UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: **CV 13-04748 SJO (PJWx)** **DATE:** **December 9, 2014**

TITLE: **Susan Howard et al. v. CVS Caremark Corporation et al.**

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFFS:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [Docket No. 42]

This matter is before the Court on the Motion for Class Certification ("Motion"), filed on September 29, 2014, by Plaintiffs Susan Howard ("Howard"), Roselyn Wooden ("Wooden"), and Isabel Alexander ("Alexander") (collectively, "Plaintiffs"). Defendants CVS Caremark Corporation, CVS Pharmacy, Inc., and CVS Pharmacy (collectively, "CVS") filed an opposition ("Opposition") on October 27, 2014, to which Plaintiffs filed their belated reply ("Reply") on November 6, 2014.[1] CVS filed an *ex parte* application for leave to file a sur-reply to the Reply on November 14, 2014, which the Court granted on November 18, 2014. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for November 17, 2014. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **DENIES** the Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant CVS is a retail pharmacy chain that operates more than 850 stores in California. (Def.'s App. of Evidence in Supp. of [Opp'n] ("Def.'s App.") Tab 1 Ex. A ("Stanley Decl.") ¶ 3, ECF No. 46-2.) Each of CVS' retail locations includes a pharmacy staffed by a pharmacy manager or

[1] Under Local Rule 7-10 (the "Local Rule"), "[a] moving party may, no later than [fourteen] days before the date designated for the hearing of the motion, serve and file a reply memorandum." L.R. 7-10. Without seeking leave from the Court or providing any justification for their lateness, Plaintiffs filed their Reply on November 6, 2014, (*see generally* Reply, ECF No. 47), three days after the deadline set by the Local Rule, which this Court strictly enforces. (*See also* Initial Standing Order ("ISO") ¶ 14, ECF No. 10.) While the Court has discretion to strike the Reply due to Plaintiffs' failure to comply with the Local Rule and the ISO, in the interest of fully considering Plaintiffs' arguments for the purposes of the Motion, it declines to do so in this instance.

pharmacist in charge, as well as several staff pharmacists, pharmacy technicians, and clerks. (Stanley Decl. ¶ 3.) "Pharmacy Supervisors" manage all operations in each CVS district ("District"), which is generally comprised of 15-20 pharmacies. (Stanley Decl. ¶ 3.) Districts, in turn, are grouped into regions ("Regions"). (Stanley Decl. ¶ 3.)

Plaintiffs are current and former CVS employees who work or worked in three of its California pharmacies. (*See* Notice of Removal ("Notice") Ex. G, First Am. Compl. ("FAC") ¶¶ 20-22, ECF No. 1.) Howard worked as a pharmacist at CVS' Riverbank store between 2008 and 2012. (FAC ¶ 20; Decl. of Susan Howard in Supp. of Pls.' [Mot.] ("Howard Decl.") ¶ 2, ECF No. 42-10.) Wooden worked as a pharmacy aide at CVS' Napa store between May 2002 and December 2012. (FAC ¶ 21; Decl. of Roselyn Wooden in Supp. of Pls.' [Mot.] ("Wooden Decl.") ¶ 2, ECF No. 42-11.) Alexander currently works as a pharmacy technician at CVS' Lancaster store and has been employed by CVS since 2006 or 2007.[2] (FAC ¶ 22; Alexander Decl. ¶ 2.)

CVS employees use the Rx Connect software system ("Rx Connect" or the "System") to enter, store, and look up prescription information for the purposes of verifying customers' prescriptions and insurance, printing labels for prescription vials, and scanning drugs for accuracy. (Def.'s App. Tab 3 ("Beaumariage Decl.") ¶ 3, ECF No. 46-2; Def.'s App. Tab 2 ("Franko Decl.") ¶ 3, ECF No. 46-2.) In order to access and use the System, CVS employees must obtain a three-letter credential ("Credential") by imputing their employee IDs and password for each day that they work. (Beaumariage Decl. ¶ 4; Franko Decl. ¶ 5; Def.'s App. Tab 7 ("Mohammadkhani Decl.") ¶ 3, ECF No. 46-3.) The Credential is typically valid for a 16-hour period, regardless of the employees' actual schedule or work time, and must be typed into Rx Connect every time the employee seeks to perform tasks such as entering data, prescription labels, or verifying prescriptions. (Beaumariage Decl. ¶¶ 4-5.) Since Rx Connect does not maintain the history of which Credentials were active for which employee at any given time, there is no way to determine whether the same Credential "was active for multiple people in the same store, on the same day, or who was assigned [which Credential] at any given time." (Franko Decl. ¶ 5.)

Plaintiffs allege that through its use of Rx Connect, CVS "cedes control over pharmacy workflow to [CVS'] customers and their physicians," so that "the customer or physician dictates when the prescription must be ready." (Mem. of P. & A. in Supp. of Pls.' [Mot.] ("Motion") 5, ECF No. 42-1.) As a result of this customer-driven system, Plaintiffs maintain that CVS' pharmacy employees do not have discretion regarding when to fill these prescriptions and must "work at the whim of the [customer], rather than the scheduling dictates of [CVS]." (Mot. 2.) Plaintiffs allege that CVS

[2] The FAC states that Alexander has been employed by CVS since 2007; however, Alexander testified in her declaration that she has been employed by CVS since 2006. (*Compare* FAC ¶ 22 *with* Decl. of Isabel Alexander in Supp. of Pls.' [Mot.] ("Alexander Decl.") ¶ 2, ECF No. 42-9.)

requires pharmacy employees to work off-the-clock in order to fill the prescriptions, refuses to pay them overtime for this work, and generally promotes a corporate culture that disfavors paying its employees overtime wages. (*See* Mot. 5; FAC ¶ 26.) Plaintiffs also allege that they were denied regular and overtime wages due to CVS' failure to adequately staff its stores, refusal to approve overtime pay for employees working more than eight hours per day or 40 hours per week, and policy of requiring its employees to work off-the-clock.[3] (Notice Ex. A ("Compl.") ¶¶ 16, 23-24, 26.)

Plaintiffs filed the instant action in the Superior Court of California for the County of Los Angeles on March 14, 2013. (*See* Compl. 1.) CVS removed the action to this Court on July 1, 2013. (*See generally* Notice.) In the operative complaint, Plaintiffs assert four claims related to CVS' alleged employment policies: (1) violations of California Labor Code ("Labor Code") Section 204 (FAC ¶¶ 33-38); (2) violations of Labor Code Sections 201 and 202 (FAC ¶¶ 40-43); (3) violations of California's Unfair Competition Law (the "UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq*. (FAC ¶¶ 45-49); and (4) penalties pursuant to California's Private Attorney General Act ("PAGA"), Cal. Lab. Code §§ 2698, *et seq.* (FAC ¶¶ 51-58.)

On September 29, 2014, Plaintiffs filed the instant Motion seeking certification of a class (the "Class") defined as "[a]ll current and former employees of CVS Caremark Corporation who held hourly, non-exempt positions such as 'Pharmacist,' or 'Pharmacy Technician,' from March 14, 2009 to the present. (Mot. 7.) Plaintiffs also seek to divide the Class into four subclasses. (Mot. 7.) The first subclass includes all members of the Class who "[w]ere not paid for all hours worked as required by the applicable Labor Code and Industrial Welfare Commission ('IWC') Wage Order [provisions] for any pay period that is within the Class Period" (the "Off-the-Clock Class"). (Mot. 7.) The second subclass consists of all members of the Class who "[w]ere not provided with overtime pay" under the applicable Labor Code and IWC Wage Order provisions (the "Overtime Class"). (Mot. 7.) The third encompasses Class members who "[w]ere not provided with accurate itemized [wage] statements" as required by the Labor Code (the "Wage Statement Class"). (Mot. 7.) The fourth and final subclass includes all Class members who "[w]ere not provided with all wages due and owing at the time of their terminations" as required by the Labor Code (the "Waiting Time Period Class"). (Mot. 7.)

