UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHRIS B. SIRKO and DANIEL CERVANTES, on behalf of themselves, all others similarly situated, and the general public, Plaintiffs, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.	Case No. CV 13-03192 DMG (SSx) **ORDER RE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION & DEFENDANT'S MOTION TO STRIKE [47] [87]**

This matter is before the Court on Plaintiffs Chris B. Sirko and Daniel Cervantes' Motion for Class Certification. A hearing was held on August 22, 2014. Having duly considered the parties' written submissions and oral argument, the Court now renders its decision. For the reasons set forth below, the Motion is **DENIED**.

I.

FACTUAL BACKGROUND

In 2009, International Business Machines Corporation ("IBM") and Kaiser Permanente ("Kaiser") entered into an outsourcing agreement. (*See* Declaration of Wendy C. Butler ("WCB Decl.") ¶ 5, Exh. D (Mullinax Depo. at 8:4-8); WCB Decl. ¶ 2, Exh. A (Cervantes Depo. at 23:6-15); WCB Decl. ¶ 4, Exh. C (Sirko Depo. at 9:4-6, 10:1-3).) Pursuant to this agreement, IBM hired 209 California-based Kaiser Information Technology ("KP-IT") employees and reassigned them back to Kaiser. (*See* Declaration of Monica Lombardo ("Lombardo Decl.") ¶ 4; *see also* Plaintiffs' Compendium of Facts and Evidence ("P's Comp.") ¶ 3.)

The 209 hires initially held exempt transitional position code 4YYY. (*See* Lombardo Decl. ¶ 4.) Of the 209 hires, 114 were later reclassified into a non-exempt position code, and 95 were later reclassified into an exempt position code in the Technical Services 24A job family other than first-line manager or team lead (position code 499K). (*See id.* ¶ 4.)

After hiring Kaiser's employees, IBM reviewed each employee's anticipated functions[1] and assigned each the "position code" and "band" that contained the functions that occupied the majority of an employee's time. (*See* WCB Decl. ¶ 5, Exh. D (Mullinax Depo. at 18:13-25, 24:20-25:13, 35:10-23).) For each position code, "there is a 'generic' position description that contain [*sic*] high-level statements of general responsibilities, not detailed job responsibilities, to capture the wide range of employee duties that fall into a position code. The descriptions are not designed to set out, and do

[1] IBM also asked each employee to complete a Job Profile Report that provided a "high-level thumbnail sketch of their job responsibilities," including their skills, roles, and people they interacted with. (*See* WCB Decl. ¶ 5, Exh. D (Mullinax Depo. at 8:4-8); *see also* Plaintiffs' Notice of Lodgment ("PNOL"), Exh. 8 (Personal Profile Excerpts).) These profiles included the amount of time, stated in percentages, that the employee spent on various responsibilities. (*See id.*)

not purport to define, the day-to-day activities of any particular individual." (*See* Lombardo Decl. ¶ 6.) Within each position are different "bands," and individuals within a particular position can fall into different bands depending on their level of responsibility, leadership, and contribution. (*See id.* ¶ 7, Exhs. A-B.) These position codes and bands align with a non-exempt or exempt status. (*See id.*)

Because the descriptions associated with position codes are broad, individual employees assigned the same position codes may perform varying duties. For example, a Technical Services 24A Professional, according to its position description, could have a range of responsibilities, including the "integrat[ion] and testing of hardware/software solutions," the "management of live production systems," and the "application of systems analysis techniques and procedures . . . to determine system functional specifications." (*See id.* ¶ 7, Exh. A at 1.)

Plaintiffs' counsel designed and sent a preliminary survey to putative class members. (*See* Declaration of J. Jason Hill ("JJH Decl.") ¶ 2.) Based on the responses to the survey, Plaintiffs' counsel obtained declarations from three putative class members. (*See* PNOL, Exh. 28 ("Declaration of Patricia Justice"); PNOL, Exh. 29 ("Declaration of James Tower"); Declaration of Davis Williams ("Williams Decl.").) Plaintiffs submitted those declarations along with declarations from the two named Plaintiffs. (*See* Declaration of Chris Sirko ("Sirko Decl."); Declaration of Daniel Cervantes ("Cervantes Decl.").)

One named Plaintiff, Daniel Cervantes, was a Recovery Manager who spent all of his time assembling teams that responded when Kaiser's computer systems experienced outages. (*See* WCB Decl. ¶ 1, Exh. B ("Resume of Daniel T. Cervantes").) The other named Plaintiff, Chris Sirko, was a Systems Programmer whose duties mostly consisted of making upgrades and installing updates. (*See* WCB Decl. ¶ 4, Exh. C (Sirko Depo. at 10:21-11:4, 72:16-18).)

