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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOE BRAUN, JEFF HALPERN, YOLANDA GARCIA, EFREN GARCIA, LONNIE COX, AARON DANCHIK, HAITHAM BIBI, JOLENE COFFMAN, and JESSICA PICKERING

Plaintiffs,

vs.

SAFECO INSURANCE COMPANY OF AMERICA, LIBERTY MUTUAL INSURANCE COMPANY, and DOES 1 through 50, inclusive,

Defendants.

Case No. 2:13-CV-00607 BRO (JCx)

[CLASS ACTION]

[ASSIGNED TO THE HON. JUDGE BEVERLY R. O'CONNELL]

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION PURSUANT TO FRCP RULE 23; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Declarations and supporting evidence filed under separate cover]

Hearing Date: July 14, 2014
Hearing Time: 1:30 p.m.
Courtroom: 14 (Spring Street)

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Attorneys for Individual and Representative Plaintiffs and the Putative Class

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on July 14, 2014, at 1:30 p.m., in Courtroom 14 of the United States District Court, Central District of California, located at 312 North Spring Street Los Angeles, CA 90012-4701, Plaintiffs will, and hereby do, move the Court for an order certifying this case as a class action under Rule 23 of the Federal Rules of Civil Procedure ("FRCP"). Plaintiffs move to certify the following class:

> All persons who worked for Safeco Insurance Company, from April 5, 2007 onwards, whose primary job duties were to process automobile or homeowners[1] insurance claims, or inspect automobile damage, and whose settlement authority was in an amount no greater than $50,000, who were denied overtime payments and/or meal and rest breaks to which they were entitled pursuant to the California Labor Code, the California Industrial Welfare Commission's ("IWC") Wage Orders and all other applicable California employment laws and regulations.

The class encompasses two types of Safeco insurance adjusters that will be referred to herein as Claims Adjusters and Auto Examiners (collectively, "Class Members"). Effective January 1, 2009, both Claims Adjusters and Auto Examiners were classified as exempt, although Auto Examiners were re-classified as non-exempt twenty-one months later, in September, 2010.

In addition, Plaintiffs move to certify the following five subclasses:

[1] Plaintiffs hereby add the words "or homeowners" to the putative class definition set forth in the First Amended Complaint to make the class definition consistent with their definition of the Misclassification Subclass. Plaintiffs contend that first party (non-casualty) homeowner adjusters and examiners, including first-party homeowners "property" adjusters and examiners, should be included in the proposed class. *See* Declaration of Scott B. Rapkin ("Rapkin Decl.") at ¶ 14.

(1) **Misclassification Subclass**: All Class Members who were at any time since January, 2009, misclassified as being exempt from California's wage and hour laws.

(2) **Auto Examiner Off-the-Clock Subclass**: All Class Members who, although classified by Defendants as non-exempt, worked off the clock and were denied overtime compensation for the time spent working off the clock.

(3) **Meal Break Subclass**: All Class Members who were denied the duty-free meal breaks, or compensation therefor, to which they are entitled under California law.

(4) **Rest Break Subclass**: All Class Members who were denied the duty-free rest breaks, or compensation therefor, to which they are entitled under California law.

(5) **Waiting Time Penalties Subclass**: All Class Members who are former employees of Defendants and, having not received all wages due to them upon resignation or termination within the period prescribed under California law, are eligible for waiting time penalties.

This Motion should be granted because Plaintiffs satisfy all of the requirements for class certification under FRCP 23(a) and FRCP 23(b)(3). With respect to Rule 23(a), Plaintiffs readily satisfy the requirements of numerosity, typicality, and adequacy of representation. Moreover, common questions predominate over individualized issues and a class action is thus far superior to litigating more than one hundred individualized claims, thereby satisfying Rule 23(b)(3).

This Motion is based on the concurrently filed Memorandum of Points and Authorities; the declarations of putative class counsel Michael D. Seplow, Michael S. Rapkin, and Scott B. Rapkin, Esqs.; the declarations of Plaintiffs and proposed class representatives Joe Braun, Jeff Hailpern, Lonnie Cox, Aaron Danchik, Haitham Bibi,

Jolene Coffman, and Jessica Pickering, [2] as well as the declarations of numerous other potential class members (collectively and concurrently filed as exhibits to the Compendium of Declarations of Proposed Class Representatives and Class Members ("Compendium of Declarations"); the pleadings and records on file in this action; and such other argument and evidence as may be presented in the hearing on this Motion.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on April 4, 2014. *See* Declaration of Michael D. Seplow, dated April 11, 2014, submitted herewith, ("Seplow Decl.") at ¶ 1.

DATED: April 11, 2014

Respectfully submitted,

SCHONBRUN DESIMONE SEPLOW HARRIS & HOFFMAN LLP

LAW OFFICES OF MICHAEL S. RAPKIN

By: /s/ Michael D. Seplow

Michael D. Seplow
Attorneys for Plaintiffs

[2] Yolanda Garcia and Efren Garcia have withdrawn as putative class representatives.

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STATUTES AND OTHER AUTHORITIES

I. INTRODUCTION

Plaintiffs seek class certification on behalf of current and former employees of Defendants Safeco Insurance Company ("Safeco") and Liberty Mutual Insurance Company ("Liberty Mutual"). The putative Class Members are low-level insurance claims processors – Claims Adjusters and Auto Examiners – who were unlawfully denied overtime compensation, as well as duty-free meal and rest breaks.

Plaintiffs allege that at various times during the class period, Class Members were misclassified as exempt under California law. Indeed, the California Court of Appeal has already determined that all Liberty Mutual insurance adjusters should be classified as non-exempt. *See* *Harris v. Liberty Mutual*, 207 Cal. App. 4th 1225, 144 Cal. Rptr. 3d 289 (2012) ("*Harris II*") (depublished). Based on Defendants' prior admission that Plaintiffs' misclassification claims are entirely subsumed by those in *Harris*, Defendants should be collaterally estopped from asserting the administrative exemption here. This legal issue is common to all proposed Class Members.

Plaintiffs further allege that although certain class members were at times properly classified as non-exempt, Defendants' policies nonetheless required them to work off the clock and required all Class Members to forego their legally mandated meal and rest breaks. Indeed, Defendants' policies, including their automated time keeping system, deterred (or outright prohibited) class members from seeking overtime or compensation for missed breaks.

Class certification is proper because common issues predominate. Here, Plaintiffs seek to challenge Defendants' uniform practice of misclassifying their low-level insurance claims processors as exempt, thereby denying them overtime compensation and meal and rest breaks. With respect to Defendants' non-exempt employees, Plaintiffs also challenge the standardized policies and procedures that require uncompensated off-the-clock work. In light of the common issues and evidence by which these claims will be adjudicated, a class action is clearly superior to

litigating hundreds of individualized claims. Accordingly, Plaintiffs' Motion should be granted.

