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

JAMES CORNN, et al.,

Plaintiffs,

v.

UNITED PARCEL SERVICE, INC.,

Defendant.

NO. C03-2001 TEH

ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS'  
MOTION FOR CLASS  
CERTIFICATION

This matter came before the Court on Monday, January 31, 2005, on Plaintiffs' motion for class certification. After carefully considering the record and the parties' written and oral arguments, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' motion for the reasons discussed below.

**BACKGROUND**

Plaintiffs James Cornn and Kim Marchant are package-car drivers working for Defendant United Parcel Service, Inc. ("UPS"), and Plaintiff Eric Duvoc is a former package-car driver and current feeder driver at UPS. They bring this suit on behalf of the following proposed class: "All non-exempt, hourly California employees of UPS whose job responsibilities during the period February 6, 1999 to the present included delivering or moving packages by driving on road. The class includes drivers designated by UPS as package car drivers, feeder drivers, combination drivers and utility drivers." First Am. Compl. ¶ 14.

1 Plaintiffs argue that UPS improperly deducted a standard lunch period from drivers'  
2 timesheets and failed to provide meal and rest periods as required by California law. In  
3 particular, Plaintiffs' first amended complaint includes five claims for relief: (1) failure to pay  
4 for all time worked; (2) failure to provide an accurate itemized statement of wages and  
5 deductions; (3) failure to provide a second meal period for employees working more than ten  
6 hours a day; (4) failure to provide a first meal period for all drivers and a third rest period for  
7 drivers working more than ten hours a day; and (5) violation of California Business and  
8 Professions Code sections 17200 *et seq.* for unlawful, unfair, and fraudulent business  
9 practices.

10 UPS moved for summary judgment on grounds that Plaintiffs' claims were preempted  
11 by the Labor Management Relations Act ("LMRA") and the federal Motor Carrier Act. This  
12 Court found that resolution of Plaintiffs' first claim would require interpretation of collective  
13 bargaining agreements between the parties because the statutes cited by Plaintiffs in support of  
14 that claim referred to a right to be paid for all work *as agreed upon*. Oct. 5, 2004 Order  
15 Granting in Part & Denying in Part UPS's Mot. for Summ. J. at 2-3 (hereinafter "Summ. J.  
16 Order"). The Court therefore found Plaintiffs' first claim to be preempted by the LMRA, and  
17 the Court accordingly granted summary judgment to UPS on Plaintiffs' first claim. *Id.*  
18 However, the Court rejected UPS's motion as to Plaintiffs' other claims, and Plaintiffs'  
19 second through fifth claims remain in this case. *Id.* at 3.

20 Plaintiffs now move to certify the remaining claims as a class action under Rule 23 of  
21 the Federal Rules of Civil Procedure.

## 22

## 23 **DISCUSSION**

### 24 **I. Summary of the Law Regarding Plaintiffs' Claims**

#### 25 **A. Itemized Statement of Wages**

26 Plaintiffs' second cause of action alleges that UPS violated California Labor Code  
27 section 226, which requires employers to provide itemized statements of wages to their  
28 employees. Plaintiffs contend that UPS failed to provide an accurate statement of wages by

1 (1) taking a standard lunch deduction regardless of the actual lunch period recorded by drivers,  
2 (2) miscoding rest periods as unpaid time, and (3) failing to reflect accurate employee start  
3 times.<sup>1</sup> *See* Cal. Labor Code § 226(a) (requiring the itemized statement to include “gross  
4 wages earned,” “total hours worked by the employee,” and “all deductions, provided, that all  
5 deductions made on written orders of the employee may be aggregated and shown as one  
6 item”); *see also* Cal. Code Regs. tit. 8, § 11090(7) (requiring that “[e]very employer shall keep  
7 accurate information with respect to each employee including the following: . . . (3) Time  
8 records showing when the employee begins and ends each work period. Meal periods, split  
9 shift intervals and total daily hours worked shall also be recorded. Meal periods during which  
10 operations cease and authorized rest periods need not be recorded. . . . [and] (5) Total hours  
11 worked in the payroll period. . . .”).

12 Section 226(e) provides for damages:

13 An employee suffering injury as a result of a knowing and  
14 intentional failure by an employer to comply with subdivision (a)  
15 is entitled to recover the greater of all actual damages or fifty  
16 dollars (\$50) for the initial pay period in which a violation occurs  
17 and one hundred dollars (\$100) per employee for each violation in  
a subsequent pay period, not exceeding an aggregate penalty of  
four thousand dollars (\$4,000), and is entitled to an award of costs  
and reasonable attorney’s fees.

18 Although neither party presented any authority for the proposition that “actual damages” in this  
19 provision equates to lost wages, the parties agreed at oral argument that lost wages would be  
20 the proper measure of damages.

