

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 23, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DANIEL VALENCIA, BELARMINO
HERNANDEZ, and JUNIOR
ARACHIGA, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

HOMEDELIVERYLINK INC.,

Defendant.

No. 4:18-cv-05034-SMJ

ORDER CERTIFYING CLASS

Plaintiffs Daniel Valencia, Belarmino Hernandez, and Junior Arachiga allege Defendant HomeDeliveryLink Inc. (“HDL”) mischaracterized them and similarly situated people as independent contractors when they are, under Washington law, employees entitled to overtime wages, rest and break periods, and no pay deductions. Before the Court is Plaintiffs’ Motion for Class Certification, ECF No. 37. Plaintiffs seek an order certifying a class and subclass. *Id.* at 8–9. Specifically, Plaintiffs seek an order certifying (1) “a Class defined as: All persons who, from March 1, 2015 and the date of final disposition of this action, have performed services for HDL in Washington as delivery drivers”; and (2) “a Subclass defined as: All persons who, from March 1, 2015 and the date of final disposition of this

1 action, have performed services for HDL in Washington as delivery drivers and
2 paid funds to HDL through check deductions.” *Id.* Plaintiffs also seek an order
3 appointing themselves as class representatives and appointing their counsel, the law
4 firms of Terrell Marshall Law Group PLLC and Lichten & Liss-Riordan PC, as
5 class counsel. *Id.* at 11. HDL opposes the motion. ECF No. 64.

6 The Court held a hearing on the motion on August 22, 2019. Having reviewed
7 the briefing and the entire file in this matter, the Court is fully informed and grants
8 the motion because Plaintiffs have met all requirements of Federal Rule of Civil
9 Procedure 23(a) (numerosity, commonality, typicality, and adequacy of
10 representation) and (b)(3) (predominance of common questions and superiority of
11 class adjudication).

12 **BACKGROUND**

13 HDL delivers furniture and appliances for Washington retailers. HDL
14 performs such deliveries through drivers it classifies as independent contractors.
15 Plaintiffs allege that they and their proposed class and subclass are, in fact, HDL’s
16 employees rather than independent contractors.¹ In support, Plaintiffs argue “HDL’s
17 drivers are economically dependent on HDL”; “HDL’s client contracts require HDL
18 to control its delivery drivers”; “HDL controls its hiring process”; “HDL requires
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20 ¹ Plaintiffs assert six causes of action alleging HDL violated various Washington statutes and regulations. ECF No. 1 at 23–32.

1 contract carriers to sign substantially uniform contracts”; “HDL controls drivers’
2 delivery services through training, mandatory meetings, and performance
3 monitoring”; “HDL controlled the tools, clothing, and equipment that drivers use”;
4 “[d]rivers cannot deviate from assigned routes, negotiate their pay, or make
5 deliveries for other companies”; “[d]rivers’ services are integral to HDL’s business
6 and require no special skill”; and “HDL makes unlawful deductions from contract
7 carriers’ pay.” ECF No. 37 at 2, 13–27.

8 Having reviewed the copious evidence Plaintiffs provided, the Court finds
9 that, at this stage, sufficient evidence exists to sustain the above contentions. Upon
10 these facts, Plaintiffs propose certifying a class of 121 Washington HDL drivers and
11 a subclass of thirty-nine such drivers who endured pay deductions. *Id.* at 9.

12 LEGAL STANDARD

13 “A representative plaintiff may sue on behalf of a class when the plaintiff
14 affirmatively demonstrates the proposed class meets the four threshold
15 requirements of . . . Rule . . . 23(a): numerosity, commonality, typicality, and
16 adequacy of representation.” *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1002
17 (9th Cir. 2018), *cert. dismissed*, 139 S. Ct. 1651 (2019). “Additionally, a plaintiff
18 seeking certification under Rule 23(b)(3) must demonstrate that ‘questions of law
19 or fact common to class members predominate over any questions affecting only
20 individual members, and that a class action is superior to other available methods

1 for fairly and efficiently adjudicating the controversy.” *Id.* (quoting Fed. R. Civ. P.
2 23(b)(3)).

