

1 THE HONORABLE MARYANN C. MORENO

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6 Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

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8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 COUNTY OF SPOKANE

10 JASON TSCHOSIK, JURGEN THIEDE, and
11 AMY THOMAS, on behalf of themselves and
all others similarly situated,

12 Plaintiffs,

13 v.

14 DIAMOND FREIGHT SYSTEMS, INC., a
Washington corporation; NORTHWEST
15 FREIGHT AND PARCEL LLC, a
Washington limited liability company;
16 PARMINDER THIND, individually; RAJIV
SAUSON, individually; TONY
MOUNTAINTESS, individually,

17 Defendants.
18

NO. 16-2-01247-1

**[PROPOSED] REVISED ORDER
GRANTING PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION**

CLERK ACTION REQUIRED

19 I. INTRODUCTION

20 This matter came before the Court on Plaintiffs' Motion for Class Certification. The
21 Court has considered the parties' briefing and supporting evidence and has heard from the
22 parties at oral argument. The Court has already granted Plaintiffs' motion but subsequent to
23 filing an Order to this effect, the Court noticed a clerical error in the proposed order submitted
24 by counsel and hereby issues a Revised Order to replace the initial order entered in this matter.
25 For the reasons stated below The Court GRANTS Plaintiffs' motion, as follows:

1 **II. BACKGROUND**

2 **A. Plaintiffs’ Allegations**

3 Named Plaintiffs Jason Tschosik, Jurgen Thiede, and Amy Thomas (“Plaintiffs”) bring
4 this action individually and on behalf of a proposed class of current and former employees of
5 Defendant Freight Companies and their owners and managers. (“Defendants”). *See* Second
6 Amended Complaint. Plaintiffs allege Defendants have engaged in a common scheme of wage
7 and hour violations against their employees, including failure pay overtime, failure to allow
8 meal and rest breaks to which they are entitled under Washington law, deducting time from the
9 payroll records of driver employees for meal breaks that were not received, and failure to
record and pay for all hours worked. *Id.* at ¶ 1.1.

10 **B. The Proposed Class**

11 Plaintiffs bring this case individually and on behalf of the following class (the “Class”):

12 All current and former employees of DFS Freight Inc, Diamond
13 Freight Systems, Inc., and/or Northwest Freight and Parcel, LLC,
in the State of Washington from April 1, 2013, through the date
of final disposition of this action.

14 **C. The Proposed Claims of the Class**

15 Plaintiffs assert the following claims against Defendants, individually and on behalf of
16 the Class members:

- 17 1. Failure to Pay Minimum Wages, Wages Less Than Entitled—RCW 49.46.090
- 18 2. Failure to Pay Overtime—RCW 49.46.130
- 19 3. Failure to Provide Rest and Meal Breaks—RCW 49.12.020 and WAC 296-126-092
- 20 4. Unpaid Wages on Termination – RCW 49.48.010
- 21 5. Willful Refusal to Pay Wages – RCW 49.52.050

22 For their alleged injuries as well as injuries suffered by the Class members, Plaintiffs
23 seek actual damages and exemplary damages, including interest thereon, and attorneys’ fees
24 and costs.

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III. ANALYSIS

The four prerequisites to class certification are numerosity, commonality, typicality, and adequacy of representation. CR 23(a); *see also Moeller v. Farmer's Ins. Co., Inc.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011); *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 682, 267 P.3d 383 (2011). In addition, one of the three conditions of CR 23(b) must be met. CR 23(b); *see also Moeller*, 173 Wn.2d at 279; *Brink's*, 164 Wn. App. at 682–83. Here, Plaintiffs seek certification under CR 23(b)(3), which requires a finding that questions of law or fact common to class members predominate over any questions affecting only the individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

CR 23 is liberally interpreted because the “rule avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits, and also frees the defendant from the harassment of identical future litigation.” *Moeller*, 173 Wn.2d at 278. Because a class is always subject to later modification or decertification, “the trial court should err in favor of certifying the class.” *Id.*

A. Plaintiffs Satisfy the Requirements for Class Certification Under Rule 23(a)

1. The Numerosity Requirement Is Satisfied

The first prerequisite for certification is that the class is “so numerous that joinder of all members is impracticable.” CR 23(a)(1). Although there is no fixed rule, more than 40 members generally suffice. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 821-22, 64 P.3d 49 (2003). In addition to sheer numbers, courts look at geographical dispersion, degree of sophistication, and class members’ reluctance to sue individually.” *Rodriguez v. Carlson*, 166 F.R.D. 465, 471 (E.D. Wash. 1996).¹

Here, the Class consists of approximately 130 current and former Washington-based employees of Defendants. The Class members are dispersed throughout Washington State and

¹ Because Rule 23 is based on its federal counterpart, interpretations of analogous provisions by federal courts are persuasive to the extent they do not contradict the decisions of Washington’s courts. *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001).

