

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELIZABETH ORTIZ, et al.,

No. C -12-05859 EDL

Plaintiffs,

**ORDER DENYING PLAINTIFFS’  
MOTION FOR CLASS CERTIFICATION**

v.

CVS CAREMARK CORPORATION, et al.,

Defendants.

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Plaintiff employees seek damages for unpaid off-the-clock work for deliveries and mileage reimbursement under California law. Plaintiffs seek to certify a class with three subclasses of non-exempt employees who worked for Defendants in California at approximately 1,000 CVS stores:

- (1) “Inter-store unpaid wages class,” consisting of all non-exempt hourly CVS employees from September 13, 2008 to the present who transported medications and/or merchandise from one CVS store to another CVS store and were not paid for that time;
- (2) “Inter-store unpaid expense reimbursement class,” consisting of all non-exempt hourly CVS employees from September 13, 2008 to the present who transported medications and/or merchandise from one CVS store to another CVS store and were not reimbursed for mileage or other expenses; and
- (3) “Inter-store underpaid expense reimbursement class,” consisting of all non-exempt hourly CVS employees from September 13, 2008 to the present who submitted mileage reimbursement requests and did not receive the full reimbursement required by law.

Plaintiffs also allege dependant claims seeking penalties for failure to furnish accurate wage statements (Labor Code § 226), waiting time penalties for failure to pay all wages owed upon termination (Labor Code §§ 201-203), and failure to maintain accurate payroll records (Labor Code § 1174).

For the reasons stated at the hearing and in this Order, Plaintiffs’ Motion for Class

1 Certification is denied. A case management conference is scheduled for January 14, 2014 at 3:00  
2 p.m. A joint case management conference statement shall be filed no later than January 7, 2014.

3 **Facts**

4 Plaintiff Elizabeth Ortiz began working at the CVS location in Indio, California as a clerk  
5 cashier in October 2008. Von Rock Decl. Ex. C (Ortiz Decl.) ¶ 2. Ortiz transferred to the Palm  
6 Desert store in 2009, and towards the end of 2009, she was promoted to the position of Head  
7 Cashier. Id. She is in the process of training to be a shift supervisor in the Indian Wells store,  
8 although she is currently on medical disability. Id. Ortiz has been classified as a non-exempt  
9 employee throughout her employment with CVS. Id.

10 Plaintiff Gail Miller began working for Sav-On in 2000 and in approximately 2006, when  
11 CVS purchased Sav-On, Miller became a CVS employee in the position of District Pharmacy  
12 Scheduling. Von Rock Decl. Ex. C (Miller Decl.) ¶ 2. In 2008, Miller transferred to the Tujunga  
13 store as a Photo Supervisor. Id. In 2009, she transferred to the position of a Pharmacy Service  
14 Associate, and in 2011, she became licensed as a Pharmacy Technician, which is her current  
15 position. Id. Miller has been classified as a non-exempt employee throughout her employment with  
16 CVS. Id.

17 Defendant CVS operates numerous stores in California. See Von Rock Decl. Ex. A at 4  
18 (stating that as of July 16, 2013, there were approximately 1,058 CVS stores in California); but  
19 see Luker Decl. ¶ 3 (stating that as of July 2013, there were approximately 850 CVS stores in  
20 California). Non-exempt employees were employed in at least forty-three different non-exempt  
21 positions that had varying responsibilities. Luker Decl. ¶ 5; Seymour Decl. ¶¶ 7-8, Ex. A-D. As of  
22 July 19, 2013, there were approximately 21,183 non-exempt employees working in CVS stores in  
23 California. Von Rock Decl. Ex. A at 5. Also as of July 19, 2013, approximately 52,144 non-exempt  
24 employees had worked in CVS stores in California between September 13, 2008 and the present.  
25 Id.; Luker Decl. ¶ 4. Of the 52,144 non-exempt employees, approximately 19,022 non-exempt  
26 employees with pharmacy-related titles have worked in CVS stores in the Pharmacy Departments in  
27 California between September 13, 2008 and the present. Von Rock Decl. Ex. A at 6.

28 **Inter-store transfer (IST)**

1 Inter-Store Transfers (ISTs) occur when merchandise or prescriptions are picked up from one  
2 CVS store and delivered to another CVS store. Two of the proposed subclasses focus on employees  
3 who conducted ISTs and did not get paid for their time because the IST occurred before or after their  
4 shift or when they were otherwise clocked out.

5 Defendants' policies prohibit employees from working off the clock. See, e.g., Seymour  
6 Decl. ¶ 15; Ex. H ("Your Guide to Caremark") at 46 (stating in part: "When you work, you must  
7 report all of the time you work. Non-exempt employees are prohibited from working 'off-the-clock'  
8 (i.e., without reporting the time worked)."). Further, employees are required to be clocked in at any  
9 time they are working. Id. Every non-exempt employee must be paid for all hours worked, and it is  
10 against CVS policy to modify time records or fail to report hours worked. Seymour Decl. Ex. E  
11 ("SucceSSS: Stock, Shop, Service") at 10; Ex. H at 46. Willful violation of timekeeping policies,  
12 including falsifying time cards or encouraging others to do so, can result in immediate termination.  
13 Seymour Decl. Ex. F "CVS Caremark Code of Conduct" at 22; Ex. G ("Your Guide to Caremark")  
14 at 17-18. Further, Defendants' policies require employees to verify that the hours worked and  
15 amounts paid on their paychecks are accurate. Seymour Decl. Ex. H at 45-46 ("Please review each  
16 paycheck or pay stub when you received it to make sure your pay is correct. If you believe an error  
17 has occurred or if you have any questions about your paycheck or pay stub, promptly report the  
18 matter to your supervisor, Human Resources Manager or the Contact Support Center."). If  
19 employees work while not clocked in, such as when performing ISTs, they are expected to inform  
20 the store manager to ensure payment of all wages. Seymour Decl. ¶ 16.