II. DISCUSSION

[3] The Court notes that Plaintiffs' theory as to why CVS' employees have little to no discretion regarding when to fill prescriptions has changed between the filing of the FAC, when Plaintiffs attributed the lack of discretion to a legal regime mandated by state and federal statutes and regulations, and the filing of the instant Motion, where Plaintiffs attribute the lack of discretion to CVS' own prescription refill policies. (*Compare* FAC ¶¶ 25-26 to Mot. 2.)

"Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits; and (2) to protect the rights of persons who might not be able to present claims on an individual basis." *Haley v. Medtronic, Inc*., 169 F.R.D. 643, 647 (C.D. Cal. 1996) (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)). Rule 23(a) of the Federal Rules of Civil Procedure ("Rule 23(a)") provides that a class action is only appropriate if four prerequisites are met: "(1) the class is so numerous that joinder of all members 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 all of these prerequisites are satisfied, the court must then determine whether the class action is maintainable under one of Rule 23(b)'s subdivisions. Fed. R. Civ. P. 23(b).

A party seeking to certify a class may not merely rest on his pleadings. Rather, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are **in fact** sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541, 2551 (2011) (emphasis in original). "[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982). Trial courts are expected to engage in a "rigorous analysis" to determine if the prerequisites of Rule 23 have been satisfied. *Dukes*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 161). This rigorous analysis will often "overlap with the merits of the plaintiff's underlying claim." *Id.*; *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. __, 133 S. Ct. 1184, 1195 (2013) ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.").

A. Rule 23(a) Requirements

1. Ascertainability

"As a threshold matter, and apart from the explicit requirements of Rule 23(a), the party seeking class certification must demonstrate that an identifiable and ascertainable class exists." *Quezada v. Con-Way Freight, Inc.,* No. CV 09-03670 JSW, 2012 WL 4901423, at *2 (N.D. Cal. Oct. 15, 2012) (citing *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009)). "Although there is no explicit requirement concerning the class definition in [Rule 23], courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed." *Schwartz v. Upper Deck Co.,* 183 F.R.D. 672, 679-80 (S.D. Cal. 1999) (citation omitted). A class is ascertainable "if its members can be ascertained by reference to objective criteria." *Id.* at 680; *see also In re TFT-LCD (Flat Panel) Antitrust Litig.,* 267 F.R.D. 583, 592 (N.D. Cal. 2010). Plaintiffs argue that the Class is ascertainable because Class members are identifiable by objective criteria related to their job titles and dates of employment. (*See* Mot. 9.) With regard to

the Plaintiffs' proposed Class of current and former CVS employees who hold or held hourly, non-exempt positions such as pharmacist or pharmacy technician between March 14, 2009 and the present, the Court agrees. (*See* Mot. 7.)

CVS argues that Plaintiffs' proposed sub-classes, described as the Off-the-Clock Class, Overtime Class, Wage Statement Class, and Waiting Time Period Class (together, the "Sub-Classes"), are impermissible "fail safe" classes. (Opp'n 8.) A fail safe class is one that "impermissibly determines membership based upon a determination of liability." *Lewis v. First Am. Title Ins.,* 265 F.R.D. 536, 551 (D. Idaho 2010); *see also Brazil v. Dell Inc.,* 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008) (finding that the proposed class was a fail safe class that could not be ascertained where identifying the proposed class members would require the court to make a legal determination as to defendant's liability). The Ninth Circuit has not expressly held that fail safe classes are impermissible, but has indicated that "obvious problems" arise "when the class itself is defined in a way that precludes membership unless the liability of the defendant is established," including unfairness to the defendant and difficulties determining which individuals should receive the class notice. *See Kamar v. RadioShack Corp.,* 375 Fed. Appx. 734, 736 (9th Cir. 2010). Other circuits have held that fail safe classes are improper. *See, e.g., Messner v. Northshore Univ. HealthSystem,* 669 F.3d 802, 825 (7th Cir. 2012); *Randleman v. Fid. Nat'l Title Ins. Co.,* 646 F.3d 347, 352 (6th Cir. 2011). Because identifying the members of the Sub-Classes would require the Court to determine CVS' liability under several of California's wage and hour laws, Plaintiffs have failed to carry their burden of proving that the Sub-Classes are precise, objective, and presently ascertainable. *See Brazil,* 585 F.2d at 1167 (quoting *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 416 (C.D. Cal. 2000)).

CVS argues that because Plaintiffs' Sub-Classes are fail safe classes, "certification should be denied on this ground." (Opp'n 9.) In light of the fact that the Ninth Circuit has not expressly forbidden fail safe classes, *see In re Autozone, Inc., Wage & Hour Emp't Practices Litig.,* 289 F.R.D. 526, 546 (N.D. Cal. 2012) (citing *Heffelfinger v. Elec. Data Sys. Corp.,* No. CV 07-00101 MMM, 2008 WL 8128621, at *10 n.57 (C.D. Cal. Jan. 7, 2008)), the Court declines CVS' invitation to deny certification on this ground alone. "Rather than denying certification on the basis of the fail safe definition, the Court [has] discretion [] to redefine the class" to avoid the fail safe problem. *In re Autozone,* 289 F.R.D. at 546. Because Plaintiffs' proposed Class of approximately 5,000 hourly, non-exempt CVS employees is ascertainable by reference to objective criteria, the Court finds that Plaintiffs' primary proposed Class, unlike the proposed Sub-Classes, is ascertainable. *See Schwartz,* 183 F.R.D. at 580.

2. Numerosity

The numerosity requirement is met where the party seeking certification shows the class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs allege

that according to CVS' corporate records, "there are more than 5,000 [C]lass members." (*See* Mot. 10; Decl. of Janine Menhennet in Supp. of Pls.' [Mot.] ("Menhennet Decl.") ¶ 6, ECF No. 42-2.) CVS does not dispute that the proposed class meets Rule 23(a)'s numerosity requirement or that joinder of its California pharmacy employees would be impracticable. (*See generally* Opp'n, ECF No. 44.) The Court concludes that the Class is sufficiently numerous under Rule 23(a).

3. Commonality

Commonality under Rule 23(a)(2) "requires the plaintiff to demonstrate that the class members have suffered the same injury." *Dukes*, 131 S. Ct. at 2551 (internal citation and quotation marks omitted). This "does not mean merely that they have all suffered a violation of the same provision of law." *Id.* Rather, class-wide claims "must depend upon a common contention . . . of such a nature that . . . determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*.; *accord Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (common answers generated must be "apt to drive the resolution" of class claims). "In order to assess commonality, 'it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.'" *Ellis v. Costco Wholesale Corp.,* 285 F.R.D. 492, 506 (N.D. Cal. 2012) (quoting *Gen. Tel. Co. of Sw.,* 457 U.S. at 160). However, "[t]he court may not go so far . . . as to judge the validity of [the] claims." *United Steel Workers v. ConocoPhillips Co.,* 593 F.3d 802, 808 (9th Cir. 2010) (citation omitted). For the purposes of demonstrating commonality, "even a single common question will do." *Dukes,* 131 S. Ct. at 2556 (internal quotations marks and formatting omitted) (citation omitted); *see also Mazza v. Am. Honda Motor Co.,* 666 F.3d 581, 589 (9th Cir. 2012) ("[C]ommonality only requires a single significant question of law or fact.").