1 are unlikely to have the resources to sue individually. Numerosity has been satisfied.

2 2. There Are Numerous Questions of Law and Fact Common to the Class

3 The second prerequisite for class certification is the existence of “a single issue
4 common to all members of the class.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320,
5 54 P.3d 665 (2002); *see also* CR 23(a)(2). Washington courts have noted, “there is a low
6 threshold to satisfy this test.” *Behr Process*, 113 Wn. App. at 320. If a defendant has “engaged
7 in a ‘common course of conduct’ in relation to all potential class members,” class certification
8 is appropriate regardless of whether “different facts and perhaps different questions of law exist
9 within the potential class.” *Brown v. Brown*, 6 Wn. App. 249, 255, 492 P.2d 581 (1971);
10 *accord Miller*, 115 Wn. App. at 825. Furthermore, a common course of conduct need not
11 affect all potential class members uniformly. Instead, a “common” question is one that is
12 “characteristic of a *usual* type or standard: *representative* of a type.” *Anfinson v. FedEx*
13 *Ground Package Sys., Inc.*, 174 Wn.2d 851, 875, 281 P.3d 289 (2012) (emphasis in original)

14 “[C]laims by workers that their employers have unlawfully denied them wages to which
15 they were legally entitled have repeatedly been held to meet the prerequisites for class
16 certification[,]” including commonality. *Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346,
17 355 (E.D.N.Y. 2011). This is because the glue holding together such claims is the common
18 question of whether an unlawful wage policy prevented employees from collecting lawfully
19 earned wage compensation. *Id.*; *see also Avilez v. Pinkerton Gov’t Servs.*, 286 F.R.D. 450, 463-
20 64 (C.D. Cal. 2014); *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 640 (9th Cir. Sept. 8, 2014)
(reversing dismissal of rest break claims in certified class action on behalf of truck drivers).

21 Here, there are numerous common questions for which there are common answers,
22 including but not limited to: (1) whether Defendants have engaged in a common course of
23 failing pay the wages to which employees are entitled for all hours worked, including overtime
24 hours; (2) whether Defendants have failed to ensure that employees receive the rest and meal
25 breaks to which they are entitled under the law; (3) whether Defendants have engaged in a

1 common course of failing to compensate Class members for missed rest and meal breaks; (4)
2 whether Defendants have engaged in a common course of deducting time from the payroll
3 records of employees for meal breaks that were not received; and (5) whether Defendants have
4 failed to keep accurate records of time worked by Class Members. Because there are numerous
5 questions of law and fact common to all Class members, the commonality requirement is
6 satisfied.

7 3. The Claims of the Named Plaintiffs Are Typical of the Class Claims

8 The third prerequisite for certification is that the claims of Plaintiffs are typical of the
9 proposed class. CR 23(a)(3). “Typicality is satisfied if the claim ‘arises from the same event
10 or practice or course of conduct that gives rise to the claims of other class members, and if his
11 or her claims are based on the same legal theory.’” *See Brink’s*, 164 Wn. App. at 684 (quoting
12 *Behr Process*, 113 Wn. App. at 320 (citation omitted)). “Where the same unlawful conduct is
13 alleged to have affected both named plaintiffs and the class members, varying fact patterns in
14 the individual claims will not defeat the typicality requirement.” *Id.*

15 Plaintiffs’ claims are typical of the Class members’ claims because they all arise from
16 the conduct of Defendants and are based on the same legal theories, namely alleged systematic
17 violations of Washington’s wage and hours laws on overtime, minimum wage and rest and
18 meal breaks.

19 4. The Named Plaintiffs and Their Counsel Will Fairly and Adequately
20 Protect the Interests of the Class.