21 UPS incorrectly argues that, following the Court’s ruling on the company’s motion for  
22 summary judgment, Plaintiffs’ section 226 claim is no longer viable. In ruling on UPS’s  
23 motion, the Court found Plaintiffs’ first claim to be preempted by the Labor Management  
24 Relations Act (“LMRA”) because, in support of that claim, Plaintiffs cited only to statutes that  
25 provided for payment of all wages as agreed upon. Summ. J. Order at 2-3. The Court then  
26 found that it would be impossible to determine what wages were agreed upon without reference

27 \_\_\_\_\_  
28 <sup>1</sup>UPS changed some of its policies in September 2003, following the initiation of this lawsuit. For instance, UPS no longer applies a standard lunch deduction.

1 to the collective bargaining agreements. *Id.* Plaintiffs’ second claim, however, rests on an  
2 independent, nonnegotiable state law right to receive an itemized statement of wages. Cal.  
3 Labor Code § 226; *id.* § 219 (providing that “no provision of this article [including section  
4 226] can in any way be contravened or set aside by private agreement, whether written, oral, or  
5 implied”). As this Court held when it ruled on UPS’s motion for summary judgment,  
6 adjudication of Plaintiffs’ second claim does not require interpretation of the collective  
7 bargaining agreements, and the claim is therefore not preempted. Summ. J. Order at 3; *see*  
8 *also id.* at 1-2 (discussing standard for finding preemption under the LMRA).

## 9 **B. Meal and Rest Periods**

10 Plaintiffs’ third cause of action concerns UPS’s alleged failure to provide a second  
11 meal period for drivers working more than ten hours per day, and their fourth cause of action  
12 concerns the provision of a first meal period and rest periods for all drivers. California law  
13 governing rest periods differs somewhat from the law governing meal periods, and the Court  
14 therefore addresses each body of law separately.

### 15 **1. Rest Periods**

16 California labor regulations require employers to “authorize and permit” a ten-minute  
17 rest period for every four hours “or major fraction thereof” worked per day. Cal. Code Regs.  
18 tit. 8, § 11090(12)(A). Employers may not require employees to work during these rest  
19 periods. Cal. Labor Code § 226.7(a). However, “[a]uthorized rest period time shall be counted  
20 as hours worked for which there shall be no deduction from wages.” Cal. Code Regs. tit. 8,  
21 § 11090(12)(A).

22 The parties agree that California law requires employers to make rest periods available  
23 but does not require employers to ensure that rest periods are actually taken. Plaintiffs do not  
24 argue that UPS failed to authorize and permit all rest periods, but only that UPS failed to  
25 authorize and permit a third rest period for drivers working more than ten hours a day. An  
26 employer who fails to “provide” a required rest period “shall pay the employee one additional  
27 hour of pay at the employee’s regular rate of compensation for each work day that the . . . rest  
28 period is not provided.” Cal. Labor Code § 226.7(b).

1                   **2. Meal Periods**

2                   California Labor Code section 512(a) states that, “[a]n employer may not employ an  
3 employee for a work period of more than five hours per day without providing the employee  
4 with a meal period of not less than 30 minutes.”<sup>2</sup> The statute further provides that, “[a]n  
5 employer may not employ an employee for a work period of more than 10 hours per day  
6 without providing the employee with a second meal period of not less than 30 minutes, except  
7 that if the total hours worked is no more than 12 hours, the second meal period may be waived  
8 by mutual consent of the employer and the employee only if the first period was not waived.”  
9 Cal. Labor Code § 512(a). Meal periods must be completely off-duty unless the employee  
10 agrees in writing to a paid, on-duty meal period. Cal. Code Regs. tit. 8, § 11090(11)(C); *see*  
11 *also* Cal. Labor Code § 226.7(a) (“No employer shall require any employee to work during any  
12 meal or rest period. . . .”). As with rest periods, if an employer fails to “provide” a required  
13 meal period, then “the employer shall pay the employee one additional hour of pay at the  
14 employee’s regular rate of compensation for each work day that the meal . . . period is not  
15 provided.” Cal. Labor Code § 226.7(b).

16                   The parties dispute the meaning of “provide” with respect to meal periods. Plaintiffs  
17 contend that employers are required not only to make meal periods available, but to ensure that  
18 employees actually take meal periods. By contrast, UPS asserts that employers need only  
19 make meal periods available to employees and need not police employees to ensure that meal  
20 periods are actually taken. This dispute is relevant to Plaintiffs’ claims because, although  
21 Plaintiffs contend that UPS failed to make second meal periods available to them, they do not  
22 argue that first meal periods were not made available. *See, e.g.*, Pls.’ Reply at 8 (basing  
23 argument for alleged first meal period violation on Plaintiffs’ position that “UPS had *a duty to*  
24 *take reasonable actions to ensure* that first meal periods were taken,” and stating that “[t]he  
25 class claim for premium pay for violation of first meal period requirements does depend on  
26 whether UPS’s legal duty is, or is not, as UPS would have it”).

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27                   <sup>2</sup>The statute also provides that this first meal period “may be waived by mutual consent  
28 of both the employer and employee” if “the total work period per day of the employee is no  
more than six hours.” Cal. Labor Code § 512(a). This exception is not at issue in this case.

