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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

RAYMOND TSCHUDY,  
individually, on behalf of himself,  
all others similarly situated, and  
on behalf of the general public,

Plaintiff,

vs.

J.C. PENNEY CORPORATION,  
INC., a Delaware corporation,

Defendants.

CASE NO. 11-cv-1011 JM (KSC)

ORDER DENYING MOTION  
TO STRIKE CLASS ALLEGATIONS,  
GRANTING MOTION FOR CLASS  
CERTIFICATION, AND DENYING  
RELATED EVIDENTIARY  
MOTIONS

Before the court are two motions regarding whether this case can be litigated as a class action, as well as several motions to strike evidence related to class certification. On November 8, 2013, J.C. Penney Corporation, Inc. (“JCP”) filed a motion to strike the class-action allegations from Plaintiffs’ second amended complaint (“MTS”). (Doc. No. 93.) On June 9, 2014, Plaintiffs filed a motion to certify this case as a class action (“MTC”). (Doc. No. 119.) Both motions were fully briefed. The parties also filed several motions to strike items of evidence related to class certification. (Doc. Nos. 97, 121-1, and 124.) For the reasons set forth below, the court denies JCP’s motion to strike the class-action allegations, grants Plaintiffs’ motion to certify this case as a class action, and denies the evidentiary motions.

1 **BACKGROUND**

2 **A. Procedural Background**

3 **1. Original Complaint and Removal**

4 Plaintiff Tschudy filed the original complaint in this case on April 5, 2011,  
5 in San Diego Superior Court. (Doc. No. 1-1.) Defendants removed the case to  
6 this court on May 9, 2011, pursuant to the Class Action Fairness Act, 28 U.S.C.  
7 § 1332(d). (Doc. No. 1.)

8 **2. The Second Amended Complaint**

9 On February 8, 2012, Plaintiffs filed the operative second amended complaint  
10 (“SAC”). (Doc. No. 45.) In the SAC, Plaintiffs contend that under California  
11 law vacation benefits accrue and vest as employees work, and that JCP’s vacation  
12 policy, called My Time Off (“MTO”), causes management associates (“MA”) and  
13 part-time non-management associates (“PTNMA”) to forfeit vacation benefits “if  
14 such employees are not employed on the first day of the calendar month following  
15 the month or months during which such paid vacation benefits were earned.” (Id.  
16 ¶ 74.) The provisions Plaintiffs challenge (the “challenged provisions”) read:

17 Management - You become eligible and receive your first deposit  
18 on the first day of the third month of employment.

19 . . .

20 Part-Time Non-Management - You become eligible and receive your  
21 first deposit on the first day of the month following 12 months  
of employment if you average 25 or more hours during the first 48  
weeks of employment. You must qualify each year for MTO deposits.

22 (Id.)

23 Based on these provisions, Plaintiffs assert two causes of action, for  
24 (1) forfeiture of wages, under California Labor Code § 200 *et seq.*; and (2) unlawful  
25 business practices, under California Business & Professions Code § 17200 *et seq.*<sup>1</sup>  
26 (Id. ¶¶ 73–93.) Specifically, Plaintiffs claim that the MTO violates California

27 \_\_\_\_\_  
28 <sup>1</sup> The SAC also presented claims under Illinois law, but those claims were transferred to Illinois. (See Doc. No. 55.)

1 Labor Code §§ 201 and 202 (timely payment of wages upon employee’s termination  
2 or resignation); § 203 (waiting-time penalties for failure to comply with §§ 201  
3 and 202); § 204 (payment of all compensation earned within each pay period);  
4 and § 227.3 (prohibition on forfeiture of vested vacation time upon termination),  
5 and that these violations also constitute unlawful business practices within the  
6 meaning of California Business & Professions Code § 17200 *et seq.* (Id. ¶¶ 74–82,  
7 84.)

8 On their claim for forfeiture of wages Plaintiffs seek damages, penalties,  
9 interest, costs and fees, and an injunction prohibiting JCP from continuing the  
10 challenged practices. (Id. ¶ 103.) On their claim for unlawful business practices  
11 Plaintiffs seek disgorgement, restitution, interest, costs and fees, and an injunction  
12 prohibiting JCP from continuing the challenged practices. (Id.)

### 13 **3. Summary Judgment**

14 On August 20, 2012, JCP filed a motion for summary judgment or summary  
15 adjudication (“MSJ”). (Doc. No. 59.) JCP asserted that it was entitled to judgment  
16 because its written policy unambiguously advises employees that they are eligible  
17 to accrue vacation benefits “only *after* the expiration of their waiting period,” and  
18 the policy makes clear that the deposits of vacation time employees receive are  
19 advances for future work rather than compensation for past work. (Doc. No. 59-1  
20 at 10.) As the basis of its arguments, JCP relied on language in detailed versions  
21 of the policy (referred to here and in previous orders as “JMTOs”), and it asserted  
22 that all new-hires, including Plaintiffs, received copies of the policy. (Id., Harris  
23 Decl. ¶¶ 5–10.)

24 Plaintiffs opposed JCP’s motion, asserting that they had never received the  
25 JMTO, and that the only policy documents they had ever been given were shorter  
26 versions (referred to here and in previous orders as “EMTOs”) that did not indicate  
27 that vacation deposits were advances for future work. (Doc. No. 66 at 3–6, 16.)  
28 They argued that summary judgment was inappropriate because there was a material

1 dispute regarding which was the controlling plan. (Id. at 16.)

2 On January 28, 2013, the court denied JCP's motion for summary judgment,  
3 as JCP had not shown that Plaintiffs had ever received the JMTOs, and the EMTOs  
4 and other statements Plaintiffs had received did not make clear that vacation  
5 deposits were advances for future work. (Doc. No. 78.) In a footnote the court  
6 stated:

7  
8 However, had JCP established that the Plaintiffs received the  
9 JMTOs, the court's analysis might have been different. The JMTO  
10 is more extensive, even providing examples about when an employee  
11 who started on a given date would begin earning MTO benefits.  
That additional information might have put PTNM employees on  
notice about the details of JCP's MTO policy. But the court need  
not examine that scenario at this juncture as JCP has not shown  
conclusively that the Plaintiffs received the JMTOs.

12 (Id. at 12 n.8.)