21 The fourth prerequisite for certification is a finding that the named plaintiffs will “fairly
22 and adequately protect the interest of the class.” CR 23(a)(4). This test is satisfied if the
23 named plaintiffs are able to prosecute the action vigorously through qualified counsel, and the
24 plaintiffs do not have interests antagonistic to those of absent class members. *See Hansen v.*
25 *Ticket Track, Inc.*, 213 F.R.D. 412, 415 (W.D. Wash. 2003).

1 With respect to the first element, Plaintiffs' counsel have extensive experience
2 certifying, litigating, trying, and settling class actions, including wage and hour actions
3 involving the same laws and regulations at issue here.

4 With respect to the second element, the claims of Plaintiffs Tschosik and Thiede are
5 coextensive with and not antagonistic to the claims asserted on behalf of the Class. Plaintiffs
6 and Class members are alleged to have suffered the same injuries: not being paid for all hours
7 worked and not being paid for missed rest and meal breaks.

8 The adequacy requirement is therefore satisfied with respect to proposed Class Counsel
9 and Plaintiffs Tschosik and Thiede.

10 However, Defendants assert that Plaintiff Thomas served as a manager for Defendants
11 and played a role in managing overtime and rest breaks for other employees and class
12 members. Plaintiffs dispute this characterization of Ms. Thomas's role and position. Because
13 these allegations have not been litigated and resolved, the Court cannot determine at this time
14 whether Ms. Thomas's claims are coextensive with and not antagonistic to the claims asserted
15 on behalf of the Class. As a result, the Court will not appoint Ms. Thomas to be a class
16 representative.

16 **B. Plaintiffs Meet the Requirements for Certification under Rule 23(b)(3)**

17 1. Common Factual and Legal Questions Concerning Defendants' Conduct
18 Predominate Over Any Individual Damages Issues

19 The predominance requirement "is not a rigid test, but rather contemplates a review of
20 many factors, the central question being whether 'adjudication of the common issues in the
21 particular suit has important and desirable advantages of judicial economy compared to all
22 other issues, or when viewed by themselves.'" *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116
23 Wn. App. 245, 254, 63 P.3d 198 (2003) (quoting 2 *Newberg* § 4.25). The requirement "is not a
24 demand that common issues be dispositive, or even determinative '[A] single common
25 issue may be the overriding one in the litigation, despite the fact that the suit also entails
numerous remaining individual questions.'" *Id.* (quoting 2 *Newberg* § 4.25). In deciding

1 whether common issues predominate, the Court “is engaged in a pragmatic inquiry into
2 whether there is a common nucleus of operative facts to each class member’s claim.” *Behr*
3 *Process*, 113 Wn. App. at 323.

4 The focus of this case is on the lawfulness of Defendants’ uniform policies and
5 practices. To prevail on their claims, Plaintiffs must demonstrate that Defendants engaged in a
6 pattern and practice of failing to pay overtime, failing to ensure that employees receive the rest
7 and meal breaks to which they are entitled under the law; failing to compensate Class members
8 for rest breaks, whether those breaks were received or not; and deducting time from the payroll
9 records of employees for meal breaks that were not received. These common issues will
10 predominate at trial.

11 While the amount of damages to which the members of the Class are entitled must be
12 calculated, the fact that those damages may be varied does not preclude class certification. *See*
13 *Behr Process*, 113 Wn. App. at 323 (citing *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir.
14 1975)); *see also Moeller*, 173 Wn.2d at 279-280 (affirming class certification even though the
15 damages model showed that some class members had not been injured by defendants’
16 conduct”). “[T]he trial court has a variety of tools available to deal with” the management of
17 any individual damages issues. *Sitton*, 116 Wn. App. at 259-60. Because common issues
18 predominate over any individualized issues, the predominance requirement is satisfied.

18 2. Plaintiffs Satisfy the Superiority Requirement

19 Before granting certification under CR 23(b)(3), the Court must find that a class action
20 is the superior means of adjudicating this controversy. “This requirement focuses upon a
21 comparison of available alternatives.” *Sitton*, 116 Wn. App. at 256. Factors to be considered
22 include “conserving time, effort and expense; providing a forum for small claimants; and
23 deterring illegal activities.” *Id.* at 257 (citation omitted). The Court also looks at the interest of
24 Class members in individually controlling the prosecution of claims, the extent of any litigation
25 already commenced by Class members, the desirability of concentrating the suit in this forum,
and any difficulties that may be encountered in managing the action. CR 23(b)(3)(A)-(D).

1 “A class action may be superior if class litigation of common issues will reduce
2 litigation costs and promote greater efficiency, or if no realistic alternative exists.” *Connor v.*
3 *Automated Accounts, Inc.*, 202 F.R.D. 265, 271 (E.D. Wash. 2001). Here, Plaintiffs’ claims
4 raise numerous common factual and legal issues. In addition, class treatment conserves judicial
5 resources and promotes consistency and efficiency of adjudication. *Lerwill v. Inflight Motion*
6 *Pictures Inc.*, 582 F.2d 507, 512–13 (9th Cir. 1978) (“Numerous individual actions would be
7 expensive and time-consuming and would create the danger of conflicting decisions as to
8 persons similarly situated.”). Given the large number of Class members and the common
9 issues, a class action is the most appropriate means of adjudicating the claims arising out of
10 Defendants’ common course of conduct.

11 Additionally, it is likely that most Class members lack the resources necessary to seek
12 legal redress against Defendants for their alleged misconduct and, without class treatment,
13 would have no effective remedy for their injuries.

14 3. This Case Presents No Management Difficulties

15 “[O]ne of the elements that goes into the balance to determine the superiority of a class
16 action in a particular case” is “manageability.” *Sitton*, 116 Wn. App. at 257 (citation omitted).
17 “[A]ny complex class action is likely to present a challenge,” but there are “a variety of tools
18 available to deal with” the management of any individual damage issues. *Id.* at 259-60.

19 Here, the Court will not face any difficulties managing and resolving the case. Liability
20 turns on Defendants’ conduct, which was generally uniform with respect to Class members,
21 and there are various ways in which to manageably determine any resulting damages.

22 4. Constitutionally Sound Notice Can Be Provided to Class Members

23 To protect their rights, absent class members must be provided with the best notice
24 practicable when an action is certified under Rule 23(b)(3). CR 23(c)(2); *see also Eisen v.*
25 *Carlisle & Jacquelin*, 417 U.S. 156, 174-175, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). Here,
26 Defendants have already produced a list of all employees who worked for the company during
27 the Class period, which includes each person’s last known phone number and mailing address.

1 Notice can be sent directly via First Class mail to all current and former employees who
2 worked for the freight companies at any time from April 1, 2013 to the present. In addition,
3 notice can be published on a website maintained and updated by Plaintiffs' attorneys.
4 Together, these approaches will provide the best practicable notice to the Class members.

5 If the parties are unable to agree on the form of notice, Plaintiffs shall present their
6 proposed form to the Court for approval.

7 **IV. CONCLUSION**

8 For the reasons set forth above, NOW, THEREFORE, IT IS HEREBY ORDERED:

9 1. The following Class is certified for purposes of litigation and trial:

10 All current and former employees of DFS Freight Inc, Diamond
11 Freight Systems, Inc., and/or Northwest Freight and Parcel, LLC,
12 in the State of Washington from April 1, 2013, through the date
13 of final disposition of this action.

14 Excluded from the Class are Defendants, any entity in which a Defendant has a
15 controlling interest or that has a controlling interest in a Defendant, and Defendants' legal
16 representatives, assignees and successors. Also excluded are the Judge to whom this case is
17 assigned and any member of the Judge's immediate family;

18 2. Plaintiffs Tschosik and Thiede are designated and appointed as representatives
19 for the Class;

20 4. The law firms of Terrell Marshall Law Group PLLC and Paukert & Troppmann
21 PLLC are appointed as counsel for the Class;

22 5. If the parties are unable to agree on the form of notice, Plaintiffs shall present
23 their proposed form to the Court for approval no later than 21 days from the date of this order.

24 IT IS SO ORDERED

25 DATED this 17 day of Dec, 2018.



THE HONORABLE MARYANN C. MORENO

1 Presented by:

2 PAUKERT & TROPPEMANN, PLLC

3 By: /s/ Andrew Biviano

4 Andrew S. Biviano, WSBA #38086

5 Email: abiviano@pt-law.com

6 522 W. Riverside Avenue, Suite 560

7 Spokane, Washington 99201

8 Telephone: (509) 232-7760

9 Facsimile: (509) 232-7762

10 *Attorney for Plaintiffs*

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