21 It is undisputed that CVS employees conduct ISTs. See, e.g., Von Rock Decl. Ex. B at 91. It  
22 is also undisputed that some of the ISTs occur while employees are off the clock, such as on their  
23 way to work or on their way home. Id. at 30-31; see also, e.g., Von Rock Decl. Ex. C ¶ 10-11  
24 (Ashby Decl.); Ex. C ¶ 11 (Boone Decl.); Ex. C (Chin Decl.) ¶ 10. Plaintiffs argue that CVS had an  
25 "on-the-ground" policy of directing employees to perform ISTs before or after their shifts or on their  
26 meal break, resulting in employees not being compensated for their time conducting the ISTs. See,  
27 e.g., Von Rock Decl. Ex. C (Ashby Decl.) ¶ 10-11; Ex. C (Boone Decl.) ¶ 11; Ex. C (Chin Decl.) ¶  
28 10.

1 Plaintiffs' declarants do not indicate whether they requested, but were denied, wages for the  
2 ISTs that they conducted. Rather, Plaintiffs state that because the ISTs were done at the behest of  
3 CVS managers, CVS should have taken affirmative steps to make sure that employees were  
4 compensated for the time for the IST. However, Defendants' timekeeping policy, on which every  
5 employee is trained, requires that employees document their hours accurately and review their  
6 paychecks for errors. Seymour Decl. ¶¶ 9-11, 17-18. Further, every employee is required to verify  
7 the accuracy of his or her time card and submit a signed copy to the store manager or supervisor.  
8 Seymour Decl. ¶ 18.

9 Defendants record each IST in a database called a "Key Rec" report. Von Rock Decl. Ex. B  
10 (Seymour Decl.) at 46. The Key Rec report records the merchandise that leaves or comes into a  
11 store. Id. at 92. More specifically, the Key Rec report identifies the sending and receiving store,  
12 providing some information about the item being transferred, including whether it was a front store  
13 or pharmacy item, and the date of the transfer. Von Rock Decl. Ex. F. According to Defendants'  
14 Federal Rule of Civil Procedure 30(b)(6) witness, there is no record by CVS of which employee  
15 performed the IST. Von Rock Decl. Ex. B at 93. Plaintiffs, however, have provided evidence that  
16 employees signed another document showing that they completed the IST and that the document  
17 was kept with the Key-Rec file. See Supp. Von Rock Decl. Ex. B (Boone Supp. Decl.) ¶ 4 ("It was  
18 also CVS policy that I sign paperwork associated with each inter-store transfer. The inter-store  
19 transfer paperwork that I signed was then placed into a binder/folder maintained by CVS store  
20 management at my home store with the Key Rec report documenting that the inter-store transfer had  
21 been completed."); Ex. O (Kellett Depo.) at 49-51 (testifying that there is paperwork that shows who  
22 completed the IST and that paperwork goes in a file).

### 23 **Mileage reimbursement**

24 Plaintiffs' proposed second and third subclasses address mileage reimbursement.  
25 Defendants' policy provides that Defendants shall reimburse employees for all necessary business  
26 expenses, including use of their personal vehicle. Seymour Decl. ¶ 21. Employees who conduct  
27 ISTs are entitled to recover such business expenses. Id. For reimbursements of expenses that  
28 employees incur while using their personal vehicles, Defendants use a mileage reimbursement

1 method, which reimburses employees for every mile they drive that exceeds their normal daily  
2 commute. Seymour Decl. ¶¶ 22-23. From 2007 to 2008, the mileage reimbursement rate was \$0.41  
3 per mile. Id. ¶ 23; Ex. K. Beginning in 2009, mileage has been reimbursed at the rate of \$0.45 per  
4 mile. Id. ¶ 23; Ex. L.

5 Plaintiff Ortiz was aware of the mileage reimbursement policy, submitted paperwork for  
6 expenses incurred, and received payment. Weil Decl. Ex. C (Ortiz Depo) at 144; Ex. E (Ortiz  
7 Depo.) at 11-14. Plaintiff Miller mistakenly thought that she was only entitled to reimbursement for  
8 ISTs that occurred during the middle of her shift, and so did not seek reimbursement. Weil Decl.  
9 Ex. A (Miller Depo.) at 138-39; 224-26.

10 Plaintiffs argue that Defendants should have known that employees incurred mileage related  
11 expenses because Defendants' store managers told them to conduct ISTs, and the Key Rec reports  
12 showed that ISTs were taking place. See Von Rock Decl. Ex. F (Key Rec reports). Plaintiffs also  
13 argue that Defendants did not have a policy to take affirmative steps to reimburse employees for  
14 mileage related expenses incurred for ISTs. However, the evidence shows that whether Defendants  
15 take affirmative steps to reimburse employees varies from store to store. Von Rock Decl. Ex. B at  
16 92. Plaintiffs also argue that Defendants underpaid mileage reimbursements because Defendants'  
17 per mile rate is lower than the IRS rate, which ranged from \$0.55 to \$0.56.5 during the class period.  
18 Pls.' Request for Judicial Notice Ex. B (IRS standard mileage rates).

### 19 **Legal Standard**

20 Plaintiffs seeking to represent a class must satisfy the threshold requirements of Federal Rule  
21 of Civil Procedure 23(a) as well as the requirements for certification under one of the subsections of  
22 Rule 23(b). See General Tel. Co. v. Falcon, 457 U.S. 147, 158-61 (1982); Doninger v. Pac. Nw.  
23 Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). Rule 23(a) provides that a case is appropriate for  
24 certification as a class action if:

- 25 (1) the class is so numerous that joinder of all members is impracticable;
- 26 (2) there are questions of law or fact common to the class;
- 27 (3) the claims or defenses of the representative parties are typical of the claims or  
28 defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the

1 class.