Plaintiffs allege that the following questions, which are common to the Class members, are apt to generate common answers: (1) whether the Class members worked off-the-clock hours for which they were not compensated by CVS (Mot. 11); (2) whether CVS' policies discouraged its employees from reporting all hours worked, including overtime hours (Mot. 14); (3) whether CVS provided accurate wage statements to its pharmacy employees (Mot. 16); and (4) whether CVS is liable for waiting time penalties for failing to timely pay wages to its former employees upon termination. (Mot. 16-17.) Plaintiffs maintain that this case, and the questions posed therein, do not turn on individualized inquiries or subjective evidence because CVS' liability can be established by cross-referencing the Class members' timekeeping records with the prescription records tracked in the Rx Connect database. (*See* Mot. 9, 14, 16-17.) CVS disputes Plaintiffs' characterization of and proposed use for the Rx Connect data, maintaining that for several reasons, "Rx Connect records cannot establish whether a particular employee was performing work." (Opp'n 1-2.)

a. Off-the-Clock Hours

Plaintiffs argue that CVS should be required to pay compensation for the off-the-clock hours worked under the applicable IWC wage order, (*see* FAC ¶ 31; Mot. 7), but do not specify which of the IWC's wage orders applies to the Class members. (*See generally* FAC; Mot.) The IWC's wage order number 7-2001 ("Wage Order 7-2001") applies to "all persons employed in the mercantile industry whether paid on a time, piece rate, commission, or other basis." Cal. Code Regs. tit. 8, § 11070.1. The "Mercantile Industry" is defined as "any industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail." Cal. Code Regs. tit. 8, § 11070.2(H). Because CVS self-describes as a retail pharmacy chain, (*see* Stanley Decl. ¶ 3; Opp'n 3), Wage Order 7-2001 is likely applicable to the Class members. The IWC's wage order number 4-2001 ("Wage Order 4-2001"), which applies to "all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis," may also apply to the Class members. *See* Cal. Code Regs. tit. 8, § 11040.1. Wage Order 4-2001 explicitly exempts pharmacists like the Class members from its professional exemption to the overtime requirement. *See* Cal. Code Regs. tit. 8, § 11040.1(A)(3)(f). Because both Wage Order 7-2001 and Wage Order 4-2001 (together, the "Wage Orders") include nearly identical definitions of the term hours worked, *compare* Cal. Code Regs. tit. 8, § 11070.2(G) *with* Cal. Code Regs. tit. 8, § 11040.2(K), the Court need not decide, for the purposes of this Order, which wage order applies to the Class members.

Under California law, an employee is generally entitled to receive overtime wages equal to one and one-half times his regular pay for hours worked in excess of forty hours per week or eight hours per day. *See Greko v. Diesel U.S.A., Inc.,* 277 F.R.D. 419, 422 (N.D. Cal. 2011) (citing Cal. Lab. Code § 510(a)). The Wage Orders define "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." *See* Cal. Code Regs. tit. 8, § 11070.2(G); Cal. Code Regs. tit. 8, § 11040.2(K). Hours worked may encompass unauthorized overtime where the employer suffers or permits the employee to work because he "knows or has reason to believe that [the employee] is continuing to work and the time is working time." *Morillion v. Royal Packing Co.,* 22 Cal. 4th 575, 585 (2000) (internal quotation marks and citation omitted). Thus, "'[a] plaintiff may establish liability for [unpaid, off-the-clock overtime] by proving that (1) he performed work for which he did not receive compensation; (2) that defendants knew or should have known that plaintiff did so; but that (3) the defendants stood idly by.'" *Jimenez v. Allstate Ins. Co.,* 765 F.3d 1161, 1165 (9th Cir. 2014) (quoting *Adoma v. Univ. of Phx., Inc.,* 270 F.R.D. 543, 548 (E.D. Cal. 2010)).

Cognizant that commonality is unlikely to exist where determining whether employees worked off-the-clock hours requires individualized information "from every potential class member," *see*

Hadjavi v. CVS Pharmacy, Inc., No. CV 10-04886 SJO, 2011 WL 3240763, at *5 (C.D. Cal. July 25, 2011), Plaintiffs argue that the Rx Connect data provides accurate records of the off-the-clock worked performed by each CVS employee. (Mot. 1-3.) More specifically, Plaintiffs maintain that the System allows one to compare each Class member's time records with his or her Rx Connect data in order to calculate the number of hours the Class member worked off-the-clock. (Mot. 11; Decl. of Wesley L. Nutten in Supp. of Pls.' [Mot.] ("Nutten Decl.") ¶ 18, ECF No. 42-3.) Cross-matching the Class members' time records with the prescription records from Rx Connect, Plaintiffs argue, reveals that the Class members worked off-the-clock hours, before or after their scheduled shifts, for nearly 20% of shifts.[4] (Mot. 1-2; *see* Nutten Decl. ¶ 16.) Plaintiffs contend that "as long as [their] theory of liability is susceptible to common proof–[here, by] cross-referencing time records with prescription records–[this] case is suitable for class certification." (Mot. 3.)

CVS argues that the "[p]rescription records cannot serve as proxies for time worked." (Opp'n 9.) First, during the beginning of the Class period, and prior to adopting Rx Connect in all of its California stores, CVS used a different credentialing system for its prescription records (the "Prior System"). (Beaumariage Decl. ¶¶ 6-7.) With the Prior System, pharmacy employees were assigned a permanent two-letter credential, which was usually comprised of his or her initials. (Beaumariage Decl. ¶ 7.) Because credentials were not secret, and employees frequently used the credentials of other employees, CVS initiated a new credentialing process when it introduced the Rx Connect system. (Beaumariage Decl. ¶ 7.) CVS argues that its employees' use of other employees' credentials means that "[t]he only way to determine if an employee worked is to ask that employee [or] otherwise investigate." (Opp'n 9.) The Prior System was completely replaced by Rx Connect at all of CVS' California stores in September 2010. (Beaumariage Decl. ¶ 8.)

Second, CVS maintains that the Rx Connect records cannot be relied on to determine a Class member's off-the-clock hours because, for numerous reasons, the System may not accurately reflect which employee performed which task. (Opp'n 9-10.) For example, one of CVS' Pharmacy Supervisors declared that a common problem she observed at several of CVS' pharmacies was employees requesting and using each other's Credentials, particularly to perform those tasks reserved for pharmacists. (Def.'s App. Tab 6 ("Kile Decl.") ¶ 3, ECF No. 46-3.) The CVS declarants also stated that it was a common practice for employees to tape their Credentials to equipment in the pharmacy in order to make it easier to scan the Credential before completing a task. (Kile Decl. ¶¶ 3-4; Mohammadkhani Decl. ¶ 4; Def.'s App. Tab 12 ("Do Decl.") ¶ 5, ECF No. 46-4.) Taping Credentials around the work station sometimes results in employees

[4] An accountant and litigation consultant hired by Plaintiffs derived the 18.8% figure from a random sample of approximately 6,417 work days during the Class period. (*See* Mot. 2 n.4; Nutten Decl. ¶¶ 1-2, 12, 14, 16.)

inadvertently scanning the Credentials of others when completing a transaction or leaving their Credentials behind when their shifts ended. (Kile Decl. ¶¶ 3-4; Do Decl. ¶ 5; Def.'s App. Tab 13 ("L. Huynh Decl.") ¶ 6, ECF No. 46-4; Def.'s App. Tab 17 ("McPhillips Decl.") ¶ 5, ECF No. 46-4; Def.'s App. Tab 21 ("Strahan Decl.") ¶ 5, ECF No. 46-4.)[5] Although Pharmacy Supervisors generally admonish employees who fail to safeguard their Credentials by taping them to equipment or otherwise leaving them in public view, such practices have occurred in numerous stores. (*See* L. Huynh Decl. ¶ 6 (Downey store); Kile Decl. ¶¶ 3-4 (Goleta store, as well as numerous stores in District 6 of Region 65); Mohammadkhani Decl. ¶¶ 4-6 (numerous stores in Region 60); McPhillips Decl. ¶ 5 (Riverside store); Strahan Decl. ¶ 5 (same); Def.'s App. Tab 22 ("Taylor Decl.") ¶ 5, ECF No. 46-4 (Los Angeles store).)

Employees have also used Credentials belonging to others when unable to use their own, (Def.'s App. Tab 10 ("Bangchan Decl.") ¶ 6, ECF No. 46-4 (used another employee's Credentials during a system outage); Taylor Decl. ¶ 5 (used another employee's Credentials rather than walking across the pharmacy to retrieve her own), or loaned their Credentials to new hires who cannot yet generate Credentials on Rx Connect. (Bangchan Decl. ¶ 6.) Further, because Rx Connect does not maintain a history of which Credentials are active for which employees at a given store, the data cannot be used to determine which employee was assigned to which Credential at any given time. (Franko Decl. ¶ 5.)