The three putative class members who submitted declarations uniformly stated: "I believe the task groups identified in the survey (Group I and Group II) tasks [*sic*] are a fair and reasonable list of duties that are common to the proposed class in this case." (*See* PNOL, Exh. 28 ("Declaration of Patricia Justice"); PNOL, Exh. 29 ("Declaration of James Tower"); Williams Decl.) Patricia Justice and Davis Williams otherwise did not give a description of their specific job duties. (*See* PNOL, Exh. 28 ("Declaration of Patricia Justice"); Williams Decl.) James Tower listed his duties as the following:

> (1) receive ticket for outage or failure as prioritized by Kaiser and other software parameters (not of my selection); (2) open the rolodex to find who both in Kaiser, IBM and the vendor (including management on top of that) to commence either teleconference or internet exchange; and (3) then document times, persons, places suggestions, so that IBM could fulfill its timeline contract-based obligations with Kaiser.
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> (*See* PNOL, Exh. 28 ("Declaration of James Tower") ¶ 5.)

Tower then stated, "My functional duty was identical to Mr. Sirko, my co-Plaintiff in this case, to keep KP-IT systems 'up and running.' This meant maintenance, support and troubleshooting." (*Id.*)

IBM also provided declarations from a number of former and current Technical Services 24A employees or their managers describing their job duties. Sharon Brisco, a Systems Programmer like Sirko, spent nearly all of her time planning, implementing, and testing upgrades. (*See* Defendant's Compendium of Declarations ("D's Comp.") ¶ 5, Exh. 5 ("Declaration of Gerald Harris, Jr.") ¶ 6.) Frank Holloway, also a Systems Programmer, spent 60 to 80 percent of his time planning and implementing projects related to NonStop, a mainframe platform that runs Kaiser's Northern California outpatient pharmacy system. (*See* D's Comp. ¶ 8, Exh. 8 ("Declaration of Frank Holloway") ¶¶ 3-4.) These projects included decommissioning NonStop equipment, encrypting patient health information stored on NonStop, and finding alternatives to Kaiser's operating system monitoring software. (*See id.* ¶¶ 7-9.) A regular part of his job involved analyzing Kaiser's business and technical needs and presenting two or three

solutions, along with the pros and cons of each solution, to Kaiser. (*See id.* ¶ 5.) He also planned the implementation of a project. (*See id.* ¶ 6.) Because each project was different, the steps he took in researching, analyzing, recommending, and planning for each project were different. (*See id.* ¶ 7.)

Jairo Pineros, a Systems Administrator, was one of the team members responsible for resolving those outages when they involved Kaiser's UNIX systems. (*See* D's Comp. ¶ 10, Exh. 10 ("Declaration of Jairo Pineros") ¶ 3.) Thomas Wotring, also a Systems Administrator, spent the "vast majority" of his time planning and implementing server upgrades, infrastructure migration, data migrations, and business continuity builds. (*See* D's Comp. ¶ 12, Exh. 12 ("Declaration of Thomas Wotring") ¶ 4.) His work included writing scripts that varied with the outcome he wanted to achieve. (*See id.* ¶ 5.) Danny Brennan meanwhile led a team of four Systems Administrators to engineer and implement solutions related to Kaiser's enterprise-wide printing systems. (*See* D's Comp. ¶ 3, Exh. 3 ("Declaration of Danny Brennan") ¶ 4.) His work involved determining Kaiser's printing needs, understanding all the technical components, and making sure his solution did not adversely impact printing and other applications on the same servers. (*See id.* ¶ 5.) As a Subject Matter Expert, Brennan also worked on resolving outages related to the Linux and AIX operating systems. (*See id.* ¶ 7.)

Ting-Jung Liang spent half of his time analyzing Kaiser's future system demands in anticipation of a change, evaluating Kaiser's current system, and recommending additions or changes to the current system components in light of the anticipated needs. (*See* D's Comp. ¶ 9, Exh. 9 ("Declaration of Gary Nichols") ¶ 3.) He spent the other half on software development and design. (*See id.* ¶ 5.)

Sarkis Mirzaiean, a Database Administrator, spent over 50 percent of his time designing or migrating physical databases, which included considering the size and composition of the databases, database parameters, and space allocation. (*See* D's Comp. ¶ 11, Exh. 11 ("Declaration of Christian Wolf") ¶ 4.)

Bassam Hassan, a Mainframe Automation Specialist, spent 90 percent of his time performing automation-related activities. (*See* D's Comp. ¶ 6, Exh. 6 ("Declaration of Bassam Hassan") ¶ 4.) Completing work orders entailed evaluating, planning, and designing automation tools to monitor and run Kaiser's applications. (*See id.* ¶ 5.) He also upgraded the automation tools and created and tested disaster recovery plans. (*See id.* ¶ 8.)

