IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

PAOLO MENDOZA and BENJAMIN HANNA, on their own behalf and on the behalf of all others similarly situated,

Plaintiffs,

v.

AMERICAN SERVICE MEDICAR CO., a Washington corporation; and PARATRANSIT SERVICES, a non-profit Washington corporation,

Defendants.

No. 16-2-23249-3 SEA

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

This matter came before the Honorable Timothy Bradshaw on Plaintiffs' Motion for Class Certification. The Court has considered the parties' briefing and supporting evidence and has heard from the parties at oral argument. For the reasons stated below, the Court GRANTS Plaintiffs' motion.

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II. BACKGROUND

A. Plaintiffs' Allegations.

Named Plaintiffs Paolo Mendoza and Benjamin Hanna ("Plaintiffs") bring this action individually and on behalf of a proposed class of current and former Non-Emergency Transportation (NEMT) drivers employed by Defendants American Service Medicar Co. ("ASM") and Paratransit Services ("Paratransit") (collectively, "Defendants"). See Class Action Complaint.

Plaintiffs allege Defendants have engaged in a scheme of wage and hour violations common against the proposed Class under Washington and Seattle law, including failing to pay drivers for proper wages for all hours worked, failing to pay drivers at the overtime rate for all hours worked in excess of 40 hours, requiring class members to pay business expenses, and failing to comply with meal and rest beak laws. Finally, Plaintiffs allege that Defendants' alleged failures to pay the proposed Class were "willful" within the meaning of RCW 49.52.050 and RCW 49.52.070.

B. The Proposed Class.

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

> All current and former Non-Emergency Transportation (NEMT) Driver employees who worked for PARATRANSIT SERVICES and AMERICAN SERVICE MEDICAR for any period of time in the last three years.

Plaintiffs contend, and Defendants agree, that Plaintiffs and some proposed Class members were paid primarily on a commission/piece rate-based system. Defendants contend that during the Class period, Defendant ASM switched from this compensation system to paying some proposed Class members primarily on an hourly basis.

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Plaintiffs propose that to the extent Plaintiffs were not paid on an hourly basis, Plaintiffs should be permitted to create a subclass of drivers and seek leave to amend the operative Complaint to add an appropriate class representative. See Manual for Complex Litigation (Fourth) § 21.26 (2010) (if necessary, "courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements"). In the alternative, the class period can be limited to commissioned/piece rate employees. Should the Court do so, Plaintiffs assert a class member will likely file a claim on behalf of hourly employees.

C. The Proposed Class' Claims

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

1. Defendants failed to provide rest breaks to the Class as required under RCW 49.12.020 and WAC 296-126-020;

2. Defendants failed to pay class members for their rest breaks in violation of RCW 49.12 et seq. WAC 296-126-092(4).

3. Defendants committed unlawful wage deductions and/or failed to adequately reimburse the Class for their business expenses, in violation of RCWs 49.52.050 and 49.52.070;

4. Defendants failed to pay overtime to class members who worked more than 40 hours a week, in violation of RCW 49.46.130 and WAC 296-128-550;

5. Defendants failed to pay class members minimum wage for all hours worked, in violation of RCWs 49.46.020 and 49.12.150, and WAC 296-126-020 to -021; (subject to any pending Motion(s).

6. The above-identified failures to pay the Class all their wages were "willful" within the meaning of RCWs 49.52.050 and 49.52.070.

7. Wage and hour claims are subject to the 3 year limitation.

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

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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; Pellino, 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, HILL VS. CARDA NW INC.

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).

Here, Defendants produced a class list to Plaintiffs in discovery identifying at least 80 current and former drivers of Defendants that fall within the Class definition. Numerosity has been satisfied.

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

The second prerequisite for class certification is the existence of "a single issue common to all members of the class." Smith v. Behr Process Corp., 113 Wn. App. 306, 320, 54 P.3d 665 (2002); see also CR 23(a)(2). Washington courts have noted, "there is a low threshold to satisfy this test." Behr Process, 113 Wn. App. at 320. If a defendant has "engaged in a 'common course of conduct' in relation to all potential class members," class certification is appropriate regardless

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of whether "different facts and perhaps different questions of law exist within the potential class." Brown v. Brown, 6 Wn. App. 249, 255, 492 P.2d 581 (1971); accord Miller, 115 Wn. App. at 825. Furthermore, a common course of conduct need not affect all potential class members uniformly. Instead, a "common" question is one that is "characteristic of a *usual* type or standard: *representative* of a type." Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 875, 281 P.3d 289 (2012) (emphasis in original) (citation omitted).