II. PROCEDURAL BACKGROUND

Plaintiffs filed *Braun v. Safeco* in the Superior Court of California, County of Los Angeles, on April 5, 2011. The action seeks relief for Defendants' failure to pay overtime to the Class, in violation of California Labor Code ("Labor Code") Section 1194; failure to pay meal and rest period compensation, in violation of Labor Code Sections 226.7 and 512; waiting time penalties under Labor Code Section 203; failure to provide accurate, itemized wage statements to the Class, in violation of California Labor Code Section 226;[1] unfair business practices in violation of California Business and Professions Code Section 17200; and penalties under the Labor Code Private Attorneys General Act of 2004 (Labor Code Sections 2698 *et seq.*) ("PAGA").[2]

Defendants answered Plaintiffs' Complaint on June 2, 2011, asserting as their thirtieth affirmative defense that *Braun v. Safeco* should be stayed as a result of the *Liberty Mutual Overtime Cases*, a set of four consolidated cases, Judicial Council Coordination Proceeding 4234, that were pending before the California Supreme Court. *See* Answer to Complaint, ¶ 30 (Dkt. No. 1 at p. 61; Seplow Decl., Ex. 2). These cases, which are often named by reference to the lead case, "*Harris*," asserted misclassification claims on behalf of Liberty Mutual claims adjusters. Defendants persuaded the state court to stay *Braun* by arguing that the *Braun* Plaintiffs were Liberty Mutual employees who fell within the class definition of, and raised identical

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[1] Plaintiffs do not believe the certification of a separate subclass for Section 226 penalties is warranted, as these claims are derivative of Plaintiffs' primary wage and hour claims; however, should the Court prefer to certify such a subclass, it would be readily ascertainable.

[2] Plaintiffs' PAGA claims are not subject to Rule 23. *See* *Baumann v Chase Investment Services*, --- F.3d---, 2014 WL 983587 (9th Cir. Mar. 13, 2014); *McKenzie v. Federal Express*, 765 F. Supp. 2d 1222, 1234 (C.D. Cal. 2011) (following federal majority view, which is "consistent with the California Supreme Court," "that PAGA claims are not class actions.").

claims to, those in the *Harris* cases. *See* Motion to Stay Proceedings Pursuant to Doctrine of Exclusive Concurrent Jurisdiction ("Motion to Stay") (Dkt. No. 1 at pp. 69-77; Seplow Decl., Ex. 3); Oct. 7, 2011 Minute Order Granting Stay (Seplow Decl., Ex. 6).

After the state appellate courts definitively resolved the administrative exemption issues in favor of those classes, the trial court presiding over *Harris* set a January 29, 2013, hearing on whether to relate *Braun* to the *Harris* cases. *See* Seplow Decl., ¶ 12. On January 28, 2013, Defendants removed this case to federal court. *See* Notice of Removal (Dkt. No. 1 at pp. 1-8). Plaintiffs' motion to remand was denied on April 9, 2013. *See* Apr. 9, 2013, Minute Order (Dkt. No. 24).

III. FACTUAL BACKGROUND

Plaintiffs and putative Class Members are current and former employees of Defendants from April 5, 2007, to the present, who worked as low level insurance claims processors – either "Claims Adjusters" or "Auto Examiners." There are approximately 67 Claims Adjusters and 82 Auto Examiners, making a total of 149 individual Class Members. *See* Declaration of Brian Duvall (Jan. 28, 2013), ¶ 10 (Dkt. No. 2) (Exhibit A to Rapkin Decl.).

During the class period, the Claims Adjusters have had various job titles, but all had essentially the same job duties and restrictions. *See* Rapkin Decl. ¶¶ 7-10 & Exs. E-H (Claims Adjuster Job Descriptions). All Claims Adjusters processed discrete claims for Liberty Mutual, following specific procedures on the front lines to resolve claims on behalf of Liberty Mutual's insureds. *See* Adjuster Decls. ¶¶ 3-5, 7.[3]

[3] Citations to "Adjuster Declarations" refer collectively to the Declarations of Carolyn August, Marisela Beas, Jolene Coffman, Efren Garcia, Yolanda Garcia, Debbie Gordon, Deanna Kubas, Roberta Lincecum, Giulietta Perrotta, Jessica Pickering, Terri Stevens, and Connie Weaver – all of which are part of concurrently filed Compendium of Declarations.

During the class period, the Auto Examiners have also held various job titles; since September 13, 2010, they have been known as Quality Assurance Reinspectors ("QARs"), or Auto Specialists. As discussed below, all Auto Examiners had substantially similar job duties and consistently demanding workloads that, in conjunction with Liberty Mutual's overtime policies, routinely compelled members of the Auto Examiner subclass to work off the clock. Auto Examiners were also misclassified as exempt from January, 2009, through September, 2010.

A. The Transition from Safeco to Liberty Mutual on January 1, 2009.

While at Safeco, the Claims Adjusters were all non-exempt employees and part of the Safeco "Examiner's Family." *See* Transcript of FRCP 30(b)(6) Deposition of Renee Miltz ("Miltz Dep."), 50:6-14 (Seplow Decl., Ex. 13). However, on January 1, 2009, despite the fact that their job duties, responsibilities, and salary did not change, all Claims Adjusters were transitioned to the Liberty Mutual "Claims Specialists Family," and reclassified as exempt employees. *Id.* at 21:23 to 22:3, 29:16 to 30:23, 50:6-20. They remain exempt to this day. *See generally id.* at 50-56.

Like the Claims Adjusters, the Auto Examiners were all non-exempt employees Safeco's "Examiner's Family," in positions entitled "Field Examiner" and QAR. *Id.* at 35:25 to 36:7. Effective January 1, 2009, the Safeco Field Examiners transitioned into the Liberty Mutual "Claims Specialists Family" and were re-classified as exempt, although their job duties, responsibilities, and compensation did not change. *See id.* at 28:24 to 29:20 (Safeco positions were "matched" to Liberty positions based on similar responsibilities and salary); *id.* at 88:21-25 (salary stayed the same); *id.* at 41:25 to 42:4 (discussing reclassification). However, some twenty-one months after its arbitrary classification of the Safeco Field Examiners as exempt employees, Liberty Mutual re-classified and created new job titles for the Field Examiners: Auto Specialist I, Auto Specialist II, and Sr. Auto Specialist. *Id.* at 46:2-10; 46:19-23, 99:19 to 100:5. Accordingly, effective September 13, 2010, the former Safeco Field Examiners were re-classified as non-exempt employees. *Id.* at 99:19 to 100:5.

The QAR position was always intended to be a non-exempt position. *See id.* at 33:11-24, 57:18-19. However, in October 2008, QARs received an inaccurate notice from their manager stating that, effective January 1, 2009, they would become exempt employees. *See id.* at 33:25-34:2; 65:21-67:18; 68:13-69:5; Declaration of Jeff Hailpern ("Hailpern Decl."), ¶ 4; Declaration of Joe Braun ("Braun Decl."), ¶ 15. It was not until in or about September 2010, with the reclassification of the Auto Specialists from exempt to non-exempt, that the QARs were informed that they were entitled to overtime. *See* Hailpern Decl., ¶ 4. As such, for over twenty months, QARs were effectively misclassified; having been told they were exempt, they had no reason or incentive to report the overtime they consistently worked.

