IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN RE: AMAZON.COM, INC., FULFILLMENT CENTER FAIR LABOR STANDARDS (FLSA) AND WAGE AND HOUR LITIGATION,

NEIL HEIMBACH; KAREN SALASKY,

Plaintiffs-Appellants,

v.

AMAZON.COM, INC.; AMAZON.COM DEDC, LLC; INTEGRITY STAFFING SOLUTIONS, INC.,

Defendants-Appellees.

On certification of questions of law from the United States Court of Appeals for the Sixth Circuit at No. 18-5942 pursuant to the Order of December 27, 2019 at 124 Em 2019

BRIEF OF *AMICI CURIAE* NATIONAL RETAIL FEDERATION AND PENNSYLVANIA RETAILERS ASSOCIATION

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INTRODUCTION

Amici curiae The National Retail Federation ("NRF") and the Pennsylvania Retailers Association ("PRA") submit this brief in support of Defendants-Appellees Amazon.com, Inc, Amazon.com DEDC, LLC, and Integrity Staffing Solutions, Inc., (collectively, "Amazon"). NRF and PRA write to assist the Court in understanding the potential unanticipated and uncontemplated impact a ruling in favor of the employee Plaintiffs-Appellants will have on retailers across Pennsylvania.

Plaintiffs are seeking a ruling that would open a floodgate of class and collective action litigation against all employers, including retailers, brought by employees seeking compensation for any number of everyday activities that employees encounter on their way to work. The mundane activities for which employees now are seeking to be compensated include the simple use of a key, key card, badge, or swipe system, or other method of allowing passage through a doorway, as well as countless other voluntary activities an employee engages in when moving from home to the workplace. This is not the law. Nor would it be a tenable standard at any time, let alone at a time when retailers across the country are grappling with the impacts of COVID-19 related closures and implementing additional precautions and social distancing measures.

STATEMENT OF INTEREST OF AMICI CURIAE

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF and the employers it represents therefore have a compelling interest in the issues certified to this Court for decision. As the industry umbrella group, NRF periodically submits amicus curiae briefs in cases raising significant legal issues, including employment law issues, which are important to the retail industry at large, and particularly to NRF's members.

The Pennsylvania Retailers Association was founded in 1932 and is the only trade association throughout the Commonwealth which represents the retail industry. As the voice of retail, PRA's membership consists of both large, multistate and small independent retailers. Retail is the largest private sector employer in the Commonwealth, with over 1.1 million jobs. There are more than 156,000 retail establishments generating $44.7 billion in economic activity in Pennsylvania.

NRF and PRA have a substantial interest in the outcome of this case to ensure their members are subject to workplace laws and regulations that are both fair and practicable. Because many of NRF's members and all of PRA's members are employers in the U.S. and Pennsylvania, they have been and will continue to be the subject of class action, collective action, and other lawsuits brought by employees claiming that they were not paid for time spent on an employer's premises undergoing "security procedures" that take no more than seconds and are simply a feature of modern day life, or are the result of the employee's own choices about how to prepare for, travel to, and arrive at work. Accordingly, NRF's and PRA's members have a strong interest in whether these activities are found to be compensable "hours worked" within the Pennsylvania Minimum Wage Act ("PMWA").

Assisting with the development of a regulatory environment that is both clear and in conformance with the law is a central component of NRF's and PRA's missions. To that end, NRF and PRA advocate for the interpretation of laws in a way that fosters a fair and equitable workplace. NRF therefore respectfully requests the opportunity to file the enclosed Amicus Brief for the Court's consideration. Rather than simply repeat the arguments made by Amazon (with which NRF and PRA agree), this amicus brief is intended to provide an added dimension to selected matters discussed by the parties, to enhance the Court's

understanding of the practical ramifications of the issue certified for review and how the decision on that issue would impact the retail industry.

No person or entity other than the amicus curiae, its members, or its counsel authored the amicus curiae brief in whole or in part, or paid in whole or in part for its preparation.

SUMMARY OF ARGUMENT

Two critical facts are not in dispute. First, Amazon provides its warehouse employees with the opportunity to leave their personal belongings in lockers provided by Amazon outside the security screening location, if the employees choose not to leave their belongings at home, in their cars, or in the break room. Second, employees who avail themselves of any of these options are able to use security screening "express lanes," which they simply walk straight through. This means there are only two categories of employees at issue here: (1) employees who experience no extra time, or possibly just seconds, as a result of the express lane screenings – because it takes them the same amount of time to pass through the metal detectors as it would take them to cover the same distance without the metal detectors, and (2) employees who experience a slight delay due to a *voluntary* security screening because they choose not to take advantage of any other available options to bypass the screening, including by using the lockers provided by Amazon.

The employees in neither category are entitled to compensation under Pennsylvania law. If they were, every employee in Pennsylvania likely would be entitled to compensation for some part of their morning routine. Employees on their way to and from work in 2020 pass through countless doors with locks, swipe cards, and other security measures that add minute increments to their day to the same degree as Amazon's express lanes. This ordinary passage of time is the very definition of *de minimis*; it is the "split-second absurdity" the Court was seeking to avoid in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Similarly, employees make countless choices in a day that could consume small amounts of time analogous to the non-express lane screenings. Even if these bits of time were held not to be *de minimis* – which they should be – they are not reflective of what the employees were "employed" to do under the law.

Plaintiffs' position creates a slippery slope towards employers being required to compensate employees for every step they take on the way from their home to their workstation. This is simply not the law, nor is it a tenable interpretation of the law in today's modern society.

ARGUMENT

I. Any Time Employees Incur Passing Through Amazon's Express Lane Security Screening Lanes Is the Very Definition of *De Minimis* – Just Like the Time Required by the Security Measures Found at Any Modern Workplace

Plaintiffs do not dispute that Amazon warehouse employees can avoid any type of security check that is more than walking, unhindered, through a metal detector. They can do this in myriad ways, including leaving personal items at home, in cars, in the break room, or in secure lockers outside the security checkpoints provided by Amazon free of charge for exactly this purpose. Rather than avoid the extra time of a security check, however, Plaintiffs want to be paid for it. They claim they are entitled to such compensation because first, the PMWA does not incorporate the federal *de minimis* rule, and second, if it does, that rule should be limited more restrictively than the federal *de minimis* rule with regard to class and collective actions, such that: (1) it does not apply to class action lawsuits; (2) in a class or collective action, the aggregate employee time for the class should be considered; (3) for a recurring practice, the aggregate time should be considered, and (4) any employer invoking the *de minimis* rule should be required to show that the unrecorded time is incapable of being measured or estimated.

Plaintiffs' argument only highlights why public policy favors the incorporation of the *de minimis* doctrine and precludes the "limitations" proposed by Plaintiffs. It also highlights why Plaintiffs' approach is contrary to the policy

embraced by Pennsylvania that wages should be fairly commensurate with the value of the services rendered. *See* 43 P.S. Sec. 333.101.

In the modern age, it is difficult to imagine any employment workstation – retail or otherwise – that does not involve some type of "security measure". A door is a security measure. A key is a security measure. As are any number of other mechanisms that employees pass through to reach their workstations on any given day. This could include:

- swiping or waving a card at a parking garage entrance, building door or elevator;
- punching in a code;
- flashing a badge as an employee walks by a security guard;
- pressing a finger on a scanner (or having eyes or palm scanned);
- simply walking through a security checkpoint without stopping, as is often the case for Amazon employees.

The problem with Plaintiffs' argument is that it proves too much. Taken to its logical conclusion, it sanctions class and collective action lawsuits against employers for any and all of these split-second activities. This is what Plaintiffs expressly argue for – that the type of split-second absurdities found to be *de minimis* in *Anderson* be aggregated for purposes of class and collective action lawsuits so that employers can be held liable for large judgments. As a result,

retail and other employers are left without any direction as to how to order their business in a way that fairly compensates their employees but at the same time avoids the risk of frivolous lawsuits seeking recourse for the time it takes an employee to walk through a door.

Plaintiffs cite to *Troester v. Starbucks Corp*., 5 Cal. 5th 829 (2018) and *Frlekin v. Apple, Inc.*, 8 Cal. 5th 1038 (2020), as examples of California cases being decided the way they urge. But those cases are distinguishable. In *Troester*, Starbucks employees were required to spend up to ten minutes per day after clocking out doing store closing procedures, including initiating a software procedure, setting the store security alarm (which is indisputably for the benefit of the store only, not the employee), and sometimes bringing in patio furniture. *Frlekin* also is distinguishable; Apple employees were required to find and potentially wait for a manager to perform a bag check, and to compare the serial number on each individual electronic device carried by the employee against a list, to confirm the electronic equipment was indeed their own and not stolen from the Apple store. Even these cases, where the time at issue was more significant, have engendered a rash of cases that push the boundaries of what constitutes compensable time. And that is the point – employers in California are now already experiencing the deleterious effects of a policy pushed too far, and have been

required to defend themselves in cases alleging that the mere swipe or flashing of a badge is sufficient to constitute "hours worked".

In *Griffin v. Sachs Elec. Co.*, 390 F. Supp. 3d 1070, 1090 (N.D. Cal. 2019), employees were required to "present their badges at the guard shack in order to enter through the Security Gate" at the edge of the ranch where a solar panel project was located, and then continue their commute down an access road, which took approximately 45 to 55 minutes. While this case also addressed control along the drive route, the initial trigger for compensability argued by the employees was an exceedingly brief security measure. As explained by the court, the employees "simply held up their badges for scanning by the person(s) staffing the guard shack". *Id.* at 1076. The employees sued in a class action lawsuit, alleging that because they had badged in and were then subjected to the employer's rules after passing through the gate, the *entire 45 to 55 minutes* spent traveling on the access road was compensable hours worked. While Sachs Electric ultimately prevailed, the company was nevertheless required to defend itself against these claims. The court found that the time employees spent between arriving at the security gate and their ultimate destination was not compensable, explaining, "[t]his process is analogous to scanning or flashing an employee badge to enter a compound or campus." *Id.* at 1091.

However, the *Griffin* decision has not stopped employees from pursuing claims based on these types of activities, leaving employers unable to anticipate what the rules may be. In order to get to their workstations, many employees swipe into a parking garage, wait for the parking garage gate to lift, press an elevator button, wait for the elevator to come, badge into their workplace, walk to a timeclock or computer, and then clock in for work. The time this takes could vary based on enumerable factors (including limited elevator ridership due to COVID), and in all cases would be impossible to estimate or record. None of these actions are what an employer would think of as work, or time they needed to capture and compensate. Yet in *Booth v. Millennium Laboratories Inc.*, San Diego Superior Court, Case No. 37-2018-00019611-CU-OE-CTL, a class was certified for activities including using a security badge to enter the building, and clocking in. (See first attached Order.)

These cases illustrate the broad risk of what Plaintiffs propose – which is contrary to the purpose of the *de minimis* doctrine and leaves employers without guidance as to whether they could be subject to liability for myriad everyday actions that have never been considered compensable work time.

In *Anderson*, the seminal case on the *de minimis* doctrine, the U.S. Supreme Court held that the *de minimis* rule applies to wage claims under the federal Fair Labor Standards Act. As the Court explained, "When the matter in issue concerns

only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded." *Anderson*, 328 U.S. at 692. The Court's decision was based on the "the realities" of the workplace and the difficulty of recording trivial amounts of time. *Id.* The Court explained that "[s]plit-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act." *Id.* Instead, "[i]t is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." *Id.*

The *de minimis* rule is based on the legal maxim that the law does not concern itself with trifles. The rule typically applies when "the harm is small, but measuring it for purposes of calculating a remedy would be difficult, time-consuming, and uncertain, hence not worthwhile given that smallness." *Mitchell v. JCG Industries, Inc.*, 745 F.3d 837, 841 (7th Cir. 2014). What Plaintiffs propose is that this long-standing and logical rule essentially be nullified by allowing mere seconds of delay to be aggregated so that virtually any action taking any amount of time could surpass the *de minimis* standard. This is contrary to a long line of well-reasoned cases finding these types of actions to be *de minimis* and therefore noncompensable.

For example, the Illinois Appellate Court applied the *de minimis* rule in *Porter v. Kraft Foods Global, Inc.*, 2012 WL 7051311 at *9 (Ill. Ct. App. 2012), to

find that a period of one to five minutes at the beginning of each shift spent putting on gear, swiping work cards, and walking from the entrance of the facility to the time terminal was *de minimis* and therefore not compensable. The court noted that it would be administratively burdensome to record the time it took up to 1,200 employees to put on different gear and proceed to one of over 30 different time terminals, "especially given that the time expended would amount to mere seconds or minutes." *Id.*

Similarly, the Wisconsin Court of Appeals applied the *de minimis* rule in *Fox v. General Telephone Co.*, 85 Wis.2d 698 (Wis. Ct. App. 1978), where employee truck drivers were tasked with transporting the employer's trucks from one location to another. Occasionally, employees would perform other tasks, such as removing waste from the trucks after transporting them, for which time the employees were not paid. *Id.* at 704. The Court ruled that the time spent performing these tasks was *de minimis* and therefore not compensable. *Id.* South Carolina also applies the *de minimis* rule to wage claims arising under state law. *See Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204 (2005) (same).

Plaintiffs' argument distorts the three-part test other courts have universally applied to the *de minimis* rule to essentially negate the rule. That test requires courts to consider three factors in determining whether otherwise compensable work time is *de minimis*: (1) the administrative difficulty of recording the time (not

"incapable of being measured or estimated" as Plaintiffs argue); (2) the aggregate amount of compensable time involved (for a single employee, not for a class of employees as Plaintiffs argue); and (3) the regularity of the additional work .

Plaintiffs' argument as to the first prong takes it too far. Theoretically anything is "capable" of being measured, but that doesn't make it plausible from an administrative perspective; it may take longer to record to record the time than the activity itself takes to perform. The body of federal case law applying the *de minimis* rule provides examples of the practical necessity for the rule.