Ricardo Sena, a Software Performance Engineer, spent all of his time managing projects, assessing Kaiser's business needs and resulting system usage, preparing for performance tests, writing test scripts, and generating performance assessment reports. (*See* D's Comp. ¶ 9, Exh. 9 ("Declaration of Gary Nichols") ¶¶ 11-16.)

Jeff Corneau, a Storage Resource Manager, spent his time managing the monitoring tools and reporting for Kaiser's storage environment. (*See* D's Comp. ¶ 4, Exh. 4 ("Declaration of Jeff Corneau") ¶ 3.) His work encompassed gathering information about Kaiser's needs, determining the best solution, planning the project, assigning work to different teams and making sure the work was completed, modifying the project plan based on changing needs or priorities, and troubleshooting any problems that arose after the project was finished. (*See id.* ¶¶ 6-9.)

A. Admissibility of Plaintiffs' Counsel's Survey and Expert Testimony

Defendants move to strike Plaintiffs' counsel's survey and the opinions of Plaintiffs' experts. The Court considers each matter in turn.

1. Plaintiffs' Counsel Survey

Plaintiffs rely on the results of a survey that was created by one of their counsel, J. Jason Hill, as their foundational evidence in support of their motion for class certification. (*See* Plaintiffs' Opp'n to Defendants' Motion to Strike at 1; JJH Decl. ¶ 2.) Hill admits that he is not a survey expert.[2] (*See* JJH Decl. ¶ 3.) Moreover, both the cover

[2] Hill states, "I am not a survey expert, but have worked with several survey experts over the last 7 years. Also, prior to engaging in a law career, I was engaged in social science areas, and graduated

letter to the survey and the survey itself indicated that the survey would be used to support a class action.[3] (*See* JJH Decl., Exh. 1 ("Cover Letter to Survey/Questionnaire"); PNOL, Exh. 11 ("IBM 'Global Services Employee' Questionnaire").) The survey consisted of 47 questions, the vast majority of which allowed for only "yes" or "no" responses. (*See* PNOL, Exh. 11 ("IBM 'Global Services Employee' Questionnaire").) The following was a question that allowed for only a "yes" or "no" response: "Did you have discretion and independent judgment to perform your duties in your own way rather than following a mandated policy?" (*Id.*)

Plaintiffs do not offer the survey as expert evidence. (Mot. at 7.) Hill's disavowal of any expert qualifications makes that clear. (*See* JJH Decl. ¶ 3.) Nonetheless, even if offered as something less than expert evidence, the survey results must be excluded as unreliable hearsay. The surveys do not fall within any hearsay exception, including the "residual hearsay" exception to the hearsay rule. *See* Fed. R. Evid. 807. To be admissible pursuant to this rule, evidence must fulfill five requirements: trustworthiness, materiality, probative importance, the interests of justice, and notice. *See Parsons v. Honeywell, Inc.*, 929 F.2d 901, 907 (2d Cir. 1991).

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from the University of Illinois with three majors, political science (attitude surveys done), corporate communications (attitude surveys done) and philosophy. I am not a statistician or an economist . . . ." (JJH Decl. ¶ 3.)

[3] The cover letter explained:

> The case has been brought on behalf of . . . individuals who worked in California . . . [and] who were not paid overtime wages . . . . In order for us to determine whether the case is capable of being certified as a class action we need data and in that aim, please find a Survey/Questionnaire form . . . . It is helpful for our analysis and for our assessment of the claims made as to whether or not proposed members may have been misclassified as "exempt" or not.

(*See* JJH Decl., Exh. 1 ("Cover Letter to Survey/Questionnaire").)

The survey concludes with this statement: "By signing below I understand the purpose of this questionnaire is to allow for the counsel representing the Plaintiffs to seek class certification . . . ." (PNOL, Exh. 11 ("IBM 'Global Services Employee' Questionnaire").)

The main concern here is the survey's trustworthiness. To satisfy the trustworthiness requirement, the proponent of the survey must show that the survey was conducted in accordance with generally accepted principles. *See, e.g.*, *Keith v. Volpe*, 858 F.2d 467, 480 (9th Cir. 1988); *accord Harolds Stores, Inc. v. Dillard Dep't Stores*, 82 F.3d 1533, 1544 (10th Cir. 1996); *Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (3d Cir. 1978). Technical and methodological deficiencies in a survey typically bear on the weight of evidence, not on its admissibility. *See Volpe*, 858 F.2d at 480; *see also Harolds Stores*, 82 F.3d at 1544. Substantial deficiencies in the design or execution of a survey of individuals, however, are grounds for its complete exclusion. *See Gibson v. Cty. of Riverside*, 181 F. Supp. 2d 1057, 1068-69 (C.D. Cal. Jan. 4, 2002); *see also Harolds Stores*, 82 F.3d at 1544; *Pittsburgh Press*, 579 F.2d at 759-60.