#### 13 **4. Motions on Class Certification**

14 On November 8, 2013, JCP filed the instant motion to strike the class  
15 allegations from the SAC. (Doc. No. 93.) Plaintiffs opposed the motion, (Doc.  
16 No. 96), and moved to strike some of the evidence JCP submitted with its motion,  
17 (Doc. No. 97), and JCP filed a reply, (Doc. No. 114).

18 On June 9, 2014, Plaintiffs filed the instant motion to certify this case as a  
19 class action. (Doc. No. 119.) JCP opposed the motion, (Doc. No. 121), and moved  
20 to strike some of the evidence Plaintiffs submitted with their motion, (Doc. No. 121-  
21 1). Plaintiffs replied, (Doc. Nos. 122, 123), and moved to strike some of the  
22 evidence JCP filed with its opposition. (Doc. No. 124.)

#### 23 **B. Legal and Factual Background**

##### 24 **1. California Law**

25 California does not require employers to offer employees paid vacation. See  
26 California Department of Labor Standards Enforcement Policies and Interpretation  
27 Manual ("DLSE Manual") § 15.1.2 (2006) ("Neither the statute nor the case law  
28 requires that any employer provide vacation benefits; the law only addresses the

1 requirements which a vacation plan, if offered, must meet.”). But, if an employer  
2 chooses to offer vacation benefits, the benefits are considered “in effect, additional  
3 wages for services performed,” Suastez v. Plastic Dress-Up Co., 31 Cal. 3d 774, 779  
4 (1982), or “a form of deferred compensation,” id. at 780. Hence, “[a] proportionate  
5 right to a paid vacation ‘vests’ as the labor is rendered.” Id. at 784. Once the right  
6 has vested, California Labor Code § 227.3 protects it from forfeiture. See id.  
7 Section 227.3 requires employers to pay terminated employees for vested vacation  
8 time in accordance with the “contract of employment or employer policy,” and  
9 prohibits contracts and policies that “provide for forfeiture of vested vacation time  
10 upon termination.”<sup>2</sup>

11 California allows employers who offer vacation to place certain limits on  
12 it, consistent with these rules. For example, “[a]n employer is entitled to adopt a  
13 policy specifying the *amount* of vacation pay an employee is entitled to be paid as  
14 wages, depending on the length of service.” Owen v. Macy’s, Inc., 175 Cal. App.  
15 4th 462, 464 (2009) (internal quotation marks omitted). And, because employers  
16 are not required to offer employees vacation, they can impose a waiting period  
17 during which no vacation is earned or vested “[i]f an express written company  
18 policy forewarns new employees that their compensation package does not include  
19 paid vacation during their initial employment.” Id.; see also DLSE Manual § 15.1.3  
20 (“Vacation plans which establish probation periods during which no vacation pay  
21 is vested are permitted.”).

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23  
24 <sup>2</sup> Section 227.3 reads:

25 Unless otherwise provided by a collective-bargaining agreement,  
26 whenever a contract of employment or employer policy provides for  
27 paid vacations, and an employee is terminated without having taken  
28 off his vested vacation time, all vested vacation time shall be paid  
to him as wages at his final rate in accordance with such contract of  
employment or employer policy respecting eligibility or time served;  
provided, however, that an employment contract or employer policy  
shall not provide for forfeiture of vested vacation time upon  
termination.

1           **2. JCP’s My Time Off Policy**

2           As noted above, JCP’s vacation policy is embodied in its My Time Off  
3 (“MTO”) plan. At this point there appear to be five documents that mention or  
4 contain some version of the MTO, some of which exist in multiple iterations:

5           1. **JMTO**—The full-length policy statement JCP relies on, in two  
6 iterations dated January 1, 2007, and December 31, 2008, respectively,  
7 (MSJ, Harris Decl., Exhs. E & F);

8           2. **EMTO**—The plan summary Plaintiffs rely on, from Your Benefits  
9 Book 1, dated January 1, 2007, (MTC, Ostroff Decl., Exh. 5, Part 1  
10 at 5–14);

11           3. **New Hire Guide to Benefits**—In iterations for various years 2008  
12 through 2012, (MTC, Ostroff Decl., Exh. 5, Part 2 at 18–25 (2008),  
13 32–39 (2009); Exh. 5, Part 3 at 5–13 (2010), 16–22 (2012));

14           4. **Benefits to Go**—Which JCP describes as a “quick version” of the  
15 MTO, (MTC, Ostroff Decl., Exh. 5, Part 2 at 38–39); and

16           5. **The Associate Guide to Winning Together**—In two iterations  
17 dated May 2007 and January 2009, respectively, (Doc. No. 76, Harris  
18 Decl., Exhs. A & B).

19           With minor variations in wording, the first four documents all contain the  
20 provisions Plaintiffs challenged in the SAC:

21           Management - You become eligible and receive your first deposit  
22 on the first day of the third month of employment.

23           ...

24           Part-Time Non-Management - You become eligible and receive your  
25 first deposit on the first day of the month following 12 months of  
26 employment if you average 25 or more hours during the first 48 weeks  
27 of employment. You must qualify each year for MTO deposits.

28           (MSJ, Harris Decl., Exh. E. at 2 (Jan. 1, 2007 JMTO); Exh. F. at 2 (Dec. 31, 2008  
JMTO); MTC, Ostroff Decl., Exh. 5, Part 1 at 13 (EMTO); see also MTC, Ostroff  
Decl., Exh. 5, Part 2 at 22 (2008 New Hire Guide), 35 (2009 New Hire Guide),  
38 (Benefits to Go); MTC, Ostroff Decl., Exh. 5, Part 3 at 12–13 (2010 New Hire  
Guide), 20 (2012 New Hire Guide).) The Associate Guide to Winning Together

1 contains only a brief description and does not explain how benefits are calculated.<sup>3</sup>

2 The first four documents listed above all also contain some explanation of  
3 how MTO benefits are calculated. For example, the EMTO explains that “MTO is  
4 calculated based on your average week, job classification and service months as of  
5 December 31. You must be employed on the first day of each month to receive an  
6 MTO deposit. Using the following table and formulas, you can calculate your own  
7 MTO deposit. . . . Average Week × Annual MTO Weeks Factor = Annual MTO  
8 ÷ 12 Months = Monthly MTO Deposit.” (MTC, Ostroff Decl., Exh. 5, Part 1 at 13.)

