclude a common determination of employment
17 status since the common questions must still be asked. The difference of one location doing
18 more or less ride-behinds than another, for example, does not mean that Defendant did not have
19 an overarching policy of performance review.⁴ Ultimately, Plaintiffs provide adequate evidence
20 for the Court to reason that the *Borello* factors are prevalent among the proposed class to satisfy
21 the Rule 23(b)'s predominance requirement.

22 23 **2. Superiority**

24 “Plaintiffs must also demonstrate that a class action is ‘superior to other available
25 methods for fairly and efficiently adjudicating the controversy.’” *Otsuka*, 251 F.R.D. at 448

26 _____
27 ⁴ Moreover, many of Defendant's arguments regarding Plaintiffs' proof are circular.
28 Stating that the drivers are contractors and therefore Defendant is not in the business of delivery
services for the purposes of determining the employment status of Plaintiffs will not disprove the
sufficiency of Plaintiffs' evidence.

1 (citing Fed. R. Civ. P. 23(b)(3)). “Where classwide litigation of common issues will reduce
2 litigation costs and promote greater efficiency, a class action may be superior to other methods
3 of litigation,” and it is superior “if no realistic alternative exists.” *Valentino v. Carter-Wallace,*
4 *Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996). The following factors are pertinent to this analysis:

5 (A) the class members’ interest in individually controlling the
6 prosecution or defense of separate actions;

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

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

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

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

13 To support their contention that class action is the superior method of litigation, Plaintiffs
14 argue with reasonable detail that each of the four aforementioned Rule 23(b)(3) factors weigh in
15 their favor. (Pls.’ Mot. 22:2–23:21.) Though Plaintiffs have the burden to show that a class
16 action is the superior method, Defendant responds to Plaintiffs with a scant three-sentence
17 argument. That argument is as follows:

18 A class action is not a superior method of adjudicating Plaintiffs’
19 claims. Plaintiffs have sufficient economic incentive to bring their own
20 claims as the damages for the named Plaintiffs’ Section 2802 claims for
21 reimbursement of necessary business expenses alone exceeds \$50,000
22 each, and they can also recover their attorney fees. Class treatment of
23 these claims is not superior to other methods.

24 (Def.’s Opp’n 23:3–9 (citations omitted)). This does not adequately negate Plaintiffs’ showing
25 of superiority. The substance of Defendant’s argument is that Plaintiffs have sufficient
26 economic incentive to bring their own claims because the damages for one of Plaintiffs’ claims
27 exceeds \$50,000. (Def.s’ Opp’n 23:3–9.) Assuming this is true, there would be over 300
28 individually controlling separate actions, heavily burdening the Court and the litigants. *See Sav-*
On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319, 340 (2004) (stating “[i]t would be
neither efficient nor fair to anyone, including defendants to force multiple trials to hear the same
evidence and decide the same issues.”). Ultimately, Defendant did not adequately demonstrate
that the Rule 23(b)(3) factors weigh against finding superiority. Therefore, the Court finds that
class treatment of this case is superior to individual litigation. *See* Fed. R. Civ. P. 23(b)(3).

1 **C. Plaintiffs’ Additional Claims**

2 In addition to their misclassification claim, Plaintiffs also argue that multiple California
3 Labor Code violations are subject to common proof and should be given class treatment. (Pls.’
4 Mot. 18:18–21:1, Pls.’ Reply 13:7–14:7.) Since the Court has allowed certification of the
5 threshold misclassification claim, Plaintiffs are allowed to proceed with demonstrating that the
6 other claims have satisfied Rule 23.

7
8 **1. Unreimbursed Business Expenses**

9 Labor Code Section 2802(a) provides:

10 An employer shall indemnify his or her employee for all necessary
11 expenditures or losses incurred by the employee in direct consequence
12 of the discharge or his or her duties, or of his or her obedience to the
directions of the employer, even though unlawful, unless the employee,
at the time of obeying the directions, believed them to be unlawful.