3 “[B]efore certifying a class, the trial court must conduct a rigorous analysis
4 to determine whether the party seeking certification has met the prerequisites of
5 Rule 23.” *Id.* at 1004 (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180,
6 1186 (9th Cir. 2001)).

7 DISCUSSION

8 The issue is whether the Court should certify a class of Washington HDL
9 drivers, and a subclass of such drivers who endured pay deductions, all of whom
10 allege they are HDL’s employees under Washington’s economic-dependence test.
11 Under the Washington Minimum Wage Act, Revised Code of Washington section
12 49.46.010(2), “an employee includes any individual permitted to work by an
13 employer.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 281 P.3d 289, 297
14 (Wash. 2012). “The relevant inquiry is whether, as a matter of economic reality, the
15 worker is economically dependent upon the alleged employer or is instead in
16 business for himself.” *Id.* at 299 (internal quotation marks omitted). Possible
17 nonexclusive factors fall into two categories and include

- 18 (A) The nature and degree of control of the workers;
19 (B) The degree of supervision, direct or indirect, of the work;
20 (C) The power to determine the pay rates or the methods of payment of
the workers;
(D) The right, directly or indirectly, to hire, fire, or modify the
employment conditions of the workers; and

1 (E) Preparation of payroll and the payment of wages.

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- 3 (1) whether the work was a specialty job on the production line;
4 (2) whether responsibility under the contracts between a labor
5 contractor and an employer pass from one labor contractor to another
6 without material changes;
7 (3) whether the premises and equipment of the employer are used for
8 the work ([e.g.,] the alleged employee's investment in equipment or
9 materials required for his task, or his employment of helpers);
10 (4) whether the employees had a business organization that could or did
11 shift as a unit from one worksite to another;
12 (5) whether the work was piecework and not work that required
13 initiative, judgment or foresight ([i.e.,] whether the service rendered
14 requires a special skill);
15 (6) whether the employee had an opportunity for profit or loss
16 depending upon the alleged employee's managerial skill;
17 (7) whether there was permanence in the working relationship; and
18 (8) whether the service rendered is an integral part of the alleged
19 employer's business.

11 *Becerra v. Expert Janitorial, LLC*, 332 P.3d 415, 421 (Wash. 2014) (internal
12 quotation marks, brackets, and citations omitted).

13 HDL argues Plaintiffs cannot meet Rule 23's commonality, predominance,
14 and adequacy requirements.² Additionally, HDL argues Plaintiffs cannot establish
15 ascertainability. The Court addresses each argument in turn.

16 **A. Ascertainability**

17 HDL argues Plaintiffs' proposed class and subclass cannot be reasonably
18 ascertained with objective criteria. ECF No. 64 at 17–19. The Court disagrees. The
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20 ² HDL does not challenge numerosity or superiority, and addresses typicality only
in the context of adequacy. *See* ECF No. 64 at 29; ECF No. 75 at 4.

1 Ninth Circuit has not adopted an “ascertainability” requirement. *Briseno v. ConAgra*
2 *Foods, Inc.*, 844 F.3d 1121, 1124 n.4 (9th Cir. 2017). For certification, it is sufficient
3 that a class is defined by objective criteria. *See id.* at 1124, 1133.

4 Plaintiffs are correct that, here, “[c]lass membership is based entirely on
5 objective criteria: (1) that the class member performed services for HDL, (2) as a
6 delivery driver, (3) in Washington, (4) on March 1, 2015 or after.” ECF No. 68 at 6.
7 “Subclass members must meet these requirements and have paid funds to HDL
8 through check deductions.” *Id.*

9 Plaintiffs are also correct that “[a]ny class identification issues in this case are
10 manageable.” *Id.* at 7. Class membership can be determined from the records of HDL
11 and its delivery customers—Innovel Solutions Inc. (formerly known as Sears
12 Logistics Services Inc.), Hill Country Holdings LLC (doing business as Ashley
13 Furniture Homestores), and Mor Furniture for Less. While two Plaintiffs drove for
14 HDL under other names, they claim they did so at the direction of, and with the
15 knowledge of, HDL management. *See* ECF No. 44 at 2; ECF No. 51 at 2; ECF No.
16 69 at 9–12, 17–20. During a post-judgment claims process, HDL can raise
17 challenges to whether a claimant is a qualified member of the class or subclass. But
18 this does not affect class certification.