9 The JMTOs, however, include details the other documents do not. For  
10 example, the JMTOs provide the following example: “If you are hired on October  
11 30, you will be eligible and receive your first MTO deposit on November 1 of the  
12 following year, provided you averaged 25 hours or more per week in the 48-week  
13 period beginning October 30.” (MSJ, Harris Decl., Exh. E at 2, Exh. F at 2.) And  
14 only the JMTOs state, “If you are *actively at work* on the first day of each month,  
15 you will receive a deposit of MTO hours that you can earn during that month. The  
16 hours are advanced to you and are available for your immediate use as soon as they  
17 are deposited into your account.” (MSJ, Harris Decl., Exh. E at 3, Exh. F at 3.)

18 According to Jeff Marcellus, whom JCP designated as most knowledgeable  
19

20 \_\_\_\_\_  
21 <sup>3</sup> Both versions of The Associate Guide to Winning Together state as follows:

22 We recognize that you may have personal situations and  
23 responsibilities to take care of during normal working hours. Paid time  
24 off provides you with pay for time off during hours you are scheduled  
25 to work. PTO (Paid Time Off) and MTO (My Time Off) are our paid  
26 time off benefits programs. To participate in PTO, you must have been  
27 Benefits Eligible on December 31, 2003, and have remained Benefits  
28 Eligible. All other Associates who meet the eligibility requirements  
receive monthly deposits of MTO that can be used during that month  
or the remainder of the year. When possible, submit all requests for  
time off to your Supervisor as far in advance as possible. Certain dates  
are unavailable, such as blackout periods resulting from key business  
activities. PTO/MTO balances are available on the Associate Kiosk.

(Doc. No. 76, Harris Decl., Exh. A at 28; Exh. B. at 24.)

1 on the MTO, the policy was first implemented in California on January 1, 2004,  
2 has remained substantively the same since then, and is applied according to its  
3 terms to all MA and PTNMA. (MTC, Ostroff Decl., Exh. 4 at 5–7, 9–12.) And,  
4 according to Anne Buckingham, JCP’s designee on matters concerning JCP’s  
5 adoption, implementation, and enforcement of the MTO, the JMTO only “exists  
6 online on the PowerLine website” and has “never existed in any . . . format other  
7 than online.” (MTC, Ostroff Decl., Exh. 5, Part 1 at 15.) What information  
8 employees received about the existence of the JMTO, its significance, or how  
9 to access it remains unclear.

### 10 **3. The Named Plaintiffs<sup>4</sup>**

11 According to the filings, Raymond Tschudy was a PTNM JCP employee  
12 in California from February 11, 2007, until he voluntarily ended his employment  
13 on February 27, 2008. (Doc. No. 119-1 at 8.) He completed 53 weeks of  
14 employment and averaged more than 25 hours per week during his entire  
15 employment. (Id.) According to Tschudy, JCP did not pay him vacation benefits  
16 after his termination because he was not employed on March 1, 2008. (Id. at 9.)  
17 According to JCP, Tschudy was not entitled to vacation pay because his employment  
18 ended on February 29, 2008, “one day short of attaining eligibility to earn MTO  
19 benefits.” (Doc. 93-1 at 6.)

20 Sheila Walker was a PTNM JCP employee in California from September 17,  
21 2008, through April 2010. (Doc. No. 119-1 at 9.) She worked more than 48 weeks  
22 and averaged 24.15 hours a week until she went on medical leave in October 2009,  
23 after which she did not return to work. (Id.) Her employment ended in April 2010.  
24 (Id.) The precise factual basis for her claim is unclear, but, like the other plaintiffs,  
25 she claims that she “forfeited vacation because of the MTO.” (Id.)

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27 <sup>4</sup> The SAC identified three additional plaintiffs who are no longer involved  
28 in this case. Laura Garcia and Lore Rednour’s Illinois-law claims were transferred  
to Illinois. (Doc. No. 55.) The parties voluntarily dismissed Leticia Hinojosa.  
(Doc. No. 88.)



1 Kamryn Candelaria was a PTNM JCP employee in California for almost five  
2 years, from July 2007 through May or June of 2012 (after this lawsuit was filed),  
3 when she resigned to take a full-time position at a bank. (Id. at 10.) During her first  
4 48 weeks of employment she averaged about 24.26 hours per week. (Id.) She never  
5 received MTO benefits. (Id.) According to JCP, she satisfied the policy’s waiting  
6 period, but she was never eligible for MTO benefits because “she did not average  
7 at least 25 hours of work over the relevant period.” (Doc. No. 93-1 at 8–9.)

## 8 DISCUSSION

9 The court addresses JCP’s threshold arguments regarding standing and  
10 judicial estoppel before turning to class certification, appointment of counsel,  
11 and the parties’ evidentiary motions.

### 12 A. Standing to Seek Injunctive Relief

13 In JCP’s filings in support of its motion to strike and in opposition to  
14 Plaintiff’s motion to certify this case as a class action, it contends that Plaintiffs  
15 lack Article III standing to seek injunctive relief on their claim under California  
16 Business & Professions Code § 17200 *et seq.*, because none of them are current  
17 JCP employees. (Doc. No. 93-1 at 3 n.3; Doc. No. 121 at 24–25.) Although not  
18 raised by the parties, the same concern applies to Plaintiffs’ standing to seek  
19 injunctive relief on its claim under California Labor Code § 200 *et seq.*

20 “In a class action, the plaintiff class bears the burden of showing that  
21 Article III standing exists.” Ellis v. Costco Wholesale Corp., 657 F.3d 970, 978  
22 (9th Cir. 2011). “Standing requires that (1) the plaintiff suffered an injury in fact,  
23 i.e., one that is sufficiently concrete and particularized and actual or imminent,  
24 not conjectural or hypothetical, (2) the injury is fairly traceable to the challenged  
25 conduct, and (3) the injury is likely to be redressed by a favorable decision.” Id.  
26 (brackets and internal quotation marks omitted). “Plaintiffs must show standing  
27 with respect to each form of relief sought. Standing exists if at least one named  
28 plaintiff meets the requirements.” Id. (citation omitted).

1 A plaintiff seeking prospective injunctive relief “must demonstrate that  
2 he has suffered or is threatened with a concrete and particularized harm, coupled  
3 with a sufficient likelihood that he will again be wronged in a similar way.”  
4 Bates v. United Parcel Service, Inc., 511 F.3d 974, 985 (9th Cir. 2007) (citation  
5 and internal quotation marks omitted). To satisfy the second requirement, there  
6 must be a “real and immediate threat of repeated injury.” Id. (internal quotation  
7 marks omitted). When evaluating standing, “[the court] must look at the facts as  
8 they exist at the time the complaint was filed.” Slayman v. FedEx Ground Package  
9 Sys., Inc., 765 F.3d 1033, 1047 (9th Cir. 2014) (internal quotation marks omitted).

10 In the present case, the initial complaint was filed in April 2011. By that  
11 time Tschudy and Walker had long ceased their employment at JCP, as Tschudy’s  
12 employment at JCP ended in 2008, and Walker’s ended in 2009. Consequently,  
13 when the case was filed, they “lacked standing to seek injunctive or declaratory  
14 relief because they would not stand to benefit from such relief.” Id. at 1047–48  
15 (internal quotation marks omitted); see also Ellis, 657 F.3d at 988 (“[O]nly current  
16 employees have standing to seek injunctive relief.”). Candelaria, however, was  
17 still employed by JCP when the complaint was filed and did have standing to seek  
18 injunctive relief at the time. But, because she was no longer employed by JCP as  
19 of May or June of 2012, “[her] claims for prospective relief became moot because  
20 [she] could no longer benefit from such relief.” Slayman, 765 F.3d at 1048.

21 “[W]here, as here, the plaintiff’s claim becomes moot before the district  
22 court certifies the class, the class action normally also becomes moot” unless an  
23 exception to mootness doctrine applies, such as the exceptions for inherently  
24 transitory claims or claims mooted by the defendant’s litigation strategy. Id.  
25 Neither exception applies here. The claims are not inherently transitory, as the  
26 putative class is not constantly changing in the sense that some members leave  
27 the class while others come in. See Sze v. INS, 153 F.3d 1005, 110 (9th Cir. 1998)  
28 (“An inherently transitory claim is one where there is a constantly changing putative

1 class, and where the trial court will not have enough time to rule on a motion for  
2 class certification before the proposed representative’s individual interest expires.”  
3 (citation and internal quotation marks omitted)). Nor does it appear that JCP  
4 mooted Candelaria’s claim by terminating her. Rather, she indicates that she left  
5 her employment at JCP voluntarily. Accordingly, her claims for injunctive relief  
6 are moot.

7 Because Tschudy and Walker did not have standing to seek prospective  
8 injunctive relief when the suit was filed, and Candelaria’s claims for injunctive  
9 relief became moot before Plaintiffs moved for class certification, none of the  
10 named Plaintiffs have standing to seek injunctive relief on behalf of the class.

11 Where, as here, the named plaintiff’s claim became moot before the class  
12 was certified, some Ninth Circuit cases have suggested that the district court should  
13 consider whether a putative class member with a live claim should be allowed to  
14 intervene. See Wade v. Kirkland, 118 F.3d 667, 670 (9th Cir. 1997); Kennerly  
15 v. United States, 721 F.2d 1252, 1260 (9th Cir. 1983); see also Newberg on Class  
16 Actions § 2:17 (5th ed. 2014) (discussing substitution of class representatives in  
17 claims mooted before a ruling on class certification). In Kennerly, such an analysis  
18 was necessary because other putative class members “may have relied” to their  
19 detriment “on [the class representative’s] asserted representation of the class.”  
20 Kennerly, 721 F.2d at 1260.

21 In this case, however, Plaintiffs’ only response to JCP’s standing arguments  
22 is that “restitution may still be obtained without also obtaining an injunction under  
23 [California Business & Professions Code § 17200 *et seq.*],” and that they “seek[]  
24 to recover on behalf of all class members the vacation that should have accrued  
25 but for the unlawful terms in JCP’s MTO.” (Doc. No. 122 at 9.) Plaintiffs have  
26 not proposed intervention by a putative class member who has a live controversy,  
27 despite two opportunities to do so, nor have they offered any argument that  
28 putative class members may have detrimentally relied on their asserted

1 representation of the class. See Sze, 153 F.3d at 1010 (the district court was not  
2 required to consider intervention where plaintiffs had not shown that putative class  
3 members had relied on plaintiffs’ asserted representation, and it was not the case  
4 that putative class members’ case would be time-barred but for the relation back  
5 of a later class certification). Because Plaintiffs do not have standing to seek  
6 injunctive relief on either of their claims and have not proposed intervention by  
7 a putative class member with a live claim, they cannot seek injunctive relief on  
8 behalf of the class. Their claims for damages, penalties, restitution, disgorgement,  
9 and fees and costs remain.

10 **B. Judicial Estoppel**

11 In their motion for class certification, Plaintiffs assert that discovery  
12 since summary judgment has confirmed that “[a]ll iterations of JCP’s MTO  
13 are substantively identical,” and that “[t]he only variations are non-substantive  
14 introductions and examples of how to calculate benefits.” (Doc. No. 119-1 at 3.)  
15 JCP responds that Plaintiffs should be judicially estopped from making these  
16 statements because at summary judgment Plaintiffs argued that there were material  
17 differences between the various MTO documents that precluded summary judgment  
18 for JCP. (Doc. No. 121 at 3.)

19 Judicial estoppel is an equitable doctrine, invoked by a court at its discretion,  
20 that “generally prevents a party from prevailing in one phase of a case on an  
21 argument and then relying on a contradictory argument to prevail in another phase.”  
22 New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (internal quotation marks  
23 omitted). Although there are no rigid prerequisites for applying judicial estoppel,  
24 the Supreme Court has instructed that “[the] party’s later position must be clearly  
25 inconsistent with its earlier position,” and that additional considerations include  
26 “whether the party has succeeded in persuading a court to accept that party’s earlier  
27 position, so that judicial acceptance of an inconsistent position in a later proceeding  
28 would create the perception that either the first or second court was misled,” id. at

1 750 (internal quotation marks omitted), and “whether the party seeking to assert  
2 an inconsistent position would derive an unfair advantage or impose an unfair  
3 detriment on the opposing party if not estopped,” id. at 751.