Plaintiffs' declarations controvert CVS' arguments about the pervasiveness of Credential-sharing. The declarants maintain that because dispensing medications involves serious, life and death

[5] Plaintiffs object to the declarations of several of CVS' witnesses who claimed that they saw CVS employees taping their Credentials in plain sight on lack of personal knowledge, foundation, hearsay, and prejudice grounds, arguing that no evidence is presented that the witnesses saw an employee scanning Credentials belonging to another. (*See* Pls.' Objections to Non-Expert Decls. Submitted by Def. CVS in Supp. of [Opp'n] 2-5, ECF No. 47-6.) The testimony to which Plaintiffs object does not involve allegations that the witnesses saw one employee scanning the Credentials of another, only that the visibility of the Credentials made the inadvertent use of another employee's Credentials possible. (*See, e.g.,* Do Decl. ¶ 5 ("It is possible, through the hustle and bustle in the pharmacy, for someone to grab and scan the wrong [C]redentials by mistake when working in Rx Connect"); Strahan Decl. ¶ 5 ("With all of the different [C]redentials stuck to the scanner, it was possible to mistakenly scan someone else's [C]redentials").) These observations are based on personal knowledge, (*see, e.g.,* Do Decl. ¶ 1; Strahan Decl. ¶ 1), relevant to the question of whether the Rx Connect data accurately reflects employees' off-the-clock hours, and the probative value of such observations is not substantially outweighed by the risk of prejudice to Plaintiffs. Plaintiffs' objections are overruled.

implications, they are careful to safeguard their Credentials. (Suppl. Decl. of Richard Allen in Supp. of Pls.' [Mot.] ("Allen Suppl.") ¶ 3, ECF No. 47-4; Suppl. Decl. of Isabel Alexander in Supp. of Pls.' [Mot.] ("Alexander Suppl.") ¶ 3, ECF No. 47-2; Suppl. Decl. of Susan Howard in Supp. of Pls.' [Mot.] ("Howard Suppl.") ¶ 3, ECF No. 47-3.) Howard and Alexander state that they have never observed other CVS employees sharing their Credentials. (Howard Suppl. ¶ 4; Alexander Suppl. ¶ 3.) Alexander indicates that she has been instructed not to share her Credentials, (Alexander Suppl. ¶ 3), while Howard contends that sharing her Credentials would place her pharmacist's license at risk. (Howard Suppl. ¶ 4.)

Third, CVS argues that Plaintiffs' theory of liability, which relies on the Rx Connect data to establish when Class members worked off-the-clock, cannot be used to verify hours for several off-the-clock tasks that Plaintiffs allegedly performed because these specific tasks are not recorded in Rx Connect. (Opp'n 10). Such off-the-clock tasks include: transferring merchandise between or within stores; making phone calls to customers, doctors' offices, or insurance companies; consulting customers about new prescriptions; and putting away supplies or medications. (Howard Decl. ¶¶ 4, 5, 13, 17; Alexander Decl. ¶¶ 10, 12, 15, 23, 27; Def.'s App. Tab 8 Ex. G ("Howard Dep.") 35-36, 40-41.) CVS contends that "[n]one of th[ese] activit[ies are] reflected in Rx Connect." (Opp'n 10.)

Similarly, CVS argues that Plaintiffs' theory of liability is at odds with the testimony of one of its named Plaintiffs: Howard. (Opp'n 11.) CVS maintains that several of Howard's off-the-clock activities, including transporting medications and giving flu shots, (*see* Howard Dep. 35-36, 41-42; Howard Decl. ¶¶ 4, 12), are not activities which can be recorded by Rx Connect. (Opp'n 11.) CVS also contends that Howard's testimony that she only verified prescriptions off-the-clock once or twice belies a theory that the Class members can rely on the Rx Connect data to accurately establish the number of hours worked off-the-clock as a general matter. (Opp'n 11; *see* Howard Dep. 44.)

To meet Rule 23(a)'s commonality requirement, Plaintiffs must show that the common question of whether the Class members worked off-the-clock hours for which CVS failed to compensate them is likely to generate a common answer. *See Dukes,* 131 S. Ct. at 2551. Plaintiffs argue that the Rx Connect data is capable of providing a common answer to this question. (*See* Mot. 1-2.) The Court notes that if the Class members' off-the-clock tasks are not the type of work susceptible to being captured by the Rx Connect data, then the data is not likely to generate a common answer as to whether CVS failed to compensate its employees for off-the-clock work. (*See also* Opp'n 10-11.) Plaintiffs cede this point, agreeing that the Rx Connect records do not allow them

to "recreate **all** time spent off-the-clock." (Reply 6.)[6] Plaintiffs argue, however, that "they **can** recreate all time spent on Rx Connect, and [they] do not seek to recover for time they cannot prove." (Reply 6.)

As indicated, to establish their off-the-clock claims, Plaintiffs must prove that: (1) the Class members performed work for which they did not receive compensation; (2) CVS knew or should have known that the Class members performed uncompensated work; and (3) CVS stood idly by despite this knowledge. *See Jimenez,* 765 F.3d at 1165. The Court examines whether Plaintiffs' common questions are apt to drive a common answer to the elements of Plaintiffs' claims in turn. *See id.*

i. Off-the-Clock Claim Analysis

The first element of Plaintiffs' off-the-clock claim requires that they show that the Class members performed work for which they did not receive compensation. *See Jimenez,* 765 F.3d at 1165; *Adoma,* 270 F.R.D. at 548. Plaintiffs seek to rely on the Rx Connect data to demonstrate that this common question is susceptible to common proof by comparing the Class members' time records to the recorded times at which they performed tasks in the Rx Connect system. (Mot. 1-2, 14.) Of the 6,417 workdays analyzed by Plaintiffs' expert, the Rx Connect database recorded 568 instances of prescriptions being processed before employee clocked in for the day and 782 instances of prescriptions being processed after the employee clocked out. (Nutten Decl. ¶¶ 12-14.) In total, the 1,345 instances of off-the-clock work comprised 18.8% of the 6,417 work days analyzed. (Nutten Decl. ¶ 16.) CVS' expert analyzed the same data provided to Plaintiffs' expert. (Def.'s App. Tab 9 ("Crandall Report")[7] ¶ 25, ECF No. 46-3.) CVS' expert

[6] Plaintiffs' late-filed Reply, which is eight pages in length, fails to comply with this Court's five-page limit for reply briefs. (*See* ISO ¶ 19). Plaintiffs' timely-filed Motion, which is twenty-three pages, is also overlong. (*See* ISO ¶ 19 ("[N]o memorandum or points and authorities . . . may exceed twenty pages.")). In order to fully consider the parties' arguments for the purpose of adjudicating this Motion, the Court elects to accept Plaintiffs' overlong pleadings. However, Plaintiffs are admonished to abide by this Court's ISO and the Local Rules in all future proceedings or risk sanctions.

[7] Plaintiffs object to the Crandall Report in its entirety on relevance, prejudice, lack of personal knowledge, and lack of foundation grounds. (*See generally* Pls.' Objections to the Report of Robert Crandall, MBA Submitted by Def. CVS in Supp. of [Opp'n], ECF No. 47-5.) Plaintiffs' objections are overruled. For the purposes of this Order, the Court does not consider or rely on the Crandall Report to the extent that CVS' expert offers improper legal conclusions or otherwise seeks to address merits of the case, such as damages, which

arrived at a similar figure to the one offered by Plaintiffs' expert, finding that, on average, 17.9% of employees' shifts included transactions recorded in the Rx Connect system that fell outside of the window during which the employee was on-the-clock. (Crandall Report ¶¶ 1 n.1, 34; *see also* Crandall Report ¶ 34, Ex. 10.)