2 Fed. R. Civ. P. 23(a). Plaintiff seeks class certification under Rule 23(b)(1), (2) and (3), which  
3 provide that a case may be certified as a class action if:

4 (1) prosecuting separate actions by or against individual class members would create  
5 a risk of:

6 (A) inconsistent or varying adjudications with respect to individual class members  
7 that would establish incompatible standards of conduct for the party opposing the  
8 class; or

9 (B) adjudications with respect to individual class members that, as a practical matter,  
10 would be dispositive of the interests of the other members not parties to the  
11 individual adjudications or would substantially impair or impede their ability to  
12 protect their interests;

13 (2) the party opposing the class has acted or refused to act on grounds that apply  
14 generally to the class, so that final injunctive relief or corresponding declaratory  
15 relief is appropriate respecting the class as a whole; or

16 (3) the court finds that the questions of law or fact common to class members  
17 predominate over any questions affecting only individual members, and that a class  
18 action is superior to other available methods for fairly and efficiently adjudicating the  
19 controversy. The matters pertinent to these findings include:

20 (A) the class members' interests in individually controlling the prosecution or defense  
21 of separate actions;

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

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

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

27 Fed. R. Civ. P. 23(b).

28 Only Rule 23(b)(3) could provide a basis for class certification here. “Rule 23(b)(2) . . . does  
not authorize class certification when each class member would be entitled to an individualized  
award of monetary damages.” Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011). Here,  
Plaintiffs are seeking primarily monetary damages. See Mot. at 22. Further, classes certified under  
(b)(1) require that individual adjudications would be impossible or unworkable. Id. at 2558. Here,  
Plaintiffs seek individual adjudications of damages. As the Supreme Court stated in Dukes, “. . . we  
think it clear that individualized monetary claims belong in Rule 23(b)(3).” Id. at 2558.

1 **Discussion**

2 **1. Ascertainability**

3 As a threshold matter, before reaching the requirements of Rule 23, the party seeking class  
4 certification must demonstrate that an identifiable and ascertainable class exists. See Mazur v. eBay,  
5 Inc., 257 F.R.D. 563, 567 (N.D. Cal. 2009). “An implied prerequisite to certification is that the class  
6 must be sufficiently definite.” Whiteway v. FedEx Kinko's Office & Print Servs., Inc., 2006 WL  
7 2642528, at \*3 (N.D. Cal.2006). “A class definition should be precise, objective, and presently  
8 ascertainable,” though “the class need not be so ascertainable that every potential member can be  
9 identified at the commencement of the action.” O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311,  
10 319 (C.D. Cal.1998) (internal quotations omitted).

11 **A. Subclasses involving ISTs**

12 Defendants have presented evidence that there are no records of which employees performed  
13 ISTs. Kaplan, who is CVS’s Compliance Manager of Store Operations, stated that Defendants do not  
14 maintain records reflecting who performs ISTs. Kaplan Decl. ¶ 14. Defendants’ Rule 30(b)(6)  
15 witness Seymour testified that the Key Rec report does not show which employee conducted the  
16 IST. Von Rock Decl. Ex. B at 93. Defendants note that at least one employee submitted a sworn  
17 statement that he conducted ISTs and then recanted at his deposition, stating that he did not conduct  
18 any ISTs. See Von Rock Decl. Ex. C (Cohn Decl.) ¶ 5 (“I performed inter-store transfers on a  
19 number of occasions and wasn’t paid for that time that I spent transferring items. A manager at CVS  
20 told me to do these transfers off the clock and told me where to pick up or deliver the medication  
21 and/or merchandise.”); Weil Decl. Ex. F (Cohn depo.) at 32 (“I can’t remember specifically  
22 transferring a medicine and not – you know, being asked specifically to transfer a medicine and not  
23 being paid”); Supp. Cohn Decl. ¶¶ 8-9 (clarifying that he thought inter-store transfers meant that he  
24 himself was transferred from store to store to work because he was a floater employee). In addition,  
25 the Key-Rec reports do not reflect whether the IST occurred while an employee was punched into  
26 the timeclock or whether Defendants later compensated the employee for the time. Employees who  
27 conducted ISTs may have had their time adjusted by their managers as required by the policies  
28 requiring compensation for all time. Further, some employees who conducted ISTs purposefully did

1 not seek compensation for their time or mileage because they did not think it was worth it. See, e.g.,  
2 Defs,' Compendium of Declarations Connaughton Decl. ¶ 6; Cheney Decl. ¶ 10. Also, there are  
3 cases in which the employee who performed the IST did not work at either the sending or receiving  
4 store. Def.'s Compendium Ex. 45 (Schmidt Decl.) ¶ 7 (stating that on one occasion, his son  
5 performed a transfer even though the son did not work at either the sending or receiving store).  
6 Even though the Key-Rec report shows whether the transferred merchandise was a front store item  
7 or a pharmacy item, that information does not necessarily narrow down significantly who within the  
8 store performed the IST because in at least one case, front store employees transferred medications  
9 for the pharmacy department. See Weil Decl. Ex. K (Chin Depo.) at 8, 13.

10 Moreover, Defendants' inventory activity report (IAR) does not reflect who performed an  
11 IST. Seymour Supp. Decl. ¶ 6 ("To ensure proper payment of merchandise and tracking of  
12 inventory, CVS attempts to maintain records of merchandise transfers to and from each CVS store  
13 location through IARs. IARs, however, do not provide information about who performed an IST;  
14 when it was performed; whether the time spent conducting any ISTs went unpaid; or whether any  
15 employee incurred reimburseable mileage that also went unpaid."); Bradley Decl. ¶ 6 (Store  
16 Manager: "These IARs do not reflect who conducted an IST, whether any ISTs were conducted by  
17 an employee from my store, or when items might have been delivered or picked up. The IARs do  
18 not include any employee-related data."); Serrato Decl. ¶ 6 (same); Ramos Decl. ¶ 6 (same); Pettit  
19 Decl. ¶ 6 (same).

20 Further, there is evidence that there is no consistent policy or practice requiring employees to  
21 sign documentation when they perform ISTs. Seymour Supp. Decl. ¶ 8 ("With respect to ISTs, I am  
22 unaware of any written CVS policy or practice requiring an employee to sign any IST-related  
23 paperwork when merchandise is delivered or picked up. I am also unaware of any store following  
24 this practice."); Serrato Decl. ¶ 8 ("I am not aware of any CVS policy requiring an employee from  
25 either the receiving or sending store to sign IST-related paperwork when picking up or delivering  
26 items. I personally have never required any CVS employees to sign any paperwork when they pick  
27 up or deliver."); Pettit Decl. ¶ 7 ("As far as I am aware, CVS does not have a policy requiring an  
28 employee from either the receiving or sending store to sign any paperwork when picking up or

1 delivering items. I have never required any employees to sign any paperwork when they pick up or  
2 deliver items during an IST.”); Ramos Decl. ¶ 7 (same); Bradley Decl. ¶ 7 (same). Further, some  
3 CVS stores do not conduct ISTs, and in some stores, only exempt employees perform ISTs. See,  
4 e.g., Defs.’ Compendium of Declarations, Gibson Decl. ¶ 11. Yet in some other stores, any  
5 employee can be asked to do an IST. See, e.g., Defs’ Compendium of Declarations, Neal Decl. ¶ 5.  
6 Some managers allow employees to perform ISTs before clocking in for a shift (see, e.g., id.  
7 Barragan Decl. ¶ 12), and others only permit employees to perform ISTs while clocked in (see, e.g.,  
8 id. Ager Decl. ¶ 8).

9 Plaintiffs have provided evidence that two employees signed paperwork as part of an IST  
10 pursuant to at least what they believed to be their store’s policy at the time, which was placed in a  
11 file related to the IST that was maintained by the store manager. See Supp. Von Rock Decl. Ex. B  
12 (Boone Supp. Decl.) ¶ 4 (“It was also CVS policy that I sign paperwork associated with each inter-  
13 store transfer. The inter-store transfer paperwork that I signed was then placed into a binder/folder  
14 maintained by CVS store management at my home store with the Key Rec report documenting that  
15 the inter-store transfer had been completed.”); Ex. O (Kellett Depo.) at 49-51 (testifying that there is  
16 paperwork that shows who completed the IST and that paperwork goes in a file). Plaintiffs also  
17 claim that they can also identify employees who completed ISTs but did not complete such  
18 paperwork by cross-referencing the Key-Rec reports (which themselves do not reflect who did an  
19 IST or when or how it occurred, see Kaplan Decl. ¶¶ 12, 14) with attendance records. Even if the  
20 pool of potential class members was limited to those employees who worked at a receiving store on  
21 the day of an IST, however, individual inquiries into which of these employees conducted an IST on  
22 a certain day would still be necessary. Kaplan Decl. ¶ 10 (stating that Defendants do not provide  
23 any direction to the sending or receiving store about how to conduct the transfer); see also Deitz v.  
24 Comcast Corp., 2007 U.S. Dist. LEXIS 53188, at \*24-26 (N.D. Cal. July 11, 2007) (“Class A is  
25 ill-defined and not clearly ascertainable. Determining who the Class A members are would require  
26 "answer[ing] numerous individualized fact-intensive questions." Fogarazzo v. Lehman Bros., 232  
27 F.R.D. 176, 181 (S.D.N.Y. 2005). The members of the putative converter-box renter class must have  
28 had ‘cable-ready television set(s) or a video cassette or DVD recorder or player.’ There would be no

1 easy way to determine which subscribers owned a cable-ready television during the relevant class  
2 period. Plaintiff nowhere cites, nor has the Court found in the voluminous record, any Comcast  
3 records that contain information on the types of devices owned by its subscribers. It would be  
4 impossible to determine without significant inquiry which subscribers owned such devices.”).

5 Although Plaintiffs need not establish the identities of all class members at this stage  
6 (Donovan v. Philip Morris USA, Inc., 2012 U.S. Dist. LEXIS 37974, at \*91 (D. Mass. Mar 21,  
7 2012)), Plaintiffs have also not provided evidence from which the Court can determine whether there  
8 is a reliable method to determine the class members. See See In re Chocolate Confectionary  
9 Antitrust Litig., 2012 U.S. Dist. LEXIS 174681, at \*99 (M.D. Pa. Dec. 7, 2012) (“Dr. McClave also  
10 explains the manner in which his statistical analysis is useful to estimate impact on a class-wide  
11 basis and to identify any customers who were not harmed, and thus eliminate them from the class.”).

12 The evidence shows that as to many, if not most ISTs, no information was recorded as to  
13 which employee made the transfers, so the subclasses are unascertainable. But the Court relies  
14 primarily on Plaintiffs’ failure to satisfy the requirements of Rule 23(a), as described below, in  
15 denying certification of the proposed subclasses.

16 **B. Third subclass**

17 The third proposed subclass consists of employees who submitted mileage reimbursement  
18 requests, but were allegedly not compensated for the full reimbursement amount because Defendants  
19 paid less than the Internal Revenue Service standard rate for mileage. Thus, this class is  
20 ascertainable because it consists of employees who can be identified by their requests for  
21 reimbursement.

22 Defendants note that not every IST required reimbursement at the IRS rate or any other rate  
23 because in some cases, employees completed the IST at a store located on their normal commuting  
24 route between their home store and their residence, and so did not incur any additional mileage on  
25 their daily commute. See, e.g., Weil Decl. Ex. G (Boone Depo.) at 21-22. Plaintiffs counter that the  
26 failure to compensate employees for mileage at the IRS standard rate for an IST on their commute  
27 path is improper because California law requires that employees be compensated while “an  
28 employee is subject to the control of an employer.” See Morillion v. Royal Packing Co., 22 Cal.4th

1 575, 578 (2000). However, the question raised by Plaintiffs is whether Defendants reimbursed  
2 employees' expenses at the proper mileage rate, whereas in Morillion, the question was whether the  
3 employees were paid for their time. Further, here the employees drive their own cars, whereas in  
4 Morillion, the employer required agricultural workers to be transported on a bus to a worksite so the  
5 employees were under the employer's control while riding the bus. See id. at 586.

6 Defendants also argue that Plaintiffs' proposed subclasses are impermissible "fail-safe"  
7 classes. In a fail-safe class, "the class members either win or are not in the class ... the Court cannot  
8 enter an adverse judgment against the class." In re AutoZone Wage and Hour Employment  
9 Practices Litig., 289 F.R.D. 526, 545-46 (N.D. Cal. 2012). Here, even if the subclasses are fail-safe  
10 classes, the class definitions could be modified, if necessary, as they were in AutoZone.

11 On balance, the third subclass is ascertainable.

## 12 **2. Rule 23(a)**

13 Even assuming that each of Plaintiffs' proposed subclasses satisfied the ascertainability  
14 requirement, the subclasses fail to satisfy all of the requirements of Rule 23(a).

### 15 **A. Numerosity**

16 The class must be so numerous that joinder of all members individually is "impracticable."  
17 See Fed. R. Civ. P. 23(a)(1). When evaluating numerosity, courts should consider the number of  
18 class members, whether their identities are known, the geographical diversity of class members, the  
19 ability of individual claimants to institute separate suits, and whether injunctive relief is sought. See  
20 William W. Schwarzer, et al., Federal Civil Procedure Before Trial, §§ 10:260-10:264 (Rutter Group  
21 2009). Here, there is no dispute that the proposed class is sufficiently numerous for class  
22 certification purposes.

### 23 **B. Commonality**

24 Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." This  
25 standard is not strictly construed:

26 Rule 23(a)(2) has been construed permissively. All questions of fact and law need  
27 not be common to satisfy the rule. The existence of shared legal issues with  
28 divergent factual predicates is sufficient, as is a common core of salient facts coupled  
with disparate legal remedies within the class.

1 Hanlon v. Chrysler, 150 F.3d 1011, 1019 (9th Cir. 1998), see also Staton v. Boeing, 327 F.3d 938,  
2 953 (9th Cir. 2003). In Dukes, the Supreme Court addressed the commonality requirement:

3 Commonality requires the plaintiff to demonstrate that the class members “have  
4 suffered the same injury,” Falcon, supra, at 157, 102 S.Ct. 2364. This does not mean  
5 merely that they have all suffered a violation of the same provision of law. Title VII,  
6 for example, can be violated in many ways—by intentional discrimination, or by  
7 hiring and promotion criteria that result in disparate impact, and by the use of these  
8 practices on the part of many different superiors in a single company. Quite  
9 obviously, the mere claim by employees of the same company that they have suffered  
10 a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to  
11 believe that all their claims can productively be litigated at once. Their claims must  
12 depend upon a common contention—for example, the assertion of discriminatory bias  
13 on the part of the same supervisor. That common contention, moreover, must be of  
14 such a nature that it is capable of classwide resolution—which means that  
15 determination of its truth or falsity will resolve an issue that is central to the validity  
16 of each one of the claims in one stroke.

17 “What matters to class certification ... is not the raising of common  
18 ‘questions’—even in droves—but, rather the capacity of a classwide proceeding  
19 to generate common *answers* apt to drive the resolution of the litigation.  
20 Dissimilarities within the proposed class are what have the potential to impede  
21 the generation of common answers.” Nagareda, supra, at 132.

22 Dukes, 131 S. Ct. at 2551 (emphasis in original). The Dukes Court continued:

23 We recognized in Falcon that “sometimes it may be necessary for the court to probe  
24 behind the pleadings before coming to rest on the certification question,” 457 U.S., at  
25 160, 102 S.Ct. 2364, and that certification is proper only if “the trial court is satisfied,  
26 after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied,” id.,  
27 at 161, 102 S.Ct. 2364; see id., at 160, 102 S.Ct. 2364 (“[A]ctual, not presumed,  
28 conformance with Rule 23(a) remains ... indispensable”). Frequently that “rigorous  
analysis” will entail some overlap with the merits of the plaintiff’s underlying claim.  
That cannot be helped. “[T]he class determination generally involves considerations  
that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of  
action.” Falcon, supra, at 160, 102 S.Ct. 2364 (quoting Coopers & Lybrand v.  
Livesay, 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978); some internal  
quotation marks omitted). Nor is there anything unusual about that consequence: The  
necessity of touching aspects of the merits in order to resolve preliminary matters,  
e.g., jurisdiction and venue, is a familiar feature of litigation. See Szabo v. Bridgeport  
Machines, Inc., 249 F.3d 672, 676–677 (C.A.7 2001) (Easterbrook, J.).

Id. at 2551-52.

29 Plaintiffs argue in this case that there are several key common questions, including whether  
30 Defendants failed to pay non-exempt employees for all hours worked for ISTs performed off the  
31 clock and whether Defendants fully indemnified non-exempt employees for mileage expenses  
32 incurred. Plaintiffs also argue that their claims arise from Defendants’ classwide policy of requiring  
33 non-exempt employees to perform ISTs before and after their shifts or while on their lunch breaks,

1 and a uniform policy of not permitting mileage reimbursement for ISTs performed on the way to or  
2 from work, and other classwide policies. However, as described more fully below, Defendants had  
3 written policies to pay employees for all of their time and to reimburse business travel expenses  
4 including mileage exceeding the normal commute. Seymour Decl. ¶¶ 9, 11, 15-19.

5 Defendants argue generally that because Plaintiffs have only proffered eight declarations  
6 from a proposed class of over 50,000, Plaintiffs have not made a showing of commonality. Dukes,  
7 131 S. Ct. at 2556 (“Here, by contrast, respondents filed some 120 affidavits reporting experiences  
8 of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of  
9 Wal-Mart’s 3,400 stores. More than half of these reports are concentrated in only six States  
10 (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or  
11 two anecdotes; and 14 States have no anecdotes about Wal-Mart’s operations at all. Even if every  
12 single one of these accounts is true, that would not demonstrate that the entire company ‘operate [s]  
13 under a general policy of discrimination,’ which is what respondents must show to certify a  
14 companywide class.”). The Dukes Court did not precisely quantify the number of examples relative  
15 to the size of the class required to show classwide discrimination, but the Court noted in a footnote  
16 that: “A discrimination claimant is free to supply as few anecdotes as he wishes. But when the claim  
17 is that a company operates under a general policy of discrimination, a few anecdotes selected from  
18 literally millions of employment decisions prove nothing at all.” Id. Defendants have responded  
19 with numerous declarations from employees who state that they were fully compensated for their  
20 ISTs. See Def.’s Compendium of Declarations.<sup>1</sup>