In *Gibson*, the court found that a survey lacked "the essential hallmarks of reliability" because the survey was not conducted by experts or independently of attorneys involved in the litigation, and the recipients of the survey were informed of the purpose of the survey and reminded that they were the beneficiaries of the survey. 181 F. Supp. 2d at 1067. The facts here are identical to those in *Gibson*. Here, Plaintiffs' counsel Hill created and administered the survey. Hill admits he is not a survey expert, and that self-assessment is supported by the fact that his experience is limited to administering "attitude surveys" as part of his undergraduate coursework. The design of the survey, too, bears out his lack of expertise. The vast majority of the questions allowed for only "yes" or "no" responses, including questions (such as the one about the exercise of discretion and independent judgment) that merited a less binary response. Finally, both the cover letter and the survey itself informed recipients that the purpose of the survey was to support a class action seeking overtime wages for employees who had been misclassified as exempt. The survey recipients had to have been aware they would be potential beneficiaries of such a lawsuit. This undermines any possible inference that the survey responses were objective. Because the survey lacks basic indicators of reliability, the Court finds it inadmissible.

2. Plaintiffs' Expert Testimony

Plaintiffs also proffer the reports of two experts, Gerry Brown and Daniel Levy, into evidence. Plaintiffs designated Brown as a subject matter expert on "computer employee and information technology positions" who would identify ways to test whether the proposed class "either engages in primarily non-exempt routine task work or whether the employees satisfy any proposed exemption." (*See* PNOL, Exh. 13 ("Plaintiffs' Initial Expert Designation for Class Certification") ¶ 1.) Levy is a statistical expert whom Plaintiffs designated to testify as to "whether the proposed class, on the whole, did or did not engage in exempt duties for a majority of their work time," based on statistical sampling using a variety of "data matrices, including Plaintiffs' class member survey." (*Id.* ¶ 2; *see also* PNOL, Exh. 14 ("Levy Initial Report") ¶¶ 3, 5; PNOL, Exh. 15 ("Levy Supp. Report") ¶¶ 3, 5.)

Levy fails to offer an opinion that would be helpful to the Court on the question before it—namely, whether the putative class members performed similar work such that this action can be tried as a class action rather than as individual mini-trials. Instead, he promises to perform further work – an additional survey as well as deposition sampling – to determine whether class members should have been classified as non-exempt. (*See* PNOL, Exh. 14 ("Levy Initial Report") ¶ 9.) Based on his review of Plaintiffs' counsel's survey, he states that he is prepared to discuss the next steps he will take to determine the "exempt/non-exempt status" of the class members, including the size of the proposed deposition sample and methods of dealing with non-response bias. (*See* PNOL, Exh. 15 ("Levy Supp. Report") ¶ 5.) He neglects, however, to offer an opinion about whether class members performed similar enough duties to certify them as a class, which is the issue at hand.

Brown offers a "tentative" opinion on this matter. (*See* PNOL, Exh. 17 ("Brown Initial Report") ¶ 7.) Based on his review of the materials, including the data from Plaintiffs' counsel's survey, he opines that "to a reasonable degree of probability" there is "sufficient indicia and reason to believe" that the putative class members have "common

duties and functions in a manner consistent with the ability to be tested, cohesively and manageably, as a group." (*Id.*) He then offers to assess at some point in the future the "actual nature of job duties in a manner that is manageable and reliable" with "the assistance of a survey/statistician and/or economist." (*Id.*)

Federal Rule of Evidence 702 allows expert testimony if the expert's "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Rule 702 "require[s] that the judge apply [her] gatekeeping role . . . to all forms of expert testimony, not just scientific testimony," and "judges are entitled to broad discretion when discharging their gatekeeping function." *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (internal quotation omitted). The trial court has a "special obligation to determine the relevance and reliability of an expert's testimony." *Elsayed Mukhtar v. California State Univ., Hayward*, 299 F.3d 1053, 1063 (9th Cir. 2002), *overruled on other grounds*, *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2014).

The Ninth Circuit has noted that under the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its progeny, a court must

> assess [an expert's] reasoning or methodology, using as appropriate such criteria as testability, publication in peer reviewed literature, and general acceptance, but the inquiry is a flexible one. Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion. In sum, the trial court must assume that the expert testimony both rests on a reliable foundation and is relevant to the task at hand. [¶] Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline.

Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d 960, 969-70 (9th Cir. 2013), *cert. denied*, —— U.S. ——, 134 S. Ct. 644, 187 L. Ed. 2d 420 (2013) (internal quotations and citations omitted).