4 The focus of the summary judgment arguments was whether JCP employees  
5 were effectively put on notice—and, as a result, contractually bound—by JCP’s  
6 practices regarding vacation benefits. At that juncture of the case, the emphasis  
7 was not upon the legality of deferring eligibility or receipt of earlier “deposited” or  
8 “earned” vacation benefits. Put another way, the earlier summary judgment filings  
9 and court decision did not comprehensively address whether JCP’s particularized  
10 deferral of accrued vacation time constitutes a forfeiture proscribed by California  
11 law. Moreover, while this court’s earlier summary judgment ruling stated, as a  
12 general proposition, that JCP may require a waiting period as a condition for  
13 vacation benefits to vest, this court did not mean to imply that JCP’s practice  
14 categorically did or did not pass muster on the forfeiture question.

15 Since the court ruled on summary judgment, it has become more clear that  
16 the iterations of JCP’s vacation policy are less important than the reality that they  
17 essentially share the complained-of features. Accordingly, it is rather immaterial  
18 for purposes of class certification whether these shared MTO features were  
19 communicated to an employee by EMTO, JMTO, word of mouth, handbook,  
20 or other means.

21 In sum, the court finds that judicial estoppel is not appropriate here, as there  
22 is no clear inconsistency between Plaintiffs’ arguments at summary judgment and  
23 their position now. Plaintiffs appear to assert only that all versions of the MTO  
24 contain the challenged provisions. That is not clearly inconsistent with their  
25 argument at summary judgment that there were material differences between  
26 the JMTO and the other policy documents that precluded summary judgment.

27 ///

28 ///

1 **C. Class Certification**

2 **1. Legal Standards**

3 “The class action is an exception to the usual rule that litigation is conducted  
4 by and on behalf of the individual named parties only.” Wal-Mart Stores, Inc. v.  
5 Dukes, — U.S. —, 131 S. Ct. 2541, 2550 (2011) (internal quotation marks omitted).  
6 To come within the exception, a putative class-action plaintiff must “affirmatively  
7 demonstrate” that the claim meets each of the four requirements of Federal Rule of  
8 Civil Procedure 23(a) and “at least one of the provisions of Rule 23(b).” Comcast  
9 Corp. v. Behrend, — U.S. —, 133 S. Ct. 1426, 1432 (2013). Rule 23(a) requires  
10 that “(1) the class is so numerous that joinder of all members is impracticable;  
11 (2) there are questions of law or fact common to the class; (3) the claims or defenses  
12 of the representative parties are typical of the claims or defenses of the class; and  
13 (4) the representative parties will fairly and adequately protect the interests of the  
14 class.” Fed. R. Civ. P. 23(a); Wal-Mart Stores, 131 S. Ct. at 2548 (internal  
15 quotation marks omitted). Rule 23(b)(3), the only Rule 23(b) subsection under  
16 which Plaintiffs propose certification, requires the court to find that “the questions  
17 of law or fact common to class members predominate over any questions affecting  
18 only individual members, and that a class action is superior to other available  
19 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P.  
20 23(b)(3).

21 “[C]ertification is proper only if the trial court is satisfied, after a rigorous  
22 analysis,” that the requirements of Rule 23 are satisfied. Comcast, 133 S. Ct. at  
23 1432 (internal quotation marks omitted). “Such an analysis will frequently entail  
24 overlap with the merits of the plaintiff’s underlying claim.” Id. (internal quotation  
25 marks omitted). “The district court is required to examine the merits of the  
26 underlying claim in this context, [but] only inasmuch as it must determine whether  
27 common questions exist; not to determine whether class members could actually  
28 prevail on the merits of their claims.” Ellis, 657 F.3d at 983 n.8. The court’s review

1 of the merits should be “limited to those aspects relevant to making the certification  
2 decision on an informed basis.” Fed. R. Civ. P. 23 advisory committee notes.  
3 “To hold otherwise would turn class certification into a mini-trial.” Ellis, 657 F.3d  
4 at 983 n.8.

## 5 **2. Adequacy of the Class Definition**

6 “Though not explicitly stated in Rule 23, courts have held that the class must  
7 be adequately defined and clearly ascertainable before a class action may proceed.”  
8 Algarin v. Maybelline, LLC, 300 F.R.D. 444, 454 (S.D. Cal. 2014). “A class is  
9 sufficiently defined and ascertainable if it is administratively feasible for the court  
10 to determine whether a particular individual is a member.” Id. (internal quotation  
11 marks omitted). Typically, that requirement is satisfied “if [class] members can  
12 be ascertained with reference to objective criteria.” Id. (internal quotation marks  
13 omitted).

14 In their motion for certification, Plaintiffs propose the following class  
15 definition:

16 Part-Time Non-Management Associates and Management Associates  
17 employed in California by JC Penney from April 5, 2007 through the  
18 date of trial who, according to JC Penney’s records, were not permitted  
to accrue, or were not paid, all accrued and unused My Time Off.

19 (Doc. No. 119-1 at 10.)<sup>5</sup>

20 Although the proposed definition is somewhat inartful, the court construes  
21 the proposed class as consisting of those JCP employees who were not permitted  
22 to accrue, or who were not paid, vacation benefits pursuant to the challenged

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24  
25 <sup>5</sup> The definition Plaintiffs propose in their MTC is narrower than the  
definition they proposed in the SAC, which was:

26 [A]ll similarly-situated former and current California employees of  
27 [JCP] who, during the four years prior to the commencement of this  
28 action . . . forfeited accrued vacation benefits and/or were denied  
compensation in lieu thereof pursuant to [JCP]’s vacation policies.

(SAC ¶ 53.) JCP does not object to the narrowing of the definition.

1 provisions in JCP’s uniform MTO policy during the proposed class period. Thus  
2 construed, the definition is sufficiently ascertainable, as it provides objective criteria  
3 for identifying class members.