13 California Code of Regulations, Title 8, Section 11090(9) provides:

14 (A) When uniforms are required by the employer to be worn by the
15 employee as a condition of employment, such uniforms shall be
provided and maintained by the employer. The term “uniform” includes
16 wearing apparel and accessories of distinctive design or color.

17 (B) When tools ore equipment are required by the employer or are
18 necessary to the performance of a job, such tools and equipment shall
be provided and maintained by the employer[.]

19 Plaintiffs maintain that in the present case, all class members have been and are treated
20 identically: they are all required to have a “helper,” pay for truck fuel, and have various
21 insurance charges deducted from the proposed class members’ biweekly wages (Johnson Dep.
22 21:19–25, 22:1-8). The deductions are purportedly a necessary expenditure imposed by
23 Defendant. In response, Defendant argues that the deductions are an expense associated with
24 being an independent contractor, and that the absence of evidence showing that all other drivers
25 incurred the same expenses should lead to a denial of class certification because the question
26 requires a highly individualized, worker-by-worker analysis. To support its position, Defendant
27 relies heavily on *Norris-Wilson v. Delta-T Grp., Inc.*, 270 F.R.D. 596 (S.D. Cal. 2010).
28 However, *Norris-Wilson* involved “necessary expenditures or losses in [plaintiffs’] travels to,
from, and between client-sites, running errands for [d]efendants’ clients, transporting

1 [d]efendants’ clients’ patients, and for other costs incurred in obedience to [d]efendants’ and
2 their clients’ duties.” *Norris-Wilson*, 270 F.R.D. at 610. Compared to *Norris-Wilson*, this is a
3 very different case because Plaintiffs do not assert such highly individualized requirements for
4 employment.

5 Rather, Plaintiffs have shown that there is a “set of discrete expenses, common to the
6 entire putative class, and that class members were required to cover themselves” such that the
7 Court sees the merits in class treatment. *See Norris-Wilson*, 270 F.R.D. at 610. Plaintiffs seek
8 expenses which every driver incurred, such as the same biweekly deductions, uniforms, and
9 helper wages. This inquiry is not as particularized as Defendant contends. The only difference
10 between Plaintiffs would be the number of helpers that they were required to use on any given
11 day. But Plaintiffs have shown through the Service Agreement and various depositions that
12 these expenses were required in order to maintain a business relationship with Defendant.
13 Accordingly, the Court finds that the claim for unreimbursed business expenses are subject to
14 common proof and is appropriate for class treatment.

16 **2. Failure to Provide Properly Itemized Wage Statements**

17 Labor Code Section 226 requires the employer to keep accurate and itemized pay
18 statements setting forth gross wages, the actual number of hours and minutes worked, and all
19 applicable hourly rates of pay. Plaintiffs have properly shown that all drivers in the proposed
20 class were not provided wage statements that included hourly wages.

21 Plaintiffs must also be able to prove that they suffered an injury as a result of the
22 improper wage statements. *See* Cal. Lab. Code § 226. This claim requires establishing that the
23 proposed class was misclassified as independent contractors because if Plaintiffs were indeed
24 employees, they should have received an itemized wage statement. Plaintiffs contend that due to
25 the misclassification, the drivers were systematically denied proper statements that would have
26 allowed them to see Defendant’s alleged deductions. Consequently, they seek damages under
27 Labor Code Section 226(e) at \$50 per employee for the initial violation, and then \$100 dollars
28 for each subsequent violation, but not to exceed \$4,000 per employee. (FAC ¶ 57.)