B. Nature, Structure, and Duties of Claims Adjusters.

Although members of the Claims Adjusters subclass held different titles, their work consisted primarily of adjusting, which Liberty Mutual's FRCP 30(b)(6) witness Ross Powell defined as "receiving a claim, verifying that there is coverage or investigating and resolving if there is a coverage issue, investigating the facts of the claim regarding liability and damages, evaluating and negotiating or litigating a claim to a resolution." Powell Dep. at 27:8-13. For all Claims Adjusters, this time-consuming process was closely regulated by Safeco and Liberty Mutual, allowing only rare and limited discretion. *See* Adjuster Decls. at ¶¶ 3-7.

C. Nature, Structure, and Duties of Auto Examiners.

The Auto Examiners are divided into seven groups, each with its own "Claims Unit Leader." In California, there are five groups of Auto Specialists and one group of QARs. *See* Declaration of Christopher Sestito (Mar. 11, 2013) ("Sestito Decl."), ¶ 5 (Dkt. No. 18-2; Rapkin Decl., Ex. B). All six of these California Claims Unit Leaders report to Mr. Sestito, who is the Claims Senior Manager for Auto Field. *Id.* at ¶ 2; *see also* Deposition of Christopher Sestito ("Sestito Dep.") at 20:17-25 (Seplow Decl., Ex. 16).

1. QARs.

QARs facilitate auto claims processing by working with Safeco's authorized auto body repair shops, primarily re-inspecting auto damage, obtaining estimates, and authorizing repair work from the body shops. *See* Sestito Decl., ¶ 3; Rapkin Decl., Ex. C (QAR Job Description); Hailpern Decl., ¶ 5; Braun Decl., ¶ 4. Every QAR in California is managed by Kerry Dayhoff, who reports to Chris Sestito. *See* Sestito Dep. at 44:23-47:5. QARs evaluate repair shop estimates to determine whether they are in line with what Safeco guidelines reflect they should be. Each set of physical damage file reviews takes QARs two to three days to complete, as they are provided in volume and require a comprehensive review. Hailpern Decl., ¶ 10; Braun Decl., ¶ 9. Furthermore, each day QARS spend a lot of time on the telephone with insureds, claimants, and/or their attorneys, as well as body shops, answering questions about claims. Hailpern Decl., ¶ 11; Braun Decl., ¶ 10. Mr. Sestito concedes that the QARs are the best authority on how long it takes them to complete their duties. Sestito Dep. at 52:24 to 53:9, 55:23 to 69:9.

2. Auto Specialists.

Auto Specialists in California all have the same job duties. *Id*. at 105:23 to 106:1, 110:15-21; Rapkin Decl., Ex. D (Auto Specialist Job Descriptions). They inspect damaged vehicles and provide estimates for parts and repairs, among other things. Auto Specialists typically have 5-7 inspections per day, each lasting, on average 1-1.5 hours. Auto Specialist Decls., ¶¶ 8-9.[4] Auto Specialists also conduct scene investigations at the scene of an accident. Sestito Dep. at 137:21 to 138:2; Danchik Decl., ¶ 3. Auto Specialists receive their daily schedule through the Click Mobile System, which tells them where and when they must be throughout the day.

[4] Citations to "Auto Specialist Declarations" refer collectively to the Declarations of Greg Alten, Haitham Bibi, Lonnie Cox, Aaron Danchik, Lisa Fitzwilliam, David Goldstein, Gloria Hurtado, Mike Oroz and Gary Yamamoto – all of which are exhibits to the concurrently filed Compendium of Declarations.

Auto Specialist Decls., ¶¶ 6-9. Beyond conducting investigations, Auto Specialists spend time on the phone every day with insureds, claimants and/or their attorneys, and body shops answering questions about claims. Sestito Dep. at 93:23 to 94:10; Auto Specialist Decls., ¶¶ 9, 10. Auto Specialists also spend time emailing with other Auto Specialists, their manager, agents, customers, or coworkers in a different department. Sestito Dep. at 95:21 to 96:3. In addition, they are often required to write partial denial letters and settlement letters with respect to salvage. *Id.* at 101:2 to 103:21.

D. Defendants' Policies and Procedures Regarding Rest and Meal Breaks.

1. Defective Electronic Time Sheets.

All Auto Specialists and QARs are required to enter their hours on the same Liberty Mutual electronic time system, Time Management, which is the time management system used by all Liberty Mutual employees. Transcript of 30(b)(6) Deposition of Robert Alexander ("Alexander Dep."), at 17:6 to 18:2 (Seplow Decl., Ex. 15). This time system allows Auto Specialists and QARs to enter a "missed meal break;" however, the time system has no option allowing the putative class members to enter a "missed rest break." *Id.* at 58:19-22, 84:22-25; Auto Specialist Decls., ¶¶ 14, 15, Hailpern Decl., ¶¶ 17-18. Moreover, Auto Specialists and QARs have never been instructed on how to report a missed rest break. *See* Auto Specialist Decls., ¶¶ 14, 15; Hailpern Decl. ¶ 17. It follows that they cannot report to the company if they have missed two rest breaks in one day or a missed meal break and a missed rest break.[5] Alexander Dep. at 42:24 to 43:13.; Hailpern Decl., ¶ 17. In short, based on the patently defective time sheets, Auto Specialists and QARs have never received

[5] Towards the end of his deposition, Mr. Alexander stated that, during a break, he had been informed that there was a means to add an additional missed meal break by hitting a "plus sign on the left-hand side [of the screen]". Alexander Dep. at 79: 1-12. This suspiciously revised testimony is contradicted by numerous declarations stating that employees were never informed how to record a missed rest break or both a missed rest and meal break in the same day. *See* Hailpern Decl., ¶ 17; Auto Specialist Decls., ¶¶ 14, 15.

compensation for missed rest breaks since January 1, 2009. Auto Specialist Decls., ¶¶ 14, 15; Hailpern Decl., ¶ 16.

2. Defendants' Policies Resulting in Missed Rest and Meal Breaks.

Since April 5, 2007, Auto Specialists spend their entire workday on the road, at body shops, or at other locations inspecting vehicles. Auto Specialist Decls., ¶¶ 7, 8. Likewise, on days that they are doing re-inspections, QARS spend almost their entire workday on the road and at body shops. Hailpern Decl. ¶ 16 ("the nature of my job requires me to often be in my car, constantly rushing from inspection to inspection."); Braun Decl., ¶ 14. Despite forcing Auto Examiners to spend hours every day driving between inspections, company policy prohibits them from conducting calls while driving. Sestito Dep. at 118:5-21. At the same time, company policy requires that all calls be returned within the same business day. *Id.* at 119:11-17, 120:15-24.