At the class certification stage, courts should apply a "tailored" *Daubert* analysis to determine the reliability of the expert's testimony regarding the Rule 23 requirements, not the merits of the case. *See Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 498 (C.D. Cal. 2012); *see also Behrend v. Comcast Corp.*, 655 F.3d 182, 204 n.13 (3d Cir. 2011) ("[A]lthough the Supreme Court recently hinted that *Daubert* may apply for evaluating expert testimony at the class certification stage, it need not turn class certification into a mini-trial."). The question is whether the expert evidence is sufficiently probative to be useful in evaluating whether class certification requirements have been met. *See In re Polypropylene Carpet Antitrust Litigation*, 996 F. Supp. 18, 26 (N.D. Ga. 1997) (at class certification stage, court only examined whether the expert's methodology will (a) comport with basic principles, (b) have any probative value, and (c) primarily use evidence that is common to all members of the proposed class).

In *Dukes v. Wal-Mart, Inc.*, the District Court struck portions of an expert declaration offered in opposition to class certification that relied on a survey "designed and administered by [defense] counsel in the midst of litigation," where "the interviewees knew the survey was related to the litigation, and the survey instrument exhibit[ed] bias on its face," because these factors "plainly demonstrate[d] that the results from the survey [were] not the product of reliable principles and methods, and therefore [were] not the type of evidence that would be reasonably relied upon by experts." 222 F.R.D. 189, 197 (N.D. Cal. 2004) (internal quotation marks omitted).

Plaintiffs' counsel's survey, as described *supra*, suffers from all of these same flaws. Therefore, to the extent that Plaintiffs' experts relied on the survey, the Court strikes those portions of the experts' reports that are based on the results of Plaintiffs' counsel's survey.

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II.

LEGAL STANDARD

A. Class Certification

Federal Rule of Civil Procedure 23 provides district courts with broad discretion in making a class certification determination, and to revisit that determination throughout the proceedings. *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001); *In re Aftermarket Automotive Lighting Products Antitrust Litig.*, 276 F.R.D. 364, 367 (C.D. Cal. 2011). Under Rule 23(a), a district court may certify a class only if the following prerequisites are met:

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

Fed. R. Civ. P. 23(a). If the Rule 23(a) requirements are satisfied, a class action may be maintained pursuant to Rule 23(b)(3) 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. The matters pertinent to these findings include:
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

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

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

Fed. R. Civ. P. 23(b)(3). The party or parties seeking certification bear the burden of demonstrating that they have met the requirements of Rule 23(b). *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 n.9 (9th Cir. 2009).

In order to make a class certification determination, a court must conduct a "rigorous analysis [into whether] the prerequisites of Rule 23(a) have been satisfied," which may require probing behind the pleadings and looking at information that goes to the merits of the underlying claim. *Comcast Corp. v. Behrend*, —— U.S. ——, 133 S.Ct. 1426, 1431, 185 L.Ed.2d 515 (2013). A court does not have license, however, to engage in "free-ranging merits inquiries" at this stage, but must limit its consideration of merits questions to the extent they are relevant to determining whether Rule 23's prerequisites have been satisfied. *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, —— U.S. ——, 133 S.Ct. 1184, 1194-95, 185 L.Ed.2d 308 (2013).

B. <u>The Administrative Exemption</u>

Plaintiffs and IBM dispute whether, under California law, IBM's California-based KP-IT employees assigned the position code Technical Services 24A are exempt employees pursuant to the administrative exemption set forth at IWC Wage Order No. 4-2001 §1(A)(2). The administrative exemption applies only if all of the following five conditions are met:

> The employee must (1) perform "office or non-manual work directly related to management policies or general business operations" of the employer or its customers, (2) "customarily and regularly exercise[] discretion and independent judgment," (3) "perform[] under only general supervision work along specialized or technical lines requiring special training" or "execute [] under only general supervision special assignments and tasks," (4) be

> engaged in the activities meeting the test for the exemption at least 50 percent of the time, and (5) earn twice the state's minimum wage.

Eicher v. Advanced Bus. Integrators, Inc., 151 Cal. App. 4th 1363, 1371, 61 Cal. Rptr. 3d 114 (2007) (quoting Wage Order No. 4-2001 § 1(A)(2)).

In 2001, the California IWC added specificity to these conditions by incorporating then-current federal regulations interpreting the federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. *See* Wage Order No. 4-2001 § 1(A)(2)(f). For example, in the first condition, the phrase "directly related to management policies or general business operations" includes, but is not limited to, "work in functional areas such as . . . computer network, internet and database administration." 29 C.F.R. § 541.201 (2001). Under California law, work must also be "of substantial importance to the management or operation of the business of [the employee's] employer or his employer's customers." *Id.* § 541.205(a). Employees' work is of substantial importance if they "carry out major assignments in conducting the operations of the business, or [their] work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business." *Id.* § 541.205(c). "[R]outine clerical duties" and "run-of-the-mine positions in any ordinary business" are not directly related to management policies or general business operations. *Id.* § 541.205(c)(1) & (2).