- Time spent by in-home service technicians logging into handheld computers, carrying them to their vans, plugging them into their vans, and then carrying them back and plugging them in at home, which would take, in aggregate, more than a "minute or so" over what the employees' walks to and from their vans otherwise would take, was *de minimis*. *Chambers v. Sears Roebuck & Co.*, 793 F. Supp.2d 938 (S.D. Tex. 2010).
- Time spent by technicians carrying their PDAs, work orders, payments, and/or laptops to and from their vehicles, and inspecting the vehicles and placing/removing cones around the vehicles, was *de minimis*. *Donatti v. Charter Communs., L.L.C.*, 950 F. Supp.2d 1038 (W.D. Mo. 2013).

- Time spent by a restaurant worker straightening chairs and picking up trash between the time he walked in the door and the time he clocked in, which took a couple of minutes, was *de minimis*. *Fast v. Applebee's Int'l, Inc.*, 502 F. Supp.2d 996 (W.D. Mo. 2007).
- Time spent putting on glasses and a hard hat and putting in ear plugs took a matter of seconds and therefore was *de minimis*. *Sandifer v. United States Steel Corp.*, 678 F.3d 590 (7th Cir. 2012), aff'd 134 S.Ct. 870 (2014).
- Time spent by corrections officers to transport canine unit dogs to and from work each day required "some degree of time and effort, [but] this effort is so negligible as to be *de minimis* and therefore not compensable." *Andrews v. Dubois*, 888 F. Supp. 213, 219 (D. Mass. 1995).
- Additional time spent by fire alarm inspectors on their commutes as a result of the City's policy requiring them to carry inspection documents with them in their vehicles was *de minimis*. *Singh v. City of New York*, 524 F.3d 361 (2d Cir. 2008).
- Time spent by dog handlers caring for dogs during their commute was *de minimis*, even when the dog-care duties were significant, such as when the dogs vomited or soiled their handlers' cars, as those

instances were few and far between. Even stops for water, which were more frequent in the heat of summer, consumed only a few minutes and were *de minimis*. *Reich v. New York City Transit Auth.*, 45 F.3d 646, 652 (2d Cir. 1995).

- Time spent by police officers stopping to feed their canines, letting the dogs out of their cars, and cleaning up after them while traveling to work was *de minimis*. In addition, the amount of work involved in monitoring a police radio during a commute was *de minimis*. *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999).
- Time spent by officers cleaning their radios, wiping their safety vests, and oiling their handcuffs was *de minimis* because the tasks took less than one minute and were not performed frequently. *Musticchi v. City of Little Rock*, 734 F. Supp.2d 621 (E.D. Ark. 2010).

Notably, these cases pertained to amounts of time along the lines of those spent going through regular (non-express lane) Amazon security screenings. Even these screenings should be considered *de minimis*, for the same reason as the activities found to be *de minimis* by other courts across the country. In all of these cases, the time was short in duration and difficult to record. However, in all of these cases, the time nevertheless would have been significant if aggregated – even for an individual, let alone across a class. An activity that takes three seconds on

the way into work and three seconds on the way out of work would aggregate to 30 seconds per week, 2 minutes per month, and 25 minutes over the course of a year (for an employee who works 5 days a week, and takes two weeks off). Twenty-five minutes no longer sounds *de minimis*. And these minutes become exponentially higher when you aggregate across a class. But no one could sensibly argue that an employer should be required to capture and compensate the individual for those three seconds. Plaintiffs' proposed interpretation of the *de minimis* rule effectively nullifies the entire rule.

Likewise, Plaintiffs' proposed rule would create a slippery slope. As the California cases above illustrate, if Amazon's security screenings are found to be compensable under Pennsylvania law, a deluge of fringe class and collective action suits will quickly follow, claiming that split second absurdities and trifles such as the use of a key or keycard are likewise "security measures" and should be compensable. What about parking garage cardkeys? Is every minute from when an employee enters the employer's parking garage, which is provided for the employee's convenience, compensable because it might be considered an employer-mandated security measure? Once a court concludes that simply walking through a metal detector is compensable time that can be aggregated to bring a class action lawsuit, plaintiffs will be empowered to bring other similar

class action lawsuits based on such trifles. The slippery slope will have been further greased.

Plaintiffs' proposed rule is impractical, contrary to 74 years of established case law, and ill-advised from a public policy perspective.

II. Voluntary Security Screenings Are Not What the Employees Are "Employed" to Do, Any More Than Countless Other Voluntary Steps Employees Take on the Way to Their Workstations

As noted above, security screenings (express lane and otherwise) qualify as *de minimis* under 74 years of well-established precedent. To the extent Plaintiffs contend the regular, non-express screenings are not *de minimis*, they are nevertheless not compensable work time. They are time undertaken voluntarily by the employees for their own convenience. Again, this is a slippery slope, and a rule that this type of time is compensable would lead to both a deluge of frivolous cases, as well as draconian workplace rules which hurt retail and other employees across Pennsylvania.

Plaintiffs use a contorted interpretation of the regulatory language to conclude that security screenings are "required" and not "for the convenience of the employee". Common sense tells us that if an employer advises employees "you can walk straight through the express lane security screening without stopping if you do not bring a bag past the checkpoint, and we are providing free lockers to store anything you would like to bring to work with you," any checks

beyond the express screening are both (1) not required and (2) for the convenience of the employee. Even without the lockers, employees are not required by Amazon to bring a bag to work – that is a matter of the employee's convenience.

The relevant question under 34 Pa. Code Section 231.1(a) is what constitutes "hours worked". Most people would interpret "hours worked" to mean time spent doing their jobs; employees understand they are paid for performing duties that advance the goals or interests of the employer, not of themselves. Employers in turn understand their responsibility to pay employees for the time employees expend performing those duties. For retail employees, obvious examples of "hours worked" are times during which employees are at their place of employment and either engaged with or waiting for customers, stocking, organizing the floor, taking inventory, etc.

Excluded from "hours worked" are those activities of everyday life that are also necessary to the job, in some sense but do not constitute work. For example, most employees don't live at their place of employment. So, to do their job, those employees must travel from their home to their workplace. Depending on where employees choose to live and the vagaries of traffic or other forms of transportation, the travel time can be short or long. Regardless, unless the employer requires that an employee use a mode of transportation provided by the employer, the time spent commuting is not compensable "hours worked." This is

because, in large part the amount of time that it takes is a result of where the employee chooses to live, which is outside of the employer's control. It would be unfair for an employer to be required to pay commute time for an employee who chose to take a job two hours from his or her home. But that commute is "required" for the employee to get to the employee's workstation, just the same as a security screening is.

Similarly, most employees do not simply get out of bed and come to work. They spend varying amounts of time on personal hygiene, depending on their personal preference. Common sense would dictate that time is not compensable. Yet cases have actually been filed on these types of claims.

In Arizona and California, police officers and sheriff's deputies have sued for the time spent getting dressed at home. See, e.g., *Bamonte v. City of Mesa*, 598 F.3d 1217 (2010) and *Reed v. County of Orange*, 716 F. Supp. 2d 876 (C.D. Cal. 2010. Similarly, in *Sephora Wage and Hour Cases*, San Francisco Superior Court, Case No. CJC-16-004911, Sephora employees filed class action claims for the time (and money) spent applying makeup at home. (See second attached Order.) Concerns about these types of claims are not exaggerated – they are the natural consequence of the slippery slope that states start down by allowing compensation for voluntary employee actions (such as choosing whether to bring personal items

to work and if so what type of items and how to carry them), which likely impact the time spent undergoing any potential security screening.

A different, but still analogous, situation is where retail employers provide employee discounts to their employees. Making use of the employee discount is the employee's choice. It is a benefit provided by the employer, voluntarily, as a benefit to employees. For security reasons, employees are typically required to have a manager ring up an employee discount purchase. The employee chooses to do something voluntary, for the employee's own benefit, that requires the employee to take extra steps and extra time to go through security measures associated with that voluntary decision. Nobody would argue that the employee should be compensated for that time.

Bringing personal items to work is no different than any of these scenarios. Some employees may come with their keys and phone in their pocket, and leave everything else in their car. Others may take public transportation and be coming to work before or after another activity. As such, they could arrive at work with gym bags; school backpacks; uniforms, tools or equipment for another job; clothes or other items for social activities; or any number of other items personal to the employee's choices. No employer is required to allow employees to bring *any* of these items on the premises past a security screening checkpoint. Having these items past the checkpoint is of no benefit to Amazon or in any way related to the

performance of work for Amazon. Amazon could have required all employees to leave all of their personal items in the lockers or at home. The fact that Amazon did not require this and allowed employees to bring items of various descriptions past the security screening checkpoint does not obligate Amazon to pay extra compensation to employees who chose to bring extra non-work related items, any more than Amazon is required to pay extra to employees who chose to take a job farther from home, to take extra care with their appearance, or to use an employee discount. All of these are matters of employee choice or preference.

Making one's bag available for a bag check is now a routine matter – just like driving or taking public transportation to arrive at a destination. When we arrive at that destination, we often undergo bag checks – before sporting events, concerts, lectures, political rallies, graduation ceremonies, and to enter public places like airports, museums, courthouses, and amusement parks, to name a few instances. High school students now often go through security screenings before entering the campus. Going through security screenings is not specific to any particular job such that is should be compensable work time; it is simply part of life. The choice between what to bring and how to carry it is a personal one made in every area of life. It is a balance between the convenience of carrying the items and the convenience of avoiding whatever additional time any screening may take.

It is not any greater a hindrance to make that personal decision before leaving for work than it is to make it before leaving for any other activity or event.

If employers are to be held responsible for compensating employees for their choices, they will simply take these choices away, leaving the employee inconvenienced. Once the door is open to employees being compensated for their own choices, those choices will simply be limited – which is not of benefit to either the employers or employees of Pennsylvania.

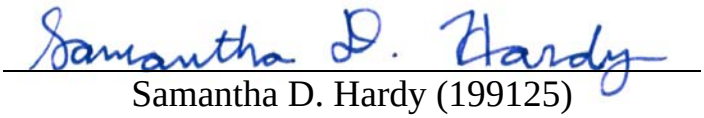
CONCLUSION

For the reasons set forth above, NRF and PRA respectfully request that the Court consider the practical implications of a decision that effectively nullifies the *de minimis* doctrine, by allowing activities that take mere seconds to be aggregated. Such a decision would subject employers to the uncertainty of whether they may face lawsuits or liability for failure to compensate employees for myriad small every day actions that employees take, sometimes voluntarily, on the way to their workstations.

Dated: June 8, 2020

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By 

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WORD COUNT CERTIFICATION

In accordance with Pennsylvania Rule of Appellate Procedure 2135(a)(1), I certify that the attached brief contains 5,047 words as calculated by the word-count feature of Microsoft Word.

Dated: June 8, 2020

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By 

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellant and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: June 8, 2020

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ATTACHMENT 1

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 02/21/2020 TIME: 09:30:00 AM DEPT: C-71

JUDICIAL OFFICER PRESIDING: Gregory W Pollack
CLERK: Terry Ray
REPORTER/ERM: Carrie Bolding CSR# 7795
BAILIFF/COURT ATTENDANT: L. Wilks

CASE NO: **37-2018-00019611-CU-OE-CTL** CASE INIT.DATE: 04/19/2018
CASE TITLE: **Allie Booth vs. Millennium Laboratories Inc [E-File]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Other employment

EVENT TYPE: Motion Hearing (Civil)
MOVING PARTY: Allie Booth
CAUSAL DOCUMENT/DATE FILED: Motion - Other for class certification, 11/12/2019

APPEARANCES
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Adam R Rosenthal, counsel, present for Defendant(s).
Jawid Habib, counsel, present for Defendant(s).

The Court orally advises the parties of its tentative ruling, after which oral argument is conducted. Upon completion of oral argument, the court makes the below ruling:

RULING AFTER ORAL ARGUMENT: The Court rules on plaintiff Allie Booth's (Plaintiff) motion for class certification as follows:

As a preliminary matter, defendant Millennium Health, LLC's (Defendant) objections to the Booth Declaration and Saltzman Declaration are overruled.

In order for a class to be certified, "[t]he party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1021.) "In turn, the community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defense typical of the class; and (3) class representatives who can adequately represent the class." (*Ibid.*) The party seeking class certification has the burden of establishing that the prerequisites are present. (*Miller v. Bank of America, N.A.* (2013) 213 Cal.App.4th 1, 7.)

Here, Defendant argues that Plaintiff has not met her burden of showing any of the community of interest requirements and that the action would be unmanageable.

Community of Interest

The "community of interest" requirement embodies three separate factors: (1) predominant common questions of law or fact; (2) class representatives whose claims or defenses are typical of the class; and (3) class representatives who can adequately represent the class. (*Richmond, supra*, 29 Cal.3d at p. 470; *Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 326 (hereafter *Sav-On*).)

Commonality. Predominant common question means that "each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment; and "the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants." (*Washington Mutual Bank, FA v. Super. Ct.* (2001) 24 Cal.4th 906, 913–914; *Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 117 (hereafter *Basurco*).)

"As a general rule if the defendant's liability can be determined by facts common to all members, a class will be certified even if the members must individually prove their damages." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (hereafter *Hicks*).) But a class action cannot be maintained where the existence of damage, the cause of damage, and the extent of damage have to be determined on a case-by-case basis, even if there are some common questions. (*Basurco, supra,* 108 Cal.App.4th at p. 119.)

Under Labor Code sections 1194 and 1194.2, an employee who has not been paid the legal minimum wage or an overtime wage may recover, inter alia, unpaid wages. (Lab. Code, §1194 (a), 1194.2(a).) Here, Plaintiff alleged that she and the proposed class were required to engage in pre-shift procedures which were not captured or compensated by Defendant's uniform timekeeping systems. (Kennedy Dec., Exh. 2.) Such activities included the use of a security badge to gain entry into Defendant's buildings (*Id.*, at Exh. 3, 112:16-114:6) and clocking-in (*Id.*, at Exh. 4, 265:4-267:19). As a result, Plaintiff contends that both she and the proposed class are due unpaid wages and overtime pay. In response, Defendant argues that the amount of time it takes to do these activities is de minimis and involves individualized issues but admits that it has done no studies to determine the actual length of time spent by each employee to perform such tasks. *(Id.*, at Exh. 3, 112:16-114:6.) However, numerous courts have certified claims based on these types of pre-shift procedures. (*Williams v. Super. Ct.* (2013) 221 Cal.App.4th 1353, 1358, 1371 (hereafter *Williams*); *Jones v. Farmers Ins. Exch.* (2013) 221 Cal.App.4th 986, 990; *See also Utne v. Home Depot U.S.A.* (N.D. Cal. 2018) 2018 WL 1989499, *3.) Notably, in *Williams*, the court at page 1370 stated that "[a]n unlawful practice may create commonality even if the practice affects class members differently. '[C]lass treatment does not require that all class members have been equally affected by the challenged practices-it suffices that the issue of whether the practice itself was unlawful is common to all.'" However, as the Court stated at oral argument, only those pre-shift activities required by Defendant which occur after an employee initially enters Defendant's facilities should be within the scope of what is compensable as to this claim.

Plaintiff also alleges that Defendant maintains uniform written policies, which facially undermine its provision of meal periods, thereby violating both the applicable Labor Code and associated Wage Order. More specifically, she cited to a policy stating that "[i]f an employee is involved in providing direct customer service or a major task, he or she should finish before taking a lunch or rest break." (Kennedy Dec., Exh. 3, 124:14-125:19, 126:4-25; Exh. 4, 154:2-8, and Exhs. 5-7.) In addition, Plaintiff pointed out other provisions which state that meal periods will be based on "business needs" and that it retains the right to change meal periods "without notice." (*Ibid.*) The California Supreme Court in *Brinker* at page 1040 held that an employer's policies and practices may not "impede or discourage [employees] from"

taking timely meal periods, or otherwise "pressur[e] employees to perform their duties in ways that omit [timely] breaks."

Typicality. In general, the test for typicality is whether other members have the same or similar injury, whether the action is based on conduct that is not unique to a single class member, and whether other class members have been injured by the same conduct. (*See Weinberger v. Thornton* (S.D. Cal. 1986) 114 F.R.D. 599, 603.) It is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 45.) Thus, it is not necessary that the class representative have personally incurred all of the damages suffered by each of the other class members. (*Wershba, supra*, 91 Cal.App.4th at p. 228.)

Here, Plaintiff presented evidence that she is ready, willing and able to litigate this action. (Booth Dec., ¶¶3-9.) More specifically, she has presented evidence that she has suffered the same injuries arising from the same claims which she seeks to pursue on behalf of the class. Defendant, in contrast, has not identified any unique claims or defenses that would serve to undermine her typicality as a class representative.

Adequacy. A plaintiff must show that they can adequately represent the class. (*Lockheed Martin Corp. v. Super. Ct.* (2003) 29 Cal.4th 1096, 1104.) As such, the class representative, through qualified counsel, must be capable of "vigorously and tenaciously" protecting the interests of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.) Adequate representation requires that (1) the interests of the representative plaintiff coincide with those of the class; (2) the representative plaintiff vigorously prosecute the claims on behalf of the class; and (3) counsel for the representative plaintiff be qualified, experienced and generally able to conduct the litigation. (*See Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 159.)

Here, Plaintiff presented sufficient evidence to establish this requirement as to her and her counsel.

Trial Plan. Plaintiff presented evidence that her claims and theories of liability may be proven via common class-wide evidence such as Defendant's employment records, uniform employment policies, and the testimony of Defendant's Person(s) Most Knowledgeable and class member witnesses regarding uniform policies and practices. This is sufficient.

Based on the foregoing, the motion is granted in all respects or, in other words, both the underlying and derivative claims shall be certified.

IT IS SO ORDERED.

Judge Gregory W Pollack

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Allie Booth vs. Millennium Laboratories Inc [E-File]

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2018-00019611-CU-OE-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 02/28/2020.

Clerk of the Court, by: Jerry Ray T. Ray _____, Deputy

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☐ Additional names and address attached.

ATTACHMENT 2

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Document Scanning Lead Sheet

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ORDER

SEPHORA WAGE AND HOUR CASES

001C06533502

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

COORDINATION PROCEEDING SPECIAL TITLE [RULE 3.550]	Judicial Council Coordination Proceeding No.: 4911
SEPHORA WAGE AND HOUR CASES	ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND SETTING CASE MANAGEMENT CONFERENCE
This document applies to all included actions	

This coordinated proceeding includes four putative wage and hour class actions[1] brought against defendant Sephora USA, Inc. Plaintiffs filed a joint motion for class certification. I heard the motion July 10, 2018, and provided an extensive written tentative at the hearing. Following the hearing, I issued an order for supplemental briefing and set a continued hearing date for September 26, 2018, when the motion was submitted. Perhaps to Sephora's consternation, plaintiffs have now had two opportunities to explain and argue their motion.

Sephora also filed motions to seal, but it appears the parties have agreed to withdraw the sensitive materials. Sephora should arrange for a conference call to alert me if there remain issues on sealing.

I set a case management conference in the Conclusion.

[1] The actions are (1) *Burnthorne-Martinez v. Sephora USA, Inc.*, Case No. CGC-16-550894; (2) *Provencio v. Sephora USA, Inc.*, Case No. 16CV294112; (3) *Hernandez v. Sephora USA, Inc.*, CGC-17-557031; and (4) *Duran v. Sephora USA, Inc.*, CGC-17-561452.

Plaintiffs' Theories of Liability

The class certification motion invokes a wide variety of alleged policies plaintiffs contend result in wage and hour violations.

1. Security Inspections

a. Leaving the Store

Plaintiffs contend that employees were subject to security inspections each time they left the Sephora store. Motion, 7; Reply, 2-3. Plaintiffs assert that Sephora's policies regarding security inspections result in off-the-clock work after shifts and during meal periods when employees leave the store. Motion at 8, 19, 23. This results in interrupted meal and rest periods. *Id.* at 23, 25. This policy also provides one predicate for plaintiffs' (1) wage statement claims pursuant to Labor Code § 226;[2] (2) waiting time penalty claims pursuant to § 203; and (3) unfair competition claims pursuant to Business & Professions Code (B&P) § 17200.

b. Scribing

Plaintiffs contend that putative class members were required to have personal cosmetics they bring to the Sephora store "scribed" – inscribed by management with a marking indicating that the cosmetic has been purchased – before their shift begins. Motion, 7. Plaintiffs contend that this policy results in pre-shift off-the-clock work. *Id.* This policy also provides one predicate for plaintiffs' (1) wage statement claims pursuant to § 226; (2) waiting time penalty claims pursuant to § 203; and (3) unfair competition claims pursuant to B&P § 17200.

2. Make-Up

Plaintiffs assert that Sephora required employees to apply make-up before their shifts and during their breaks. Motion, 1, 11-13. Plaintiffs also contend Sephora did not reimburse employees for the cost of make-up. *Id.* at 12. As a result, plaintiffs argue that Sephora is liable

[2] Statutory section citations (§) are to the Labor Code unless otherwise shown.

for unpaid off-the-clock work, for meal and rest period violations, unreimbursed business expenses, and unlawful coerced purchases. *Id.* at 22-23, 25, 27. This policy also provides one predicate for plaintiffs' (1) wage statement claims pursuant to § 226; (2) waiting time penalty claims pursuant to § 203; and (3) unfair competition claims pursuant to B&P § 17200.

3. Costume Maintenance

Plaintiffs state that Sephora required employees to wear a uniform, which Sephora called a costume. Motion, 1. Sephora provided the costumer free of charge but required employees to have the costume hemmed and kept clean and presentable. *Id.* Plaintiffs assert that time spent getting the costume hemmed and maintaining the costume was compensable, but that Sephora did not pay compensation for that time. *Id.* at 1, 13-14, 22-23. This policy also provides one predicate for Plaintiffs' (1) wage statement claims pursuant to § 226; (2) waiting time penalty claims pursuant to § 203; and (3) unfair competition claims pursuant to B&P § 17200.

4. Payroll Cards

Plaintiffs assert that Sephora paid its employees using payroll cards. Plaintiffs articulated two payroll card theories in their moving papers: (1) Sephora violates § 213(d) by requiring employees to receive their pay via direct deposit; and (2) Sephora violates § 212(a) because funds deposited on payroll cards were not readily available without discount. *Id.* at 14-15, 26. Plaintiffs seem to have abandoned the first theory. Reply, 1 (including only the second theory in the list of allegedly unlawful policies). This policy may also provide one predicate for Plaintiffs' ancillary claims.

5. Minimum Management Staffing

Plaintiffs state that managers and leads could not leave the store for meal breaks unless another manager or lead was present. Motion, 9. Plaintiffs contend that this resulted in non-

compliant meal breaks. *Id.* This policy may also provide one predicate for Plaintiffs' ancillary claims. *See id.* at 29-30.

6. Rest Periods

Setting aside the various policies that plaintiffs assert resulted in interrupted or shortened rest periods,[3] plaintiffs also argue that Sephora's rest period policy was unlawful because (1) Sephora's policy provided only one rest period for every four hours worked, ignoring the "or major fraction thereof" requirement in the wage order; and (2) Sephora's policy was to schedule the rest periods "according to business needs" instead of "in the middle of the work period insofar as practical." Motion, 2, 23-25. It is unclear whether plaintiffs continue to press the first theory. Reply, 1, 12-13 (specifically addressing only the second theory). This policy may also provide one predicate for plaintiffs' ancillary claims. Motion, 29-30.

7. Store Closing

Plaintiffs state that Sephora required employees who worked closing shifts to wait off-the-clock while a manager locks the store. Motion, 8. Plaintiffs claim that this results in unpaid wages. The policy also provides one predicate for plaintiffs' (1) wage statement claims pursuant to § 226; (2) waiting time penalty claims under § 203; and (3) unfair competition claims pursuant to B&P § 17200.

8. Non-Discretionary Bonus Calculations

Plaintiffs contend that Sephora violated California law by failing to include non-discretionary bonuses in employees' regular rate of pay in determining their overtime rate of pay between March 2013 and mid-July 2014. Motion, 2, 16, 27-29. Plaintiffs allege that this resulted in unpaid overtime compensation. *See id.* at 2. This may also provide a predicate for

[3] Plaintiffs' meal period claims are based entirely on the theory that Sephora's other policies resulted in interrupted or shortened meal periods. Motion, 23-24. Accordingly, Sephora's meal period policy is not discussed separately.

plaintiffs' (1) wage statement claims pursuant to § 226; (2) waiting time penalty claims pursuant to § 203; and (3) unfair competition claims under B&P § 17200.

9. Wage Statements

Aside from their derivative wage statement claims, plaintiffs assert direct wage statement claims on two theories: (1) Sephora did not provide sufficient access to wage statements; and (2) Sephora's wage statements did not include the hourly overtime rate and hours for the bonus-related overtime amount received by each employee. Motion, 2, 16, 29. Plaintiffs seem to have abandoned the first theory. Reply, 1, 11-12 (specifically addressing only the second theory). This policy may also provide one predicate for plaintiffs' ancillary claims.

Discussion

1. Class Definition

Plaintiffs' propose certification of a class of "all non-exempt employees who worked for Sephora at retail locations in California between May 23, 2013 and the present." Motion, 4 (emphasis removed).

Plaintiff Duran also proposes two subclasses: (1) "[A]ll non-exempt employees of Sephora in California during the period March 2013 through the present who worked overtime hours (more than eight (8) hours in a day or forty (40) hours in a week) and received a non-discretionary bonus but did not receive the legal rate of overtime for the bonus earned" ("Unpaid Bonus Overtime Subclass"); and (2) "[A]ll non-exempt employees of Sephora in California during the period March 9, 2016 through the present who received inaccurate wage statements that did not include the applicable hourly overtime rate and hours for the bonus-related overtime amount received by each employee" ("Wage Statement Subclass"). *Id.*

The moving papers "recognize[d] the likely need to create additional subclasses" but unfortunately chose not to propose them. Sephora objected to this approach, arguing that class certification should be denied because plaintiffs did not "connect class members to the claims asserted." Opposition, 12. Plaintiffs then proposed a series of additional subclasses. Reply at 14.

2. The General Class Definition Sets Forth a Numerous and Ascertainable Class

The general class definition sets forth objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary. *ABM Indus. Overtime Cases*, 19 Cal. App. 5th 277, 302 (2017, as modified Jan. 10, 2018). The class is numerous. Allen Decl. ¶ 9 (plaintiffs' counsel received contact information for more than 8,000 individuals who were employed by Sephora during the class period in discovery in this litigation).

Sephora argues the class definition is overbroad as to some or all of plaintiffs' theories. Opposition, 12-13. Sephora relies on *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905 (2010), which is inapposite. There the court reasoned that the class was limited to individuals who purchased items online at the time that the country of origin was misidentified but was not limited to those consumers who clicked on the "Additional Info" icon on the website, which would have exposed them to the country of origin information. So, the class members could not identify themselves. This is not the issue here.

As it relates to more than one of Plaintiffs' theories of liability – such as plaintiffs' theories predicated on security inspections and costume maintenance – the general class

definition is not over-inclusive because plaintiffs claim that common policies impacted all putative class members.[4]

Sub-classes are discussed below.

3. Commonality/Predominance/Superiority

A. In General

The predominance test asks in effect whether the issues that may be jointly tried, as compared to those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process or the litigants. *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1022 (2012); *ABM Indus.*, 19 Cal.App.5th at 307. Courts examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. *Brinker*, 53 Cal.4th at 1025. Generally, if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages. *Id.* at 1022; *ABM Indus.*, 19 Cal.App.5th at 309. At this stage, courts should grant certification as long as the plaintiff's posited theory is amenable to resolution on a class-wide basis, even if the theory is ultimately incorrect as a matter of substantive law. *ABM Indus.*, 19 Cal.App.5th at 307-08.[5]

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[4] Sephora notes that non-exempt store employees include loss prevention personnel. Opposition, 12 n.29; Perna Decl. ¶ 4. Sephora argues that none of the complaints specifically identified loss prevention personnel as putative class members. Opposition, 12 n.29. Sephora contends that loss prevention personnel should be excised from the putative class. *Id.* (citing *Jones v. Farmers Ins. Exchange*, 221 Cal.App.4th 986, 1000 (2013)). But several of the complaints appear to implicate loss prevention personnel. Duran Complaint ¶ 5 (class definition included all non-exempt hourly employees); Hernandez Complaint ¶ 12 (class definition included a series of specified job titles and employees in "a substantially similar position under a different title"); Burnthorne-Martinez FAC ¶ 11 (defining a class of all hourly non-exempt leads, and/or in other positions with similar job titles, descriptions, duties, and/or compensation arrangements).

[5] *ABM* did not address manageability concerns. *ABM Indus.*, 19 Cal.App.5th at 311 n.15. Nor, I should add, except in dicta did the case invoked by *ABM*, *Nicodemus v. Saint Francis Mem'l Hosp.*, 3 Cal. App. 5th 1200, 1219 n.10 (2016).

Courts also consider whether individual issues can be managed fairly and efficiently. *Duran v. U.S. Bank Nat'l Assn.*, 19 Cal.App.5th 630, 638 (2018) (*Duran II*).

Class actions must be superior to alternate means. *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 332 (2004) (citing *Washington Mutual Bank, FA v. Superior Court*, 24 Cal.4th 906, 914 (2001)). In the wage and hour arena, "the class action mechanism allows claims of many individuals to be resolved at the same time, eliminates the possibility of repetitious litigation and affords small claimants with a method of obtaining redress for claims which otherwise would be too insignificant to warrant individual litigation. [Citation.] Moreover, the issues slated for contest are primarily common issues involving common evidence. It would not be efficient or fair to relegate these complaints to multiple trials." *ABM Indus.*, 19 Cal.App.5th at 299-300, quoting *Bufil v. Dollar Financial Group, Inc.*, 162 Cal.App.4th 1193, 1208 (2008).

B. Manageability and Superiority

Plaintiffs spent little time addressing the manageability and superiority elements. Motion, 30 (arguing that the only individual issues will be damages issues, which cannot be the basis for denying certification), 34. Plaintiffs' original papers did not include a trial plan.

During the July 10, 2018 hearing, I alerted plaintiffs that a viable trial plan would be a advisable.[6] The supplemental papers (Supplemental Brief dated July 30, 2018) did nothing to help. The "trial plan" is to have a liability phase and a damages phase. Liability will be demonstrated with "corporate records" and PMK deposition testimony as well as with Sephora's

[6] I am soft-pedaling here: I actually told the plaintiffs to provide a trial plan. The written tentative provided to counsel included this: "Plaintiffs spent virtually no time addressing the manageability and superiority elements.[¶] In their moving papers they spend no time on how to handle individual issues, and have no trial plan. There likely are individual issues regarding liability. Some of those are noted below. How will Plaintiffs handle those? How many people will testify--everyone in the class? How much time will this take at trial, and what sort of pre-trial discovery may be permitted, given the people (and the topics on which they will testify) who are likely to testify at trial? [¶] A trial plan is required addressing all individual liability issues (the plan may of course indicate that the tentative findings below identifying individual issues are incorrect)."

expert report—although that report is apparently undisclosed to plaintiffs (Suppl. Brief at 20 n.14), which means plaintiffs' counsel are just speculating here. Suppl. Brief at 16:12-15; 17:3-5; 17:12-14; 18:1-3; 18:12-15; 18:25-26.[7] Damages will be handled with "certain statistical methods" (*id.* at 19:20) and perhaps reliance on methods used by an expert whose report plaintiffs do not have. *E.g., id.* at 20:9. As far as Sephora's defenses are concerned, there is nothing but the *ipse dixit* statement that "Defendant will have the opportunity to present evidence regarding deviations in policies and individual issues at trial." *Id.* at 22:20-23. This is the sole mention in that brief of how individual issues will be handled, and of course it is entirely inadequate. Indeed, the 'trial plan' is empty: only once does it mention the elements of one of the many pertinent claims (*id.* at 17:20 et seq.), and in each case relies on only the most general suggestion of generic evidence from Sephora.

There is no meaningful trial plan. Compare *Payton v. Csi Elec. Contractors, Inc.,* No. B284065, 2018 WL 4659500 (Cal. Ct. App. Sept. 28, 2018) (inadequate trial plan). Plaintiffs' supplemental brief does not focus on the manageability problems presented by individual issues. *Duran II,* 19 Cal.App.5th at 638.[8]

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[7] Plaintiffs' counsel contradicted this at argument when they told me that they will not use expert, statistical or survey evidence to prove liability. Tr. 67-68; see also Reply at 15.

[8] In *Duran v. U.S. Bank Nat'l Assn.*, 59 Cal.4th 1 (2014), the Supreme Court explained that misclassification claims have the potential to raise numerous individual questions that may be difficult, or even impossible, to litigate on a class-wide basis. *Duran I,* 59 Cal.4th at 27. Summarizing its conclusion, the Court held that class certification was appropriate only if those individual questions can be managed with an appropriate trial plan. *Id.* In its analysis, the Court specifically held: "If statistical evidence will comprise part of the proof on class action claims, the court should consider at the certification stage whether a trial plan has been developed to address its use. A trial plan describing the statistical proof a party anticipates will weigh in favor of granting class certification if it shows how individual issues can be managed at trial. Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action. In any event, decertification must be ordered whenever a trial plan proves unworkable." *Id.* at 31-32. While *Duran* counsels a prudent plaintiff to include a trial plan with his or her certification motion, it does not by its terms apply here. The First District Court of Appeal has intimated that a less stringent manageability analysis applies in the absence of numerous and substantial individual questions determining an individual's right to recover following a class judgment on common issues. *Nicodemus*, 3 Cal.App.5th at 1219 n.10 (discussing manageability element in dicta). I have applied that slightly less stringent standard in this case, but as *Duran* instructs, if plaintiffs do not actually demonstrate how the individual issues, including damages issues, are to managed, they risk decertification:

With respect to superiority, the Courts of Appeal have explained that wage and hour claims of the sort presented here are best litigated on a class basis where the other prerequisites of the class certification analysis are satisfied. *ABM Indus.*, 19 Cal.App.5th at 299-300 (explaining benefits of class treatment in wage and hour litigation). Thus the superiority element is satisfied here if the other elements are satisfied.

C. Individual issues & "Entitlement to Relief"

Plaintiffs expressly suggest that as to the scribing sub-class (discussed in more detail below) it is not a bar to certification that some class members, but not others, actually submitted their products for scribing. Plaintiffs agree individual issues are presented, but then write "but it is an issue regarding entitlement to relief," Plaintiffs' Suppl. Brief at 10:1-2. Plaintiffs suggest this is not more than an individualized damages issue, and that aggregate damages can be determined (although we are not told how this would be done). While express here, the argument implicitly underlies much of plaintiffs' arguments on other sub-classes, such as that predicated on the 'Tailoring' theory': That is, that individual issues don't count against certification because they are, at most, about 'entitlement" to relief and so about damages--and individual issues regarding damages don't bar certification.

The phase 'entitlement to relief' is susceptible to many readings, and can be used, as in plaintiffs' papers, to gloss over the distinction between liability and damages—for 'entitlement to a remedy' may be used to allude to liability issue. This is a conflation we should avoid.

The language at issue comes from the iconic *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 332–33 (2004). The context was *damages*, and our Supreme Court held "That calculation of individual damages may at some point be required does not foreclose the

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"'[i]ndividual issues do not render class certification inappropriate *so long as* such issues may effectively be managed.'" *Duran v. U.S. Bank Nat'l Assn.*, 59 Cal. 4th 1, 29 (2014), quoting *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 334 (2004).

possibility of taking common evidence on the misclassification questions." *Id.*, 34 Cal.3d at 332. It was in that context that it wrote the notable sentence, "In any event, 'a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages.' (*Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266....)." The *Employment Development* case itself probably too was referring to damages, as it noted in this context "remedial procedures". 30 Cal. 3d at 266. Only the "burdens in identifying and providing appropriate *relief*" were at issue in that case. 30 Cal.3d at 265 (emphasis supplied).

Eighteen published cases have quoted the *Sav-On* language, and most have cited it for just this point: that individual damages issues do not necessarily block certification.[9] In some other cases the ruling is unclear, but also probably refers to damages.[10]

Some case cite *Sav-On*'s holding but seem to conflate damages and liability investigations. *Dunbar v. Albertson's, Inc.,* 141 Cal. App. 4th 1422, 1431 (2006) (may simply be reporting conflation by one of the parties, not the court);[11] *In re Cipro Cases I & II,* 121 Cal. App. 4th 402, 413–14 (2004).

And another group of cases uses the *Sav-On* holding in an entirely different context:- that of ascertainability. Confronted with, e.g., trial court rulings that find fault with a proffered

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[9] *Classen v. Weller*, 145 Cal. App. 3d 27, 46 (1983) (correctly cites Sav-On as re damages); accord: *Osborne v. Subaru of Am., Inc.,* 198 Cal. App. 3d 646, 657 (1988) ("Variations in damages rules") (individual damages still a consideration however); *Bradley v. Networkers Internat., LLC*, 211 Cal. App. 4th 1129, 1155 (2012), as modified on denial of reh'g (Jan. 8, 2013); *Alberts v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388, 408 (2015); *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 742 (2004).

[10] *Reyes v. San Diego Cty. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1278 (1987). While the opinion is unclear in its reference to the "community of interest requirement," its cite to *Vasquez v. Superior Court,* 4 Cal.3d 800, 815 (1971) strongly suggests it has damages in mind.

[11] "Plaintiff maintains that the court mistakenly believed that, as a matter of law, a class could not be certified because there were individual issues of liability. (See *Sav–On Drug Stores, Inc. v. Superior Court, supra,* 34 Cal.4th at p. 333, 17 Cal.Rptr.3d 906, 96 P.3d 194 [" 'a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery' "].)" *Dunbar*, 141 Cal. App. 4th at 143.

classes because they include people who both have and do not have a claim[12] such that one might describe the class as overbroad, some opinions have found that the issue does not, at least, pose an *ascertainability* problem. In that context the opinions note the *Sav-On* language.[13]

Those ascertainability cases aside, though, it is relatively clear that the *Sav-On* language does not modify the usual tests: individual issues as to liability may defeat certification, whereas damages issues likely do not. But in any event, parties moving for certification must, as matter of manageability still articulate a means to handle individual issues, whether they relate to damages or not.

D. Individual issues & Common Policies

While common policies are often the touchstone of a successful certification motion because they so plainly present common issues, such policies may not be sufficient because, again, there may *also* be individual issues:

> As the court explained in *Cruz v. Sun World Internat., LLC* (2015) 243 Cal.App.4th 367, 197 Cal.Rptr.3d 172, plaintiffs "may not simply allege" a uniform policy or practice, but must "present substantial evidence that proving both the existence of the defendant's uniform policy or practice and the alleged illegal effects of that policy or practice could be accomplished efficiently and manageably within a class setting." (*Id.* at p. 384, 197 Cal.Rptr.3d 172.)

Payton v. Csi Elec. Contractors, Inc., No. B284065, 2018 WL 4659500, at *5 (Cal. Ct. App. Sept. 28, 2018).

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[12] E.g., *Miller v. Bank of Am., N.A.*, 213 Cal. App. 4th 1, 9 (2013); *Payton v. Csi Elec. Contractors, Inc.*, No. B284065, 2018 WL 4659500, at *5 (Cal. Ct. App. Sept. 28, 2018) ("The class action device may not be used here to provide relief to class members who actually suffered no violation because they were given the regular rest breaks that the law requires.").

[13] E.g., *ABM Indus. Overtime Cases*, 19 Cal. App. 5th 277, 299 (2017, as modified Jan. 10, 2018); *Nicodemus v. Saint Francis Mem'l Hosp.*, 3 Cal. App. 5th 1200, 1214 (2016); *Franchise Tax Bd. Ltd. Liab. Corp. Tax Refund Cases*, 25 Cal. App. 5th 369, 387–88, 391 (2018), review filed Aug. 27, 2018 at 39; *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1533 (2008); *Aguiar v. Cintas Corp. No. 2*, 144 Cal. App. 4th 121, 136 (2006); *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1335 (2008); *Harper v. 24 Hour Fitness, Inc.*, 167 Cal. App. 4th 966, 977 (2008); *Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App. 4th 1290, 1305 (2015).

Furthermore, even where there is evidence of a policy there may also be creditable evidence that the policy was not in fact common- i.e., that some putative class members were in fact not subject to the policy:

> Thus, Payton is incorrect in claiming that the existence of a site-wide tacked break policy itself was sufficient to prove liability on a common basis. Even assuming that a single tacked afternoon rest break was unlawful, the relevant question for liability is whether there was a uniform policy for workers to receive *only* such a break. Workers who received a mid-afternoon break either instead of, or in addition to, the tacked rest break did not suffer a violation under Payton's theory.

Payton, supra at *5.

4. The Subclasses

A. Security Inspections

Sephora maintained a written policy pursuant to which employee's "personal effects," "pockets," and "bags" were subject to "regular inspection and search when leaving the workplace." *See* Allen Decl., Ex. 6 at SEPHORA_000468; Motion, 7 n.18 (citing Allen Decl., Ex. 6 and arguing, without citation, that it is representative of written policies in employee handbooks published annually throughout the putative class period).

The parties use competing terminology to describe the policy: plaintiffs describe Sephora's searches as "security inspections" whereas Sephora refers to the searches as "bag checks." *Compare* Motion, 1; Opposition, 9. Plaintiffs' terminology is more appropriate. According to both the written policy presented by plaintiffs and Sephora's own evidence, employees are subject to inspection pursuant to Sephora's policy whether or not they bring a bag to work. Allen Decl., Ex. 1 at 48:12-15, Ex. 6 at SEPHORA_000468; Perna Decl. ¶ 12 at 6:2-5; Allen Decl., Ex. 16 at 113:20-114:13.[14]

[14] Sephora's class-member declarations confirm that employees were regularly subjected to security inspections whether or not they brought bags to work. *See, e.g.*, Alvaranga Decl. ¶ 10. Sephora's expert was also instructed that employees leaving the store who were not subject to a bag check were still subject to a "visual inspection." *See* Crandall Decl. ¶¶ 19-20. The only evidence that suggests that employees may have been able to leave the store

When employees leave the store during their lunch break or after their shift, the security inspection occurs off-the-clock. Allen Decl., Ex. 16 at 98:16-18.[15] However, in July 2015 Sephora began adding three minutes to the shifts of its non-exempt California employees to compensate them for the time they might have to wait for security bag checks. Diaz Decl. ¶ 10. Sephora chose to add three minutes based on the results of a time study, which it has thus far refused to produce in this litigation on the basis of attorney-client privilege. *Id.* Sephora asserts that an additional three minutes is "more than enough to compensate most employees for time spent on bag checks" based on the undisclosed study. *Id.*

Plaintiffs' bag-check theory appears to include four discrete sub-theories. The first is a claim for off-the-clock work before July 2015. During that period, Sephora uniformly subjected its employees to bag checks while they were off the clock without recording the time spent undergoing those bag checks and without paying any compensation for that time. The central questions are (1) Whether security inspections could be avoided, such as by choosing not to take a bag to work; and (2) Whether the time undergoing security inspections was non-compensable because it was de minimis. Opposition, 25-26.

As to the first question, plaintiffs have identified common evidence in support of their argument that security inspections were mandatory and unavoidable. The weight of the evidence supports the conclusion that this is a common question.

As to the second issue, we turn to *Troester v. Starbucks Cop.*, 5 Cal.5th 829 (2018). The federal de minimis defense has not been adopted in this state. *Troester*, 5 Cal.5th at 835. The

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uninspected in some circumstances is deposition testimony from one named plaintiff – Morales – and one of plaintiffs' declarants – Melissa Baez. *See* Heifetz Decl., Ex. E at 198:19-206:15 (if an employee left on lunch with only a credit card or cash, they would not be subject to security inspection; even on lunch break, security inspection would be required if employee brought wallet); Jahansouz Decl., Ex. E at 63:13-23 (stating, without establishing foundation, that employees who did not bring a bag could leave without being subject to a security inspection). However, there is no evidence that there is any putative class member was never subjected to a security inspection at any point during the course of his or her employment by Sephora.

[15] Employees do not clock out for rest periods.

Court did not decide if the de minimis defense could apply where compensable time is "so minute and irregular that it is unreasonable to expect the time to be recorded." *Id.* at 835, 843. The Court noted that the de minimis defense cannot intrude into the right for a ten-minute rest period. *Id.* at 844-45. The de minimis defense as explained in *Troester* presents a common question. The focus is on the nature of the unrecorded time – i.e., whether it is a regular feature of the job. Plaintiffs have identified common evidence that security inspections are a regular feature of the job – employees undergo a security inspection every time they leave the store.

The de minimis defense does not to give rise to substantial individual questions. *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 617-19 (C.D. Cal. 2015).[16] Thus the claim for off-the-clock work prior to July 2015 turns on common questions. At most, the record indicates that individual questions will arise as to the amount of damages. Those questions should not defeat certification. *ABM Indus.*, 19 Cal.App.5th at 308. The commonality, predominance, manageability, and superiority elements are met. As with other sub-classes certified here, though, plaintiffs will have to explain how to manage damages, or risk decertification. *Duran v. U.S. Bank National Assn.*, 59 Cal.4th 1, 31-32 (2014).

In the supplemental briefing, Sephora argues that even before the "three-minute policy" was instituted, there are individual issues as to whether employees were compensated for time spent waiting for or undergoing security inspections because Sephora's policy was for managers to adjust time records to compensate for that time. Sephora Supplemental Brief, 7. Sephora cites to a deposition excerpt stating that a manager could add time to an employee's shift so that

[16] The de minimis defense at least under federal law focuses on "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional activity." *Moore*, 311 F.R.D. at 617. Here, the first and third elements may be derived from Sephora's common practice – they do not turn on individual evidence. As to the second element, Sephora has produced evidence that the time spent undergoing security inspections varied – particularly as between individuals who brought bags and individuals who did not. But courts considering the second element "may consider estimates and averages, as opposed to calculating time by individual employee." *Id.* at 618. This is what Sephora has apparently already done. *See* Diaz Decl. ¶ 10.

they would be compensated for time spent going through security inspections. Heifetz Decl., Ex. K at 39:17-22. There is no indication in this excerpt that (1) Sephora encouraged managers to adjust the time records to compensate employees for time spent waiting for or undergoing security inspections; or (2) Managers actually did adjust time records to compensate employees for time spent waiting for or undergoing security inspections. On balance, plaintiffs have made a showing at this stage that liability for uncompensated time spent waiting for or undergoing bag checks will be established through common evidence during the time period before the three-minute policy was implemented. Individual questions regarding the amount of time that was uncompensated will relate to damages only, not to liability. *Hernandez v. Mendoza*, 199 Cal.App.3d 721, 726 (1988) (citing Ninth Circuit authority relying on *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1945)); *see also Duran,* 59 Cal.4th 1, 40-41 (2014) (describing *Mt. Clemens* burden shifting).

The second discrete theory is the claim for off-the-clock work *after* July 2015. The only difference between this and the first theory is the fact that Sephora paid for three extra minutes of work on each shift to compensate for time spent undergoing security inspections. Diaz Decl. ¶ 10. This change in policy adds an additional and significant issue: Sephora will contend that it is not liable for unpaid off-the-clock work on any shift in which the total time spent undergoing security inspections off-the-clock was less than or equal to three minutes. Opposition, 27. Whether employees spent a total of more than three minutes undergoing security inspections probably cannot be determined without individual inquiries. But that line of inquiry will likely relate only to damages for two reasons. First, plaintiffs may contend that the maintenance of Sephora's policy, which was to pay a flat three minutes without measuring the actual time spent undergoing security inspections, was *itself* unlawful. Motion, 21. Second, there is now no

evidence that any employee was able to complete all off-the-clock security inspections in less than three minutes on all of his or her shifts.[17] If there are no such employees, then the three minutes of compensation that were paid mitigate damages, but they do not affect liability. Because the individualized inquiries likely relate only to damages, they should not defeat predominance, manageability,[18] or superiority. *ABM Indus.*, 19 Cal.App.5th at 308. However if post-certification proceedings reveal that either of the two assumptions I have just stated are wrong, decertification may be appropriate.

The third and fourth discrete theories are that meal and rest periods (respectively) were interrupted by security inspections. These theories are based on a common predicate, that Sephora maintains a common policy counting the time undergoing security inspections as part of the break.[19] At the same time, the success of these theories are also contingent on an employee leaving the store during meal or rest periods. Villarino Decl. ¶ 12 (implying, without directly stating, that she never left the Sephora store during a meal or rest period).[20] These theories are probably also contingent on the timing and duration of the break and the length of the bag check: an employee who takes an hour-long lunch break beginning 4.5 hours into her shift likely received a compliant meal period even if she underwent a security inspection that encompassed

[17] The declarations supplied by Sephora do not contain any concrete testimony that any employee was always able to complete all daily security inspections with only three aggregate minutes of off-the-clock time. Alvara Decl. ¶¶ 8-10; Alvarenga Decl. ¶ 10; Fernandez Decl. ¶¶ 9-11; Kennedy Decl. ¶ 14; Larsson Decl. ¶ 16; McKail Decl. ¶¶ 21-26; McLaren Decl. ¶ 17; Meyer Decl. ¶ 15; Meza Decl. ¶ 11; Montelongo Decl. ¶ 15; Norman Decl. ¶ 14; Ochoa Decl. ¶ 9; Puppo Myer Decl. ¶¶ 15-16; Ring Decl. ¶¶ 16-17; Salazar Decl. ¶ 10; Simoni Decl. ¶¶ 23-24; Vargas Decl. ¶ 12; Carbone Decl. ¶¶ 7-8; B. Ramirez Decl. ¶ 14; L. Ramirez Decl. ¶ 14.

[18] As with other certified sub-classes, plaintiffs must be able to explain how individual damages questions will be managed, or risk decertification.

[19] *E.g.*, Crandall Decl. ¶ 8, Ex. 1 (based on Sephora's timekeeping data – through which employees clocked out for meal periods before undergoing a security inspection during a meal period – 16% of meal periods were exactly 30 minutes and only 52% of meal periods were longer than 35 minutes); Diaz Decl., Ex. F (timekeeping policies).

[20] Sephora submits numerous declarations in which putative class members state that their breaks have never been interrupted. These are legal conclusions that do not speak to whether employees underwent security inspections during their breaks.

the first five minutes of that break, but the same would not be true if the break nominally started at the fifth hour of work or was recorded as less than 35 minutes in Sephora's time records.

While individuals with breaks of exactly thirty minutes in their history might not be required to testify, those with a history of long breaks may have to testify to support their claims. These are individual issues which swap the common issues presented.

(i) Damages

Individualized damages cannot be determined on a class-wide basis. Plaintiffs propose a procedure by which they offer aggregate proof of damages followed by apportionment through a claims process, which may be managed by a special master. Plaintiffs' Supplemental Brief, 19-21. Sephora notes that plaintiffs have not yet produced an expert or other evidence supporting the inference that the submission of statistical evidence will prove workable. Sephora Supplemental Brief, 8-9.

Duran stated:

> If statistical evidence will comprise part of the proof on class action claims, the court should consider at the certification stage whether a trial plan has been developed to address its use. A trial plan describing the statistical proof a party anticipates will weigh in favor of granting class certification if it shows how individual issues can be managed at trial. Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action. In any event, decertification must be ordered whenever a trial plan proves unworkable.
>
> *Duran*, 59 Cal.4th at 31-32.

In the abstract, statistical proof may be used to prove damages. Plaintiffs have disregarded *Duran*'s guidance to prepare a plan for offering statistical proof before certification. But *Duran*'s guidance is not a requirement. At the same time, *Duran* notes that where a class action proceeds in reliance on "assurances" that a statistical plan will eventually be developed, "decertification must be ordered whenever a trial plan proves unworkable." *Duran*, 59 Cal.4th at 32. Here, plaintiffs' plan is workable only if valid statistical proof of the amount of damages is

submitted. The class will be decertified if valid statistical proof of aggregate damages cannot be developed. We will discuss the matter at an upcoming case management conference.

(ii) Waiting Time Penalties

Sephora argues that plaintiffs have not shown what common proof they will use to show willfulness. Plaintiffs respond they will use the same evidence relevant to the underlying violations. Motion, 30. The various waiting time penalty subclasses proposed in the supplemental briefing should be certified if the subclasses as to the underlying theories of liability for predicate violations are certified.

B. Scribing

Sephora imposed a common scribing policy throughout the relevant class period. Motion, 7; Opposition, 9-10, 28. Employees with personal makeup products of the same brand sold by Sephora bring these to management to have the products inscribed with an identifiable marking so that the employee will be able to leave the store with the product in the future. Allen Decl., Ex. 16 at 82:15-83:5; Perna Decl. ¶ 14.[21] Sephora does not require employees to clock in before handing a product to management to be inscribed. Allen Decl., Ex. 16 at 84:7-14. However, submitting a make-up product for inscription is an infrequent and quick process. Perna Decl. ¶ 14; Booker Decl. ¶ 6.

Plaintiffs argue that any employee who submitted a product to be scribed before clocking in is entitled to compensation for the time spent bringing the product to management for inscription, including any waiting time. Motion, 7. Sephora counters that scribing is infrequent and asserts that scribing may occur on the clock. Opposition, 28.

[21] While Perna declares that "scribing practices vary from store to store[,]" it is clear from her testimony that Sephora expects scribing to occur in some form at all of its California locations. Perna Decl. ¶ 14.

Plaintiffs propose two scribing subclasses. The first is comprised of all hourly non-exempt employees who worked for Sephora at retail locations in California and who, while off the clock, submitted a product to be scribed by management between May 23, 2013 and the date of class certification. Plaintiffs' Supplemental Brief, 4. The second is limited to former employees and extends back to only May 23, 2014. *Id.*

In the supplemental briefing, Plaintiffs concede that the question of whether employees submitted makeup for inscription while off the clock is an individual issue but argue that it regards only "entitlement to relief." Plaintiffs' Supplemental Brief, 9-10. Plaintiffs argue that the aggregate damages can be determined before a claims process is used to apportion the recovery. *Id.* at 10. Sephora responds that no class should be certified because there is no common policy. Sephora Supplemental Brief, 12.[22] Sephora also argues that plaintiffs have failed to recognize that the individual issues go to liability and that, in any event, plaintiffs have no manageable plan to prove what plaintiffs refer to as damages issues. *Id.* at 12-13.

The scribing claims should not be certified. While there is a common policy that requires scribing, plaintiffs have not shown there is a common policy that requires scribing to occur off-the-clock. The basic inquiry would be whether, in each individual case, employees actually submitted products for scribing while off-the-clock. Plaintiffs have not proposed a means by which these inquiries, which relate to liability, can be managed. Certification is denied on predominance, manageability, and superiority grounds.

C. **Makeup**

Sephora's written make-up policy changed once during the putative class period. Perna Decl. ¶ 21, Ex. A at SEPHORA_STATE_DURAN_000107 (original policy), SEPHORA_00086

[22] Sephora presumably means that there is no common policy that requires employees to submit products for inscription off the clock, which is true. There is a common policy that requires employees to submit products for inscription, but it is silent as to whether employees should be clocked in when that occurs.

(same), SEPHORA_000466 (same), SEPHORA_000560 (revised policy). Pursuant to the original policy, female employees were required to wear at least five pieces of make-up. *See id.*, Ex. A at SEPHORA_STATE_DURAN_000107. The make-up policy was optional for male employees. *Id.* The written policy was revised in July 2016. *Id.* at ¶ 21, Ex. A at SEPHORA_000560. In the revised policy, Sephora provided a "makeup suggestion" in which "[a]ny cast member may choose to participate." *See id.*, Ex. A at SEPHORA_000560. These suggestions include encouragement to wear looks that highlight the current store "Animations." *Id.*; Allen Decl., Ex. 16 at 64:17-65:24 (animations are "looks" that the store is using in its promotional and marketing materials). Sephora does not treat time spent applying make-up off-the-clock as compensable time. *E.g.*, Opposition, 23-25 (arguing that time spent applying make-up while off-the-clock is not compensable).

Sephora provides employees free makeup, but does not reimburse employees for any makeup employees purchased to enable themselves to comply with Sephora's makeup policy. *See* Perna Decl. ¶¶ 13, 15; *see also, e.g.*, Burnthorne-Martinez Decl. ¶ 14;[23] Opposition, 29-30 (no dispute that Sephora does not reimburse employees for makeup purchases).

Plaintiffs propose four makeup subclasses. In short, these are: (1) All female hourly non-exempt employees at retail locations in California during the time period between May 23, 2013 and June 30, 2016; (2) All female hourly non-exempt employees at retail locations in California during the time period between July 1, 2016 and the date of class certification; and (3) and (4) Former employees who also meet the foregoing descriptions, except that the first former employee subclass only extends back to May 23, 2014. Plaintiffs' Supplemental Brief, 3-4.

[23] Sephora's "vague and ambiguous" objection to ¶ 14 of the Burnthorne-Martinez Declaration is overruled. Sephora Objections, 15.

(i) Off-The-Clock Work and Interrupted Breaks

The parties appear to agree that whether off-the-clock time spent applying makeup is compensable turns on whether employees were subject Sephora's control. Motion, 22; Opposition, 23-24. Both parties invoke *Morillion v. Royal Packing Co.*, 22 Cal.4th 575 (2000). Motion, 22; Opposition, 24. In *Morillion*, the Court ruled that employees were entitled to be paid for the time traveling on their employer's buses to and from the job sites, because the employer required them to use the buses. *Morillion*, 22 Cal.4th at 587-88. The Court held that "[t]he level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative." *Id.* at 587.

In plaintiffs' view, the claim is simple – Sephora requires female employees to wear makeup so it must pay them for the time they spend applying it. Motion, 22; Reply, 14. This claim is predicated on the policies contained in Sephora's employee handbooks. Perna Decl. ¶ 21, Ex. A at SEPHORA_STATE_DURAN_000107 (original policy), SEPHORA_000560 (revised policy); Allen Decl., Ex. 16 at 60:4-62:12.

Sephora argues that several individual issues are implicated. First, Sephora argues that employees are not subject to its control if they would have applied makeup regardless of Sephora's makeup policy. Opposition, 24. That some employees may have voluntarily taken the same action does not indicate that there will be a need for individualized evidence or individualized liability determinations. Rather, the liability determination will be based on a common consideration of the level of control the employer exercised over its employees. *Morillion*, 22 Cal.4th at 587. For example, *Morillion* did not analyze whether the employees would have chosen to use the buses provided by the employer as opposed to other methods of

commuting to the job site to determine whether the time spent commuting on the employer's buses was compensable. *Id.* at 581-88.

Second, Sephora argues that there were variations in the amount of time spent applying makeup and whether employees were permitted to apply makeup while they were on the clock. Opposition, 24. Except to the extent employees never applied makeup off the clock, these variations relate to the amount of damages. These issues do not defeat predominance and are unlikely to present unmanageable individual issues.

Third, Sephora argues that store managers had, and exercised, discretion to permit employees to work without makeup. Opposition, 24. This contention cuts to the heart of the predominance inquiry. To support its argument, Sephora cites to a few declarations. First, Lindsey Pilcher, a store manager, declares she has always informed employees that makeup is optional, even before July 2016. Pilcher Decl. ¶ 4. Nevertheless, Pilcher concedes that she does make "suggestions" to employees encouraging them to apply some categories of makeup and to look inspirational because Sephora works in the beauty industry. *Id.* Second, Lorraine Ramirez declares that she has allowed cast members who have acne not to wear makeup because it aggravates their skin and that one current employee is not required to wear foundation. L. Ramirez Decl. ¶¶ 6-7. Third, Cocoa Carbone declares that before July 2016 Sephora leads did not count the number of makeup items employees were wearing and did not document employees when they sometimes reported to work without makeup. Carbone Decl. ¶ 16. Fourth, two other manager declarations cited by Sephora do not disclaim enforcement of the makeup policy. B. Ramirez Decl. ¶ 6 (does not recall an employee being documented for failing to wear makeup, although does recall leadership encouraging employees to wear more makeup); Keith Decl. ¶ 7 (if employee reported to work without the amount of makeup Sephora required, they

would be sent backstage to apply additional makeup while on the clock). Fifth, two non-managerial employees – one a female who wears makeup to work and one a male – state their belief that there is no mandatory make-up policy. Larsson Decl. ¶ 5-6; Meza Decl. ¶¶ 4-6.

Sephora's evidence suggests that there may be limited store-level variation in the enforcement of Sephora's makeup policy. But it does not rebut the PMK testimony and written policies evidencing the policies. Perna Decl. ¶ 21, Ex. A at SEPHORA_STATE_DURAN_000107 (original policy), SEPHORA_000560 (revised policy); Allen Decl., Ex. 16 at 60:4-62:12.

Based on this discussion, the putative class should be analyzed as two groups. The first group consists of the female[24] employees who worked for Sephora in California *before* the makeup policy changed in or around July 2016. The second group includes female employees who worked for Sephora in California after the makeup policy was changed in or around July 2016.

As to the first group, Sephora's original makeup policy and PMK testimony demonstrate the existence of a common policy requiring employees to wear makeup. Sephora's evidence indicates that there may have been outlier stores that deviated from Sephora's company policy. For these employees, the common question – whether Sephora was required to compensate employees for time spent applying makeup in light of its common policy – will predominate. Sephora may put on store-specific evidence that the policy was not enforced. Such evidence is unlikely to upset manageability. The commonality, predominance, manageability, and superiority elements are met on this theory. That class members may have to self-identify as, for example, employees who applied makeup before work or during their breaks should not result in the denial of class certification now. *ABM Indus.*, 19 Cal.App.5th at 304; *Nicodemus*, 3

[24] There is no evidence of a policy requiring or suggesting that male employees wear makeup.

Cal.App.4th at 1219 n.10. But as noted above, decertification remains a possibility. See above, n.8.

This reasoning does not extend to claims based on the need to re-apply makeup during breaks. The record does not establish that female employees would uniformly be required to re-apply makeup. As a result, the heart of the meal and rest period theories will be whether makeup was reapplied during breaks, an issue that will turn on individual testimony. Those theories present predominant and unmanageable individual issues.

As to the second group (post July 2016), the key distinction is that there is no policy that requires employees to employ makeup. Plaintiffs' theory is that the "suggestions" contained in the current makeup policy have the same effect. Sephora's PMK explained that the modification in the makeup policy was intended to increase the level of discretion at the store level to empower store directors to permit store employees to feel more comfortable at work. Allen Decl., Ex. 16 at 61:24-62:12. The evidence shows there will be varying indicia of control by different managers at different times, and plaintiffs provide no guidance on how to manage those disparate inquires. As plaintiffs write, after the policy revision there were substantial variations in how the new policy was implemented, noting "many class members believed they had to wear makeup," Plaintiffs' Supplemental Brief at 10, directly implying many others did not.

(ii) **Expense Reimbursements**

Plaintiffs contend that Sephora's makeup policy required employees to purchase makeup and that Sephora did not reimburse those expenses. Motion, 27, citing § 2802; *Cassady v. Morgan, Lewis & Bockius LLP*, 145 Cal.App.4th 220, 230 (2006). The elements of a § 2802 claim are "(1) the employee made expenditures or incurred losses; (2) the expenditures or losses were incurred in direct consequence of the employee's discharge of his or her duties, or

obedience to the directions of the employer; and (3) the expenditures or losses were necessary." *Cassady*, 145 Cal.App.4th at 230.

Whether an employee purchased makeup will require individual proof. The right to recover as a member of the class who purchased makeup and the amounts of any damages are individual questions.[25]

There is no evidence of a common policy requiring employees to purchase makeup at Sephora stores instead of at stores operated by other retailers. Because there is no common policy requiring employees to make purchases at Sephora stores, certification of the § 450 claim should be denied under *Morgan*. The § 2802 claim also requires individual inquiries because it must focus on which items were purchased by a given employee and whether that purchase was necessary. *Morgan v. Wet Seal*, 210 Cal.App.4th 1341, 1357 (2012); *but see Brown v. Abercrombie & Fitch Co.*, 2015 WL 9690537, at *14, *19 (C.D. Cal. 2015) (reaching different result under a similar uniform policy).

The expense reimbursement theories should not be certified.

(iii) Coerced Purchases

Plaintiffs may also contend that Sephora coerced employees to purchase Sephora-brand products. Motion, 27, citing § 450.[26] Sephora notes that plaintiffs failed to produce any evidence of such a policy. Opposition, 29-30, citing *Morgan v. Wet Seal*, 210 Cal.App.4th 1341

[25] In *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007), the California Supreme Court noted that determining whether the amount of expenses incurred was "necessary" depends on the reasonableness of the employee's choices in incurring the expenses. There, the actual expenses incurred by the use of the employee's own vehicle would vary based on the type of vehicle driven by the employee. *Id.* Here, any dispute about the reasonableness of the cost employees paid to purchase makeup will relate to damages, not liability, because no reimbursement was paid.

[26] Plaintiffs appear to conflate their §§ 450 and 2802 claims, arguing that they intend to pursue a claim for "coerced purchases" because the original makeup policy employees were required to wear makeup highlighted in the current animation, before arguing that a federal case certified a similar claim for violation of § 2802. *Id.* at 10-11.

(2012); Motion, 11-13 (no citation to evidence requiring employees to purchase Sephora brand products). In reply, plaintiffs do not address this theory. Reply, 1, 7-8.

Morgan affirmed the trial court's decision to deny certification of a § 450 claim where there was no evidence of a common policy requiring or coercing employees to purchase merchandise from Wet Seal stores. *Morgan*, 210 Cal.App.4th at 1355-57. Plaintiffs' showing here is similarly deficient. Common questions do not predominate and the theory cannot be certified.

D. Costume Maintenance

Sephora has required employees to wear a "costume" on the sales floor and provided costumes to its employees. *E.g.*, Perna Decl. ¶ 17. Plaintiffs challenge two aspects of the costume policy. First, they allege that employees were required to have the costumes tailored but were not compensated for the time spent securing tailoring. Motion, 13-14. Second, plaintiffs allege employees were required to maintain the costumes but were not compensated for that time.[27]

Plaintiffs propose two tailoring subclasses. The first is comprised of all hourly non-exempt employees who worked for Sephora in California and spent time tailoring or having their costumes tailored while off-the-clock between May 23, 2014 and the date of class certification. *See* Plaintiffs' Supplemental Brief, 5. The second is former employees who meet the same definition. *See id.*[28]

[27] Sephora's policy was to reimburse employees for tailoring if the alterations were pre-approved. *See* Perna Decl. ¶ 20; Concepcion Decl. ¶ 12; Melissa Gonzalez Decl. ¶ 11. Plaintiffs do not premise liability on unreimbursed business expenses. Rather, Plaintiffs' theories are based solely on off-the-clock work.

[28] There are typos in the first subclass definition. Specifically, it is likely plaintiffs intended the first tailoring subclass to extend back to May 23, 2013.

(i) **Tailoring Theory**

With respect to the first theory, the evidence shows Sephora required employees to tailor their uniforms in some circumstances pursuant to a common written policy. Allen Decl., Ex. 16 at 40:10-24; Perna Decl., Ex. A at SEPHORA_STATE_DURAN_000108, SEPHORA_000087, SEPHORA_000466, SEPHORA_000559. There was, however, variation with respect to whether employees were forced to pursue tailoring off-the-clock to comply with Sephora's requirements. *See, e.g.*, Concepcion Decl. ¶ 12 (costume professionally tailored); Larsson Decl. ¶ 13 (never had costume altered); Mata Decl. ¶ 14 (never had costume tailored or hemmed); Perna Decl. ¶ 20.

There could be a common question whether time spent securing alterations to bring costumes into compliance with the policy is compensable. There are also individual questions as to whether each putative class member spent time securing tailoring services while off the clock. In their supplemental brief, plaintiffs concede the existence of individualized issues but argue these only go to 'entitlement to relief.' Plaintiffs' Supplemental Brief, 10.

Plaintiffs suggest that statistical methods may be used to calculate total damages, but they never directly discuss the tailoring theory. *Id.* at 19-22. Perhaps they suggest a time and motion study to approximate the time spent undergoing security inspections. *Id.* There is no discussion of the scope of the tailoring issue or its suitability to statistical proof, and in particular there is nothing that discusses how liability issues will be managed. Indeed, plaintiffs disclaim reliance on surveys, statistics or experts in the liability phase. Tr. 67-68. But the individual issues here go not just to damages but to liability. Individuals do not have a claim for unpaid wages under the tailoring theory unless they spent at least some time having their uniforms tailored while off the clock. Plaintiffs have not shown the existence of a common policy that requires employees to

secure tailoring off-the-clock. Accordingly, plaintiffs would be required to rely on individual evidence to establish liability. Plaintiffs have not shown how these individual issues would be manageable. As a result, plaintiffs have not shown predominance, manageability, or superiority. Neither tailoring subclass can be certified.

(ii) **Maintenance Theory**

With respect to the second theory, Sephora has had two distinct written maintenance policies over the course of the putative class period – one that required costumes to be "clean" and "pressed" and one that required costumes to be "presentable." Perna Decl., Ex. A at SEPHORA_STATE_DURAN_000107, SEPHORA_000086, SEPHORA_000465, SEPHORA_000558. But there is substantial evidence that the costumes could be and were maintained by washing and drying them with an individual's regular clothing. *E.g.*, Perna Decl. ¶ 19. Sephora argues that the fact that its costumes do not require special care defeats liability and criticize plaintiffs for failing to offer evidence that special care was, in fact, required. Opposition, 22. Plaintiffs reply that their theory does not turn on how employees maintained their costumes – arguing that whether or not special care was required any time spent maintaining costumes is compensable. Reply, 6; Motion, 14 (ambiguous as to what employees were required to do to maintain their costumes). Under plaintiffs' theory, the liability inquiry will not present individual questions because all employees were required to perform at least basic costume maintenance.[29] Now is not the time to evaluate whether plaintiffs' theory is valid. The uniform maintenance theory can be certified.

[29] With respect to damages, the amount of time spent maintaining costumes will turn on individual proof. *See, e.g.*, Perna Decl. ¶ 19 (discussing factors that may bear on how frequently putative class members were required to clean their costumes). However, these individual damages issues should not defeat certification. *See Brinker*, 53 Cal.4th at 1022. Plaintiffs have to explain how this will be handled. As noted in connection with other theories, the claims are subject to decertification if a satisfactory method is not presented.

Plaintiffs propose two costume maintenance subclasses. The first is comprised of all hourly non-exempt employees who worked for Sephora at retail locations in California and were provided a uniform by Sephora between May 23, 2013 and the date of class certification. Plaintiffs' Supplemental Brief, 4. The second is limited to former employees and extends back to only May 23, 2014. *Id.* at 4-5. It is appropriate to have a waiting time penalties subclass based on costume maintenance because the limitations period is different. Accordingly, the off-the-clock claim should be certified pursuant to the general class definition and the waiting time penalties subclass should be certified, with modified language.

E. Payroll Cards

Plaintiffs articulated two payroll card theories in their moving papers: (1) Sephora violates § 213(d) by requiring employees to receive their pay via direct deposit – either to their bank account of via payroll card; and (2) Sephora violates § 212(a) because funds deposited on payroll cards were not readily available without discount. Motion, 14-15, 26.

(i) **Direct Deposit**

Plaintiffs' first theory is opaque. Plaintiffs cited to evidence that Sephora issues its final pay either via direct deposit or via paycard. Motion, 14, citing Allen Decl., Ex. 1 at 100:3-18, Ex. 14.[30] Sephora argues that the theory is based on a misunderstanding of Sephora's policy. Opposition, 19, citing evidence. Plaintiffs do not respond to Sephora's argument, omitting the theory from their reply. Reply, 1. In supplemental briefing, plaintiffs confirmed that they are pursuing the two theories noted above. Plaintiffs' Supplemental Brief, 11. But the supplemental briefing does not help. Plaintiffs' cite § 213(d) for the proposition that it is unlawful to require

[30] The other cited excerpts from the Diaz deposition do not support the inference that employees could not receive paper checks for their regular pay. *See* Motion, 14 (citing evidence). Indeed, uncited testimony in the pages provided by Plaintiffs indicates that employees could receive paper checks in the usual course. *See* Allen Decl., Ex. 1 at 108:16-23.

class members to receive their final pay via direct deposit or payroll card – prior authorization is required. *Id.* at 11. Plaintiffs assert that the primary issue will be whether Sephora secured voluntary authorization before making the final payment via direct deposit or paycard. *Id.* at 17.

Section 213(d) is an exception to liability under § 212. It does not prohibit conduct, but it does support the argument that payment via direct deposit must be voluntarily authorized to avoid a violation of § 212.

There is some evidence that Sephora issues final pay either via direct deposit or via paycard. But the record does not, by a preponderance of the evidence, show a common policy pursuant to which Sephora employees were required to accept final payment of wages by payroll card or direct deposit without authorization or without the option of receiving a paper check. Allen Decl., Ex. 1 at 100:13-20, Ex. 14. Plaintiffs' strongest evidence is a written policy stating that employees in states where final pay must be paid to involuntarily terminated employees upon termination must be paid via paycard. Allen Decl., Ex. 14. But that doesn't resolve the central question posed by plaintiffs, whether Sephora secured voluntary authorization to pay the employees in question by paycard before making such a payment. Given the centrality of this inquiry and the absence of common evidence, certification of the second theory should be denied. This determination is underscored by the conflicting evidence as to whether final payment could be made by a paper check. Allen Decl., Ex. 1 at 100:13-20.

(ii) **Discounts**

Plaintiffs' second theory is more clear. When Sephora paid employees with payroll cards, the funds deposited on the cards were subject to common fee schedules. Motion, 15; Opposition, 19-20; Allen Decl., Ex. 15; Diaz Decl. ¶¶ 18-19, Exs. L-M. Whether paying employees with payroll cards using subject to these common fee schedules violated § 212(a),

which requires that instruments issued for payment of wages be negotiable and payable in cash on demand and without discount, is a common question of law. This is the central dispute between the parties and is the predominant common question. Opposition, 19-20 (arguing that plaintiffs' theory of liability fails because Sephora's common policy was lawful).

There is evidence that something less than all of Sephora's employees received payment by payroll card. Diaz Decl. ¶¶ 16-17 (explaining that most employees opt to receive their regular wages by direct deposit, but that payroll cards are most often used to make the final payment of wages upon the termination of employment). Accordingly, a subclass should be defined that is limited to employees who have received compensation on payroll cards.[31]

F. Minimum Management Staffing

Sephora required at least one member of the management team to be in the store at all times. Motion, 9; Opposition, 15; Perna Decl. ¶ 10; Baldwin Decl. ¶ 10; Caceres Decl. ¶ 11; Burnthorne-Martinez Decl. ¶ 15.[32] Sephora submits uncontroverted evidence that its policy in this circumstances is for the management employee to remain clocked in, resulting in payment of one hour of premium pay as well as compensation for the time worked. *Compare* Perna Decl. ¶ 10; *with* Baldwin Decl. ¶ 10; Caceres Decl. ¶ 11; Burnthorne-Martinez Decl. ¶ 15. Plaintiffs did not address this theory of liability in their reply, although the sub-class definition found in their reply does include a sub-class for this theory. Reply, 1, 14.

It is not clear if plaintiffs contend that Sephora's minimum management staffing policy resulted in a violation of law. Motion, 9 (stating only that employees were unable to leave the

[31] Sephora points to evidence that some individuals withdrew funds from their payroll cards successfully. Opposition, 19; Curiel Decl. ¶ 15; Villarino Decl. ¶ 15. However, Labor Code § 212(a) appears to establish an objective test that turns on the uniform nature of the payroll cards, not individual experiences in accessing the funds. Sephora probably has records of the payments it made by payroll card. For example, it required employees to sign authorizations before it made payments by payroll card. Perna Decl. ¶ 24.

[32] Sephora's objections to the cited testimony from Baldwin, Caceres, and Burnthorne-Martinez, which are based on the foundation for the testimony and the alleged ambiguity of the testimony, are overruled. Sephora Objections, 24, 27, 56.

premises for missed meal periods, without addressing whether employees were paid premium pay in these instances). Thus there is no showing that liability can be established by common proof.

G. Rest Periods

Plaintiffs motion argued that Sephora had unlawful rest period policies because: (1) Sephora's policy did not take into account the "or major fraction thereof" language in the wage order, resulting in, for example, Sephora failing to provide rest breaks for employees who worked more than six hours but less than 8 hours; and (2) Sephora scheduled rest periods "according to business needs" rather than "in the middle of the work period insofar as practical." Motion, 2, 23-25.

Plaintiffs' first theory appears to be supported by only a misunderstanding of Sephora's rest period policy. *Compare* Motion, 10 n.30 (citing employee handbooks that state the minimum rest period expectations for Sephora's United States employees as evidence of Sephora's rest period policy); *with* Allen Decl., Ex. 13 at SEPHORA_000827 (California rest period policy consistent with the requirements espoused by Plaintiffs' first theory). Plaintiffs did not reply to Sephora's point that plaintiffs misunderstood the rest period policy. Opposition, 16-17. It is unclear whether plaintiffs maintain the first theory but if they do they have not pointed to common evidence that Sephora maintained an assertedly illegal policy. Accordingly, plaintiffs have not shown that common questions predominate.

Plaintiffs' second theory is more difficult to ascertain. Perhaps they contend that the failure expressly to maintain a policy that requires rest periods to be scheduled "in the middle of the work period insofar as practical" is unlawful. Allen Decl., Ex. 13 at SEPHORA_000827 (no reference to scheduling breaks "in the middle of the work period insofar as practical"); *cf.*,

Safeway, Inc. v. Superior Court, 238 Cal.App.4th 1138, 1154 (2015) (that employer had practice of failing to pay premium wages when required was susceptible of common proof). But plaintiffs seem to contend something else, i.e., that Sephora affirmatively scheduled employee's rest breaks without making an effort to schedule the breaks "in the middle of the work period insofar as practical." Motion, 10; Reply, 12-13.

Establishing liability will require proof that rest breaks were not, in fact, scheduled in the middle of the work period 'insofar as practical'. The common policy is not useful on this point. Plaintiffs assert that the *failure* to have a policy that expressly requires meal periods to be scheduled "in the middle of the work period insofar as practical" is, standing alone, a violation of the employer's obligation to make a good faith effort to authorize or permit rest periods in the middle of each work period. But there is no evidence of a common policy that resulted in legal violations pursuant to their theory of liability. This theory cannot be certified.

H. Store Closing

The parties agree Sephora required at least one employee to wait, off-the-clock, for a keyholder to set the alarm at the end of each closing shift. Motion, 8; Perna Decl. ¶ 16. As described by Perna, one employee waits with the keyholder who is authorized to close the store and the keyholder will not set the alarm until the other employee has clocked out. Perna Decl. ¶ 16; *but see* Fernandez Decl. ¶ 16 (declaring that the store he works at has an overnight crew, so the alarm typically is not set after the closing shift and that he has never waited off the clock to leave the store after a closing shift). The amount of time the employee must wait off-the-clock (while the keyholder sets the alarm) varies. *Compare* Caceres Decl. ¶ 7;[33] *with* Keith Decl. ¶ 6 (takes seconds to set the alarm).

[33] Sephora's objection to ¶ 7 of the Caceres Declaration is overruled. Sephora Objections, 26.

Plaintiffs propose two closing shift subclasses. The first is comprised of all hourly non-exempt employees who worked for Sephora at retail locations in California between May 23, 2013 and the date of class certification who worked a closing shift. Plaintiffs' Supplemental Brief, 2. The second is limited to former employees and extends back to only May 23, 2014. *Id.*

Plaintiffs argue that any employee working a closing shift would be exposed to a violation because they had to "wait for the door to be unlocked." Plaintiffs' Supplemental Brief, 9; *compare* Motion, 8:16-18 (closing shift theory was that class members who work closing shifts have to wait off-the-clock for the manager to lock the store). Plaintiffs argue that it is unnecessary to identify the individuals exposed to the policy during the liability phase; aggregated damages can be proven through statistical evidence and individuals who were exposed to the policy can participate in a claims process. Plaintiffs' Supplemental Brief, 9-10, 16, 19-20.

There is material issue of numerosity here; unlike the other sub-classes, it is not obvious that more than handful of people could be included. Plaintiffs make no showing on this.

Individual issues will present an unmanageable hurdle because each employee that worked a closing shift will have to testify to establish whether or not he or she was required to wait with a keyholder while the alarm was set. Whether a given employee was required to wait off-the-clock while the alarm was set is the heart of the liability case. That fact cannot be proven by the common policy or timesheets. The core question is ultimately individual and unmanageable. The closing shift subclasses should not be certified.

I. Non-Discretionary Bonus Calculations

Sephora has paid its employees non-discretionary bonuses using standard calculations. Motion, 29; Opposition, 31; Gutierrez Decl., Ex. 18 at 128:20-129:23, 130:18-132:22, Ex. 19;

Diaz Decl. ¶¶ 11-12. Before July 2014, Sephora did not include the bonuses in its employees' regular rates of pay when it computed their overtime compensation. Motion, 29; Opposition, 31; Gutierrez Decl., Ex. 18 at 136:15-140:19; Diaz Decl. ¶ 12. From July 2014 onward, Sephora *did* include the bonuses in the calculation. Gutierrez Decl., Ex. 18 at 136:15-140:19; Diaz Decl. ¶ 12.

Duran claims it was unlawful for Sephora to exclude the bonuses from its employees' regular rates of pay when it computed their overtime compensation. Motion, 29. As a result all employees who received overtime compensation and a non-discretionary bonus during the same pay period prior to mid-July 2014 were not paid all of the wages they were owed. *Id.* While Sephora disputes Duran's interpretation of the law, Opposition, 31, this just underscores the existence of a predominant common question of law.

The employees affected are ascertainable – either by self-identification or by reference to Sephora's records. *E.g.*, Diaz Decl. ¶¶ 13, 15 (describing wage statements, including how bonus information was displayed on wage statements). The resolution of the legal dispute will be dispositive of liability. Damages may be measured by recalculating overtime compensation taking the non-discretionary bonuses into consideration. This can be accomplished by referencing the wage statements. *E.g.*, *id.*

Time span of sub-class. Duran proposes a subclass from March 10, 2012 through the present who worked overtime hours and received a non-discretionary bonus but did not receive the legal rate of overtime for the bonus earned. Plaintiffs' Supplemental Brief, 5-6. Sephora argues the class period should begin no earlier than May 23, 2013 pursuant to Case Management Order No. 1 and should close in July 2014 consistent with Duran's theory. Sephora Supplemental Brief, 24-25.

As to the beginning of the class period, Duran's action was not included in these proceedings when the Court entered Case Management Order No. 1. Accordingly, the foundation for the beginning of the class period – an agreement between the parties – does not apply to her. The subclass period should open on March 10, 2012. As to the end of the class period, it should close on the date in July 2014 when the challenged practice stopped. A broader definition would do nothing more than sweep in individuals with no claims. Thus the subclass should be certified except that "through the present" should be replaced with "through July 2014," subject to additional clarification of the date when the practice stopped.

J. Wage Statements

There are two distinct policies that may give rise to plaintiffs' direct wage statement theories.

(i)

Throughout the putative class period, Sephora made wage statements available electronically. Diaz Decl. ¶¶ 14-15. Employees were permitted to opt out of this program to receive paper wage statements. *Id.* at ¶ 14. To the extent plaintiffs are challenging this policy as unlawful, the challenge presents predominant common questions and no individual liability issues. This may be certified.

(ii)

Sephora's wage statements assertedly did not disclose the applicable overtime rate or the number of overtime hours used to calculate the additional overtime compensation owed to the employees as a result of the bonus compensation. Gutierrez Decl., Ex. 18 at 142:4-144:6. According to Duran, each such pay stub violates § 226(a)(9) because each such pay stub does not contain "all applicable hourly rates in effect during the pay period and the corresponding number

of hours worked at each hourly rate." Motion, 29; § 226(a)(9). Sephora contends there are no violations of § 226(a) because the information identified by Duran is beyond the scope of § 226(a). Opposition, 32. This is a common question. Sephora also argues that each class member will have to make an individualized showing of causation and damages. *Id.* at 32-33. But if the omitted information was required by § 226(a)(9), then the causation and injury elements are satisfied. Section 226(e)(2). As a result, the individual issues identified by Sephora will never arise – the liability determination will turn entirely on whether Sephora was required to include the omitted information by § 226(a)(9). That is the predominant common question here.

Duran has proposed here a subclass that is properly limited. Motion, 4. The putative sub-class members can be ascertained by reference to their wage statements or by self-identification. Diaz Decl. ¶ 4 (briefly outlining Sephora's electronic human resources record-keeping systems); Gutierrez Decl., Ex. 21 (paystubs for Duran produced by Sephora in this litigation). There are no individual issues as to liability. Damages will turn on the number of wage statements at issue. Section 226(e). Given the existence of payroll records, these individual damages issues do not present manageability concerns that preclude class certification.

Sephora argues that claims prior to September 22, 2016 are time-barred and not saved by tolling. Sephora Supplemental Brief, 25. The last clause of the definition ("but did not receive the legal rate of overtime for the bonus earned") should be removed. The tolling argument will apply with equal force throughout the period from March 10, 2015 through September 22, 2016, and may be addressed on the merits. That this issue presents one additional obstacle on the

merits for claims between March 20, 2015 and September 22, 2016 does not preclude certification of the entire subclass.

5. Typicality/Adequacy

A. Background

The typicality element requires a representative plaintiff have claims similar, although not necessarily identical, to the remainder of the class. *Classen v. Weller*, 145 Cal.App.3d 27, 46 (1983).

"Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and [whether] the plaintiffs interests are ... antagonistic to the interests of the class." *McGhee v. Bank of America*, 60 Cal.App.3d 442, 450 (1976). "It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent. But only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 470 (1981).

B. Provencio

Provencio worked for Sephora from before January 2013 until after August 2014. Provencio Decl. ¶ 3. Sephora's records indicate that Provencio was hired by Sephora in 2011 left on maternity leave in September 2015. Diaz Decl., Ex. B. Provencio's declaration supports the conclusion that she was subject to all of the practices challenged by this litigation during her employment, except that: (1) Provencio was not a lead; (2) Provencio did not establish that she worked a closing shift; (3) Provencio did not establish that she incurred expenses to purchase makeup for use at Sephora; and (4) Provencio did not establish that she worked overtime or

received bonuses. Provencio Decl. ¶¶ 3-14.[34] Her declaration also supports the conclusion that she understands the responsibilities of a class representative and will undertake to fulfill them. *Id.* at ¶¶ 15-18.[35]

Sephora argues that all of the plaintiffs are atypical because they have personal grievances with their treatment at Sephora. Opposition, 33-34. Whether or not this is true, it is irrelevant to the typicality element. Sephora does not otherwise challenge typicality or adequacy as those elements relate to Provencio.

Accordingly, Provencio's claims that are typical of the class and all subclasses that encompass her dates of employment, except the claims based on employment as a lead, off-the-clock work during closing shifts, reimbursement for makeup expenses, and the miscalculation of overtime rates. Provencio will adequately represent the class and any such subclasses.

C. Burnthorne-Martinez

Burnthorne-Martinez worked for Sephora between approximately September 2014 and May 2015. Burnthorne-Martinez Decl. ¶ 3. Burnthorne-Martinez's declaration supports the conclusion that she was subject to all of the practices challenged by this litigation during her employment, except that (1) her declaration does not establish that she worked overtime or received bonuses; and (2) her declaration does not establish that she had her costume tailored.

[34] Sephora's objections to ¶¶ 4, 6-14 are overruled. Sephora Objections, 49-53. Notably, out of court statements of non-testifying witnesses are only considered for non-hearsay purposes and contradictory deposition testimony is considered to the extent it impeaches Provencio's testimony. Importantly, Provencio's deposition testimony does not impeach her memory that she spent time off-the-clock tailoring her Sephora costume. Heifetz Decl., Ex. G at 126:18-127:1.

[35] Sephora's objection to ¶ 17 is overruled. Sephora Objections, 53.

See id. at ¶¶ 4-7, 9-16.[36] Her declaration shows she understands the responsibilities of a class representative and will undertake to fulfill them. *Id.* at ¶¶ 17-20.[37]

Sephora argues that all of the plaintiffs are atypical because they have personal grievances with their treatment at Sephora. Opposition, 33-34. True or not, it is irrelevant to the typicality element.

Next Sephora argues that Burnthorne-Martinez is inadequate to represent the class because she enforced the policies she now challenges when she was a leadership level Sephora employee. Opposition, 34.[38] This, too, is not disqualifying. It does not indicate a conflict of interest with respect to the subject matter of the litigation. *Richmond*, 29 Cal.3d at 470; *Pena v. Taylor Farms Pacific, Inc.*, 305 F.R.D. 197, 215 (E.D. Cal 2015).

Burnthorne-Martinez's claims are typical of the class and all subclasses that encompass her dates of employment, except claims based on the miscalculation of overtime rates and costume tailoring. Burnthorne-Martinez will adequately represent the class and any such subclasses.

D. Hernandez

Hernandez worked for Sephora between late 2014 and May 3, 2016. Hernandez Decl. ¶¶ 4-5. Her declaration shows she was subject to all of the practices challenged by this litigation during her employment, except that (1) Hernandez was not a lead; (2) Hernandez did not establish that she worked a closing shift; (3) Hernandez did not establish that she incurred expenses to purchase makeup for use at Sephora; (4) Hernandez did not establish that she had her

[36] Sephora's objections to ¶¶ 4, 6-7, 9-15 are overruled. Sephora Objections, 53-56. Notably, out of court statements of non-testifying witnesses are only considered for non-hearsay purposes and contradictory deposition testimony is considered to the extent it impeaches Burnthorne-Martinez's testimony.

[37] Sephora's objection to ¶ 19 is overruled. Sephora Objections, 56.

[38] Sephora submitted evidence of discipline Burnthorne-Martinez received during her employment. Diaz Decl., Ex. A. This discipline is not relevant to her typicality or adequacy.

costume tailored; and (5) Hernandez did not establish that she ever had any items scribed. *Id.* at ¶¶ 6-17, 21-34.[39] She understands the responsibilities of a class representative and will undertake to fulfill them. *Id.* at ¶¶ 35-38.[40]

Sephora argues that all of the plaintiffs are atypical because they have personal grievances with their treatment at Sephora. Opposition, 33-34. Whether or not this is true, it is irrelevant to the typicality element. Sephora does not otherwise challenge typicality or adequacy as those elements relate to Hernandez. *See id.*

Accordingly, Hernandez's claims that are typical of the class and all subclasses that encompass her dates of employment, except the claims based on employment as a lead, off-the-clock work during closing shifts, reimbursement for makeup expenses, costume tailoring, and off-the-clock time for scribing. Hernandez will adequately represent the class and her subclasses.

E. Morales

Morales worked for Sephora between approximately December 2005 and November 2015. Morales Decl. ¶¶ 3-10.[41] Her declaration supports the conclusion that she was subject to all of the practices challenged by this litigation during her employment, except that: (1) Although she was a lead, Morales does not report being forced to skip a break because no other leads were present; (2) Morales did not establish that she worked a closing shift; (3) Morales did not establish that she incurred expenses to purchase makeup for use at Sephora; (4) Morales did not establish that she worked overtime or received bonuses; and (5) Morales did not establish that

[39] Hernandez's declaration does not comply with C.C.P. § 2015.5. However, Sephora did not object on that basis. Sephora's objections to ¶¶ 6, 8, 11-12, 15-17, 25-26, 30-31, 33 are overruled. Sephora Objections, 61-66. Out of court statements of non-testifying witnesses are only considered for non-hearsay purposes and contradictory deposition testimony is considered to the extent it impeaches Hernandez's testimony.

[40] Sephora's objection to ¶ 37 is overruled. Sephora Objections, 66.

[41] Sephora's objection to ¶ 6 is overruled. Sephora Objections, 57.

she had her costume tailored. *Id.* at ¶¶ 12-32.[42] She understands the responsibilities of a class representative and will undertake to fulfill them. *Id.* at ¶¶ 33-36.[43]

Morales' claims that are typical of the class and all subclasses that encompass her dates of employment, except the claims based on missed meal periods as a lead, off-the-clock work during closing shifts, reimbursement for makeup expenses, costume tailoring, and claims based on the miscalculation of overtime rates. Morales will adequately represent the class and any such subclasses.

F. Duran

Duran apparently only seeks to represent the subclasses relating to Sephora's computation of overtime wages and wage statements reflecting that computation. Motion, 4, 32-33; Duran Decl. ¶ 2. Duran worked for Sephora between 2013 and 2017. Duran Decl. ¶ 4.[44] Duran routinely worked overtime during months and quarters that she received bonuses pursuant to Sephora's bonus plan. *Id.* She understands the responsibilities of a class representative and will undertake to fulfill them. *Id.* at ¶¶ 9-12.[45]

Sephora argues that Duran aggressively enforced its policies, including its makeup policy, such that she has a conflict with the class. Opposition, 34. This is not disqualifying. It does not indicate a conflict of interest with respect to the subject matter of the litigation. *Richmond*, 29 Cal.3d at 470; *see also Pena v. Taylor Farms Pacific, Inc.*, 305 F.R.D. 197, 215

[42] Morales' declaration does not comply with C.C.P. § 2015.5. However, Sephora did not object on that basis. Sephora's objections to ¶¶ 12-14, 18-21, 27-28, 31-32 are overruled. Sephora Objections, 57-61. Out of court statements of non-testifying witnesses are only considered for non-hearsay purposes and contradictory deposition testimony is considered to the extent it impeaches Morales' testimony. Importantly, Morales testified at deposition that she was unable to obtain all of the funds from her payroll card because her bank would not accept it. Heifetz Decl., Ex. E at 218:3-218:20.

[43] Sephora's objection to ¶ 35 is overruled. Sephora Objections, 61.

[44] Sephora's objection to ¶ 4 is overruled. Sephora Objections, 66-67.

[45] Sephora's objection to ¶ 11 is overruled. Sephora Objections, 67.

(E.D. Cal 2015). Even if it did present a conflict, Duran seeks to serve as a representative as to different claims.

Accordingly, Duran's claims arising out of the computation of overtime wages and the issuance of wage statements reflecting that computation are typical of the class claims. Duran will adequately represent the class and any such subclasses.

G. Adequacy of Plaintiffs' Counsel

Sephora does not challenge the adequacy of counsel.

Conclusion

The class certification motion is granted in part and denied in part. The parties must now confer on a form of order, consistent with the discussions in this order, setting forth (i) the certified class and each sub-classes including their full definition, and (ii) the specific class representative(s) for each.

A case management conference (CMC) is set for November 1, 2018, at 9:00 a.m.[46] The parties' joint CMC statement should set forth the results of their meet and confer on (i) timing and content and method of notice; (ii) when plaintiffs will present a robust trial plan[47] addressing

[46] If this date is impossible for the parties, they may contact the Department's clerk and arrange to shift the conference up to two weeks.

[47] Because trial plans must address material affirmative defenses, e.g., *Duran v. U.S. Bank Nat'l Assn.*, 19 Cal. App. 5th 630, 643, 646 (2018), the parties' meet and confer should probably address the timing of defendant's election of defenses it in good faith intends to press at trial. Trial plans set forth for example proposed statistical proof with sufficient detail to enable a preliminary evaluation of validity, i.e. with sufficient particularity as to allow the type of analysis done in *Duran*, 59 Cal. 4th at 41 *et seq.* See generally *Payton v. Csi Elec. Contractors, Inc.*, No. B284065, 2018 WL 4659500, at *7 (Cal. Ct. App. Sept. 28, 2018); Weil & Brown, et al., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 14:98a (Rutter: 2018).

the manageability of every issue and in particular individual issues; (iii) other next steps in this litigation.

Dated: October 11, 2018

Curtis E.A. Karnow
Judge Of The Superior Court

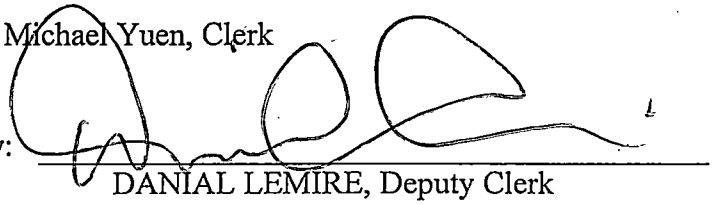
CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On OCT 12 2018, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: OCT 12 2018

T. Michael Yuen, Clerk

By: 
DANIAL LEMIRE, Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that on this date, a true and correct copy of this filing was served on the following via U.S. Mail, which satisfies the requirements of Pa.R.A.P. 121:

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Executed on June 8, 2020, at San Diego, California.

Dated: June 8, 2020

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