Defendants further require Auto Examiners to return calls, conduct inspections and appraisals, handle emails, and prepare reports only between 8:00 a.m. and 4:30 p.m. *Id.* at 120:11-14, 164:5-25. This places additional time pressure on these employees. In addition, Auto Examiners are provided company cars and are responsible for maintaining, washing, and putting gas in the cars, and they are only allowed to do so between 8:00 a.m. and 4:30 p.m. *Id.* at 134:23 to 135:19. At the same time, Auto Examiners cannot rush through their tasks, because their performance reviews assess the accuracy of their estimates, *id.* at 146:18 to 148:19, as well as customer satisfaction, *id.* at 148:20 to 149:18. As a result of the foregoing, Auto Examiners rarely, if ever, take uninterrupted rest breaks and meal breaks. *See* Braun Decl., ¶ 14; Hailpern Decl., ¶ 16; Auto Specialist Decls., ¶¶ 13-14 .

Faced with similar pressures, Claims Adjusters were also regularly forced to forego their breaks. *See* Adjuster Decls., ¶¶ 4, 6; *see also* Ex. A to Gordon Decl. ("The benefit we were told to being a salaried employee was we could be more flexible with our own schedules. However, there is no benefit to realize here as a salaried employee, versus earning an hourly wage, when the employee is also given a

significantly increased workload that requires the person to work all day, at night, and on the weekends, now without the benefit of being able to claim any overtime at all.").

Furthermore, even if Class Members found ten minutes during their busy day to take a break (let alone the required two per day), or thirty minutes for a meal break, company policy prevents such breaks from being uninterrupted. That is because Auto Specialists and QARs are to keep their company issued phone on their person at all times. Braun Decl., ¶ 14; Hailpern Decl., ¶ 16; Auto Specialist Decls., ¶¶ 13-14. Auto Specialists and QARs have never been told to ignore business related calls if they are in the midst of a break, nor are they likely to ignore a call because a telephone call could come from their manager, or company dispatch, or claimants and body shops, notifying them of scheduling changes. Braun Decl., ¶ 14; Hailpern Decl., ¶ 16; Auto Specialist Decls., ¶¶ 13-14. In short, while putative class members must keep their phones on at all times between 8:00 a.m. and 4:30 p.m., the Defendants do not have a means by which Auto Specialists and QARs can inform their managers or others at the company that they are taking a break. *See* Transcript of 30(b)(6) Deposition of Jill Judah ("Judah Dep."), at 66:13 to 67:4 (Seplow Decl., Ex. 14); Braun Decl., ¶ 14; Hailpern Decl., ¶ 16. These policies thus result in Auto Specialists and QARs always being "on call." Moreover, many times Auto Specialists and QARs do not stop to eat lunch; and when they do, they often do so while sitting in their car, returning business calls and emails. Braun Decl., ¶ 14; Hailpern Decl., ¶ 16; Auto Specialist Decls., ¶¶ 13-14. Claims Adjusters were similarly pressured to answer their phones and manage their workload, such that they, too, regularly worked through meal and rest breaks. *See* Adjuster Decls., ¶¶ 4, 6.

E. Defendants' Policies and Procedures Regarding Overtime.

According to Defendants' policies and procedures, overtime must be approved in advance by a manager. Rapkin Decl., ¶ 13 & Ex. I at LMIC005896; Sestito Dep. at 165:10-21; Judah Dep. at 46:12 to 47:3; Braun Decl., ¶ 11; Hailpern Decl., ¶ 12; Auto Specialist Decls., ¶¶ 10, 11. Employees can also be disciplined for unapproved

overtime. Sestito Dep. at 173:3-12; Judah Dep. at 50:10-25. However, acquiring advance approval is a burdensome process; and if managers do not answer their phone, pre-approval sought by an employee can even be impossible. Braun Decl., ¶ 11; Hailpern Decl., ¶ 12; Auto Specialist Decls., ¶¶ 10, 11. Further, even when employees do reach a manager, employees are often discouraged from requesting overtime, and are often asked why they cannot finish their work within regular working hours. Braun Decl., ¶ 11; Hailpern Decl., ¶ 12; Auto Specialist Decls., ¶¶ 10, 11.

Moreover, company policy expressly prohibits employees from conducting any business, including checking their daily schedule, before 8:00 a.m. and after 4:30 p.m. Auto Specialist Decls., ¶¶ 5, 6. At the same time, Defendants maintain certain policies that make completing all assignments within those hours extremely difficult, if not impossible. In addition, Auto Specialists and QARs must meet daily production goals, accuracy goals, and certain customer review standards. Sestito Dep. at 137:9-14, 146:18 to 149:18. Accordingly, although technically "prohibited" from checking their next day's schedule between 4:30 p.m. and 8:00 a.m., for practical purposes every morning Auto Specialists must do so to ensure that the 8:00 a.m. appointment has not been cancelled or otherwise changed. *Id.* at 168:6-20; Auto Specialist Decls., ¶¶ 6, 7. If they do not, then Auto Specialists could arrive at an inspection at 8:00 a.m. only to learn that it had been cancelled and they were supposed to be somewhere else, resulting in a delay in getting to the first appointment and every other appointment that day being postponed. *See* Auto Specialist Decls., ¶¶ 6, 7. Stuck between the proverbial rock and a hard place, Auto Specialists had no choice but to log on in the morning before 8:00 a.m. and not report their time, rather than risk the foregoing scenario and be forced to seek overtime for work after 4:30 p.m.

The foregoing policies routinely result in employees working before 8:00 a.m. and/or after 4:30 p.m., in order to complete their tasks. *See* Braun Decl., ¶¶ 8, 10, 12; Hailpern Decl., ¶ 11, 14; Auto Specialist Decls. ¶¶ 9-12; *see also* Adjuster Decls., ¶¶ 6, 9. Moreover, Defendants have numerous means to monitor the work times of putative

class members and, thus knew or should have known that, at least since April 5, 2007, Auto Specialists and QARs have been working off-the-clock. *See* Sestito Dep. at 171:24 to 173:1, 193:8 to 194:5; Alexander Dep. at 36:23 to 37:4; Braun Decl., ¶ 13; Hailpern Decl., ¶ 15; Auto Specialist Decls. ¶¶ 12, 13.

IV. THE CLASS AND SUBCLASSES SHOULD BE CERTIFIED.

In this case, the predominant, common questions under Rule 23 are (1) whether Defendants are collaterally estopped from asserting the administrative exemption in light of the ruling in the *Harris* case; (2) whether the California Labor Code's narrow administrative exemption applies to the misclassification subclass; and (3) whether Defendants' policies and performance expectations (a) compelled members of the Auto Examiner subclass to work off the clock, and (b) caused Class Members to miss meal and rest breaks. If they are not estopped from asserting it, Defendants' administrative exemption defense will turn on whether the exemption can be applied to adjusters and examiners who, according to Defendants' 30(b)(6) witnesses, spend their time gathering information and resolving claim-specific settlements. The off-the-clock and missed meal and rest break determinations will rest on whether Defendants' *uniform* policies and performance expectations amounted to a de facto policy requiring Class Members to work overtime without reporting it, and miss meal and rest breaks Even if these issues could be resolved in favor of Defendants, "*questions* common to the class predominate," and regardless of whether those "questions will be answered, on the merits, in favor of the class," class certification is thus appropriate. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, --- U.S. ---, 133 S. Ct. 1184, 1191 (2013).