19 Finally, Plaintiffs are correct that “choice-of-law issues are not before the
20 Court and . . . do not defeat class certification” because “HDL identifies no foreign

1 law that conflicts with Washington law.” ECF No. 68 at 9 (citing *In re Hyundai &*
2 *Kia Fuel Econ. Litig.*, 926 F.3d 539, 562–63 (9th Cir. 2019) (en banc)).

3 **B. Commonality**

4 Rule 23(a)(2) requires “questions of law or fact common to the class.”³ HDL
5 argues “resolution of Plaintiffs’ core claim—that they were misclassified as
6 independent contractors—turns on each putative class member’s experience under
7 the factors set out in Washington’s economic-dependence test” and “[b]y necessity,
8 that analysis entails examining issues that find no uniformity among the proposed
9 class.” ECF No. 64 at 6. The Court disagrees. “All questions of fact and law need
10 not be common to satisfy the [commonality requirement]. The existence of shared
11 legal issues with divergent factual predicates is sufficient, as is a common core of
12 salient facts coupled with disparate legal remedies within the class.” *Meyer v.*
13 *Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012) (alteration in
14 original) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)).

15 “The common contention ‘must be of such a nature that it is capable of classwide
16 resolution—which means that determination of its truth or falsity will resolve an

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18 ³ Regarding commonality, Plaintiffs argue that, “[f]or the Class, common questions
19 of law and fact include (1) whether HDL is an employer of the Class members under
20 Washington law; (2) whether HDL unlawfully failed to pay Class members overtime
for all hours worked over 40 hours per week; and (3) whether HDL failed to ensure
that drivers received rest and meal breaks required by law.” ECF No. 37 at 4. Also,
“[t]he claims of the Subclass raise the additional common question of whether HDL
made unlawful deductions from Subclass members’ wages.” *Id.*

1 issue that is central to the validity of each one of the claims in one stroke.” *Id.* at
2 1401–42 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).⁴

3 That is the case here. Plaintiffs contend their proposed class and subclass are
4 all HDL’s employees under Washington’s economic-dependence test. This common
5 contention is capable of classwide resolution because determining its truth or falsity
6 will resolve in one stroke the misclassification issue central to the validity of each
7 individual claim. There are shared legal issues and a common core of salient facts
8 derived from common evidence. Thus, there are questions of law and fact common
9 to the class and subclass. Plaintiffs have demonstrated commonality. *See Williams*
10 *v. Jani-King of Phila. Inc.*, 837 F.3d 314, 319–25 (3d Cir. 2016); *DaSilva v. Border*
11 *Transfer of MA, Inc.*, 296 F. Supp. 3d 389, 398–404 (D. Mass. 2017); *Vargas v.*
12 *Spirit Delivery & Distrib. Servs., Inc.*, 245 F. Supp. 3d 268, 286–87 (D. Mass. 2017);
13 *Wilkins v. Just Energy Grp., Inc.*, 308 F.R.D. 170, 182–84 (N.D. Ill. 2015);
14 *Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 606 (N.D. Cal. 2014); *Scovil v.*
15 *FedEx Ground Package Sys., Inc.*, 886 F. Supp. 2d 45, 48 (D. Me. 2012); *Phelps v.*
16 *3PD, Inc.*, 261 F.R.D. 548, 555–57 (D. Or. 2009).

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18 _____
19 ⁴ “The commonality and typicality requirements . . . ‘tend to merge’” *Meyer*,
20 707 F.3d at 1041 (quoting *Dukes*, 564 U.S. at 350 n.5). “[R]epresentative claims are
‘typical’ if they are reasonably co-extensive with those of absent class members;
they need not be substantially identical.” *Id.* at 1042 (alteration in original) (quoting
Hanlon, 150 F.3d at 1020).

1 **C. Predominance**

2 Rule 23(b)(3) requires a court finding that “the questions of law or fact
3 common to class members predominate over any questions affecting only individual
4 members,” and “a class action is superior to other available methods for fairly and
5 efficiently adjudicating the controversy.”⁵

6 “Rule 23(b)(3)’s predominance inquiry is ‘far more demanding’ than Rule
7 23(a)’s commonality requirement.” *Sali*, 909 F.3d at 1008 (quoting *Amchem Prods.,*
8 *Inc. v. Windsor*, 521 U.S. 591, 624 (1997)). “When evaluating predominance, ‘a
9 court has a duty to take a close look at whether common questions predominate over
10 individual ones, and ensure that individual questions do not overwhelm questions
11 common to the class.’” *Id.* (quoting *In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d
12 679, 691 (9th Cir. 2018), *vacated on other grounds on reh’g en banc*, 926 F.3d 539
13 (9th Cir. 2019)). “The main concern of the predominance inquiry under Rule
14 23(b)(3) is the balance between individual and common issues.” *Id.* (quoting *Wang*
15 *v. Chinese Daily News, Inc.*, 737 F.3d 538, 545–46 (9th Cir. 2013)). Relevant factors
16 include

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18 ⁵ Regarding predominance, Plaintiffs argue that “numerous questions of law and fact
19 common to all members of the Class and Subclass predominate over any
20 individualized issues.” ECF No. 37. at 10. “The central common issue—whether
HDL is the delivery drivers’ employer—predominates over any individualized
issue.” *Id.* Further, “Plaintiffs have no conflicts with other Class members, have
retained experienced counsel, and are diligently pursuing Class claims.” *Id.*

1 (A) the class members’ interests in individually controlling the
prosecution or defense of separate actions;

2 (B) the extent and nature of any litigation concerning the controversy
already begun by or against class members;

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

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

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

6 Here, the questions of law and fact common to class and subclass members
7 predominate over any questions affecting only individual members. Individual
8 questions do not overwhelm questions common to the class and subclass.

9 Plaintiffs have submitted copious evidence, common to their proposed class
10 and subclass, tending to show HDL’s Washington drivers are its employees entitled
11 to overtime wages, rest and break periods, and no pay deductions. HDL disputes the
12 merits of Plaintiffs’ allegations.⁶ But HDL does not argue its policies and practices
13 varied significantly among its Washington drivers. Minor differences do not
14 preclude a finding of predominance. Nor do variances in potential damages.⁷

16 ⁶ “Although . . . a court’s class-certification analysis must be ‘rigorous’ and may
17 ‘entail some overlap with the merits of the plaintiff’s underlying claim,’ Rule 23
18 grants courts no license to engage in free-ranging merits inquiries at the certification
19 stage.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465–66 (2013)
(quoting *Dukes*, 564 U.S. at 351). “Merits questions may be considered to the
20 extent—but only to the extent—that they are relevant to determining whether the
Rule 23 prerequisites for class certification are satisfied.” *Id.* at 466.

⁷ “[T]he need for individual damages calculations does not, alone, defeat class
certification.” *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th
Cir. 2016).

1 Contrary to HDL’s assertion, Plaintiffs do not merely rely on anecdotal evidence.⁸
2 To the extent any gaps in the record exist, Plaintiffs are entitled to the benefit of
3 reasonable inferences. Further, HDL’s waiver defense is speculative at this juncture
4 and does not preclude a finding of predominance. Plaintiffs have demonstrated
5 predominance. *See Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1059–61 (7th Cir.
6 2016); *DaSilva*, 296 F. Supp. 3d at 405–06; *Vargas*, 245 F. Supp. 3d at 289; *Wilkins*,
7 308 F.R.D. at 184–89; *Villalpando*, 303 F.R.D. at 607–10; *Scovil*, 886 F. Supp. 2d
8 at 49–55; *Phelps*, 261 F.R.D. at 559–63.