4 JCP responds, however, that the proposed definition is grossly overbroad  
5 because it includes (1) employees who would not be entitled to benefits under any  
6 reasonable reading of policy, such as those who were employed for only a week  
7 or a day, those who never averaged 25 hours per week, and those who were not  
8 employed on the first day of the thirteenth month of their employment; (2) 13,685  
9 seasonal workers who have no reasonable expectation of receiving time off because  
10 they are told that there is a blackout period for the duration of their employment  
11 during which no vacation can be taken; (3) current employees (approximately  
12 10,586 of them) who, even if Plaintiffs prevail on the merits, are not eligible  
13 for payment for vacation time under California Labor Code § 227.3 because  
14 (according to JCP) that provision applies only to terminated employees; (4) 32,127  
15 employees hired after July 17, 2009, who executed binding arbitration agreements  
16 that include class-action waivers; and (5) another 4,000 employees who executed  
17 releases in JCP’s favor. (Doc. No. 121 at 21–24 & nn. 21, 26.)

18 The first two arguments appear to be that those who do not satisfy the MTO’s  
19 eligibility requirements must be excluded from the class. The problem, however,  
20 is that the requirements JCP refers to—that PTNMA must (1) average 25 or more  
21 hours (2) for 48 weeks and (3) be employed on the first day of the month following  
22 12 months of employment—are the very provisions Plaintiffs contend are unlawful.  
23 Such a merits-based exclusion would be inappropriate at this point and, regardless,  
24 would not affect the court’s ascertainability analysis.

25 The third argument, that no current employees can be included in the class  
26 because California Labor Code § 227.3 requires compensation only for terminated  
27 employees, suffers from a similar defect. Plaintiffs assert that courts have extended  
28 § 227.3 to protect current employees, not just terminated employees, (Doc. No. 119-



1 1 at 2), while JCP contends that Plaintiffs are wrong on that point, (Doc. No. 121  
2 at 22 n.23). The court cannot resolve this issue without ruling on its merits.  
3 Beyond that, however, JCP has not offered any argument or authority explaining  
4 why, even if it is correct on that point, current employees (who have not been  
5 terminated, but may be) cannot be included in the class.

6 JCP's fourth and fifth arguments, that the class cannot include those who  
7 executed arbitration agreements or signed releases in JCP's favor, are more  
8 substantial, given the strong federal policies favoring enforcement of arbitration  
9 agreements. But this court has not yet determined whether the arbitration agreement  
10 would bar this lawsuit, the present motions are not the proper vehicle for deciding  
11 the issue, and JCP offered no evidence of the 4,000 signed releases it refers to.  
12 Moreover, other courts to have confronted similar claims have concluded that "the  
13 fact that some members of a putative class may have signed arbitration agreements  
14 or released claims against a defendant does not bar class certification." Avilez v.  
15 Pinkerton Gov't Servs., 286 F.R.D. 450, 474 (C.D. Cal. 2012) (internal quotation  
16 marks omitted); Herrera v. LCS Fin. Servs. Corp., 274 F.R.D. 666, 681 (N.D. Cal.  
17 2011). The court agrees.

18 Accordingly, the court finds that the proposed class definition is sufficiently  
19 ascertainable and not too broad. This conclusion does not foreclose the possibility  
20 that subclasses may be created in the future to address these issues as necessary.  
21 See Fed. R. Civ. P. 23(c)(3)(5).

### 22 **3. Rule 23(a) Requirements**

23 As discussed above, to satisfy Rule 23(a) a case must meet four requirements:  
24 (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.  
25 See Wal-Mart Stores, 131 S. Ct. at 2548. The court addresses each below.

#### 26 **a. Numerosity**

27 Rule 23(a)(1) requires the proposed class to be "so numerous that  
28 joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). In this

1 context, “impracticability does not mean impossibility, but only the difficulty  
2 or inconvenience of joining all members of the class.” Harris v. Palm Springs  
3 Alpine Estates, Inc., 329 F.2d 909, 913–14 (9th Cir. 1964) (internal quotation marks  
4 omitted). In determining whether numerosity is satisfied, the court “may consider  
5 reasonable inferences drawn from [the] facts before [it].” Gay v. Waiters’ & Dairy  
6 Lunchmen’s Union, 549 F.2d 1330, 1332 n.5 (9th Cir. 1977).

7 Plaintiffs assert, based on data JCP produced in July 2013, that there are  
8 approximately 64,593 class members, which includes 53,637 terminated PTNMA;  
9 10,266 current PTNMA; 369 terminated MA; and 361 current MA.<sup>6</sup> (Doc. No.  
10 119-1 at 15.) In its motion to strike, JCP asserts that “this matter involves more  
11 than 62,000 employees,” (Doc. No. 93-1), and in its opposition to Plaintiff’s motion  
12 for certification, JCP does not dispute that numerosity is satisfied. There is no  
13 doubt that joinder of such numbers is impracticable. Accordingly, the court finds  
14 that numerosity is satisfied.

#### 15 **b. Commonality**

16 Rule 23(a)(2) requires that “there are questions of law or fact common to the  
17 class.” Fed. R. Civ. P. 23(a)(2). “Commonality requires the plaintiff to demonstrate  
18 that the class members have suffered the same injury.” Wal-Mart Stores, 131 S. Ct.  
19 at 2551 (internal quotation marks omitted). “This does not mean merely that they  
20 have all suffered a violation of the same provision of law.” Id. Rather, “[t]heir  
21 claims must depend upon a common contention,” which “must be of such a nature  
22 that it is capable of classwide resolution,” so that “determination of its truth or  
23 falsity will resolve an issue that is central to the validity of each one of the claims  
24 in one stroke.” Id. But “all questions of fact and law need not be common to satisfy  
25 the rule.” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). Rather,  
26

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27 <sup>6</sup> According to Plaintiffs’ counsel, the sum of PTNMA and MA exceeds  
28 64,593 because several hundred putative class members worked in more than one  
capacity. (MTC, Kostas Decl. ¶ 8.)

1 “[t]he existence of shared legal issues with divergent factual predicates is sufficient,  
2 as is a common core of salient facts coupled with disparate legal remedies.” Id.  
3 For purposes of this inquiry, “even a single common question will do.” Wal-Mart  
4 Stores, 131 S. Ct. at 2556 (brackets and internal quotation marks omitted).

5 In this case, the question common to all putative class members’ claims is  
6 whether the challenged provisions in JCP’s uniform MTO violate California law.  
7 Such a legal question is the type that can be answered on a classwide basis. See  
8 Stiller v. Costco Wholesale Corp., 298 F.R.D. 611, 624 (S.D. Cal. Apr. 15, 2014)  
9 (“Claims alleging that a uniform policy consistently applied to a group of employees  
10 is in violation of the wage and hour laws are of the sort routinely, and properly,  
11 found suitable for class treatment.”) (quoting Brinker Restaurant Corp. v. Superior  
12 Court, 53 Cal. 4th 1004, 1033 (2012)). JCP focuses its arguments almost  
13 exclusively on predominance and does not, beyond those arguments, address  
14 whether commonality is satisfied. The court is satisfied that there is a common  
15 question and addresses JCP’s arguments on predominance below.

### 16 c. Typicality

17 Rule 23(a)(3) requires the representative party to have claims or defenses  
18 that are “typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3).  
19 “Typicality refers to the nature of the claim or defense of the class representative,  
20 and not to the specific facts from which it arose or the relief sought.” Hanon v.  
21 Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (internal quotation marks  
22 omitted). “The test of typicality is whether other members have the same or similar  
23 injury, whether the action “is based on conduct which is not unique to the named  
24 plaintiffs, and whether other class members have been injured by the same course  
25 of conduct.” Id. (internal quotation marks omitted.) “The purpose of the typicality  
26 requirement is to assure that the interest of the named representative aligns with  
27 the interests of the class.” Id. “[R]epresentative claims are typical if they are  
28 reasonably coextensive with those of absent class members; they need not be

1 substantially identical.” Hanlon, 150 F.3d at 1020.

2 In this case, the named Plaintiffs’ claims and the claims of putative class  
3 members all arise from the challenged provisions in the MTO, are based on the  
4 same legal theories, and involve similar injuries in the form of purportedly  
5 improperly denied or forfeited vacation benefits.

6 JCP contends that Plaintiffs are atypical of the class because none of them  
7 were ever MA and none of them satisfied the “facial requirements” to accrue  
8 vacation time under the JMTO. (Doc. No. 121 at 25.) But JCP does not explain  
9 why it matters that Plaintiffs were never MA, and there is no obvious reason why  
10 Plaintiffs, who are former PTNMA, cannot effectively represent MA, whose  
11 vacation benefits are governed by a simpler provision of the same policy that  
12 governs PTNMA and is, according to Plaintiffs, illegal for the same reasons.<sup>7</sup> Nor  
13 does it matter for purposes of this analysis that none of the named Plaintiffs satisfied  
14 the so-called “facial requirements” to accrue vacation time, as those requirements  
15 appear to be the very provisions Plaintiffs contend are illegal. Given that Plaintiffs’  
16 claims are essentially identical to those of PTNMA class members, who comprise  
17 almost the entire class, and very similar to those of MA class members, the court  
18 finds the typicality requirement satisfied.

19 **d. Adequacy**

20 Rule 23(a)(4) requires that “the representative parties will fairly and  
21 adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “The  
22 adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest  
23 between named parties and the class they seek to represent.” Amchem Prods.,  
24 Inc. v. Windsor, 521 U.S. 591, 625 (1997). “Resolution of two questions  
25 determines legal adequacy: (1) do the named plaintiffs and their counsel have  
26 any conflicts of interest with other class members and (2) will the named plaintiffs

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28 

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<sup>7</sup> As noted earlier, the court leaves open the possibility of future subclasses.

1 and their counsel prosecute the action vigorously on behalf of the class?” Hanlon,  
2 150 F.3d at 1020.

3 In support of their motion for certification, Plaintiffs submitted declarations  
4 stating, among other things, that they understand their duties and that they will  
5 continue to vigorously prosecute this case on behalf of the class. (MTC, Tschudy  
6 Decl., Walker Decl., Candelaria Decl.) Plaintiffs’ counsel submitted declarations  
7 and detailed biographies indicating that they are experienced in wage-and-hour  
8 class litigation. (MTC, Ostroff Decl. ¶ 7 & Exh. 1; MTC, Kostas Decl. ¶ 2 & Exh.  
9 1.) And the court has not been made aware of any conflicts that threaten to impair  
10 the representation. JCP contends that Plaintiffs are not adequate for the reasons that  
11 their claims are atypical, (Doc. No. 121 at 25), but, as discussed above, Plaintiffs’  
12 claims are typical of the class. Accordingly, the court finds that Plaintiffs and their  
13 counsel are adequate to represent the class.

#### 14 **4. Rule 23(b)(3) Requirements**

15 As noted above, to certify a class under Rule 23(b)(3), the court must find  
16 (1) “that the questions of law or fact common to class members predominate over  
17 any questions affecting only individual members,” and (2) “that a class action is  
18 superior to other available methods for fairly and efficiently adjudicating the  
19 controversy.” Fed. R. Civ. P. 23(b)(3); Hanlon, 150 F.3d at 1022. The court  
20 addresses each consideration below.

##### 21 **a. Predominance**

22 Rule 23(b)(3)’s predominance requirement is more stringent than Rule  
23 23(a)(2)’s commonality requirement. The analysis under Rule 23(b)(3) “presumes  
24 that the existence of common issues of fact or law have been established pursuant  
25 to Rule 23(a)(2),” and, “[i]n contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on  
26 the relationship between the common and individual issues.” Hanlon, 150 F.3d  
27 at 1022. For purposes of this inquiry, there is “clear justification” for handling the  
28 dispute on a representative basis “[w]hen common questions present a significant

1 aspect of the case and they can be resolved for all members of the class in a single  
2 adjudication.” Id. (internal quotation marks omitted).

3         In this case, the overriding question is whether JCP’s uniform policy violates  
4 California labor law. Certainly, the policy itself contains different provisions  
5 (or limitations) that may affect putative class members differently, depending on  
6 the length of employment and hours worked (or averaged). But, fundamentally,  
7 the issue is the same for all putative class members: Does JCP’s uniform policy  
8 of deferred vesting cause a “forfeiture” within the meaning of the California Labor  
9 Code? The answer to that question will not depend upon, for example, whether  
10 an otherwise qualified employee was “employed on the first day of the thirteenth  
11 month” following a twelve-month period of employment, or what each employee  
12 believed about the provisions of the policy. Rather, the inquiry will be whether  
13 non-entitlement to “accrued” vacation “deposits,” predicated upon the challenged  
14 provisions of JCP’s policy, is illegal. On the other hand, if JCP’s policy passes  
15 muster, as, for example, advance payment of wages or compensation, then that  
16 result applies across the putative class as well. The court concludes, therefore,  
17 that common questions predominate.

18         In its motion to strike and its opposition to Plaintiffs’ motion for certification,  
19 however, JCP argues at length that this case cannot be litigated as a class action  
20 because individualized questions of contract formation predominate, and because  
21 Plaintiffs all claim reliance on different sources for their understanding of the MTO.  
22 (Doc. No. 93-1 at 9–21; Doc. No. 121 at 16–21.) In support of those propositions  
23 it relies on this court’s order denying summary judgment and the existence of the  
24 various MTO documents. (Id.)

25         But the court’s only conclusions at summary judgment were that JCP had  
26 not established that it had made the JMTO available to employees, and that the  
27 documents Plaintiffs had received did not make clear that MTO deposits are  
28 advances for future work, as opposed to compensation for past services. (See

1 Doc. No. 78 at 11–12.) That is all. Indeed, California Labor Code § 227.3  
2 contemplates that vacation benefits are controlled either by a “contract of  
3 employment or employer policy.” (Emphasis added.) In this case, as discussed  
4 above, all versions of the MTO contain the challenged provisions, and JCP does  
5 not dispute that it applies the MTO according to its terms as to all PTNMA and MA.  
6 Because Plaintiffs challenge the legality of a uniform policy that, at this point,  
7 appears to be uniformly applied, there is no need for individualized determinations.

8 JCP asserts also that the need for individualized damages determinations  
9 precludes class certification. (Doc. No. 93-1 at 21–25.) But the Ninth Circuit has  
10 instructed that “individualized monetary claims belong in Rule 23(b)(3). Thus,  
11 the presence of individualized damages cannot, by itself, defeat class certification  
12 under Rule 23(b)(3).” Levy v. Medline Indus. Inc., 716 F.3d 510, 514 (9th Cir.  
13 2013) (internal quotation marks omitted). In Levy, the fact that individualized  
14 damages determinations would be necessary did not preclude a finding of  
15 predominance where the defendant company’s “computerized payroll and  
16 timekeeping database would enable the court to accurately calculate damages  
17 and related penalties for each claim.” Id.

18 Here, as in Levy, if putative class members prove JCP’s liability, damages  
19 will be calculated based on the wages each employee lost due to JCP’s unlawful  
20 practices. Based on Plaintiffs’ submissions, JCP’s employment records appear  
21 to contain all the information necessary to calculate damages, including each  
22 employee’s name, contact information, hire date, termination date, weekly hours  
23 worked, pay rates, and MTO deposits and usage. (See Doc. No. 119-1 at 14.)  
24 Accordingly, the fact that damages will need to be calculated for each employee  
25 if Plaintiffs prevail does not preclude a finding of predominance.

26 **b. Superiority**

27 Whether a class action is the superior method of litigation depends on  
28 (1) “the class members’ interests in individually controlling the prosecution or

1 defense of separate actions”; (2) “the extent and nature of any litigation concerning  
2 the controversy already begun by or against class members”; (3) “the desirability  
3 or undesirability of concentrating the litigation of the claims in the particular  
4 forum”; and (4) “the likely difficulties in managing a class action.” Fed. R. Civ. P.  
5 23(b)(3)(A)–(D).

6 In this case, putative class members stand to recover relatively small sums  
7 of money, making individualized litigation unlikely. The court is not aware of  
8 any similar or related cases in California. This court is an appropriate forum for  
9 resolution of the case, as the claims are under California law and the class is limited  
10 to California employees. And, as discussed above, the court is not aware of any  
11 likely difficulties in managing this case. Accordingly, the court finds that a class  
12 action is the superior method of resolving Plaintiffs’ claims.

### 13 **C. Appointment of Class Counsel**

14 Rule 23(g) requires the court to appoint class counsel when certifying a case  
15 as a class action. The court must consider the following four factors: (I) the work  
16 counsel has done in identifying or investigating potential claims in the action;  
17 (ii) counsel’s experience in handling class actions, other complex litigation, and  
18 the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable  
19 law; and (iv) the resources that counsel will commit to representing the class.  
20 Fed. R. Civ. P. 23(g).

21 Based on their submissions, the court is satisfied that Plaintiffs’ counsel of  
22 record, Sheldon A. Ostroff, of the Law Offices of Sheldon A. Ostroff, and James C.  
23 Kostas, of Huffman & Kostas, meet the criteria of Rule 23(b) and should serve  
24 as class co-counsel.

### 25 **D. Evidentiary Motions**

26 As noted earlier, the parties filed several evidentiary objections and  
27 corresponding motions to strike related to their motions on class certification.  
28 Plaintiffs object to statements JCP’s counsel submitted regarding former Plaintiff



1 Leticia Hinojosa, (Doc. No. 97), and portions of employee declarations JCP  
2 submitted in opposition to the motion for class certification, (Doc. No. 124).  
3 JCP objects to various aspects of Plaintiffs' declarations. (Doc. No. 121-1.)


4 Because class certification is a preliminary procedure, "evidence presented  
5 in support of class certification need not be admissible at trial." Makaeff v. Trump  
6 Univ., LLC, 2014 WL 688164, at \*20 (S.D. Cal. Feb. 21, 2014); Amalgamated  
7 Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc., 2009 WL  
8 249888, at \*3 (S.D. Cal. Feb. 2, 2009). Accordingly, at this stage, the court  
9 overrules the parties' evidentiary objections and denies the motions to strike.

10 **CONCLUSION**

11 JCP's motion to strike the class allegations from Plaintiff's second amended  
12 complaint (Doc. No. 93) is DENIED. Plaintiffs' motion to certify this case as a  
13 class action (Doc. No. 119) is GRANTED. Plaintiffs' counsel of record, Sheldon  
14 A. Ostroff, of the Law Offices of Sheldon A. Ostroff, and James C. Kostas, of  
15 Huffman & Kostas, are APPOINTED AS CLASS CO-COUNSEL. The parties'  
16 evidentiary objections are overruled, and their motions to strike evidence related  
17 to the motions for class certification (Doc. Nos. 97, 121-1, and 124) are DENIED.

18 IT IS SO ORDERED.

19 DATED: December 17, 2014

20   
21 Hon. Jeffrey T. Miller  
22 United States District Judge  
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