A. Class Certification Is Appropriate under Rule 23(a)'s Numerosity, Typicality, and Adequacy Requirements.

1. The Class Is Numerous.

A class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Because forty members presumptively satisfies this requirement,

see, e.g., *Avilez v. Pinkerton Government Services*, 286 F.R.D. 450, 456 (C.D. Cal. 2012), this class, numbering well over one hundred, easily meets the requirement.

2. The Representative Parties' Claims or Defenses Are Typical.

Typicality is assessed under Rule 23(a)(3) by determining "'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). Here, the class representatives are all Claims Adjusters or Auto Examiners; all performed the same duties as the rest of the proposed Class Members, all were classified (or effectively classified) as exempt, all worked overtime hours, and all did not receive required overtime pay, as well as meal and rest breaks. *See* Bibi Decl., ¶¶ 7, 9-10, 12, 14-15; Cox Decl., ¶¶ 7, 9-10, 12, 14-15 Braun Decl., ¶¶ 8, 10-12, 14 ; Coffman Decl., ¶¶ 6-9; Danchik Decl.,¶¶ 7, 9-10, 12, 14-15; Hailpern Decl., ¶¶ 11-14,16-17; Pickering Decl., ¶¶ 6-9; *see also Campbell v. PriceWaterhouseCoopers, LLP*, 287 F.R.D. 615, 623 (E.D. Cal. 2012) ("[T]he named plaintiffs satisfy the typicality requirement not because they were model employees, but because they present the same common questions as are presented by other class members. For example, they present the common issues of whether their work involved the exercise of discretion and independent judgment . . . ."). Similarly, Plaintiffs Braun, Coffman, Danchik, and Pickering, all former employees of Defendants, have claims for unpaid wages that are typical of the Waiting Time Penalties Subclass. Thus, typicality is satisfied.

3. The Representative Parties Will Adequately Protect the Class.

Plaintiffs satisfy the adequacy requirement of Rule 23(a)(4) if they do not have conflicts of interest with the proposed class and are represented by qualified and competent counsel. *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 535 (N.D. Cal. 2012). None of the representative Plaintiffs has any conflict of interest with the class

(or subclasses). *See* Bibi Decl., ¶ 2; Braun Decl., ¶ 2; Coffman Decl., ¶ 10; Cox Decl., ¶ 2; Danchik Decl. ¶ 2; Hailpern Decl., ¶ 2; Pickering Decl., ¶ 10. Plaintiffs are represented by qualified and competent counsel with successful track records in class action litigation. *See* Seplow Decl. ¶¶ 19-26; Declaration of Michael S. Rapkin, ¶¶ 2-12. Accordingly, the Court should appoint Plaintiffs as class representatives and their counsel, Schonbrun DeSimone Seplow Harris & Hoffman LLP and Law Offices of Michael S. Rapkin, as Class Counsel.

B. Predominant Common Questions of Law and Fact Support Class Certification under Rule 23(a)(2) and 23(b)(3).

The "commonality" prong of Rule 23(a) requires "questions of law or fact common to the class." *See* Fed. R. Civ. P. 23(a)(2); *Avilez*, 286 F.R.D. at 460-61. This "requires that the class's claims are based on a 'common contention . . . capable of classwide resolution,' meaning that determination of the 'truth or falsity' of that contention 'will resolve an issue that is central to the validity of [the class's] claims.'" *Avilez*, 286 F.R.D. at 460-61 (quoting *Wal-Mart Stores, Inc. v. Dukes*, --- U.S.---, 131 S. Ct. 2541, 2551 (2011)). The commonality requirement has been "'construed permissively.'" *Id.* at 461 (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011)). Indeed, "*just one* common question of law or fact will satisfy the rule," *id.* (emphasis added), and the test is "'less rigorous'" than the predominance test of Rule 23(b)(3), *id.* (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). However, as demonstrated below, the common questions at issue here far exceed Rule 23(a)(2)'s threshold, satisfying Rule 23(b)(3)'s requirement of predominance, under which a class action may be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." For the same reasons commonality is established, the predominance requirement is met here.

1. The Collateral Estoppel Effect of the California Court of Appeal's Determination in the *Liberty Mutual Overtime Cases* Presents A Predominant Common Legal Issue.

The issue of whether Liberty Mutual adjusters and field examiners (including the *Braun* Class Members) were non-exempt has been litigated to a final decision in the California Courts in the *Harris* case. Defendants should not be free to re-litigate this issue, the resolution of which should be binding on all putative class members in the *Braun* case. At the very least, however, the issue of whether Liberty Mutual is estopped from re-litigating the issue presents a predominant common legal issue.

On July 25, 2011, while an appeal from *Harris* was pending before the California Supreme Court, Defendants filed a Motion to Stay, arguing that *Braun v. Safeco* should be stayed pending resolution of the earlier-filed *Harris* cases. In particular, Defendants claimed that they "should not be required to undertake discovery in the instant case or to litigate the *very same issues* regarding the proper interpretation of the administrative exemption in two different forums." Motion to Stay, at 2:2-4 (Dkt. No. 1 at p. 72; Seplow Decl., Ex. 3) (emphasis added); *see also id.* at 5:11-13 ("In both cases, Liberty Mutual (including its subsidiaries) is the defendant. Plaintiffs' overtime misclassification claim is precisely the same claim alleged in the Coordinated Overtime Proceeding [Liberty Mutual Overtime Cases]."); Defendants' Reply in Support of Motion to Stay at 3:18-23: (Dkt. No. 1 at p. 147; Seplow Decl., Ex. 4) ("Plaintiffs [in *Braun*] are squarely within the scope of the class definition at issue in *Harris*."). On October 7, 2011, the state court stayed proceedings in *Braun v. Safeco*. *See* Seplow Decl., ¶ 6 & Ex. 6.

On December 29, 2011, the California Supreme Court issued its decision in *Harris*, clarifying the application of the administrative exemption and remanding to the California Court of Appeal for further proceedings. *See Harris v. Superior Court*, 53 Cal. 4th 170 (2011) ("*Harris I*"). Subsequently, on July 23, 2012, the California Court of Appeal issued another decision in *Harris* ("*Harris II*"). The *Harris II* decision directed the trial court to grant plaintiffs' motion for summary adjudication of

defendants' affirmative defense based on the administrative exemption and to deny defendants' motion to decertify the class. *See* *Harris II*, 144 Cal. Rptr. 3d at 306.[6]

In fact, Defendants have consistently taken the position that all of the plaintiffs and putative class members in the *Braun* case are also putative class members in the *Harris-Liberty Mutual Overtime Cases*. For example, in response to Plaintiffs' motion to lift the stay, Defendants informed the state court that "Plaintiffs are Liberty Mutual employees who themselves fall within the putative class definition at issue in the *Harris* case and whose overtime mis-classification claim is entirely subsumed by the claims that the *Harris* plaintiffs seek to bring on their behalf." Defendants' Response re Request to Lift Stay (filed January 26, 2012) at 1:16-19 (Dkt. No. 1 at p. 159; Seplow Decl., Ex. 7) (emphasis in original); *see also* Defendants' Reply in Support of Motion to Stay at 3:21-23 ("[T]he breadth of the *Harris* class definition encompasses the Plaintiffs and the putative class members in this [the *Braun*] case.").[7]

In light of Defendants' consistent contention that the *Braun* Plaintiffs and putative Class Members are part of the *Harris* class, the California Court of Appeal's ruling that all Liberty Mutual adjusters are non-exempt under California law should be binding on the Defendants in this case based on the principles of collateral estoppel and/or res judicata. *See* 7 Witkin, Cal. Proc. 5th (2008) Judgm, § 413, p. 1053 ("[T]he first judgment 'operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." (quoting *Todhunter v. Smith*, 219 Cal. 690, 695 (1934)).