Section 541.205 provides specific guidance with respect to employees in the data processing field, such as systems analysts and computer programmers. *See id.* § 541.205(c)(7). For example, if such an employee is "concerned with the planning, scheduling, and coordination of activities which are required to develop systems for processing data to obtain solutions to complex business, scientific, or engineering problems of his employer or his employer's customers, he is clearly doing work directly related to management policies or general business operations." *Id.*

As to the second condition, "[f]actors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance" include "whether the employee has authority to formulate, affect, interpret,

or implement management policies or operating practices; . . . whether the employee has the authority to waive or deviate from established policies and procedures without prior approval; . . . [and] whether the employee provides consultation or expert advice to management." *Id.* § 541.202(b). Independent judgment means that an employee "has authority to make an independent choice, free from immediate direction or supervision," but not that this choice is not "reviewed at a higher level." *Id.* § 541.202(c).[4] The power to make independent recommendations may suffice to meet the second condition. *See id.*

Finally, under the express terms of the Wage Order, when a court determines whether the fourth condition is met, "[t]he work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered." Wage Order No. 4-2001 § 1(A)(2)(f).

At the class certification stage, it is not this Court's role to determine whether these IT professionals, individually or as a class, meet the conditions of the administrative exemption. The Court's inquiry is limited to the two narrower questions. First, are Rule 23(a)'s requirements met? Second, pursuant to Rule 23(b)(3), are the actual work

[4] The incorporated regulations specifically discuss the meaning of "discretion and independent judgment" in the context of a systems analyst or computer programmer. 29 C.F.R. § 541.207(c)(7) (2001). A systems analyst exercises discretion and independent judgment when he (1) "develops methods to process . . . accounting, inventory, sales, and other business information by using electronic computers"; and (2) "determines the exact nature of the data processing problem, and structures the problem in a logical manner so that a system to solve the problem and obtain the desired results can be developed." *Id.* A computer programmer exercises discretion and independent judgment when he (1) carefully analyzes a computer processing problem "so that exact and logical steps for its solution can be worked out"; and (2) "determines exactly what information must be used to prepare the necessary documents and by ascertaining the exact form in which the information is to be presented." *Id.* In contrast, "highly technical and mechanical operations such as the preparation of a flow chart or diagram showing the order in which the computer must perform each operation, the preparation of instructions to the console operator who runs the computer or the actual running of the computer by the programmer, . . . and the debugging of a program" do not require the contemplated level of discretion and independent judgment. *Id.*

experiences of these employees so similar that determining whether the administrative exemption's conditions have been met on a class-wide basis "would further the goals of efficiency and judicial economy," or are those experiences so distinct that determining whether the exemption applies "would require an individualized inquiry into the manner in which each [employee] actually carried out his or her work[?]" *Vinole*, 571 F.3d at 944, 946.

III.

DISCUSSION

Plaintiffs propose to certify one class comprised of all of IBM's California-based employees and former employees employed at any time from February 26, 2009 to the present who "(1) are currently or [were] formerly employed as IT personnel assigned to maintain and support Kaiser Permanente's health information systems in the job position of either a 4YYY 'Transitional Exempt Employee' or a 'IBM Technical Services [Professional]' with job code '24A (salary bands 6-8)/499K'; (2) did not hold managerial positions; and (3) were classified as exempt employees according to IBM's corporate records." (Mot. at 1.)

A. The Rule 23(a) Requirements

1. Numerosity

A class may only be certified if the class is so numerous that joinder of all parties is impracticable. Fed. R. Civ. P. 23(a)(1). "'Impracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). This requirement imposes no absolute limitations, and requires the examination of the specific facts of each case. *Gen. Tel. Co. of the NW, Inc. v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). Here, the putative class includes at least 209 Technical Services 24A employees across the state. Plaintiffs meet the numerosity requirement as joinder of all members of this putative class is impracticable.

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2. Commonality

The commonality requirement is satisfied "if there are questions of fact and law which are common to the class." Fed. R. Civ. P. 23(a)(2). "[C]ommonality requires that the class members' claims depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (internal quotations omitted). "This does not, however, mean that *every* question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single *significant* question of law or fact." *Id.* (internal quotation omitted) (emphasis in original). "The requirements of Rule 23(a)(2) have been construed permissively, and all questions of fact and law need not be common to satisfy the rule." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (internal quotation omitted).