The second element of Plaintiffs' off-the-clock claims requires that they show that CVS knew or should have known that the Class members were performing work without compensation. *See Jimenez,* F.3d at 1165. This is because under California law, liability for off-the-clock hours worked is "contingent on proof [the employer] knew or should have known off-the-clock work was occurring." *Brinker Rest. Grp. v. Super. Ct.,* 53 Cal. 4th 1004, 1051 (2012) (citing *Morillion,* 22 Cal. 4th at 585; *White v. Starbucks Corp.,* 497 F. SNovember 17, 2014upp. 2d 1080, 1083-85 (N.D. Cal. 2007)). CVS argues that Plaintiffs have failed to provide evidence establishing that "CVS was actually aware [that off-the-clock] work occurred." (Opp'n 14.) Plaintiffs contend that "if a defendant's business records can prove that its employees were working off-the-clock, knowledge can be imputed to [the] defendant." (Mot. 11.) Plaintiffs cite *Adoma* and *Jimenez v. Allstate Ins. Co.,* No. CV 10-08486 JAK, 2012 WL 1366052 (C.D. Cal. Apr. 18, 2012), for this proposition. (*See* Mot. 11.)

In *Adoma,* the plaintiffs sought to use the defendant employer's computer login and phone records to support their off-the-clock claims. *See Adoma,* 270 F.R.D. at 548. The *Adoma* court recognized several deficiencies with using the employer's login and phone records to establish liability for the plaintiffs' off-the-clock claims, including: employees logging in before beginning work; employees forgetting to login; technical issues with the phone system; employees' inability to login from some locations; the records' inability to capture times at which employees were logged in but did not perform work; employees' failure to use the correct code to log their work; and the inability of employees to correct errors or omissions in their phone records. *Id.* at 549-50. Based on these deficiencies, the *Adoma* court stated that "there are reasons to think that any method of reconstructing records of hours worked using the [phone records] will be imperfect [and r]ecognition of these imperfections invites individualized inquiries into their scope." *Id.* at 550. The *Adoma* court nevertheless afforded the plaintiffs an opportunity to overcome the records' deficiencies by relying on a sample of "representative inquiries whose results will be extrapolated to the class," as permitted by the Ninth Circuit in *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). *Id.* In *Dukes,* the Supreme Court disapproved of the use of *Hilao's* sampling approach to establish an employer's liability where it prevented the employer from asserting its statutory defenses to the each of the plaintiffs' individual claims. *See Dukes,* 131 S. Ct. at 2550, 2561.

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extend beyond the scope appropriate for a motion for class certification.

In *Jimenez,* the court permitted the use of statistical sampling to establish the "pattern or practice" of overtime work by the defendant's employees, but indicated that, "in light of *Dukes*, [the plaintiff had] not met his burden of affirmatively demonstrating that statistical sampling is a proper method of calculating individual damages." *Jimenez,* 2012 WL 1366052, at *14-15. In the Ninth Circuit, individualized "damage calculations alone cannot defeat [class] certification." *See Yokoyama v. Midland Nat'l Life Ins. Co.,* 594 F.3d 1087, 1094 (9th Cir. 2010). Accordingly, the *Jimenez* court granted the plaintiff's motion for class certification as to his unpaid overtime claims on the issue of liability but not damages. *See Jimenez,* 2012 WL 1366052, at *15, 22. The Ninth Circuit affirmed. *See Jimenez v. Allstate Ins. Co.,* 765 F.3d 1161 (9th Cir. 2014).

Plaintiffs indicate that "[a]t trial, the experts will analyze all shifts and proof will not be based on [sampling]" because "Rx Connect data and payroll data is available for all shifts." (Reply 6 n.13.) However, while there is no indication that Plaintiffs intend to resort to the sampling disapproved of in *Dukes* to establish liability or damages at trial, several shortcomings with the Rx Connect records undermine Plaintiffs' assertion that there is a common question presented as to whether knowledge of the Class members' off-the-clock work can be imputed to CVS "in light of its access" to the Rx Connect data. *Cf. Jimenez,* 2012 WL 1366052, at *10.

First, CVS' argument that the Rx Connect records "[were] not created for timekeeping or to otherwise be the sole and definitive source as to who worked on a prescription," (*see* Opp'n 2), is supported by the record. CVS' IT Director declares that Rx Connect is designed to allow employees to "initiate and carry out the prescription filling process" and track the copious amounts of prescription data generated as part of this process. (Franko Decl. ¶¶ 3-4.) Because the System does not track which Credentials were assigned to which employee at a given time, there is no mechanism by which CVS can determine whether the same Credential was active for multiple employees in the same store during the same shift or which employee was assigned which Credential at any specific time. (Franko Decl. ¶ 5.) CVS' declarations regarding the practice of Credential-sharing also highlight the difficulties with ascertaining whether the Rx Connect data accurately reflects the off-the-clock work performed by a specific employee, though Plaintiffs' counter-declarations indicate that the practice may not have been widespread. *See supra* Part II.A.3.a.

Second, Plaintiffs' expert was required to sift through and eliminate a significant portion of the available Rx Connect data in order to arrive at his figure regarding the number of shifts during which CVS employees worked off-the-clock precisely due to the data's deficiencies as a timekeeping mechanism. Because the Rx Connect does not represent the "true first and last prescription record for each employee on [a given] date," Plaintiffs' expert was required to limit his data pool to those shifts beginning after 6:00 am, ending before 8:00 pm, and involving only regular, eight-hour shifts rather than part-time or graveyard shifts. (Nutten Decl. ¶¶ 6, 9-10.) Plaintiffs' expert indicated that this paring down was necessary in order to eliminate data that

resulted in "false positives" for off-the-clock work. (Nutten Decl. ¶ 10.) Although Plaintiffs argue that they plan to use the data from all of the Class members' shifts at trial, (*see* Reply 6 n.13), they offer no means by which this data can be utilized without eliminating part-time or graveyard shifts or otherwise encountering the same difficulties that caused their expert to pare down the data from 17,750 to 6,417 work days. (*See generally* Reply; *see* Nutten Decl. ¶¶ 7, 11.)

Third, CVS' policy requires that all employees review their time cards on a weekly basis before signing a certification stating that their time cards reflect all hours worked. (*See* Stanley Decl. ¶ 4, Ex. A ("Timekeeping Police") 1.) Employees are also instructed to contact their supervisor or human resources person if they were not paid correctly for all hours worked. (Stanley Decl. ¶ 5; Timekeeping Policy 3.) Several CVS employees testified that they were paid for all hours worked, including overtime. (*See, e.g.,* Bangchan Decl. ¶¶ 3-4; Def.'s App. Tab 11 ("Cruz Decl.") ¶¶ 3-4; Do Decl. ¶¶ 3-4; L. Huynh Decl. ¶¶ 3-5; Def.'s App. Tab 14 ("T. Huynh Decl.") ¶¶ 3-5; Def.'s App. Tab 15 ("Laughlin Decl.") ¶¶ 3-5; Def.'s App. Tab 16 ("Matthews Decl.") ¶¶ 3-4; McPhillips Decl. Decl. ¶ 3; Def.'s App. Tab 18 ("Rubaclava Decl.") ¶ 3; Def.'s App. Tab 19 ("Perez Decl.") ¶¶ 3-5; Def.'s App. Tab 20 ("Sampey Decl.") ¶¶ 3-5; Strahan Decl. ¶¶ 3-4; Taylor Decl. ¶¶ 3-4.) Further, in approximately 46% of the shifts analyzed by both experts which involved off-the-clock work, Defendant's expert indicated that the employee also recorded overtime. (Crandall Decl. ¶ 8.) CVS argues that this large percentage of shifts involving both recorded and unrecorded overtime calls for individualized inquiries because it "[begs] the question of why some overtime would have been recorded while other overtime supposedly off-the-clock." (Opp'n 12.) The Court agrees.