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[6] The California Supreme Court denied review on October 24, 2012, and depublished *Harris II*. *See* *Harris v. Superior Court*, Cal. Supreme Court Case No. S205097.

[7] Like the adjusters comprising the *Harris* class, the *Braun* Class Members "are primarily engaged in work that fails to satisfy the qualitative component of the 'directly related' requirement because their primary duties are the day-to-day tasks involved in adjusting individual claims. They investigate and estimate claims, make coverage determinations, set reserves, negotiate settlements, make settlement recommendations for claims beyond their settlement authority, identify potential fraud, and the like." *Harris II*, 144 Cal. Rptr. 3d at 298; *see also* Adjuster Decls., ¶¶ 3-5, 7, 9.

Under California law, which this Court should apply in determining the preclusive effect of the *Harris* decision,[8] collateral estoppel is applicable when "'(1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.'" *Frosini v. Bridgestone Firestone N. Am. Tire, LLC*, CV 05-0578 CAS RZX, 2007 WL 2781656, at *4 (C.D. Cal. 2007) (quoting *People v. Barragan*, 32 Cal. 4th 236, 253 (2004)). These factors are readily satisfied here. Indeed, the *Harris* ruling applied to all Liberty Mutual adjusters, regardless of their level of authority. *See Harris II*, 144 Cal. Rptr. 3d 305 (rejecting Defendants' arguments regarding the alleged heterogeneity of the adjuster class, including that "the settlement authority of Liberty Mutual claims handlers . . . "varies widely." In contrast, the *Braun* class is limited to lower level adjusters with settlement authority no greater than $50,000. If the Court determines, as Plaintiffs urge, that the *Harris* ruling is binding on the *Braun* class members, then all of these class members will be found to have been misclassified by Defendants at some point during the class period. *Cf. Frosini*, 2007 WL 2781656, at *11 ("Based on the foregoing, the Court finds that the plaintiffs in the instant case are collaterally estopped . . . from relitigating the issue of whether the proposed class may be certified in this action."). More fundamentally, however, the issue of whether the *Harris* ruling collaterally estops Defendants from asserting the administrative exemption is a predominant common question that, by itself, supports class certification under Rule 23(b)(3).[9]

[8] "Under the Full Faith and Credit Act, federal courts must give state judicial proceedings 'the same full faith and credit . . . as they have by law or usage in the courts of [the] State . . . from which they are taken.'" *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir.1988) (quoting 28 U.S.C. § 1738).

[9] Moreover, this issue could readily be addressed in a motion for summary judgment, which Plaintiffs intend to file.

2. The Administrative Exemption Presents Predominating Common Questions for the Misclassification Subclass.

Defendants' Twenty-Sixth Affirmative Defense argues that "Plaintiffs and putative class members were properly classified as exempt from overtime requirements pursuant to . . . the administrative exemption." Answer to First Amended Complaint, ¶ 25 (Dkt. No. 29 at p. 36). This defense is common to all putative class members in the misclassification subclass, because there is uniformity in the job requirements and duties of the putative class members in each subclass. Among other requirements to satisfy the narrow administrative exemption,[10] employees must: 1) have duties that involve the performance of work directly related to management policies or general business operations of their employer or their employer's customers; *and* 2) customarily and regularly exercise discretion and independent judgment. *See* Wage Order 4 § 1(A)(2)(a)(I), (A)(2)(b) (effective Jan. 1, 2001);[11] *see also Rieve v. Coventry Health Care Inc.*, 870 F. Supp. 2d 856, 868-69 (C.D. Cal. 2012).

Under the "directly related" prong, an employee's duties must be "both 'qualitatively administrative' and 'quantitatively . . . of substantial importance to the management or operations of the business.'" *See Rieve*, 870 F. Supp. 2d at 869 (quoting *Harris I*, 53 Cal. 4th at 181). As stated in the federal regulation explicitly incorporated into California's administrative exemption, the "directly related" requirement "describes those types of activities relating to the administrative operations of a business *as distinguished from 'production' . . . work*." 29 C.F.R. § 541.205(a) (2000) (emphasis added); *see also Rieve*, 870 F. Supp. 2d at 871-72 & n.6 (discussing the 2000 version of the regulation as the basis for California's law).

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[10] Exemptions under California law are to be narrowly construed against the employer, and the employer has the burden of establishing it is entitled to the exemption. *See Eicher v. Advanced Bus. Integrators, Inc.*, 151 Cal. App. 4th 1363, 1369-70 (2007).

[11] "The IWC's wage orders are to be accorded the same dignity as statutes." *Abdullah v. U.S. Sec. Associates, Inc.*, 731 F.3d 952, 958 n.7 (9th Cir. 2013) (quoting *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1027 (2012)).

Accordingly, as stated in *Rieve*, the "key inquiry" under the "directly related" prong is "an examination of whether the employee's value *directly flows* to the management or operation of the business." 870 F. Supp. 2d at 873 (internal quotation marks omitted) (emphasis added). In other words, "the employee in question *must hold a supervisory position* instead of serving on the front lines of the business." *Id.* (emphasis added).

Qualitatively administrative work involves advising management, planning, negotiating and representing the company. *Harris I*, 53 Cal.4th at 181-82; 29 C.F.R. § 541.205(c)(2) (2000) ("[A]n inspector for an insurance company[] may cause loss to his employer by the failure to perform his job properly. But such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be 'directly related to management policies or general business operations' as that phrase used in [29 C.F.R.] § 541.2"); *see also, e.g.*, *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990), *cert. denied*, 498 U.S. 1086, 111 S. Ct. 962, 112 L.Ed.2d 1049 (1991)) (under 1987 C.F.R., the "test is whether the activities are directly related to *management policies* or *general* business operations," and the exemption applies to those engaged in "the running of a business, and not merely . . . the day-to-day carrying out of its affairs").

Here, common issues predominate as to both prongs of the foregoing test, and whether Class Members are subject to the administrative exemption depends on evidence common to all Class Members. In this case, Defendants' Rule 30(b)(6) witness Ross Powell testimony establishes that Claims Adjuster employees do not primarily engage in duties that involve the performance of work directly related to management policies or general business operations of Liberty Mutual or its customers. Critically, they are not involved in budgetary decisions (apart from those related to a particular claim), *id.* at 45:23 to 46:5, 69:24 to 70:4, 91:12-15, 100:13-16, do not create any policies for claims handling operations, *id.* at 46:6-8, 70:5-8, do not have any human resources functions such as firing, hiring, discipline, or setting salaries

or benefits, *id.* at 46:12-20, 70:21 to 71:8, 92:18 to 93:7, 101:11-22, do not set settlement authority for others in the company, *id.* at 46:21-24, 71:13-19, 93:8-11, 101:23 to 102:1, do not handle financial planning for the company (apart from individual claims they are processing), *id.* at 46:25 to 47:7, 71:20-23, 93:12-16, 102:2-5, and do not provide any accounting functions, *id.* at 47:12, 71:24 to 72:2, 93:17-20, 102:6-9. Moreover, they cannot bind the company in any manner or enter into contracts on behalf of the company, apart from the individual claims they are processing. *Id.* at 49:12-21, 50:25 to 51:8, 72:19 to 73:7, 94:11-21, 102:18-25. As Mr. Powell explained, their work is highly regulated and supervised and they must obtain approval from management if they wish to settle a claim in excess of their authority. *Id.* at 57:21 to 58:1, 59:3-4, 67:7 to 68:2, 84:14 to 85:25, 89:8-20, 99:21 to 100:12. Critically, a second signature from a manager is required on any check issued by Liberty Mutual in excess of $7,500. *Id.* at 59:11-13, 85:19-25. Finally, they do not supervise anyone. *Id.* at 41:20-22, 51:9-13, 65:13-15, 84:12-13. Indeed, Claims Adjusters worked long hours not due to the complexity of the claims adjusting process, but due to the large volume of claims Defendants expected them to handle. *See* Adjuster Decls., ¶ 7. Moreover, they spent a majority of their time processing new claims and making phone calls. *See* Adjuster Decls., ¶ 4. [12]

In short, Defendants' 30(b)(6) testimony establishes that common proof, *i.e.*, Defendants' policies and guidelines, will determine the level of Class Members' discretion and independent judgment, as well as whether their work was directly related to management or general business operations. A finding of commonality and predominance is therefore appropriate. *See, e.g.*, *Heffelfinger v. Elec. Data Sys. Corp.*,

[12] The Auto Examiners' duties allow even less discretion and independent judgment, and are at least equally removed from Defendants' general business operations. *See* Auto Specialist Decls., ¶¶ 3, 4; Hailpern Decl. ¶ 5. If the Claims Adjusters were misclassified, then *a fortiori* the Auto Examiners were as well, from January 2009 through September, 2010. Moreover, the common, collateral estoppel issue applies with equal force to both Auto Examiners and Claims Adjusters.

No. CV 07-00101 MMM (Ex), 2008 WL 8128621, at *27 (C.D. Cal. 2008), *aff'd* 492 F. App'x 710, 714 (9th Cir. 2012) (certifying administrative exemption class under Rule 23(b)(3) despite "serious issues" regarding fact that "job responsibilities vary," reasoning that the "underlying question in this case turns on whether certain types of job duties are exempt"); *Jacob v. Duane Reade, Inc.*, 289 F.R.D. 408, 422 (S.D.N.Y. 2013) ("Predominance requires meaningful consistency, not indistinguishable identity."); *see also* *Campbell*, 287 F.R.D. at 624 ("[I]n the key area of whether that work involves the exercise of discretion and independent judgment, defendant has failed to show that individual issues will predominate."). Indeed, district courts across the country have evaluated state and federal administrative exemptions on a class or collective basis when the nature of the employees' shared duties determined whether the exemptions applied.[13]

Moreover, the fact that Defendants classified all Class Members as exempt, based on their job titles, rather than undertaking an employee-by-employee analysis, weighs in favor of finding that certification is warranted. As stated in *In re Wells Fargo Overtime Pay Litigation*, 571 F.3d 953 (9th Cir. 2009), broad internal classifications such as this suggests "that the employer believes some degree of homogeneity exists among the employees," thus undercutting "arguments that the employees are too diverse for uniform treatment." *Id.* at 957. Moreover, there is no question that "an exemption policy is a permissible factor for consideration under Rule 23(b)(3)." *Id.*; *see also* *Abdullah v. U.S. Sec. Associates, Inc.*, 731 F.3d 952, 964 (9th

[13] *See, e.g.*, *Fenton v. Farmers Ins. Exch.*, 663 F. Supp. 2d 718, 722-23 (D. Minn. 2009) (holding under FLSA and California law, investigators of insurance claims not administratively exempt); *Reich v. Am. Int'l Adjustment Co.*, 902 F. Supp. 321, 322-25 (D. Conn. 1994) (automobile damage inspectors not exempt under FLSA); *Gusdonovich v. Bus. Inform.*, 705 F. Supp. 262, 265 (W.D. Pa. 1985) ("BIC's business is 'producing' information for its clients, and the plaintiff's duties consisted almost entirely of gathering that 'product'. Thus, it appears to the court that the plaintiff was engaged in 'production' within the meaning of [the administrative exemption].").

Cir. 2013) (challenge to common policy predominated because there were "no *relevant* distinctions between the worksites") (emphasis added).

In sum, certification is proper because the heart of the case is a classification challenge that will stand or fall with respect to the entire class, rather than a challenge that may succeed as to some class members but fail as to others. *See, e.g.*, *Campbell*, 287 F.R.D. at 624 (common issues predominate because nothing suggested that some employees customarily exercised discretion and independent judgment while others did not); *Jacob*, 289 F.R.D. at 420-21 (predominance met because "'core' merits inquiry" on administrative exemption is not individualized because "most, if not all, ASMs perform a similar swath of duties"); *Heffelfinger*, 2008 WL 8128621, at *24, 26 ("[Q]uestions whether certain tasks . . . are exempt," are "the kind of sweeping threshold question that courts have found justifies class treatment;" to defeat certification, defendants must "adduc[e] evidence that their exemption mistake was confined to individual employees or differed across the proposed class."). Thus, the existence of "uniform corporate policies" "will often bear heavily on questions of predominance and superiority." *In re Wells Fargo*, 571 F.3d at 958.

3. Common Questions Predominate with Respect to Auto Examiners' Off-the-Clock Claims.

In this case, the Auto Examiners challenge the legality of Defendants' classwide practices and procedures regarding overtime policies as applied to all Auto Examiners. With regard to the Auto Examiner off-the-clock subclass, Plaintiffs' theories of liability are again supported by common evidence, and common questions will predominate in the resolution of these claims. Indeed, this Motion comes on the heels of several courts certifying classes of insurance adjusters, including automobile field examiners, alleging that company policies caused them to work off-the-clock. *See* *Jimenez v. Allstate Insurance Company*, Case No. LA CV10-08486, 2012 WL 1366052 (C.D. Cal. 2012); *Williams v. Allstate Insurance Co.*, 221 Cal. App. 4th 1353

(2013); *Jones v. Farmers Ins. Exch.*, 221 Cal. App. 4th 986 (2013). As in those cases, the off-the-clock subclass here should be certified.