Here, although members of the putative class have had divergent work experiences, Plaintiffs are all identically classified employees of the same company, sharing one generic job description, and they all raise identical legal questions – whether they were misclassified as exempt, and, if so, whether they were therefore denied overtime pay to which they were entitled by state law. These shared legal issues, coupled with a common core of salient facts, are sufficient to establish commonality.

3. Typicality

The typicality requirement is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

IBM does not dispute that Sirko and Cervantes meet the typicality requirement. Despite the significant differences in their jobs, Sirko and Cervantes' legal claims are identical to one another, and to the claims of the remainder of the putative class – that they, like all California-based Technical Services 24A personnel assigned to Kaiser, were

misclassified as exempt and thus denied overtime pay. This is enough to surmount the permissive standard for typicality.

4. Adequacy of Representation

"Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* at 1020. There is no evidence in the record suggesting that Sirko, Cervantes, or their counsel have any conflict of interest with other class members or are otherwise inadequate, and IBM does not dispute their adequacy. In sum, the putative class satisfies all of the requirements set forth at Rule 23(a).

B. The Rule 23(b)(3) Requirements

"Rule 23(b)(3)'s predominance and superiority requirements were added to cover cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (quotations and alterations internal to *Amchem* removed)). Whether judicial economy will be served by class certification in a particular case "turns on close scrutiny of the relationship between the common and individual issues." *Wells Fargo*, 571 F.3d at 958 (quotations removed).

1. Whether Common Questions Of Law Or Fact Predominate

"The predominance inquiry of Rule 23(b)(3) asks whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 957 (internal quotations removed). The focus is on "the relationship between the common and individual issues." *Hanlon*, 150 F.3d at 1022.

Ninth Circuit case law suggests the types of evidence that are, as a general matter, useful to a predominance analysis in exemption cases such as this one. For example, company policies declaring that a certain job title is uniformly exempt or non-exempt

may be pertinent to the inquiry. "An exemption policy is a permissible factor for consideration under Rule 23(b)(3)," but "[w]hether such a policy is in place or not, courts must still ask where the individual employees actually spent their time." *Wells Fargo*, 571 F.3d at 957, 959 (holding that a "district court abused its discretion in relying on [an exemption] policy to the near exclusion of other factors relevant to the predominance inquiry"). Even more probative are "comprehensive uniform policies detailing the job duties and responsibilities of employees." *Id.* at 958. These "carry great weight for certification purposes" because "[s]uch centralized rules, to the extent they reflect the realities of the workplace, suggest a uniformity among employees that is susceptible to common proof." *Id.* at 958-59; *see also Vinole*, 571 F.3d at 947 (discussing the importance of "companywide policies governing how employees spend their time"). No less important is evidence bearing directly on the Court's "need to make a factual determination as to whether class members are actually performing similar duties," *Wells Fargo*, 571 F.3d at 959 (quoting *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 603 (E.D. Cal. 2008)), such as "uniformity in work duties and experiences that diminish the need for individualized inquiry." *Vinole*, 571 F.3d at 947.

The emphasis in *Wells Fargo* and *Vinole* on what employees actually do is consistent with California law governing the administrative exemption. *See* Wage Order No. 4-2001 § 1(A)(2)(f) (determining whether an employee is "primarily engaged in duties that meet the test of the exemption" turns on three factors – "work actually performed by an employee during the course of a workweek . . . [and] the amount of time an employee spends on such work," "the employer's realistic expectations," and "the realistic requirements of the job" – but the "work actually performed" is the "first and foremost" concern).

With this emphasis in mind, the Court turns to the question of whether determining the applicability of California's administrative exemption to members of the putative class is predominantly subject to common proof. The Court addresses this question by discussing each of the administrative exemption's five conditions, as set out in *Eicher*.

The first condition is whether employees "perform office or non-manual work directly related to management policies or general business operations of the employer or its customers," *Eicher*, 151 Cal. App. 4th at 1371, including "work in functional areas . . . such as computer network, internet and database administration," 29 C.F.R. § 541.201 (2001), that is "of substantial importance to the management or operation of the business of [the employee's] employer or his employer's customers," *id.* § 541.205(a). The record in this case demonstrates that this question can only be answered on an individualized basis. Technical Services 24A employees held a range of job titles and performed differing tasks with varying levels of importance to the management or operation of Kaiser's business. Corneau, for example, described his duties as a Storage Resource Manager as gathering information about Kaiser's information storage needs, determining the best solution to a problem, and planning and implementing those solutions. His duties appear less routine and clerical, and of more importance to the management or operation of Kaiser's business, than those of Williams, who depicted his duties as receiving tickets for outages, opening a directory to see whom to call to fix the problem, and documenting the recovery process. The upshot of analyzing these examples, though, is not a conclusion that one job is more important or more management-related than the other, but rather a determination that, upon rigorous examination, the actual work duties of Technical Services 24A employees vary remarkably from one to the next, such that common proof as to the first condition is not feasible.