ii. Conclusion Regarding Plaintiffs' Off-the-Clock Claims

Commonality requires that the Class members' claims "must depend upon a common contention of such a nature . . . that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S. Ct. at 2551. Here, for several reasons, the Rx Connect data appears to be poor "glue" for holding together Plaintiffs' claims. *See id.* at 2552. First, the data's deficiencies leave open questions regarding: (1) whether the Credentials can be used to identify which employee performed which task and (2) why an employee would record some but not all of his or her overtime for one shift. Such shortcomings, in turn, invite individualized inquiries. When determining whether to certify a class, "courts are comfortable with individualized inquires as to damages, but are decidedly less willing to certify classes where individualized inquiries are necessary to determine liability." *Kurihara v. Best Buy Co.,* No. CV 06-01884 MHP, 2007 WL 2501698, at *9 (N.D. Cal. Aug. 30, 2007) (collecting cases). Further, Plaintiffs' expert's analysis suggests that some shifts cannot be analyzed without creating false positives for off-the-clock work, (*see* Nutten Decl. ¶¶ 6-7, 9-11), which undermines Plaintiffs' argument that they will not be required to resort to sampling in order to prove liability. To establish their off-the-clock claims, Plaintiffs must prove that: (1) the Class members performed work for

which they did not receive compensation; (2) CVS knew or should have known that the Class members performed uncompensated work; and (3) CVS stood idly by despite this knowledge. *See Jimenez,* 765 F.3d at 1165. Based on the shortcomings of the Rx Connect data as a mechanism to track the Class members' time, the Court finds that Plaintiffs' question of whether the Class members worked off-the-clock hours for which they were not compensated by CVS, (*see* Mot. 11), is not likely to generate a common answer. *Dukes,* 131 S. Ct. at 2552.

b. CVS' Overtime Policy

According to the California Supreme Court, "evidence of a systematic company policy to pressure or require employees to work off-the-clock," may support Class certification. *Brinker,* 53 Cal. 4th at 1051 (collecting cases). However, "where no substantial evidence points to a uniform, companywide policy," and "proof of off-the-clock liability would have had to continue in an employee-by-employee fashion," class certification is inappropriate. *See id.*

Plaintiffs allege that a common question exists as to whether CVS' policies discouraged its employees from reporting all hours worked, including overtime hours. (Mot. 14.) Plaintiffs do not dispute that CVS has a written policy prohibiting off-the-clock work. (Mot. 14 n.8.) Instead, Plaintiffs argue that despite the existence of its written policy prohibiting off-the-clock work, CVS had a *de facto* practice of failing to pay its workers for all hours worked and promulgated a "corporate culture" in which overtime was disfavored. (Mot. 5, 12.) More specifically, Plaintiffs contend that "CVS' written policies and actual practices had the effect of deterring the recording of actual hours worked, including overtime." (Mot. 14.)

To support this contention, Plaintiffs rely heavily on the deposition testimony of Brian Berninger ("Berninger"), the individual whom Plaintiffs' deposed as CVS' person most knowledgeable regarding pharmacy policies and procedures. (*See* Menhennet Decl. ¶ 7, Ex. E[8] ("Berninger Dep.").) At his deposition, Berninger testified that CVS has no control over how many prescriptions it must fill each day. (Berninger Dep. 46.) Berninger also testified that CVS has a pre-approval process for overtime, meaning that a CVS employee must call her supervisor or otherwise seek her supervisor's permission before working overtime. (*See* Berninger Dep. 46-47; Menhennet Decl. ¶¶ 10-11, Exs. H, I.) Berninger indicated that he would "discuss possible solutions, other than overtime" with employees seeking pre-approval, but he would not "disapprove it." (Berninger Dep. 47-48.)

[8] CVS objects to several of the exhibits attached to the Menhennet Declaration on lack of foundation, lack of authentication, improper expert testimony, and hearsay grounds. CVS' objections to Exhibit C, documentation of Alexander's hours generated by Plaintiffs' counsel, are sustained. All other objections are overruled.

When asked about CVS' prescription filling process, Berninger indicated that the Rx Connect system has a wait-time calculator that will record when a customer is waiting for a prescription to be filled. (Berninger Dep. 13.) Plaintiffs filed several declarations in which CVS employees testified that when prescriptions "go red" because the prescriptions' due time in the wait-time calculator expires, they risk receiving verbal or written reprimands from their supervisors. (*See, e.g.,* Decl. of Richard Allen in Supp. of Pls.' [Mot.] ("Allen Decl.") ¶ 5, ECF No. 42-6; Alexander Decl. ¶¶ 4-5, 7; Decl. of Talya Bakmajian in Supp. of Pls.' [Mot.] ("Bakmajian Decl.") ¶ 3, ECF No. 42-7; Howard Decl. ¶ 6.) Alexander testified that the most commonplace reason she would work off-the-clock was to prevent prescriptions from "going red." (Alexander Decl. ¶ 8.) Howard testified that despite the fact that she told both of her managers that she was working off-the-clock to verify prescriptions, her managers neither disciplined her for working off-the-clock nor adjusted her hours to be sure that she was compensated for this work. (Howard Decl. ¶¶ 10-11.)

Finally, Plaintiffs seek to rely on a document labeled "9657 Challenge Store/Rx Action Plan," which was distributed to the pharmacy staff at the store where Alexander works ("Store 9657"), to demonstrate that "[e]ntire pharmacy departments are disciplined when wait times exceed the promised time." (Mot. 4; *see* Menhennet Decl. ¶ 9, Ex. G ("Action Plan"); Alexander Suppl.¶ 5.) The Action Plan indicates that it was added to the personnel files of the employees working at the 9657 Store, including Alexander's, and that failure to comply with company standards would "result in further disciplinary action up to and including termination." (Action Plan 2; Alexander Suppl. ¶ 5.) The Action Plan refers to several issues at the 9657 Store, including employees: failing to properly clean or organize their work stations, abandoning their assigned roles and stations, and neglecting to follow through with their promises to customers. (*See* Action Plan 1.) Other problems identified in the Action Plan included "general attendance issues" and "[m]edical issues due to lack of training." (*See* Action Plan 1.) Only some of the issues identified in the Action Plan, such as a lack of urgency "from associates working in drop off and production" and "waiters" not being called out or being improperly entered into the system, appear to relate to employees failing to meet the waiting times set by the Rx Connect system. (*See* Action Plan 1.)

Based on the above, Plaintiffs argue that despite the CVS managers' knowledge that "overtime cannot always be anticipated, CVS maintains its preapproval rule for overtime." (Mot. 5.) Plaintiffs argue that this preapproval rule, combined with CVS' concern with assuring that its customers receive the prescriptions in a timely manner, creates an environment in which CVS systematically deterred its employees from recording their actual hours worked. (Mot. 14.) *See Brinker,* 53 Cal. 4th at 1051.

In its Opposition, CVS places a great deal of emphasis on its California-wide policies prohibiting employees from working off-the-clock. (*See* Opp'n 4-5, 15-18.) CVS' written policies expressly prohibit off-the-clock work (*see* Stanley Decl. ¶ 4, Ex. B ("Timekeeping Notice")) and employees who violate CVS' timekeeping policy may be subject to disciplinary action. (Stanley Decl. ¶ 7.)

CVS provides a number of avenues for employees to direct questions regarding its timekeeping policies, including managers at its stores, District managers, human resources personnel, or its ethics hotline. (Stanley Decl. ¶ 6.) Further, numerous CVS employees testified that they are able to correct time entries to reflect their actual time worked, (*see* Cruz Decl. ¶ 4; Do Decl. ¶ 3; T. Huynh Decl. ¶ 4; Laughlin Decl. ¶ 3; Taylor Decl. ¶ 3), and that they have never been disciplined for incurring overtime. (*See* Bangchan Decl. ¶ 4; Matthews Decl. ¶ 4; Strahan Decl. ¶ 4.) Berninger's deposition appears to be in accord with these declarations: although Berninger stated that he would respond to requests for pre-approval by discussing solutions other than overtime, he ultimately concluded that he and his managers would approve requests for overtime when other solutions were not available. (*See* Berninger Dep. 47-48.) Finally, some employees have indicated that they have not needed to seek pre-approval for overtime worked because they have been able to work overtime as needed. (*See, e.g.,* Cruz Decl. ¶ 5 (pharmacy associate whose managers approved overtime "on the spot" when requested); L. Hunyh Decl. ¶ 5 (pharmacy manager who permitted employees to incur overtime on their own "authority" without seeking pre-approval); Matthews Decl. ¶ 4 (pharmacist who has the authority to decide to work overtime "on [her] own").)

Here, CVS' only formal policies "disavow [off-the-clock] work." *See Brinker*, 53 Cal. 4th at 1051. Additionally, based on the conflicting evidence from the parties, it appears that "proof of off-the-clock liability would have had to continue in an employee-by-employee fashion," in order to determine whether employees were pressured to work off-the-clock, disciplined for working overtime, or forced to falsify their time records. *See id.* at 1052. In light of the declarations indicating that pre-approval policy varied from manager to manager, (*see* Cruz Decl. ¶ 5; L. Hunyh Decl. ¶ 5; Matthews Decl. ¶ 4), an employee-by-employee inquiry would also be necessary to discern whether CVS required pre-approval for overtime at each of its 850 stores in California. Due to the apparent lack of a "common policy" encouraging off-the-clock work, *see id.* at 1051, the Court finds that Plaintiffs' question of whether CVS' policies discouraged its employees from reporting all hours worked, (Mot. 14), is not likely to generate a common answer. *See Dukes,* 131 S. Ct. at 2552.

c. Wage Statements & Waiting Time Penalties

As suggested in the Court's discussion of fail safe classes, Plaintiffs' third and fourth questions regarding whether CVS is liable for wage statement or waiting time penalties for failing to pay its employees required wages, (*see* Mot. 16-17), rely on a legal determination as to CVS' liability for overtime pay. *See supra* Part II.A.1. This is because liability for both types of penalties requires a finding that the employer failed to pay its employee the proper wage.

Section 226 of the California Labor Code obligates employers to provide accurate wage statements showing, among other things: gross wages earned, total hours worked, and net wages

earned. Cal Lab. Code § 226(a) ("Section 226(a)"). An employee who suffers an injury cognizable under Section 226 is entitled to penalties. Cal. Lab. Code § 226(e)(1) ("Section 226(e)"). "[A] claim for damages under Section 226(e) requires a showing of three elements: (1) a violation of Section 226(a); (2) that is knowing and intentional; and (3) a resulting injury." *Willner v. Manpower Inc.,* No. CV 11-02846 JST, 2014 WL 1303495, at *8 (N.D. Cal. Mar. 31, 2014) (citing *Reinhardt v. Gemini Motor Transp.,* 879 F. Supp. 2d 1138, 1141 (E.D. Cal. 2012); *see also Alonzo v. Maximus, Inc.,* 832 F. Supp. 2d 1122, 1134 (C.D. Cal. 2011). A violation occurs when the employee's wage statements do not contain information required by Section 226(a). *Willner*, 2014 WL 1303495, at *9. An actual injury arises when the employer's failure to include the information required by Section 226(a) creates "the possibility of not being paid overtime, employee confusion over whether they received all wages owed them, difficulty and expense involved in reconstructing pay records, and forc[es] employees to make mathematical computations to analyze whether the wages paid in fact compensated them for all hours worked." *Alonzo,* 832 F. Supp. 2d at 1135 (citation omitted). Absent a common question regarding CVS' failure to pay its employees for off-the-clock work, the Court has no mechanism by which it may address, on a classwide basis, whether CVS violated Section 226(a) by failing to include overtime or off-the-clock hours on the Class members' wage statements or caused an injury of the type described in *Alonzo* through such an omission.

Similarly, an employer is only liable for waiting time penalties if the "employer willfully fails to pay . . . any wages of an employee who is discharged or quits." Cal. Lab. Code § 203; *see also Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.,* 102 Cal. App. 4th 765, 780 (2002). This means that "if [an employer] owed [its former employees] wages at the time their employment terminated and failed to pay them, it is liable to the employee for penalties." *Road Sprinkler,* 102 Cal. App. 4th at 779. The Court has found that Plaintiffs have failed to raise common questions regarding whether the Class members performed uncompensated, off-the-clock work and whether CVS had a systematic policy of discouraging its employees from reporting all hours worked. *See supra* Parts II.A.3.a-b. Because waiting time penalties may only be incurred for wages owed, *Road Sprinkler,* 102 Cal. App. 4th at 779, absent common questions regarding whether CVS failed to compensate its employees for off-the-clock work, the Court finds no common question regarding CVS' liability for waiting time penalties.

The Ninth Circuit has held that Rule 23's commonality requirement is "construed permissively" so that "[a]ll questions of fact and law need not be common to satisfy the rule." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998). However, *Dukes* requires that classwide proceeds have the capacity to "generate common answers apt to drive the resolution of the litigation." *Dukes,* 131 S. Ct. at 2551 (emphasis omitted) (citation omitted). Although even a single common question will satisfy this prerequisite, for the foregoing reasons, the Court finds that Plaintiffs have failed to establish "the existence of any common question." *See id.* at 2556-57.

Plaintiffs' failure to satisfy the commonality requirement requires the Court to deny the Motion. *See Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1186 (9th Cir. 2001) ("As the party seeking class certification, [plaintiffs] bear[] the burden of demonstrating that [they] ha[ve] met **each** of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b).") (emphasis added) (citation omitted). However, in order to fully address the merits of the parties' pleadings in connection with this Motion, the Court continues with its analysis of the Rule 23 requirements.

4. Typicality

Rule 23(a) requires that "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). "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Typicality tests whether putative class members "have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted); *see also Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon,* 976 F.2d at 508 (citation omitted). "Three factors go into this determination: (1) whether other members have the same or similar injury, [(2)] whether the action is based on conduct which is not unique to the named plaintiffs, and [(3)] whether other class members have been injured by the same course of conduct." *In re Nat'l W. Life Ins. Deferred Annuities Litig.,* 268 F.R.D. 652, 661 (S.D. Cal. 2010) (quoting *Hanon,* 976 F.2d at 508) (internal quotation marks omitted). "Although the representative claims need not 'be substantially identical' to those of absent class members, they must be 'reasonably co-extensive.'" *In re Nat'l W. Life Ins.,* 268 F.R.D. at 661 (quoting *Hanlon*, 150 F.3d at 1020).

CVS does not address the issue of typicality. (*See generally* Opp'n.) Plaintiffs argue that their claims "arise from the same facts and legal theories as the [C]lass members' claims" and that they have been the subject of the same policies and practices by CVS. (Mot. 17.) In short, Plaintiffs allege that they have suffered the same injury as the Class members, based on the same conduct by CVS. *See Hanon* 976 F.2d at 508. Further, there is no indication that the injuries suffered by Howard or Alexander, the persons Plaintiffs seek to have certified as the Class representatives, (*see* Mot. 5-6), suffered an injury based on conduct by CVS that was unique to them. *See id.* Thus, the Court finds that the Plaintiffs have satisfied Rule 23's typicality requirement.

5. Adequacy

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The representative parties in a class action must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). An examination of adequate representation generally consists of two questions: "(1) [d]o the representative plaintiffs and their counsel have any conflicts of interest with other class members[;] and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (citing *Hanlon,* 150 F.3d at 1020). "The adequacy requirement is needed to protect the due process rights of all of the class members, because in a class proceeding, all class members will be bound by the final judgment." *Hughes v. WinCo Foods,* No. CV 11-00644 JAK, 2012 WL 34483, at *7 (C.D. Cal. Jan. 4, 2012) (citing *Richards v. Jefferson Cnty.*, 517 U.S. 793, 800-01 (1996)).

With regard to their counsel, Plaintiffs maintain that their attorneys have "significant experience in prosecuting wage and hour class actions, and employment litigation generally." (Mot. 18; *see generally* Decl. of David R. Markham in Supp. of Pls.' [Mot.], ECF No. 42-4; Decl. of Walter Haines in Supp. of Pls.' [Mot.], ECF No. 42-5.) Plaintiffs also contend that they have a "thorough understanding of this suit," their interests are aligned with those of the Class members, and they have no conflicts with other Class members. (*See* Mot. 18; Howard Decl. ¶ 22; Alexander Decl. ¶ 28.) CVS argues that Plaintiffs and their counsel are not adequate representatives because there is an "inherent and irreparable conflict in the Class." (Opp'n 18.)

"Supervisory employees are often inappropriate representatives of non[-]supervisory employees because the structure of the workplace tends to cultivate distinctly different interests between the two groups." *Wagner v. Taylor,* 836 F.2d 578, 595 (D.C. Cir. 1987). As a result of the distinct interests between supervisory and non-supervisory employees, "[t]he inclusion of supervisors in [a] proposed class [including non-supervisory employees] creates a potential conflict of interest and may result in inadequate representation." *Hughes,* 2012 WL 34483, at *7; *see also Hadjavi*, 2011 WL 3240763, at *6 (same).

Here, Plaintiffs Alexander and Wooden testified that the supervisory pharmacists pressured and instructed them to work-off-the-clock. (Alexander Decl. ¶¶ 11, 22, 25; Wooden Decl. ¶¶ 4-6.) The record indicates, however, that it is the supervisory pharmacists who schedule and manage the non-supervisory employees' hours. (*See* Berninger Dep. 47 (lead pharmacist should be aware when a pharmacy technician is working overtime); McPhillips Decl. ¶ 4 (pharmacy technician was required to seek pre-approval depending on which pharmacist in charge or supervisory pharmacist was charged with running her store). The fact that Howard would represent pharmacists and Alexander would represent technicians, (*see* Reply 7), does not address the potential conflict of interest between pharmacists acting in a supervisory capacity and the technicians they supervise. This is particularly true in light of the fact that Plaintiffs' Class definition makes no distinction between supervisory pharmacists who controlled or managed the hours of other employees and non-supervisory pharmacists, if any, who lacked this ability. (*See* Mot. 7.) Because Plaintiffs

assign partial responsibility for being required to work off-the-clock to CVS' supervisory employees, (*see* Alexander Decl. ¶¶ 11, 22, 25; Wooden Decl. ¶¶ 4-6), this "raises sufficient concerns about adequacy of representation to make the [C]lass, as currently defined, inappropriate." *See Hughes,* 2012 WL 34483, at *7. The Court finds that Plaintiffs have failed to meet Rule 23's adequacy requirement.

B. Rule 23(b)(3) Requirements

Plaintiffs seek certification pursuant to the third subdivision of Rule 23(b). (*See* Mot. 19.) "Under Rule 23(b)(3), a class may be certified if the district 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.'" *Vinole v. Countrywide Home Loans, Inc.,* 571 F.3d 935, 944 (9th Cir. 2009) (quoting Fed. R. Civ. P. 23(b)(3)). Courts commonly refer to the two elements under Rule 23(b)(3) as the "predominance" and "superiority" requirements. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997). To be certified, the Class must satisfy both. *Id.*

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1. Predominance

Predominance requires "that the questions of law or fact common to all members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623 (citation omitted). Although analogous to the commonality inquiry under Rule 23(a)(2), the predominance inquiry is more rigorous. *See Hanlon*, 150 F.3d at 1019. The "main concern . . . [is] the balance between individual and common issues." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir. 2009). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022 (citation omitted). By contrast, when "claims require a fact-intensive, individual analysis," then class certification will "burden the court" and is inappropriate. *See Vinole*, 571 F.3d at 947. One of the underlying priorities of the predominance test is accomplishing judicial economy. *See Zinser*, 253 F.3d at 1189 (quoting *Valentino v. Carter-Wallace, Inc.,* 97 F.3d 1227, 1234 (9th Cir. 1996)).

As in *Adoma,* recognition of the imperfections arising from using the Rx Connect data to determine whether the Class members worked off-the-clock, *see supra* Part II.A.3.a.i-ii, "invites individualized inquiries." *See Adoma,* 270 F.R.D. at 550. Such individualized inquiries include whether the Rx

Connect data actually reflects the tasks performed by a particular employee and, more importantly, whether the Rx Connect data accurately captures the hours worked by each Class member. For the reasons explained above, the Rx Connect data appears to be a poor proxy for determining whether the Class members worked off-the-clock. Further, Plaintiffs have offered no other mechanism for ascertaining this information, (*see generally* Mot.; Reply), likely due to concerns about multiplying the number of individualized inquiries if they were required to seek this information from the Class members themselves. (*See* Mot. 1-2.) Finally, the apparent lack of a common policy whereby CVS encouraged its employee to work off-the-clock, *see supra* Part II.A.3.b, also suggests that any efforts to discern whether some Class members were encouraged to work off-the-clock would require individualized inquiries regarding the policies and managerial decisions each CVS pharmacy. These types of inquiries are not conducive to achieving judicial economy. *See Zinser*, 253 F.3d at 1189.

"If there [are] no common questions of law or fact, those questions obviously [cannot] predominate over questions affecting individual members." *Sullivan v. Chase Inv. Servs. of Boston, Inc.,* 79 F.R.D. 246, 257 (N.D. Cal. 1978). As stated above, the Court finds that Plaintiffs have failed to present a common question apt to generate a common answer as to the Class members. *See supra* Part.II.A.3. Accordingly, the Court finds that Plaintiffs have failed to meet their burden under Rule 23's predominance requirement.

2. Superiority

The superiority inquiry requires a "comparative evaluation of alternative mechanisms of dispute resolution," *Hanlon*, 150 F.3d at 1023, and a class action may prove superior "[w]here classwide litigation of common issues will reduce litigation costs and promote greater efficiency" than other methods. *Valentino,* 97 F.3d at 1234. In deciding whether a class action would be the superior method for resolving the controversy, courts consider several factors, including: "[1] the class members' interest in individually controlling the prosecution or defense of separate actions; [2] the extent and nature of any litigation concerning the controversy already begun by or against class members; [3] the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and [4] the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D).

Plaintiffs argue that, to their counsel's knowledge, there is no similar litigation already in progress by class members. (Mot. 22.) Without explicitly referring to the Class members' interest in individually controlling the prosecution of their off-the-clock claims, Plaintiffs maintain that the "expense of pursuing more than 5,000 separate actions could easily exceed the amount at stake for any individual [C]lass member." (Mot. 22.) CVS does not dispute either contention. (*See generally* Opp'n.) Neither party addresses the desirability of concentrating litigation in this forum, (*see generally* Mot.; Opp'n), although the Court notes that because Plaintiffs propose a statewide

class, (*see* Mot. 1, 7), litigating all claims in this Court may not be convenient for all Class members.

Plaintiffs argue that class action would be a superior method of adjudication because, since there are more than 5,000 Class members, "the prospect of litigating 5,000 separate cases all involving the [Rx Connect system] would constitute a judicial morass." (Mot. 22.) This argument assumes that the Rx Connect data would permit the Court to assess the validity of the more than 5,000 Class members off-the-clock claim without resorting to individualized inquiries. Because the Court has found that the absence of common questions necessitates individualized inquiries, a class action is not the superior method for litigation this matter. The Court finds that Plaintiffs have failed to demonstrate that class litigation is the superior mechanism for resolving their dispute.

C. Rule 23 Analysis

Fundamentally, "[t]he party seeking class certification bears the burden of demonstrating that the requirements of Rules 23(a) and (b) are met." *ConocoPhillips,* 593 F.3d at 807 (quoting *Zinser,* 253 F.3d at 1186). Here, Plaintiffs' Motion falls short in several respects. First, Plaintiffs have failed to demonstrate the existence of one or more common questions likely to generate common answers. Second, the potential conflicts of interest between supervisory pharmacists and non-supervisory pharmacy technicians in the putative Class indicates that Plaintiffs and their counsel are not adequate representatives as to all Class members. Third, due to the apparent lack of a common question, Plaintiffs have not been able to show that common questions predominate. Fourth, given the numerous individualized inquiries that class litigation would necessitate due to the lack of common questions, Plaintiffs have failed to show that class adjudication is the superior method for resolving their disputes. In the aggregate, Plaintiffs have failed to show that the adjudication of this matter as a class action promotes judicial economy. *See Haley*, 169 F.R.D. at 647.

The Court **DENIES** Plaintiffs' Motion for Class Certification.

III. RULING

For the foregoing reasons, the Court **DENIES** the Motion.

IT IS SO ORDERED.