For example, in *Jimenez*, the court certified a class of 1,300 claims adjusters assigned to 13 offices throughout California, alleging a company-wide policy of discouraging and limiting overtime, and the district court concluded that the existence of the following common questions warranted class treatment: "(i) whether [Allstate] had a common and widespread practice of not following its policies regarding overtime; (ii) whether [Allstate] knew or should have known that claims adjusters were working off-the-clock without compensation; and (iii) whether Allstate managers who were so informed elected to take no corrective steps with respect to adjusters who were working overtime without compensation." 2012 WL 1366052, at *7. In similar circumstances, the California Court of Appeal has also certified off-the-clock claims.[14]

Moreover, "[C]lass treatment does not require that all class members have been equally affected by the challenged practices – it suffices that the issue of whether the practice itself was unlawful is common to all." *Jones*, 221 Cal. App. 4th at 996 (*quoting Jacks v. DirectSat USA, LLC*, 2012 WL 2374444, at *6 (N.D. Ill 2012); *see*

[14] In *Williams*, the certified class consisted of auto field adjusters who, like the Auto Examiners here, traveled to sites such as body shops to inspect and analyze the value of damages vehicles. *See* 221 Cal. App. 4th at 1356, 1371. The *Williams* plaintiffs claimed that Allstate had a policy and practice of not compensating adjusters for work performed before their first vehicle inspection and after their last inspection every day. *Id.* at 1358. The court in *Williams* found that the "alleged commonality was the practice of adjusters working off-the-clock in order to complete their daily work." *Id.* at 1369. Similarly, in *Jones*, the court certified a class of auto physical damage claims representatives who argued (as in the present case) that they were not paid for pre-shift work. *See* 221 Cal. App. 4th at 991. The court concluded that the alleged existence of the pre-shift work policy was "factual question that is common to all class members and is amenable to class treatment." *Id.* at 996. The court further concluded that"[w]hether such a policy, if it exists, deprives employees of compensation for work for which they are entitled to compensation is a legal question that is common to all class members and is amenable to class treatment." *Id.*

also Jimenez, 2012 WL 1366052, at *19 ("[O]vertime claims may present a number of individualized questions, including whether individual employees worked off-the-clock. Nonetheless, courts have certified classes and allowed collective actions to proceed notwithstanding such circumstances . . . .") (citations omitted). In light of the foregoing, the Auto Examiners' off-the-clock claims present (predominating) common questions, making certification of this subclass appropriate.

4. Common Issues Predominate with Respect to the Meal and Rest Break Claims.

As set forth above, Defendants maintain uniform practices and policies regarding meal and rest breaks that do not comport with California law. First, because of their defective electronic time sheets, Defendants offer no method through which employees can request compensation for missed rest breaks. This alone requires certification of the Rest Break Subclass. Second, Auto Examiners are not permitted to turn off their company issued phones during their entire work day, so they are never relieved of all duties. Third, evidence shows that Auto Examiners' daily schedules coupled with the company policy that prohibits business calls while driving makes it extremely difficult for Auto Examiners to timely complete their duties between 8:00 a.m. and 4:30 p.m., and take all required meal and rest breaks. These common issues apply to Claims Adjusters as well. *See* Adjuster Decls. ¶¶ 4, 6-7.

In *Brinker*, the plaintiffs presented evidence of a common rest break policy that did not conform to California law. Noting that "a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment," 53 Cal. 4th at 1033, The California Supreme Court cautioned that "an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks," *id.* at 1040. To the contrary, "[t]he wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally

protected breaks." *Id.*; *see also* *Avilez*, 286 F.R.D. at 468 ("Courts in this circuit routinely hold that the predominance requirement of Rule 23(b)(3) is satisfied where, as here, the Defendant has a policy and practice that allegedly fails to provide the putative class members with off-duty meal breaks . . ."); *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 638 (S.D. Cal. 2010); (granting certification of rest and meal break class where "common policies and practices . . . actively discouraged or prevented . . . employees from taking meal periods"); *Mendez v. R + L Carriers, Inc.*, Case No. C 11-2478 CW, 2012 WL 5868973, *8, 15-16 (N.D. Cal. 2012) (certifying meal and rest break class based on unofficial policies of discouraging employees from taking breaks despite existence of a written policy); *Pina v. Con-Way Freight, Inc.*, Case No. C 10-00100 JW, 2012 WL 1278301, at *7 (N.D. Cal. 2012) (certifying class alleging unlawful pressure on employees to delay meal periods in order to provide timely service). California cases, with similar facts, are in accord. *See* *Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286 (2010); *Bradley v. Networkers Int'l*, 211 Cal. App. 4th 1129 (2012).[15] Notably, the court in *Jaimez* concluded that common issues predominated even if the relevant employment policies did not affect each employee in the same way and damages would need to be proved individually. *See* 181 Cal. App. 4th at 1301, 1303-05.

[15] In *Jaimez* and *Bradley*, as here, the workers were on the road for most of the day and performed services at the customers' places of business. In *Bradley*, plaintiffs alleged that "scheduling and work requirements made it difficult for employees to take required rest and meal breaks." 211 Cal. App. 4th at 1152. Similarly, *Jaimez* framed the "predominant common factual issue" as whether class members missed meal breaks due to the defendant's scheduling policy and practice. 181 Cal. App. 4th at 1305; *see also* *Faulkinbury v. Boyd & Assocs.*, 216 Cal. App. 4th 220, 235 (2013) ("An employer is required to permit and authorize the required rest breaks, and if it adopts a uniform policy that does not do so, then 'it has violated the wage order and is liable.'") (quoting *Brinker*, 53 Cal. 4th at 1033); *Benton v. Telecom Network Specialists, Inc.*, 220 Cal. App. 4th 701, 725-28 (2013) (reversing denial of class certification despite evidence that some putative class members received breaks); *Bufil v. Dollar Financial Group, Inc.*, 162 Cal. App. 4th 1193, 1207 (2008) (same).

C. Under Rule 23(b)(3), Class Resolution Is Superior.

A class action is superior because there are significant disincentives for individuals to step forward with claims against a current or former employer. *See, e.g.*, *Rutti v. Lojack Corp*., No. SACV 06–350 DOC, 2012 WL 3151077, at *5 (C.D. Cal. 2012) ("It is well-established that there are strong disincentives for employees to participate in a class action against their current or former employer . . .") (citing cases). Moreover, the size of the proposed class is manageable. *See Ellis*, 285 F.R.D. at 540 (finding 700 estimated class members manageable). Because Plaintiffs challenge classwide policies, judicial economy favors adjudicating their claims in one proceeding, rather than scores of individual proceedings. *See id.* In addition, the class members' interest in individually controlling the prosecution of this action is limited because the size of the potential recovery available to each potential plaintiff is unlikely to create an incentive to litigate the case individually, given the cost and risk of fully prosecuting such claims. In any event, class members who prefer to proceed individually may opt out. *See Heffelfinger*, 2008 WL 8128621, at *27-*28.

V. CONCLUSION

For the foregoing reasons, Plaintiffs urge the Court to certify the class and subclasses in this action so that the uniform claims they present may be resolved on a classwide basis. Plaintiffs further respectfully request that the Court appoint the named Plaintiffs as Class Representatives and the undersigned as Class Counsel.

DATED: April 11, 2014

Respectfully submitted,

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