The second condition is whether employees "customarily and regularly exercise[] discretion and independent judgment," *Eicher*, 151 Cal. App. 4th at 1371, in light of "whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; . . . whether the employee has the authority to waive or deviate from established policies and procedures without prior approval; . . . [and] whether the employee provides consultation or expert advice to management," 29 C.F.R. § 541.202(b) (2001). The central question is whether an employee has authority to make an independent recommendation to his or her superiors or to the company's

customers, not whether the recommendation is "reviewed at a higher level." *Id.* § 541.202(c).

Again, the Court finds that this question can only be answered on an individualized basis. With respect to just the personnel tasked with responding to outages, for example, the degree of discretion and independent judgment exercised by a Recovery Manager like Cervantes, who assembled the personnel already assigned to support the impacted system on a single "bridge" call but did not fix any system himself, differs markedly from the degree of discretion and independent judgment exercised by Systems Administrators like Pineros or Brennan, who had to use their specialized technical knowledge of the impacted system to identify the problem and figure out the quickest path to recovery. Even the amount of discretion and independent judgment exercised by people with the same job title could vary. For example, Sirko, a Systems Programmer, had only a minimal amount of discretion in upgrading Kaiser's system (implying that he only once made a suggestion to the client, regarding backup data), while Holloway, also a Systems Programmer, claimed he was in charge of coming up with and presenting two or three solutions to the client, after independently analyzing the client's business and technical needs. If one takes into account the whole putative class, the differences are even more pronounced. Compare Cervantes, for instance, with Corneau, who as a Storage Resource Manager assessed Kaiser's storage needs and determined the best solution for its needs, or with Mirzaiean, who as a Database Administrator took into consideration the size and composition of the databases, database parameters, and space allocation in designing or migrating Kaiser's physical databases.

Based on the examples mentioned here, and in the fuller discussion of the parties' factual assertions *supra*, the record shows a broad range in the discretion exercised by Technical Services 24A professionals. Given such an array of experiences, determining whether a Technical Services 24A professional exercised discretion and independent judgment sufficient to satisfy the second condition of the administrative exemption

requires an individualized factual inquiry, and does not lend itself to common proof on a class-wide basis.

The third condition is whether employees perform "work along specialized or technical lines" or "special assignments and tasks" under "only general supervision," as opposed to direct and specific supervision by superiors. *Eicher*, 151 Cal. App. 4th at 1371. The record here shows that this condition also does not lend itself to common proof. The putative class members perform different functions that require varying levels of training, experience, and knowledge and have different levels of interaction with their supervisors.

The fourth condition is whether an employee is "engaged in the activities meeting the test for the exemption at least 50 percent of the time." *Id.* Plaintiffs assert that Technical Services 24A professionals spend over 50 percent of their time on "installation, maintenance, and support." But it is far from clear that installation, maintenance, and support are uniformly non-exempt activities, regardless of which professional is performing those tasks. Instead, sometimes those tasks involve a great deal of discretion and independent judgment and very little supervision, and other times they involve little more than getting preassigned personnel on the same phone call. Second, the record is clear that even those with similar job duties could spend different amounts of time on each discrete task. Thus, the question of whether a Technical Services 24A professional is performing tasks meeting the test for exemption over 50 percent of the time will likely require resolving individual questions of fact.

The fifth condition, whether an employee "earn[s] twice the state's minimum wage," *id.*, is not disputed by the parties.

In sum, in order to rule on the merits, this Court will need to determine whether Plaintiffs can demonstrate that the work experience of Technical Services 24A professionals meets all five of these conditions. Common proof will be insufficient to establish the presence or absence of four of the conditions. Because the merits of this case cannot be resolved without significant individual inquiry, this Court finds that

common questions do not predominate. At the class certification stage, Plaintiffs have the burden of demonstrating predominance as required by the first prong of Rule 23(b)(3), and they have failed to carry their burden.

2. Superiority Of Class Action

"If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'" *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001). Because the determination of whether a Technical Services 24A professional is exempt or not will likely need to be made on a employee-by-employee basis rather than on a class-wide basis, Plaintiffs have not carried their burden under the superiority prong of Rule 23(b)(3).

IV.

CONCLUSION

In light of the foregoing, Defendant's Motion to Strike is **GRANTED** as to Plaintiffs' counsel's survey and portions of the Plaintiffs' expert reports that rely on the survey. Plaintiffs' Motion for Class Certification is **DENIED**.

IT IS SO ORDERED.

DATED: September 3, 2014

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE