IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

JENNIFER HARRISON, on behalf of herself and others similarly situated,

Plaintiff,

v.

HARRY & DAVID OPERATIONS, INC., and HARRY AND DAVID, LLC,

Defendants.

Case No. 1:18-cv-00410-CL

REPORT & RECOMMENDATION

CLARKE, Magistrate Judge.

This case involves deciding what constitutes compensable work and when the compensable workday should start. The plaintiff class consists of current and former employees of the Harry & David call center in Medford, Oregon, who seek to recover unpaid regular and overtime wages allegedly owed pursuant to the FLSA and Oregon wage statutes. The plaintiff class was conditionally certified under the FLSA in January 2019. This case comes before the

court on Defendants' Motion for Decertification of the FLSA Class (Dkt. No. 142) and Plaintiff's Motion for Class Certification under Rule 23 (Dkt. No. 134). Defendants have also filed a Motion for Exclusion of Evidence of Plaintiff's Damages (Dkt. No. 155) and a Motion to Strike Plaintiff's Expert Report (Dkt. No. 157).

For the reasons discussed below, this Court recommends that Defendants' Motion for Decertification (#142) be DENIED, and Plaintiff's Motion for Class Certification under Rule 23 (#134) be GRANTED. This Court also recommends that Defendant's motions to exclude and strike (#155, 157) be DENIED.

BACKGROUND

Plaintiff Harrison filed this action on March 8, 2018 to challenge Harry & David's failure to (i) pay its Medford call center agents for all time worked on its premises; and (ii) to ensure they received full 30-minute meal breaks, as required by Oregon law. Plaintiffs allege that Defendants engage in a common practice of requiring call center employees to perform tasks at the start and end of each shift for which they are not compensated. Harry & David uses a common pay system that allegedly ignores the time agents are necessarily on its premises for work and prevents them from taking full 30-minute meal breaks. Harry & David requires all of its call center agents to use a time clock program accessible through its computers, which agents also use to handle calls. The time clock can only be accessed after entering the premises, retrieving equipment, booting up the computer, and accessing the time-keeping program. The plaintiff class performs the same required activities of picking up or dropping off supplies before and after their shifts while clocked out and during their unpaid meal breaks. They are subject to the same discipline, attendance, and other employment policies. They are monitored by the same department, Harry & David's real time operations ("RTO") department.

Plaintiff asserted the FLSA claims on a collective basis, pursuant to 29 U.S.C. § 216(b), and the Oregon claims on a class basis, pursuant to Fed. R. Civ. P. 23. The plaintiff class was conditionally certified under the FLSA in January 2019. The parties agreed to the following collective class definition:

> All current and former hourly-paid call center workers at Harry & David Operations, Inc.'s Medford, Oregon call center who at any time since March 8, 2015 have worked in positions in which employees primarily handle telephone sales calls on behalf of the 1-800-Flowers.com, Inc. Family of Brands (for example, Harry & David, FruitBouquets.com, The Popcorn Factory, etc.).

Consent Motion to Approve Collective Class Definition at 2 (Dkt. No. 68). Following FLSA notice, more than 200 FLSA plaintiffs joined this action. Harry & David now moves to decertify the conditionally certified FLSA class on the grounds that the plaintiff and the opt-in plaintiffs are not similarly situated and because Harry & David's operations, policies, and procedure comply with the FLSA.

At the same time, Plaintiff moves for class certification pursuant to Fed. R. Civ. P. 23 to pursue the claims for this unpaid work time under Oregon law. Specifically, Plaintiff Harrison seeks an order granting the following relief pursuant to Rule 23:

(1) Certifying this case as a class action pursuant to Fed. R. Civ. P. 23(b)(3) and appointing Plaintiff Harrison as class representative;

(2) Appointing Plaintiff's counsel as class counsel pursuant to Fed. R. Civ. P. 23(g);

(3) Approving Plaintiff's proposed Notice (Ex. 1)[1] for distribution to all putative class members via U.S. Mail and email; and,

(4) Order Defendants to produce a list of all class members, including names, last known mailing addresses, last known email addresses, and last known telephone numbers within 14 days of the Court's ruling.

Plaintiff requests the Court certify the following Rule 23 class:

> All current and former hourly-paid call center agents at Defendant Harry & David Operations, Inc.'s ("Defendant" or "Harry & David") Medford, Oregon call center who at any time since March 8, 2012 have worked in call-handling positions. This includes the following positions: inbound phones (*e.g.*, inbound sales specialists, inbound sales agents, sales and service specialists, and customer service agents), customer outreach marketing (or "COM"), and blended agents. This class does not include employees of Harry and David, LLC, nor does it include employees who never worked in a position listed above.

This class definition excludes employees who never worked in positions where they handled inbound or outbound calls. The Rule 23 class is not limited to the current job titles, but rather includes employees performing the job functions identified, regardless of the job title.

LEGAL STANDARDS

A. FLSA Standard

Section 216(b) of the FLSA authorizes an employee to maintain an action against an employer for violations of the Act on behalf of the employee and "other employees similarly situated." 29 U.S.C. § 216(b). Members of a FLSA collective action must "opt-in" to the action by filing written consent with the court in order to be bound by the judgment. *Id.*; *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525, 528 (9th Cir. 2013) ("Under FLSA, a potential plaintiff does not benefit from (and is not bound by) a judgment unless he or she affirmatively opts in to the lawsuit." (citation omitted) (internal quotation marks omitted)). This distinguishes FLSA collective actions from class actions under Federal Rule of Civil Procedure 23, which requires class members to opt out or be bound by the result of the action. *Busk*, 713 F.3d at 528. The district court has discretion to determine whether a collective action is appropriate. *Hargrove*, 1999 WL 1279651, at *3; *see also Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 535 (N.D. Cal. 2007) ("The court's determination of whether a collective action is appropriate is discretionary").

In evaluating FLSA collective action certification motions and determining when a district court should exercise its discretion to become involved in the notification process, courts in this District use a two-step process set forth in *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001). *See Goudie*, 2008 WL 4628394, at *3.

> The first determination is made at the so-called "notice stage." At the notice stage, the district court makes a decision—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members.
>
> Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification" of a representative class. If the district court "conditionally certifies" the class, putative class members are given notice and the opportunity to "opt-in." The action proceeds as a representative action throughout discovery.
>
> The second determination is typically precipitated by a motion for "decertification" by the defendant usually filed after discovery is largely complete and the matter is ready for trial. At this stage, the court has much more information on which to base its decision, and makes a factual determination on the similarly situated question. If the claimants are similarly situated, the district court allows the representative action to proceed to trial. If the claimants are not similarly situated, the district court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice. The class representatives—i.e. the original plaintiffs—proceed to trial on their individual claims.

Hipp, 252 F.3d at 1218 (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995)).

Having completed the FLSA "notice stage," this case is now in the second stage where defendants have moved to "decertify" and the Court must determine whether the plaintiff and opt-in plaintiffs are similarly situated.

B. Rule 23 Standard

Plaintiff also seeks class certification under Rule 23. Under Rule 23, Plaintiff must affirmatively demonstrate that the proposed class meets the four threshold requirements of Fed.

R. Civ. P. 23(a) and at least one of the requirements of Fed. R. Civ. P. 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). To satisfy Rule 23(a), the plaintiffs must show that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). To certify a class under Rule 23(b)(3), the court must "find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Plaintiffs bear the burden of demonstrating that each element of Rule 23 is satisfied. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). While the primary focus is not on the merits of the plaintiffs' claims, the Court must conduct a "rigorous" analysis and conclude that each of the four requirements of Rule 23(a) has been affirmatively shown with facts before certification can occur. *Falcon*, 457 U.S. 147 (1982); *Comcast v. Behrend*, 133 S.Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-351 (2011) ("Rule 23 does not set forth a mere pleading standard…[the party seeking certification must instead] prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."). However, the Court need only consider the complaint and "material sufficient to form a reasonable judgment on each [Rule 23(a)] requirement . . . ." *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). Holding plaintiffs to the evidentiary standards that will apply at trial risks terminating important class actions before a putative class may gather crucial admissible evidence. *Sali v. Corona Reg'l Med. Ctr.*, 889 F.3d 623, 633 (9th Cir. 2018).

DISCUSSION

I. The FLSA class certification will remain; decertification is denied.

The parties have engaged in significant discovery and Defendants now move for decertification of the FLSA collective class. The decertification analysis turns on whether the named plaintiff and members of the proposed class are "similarly situated." *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1108-10 (9th Cir.2018). The Ninth Circuit has defined similarly situated to mean "alike with regard to some material aspect of their litigation. *Id.* What matters most is that there is a legal or factual similarity that is material to the resolution of the party plaintiffs' claims. *Id*. at 1114-15. At the "decertification stage" "[i]t is not sufficient for the plaintiffs' evidence to merely 'successfully engage' the competing evidence offered by the defendant, rather, it is plaintiffs' burden to provide substantial evidence to demonstrate that they are similarly situated." *Reed v. Cty. of Orange*, 266 F.R.D. 446, 449 (C.D. Cal. 2010) (internal citations omitted). In *Campbell*, the Ninth Circuit emphasized that when certification rests on a disputed material fact going to the merits of the plaintiffs' FLSA claims, "the collective action cannot be decertified unless the factual dispute is resolved against the plaintiffs' assertions by the appropriate factfinder." *Campbell*, 903 F.3d at 119.

In this case, the FLSA Plaintiffs claim that they are owed overtime under the FLSA for time they worked off the clock without compensation prior to clocking-in for each shift, while clocked out during their unpaid meal periods, and after clocking out at the end of each shift. Plaintiffs challenge the common compensation, timekeeping, and attendance policies for call center agents of Harry & David. Plaintiffs apply the FLSA's "continuous workday" rule to their claims. The "continuous workday" rule is premised on the notion that all time an employee spends from the first compensable activity to the final compensable activity each day is

compensable, regardless of "whether or not the employee actually engages in work throughout that entire period." *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 941 (9th Cir. 2019) (citing *IBP, Inc. v. Alvarez*, 546 U.S. 21, 27-28 (2005)). "[W]ork time [is] continuous, not the sum of discrete periods." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 907 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005). The heart of Plaintiffs' claims turn on whether their required pre-shift tasks, *i.e.* the procedures they must complete prior to clocking-in to the timekeeper system, are compensable activities under the FLSA.

Plaintiffs present five central legal and factual issues that are common to all FLSA Plaintiffs and are material to resolving this action:

(1) Whether retrieving "muffies" and other supplies starts the continuous workday;

(2) Whether disposing of "muffies" and other supplies ends the continuous workday;

(3) Whether or not these work activities are performed without pay;

(4) Whether Harry & David's quarter-hour rounding scheme was unlawfully one-sided;

(5) Whether Harry & David knew or should have known that its policies and practices violated the FLSA.

Plaintiffs have shown that Harry & David subjected all call center agents to identical attendance requirements and pre and post shift procedures. Plaintiffs have shown through deposition testimony as well as Harry & David's written policies that they were trained by Harry & David to perform the same activities prior to clocking-in. These steps include gathering muffies and scratch paper and pencils, locating and sanitizing a workstation, putting the muffies on the headset and microphone, waking up and logging into a computer, accessing "OTC", and then clocking-in. These steps in tandem with the attendance requirements allegedly result in off-the-clock work for which FLSA Plaintiffs are not compensated.

Defendants argue that these pre-shift tasks are not compensable as they do not squarely fit the application of the FLSA's "continuous workday" rule. However, whether this time is considered "compensable" is not a determination that this Court needs to make at this time, nor should it. At this time, the question before the Court is whether Plaintiffs have carried their burden to show that they are similarly situated. This Court finds that Plaintiffs have satisfied this burden.

On each of the five issues presented by Plaintiffs, the record may permit a reasonable jury to find in favor of the FLSA Plaintiffs. It is undisputed that the FLSA Plaintiffs are all call center agents whose principal activity was handling telephone calls using their computers in the same call center environment. The FLSA Plaintiffs intend to prove their claims by relying primarily on Harry & David's own documents, which show it had common policies and practices for all call center agents and describe the pre and post shift procedures required of all call center agents. Plaintiffs also intend to rely on the representative testimony of the FLSA Plaintiffs about these pre and post shift tasks and how they were trained by Harry & David to complete these tasks while "off the clock." Plaintiffs have successfully shown that they all performed the same job at the same call center and were subject to the same employment and attendance policies and procedures.

Defendants argue that the time it took for many of the FLSA Plaintiffs to complete these pre and post shift tasks is *de minimums.* However, the question of whether particular activities constitute compensable work is a legal question, which can be resolved on a class-wide basis. *See, e.g.*, *Burch v. Qwest Communications Int'l Inc.*, 677 F. Supp. 2d 1001, 1120 (D. Minn. 2009). In the Ninth Circuit, courts look to "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the

additional work," in order to determine whether the *de minimis* defense is applicable. *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984). There is no precise amount of time that may be denied compensation as *de minimis*," and instead, "common sense must be applied to the facts of each case." *Id.* at 1062. Importantly, the *de minimis* defense has been rejected where the unpaid wages "when aggregated, amounted to a substantial claim." *Id.* at 1063. As this Court has held, "[b]eing a short amount of time alone is not enough, it must also be impractical to record it." *Rother v. Lupenko*, No. 3:08-cv-00161-MO, 2011 WL 1311773, at *2 (D. Or. Apr. 1, 2011), *aff'd in part and rev'd in part on other grounds in part*, 515 F. App'x 672 (9th Cir. 2013). This is why courts routinely hold that "it is up to the fact-finder to decide whether time over forty hours a week is *de minimis*." *See Clark v. Teamsters Local Union 651*, 349 F. Supp. 3d 605, 620 (E.D. Ky. 2018); *Espenscheid v. DirectSat USA, LLC*, No. 09-cv-625-bbc, 2011 WL 10069108 (W.D. Wisc. April 11, 2011) ("because there are genuine disputes about how long the plaintiffs spent performing the tasks at issue, I cannot determine whether time spent performing these tasks is *de minimis*."). Even if it takes the FLSA Plaintiffs a mere minute to pick up the muffies, Plaintiffs are not claiming that they should be paid solely for the time it takes to pick up the muffies. Instead, they are claiming that the picking up of muffies and other supplies begins the continuous workday in what is the first step of the pre-shift process they are required to follow before clocking-in.

Additionally, the record here contains evidence that it was administratively possible to capture the time at issue for every call center agent by placing a time clock at the entrance of the call center near where call center agents picked up the muffies and other supplies. Defendant's argument that allowing the call center employees to clock-in when they pick up their muffies will result in having to pay employees for non-work activities is a red herring. Defendants argue

that the FLSA Plaintiffs completed different personal tasks after picking up their muffies, such as taking a smoke break, and that they should not have to pay employees for such activities. However, Defendants could avoid having to pay for smoke breaks by simply prohibiting employees from taking a 15-minute smoke break after picking up their muffies and before sitting at a computer. The Court is not aware of any law that requires Harry & David to allow breaks at any time an employee chooses to take one. Moreover, Harry & David already tracked the time and identity of agents entering the call center floor at the same location for its own security purposes. *See* Mtn. for Class Cert. at 4, 12 (Dkt. No. 134). Harry & David's policies and procedures prohibit agents from being on the premises for any purposes other than work. Harry & David dictates the procedures agents must follow throughout their shift and monitors in real time whether they are following them or not. In short, a reasonable juror could find for the FLSA Plaintiffs on administrative feasibility.

The resolution of issues (1) and (2) turn on a jury finding that retrieving and disposing of supplies is "integral and indispensable" to the FLSA Plaintiffs' call-handling activities. Likewise, issue (3)—whether or not these activities are uncompensated—turns on Harry & David's own written policies and procedures, which set out detailed, multi-step procedures for the beginning and end of each shift and for lunch and confirm testimony that these activities were performed off the clock. Issue (4) turns on whether or not Harry & David's rounding scheme combined with its written policies for attendance and clocking in and out was one-sided. Finally, the resolution of issue (5)—willfulness—rests on common facts about the actions and knowledge of Harry & David. Taking the facts in the light most favorable to the FLSA Plaintiffs, Harry & David has not shown that there is an absence of genuine disputes as to any material facts related to the determination of whether the FLSA Plaintiffs are similarly situated. A

reasonable jury could, on the present factual record, find for the FLSA Plaintiffs collectively on each issue. Therefore, Defendant's motion to decertify should be denied and the FLSA Plaintiffs' claims should proceed collectively to trial.

II. Rule 23 class certification is granted.

Class certification under Fed. R. Civ. P. 23 is proper when plaintiffs show that they meet the requirements of Rule 23(a) and also come within one of the provisions of 23(b). *Giles v. St. Charles Health Sys., Inc.*, 294 F.R.D. 585, 589 (D. Or. 2013); *Wilcox Dev. Co. v. First Interstate Bank, N.A.*, 97 F.R.D. 440, 443 (D. Or. 1983). In this case, Plaintiff Harrison seeks certification pursuant to Rule 23(b)(3). It is Plaintiff's burden to show how Harry & David's common policies ensure that this case satisfies these requirements.

Rule 23(a) establishes four threshold requirements applicable to all class actions: (1) numerosity (that "the class is so numerous that joinder of all members is impracticable"); (2) commonality ("there are questions of law or fact common to the class"); (3) typicality ("the claims or defenses of the representative parties are typical of the claims or defenses of the class"); and (4) adequacy ("the representative parties will fairly and adequately protect the interests of the class"). Fed. R. Civ. P. 23(a). Once the Court determines that these prerequisites are satisfied, it examines whether (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," referred to as the "predominance" requirement; and (2) whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In this case, all requirements for class certification under Rule 23 have been established.

a. The numerosity element is met.

Numerosity is met when the proposed class size is so large that joinder would be impractical. *Giles*, 294 F.R.D. at 590 (quoting *Jordan v. L.A. Cnty.*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982)). In this district, a class of about 40 members has been adopted as a "rough rule of thumb" for when this requirement is satisfied. *Id.* (quoting *Wilcox*, 97 F.R.D. at 443).

In this case, Plaintiff's proposed class numbers are in the thousands. The notice list produced for the shorter three-year FLSA statute of limitations numbered in excess of 2,000. *See* FLSA Notice List (Dkt. No. 135-11). Moreover, though the class size alone is sufficient to meet this requirement, the relatively small size of each class member's individual claim for unpaid wages also indicates the impracticability of joinder. *Jordan*, 669 F.2d at 1319-20 (citations omitted). Therefore, the numerosity requirement of Fed. R. Civ. P. 23(a)(1) is satisfied.

b. The commonality element is met.

The commonality requirement of Rule 23(a) does not require that all questions of fact and law be common to the class. *Giles*, 294 F.R.D. at 590 (quoting *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998)). The class members' claims "must depend on a common contention . . . that is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Nevertheless, "[t]he threshold requirement of commonality is not high." *Giles*, 294 F.R.D. at 590 (citation and modifications omitted).

In *Senne v. Kansas City Royals Baseball Corp*., the Ninth Circuit confirmed that "uniform corporate policies 'carry great weight for certification purposes.'" 934 F.3d 918, 943

(9th Cir. 2019) (quoting *Wells Fargo Home Mortg. Overtime Pay Litig*., 571 F.3d 953, 958 (9th Cir. 2009)). For this reason, "courts often certify class actions when an employer's wage and hour practices similarly impact a large number of workers." *Giles*, 294 F.R.D. at 596 (citing *Lerwill v. Inflight Motion Pictures, Inc*., 582 F.2d 507, 512 (9th Cir.1978)); see also *Willis v. Ironwood Comm'ns, Inc.*, No. 3:07-cv-01252-KI, 2008 WL 2167175, at *5 ("Class actions are the typical way of resolving allegations of wage and hour violations."). When class members are subject to the same employment policies, same payment practice, and governed by the same laws, commonality is satisfied. *See Giles*, 294 F.R.D. at 590-91 (finding commonality satisfied in Oregon wage-and-hour class action).

In this case, Plaintiff has carried her burden of showing that Plaintiff and the proposed class members are similarly impacted and subjected to the same wage and hour practices, the same employment policies, same payment practice, and governed by the same laws. Plaintiff relies on Harry & David's common practice of requiring employees to engage in tasks at the start and end of their shifts, as well as at the start and end of their meal breaks, for which they are not compensated. These practices include requiring employees to pick up "muffies," locate a workstation, sanitize the workstation, and login to the computer prior to clocking-in to the timekeeper system on their computers. Plaintiff and the proposed class members are all subject to the same attendance policy that allegedly requires them to cut their meal periods short in order to be ready for work within 30 minutes of starting the meal period. Whether this time is compensable under Oregon law is a question that is common to Plaintiff and the proposed Rule 23 class.

Plaintiff has further presented other common questions for the Court to decide. These questions include, but may not be limited to, (1) whether Harry & David's rounding and

attendance policies resulted in an unlawful one-way rounding system under Oregon state law; (2) whether Harry & David's alleged violations of Oregon's overtime and meal period regulations was willful; and (3) the amount of penalties owed for willful violations of Oregon's wage-and-hour laws.

c. The typicality element is met.

"The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Willis*, 2008 WL 2167175, at *4 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992)). "When assessing typicality, the court examines 'the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.'" *Giles*, 294 F.R.D. at 591 (quoting *Hanon*, 976 F.2d at 508). In other words, typicality examines whether class members have "the same or similar injury," whether the conduct at issue "is not unique to the named plaintiffs," and whether members of the class "have been injured by the same course of conduct." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (quoting *Hanon*, 976 F.2d at 508). This Court has noted that the threshold "typicality" requirement is, like commonality, "not high." *Giles*, 294 F.R.D. at 591 (citations omitted).

Here, Plaintiff claims that she and the proposed class members did not receive all the wages they were owed under Oregon law. She alleges that she was necessarily on the premises performing work activities without pay before clocking-in and after clocking-out for each shift. She challenges Harry & David's rounding policy as unlawfully one-sided. She also alleges that her meal periods were cut short. These allegations are not the result of any conduct specific to her. Instead, these allegations stem from Harry & David's policies and practices, which were applied to Plaintiff in the same way as the other call center agents. Although the other call center

agents may have engaged in various other personal activities in addition to these required tasks prior to clocking-in to the timekeeper system, Plaintiff's claims rest on a common theory of how the same policies and practices violated Oregon law with respect to all of the call center agents.

d. The adequacy element is met.

The adequacy requirement ensures that the representative party will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "This factor requires (1) that the proposed representatives Plaintiffs [or Plaintiff] do not have conflicts of interest with the proposed class, and (2) that Plaintiffs are represented by qualified and competent counsel." *Magallon v. Robert Half Int'l, Inc.*, 311 F.R.D. 625, 638 (D. Or. 2015) (quoting *Giles*, 294 F.R.D. at 592 (internal quotation marks omitted)).

The interests of Plaintiff Harrison are aligned with the members of the class. They arise out of the same course of conduct, rely on the same legal theory, allege the same injuries, and ultimately seek the same or similar relief as the claims of the Rule 23 Class she seeks to represent. By advancing her own claims, Plaintiff Harrison has advanced and will advance the claims of the Rule 23 Class members. Plaintiff Harrison has pursued these claims for approximately two years during which time she has submitted a declaration in support of conditional class certification under the FLSA, sat for deposition, and responded to written discovery. Defendants have not shown that Plaintiff Harrison has an interest that is antagonistic to the Rule 23 Class. She has demonstrated a commitment to her claims and those of individuals she seeks to represent.

Plaintiff Harrison has retained counsel experienced in litigating class and collective wage-and-hour litigation under both the FLSA and various state laws, including Oregon state law. *See generally* Declarations of David W. Garrison, Mark J. Gottesfeld, and Steve D. Larson.

The Court has not been presented with evidence to conclude that Plaintiff Harrison or her counsel are inadequate to serve as the representative plaintiff or as counsel for the plaintiff class.

e. The requirements of Fed. R. Civ. P. 23(b)(3) have been met.

Once a court finds that the Rule 23(a) prerequisites are satisfied, as it has here, a class may be certified pursuant to Rule 23(b)(3) if the court "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Giles*, 294 F.R.D. at 594 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). The analysis does not, however, require plaintiffs to show that there are no individual issues. *Id.* (citing *Phelps v. 3PD, Inc.*, 261 F.R.D. 548, 559 (D. Or. 2009)). Instead, the inquiry requires courts to determine "whether the common, aggregation-enabling issues in the case are more prevalent or important than the noncommon, aggregation-defeating, individual issues." *Senne*, 934 F.3d at 938 (quoting *Tyson Foods, Inc.*, 136 S. Ct. at 1045).

The Ninth Circuit has emphasized that common employment policies and practices are frequently central to the predominance analysis, and where such policies are present, "predominance is rarely defeated." *Id.* at 944. Therefore, for all the same reasons provided under the commonality analysis, this Court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members. Evidence presented by Harry & David as to the different activities employees engaged in between the time they arrived on the premises and the time they clocked-in are not enough to defeat Rule 23 class certification. It may be true that damages may need to be calculated on an individual basis, but

the predominate questions in this case are about when the workday actually begins and ends for Harry & David's call center agents and whether Harry & David's policies and practices violate wage and hour laws.

Ample case precedent compels this Court to find that treating this case as a class action is superior to other available methods for fairly and efficiently adjudicating this controversy. Plaintiff and the class members are challenging common policies and practices that, litigated individually, could result in inconsistent results. Challenges to common policies should be adjudicated in a single action, particularly in the wage and hour context. *See, e.g.*, *Senne*, 934 F.3d at 943 (common policies "carry great weight for certification purposes") (citation omitted); *Giles*, 294 F.R.D. at 596 (certification frequently appropriate "when an employer's wage and hour practices similarly impact a large number of workers"); *Willis*, 2008 WL 2167175, at *5 ("Class actions are the typical way of resolving allegations of wage and hour violations.").

Plaintiff has confirmed that she is unaware of any individual litigation related to this action brought by a class member. There is another litigation involving similar claims pending in the Southern District of Ohio that is awaiting approval of an FLSA collective action settlement limited to employees who worked at an Ohio call center operated by 1-800-Flowers, a company related to Harry & David. *See Conklin v. 1-800 Flowers.com, Inc.*, No. 2:16-CV-00675, 2020 WL 419430 (S.D. Ohio Jan. 27, 2020). That litigation does not involve any class members in this case and does not resolve any Oregon state law claims.

For all these reasons, the Court finds that Plaintiff's motion for Rule 23 class certification should be granted. Plaintiff Harrison is appointed as the class representative and her counsel as class counsel. This Court further authorizes Plaintiff's proposed class notice found in Exhibit 1 to this motion (Dkt. No. 135-1).

III. Defendant's motions to exclude and strike evidence are denied.

a. Defendant's motion to exclude evidence of Plaintiff Harrison's damages is denied.

Defendants have moved this Court for an evidentiary exclusion sanction against Plaintiff Harrison to exclude evidence of her damages for any motion, hearing, or trial of this matter, pursuant to Rule 26(a)(1)(A)(iii) and Rule 37(c)(1) of the Federal Rules of Civil Procedure. Rule 26(a)(1)(A)(iii) states:

> [A] party must, without awaiting a discovery request, provide to the other parties . . . a computation of each category of damages claimed by the disclosing party – who must also make available . . . the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

Defendants base their motion on the premise that Plaintiff Harrison has not provided Defendants with evidence to how she calculates her requested damages.

"The terms 'computation' and 'category' are not rigidly defined, and 'Rule 26 does not elaborate on the level of specificity required in the initial damages disclosure.'" *McSwiggin v. Omni Limousine*, No. 2:14-cv-02172, 2016 WL 1030053, at *3 (D. Nev. Mar. 10, 2016) (quoting *Cardoza*, 2015 WL 3875916, at *2). And, "[a] computation of damages may not need to be detailed early in the case before all relevant documents or evidence has been obtained by the plaintiff." *Id.* (quoting *Cardoza*, 2015 WL 3875916, at *2). District courts in the Ninth Circuit have consistently found plaintiffs in compliance with their Rule 26(a) obligations when they "disclose the basic method or formula by which it contends its damages should or will be calculated even if it cannot identify the specific dollar amount of damages pending further discovery," followed by supplementation as information becomes available through discovery. *Cardoza*, 2015 WL 3875916, at * (denying defendants motion to compel supplementation of Plaintiffs' initial disclosures where it was still early in the case and plaintiffs' provided a rough

estimate of the damages sought); *see also McSwiggin*, 2016 WL 1030053, at * (finding an order to compel supplementation of plaintiffs' discovery responses unnecessary because "plaintiffs initially disclosed a detailed formula using precise categories by which they contended damages should be calculated, and then, as the case became more advanced, provided detailed damages calculations in their expert's report pursuant to their obligation to supplement.").

In this case, the Court finds that Plaintiff has complied with the spirit of Rule 26(a) throughout this litigation and provided Defendants with the method by which she contends damages will be calculated. She has also supplemented her disclosures as more information has become available and provided an expert report that shows how her damages figure was calculated. Specifically, the Parties agreed to exchange their Initial Disclosures in August 2018, and Plaintiff did so on August 31, 2018. In her Initial Disclosures, Plaintiff Harrison made clear that she is seeking damages for herself, those who filed FLSA claims, and the members of the Rule 23 class. Plaintiff's initial disclosures explained that, at that time, she had not compiled a formal analysis or computation of the full damages she seeks, but explained the categories of the damages she seeks and the basis of her computation of damages (unpaid wages for time when she and others were not clocked-in):

> unpaid regular and overtime wages for work activities performed whenever Plaintiff Harrison and those she seeks to represent were not clocked in for pay purposes and unpaid wages due to Defendants' failure to factor bonus payments into their overtime calculations; all liquidated damages permitted by the FLSA; all damages, including penalties and liquidated damages, permitted by the Oregon wage statues; and all other relief provided for by the FLSA and Oregon wage statutes, including payment of Plaintiffs' attorney's fees and costs by Defendants.

Exhibit A to Plf.'s Response to Def.'s Mtn. to Exclude Evidence (Dkt. No. 170-1). Plaintiff further stated that "[u]ntil [she] has had the benefit of full discovery on damages issues, Plaintiff cannot provide detailed damages computations." *Id*. According to Plaintiff, she still has not had

the full benefit of full discovery on damages, as Defendants have not completed their pay and time data production on FLSA Opt-In Plaintiffs and the parties have not conducted discovery on Rule 23 class members who are not Opt-In Plaintiffs.

Plaintiff further explains in response to Defendant's motion that there are three variables that must be used to compute these damages for Plaintiff and other call center agents: (1) an hourly rate; (2) an overtime rate of one-and-one-half times the hourly rate for hours over forty (40) in a workweek; and (3) the amount of time for the off-the-clock work. The hourly rate for Plaintiff and all other call center agents was and is maintained by Defendants. The overtime multiplier is set by the federal and state laws that Plaintiff seeks to enforce and is the same for Plaintiff and all other call center agents (one-and-one-half times the hourly rate). The only variable that is in dispute is the amount of off-the-clock time that Plaintiff and other call center agents worked without pay, and of course, whether they are entitled to this off-the-clock time.

The damages Plaintiff seeks for herself and those she seeks to represent will be based on the amount of time the trier of fact finds that Defendants' call center agents worked off-the-clock. To that end, Plaintiff has provided detailed estimates of the time she and other Opt-In Plaintiffs worked off-the-clock in the form of (1) her own declaration and the declaration of Opt-In Plaintiff Dayleen Hibben; (2) her own deposition testimony and that of 31 other Opt-In Plaintiffs; and (3) her own written discovery responses and those of 69 other Opt-In Plaintiffs, including 54 Opt-In Plaintiffs who were not deposed. In other words, Defendants have received written or deposition testimony from at least 86 total Plaintiffs, including Plaintiff Harrison.

Plaintiff and those she seeks to represent seek to be paid for work that they allege is compensable under the FLSA and Oregon law, but was not captured by Defendants' timekeeping system. In cases like this one, where an employer's records have not tracked all time worked,

FLSA plaintiffs may prove the amount and extent of uncompensated time worked as a matter of "just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). Plaintiff Harrison's estimate of her off-the-clock work, as well as the estimates of other call center agents, are representative evidence of the amount and extent of uncompensated work performed by Plaintiff Harrison and all other Opt-In Plaintiffs and Rule 23 class members. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (representative evidence can be used "to fill an evidentiary gap created by the employer's failure to keep adequate records" whether employees proceed as a class or with thousands of individual lawsuits); *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 940 (9th Cir. 2019) (employee testimony is permissible representative evidence to prove both damages and liability). Under the framework of *Mt. Clemens* and its progeny, this uncaptured time is the only variable relevant to calculating Plaintiff's unpaid wages not already in the Defendants' possession.

The nature of Plaintiff's claims—*i.e.*, the allegation that she and other agents worked off-the-clock without pay—inherently puts Defendants on notice that there will be some amount of time that should have been, but was not, recorded and paid by Defendants and that damages calculations will involve adding that time to the time captured by its payroll and timekeeping systems. As Ninth Circuit courts have made clear, the purpose of Rule 26(a) damages computations is to " provide sufficient detail to enable the defendants to understand the contours of their potential exposure and make informed decisions regarding settlement and discovery." *Id.* at *3. The Court finds that Defendants have been put on notice of the damages Plaintiff Harrison seeks for herself and others in this action consistent with Rule 26(a) and (e).

Finally, To the extent Defendants' believe Plaintiff's discovery production on her computation of damages is insufficient, Defendants are mistaken that Rule 37(c) relieves them of

the obligation to proactively address discovery issues. In addressing a very similar motion in *DeForest v. City of Ashland*, No. 1:11-CV-03159-CL, 2016 WL 4059191 (D. Or. July 25, 2016), this Court concluded that the failure to proactively address discovery issues was fatal to a Rule 37(c) sanction motion. In *DeForest*, one party resorted to moving for a discovery sanction under Rule 37(c), rather than abiding by Rule 37(a)(1)'s admonishment to engage in good faith. *Id.* at *1. This Court first noted that, in considering a motion under Rule 37(c), courts "may consider the party's entire course of conduct throughout the proceedings." *Id.* at *2 (citing *Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 771-72 (9th Cir. 1995)). Ultimately, in rejecting the bid for sanctions in *DeForest*, this Court reasoned "that the Plaintiffs [*i.e.*, the moving party] failed to pursue discovery on the issue," (*id.* at *2), and "that most, if not all, of these discovery disputes could have been informally resolved by the attorneys or, if needed, with court assistance," (*id.* at *4). In affirming this Court's decision in *DeForest*, District Judge Aiken agreed with this Court's reasoning that a party's failure to follow up with the other side on a discovery issues prior to filing a motion for sanctions renders the moving party's efforts to seek a discovery sanction misplaced. *DeForest v. City of Ashland*, No. 1:11-CV-03159-CL, 2016 WL 6694484, at *1 (D. Or. Nov. 14, 2016). In essence, this Court's decision in *DeForest*, and Judge Aiken's affirmation of it, stand for the straightforward proposition that the mere availability of Rule 37(c) does not permit parties to avoid working in good faith to resolve ordinary discovery disputes.

Moreover, the Ninth Circuit has made clear that discovery sanction orders excluding evidence under Rule 37 are inappropriate if the responding party's failure to disclose was substantially justified or harmless. *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008), *as amended* (Sept. 16, 2008) (citing *Yeti by Molly, Ltd. v. Deckers Outdoor*

Corp., 259 F.3d 1101, 1105 (9th Cir. 2001)). In this case, any purported failure to provide sufficient evidence concerning a computation of damages is substantially justified and harmless for several reasons: (1) Plaintiff has repeatedly identified the amount of time she estimates that she worked off the clock each shift since August 2018; (2) Defendants possess all the pay and time records necessary to perform a damages computation on the basis of Plaintiff's estimates; (3) Plaintiff has not relied on a computation of her damages in her motion seeking Rule 23 class certification of her Oregon state law claims or in her opposition to the decertification of the FLSA claims; and (5) the identity of the parties and claims in this case, and whether some or all of those claims can proceed on a collective or class basis to trial, was yet to be determined at the time Defendants filed this Rule 37 motion. Plaintiff has outlined all of the ways in which she provided her estimates of the off-the-clock time she spent working before her shift, during her meal period, and after her shift. In addition to Plaintiff Harrison, Defendants have been able to depose 31 other FLSA Plaintiffs and have received written discovery responses from 69 other Opt-In Plaintiffs, including 54 who were not deposed. In other words, Defendants have evidence regarding the estimates of unpaid, off-the-clock work time from at least 86 individuals. For these reasons, Defendant's motion to exclude evidence of Plaintiff Harrison's damages is denied.

b. Defendant's motion to strike Plaintiff's expert report is denied.

Plaintiff has produced a January 24, 2020 report from Liesl Mae Fox, Ph.D. ("Fox Report") that is based upon computerized pay and time records and badge swipe data produced by Harry & David for most of the FLSA Plaintiffs. *See* Dkt. No. 138-1. According to Plaintiff, this report was produced solely to demonstrate how representative evidence can serve as the basis for determining both liability and damages following Rule 23 class discovery. *See* Dkt. No. 134 at 9-18. Defendants have moved to strike this expert report pursuant to Rules 403 and 702 of

the Federal Rules of Evidence, as well as Rule 37(c)(1) of the Federal Rules of Civil Procedure on the basis that the report opined on legal conclusions and improperly relied on undisclosed materials in rendering the report.

Rule 702 of the Federal Rules of Evidence states that an expert witness may testify in a case in the form of an opinion if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Rule 403 of the Federal Rules of Evidence states that, even where evidence may be relevant and admissible, courts may still exclude such evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

Rule 26(a)(2) of the Federal Rules of Civil Procedure requires that a party that intends to use an expert witness must disclose the following items, among other information: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; and (iii) any exhibits that will be used to summarize or support them. Fed. R. Civ. P. 26(a)(2)(B). Finally, Rule 37(c)(1) of the Federal Rules of Civil Procedure states that if a party fails to provide information required by Rules 26(a), the party is not allowed to use that information . . . unless the failure was "substantially justified or is harmless."

First, this Court accepts Plaintiff's assertion that the expert report was produced solely to demonstrate that this case can be efficiently tried on a class-wide and collective basis by analyzing Harry & David's computerized pay and time records and by applying common formulas in determining liability and damages. The Fox Report is not a damages report for use at trial, nor did the Court rely on this report to decide either the motion to decertify the FLSA class or the motion to certify the Rule 23 class. The Fox Report did not set out to definitively calculate the damages determined to be owed to the sample of call center agents. The report was simply used to demonstrate that damages could be calculated on a class wide basis following certification. What figures those calculations revealed or the accuracy of information used to make those calculations was not evaluated by the Court or a fact finder. For this reason, Federal Rules of Evidence 702 and 403 are not relevant here and do not prohibit Plaintiff from presenting the Fox Report in response to Defendant's motion to decertify.

The ruling in *Smith v. Family Video Movie Club, Inc.*, No. 11-c-1773, 2015 WL 1542663 (N.D. Ill. March 31, 2015) is instructive here. There, the plaintiff submitted an expert report on behalf of only a sample of the FLSA collective in response to the pending decertification motion. *See id.* at * 8. The defendant sought to exclude the report from the court's consideration for multiple reasons, one of them being that the expert did not rely upon testimony of each opt-in class members' off-the-clock work. *See id.* at *5. The court rejected this argument finding the expert testimony at this stage was not meant to definitively conclude how much each opt-in will be entitled to in damages, but rather was just a piece of evidence showing that common representative evidence can assist the jury at trial:

> [The] expert testimony, however, is not offered to prove the actual amount of off-the-clock hours worked. Rather his testimony and the illustrative calculations are offered to show that, if and when the amount of off-the-clock hours is

> determined for each Plaintiff, [the expert] can use his formula to calculate damages.

Id.

Finally, regarding Defendant's argument pursuant to Rules 26(a)(2) and 37(c), the Court is not persuaded to strike the Fox Report. All of the cases cited by Harry & David in its motion where the court granted a motion to strike an expert report are distinguishable from the instant procedural posture of this case. Not a single case cited by Harry & David involved the striking of an expert report presented to the Court in connection with a motion for class certification. Instead, those cases were in the context of motions for summary judgment or pre-trial motions *in limine*, both of which involve a different evidentiary standard than at the class certification stage. Evidence that plaintiffs rely on at class certification need not be admissible because "transforming a preliminary stage into an evidentiary shooting match inhibits an early determination of the best manner to conduct the action." *Sali v. Corona Regional Medical Center*, 909 F.3d 996, 1004 (9th Cir. 2018). As a result, "[t]he court's consideration should not be limited to only admissible evidence." *Id.* at 1006. Therefore, Defendant's motion to strike the Fox Report is denied.

RECOMMENDATION

For the reasons stated above, Defendants' Motion for Decertification (#142) should be DENIED; Plaintiff's Motion for Class Certification under Rule 23 (#134) should be GRANTED; and Defendant's motions to exclude and strike (#155, 157) should be DENIED.

This Report and Recommendation will be referred to a district judge. Objections, if any, are due no later than fourteen (14) days after the date this recommendation is filed. If objections are filed, any response is due within fourteen (14) days after the date the objections are filed. *See* Fed. R. Civ. P. 72, 6. Parties are advised that the failure to file objections within the specified

time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED this 21st day of October, 2020.

MARK D. CLARKE
United States Magistrate Judge