1           The meaning of an employer’s obligation to “provide” meal periods is an area of  
2 unsettled law. It appears that no court has ever held that an employer need only make meal  
3 periods available, and that only one court has held that an employer must ensure that meal  
4 periods are actually taken. *See Savaglio v. Wal-Mart Stores, Inc.*, Nov. 6, 2003 Order  
5 (1) Granting Class Certification in Part and (2) Denying Class Certification in Part, Alameda  
6 County Superior Court, Case No. C-835687, at 10-18 (Ex. E to Pls.’ Req. for Judicial Notice  
7 in Opp’n to Def.’s Mot. for Summ. J.) (hereinafter “*Savaglio* Class Cert. Order”).

8           Ordinarily, the Court would be inclined to follow the only known authority on a  
9 particular issue, but the question before the Court is complicated by recent actions by the  
10 Department of Labor Standards and Enforcement (“DLSE”), the agency charged with enforcing  
11 Labor Code statutes and Industrial Welfare Commission (“IWC”) wage orders. In a November  
12 3, 2003 opinion letter, the DLSE opined that, “[a]s to meal periods, employers have an  
13 obligation to self-police, and to ensure that employees are in fact taking required meal  
14 periods.” Nov. 3, 2003 DLSE opinion letter (Ex. B to Def.’s App. of Authorities in Supp. of  
15 Mot. for Summ. J.). The DLSE had taken the same position in its enforcement policies and  
16 interpretations manual: “The clear intent of the IWC is that the burden of insuring that  
17 employees take a meal period within the specified time is on the employer. . . .” DLSE  
18 Enforcement Policies & Interpretations Manual § 45.2.1 (Ex. 1 to Pls.’ Req. for Judicial  
19 Notice). However, on December 20, 2004, the DLSE withdrew certain opinion letters,  
20 including the November 3, 2003 letter relied upon by Plaintiffs. Dec. 20, 2004 DLSE internal  
21 memo (Ex. C to Def.’s Corrected Statement of Recent Proposed Regulation).

22           The DLSE has also recently proposed new regulations, currently in the public comment  
23 phase, that would establish criteria for determining if a meal period has been provided in  
24 accordance with section 512. In the statement of reasons for the new regulations, the DLSE  
25 notes that current law is unclear on the meaning of “provide.” The proposed regulations state  
26 that:

27                     An employer shall be deemed to have provided a meal period to an  
28                     employee in accordance with Labor Code Section 512 if the  
                          employer:

- a. *Makes the meal period available to the employee and affords the opportunity to take it;* and
- b. Posts the applicable order of the Industrial Welfare Commission; and
- c. Maintains accurate time records for covered employees, as required by the posted order.

Proposed Regulation § 13700(b)(1) (Ex. A to UPS’s Corrected Statement of Recent Proposed Regulation) (emphasis added). Thus, it appears that the DLSE’s position has changed, and that the agency no longer interprets California law to require an employer to ensure that meal periods are actually taken. This partially undercuts the basis for the *Savaglio* court’s decision that employers must do so. *Savaglio* Class Cert. Order at 16-18 (finding support for its decision in the DLSE manual and a DLSE advisory letter, but also citing independent reasons for concluding that employers must ensure that meal periods are taken).

That said, Plaintiffs correctly point out that the new proposed regulation is just that – proposed – and it is uncertain whether it will be adopted in its current form, if it is adopted at all. Until the regulation is adopted after the DLSE follows the public comment process laid out in the Administrative Procedure Act (“APA”), the DLSE’s interpretation is not entitled to deference by this Court. *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557, 568-77 (1996) (holding that, although the DLSE need not comply with the APA when interpreting a regulation on a case-by-case basis, when the DLSE interprets a regulation “in an enforcement policy of general application without following the APA,” that interpretation is void and entitled to no deference); *Bell v. Farmers Ins. Exch.*, 87 Cal. App. 4th 805, 815 & n.10 (2001) (holding that courts may consider DLSE advisory letters giving opinions on a case-by-case basis, even though such letters are not controlling authority, but further holding that the *Tidewater* decision requires that a court not defer to an interpretation contained in the DLSE Enforcement Policies and Interpretation Manual).

In light of the pending proceedings to revise the regulations governing meal periods, and because, for the reasons discussed below, the Court finds it unnecessary to rule on this issue to resolve the current motion, the Court does not decide at this time whether an employer must,

1 under California law, ensure that its employees take meal periods, or whether an employer  
2 must only make meal periods available.

### 3 **C. Unfair Competition Law (“UCL”)**

4 Plaintiffs’ fifth cause of action states a violation of California Business and  
5 Professions Code sections 17200 *et seq.* Plaintiffs contend that UPS’s violation of the above  
6 labor statutes and regulations makes UPS’s practices unlawful, unfair, and fraudulent, thus  
7 making the UCL claim derivative of Plaintiffs’ labor law claims. Neither party raises separate  
8 arguments that apply specifically to Plaintiffs’ UCL cause of action.

### 9 **D. Statute of Limitations**

10 Plaintiffs seek to certify a class of “non-exempt, hourly California employees of UPS  
11 whose job responsibilities during the period February 6, 1999 to the present included  
12 delivering or moving packages by driving on road.” Plaintiffs originally filed their complaint  
13 on February 6, 2003, and therefore seek application of a four-year statute of limitations. UPS  
14 counters – albeit only in a conclusory fashion in its supplemental brief – that the relevant  
15 statute of limitations is only one year. UPS’s argument relies on its assertion that Labor Code  
16 section 226.7 provides for a “penalty,” and that penalties are subject to a one-year statute of  
17 limitation under California Code of Civil Procedure section 340. The company’s position,  
18 however, is not persuasive. This Court agrees with the reasoning of a sister court in the  
19 Central District of California that recently held that an award under section 226.7 is  
20 restitutionary, and not a penalty, because such an award is for earned wages. *Tomlinson v.*  
21 *Indymac Bank, F.S.B.*, No. SACV 04-294 JVS, --- F. Supp. 2d ---, 2005 WL 469291, at \*3-5  
22 (C.D. Cal. Feb. 18, 2005). As restitution, an award of earned wages may be recovered under  
23 the UCL. *Id.*; *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 178 (2000)  
24 (“[E]arned wages that are due and payable pursuant to section 200 *et seq.* of the Labor Code are  
25 as much the property of the employee who has given his or her labor to the employer in  
26 exchange for that property as is property a person surrenders through an unfair business  
27 practice. An order that earned wages be paid is therefore a restitutionary remedy authorized by  
28

1 the UCL.”). Thus, the UCL’s four-year statute of limitations applies to the putative class.

2 See Cal. Bus. & Prof. Code § 17208; *Cortez*, 23 Cal. 4th at 178-79.

3  
4 **II. Requirements of Rule 23 of the Federal Rules of Civil Procedure**

5 The Court now turns to analyzing whether the proposed class meets the requirements  
6 for class certification under Rule 23 of the Federal Rules of Civil Procedure. A party seeking  
7 to certify a class must demonstrate that it has met all four requirements of Rule 23(a) and at  
8 least one of the requirements of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d  
9 1180, 1186 (9th Cir. 2001). Rule 23(a) allows a class to be certified

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

14 Fed. R. Civ. P. 23(a); see also *Zinser*, 253 F.3d at 1186. That is, the class must satisfy the  
15 requirements of numerosity, commonality, typicality, and adequacy.

16 Rule 23(b) provides for the maintenance of several different types of class actions.  
17 Fed. R. Civ. P. 23(b). Plaintiffs seek to certify the proposed class under Rule 23(b)(3). This  
18 rule allows a class to be certified if a court finds both that common questions of law or fact  
19 “predominate” over individual questions and that “a class action is superior to other available  
20 methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3).

21 The party seeking certification must provide facts to satisfy these requirements, and  
22 simply repeating the language of the rules in its moving papers is insufficient. *Doninger v.*  
23 *Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977). A district court must  
24 conduct a “rigorous analysis” of the moving party’s claims to examine whether the  
25 requirements of Rule 23 are met. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147,  
26 161 (1982). However, although the court is “at liberty” to consider evidence that relates to the  
27 merits if such evidence also goes to the requirements of Rule 23, *Hanon v. Dataproducts*  
28 *Corp.*, 976 F.2d 497, 508 (9th Cir. 1992), the court may not consider whether the party

1 seeking class certification has stated a cause of action or is likely to prevail on the merits,  
2 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). If a district court concludes that  
3 the moving party has met its burden of proof, then the court has broad discretion to certify the  
4 class. *Zinser*, 253 F.3d at 1186.

## 5 **A. Rule 23(a) Requirements**

### 6 **1. Numerosity**

7 Numerosity does not require that joinder of all members be impossible, but only that  
8 joinder be impracticable. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448  
9 (N.D. Cal. 1994); Fed. R. Civ. P. 23(a)(1). Plaintiffs do not need to state the exact number of  
10 potential class members, nor is a specific number of class members required for numerosity;  
11 rather, whether joinder is impracticable depends on the facts and circumstances of each case.  
12 *Arnold*, 158 F.R.D. at 448.

13 UPS does not contest numerosity in this case, and there is evidence that the class  
14 includes several thousand drivers. This is sufficient to satisfy the numerosity requirement of  
15 Rule 23(a)(1).

### 16 **2. Commonality**

17 Rule 23(a)(2) requires that common questions of law or fact exist among class  
18 members. Fed. R. Civ. P. 23(a)(2). The Ninth Circuit construes the commonality requirement  
19 under this rule “permissively,” having noted that the requirement under Rule 23(a)(2) is less  
20 rigorous than that under Rule 23(b)(3). *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th  
21 Cir. 1998); compare Fed. R. Civ. P. 23(b)(3) (requiring that common questions of law or fact  
22 “predominate” in class actions maintained under this subsection) with Fed. R. Civ. P. 23(a)(2)  
23 (not including “predominate” or similar language in describing the general commonality  
24 requirement). It is sufficient for class members to have shared legal issues but divergent facts  
25 or, similarly, to share a common core of facts but base their claims for relief on different legal  
26 theories. *Hanlon*, 150 F.3d at 1019. Indeed, the Ninth Circuit considers the requirements for  
27 finding commonality under Rule 23(a)(2) to be “minimal.” *Id.* at 1020.

28

1 Here, Plaintiffs clearly meet this minimal commonality requirement. Questions  
2 common to the class include, for example, (1) whether UPS’s policy of deducting a standard  
3 lunch hour, unless an individual manager were to approve an override, violates California law,  
4 and (2) whether UPS ever told its drivers they were entitled to a second meal period and third  
5 rest period if they worked more than ten hours a day and, if not, whether failure to do so  
6 violates California law. The primary question in this case, as in many class actions, is not  
7 whether common issues exist but whether common issues predominate. The Court addresses  
8 the predominance of common issues in the section below discussing the requirements of Rule  
9 23(b)(3).

### 10 3. Typicality

11 Rule 23(a)(3) requires typicality, which the Ninth Circuit also interprets permissively.  
12 *Hanlon*, 150 F.3d at 1020. Typicality requires that the named plaintiffs be members of the  
13 class they represent and “possess the same interest and suffer the same injury” as class  
14 members. *Falcon*, 457 U.S. at 156 (citation omitted). The named plaintiffs’ claims need not  
15 be identical to the claims of the class to satisfy typicality; rather, the claims are typical if they  
16 are “reasonably co-extensive with those of absent class members.” *Hanlon*, 150 F.3d at 1020.  
17 It is sufficient for plaintiffs’ claims to “arise from the same remedial and legal theories” as the  
18 class claims. *Arnold*, 158 F.R.D. at 449.

19 UPS argues, although not specifically in reference to typicality, that the class should  
20 not include combination drivers and utility drivers because none of the proposed named  
21 plaintiffs has ever worked in either position. The company further argues that feeder drivers  
22 should also be excluded from the class because Plaintiffs have not presented any statistical  
23 evidence regarding feeder drivers’ time records. While UPS’s factual contentions are correct,  
24 Plaintiffs assert – and UPS has not refuted – that combination and utility drivers are UPS  
25 employees who perform the work of a package-car or feeder driver on a part-time basis. Thus,  
26 there appears to be no need to have a separate class representative to represent combination  
27 and utility drivers, as these drivers’ claims are based on their work as package-car or feeder  
28 drivers. In addition, there is no evidence that the challenged policies did not apply equally to

1 all driver positions that Plaintiffs seek to include in the class. The only differences explained  
2 by the parties are: (1) that package-car drivers (and therefore utility and combination drivers  
3 who drive package cars as part of their jobs) enter time using a DIAD board, whereas feeder  
4 drivers enter time using a different device, known as an FDT, and (2) that DIAD and FDT  
5 records were uploaded to different timecard-processing systems. These differences are not  
6 significant for class certification purposes because Plaintiffs have presented evidence that  
7 both systems included a standard lunch deduction.

8         Moreover, much of UPS's opposition argues the merits of this case, which this Court  
9 cannot consider at the class certification stage. *Eisen*, 417 U.S. at 178. For instance, UPS  
10 does not dispute that, prior to September 2003, it had a company-wide practice of deducting a  
11 standard lunch hour from the first five hours of an employees' workday, regardless of the lunch  
12 period, if any, recorded by a driver. The company argues that this policy, which also allowed  
13 managers to adjust lunch-hour deductions on an individual basis, did not violate California law,  
14 but that is an issue to be determined at a later stage of the proceedings. For purposes of class  
15 certification, it suffices that all members of the class, including the named plaintiffs, were  
16 subject to the same policies, and that the legal theories of the named plaintiffs are the same as  
17 those of the class.

18         Finally, Rule 23 does not require a class representative for each job category that may  
19 be included in the class. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003)  
20 (rejecting defendant's argument that typicality requires plaintiffs to "provide clear  
21 documentation that each job category had a class representative for each type of discrimination  
22 claim alleged"); *Hartman v. Duffey*, 19 F.3d 1459, 1471-72 (D.C. Cir. 1994) (holding, in  
23 gender discrimination class action, that "an unsuccessful applicant for one particular job can  
24 presumably challenge discriminatory hiring for different job categories where the primary  
25 practices used to discriminate in the different categories are themselves similar"). Instead, the  
26 named representatives' claims must only be "reasonably co-extensive" with the claims of  
27 absent class members. *Hanlon*, 150 F.3d at 1020. Given the Ninth Circuit's permissive  
28 standard, the named plaintiffs satisfy this typicality requirement, with one exception. Other

1 than the single exception discussed below, Plaintiffs challenge the application of company-  
2 wide practices, and the named plaintiffs' claims arise from the same legal theories as the class  
3 claims.

4         The exception to Plaintiffs' satisfaction of Rule 23(a)(3)'s typicality requirement  
5 relates to the claim Plaintiffs seek to assert regarding the first two rest periods of a driver's  
6 shift. Plaintiffs made clear at oral argument that they do not contend there was a class-wide  
7 failure by UPS to permit and authorize two rest periods for drivers working eight to ten hours a  
8 day. Instead, Plaintiffs assert that UPS drivers were not trained on how to enter these rest  
9 periods to make sure that the breaks would show up as paid time, and that UPS's statements of  
10 wages therefore misstated the amount of time Plaintiffs spent working. Notably, however,  
11 neither the moving nor the reply declarations of any of the named plaintiffs assert that they  
12 ever took a rest period for which they were not paid, either because they miscoded the time  
13 when they entered it or for any other reason. Nor have Plaintiffs cited to any other evidence,  
14 such as deposition testimony, that UPS failed to pay the named plaintiffs for break time  
15 actually taken. Thus, the named plaintiffs' claims are not typical of any class claim that might  
16 exist regarding miscoded rest periods, and certification of that claim would therefore be  
17 improper.

#### 18                 **4. Adequacy**

19         The fourth and final Rule 23(a) requirement – adequacy – requires (1) that the proposed  
20 representatives do not have conflicts of interest with the proposed class and  
21 (2) that the representatives are represented by qualified counsel. *Hanlon*, 150 F.3d at 1020;  
22 *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998). In this case, there is no evidence that  
23 the proposed named plaintiffs have any conflicts of interest with the class, and Plaintiffs'  
24 counsel are experienced class action litigators. *See* York Decl. Re: Adequacy of Class  
25 Counsel. Based on Plaintiffs' counsel's representation in this case thus far, the material  
26 contained in the York Declaration Re: Adequacy of Class Counsel, and the statements made by  
27 counsel at oral argument specifically in response to the factors enumerated in Federal Rule of  
28 Civil Procedure 23(g)(1)(C), the Court finds that: (1) Plaintiffs' counsel have diligently

1 identified and investigated potential claims in this litigation; (2) counsel have sufficient  
2 experience in pursuing class cases; (3) counsel have demonstrated an adequate understanding  
3 of the applicable law; and (4) counsel have the necessary resources to fully represent the class  
4 throughout this litigation and are committed to dedicating those resources to this case.  
5 Accordingly, the Court finds that Plaintiffs have satisfied the adequacy requirements of Rule  
6 23(a)(4).

7 **B. Rule 23(b)(3) Requirements**

8 Having found that the proposed class satisfies the requirements of Rule 23(a), the Court  
9 now considers whether the class also meets the requirements of Rule 23(b). Plaintiffs seek to  
10 certify the class under Rule 23(b)(3), which allows a class to be certified if the court finds  
11 both that common questions of law or fact “predominate” over individual questions and that “a  
12 class action is superior to other available methods for the fair and efficient adjudication of the  
13 controversy.” The rule lists four factors that a court should consider when deciding whether  
14 to certify a (b)(3) class:

15 (A) the interest of members of the class in individually controlling  
16 the prosecution or defense of separate actions; (B) the extent and  
17 nature of any litigation concerning the controversy already  
18 commenced by or against members of the class; (C) the  
desirability or undesirability of concentrating the litigation of the  
claims in the particular forum; [and] (D) the difficulties likely to  
be encountered in the management of a class action.

19 Fed. R. Civ. P. 23(b)(3).

20 In this case, Plaintiffs persuasively argue that the first three of these factors weigh in  
21 favor of the superiority of a class action. There are no other cases pending regarding the issues  
22 in this case, and class members might be discouraged from pursuing individual claims either  
23 because of the cost of litigation or because they fear reprisal for suing their employer. In  
24 addition, UPS removed this case to this forum, and Plaintiffs did not contest removal. The  
25 parties have completed a significant amount of discovery in this case, and the Court has already  
26 conducted multiple case management conferences over a two-year period and decided a  
27 summary judgment motion. Continuing litigation in this forum would therefore be desirable.  
28

1 UPS asserts that certifying a (b)(3) class would be improper because individual issues  
2 predominate and, as a result, a class action would be unmanageable. The Court discusses this  
3 argument with respect to each of Plaintiffs' claims in turn below.

#### 4 **1. Early Morning Work**

5 UPS never directly argues that Plaintiffs' early morning work claim is not amenable to  
6 class treatment. Instead, UPS asserts that the complaint does not include a claim for early  
7 morning work and the claim therefore cannot be considered on this motion. As both parties  
8 observe, notice pleading is the rule in federal court. *Conley v. Gibson*, 355 U.S. 41, 47-48  
9 (1957). Thus, a plaintiff's complaint must "give the defendant fair notice of what the plaintiff's  
10 claim is and the grounds upon which it rests." *Id.*

11 In this case, the Court's review of the first amended complaint reveals no mention of an  
12 early morning work claim, nor do Plaintiffs point to any part of the complaint that mentions  
13 work performed prior to drivers' scheduled start times. While the complaint does allege that  
14 UPS failed to pay Plaintiff for all time worked and that UPS failed to provide an accurate  
15 statement of wages, a fair reading of the complaint would only put UPS on notice that these  
16 claims were based on alleged failures to provide meal and rest periods as required by  
17 California law. Nothing in the amended complaint indicates that Plaintiffs were asserting an  
18 early morning work claim.

19 Plaintiffs assert, in a footnote, that they should be permitted to amend the complaint to  
20 state an early morning work claim if the Court finds that the current complaint fails to plead  
21 such a claim. Pls.' Reply at 7 n.8. However, a footnote in Plaintiffs' reply brief is an  
22 insufficient means of presenting this issue to the Court. Should Plaintiffs desire to proceed on  
23 their early morning work claim, Plaintiffs must file a properly noticed motion to amend in  
24 accordance with the local rules.<sup>3</sup> If the Court ultimately grants Plaintiffs leave to amend, the

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25 <sup>3</sup>The Court expresses no opinion on whether Plaintiffs' motion would ultimately be  
26 granted. However, the Court notes that UPS's contention that Plaintiffs raised the early  
27 morning work issue only after UPS took Plaintiffs' depositions appears to be disingenuous.  
28 Plaintiffs raised the issue at least as early as November 2003, when they deposed Richard  
Murphy. *See* Murphy Dep. at 84:6-85:10 (Ex. J to May 13, 2004 York Decl. in Supp. of Mot.  
for Class Cert.). UPS did not depose the named plaintiffs until several months later, in January  
and May 2004. *See* Cornn, Duvoc, and Marchant Dep. (Ex. A-C to Aug. 2, 2004 Gammon

1 Court will address the suitability of class treatment for the early morning work claim at that  
2 time. It would be premature to address whether class treatment is suitable for a claim that is  
3 not stated in the operative complaint.

## 4 **2. First Two Rest Periods**

5 Plaintiffs' only claim regarding the first two rest periods is that the wage statements  
6 provided by UPS violated Labor Code section 226 because they inaccurately recorded rest  
7 periods as unpaid time. The Court need not address whether common issues predominate on  
8 this claim because the Court has already found class treatment of the claim to be unsuitable for  
9 lack of typicality.

## 10 **3. First Meal Period**

11 Plaintiffs present two claims regarding the first meal period. First, Plaintiffs contend  
12 that UPS breached its obligation under California Labor Code section 512 to provide a thirty-  
13 minute meal period to its drivers within the first five hours of each shift. Second, Plaintiffs  
14 contend that UPS's use of the standardized lunch deduction resulted in inaccurate statements  
15 of wages in violation of California Labor Code section 226. The Court finds common issues  
16 to predominate on both claims.

17 First, on Plaintiffs' claim under California Labor Code section 512, the overarching  
18 common issue is whether the statute requires an employer to force its employees to take a  
19 meal period during the first five hours of an employees' shift, or whether the law only requires  
20 an employer to make such meal periods available. In addition, under either reading, liability  
21 would be susceptible to class-wide proof. If employers must ensure that meal periods are  
22 taken, as Plaintiffs contend, then the Court need not make any individualized inquiries as to  
23 why any given driver may not have taken a thirty-minute lunch period. If UPS's position is  
24 ultimately adopted, the proposed regulations require that an employer will be deemed to have  
25 provided a meal period only if the employer "maintains accurate time records for covered  
26 employees." Proposed Regulation § 13700(b)(1). Thus, even if "provide" only requires an  
27 employer to make meal periods available, Plaintiffs would still share the common issue of

28 \_\_\_\_\_  
Decl. in Opp'n to Mot. for Class Cert.).

1 whether using a standard lunch deduction violates section 512 because it creates inaccurate  
2 time records.

3 The parties vigorously dispute the accuracy of the time records in this case, which  
4 presents another key question common to the class claims. UPS asserts that drivers, including  
5 the named plaintiffs, do not always enter the meal periods that they take, and that the time  
6 records entered by drivers are therefore inaccurate. Thus, the company argues that the Court  
7 would have to conduct individualized inquiries as to every driver on every day to see if the  
8 driver actually took a meal period. On the other hand, Plaintiffs have presented testimony from  
9 UPS's designated representative, under Rule 30(b)(6), that states that UPS presumed the  
10 accuracy of time records entered by its drivers. It is also not disputed that UPS has a legal  
11 obligation to maintain accurate time records. As a result, Plaintiffs argue that UPS is estopped  
12 from contesting the accuracy of the records or, if UPS does now claim that the records are  
13 inaccurate, then that serves as an admission that the company breached its duty to keep accurate  
14 time records by deducting a standard lunch hour without knowing how long an employee  
15 actually took for meal periods.

16 At this stage of the proceedings, the Court need not determine which party has the  
17 stronger argument on whether the drivers' time records should be considered accurate. Indeed,  
18 that question may be one that only the jury can decide. *See Savaglio* Class Cert. Order at 24  
19 (holding that it is up to the trier of fact to "determine whether the records are sufficiently  
20 accurate to support an award of damages and, if so, the amount of damages"). The Court finds,  
21 however, that the accuracy of the time records entered by UPS drivers is a question common to  
22 the class. Similarly, it is a common question whether an employer may lawfully assume that its  
23 employees are taking a standard lunch period without reference to contemporaneous time  
24 records kept by the employees at the direction their employer, and without any attempt to  
25 verify whether employees were taking the standard lunch period without reporting it.

26 UPS is, of course, correct that damages, if any, will have to be calculated on an  
27 individualized basis. However, the need for individualized determination of damages does not  
28 defeat certification of a (b)(3) class. *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)

1 (“The amount of damages is invariably an individual question and does not defeat class action  
2 treatment.”). This would be especially true if the time records are found to be accurate; in that  
3 case, no laborious individualized determinations would be necessary, and damages could be  
4 calculated simply by looking to the time records to determine when a driver recorded a lunch  
5 break shorter than the standard lunch deduction. In any event, the Court retains discretion to  
6 decertify the class on this claim if individual issues are found to predominate at a later date, or  
7 if it later appears that determination of damages would be unmanageable. *E.g.*, Fed. R. Civ. P.  
8 23(c)(1)(C) (providing that class certification orders “may be altered or amended before final  
9 judgment”); *Armstrong v. Davis*, 275 F.3d 849, 872 n.28 (9th Cir. 2001) (holding that “district  
10 courts [have] broad discretion to determine whether a class should be certified, and to revisit  
11 that certification throughout the legal proceedings before the court”). At this time, however,  
12 the Court concludes that common issues predominate on Plaintiffs’ claims regarding the first  
13 meal period, and that the claims appear manageable on a class basis.

#### 14 **4. Second Meal Period and Third Rest Period**

15 On Plaintiffs’ claims regarding the second meal period and third rest period for drivers  
16 who worked more than ten hours a day, Plaintiffs have presented evidence that, prior to  
17 September 2003 (when UPS changed some of its policies, apparently in response to this  
18 lawsuit), UPS never told its drivers that they were entitled to a second meal period or third rest  
19 break if they worked more than ten hours. There is also evidence that, prior to September  
20 2003, package-car drivers could only enter two rest periods on the DIAD.

21 UPS asserts that individual issues predominate on these claims, but the company’s  
22 position is not persuasive. For instance, UPS argues that some employees who worked more  
23 than ten hours on any given day may have taken the second meal period or may have chosen to  
24 waive the second meal period. However, an employee cannot waive something that was never  
25 offered to him or her in the first place. In addition, even if there is a gap in a driver’s time  
26 records, that does not mean that a rest or meal period was necessarily taken. Nor would it be  
27 dispositive that some drivers may have taken a second meal period or third rest break if, in fact,  
28 UPS never informed its drivers that they were entitled to the additional meal and rest periods;

1 it could be, for example, that those employees simply took unauthorized break time. Thus, the  
2 Court does not agree with UPS that individual issues predominate over the common issues  
3 surrounding whether the company authorized a second meal period and third rest period for  
4 drivers working more than ten hours a day.

5 In addition, damages for any liability on these claims could be easily calculated. The  
6 statute provides for damages equal to one hour of pay at the employee's usual hourly rate. Cal.  
7 Labor Code § 226.7. These hourly rates can be readily retrieved from computerized records,  
8 as can the number of days in which each employee worked more than ten hours.<sup>4</sup>  
9 Consequently, the Court does not find this claim to be unmanageable as a class claim, nor, as  
10 previously noted, does the need for an individualized determination of damages defeat the  
11 suitability of class certification.

#### 12 **5. Unfair Competition Law ("UCL") Claim**

13 Neither party specifically argued the appropriateness of certifying Plaintiffs' UCL  
14 claim, and the Court finds it suitable to certify the UCL claim only to the extent that it is  
15 derivative of other claims for which class certification has been granted.

#### 16 17 **CONCLUSION**

18 For the above reasons, the Court GRANTS IN PART and DENIES IN PART Plaintiff's  
19 motion for class certification. In particular:

20 1. The class shall include all non-exempt, hourly California employees of UPS whose  
21 job responsibilities during the period February 6, 1999 to the present included delivering or  
22 moving packages by driving on road. All drivers designated by UPS as package-car drivers and  
23 feeder drivers, as well as combination drivers and utility drivers whose job responsibilities  
24 included those of package-car or feeder drivers, shall be included in the class.

25 \_\_\_\_\_  
26 <sup>4</sup>The parties dispute whether the amount of time worked by a driver on any given day  
27 should be calculated based on the actual or scheduled start time, and also whether the standard  
28 lunch hour should be deducted when calculating the amount of time worked. The Court need  
not resolve these disputes at this stage of the proceedings because, regardless of the formula  
selected, the relevant point is that the amount of time worked in a day is susceptible to a  
formulaic calculation based on computerized data.

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2. The class is certified only for the following claims:

a. Plaintiffs' claims regarding the first meal period, including whether UPS breached its obligation to provide a first meal period under California Labor Code section 512 and whether the standard lunch deduction violated California Labor Code section 226;

b. Plaintiffs' claims that UPS failed to provide a second meal period and third rest period to drivers who worked more than ten hours a day; and

c. Plaintiffs' unfair competition law claim to the extent that it is derivative of the above claims.

3. The class shall be represented by Kershaw, Cutter, Ratinoff & York, and Scott Cole & Associates, APC.

IT IS FURTHER ORDERED that, if Plaintiffs wish to seek leave to amend the complaint to state an early morning work claim, then they shall file a regularly noticed motion on or before **Monday, April 11, 2005**. The briefing schedule will be in accordance with the local rules. However, the opening and opposition briefs shall be limited to ten pages, and the reply brief shall be limited to seven pages.

**IT IS SO ORDERED.**

DATED 03/14/05

/s/  
THELTON E. HENDERSON, JUDGE  
UNITED STATES DISTRICT COURT