1 However, the parties disagree about the type of injury that is necessary in order to state a
2 claim under Section 226. Plaintiffs cite cases holding that the injury requirement is minimal.
3 *See, e.g., Perez v. Safety-Kleen Sys., Inc.*, Nos. C 05-5338, 07-0886, 2007 WL 1848037, at *9
4 (N.D. Cal. June 27, 2007) (merely filing the “lawsuit, and the difficulty and expense Plaintiffs
5 have encountered in attempting to reconstruct time and pay records . . . is evidence of the
6 injury”). Defendant argues the contrary, but this Court agrees that “the injury requirement
7 should be interpreted as minimal in order to effectuate the purpose of the wage statement statute;
8 if the injury requirement were more than minimal, it would nullify the impact of the
9 requirements of the statute.” *See Seckler v. Kindred Healthcare Operating Grp., Inc.*, SACV
10 10-01188 DDP, 2013 WL 812656, at *12 (C.D. Cal. Mar. 5, 2013); *see also Wang v. Chinese*
11 *Daily News, Inc.*, 435 F. Supp. 2d 1042, 1050-51 (C.D. Cal. 2006) (stating the purpose of
12 Section 226's information requirement).

13 Furthermore, a recent statutory amendment to Section 226 provides a statutory definition
14 for injury:

15 Section 226(e) now states that “[a]n employee is deemed to suffer
16 injury . . . if the employer fails to provide accurate and complete
17 information as required by one or more of [the section (a) requirements]
18 and if the employee cannot promptly and easily determine from the
19 wage statement alone . . . (i) The amount of gross wages or net wages
20 . . . (ii) Which deductions the employer made from gross wages to
21 determine the net wages . . .” The Senate Bill Analysis indicates that
22 because of the “contradictory and inconsistent interpretations of what
23 constitutes ‘suffering injury’ . . . in the various court cases . . . it is
24 necessary to provide further clarity on the issue . . .”
25 *Seckler*, 2013 WL 812656, at *12 (internal citations omitted) (alterations in original). This

26 amendment reinforces the Court’s interpretation of the injury requirement under Section 226.
27 *See id.*

28 Accordingly, the Court finds that Plaintiffs’ inability to determine their hourly wage
meets the minimal-injury requirement of Section 226. Determining that the hours worked was
not present on pay records is not an individualized inquiry beyond the number of times the
violation occurred per employee during the specified period. This information can be obtained
through pay records. Moreover, the claim does not require looking specifically at every hour
that every proposed class member worked, as Defendant suggests, but rather merely obtaining

1 pay records for the relevant time period and checking whether the number of hours worked
2 appears on the pay statement. Therefore, this claim is also subject to common proof and
3 appropriate for class treatment.
4

5 **3. Unfair Competition Law (“UCL”)**

6 A claim for unfair competition under the UCL may be brought “by a person who has
7 suffered injury in fact and has lost money or property as a result of the unfair competition.” Cal.
8 Bus. & Prof. Code § 17204. “Therefore, to establish standing under the UCL a plaintiff must
9 “(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact,
10 i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by,
11 the unfair business practice . . . that is the gravamen of the claim.” *Leghorn v. Wells Fargo*
12 *Bank, N.A.*, — F. Supp. 2d —, 2013 WL 3064548, at *26 (N.D. Cal. June 19, 2013) (quoting
13 *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 337 (2011)) (internal quotation marks
14 omitted) (emphasis removed). The UCL prohibits “unfair competition,” which is defined as any
15 “unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. To
16 establish a violation of the UCL, a plaintiff may establish a violation under any one of the three
17 aforementioned prongs. *Leghorn*, 2013 WL 3064548, at *26. Here, Plaintiffs rely on the
18 “unlawful” prong.

19 Plaintiffs argue that since misclassification will be given class treatment, a UCL claim
20 can also be given class treatment because it will serve as the unlawful action required under the
21 UCL. Misclassification applies to all members of the class, and the same inquiry will be
22 repeated for the UCL claim. Furthermore, as discussed in more detail above, Plaintiffs have
23 sufficiently shown that an economic injury may have occurred as a result of the
24 misclassification. Defendant’s only argument against permitting class treatment of the UCL
25 claim is that Plaintiffs fail to establish the appropriateness in giving class treatment for the
26 underlying misclassification claim. As discussed above, the Court finds that class treatment of
27 the misclassification claim is appropriate. Therefore, the UCL claim is also appropriate for class
28 treatment.

1 **4. California Private Attorney General Act (“PAGA”)**

2 The California Supreme Court held that PAGA claims do not need to satisfy class
3 certification requirements. *See Arias v. Superior Court*, 46 Cal. 4th 969, 975 (2009).

4 Subsequently, federal district courts were faced with the same question under Rule 23. The
5 district courts remain divided on the issue, and the Ninth Circuit has yet to hear the issue. *See*
6 *McKenzie v. Fed. Express Corp.*, 765 F. Supp. 2d 1222, 1233 (C.D. Cal.2011) (listing California
7 district courts holding class certification requirements of Rule 23 do not apply to PAGA claims).

8 As Magistrate Judge William McCurine, Jr. properly noted:

9 The majority of district courts have held that PAGA actions, although
10 representative, do not need to be brought as class actions in light of the
11 fact that PAGA operates as a law-enforcement mechanism as opposed
12 to an action which conveys a private benefit on the named plaintiff and
13 those represented. *See e.g. Thomas v. Aetna Health of Cal., Inc.*, 2011
14 WL 2173715, at *12-13 (E.D. Cal. June 2, 2011) (explaining “while the
15 Ninth Circuit has not addressed these issue, the majority view among
16 the district courts following *Arias* creates the following framework: (1)
17 PAGA actions must be filed as representative actions on behalf of
18 current or former aggrieved employees; (2) while PAGA actions may
19 be brought as class actions, Rule 23 certification is not necessary to the
20 extent PAGA actions are brought in a non-class representative capacity;
21 and (3) prudential standing concerns as to non-class representative
22 PAGA suits are either satisfied . . . or inapplicable . . .”).

23 (December 14, 2012 Discovery Order 4:2–12 [Doc. 198].) Judge McCurine did not, as Plaintiffs
24 contend, rule that this Court follows the majority view that PAGA claims do not require Rule 23
25 certification, thus allowing them to skip briefing the matter in their motion, but rather noted the
26 state of the law to allow discovery. Specifically, he noted that Rule 23 certification is not
27 necessary for PAGA actions brought in a non-class representative capacity, and thus, the parties
28 must commence PAGA discovery because Plaintiffs have indicated that they will proceed as a
non-class representative action under PAGA. (*Id.* at 4:16–23.) Due to this apparent
misunderstanding, Plaintiffs do not make any valid legal argument regarding whether the PAGA
claim should be given class treatment. Consequently, without a request to pursue their PAGA
claim in this class action, the Court cannot conclude that the PAGA claim should be given class
treatment.

27 //

28 //


1 **D. Proposed Class Notice**

2 Defendant contends that Plaintiffs' Proposed Class Notice creates confusion among class
3 members due to the term "delivery-truck drivers," and that the phrase "did not employ or use
4 other drivers" is not an ascertainable group of individuals. (Def.'s Opp'n 24:14-23.) Plaintiffs
5 correctly argue that "delivery-truck drivers" is a description of the work performed for
6 Defendant, and creates no more confusion than any other descriptor. (Pls.' Reply 14:24-15:2.)
7 This identical job description was also approved for notice in *Cardinal Logistics Management*.
8 *See Smith*, 2008 WL 4156364, at *12. Furthermore, Plaintiffs also establish a prudent method for
9 notifying the class. Drivers can self-qualify under the modifier "did not employ or use other
10 drivers," meaning that they did not hire another driver to carry out Defendant's work. Drivers
11 who hired another person to do their work for them will be aware of this fact. No other
12 objections to the notice have been raised, and the Court accordingly approves Plaintiffs' proposed
13 class notice.

14
15 **IV. CONCLUSION & ORDER**

16 In light of the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART**
17 Plaintiffs' Motion for Class Certification. Specifically, the Court **DENIES** Plaintiffs' request to
18 give their PAGA claim class treatment, and **GRANTS** the remainder of Plaintiffs' motion in its
19 entirety.

20
21 DATED: August 21, 2013

22
23 
M. James Lorenz
United States District Court Judge

24 COPY TO:

25 HON. WILLIAM MCCURINE, JR.
26 UNITED STATES MAGISTRATE JUDGE

27 ALL PARTIES/COUNSEL
28