### 21 1. First and second subclasses

22 To prove an off-the-clock claim, a plaintiff must demonstrate that she actually worked off the  
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24 <sup>1</sup> To counter Plaintiffs’ declarations, Defendants submitted 53 declarations from employees  
25 with its opposition brief. Plaintiffs argue that the majority of those declarations should be stricken  
26 because the declarants were not disclosed to Plaintiffs and they have not had a chance to depose all of  
27 them, although they were able to depose nine of them. Plaintiffs argue that since none of the witnesses  
28 were disclosed in initial disclosures or any supplemental disclosures (even though some of the  
declarations are dated in June 2013, see Barragan Decl.), and were not listed as potential class members,  
the witnesses should be excluded (at least the ones that Plaintiffs were not able to depose) under Rule  
37(c)(1) because the failure to disclose was not harmless or justified. However, any failure to disclose  
was harmless because Plaintiffs were able to depose nine of the declarants, and these declarations alone  
support Defendants’ arguments -- the rest are to the same effect.

1 clock, that she was not compensated for it, and the employer was aware or should have been aware  
2 that she was performing off the clock work. See York v. Starbucks Corp., 2011 U.S. Dist. LEXIS  
3 155682, at \*85-86 (C.D. Cal. Nov. 23, 2011) (“The record before this Court establishes the strongly  
4 worded Starbucks policy that ‘time worked is time paid.’ But the policy goes much further: it  
5 expressly prohibits employees from working during breaks and bars working before or after the  
6 completion of a shift unless punched into the time keeping system. Nonexempt employees who  
7 persist in working off-the-clock are subject to discipline; likewise those employees are instructed to  
8 report managers who encourage or require off-the-clock work. And managers who instruct or permit  
9 their subordinates to work off-the-clock are subject to discipline including termination. In view of  
10 this policy and the rationale of Dukes and Ellis, York must present evidence of a systematic  
11 corporate-wide practice of forcing employees to work off-the-clock to meet Rule 23's  
12 "commonality" requirement. The record will not support such a finding.”); see also AutoZone, 289  
13 F.R.D. at 539 (“Here, as in Brinker, there is a uniform policy prohibiting off-the-clock work. In light  
14 of that policy, Plaintiffs must present substantial evidence that AutoZone requires its employees to  
15 work off-the-clock. Plaintiffs present evidence that AutoZone requires employees to perform  
16 opening tasks, but not that AutoZone does not provide a means for employees to be compensated  
17 for those tasks. Although Plaintiffs can point to the declarations of Plaintiffs Jimmy Ellison, William  
18 Doland, and 13 other putative class members, all stating that they were systematically not paid for  
19 work done before clocking in, Defendant’s 133 putative class member declarations attesting to never  
20 having performed or reported any off-the-clock work, undermines the notion that Defendant ‘knew  
21 or should have known that off-the-clock work was occurring,’ . . .”) (internal citations omitted).

22 Here, the policies in the record are that employees must be clocked in when they are  
23 working, and can be subject to discipline if they are not. There is a policy under which managers  
24 can adjust time records to account for any work that does take place off the clock. Even if the ISTs  
25 can be linked to specific employees through a form that may or may not have been signed by the  
26 transferring employee, as in York and AutoZone, the Court would have to conduct mini-trials of all  
27 putative class members to determine whether that employee performed the IST off the clock, and if  
28 so, whether the employee was paid or not by adjusting the time records retroactively, as well as

1 whether management had reason to know that the employee had worked without pay. Compare Von  
2 Rock Decl. Ex. C (Cohn Decl.) ¶ 5 (“I performed inter-store transfers on a number of occasions and  
3 wasn’t paid for that time that I spent transferring items. A manager at CVS told me to do these  
4 transfers off the clock and told me where to pick up or deliver the medication and/or merchandise.”),  
5 with Def.’s Compendium of Declarations, Ager Decl. ¶ 8; Hallen Decl. ¶¶ 8, 11, 12, 14 (employees  
6 who have testified that they only performed ISTs while on the clock and/or that they were fully  
7 compensated for their work time).

8 Plaintiffs argue that Defendants have a policy that “requires” non-exempt employees to  
9 perform ISTs before and after a scheduled shift or while clocked out for lunch. There is no evidence  
10 of such a uniform policy or practice. Instead, the evidence is that sometimes managers or non-  
11 managers ask non-exempt employees to perform ISTs before or after their shifts or while clocked  
12 out for lunch, see, e.g., Von Rock Decl. Ex. C (Boone Decl.) ¶ 11, and sometimes a manager asks an  
13 employee to perform an IST during the employee’s shift. See, e.g., Von Rock Decl. Ex. C (Ashby  
14 Decl.) ¶ 10. Further, even if an IST is performed off the clock, Defendants’ official policy is that  
15 employees must be paid for all time worked and managers can change time records to account for  
16 the IST. See, e.g., Def.’s Compendium of Declarations, Ager Decl. ¶ 8 (stating that the policy at her  
17 home store was to require all ISTs to be on the clock). And there is evidence that this policy of  
18 paying for all time worked was followed at least as to some ISTs performed off the clock when the  
19 manager knew of the IST. See, e.g., Defs’ Compendium of Declarations, Auer Decl. ¶ 7 (stating that  
20 she conducted ISTs before work and reported her work time to her manager and received  
21 compensation).

22 Plaintiffs also argue that the policy to ask for manual overrides of time records to account for  
23 ISTs is unlawful on its face because: (1) it does not compensate employees for time spent under  
24 Defendants’ control while performing the IST; and (2) it does not reflect California law that time  
25 spent traveling from a remote worksite is compensable if it exceeds the employee’s normal  
26 commute. As to the first reason, Plaintiffs argue that under Defendants’ “admitted policy,”  
27 employees are not compensated for the time spent conducting ISTs. However, there is evidence in  
28 the record that some stores required that ISTs be performed while on the clock. See, e.g., Def.’s

1 Compendium of Declarations, Ager Decl. ¶ 8. And there is also evidence that some employees  
2 requested payment for the time spent on ISTs and were paid. Id., Auer Decl. ¶¶ 7, 8. Thus, there is  
3 no evidence of a policy to exclude payment for time spent on ISTs.

4 As to the second reason, Plaintiffs argue that under Defendants' policy, employees are not  
5 compensated for time spent traveling between stores where the trip between the second store and  
6 home is longer than the employee's normal commute. Plaintiffs point to some declarations stating  
7 that employees were not compensated for this time (see, e.g., Def.'s Compendium of Declarations,  
8 Juricich Decl. ¶ 12, Kellett Decl. ¶ 12), but these declarations do not say that Defendants refused  
9 compensation, only that the declarants did not ask for it. Plaintiffs argue that this policy dissuades  
10 employees from reporting any time at all, but Plaintiffs have not pointed to any evidence that any  
11 employee, much less all or most employees, was dissuaded.

12 In addition, Plaintiffs argue that Defendants have a policy of restricting the amount of time  
13 the employees in a given store may work, and that any hours in excess of that budget require District  
14 Store Manager approval. See Supp. Von Rock Decl. Ex. A (Abbott Decl.) ¶¶ 9, 10. Plaintiffs argue  
15 that this effectively prevents store managers from recording employees' time for pre- and post-shift  
16 ISTs, and provides an incentive for store managers not to record that time. There is evidence that  
17 stores have budgeted hours (see Supp. Von Rock Decl. Ex. D (CVS Operations Manual - Weekly  
18 Store Schedule); Ex. A (Abbott Decl.) ¶ 9), but there is no evidence that managers failed to  
19 compensate employees for this reason.

20 On the issue of whether Defendants knew or should have known that its employees  
21 performed ISTs off the clock, Plaintiffs have not shown how the Court could determine whether  
22 Defendants' store managers across 850 stores in California over a five year period knew of each  
23 instance of an alleged off the clock IST. In fact, there is evidence that putative class members  
24 performed ISTs without notifying their managers. See, e.g., Def.'s Compendium of Declarations,  
25 Ager Decl. ¶ 6, Becker Decl. ¶ 5; Flores Decl. ¶ 4. Other putative class members performed ISTs at  
26 the direction of store managers, but were not told when to perform the IST or whether it should be  
27 done off the clock. See, e.g., Weil Decl. (Boone Depo.) at 11-12.

28 Finally, Plaintiffs argue that Defendants knew of off the clock work because store managers

1 regularly reviewed Key-Rec reports. Even if store managers review the Key-Rec reports (See Supp.  
2 Von Rock Decl. Ex. A (Abbott Decl.) ¶ 7), the undisputed evidence is that the Key-Rec reports  
3 themselves do not show which employee conducted the IST, and do not show whether the IST was  
4 done on or off the clock. Instead, individualized questions about whether Defendants knew that  
5 ISTs were performed off the clock remain.

6 Further, when employees are clocked out, there is a presumption that they are not performing  
7 work. Brinker, 53 Cal.4th at 1051-52. The Brinker court stated:

8 The only formal Brinker off-the-clock policy submitted disavows such work,  
9 consistent with state law. Nor has Hohnbaum presented substantial evidence of a  
10 systematic company policy to pressure or require employees to work off the clock, a  
distinction that differentiates this case from those he relies upon in which  
off-the-clock classes have been certified.

11 Moreover, that employees are clocked out creates a presumption they are doing no  
12 work, a presumption Hohnbaum and the putative class members have the burden to  
13 rebut. As all parties agree, liability is contingent on proof Brinker knew or should  
14 have known off-the-clock work was occurring. Nothing before the trial court  
15 demonstrated how this could be shown through common proof, in the absence of  
16 evidence of a uniform policy or practice. Instead, the trial court was presented with  
17 anecdotal evidence of a handful of individual instances in which employees worked  
off the clock, with or without knowledge or awareness by Brinker supervisors. On a  
record such as this, where no substantial evidence points to a uniform, companywide  
policy, proof of off-the-clock liability would have had to continue in an  
employee-by-employee fashion, demonstrating who worked off the clock, how long  
they worked, and whether Brinker knew or should have known of their work.

18 Id. (internal citations omitted). However, here, Plaintiffs argue that the employer, not the employee,  
19 is responsible for keeping track of the time worked (see Wage Order 4-2001, § 7), and that if an  
20 employer knows that an employee is working off the clock but has not keep accurate records, it has  
21 violated the law. See Morillion, 22 Cal. 4th at 578. As stated above, Morillion is inapposite because  
22 it involves compensation for time required to be spent riding in an employer's bus back and forth to  
23 a work site. Further, as described above, there is no evidence that every employees signs paperwork  
24 from which Defendants could determine who performed each IST. Plaintiffs argue that even if  
25 Defendants did not know in advance that ISTs were taking place, they would know by looking at the  
26 Key-Rec report and IAR binder that they had taken place, and would know that the employee who  
27 conducted the IST used his personal vehicle. Reply at 10. Plaintiffs conclude that, therefore,  
28 Defendants had actual knowledge regarding every IST and the employee's incurring of expenses.

1 Plaintiffs' conclusion is not persuasive, especially because there is evidence that some ISTs were not  
2 done in personal vehicles, and some were done within the normal commute to work or home.

3 The second subclass also fails for lack of commonality. Under California law, Defendants  
4 are required to reimburse Plaintiffs for all necessary expenses incurred in performing their duties.  
5 See Cal. Labor Code § 2802 (“An employer shall indemnify his or her employee for all necessary  
6 expenditures or losses incurred by the employee in direct consequence of the discharge of his or her  
7 duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the  
8 employee, at the time of obeying the directions, believed them to be unlawful.”). Here, whether  
9 putative class members incurred an expense varies. Some class members did not conduct ISTs and  
10 did not otherwise use their vehicles for business purposes (see, e.g., Def.’s Compendium of  
11 Declarations, Barton Decl. ¶ 9), and as described above, there is likely no reliable way to determine  
12 which employees conducted most of the ISTs. Second, even if an employee performed an IST, he or  
13 she may not have incurred an expense. See, e.g., Def.’s Compendium of Declarations, Barton Decl.  
14 ¶ 7 (stating that he has only seen ISTs performed using rental trucks paid for by Defendants);  
15 Schmidt Decl. ¶ 7 (stating that ISTs were usually performed by store manager or by rental truck).

16 Further, the question of whether putative class members actually sought reimbursement is an  
17 important one, and there is no common answer to that question. See Chavez c. Lumber Liquidators,  
18 Inc., 2012 U.S. Dist. LEXIS 40984, at \*29-30 (N.D. Cal. Mar. 26, 2012) (“The Court finds that  
19 certification is inappropriate for the Unpaid Reimbursement Class because, under Rule 23(b),  
20 common issues do not predominate. Plaintiffs have not shown that LLI instituted a uniform policy  
21 resulting in the denial or reimbursement requests. In fact, LLI's Travel and Entertainment policy  
22 (T&E Policy) allows for reimbursement of a number of business-related expenses, including  
23 mileage. Accordingly, to assess the merits of Plaintiffs' reimbursement claim, the Court would need  
24 to scrutinize each class member's claimed expenses. Specifically, the Court would need to make  
25 individualized factual determinations concerning: (1) whether the claimed expenses were  
26 "necessary" and incurred in direct consequence of the discharge of the employee's duties; (2)  
27 whether the employee actually sought reimbursement from LLI for the expenses; and (3) whether  
28 LLI reimbursed the employee for the expense.”) (internal citations omitted). Even if the commute

1 exclusion is improper, there are individual instances of how ISTs were performed that would require  
2 individual determinations.

3 In conclusion, the first and second subclasses fail to satisfy the commonality requirement of  
4 Rule 23(a).

### 5 3. Third subclass

6 Plaintiffs' theory for the third proposed subclass has shifted over time, from a general failure  
7 to indemnify business expenses in the first amended complaint, to the more narrow argument in this  
8 motion that Defendants' mileage reimbursement rate was inadequate to reimburse all employees  
9 because it was \$0.05 to \$0.17 per mile less than the IRS standard rate. This narrow proposed  
10 subclass was not pled in the operative first amended complaint. See Munoz v. Guimarra Vineyards  
11 Corp., 2012 U.S. Dist. LEXIS 93043, at \*52-53 (E.D. Cal. July 5, 2012) (recommending denial of  
12 class certification for a subclass for unpaid rest breaks because the class was based on a claim that  
13 was not pled in the operative complaint); York, 2011 U.S. Dist. LEXIS 155682, at \*31 (rejecting  
14 class certification of two subclasses because the operative complaint did not give adequate notice of  
15 the claims that support certification of the two subclasses). At the hearing, Plaintiffs could not point  
16 to any paragraph in the first amended complaint setting forth the claim that the mileage  
17 reimbursement rate was improperly less than the IRS rate. Thus, certification of this subclass is  
18 denied.

19 Even if Plaintiffs had pled in the first amended complaint that Defendants' mileage  
20 reimbursement rate was impermissibly less than the IRS standard rate, certification of this subclass  
21 would still be denied. Plaintiffs' third subclass rests on the argument that the IRS standard rate is  
22 the presumptively reasonable rate. See Gattuso v. Harte Hanks Shoppers, Inc., 42 Cal.4th 554, 564-  
23 66 (2007). The Gattuso case, however, does not hold that the IRS rate is presumptively reasonable;  
24 rather, the Gattuso Court stated that the IRS rate was widely used by private business employers and  
25 that California Labor Code section 2802 permits use of the IRS rate to calculate expense  
26 reimbursement. The Gattuso court also noted that there are two ways to compensate for mileage: (1)  
27 the actual expense method, which requires employees to keep detailed and accurate records of  
28 amounts spent in fuel, maintenance, repairs, insurance, registration and depreciation, apportioned

1 between personal and business use; and (2) the mileage reimbursement method, which requires  
2 employees only to submit the number of miles driven to the employer, which then multiplies the  
3 work-required miles by a predetermined amount that approximates the per-mile cost of owning and  
4 operating a vehicle. Gattuso, 42 Cal.4th at 568. Here, Defendants used the mileage reimbursement  
5 method, which employees may only challenge based on their own particular individual  
6 circumstances such as mileage per gallon and age of the vehicle used:

7       Because a mileage rate used in the mileage reimbursement method is merely an  
8 approximation of actual expenses, the mileage reimbursement method is inherently  
9 less accurate than the actual expense method. . . . If the employee can show that the  
10 reimbursement amount that the employer has paid is less than the actual expenses that  
the employee has necessarily incurred for work-required automobile use (as  
calculated using the actual expense method), the employer must make up the  
difference.

11 Id. at 569.

12       Thus, any challenge to Defendants' mileage reimbursement method would require Plaintiffs  
13 to show that the mileage reimbursement was less than class members' actual expenses. That  
14 showing would require myriad answers to individualized questions for each class member, including  
15 what make and vintage of vehicle was used, whether it was financed or leased and, if so, at what  
16 cost, and what kind of fuel was used. Analysis of actual expenses is not appropriate for class  
17 treatment because it would not present issues common to the class.

### 18 **Conclusion**

19       Because Plaintiffs' proposed subclasses fail for lack of commonality and also because the  
20 third proposed subclass was not pled in the operative complaint, the Court need not reach the  
21 remaining components of the Rule 23(a) analysis or the requirements of Rule 23(b)(3). Plaintiffs'  
22 Motion for Class Certification is denied. A case management conference is scheduled for January  
23 14, 2014 at 3:00 p.m. A joint case management conference statement shall be filed no later than  
24 January 7, 2014.

25       **IT IS SO ORDERED.**

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

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Dated: December 2, 2013

*Elizabeth D. Laporte*  
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ELIZABETH D. LAPORTE  
United States Magistrate Judge