9 **D. Adequacy**

10 Rule 23(a)(4) requires that “the representative parties will fairly and
11 adequately protect the interests of the class.”⁹ “Determining whether
12 representation is adequate requires the court to consider two questions: ‘(a) do
13 the named plaintiffs and their counsel have any conflicts of interest with other
14 class members and (b) will the named plaintiffs and their counsel prosecute the
15 action vigorously on behalf of the class?’” *Sali*, 909 F.3d at 1007 (quoting *In re*

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17 ⁸ Regardless, using representative evidence appears to be a reliable means of proving
18 or disproving the elements of Plaintiffs’ causes of action, including liability *and*
19 damages. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016);
20 *Vaquero*, 824 F.3d at 1155.

⁹ Regarding adequacy, Plaintiffs argue they “have no conflicts with other Class
members, have retained experienced counsel, and are diligently pursuing Class
claims.” ECF No. 37 at 10. They reason that, “[r]egardless of whether they paid
funds to HDL through paycheck deductions, Plaintiffs and members of the Class and
Subclass were all subjected to the same unlawful conduct by HDL.” *Id.*

1 *Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000)).¹⁰

2 Here, Plaintiffs and their counsel do not have any conflicts of interest with
3 other class or subclass members. Plaintiffs and their counsel will prosecute the
4 action vigorously on behalf of the class and subclass. Therefore, Plaintiffs will
5 fairly and adequately protect the interests of the class and subclass.

6 HDL argues a conflict of interests exists between the thirty-nine “contract
7 carriers” (Washington drivers who performed HDL deliveries pursuant to signed
8 contracts) and the eighty-two “second drivers” (Washington drivers who
9 performed HDL deliveries but never signed contracts). Specifically, HDL
10 argues contract carriers employed second drivers, so the former may be liable to
11 the latter as employers. Courts have rejected this argument on the reasoning that
12 if one group has employment status, so too does the other, and the sole employer
13 is the company utilizing their services. *See* ECF No. 68 at 13–14 (collecting
14 cases). This reasoning applies here. If contract carriers are employees, so too are
15 second drivers, and the sole employer is HDL. After all, HDL treated contract
16 carriers no differently than second drivers. No conflict of interests exists.

17 HDL also challenges one Plaintiff’s ability to represent the subclass. ECF
18 But its claim that he was an absentee owner of a carrier business does not hold

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20 ¹⁰ The commonality and typicality requirements “tend to merge with the
adequacy-of-representation requirement.” *Dukes*, 564 U.S. at 350 n.5 (quoting
Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 158 n.13 (1982)).

1 up. And, he has the minimum level of sophistication and understanding required
2 of a named plaintiff. Plaintiffs have demonstrated adequacy.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 **1.** Plaintiffs' Motion for Class Certification, **ECF No. 37**, is **GRANTED**.

5 **2.** The following **CLASS** is **CERTIFIED** for litigation in this case:

6 All persons who, from March 1, 2015 and the date of final
7 disposition of this action, have performed services for HDL in
8 Washington as delivery drivers.

9 **3.** The following **SUBCLASS** is **CERTIFIED** for litigation in this case:

10 All persons who, from March 1, 2015 and the date of final
11 disposition of this action, have performed services for HDL in
12 Washington as delivery drivers and paid funds to HDL through
13 check deductions.

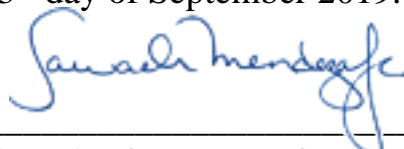
14 **4.** Plaintiffs Daniel Valencia, Belarmino Hernandez, and Junior Arachiga
15 are **APPOINTED** as **CLASS REPRESENTATIVES**.

16 **5.** The law firms of Terrell Marshall Law Group PLLC and Lichten &
17 Liss-Riordan PC are **APPOINTED** as **CLASS COUNSEL**.

18 **6.** No later than **five business days** from the date of this Order, Plaintiffs
19 shall file a proposal for sending **notice** of this action to the class and
20 subclass.

1 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
2 provide copies to all counsel.

3 **DATED** this 23rd day of September 2019.

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SALVADOR MENDOZA, JR.
6 United States District Judge
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