"'[C]laims by workers that their employers have unlawfully denied them wages to which they were legally entitled have repeatedly been held to meet the prerequisites for class certification[],' including commonality." Mendis v. Schneider Nat'l Carriers, Inc., C15-0144-JCC, 2017 WL 497600, at *2 (W.D. Wash. Feb. 7, 2017) (quoting Ramos v. SimplexGrinnell LP, 796 F. Supp. 2d 346, 355 (E.D.N.Y. 2011)).[1] This is because the "glue" holding together such claims is the "common question" of "whether an unlawful [wage] policy prevented employees from collecting lawfully earned [wage] compensation." Ramos, 796 F. Supp. 2d at 355.

Common questions of law and fact arise from Defendants' conduct as to the proposed Class and subclasses, including whether: (1) Defendants failed to provide rest breaks to the Class; (2) Defendants failed to pay class members for their rest breaks; (3) Defendants committed unlawful wage deductions and/or failed to adequately reimburse the Class for their business expenses; (4) Defendants failed to pay overtime to class members who worked more than 40 hours a week; (5) Defendants failed to pay class members the applicable minimum wage for all hours worked, including non-productive time; and (6) The above-identified failures to pay the Class all their wages were "willful." Due to these common questions among the proposed Class, the Court finds the commonality requirement is satisfied.

[1] Because Civil 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).

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In addition, this Court recognizes its authority to create subclasses to manage differences among the Class with regards to liability or damages that are common to the subclasses. Sitton v. State Farm Mut. Auto Ins. Co., 116 Wn.App. 254, 255, 260, 63 P.3d 198 (2003). Accordingly, because Defendants contend some drivers were paid on an hourly basis, the Court creates two sub-classes:

(1) Employees who were paid on a commission or piece-rate basis; and,

(2) Employees who were paid by the hour.

The Court is only provisionally certifying the hourly paid subclass until such time as Plaintiffs include a Class Representative who was paid on an hourly basis as e. Also, the Court recognizes that certain class members may be part of both subclasses if they worked as both an hourly paid employee and commission or piece-rate based employee.

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

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

Plaintiffs' claims are typical of the Class members' claims because they all arise from the same conduct of Defendants and are based on the same legal theories, namely alleged systematic violations of the Washington and Seattle wage and hour laws at issue. The record shows that Plaintiffs were drivers. The harm suffered was of similar nature to that of the Class and arose from Defendants' uniform pay policies and practices. The Plaintiffs claims are based on the same legal theory and statutes as to the class.

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Defendants argue Plaintiff Mendoza is atypical because he was frequently on call during the night shift while at his residence. Plaintiffs at oral argument and in their briefing affirm they are not seeking to recover damages for the time spent while Mr. Mendoza was on call at night while at his residence.

Accordingly, based on the Plaintiffs' affirmation and other evidence in the record, the Court finds Mr. Mendoza and Mr. Hanna typical to the Class, specifically to those Class members who were paid on a commission or piece-rate basis. However, the Court does not find that the current Plaintiffs are typical or adequate class representative of employees who are paid hourly. Plaintiffs affirmed at oral argument that they can present an additional Plaintiff was has been paid hourly by Defendants and who is typical of such Class members and can therefore adequately represent their interests. As set forth below, and based on Plaintiffs' representation, the Court will provisionally certify a subclass of hourly paid employees. If Plaintiffs fail to timely amend their Complaint with an adequate representative of the hourly subclass, then the Court will decertify that provisional subclass.

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

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

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

With respect to the second element, the claims of Plaintiffs are coextensive with and not antagonistic to the claims asserted on behalf of the Class. Plaintiffs and Class members are alleged to have suffered the same injuries as the Class.

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The adequacy requirement is satisfied, except as stated above with respect to the provisional subclass of hourly employees.

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

1. Common Factual and Legal Questions Concerning Defendant's Conduct Predominate Over Any Individual Damages Issues.

The predominance requirement "is not a rigid test, but rather contemplates a review of many factors, the central question being whether 'adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves.'" Sitton 116 Wn. App. at 254 (quoting 1 Newberg & Conte, Newberg on Class Action, § 4:25, at 4-86(3rd ed. 1992). The requirement "is not a demand that common issues be dispositive, or even determinative .... '[A] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.'" Id. In deciding whether common issues predominate, the Court "is engaged in a pragmatic inquiry into whether there is a common nucleus of operative facts to each class member's claim." Behr Process, 113 Wn. App. at 323.

The focus of this case is on the lawfulness of Defendants' uniform policies and practices. To prevail on their claims, Plaintiffs must demonstrate that Defendants engaged in a pattern and practice of violating the Seattle Ordinances and Washington laws at issue. These common issues will predominate at trial.

While the amount of damages to which the members of the Class are entitled must be calculated, the fact that those damages may be varied does not preclude class certification See Mendis, 2017 WL 497600, at*7. Because common issues predominate over any individualized issues, the predominance requirement is satisfied.

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2. Plaintiffs Satisfy the Superiority Requirement.

Before granting certification under CR 23(b)(3), the Court must find that a class action is the superior means of adjudicating this controversy. "This requirement focuses upon a comparison of available alternatives." Sitton, 116 Wn. App. at 256. Factors to be considered include "conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities." Id. at 257 (citation omitted). The Court also looks at the interest of Class members in individually controlling the prosecution of claims, the extent of any litigation 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).

There are more than 80 Class members. Joinder of all 80 Class members would be inferior to a class action. It would be a burden on the Court to manage a claim with 80 separate plaintiffs. Also filing 80 different claims would be a drain on judicial resources. A class action may be superior if class litigation of common issues will reduce litigation costs and promote greater efficiency, or if no realistic alternative exists." Chavez v. Our Lady of Lourdes at Pasco, ___ Wn.2d ___, slip op. at 10, (Apr. 19, 2018). Here, forcing numerous plaintiffs to litigate the same alleged pattern or practice of underpaying statutory wage claims in repeated individual trials runs counter to the very purpose of the class action. Class treatment conserves judicial resources and promotes consistency and efficiency of adjudication for both the Defendants and Plaintiffs. Id. at 16

Here, Plaintiffs' claims raise numerous common factual and legal issues. In addition, class treatment conserves judicial resources and promotes consistency and efficiency of adjudication. Given the large number of Class members and the common issues, as well as the relatively modest recovery Plaintiffs estimate for each Class member, a class action is the most

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appropriate means of adjudicating the claims arising out of Defendants' common course of conduct.

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

3. This Case Presents No Management Difficulties.

"[O]ne of the elements that goes into the balance to determine the superiority of a class action in a particular case" is "manageability." Sitton, 116 Wn. App. at 257 (citation omitted). Trial courts have a "variety of procedural options to reduce the burden of resolving individual damage issues, including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class members, or even class decertification after liability is determined." Chavez, slip op. at 14 (citing Sitton, 116 Wn. App. at 255).

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

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

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

In addition, notice can be published on a website maintained and updated by Plaintiffs' attorneys. Together, these approaches will provide the best practicable notice to the Class members.

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

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II. CONCLUSION

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

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

> All current and former Non-Emergency Transportation (NEMT) Driver employees who worked for PARATRANSIT SERVICES and AMERICAN SERVICE MEDICAR for any period of time in the last three years.

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

2. Furthermore, the Court finds it appropriate to create the following subclasses:

(a) Employees who were paid on a commission/piece rate basis; and,

(b) Employees who were paid hourly. This subclass is only provisionally certified as set forth above and pursuant to paragraph 6 below.

3. Plaintiffs Mendoza and Hanna are designated and appointed as representatives for the Class;

4. The law firms Rekhi & Wolk, P.S. and Nolan Lim Law are appointed as counsel for the Class;

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

6. Within 10 days from the date of this order, Plaintiffs shall file a Motion for Leave to Amend Complaint seeking to add a new Class Representative who can represent the subclass of hourly paid employees.

7. The Court reminds the parties that pursuant to its December 13, 2017 Order Granting Stipulation Entering Briefing Schedule on Motion for Class Certification and Staying Case Schedule Pending Resolution of That Motion, the parties shall submit a joint proposal for new case schedule deadlines and trial date within 15 days of the date of this order.

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IV. CONCLUSION

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

IT IS SO ORDERED

DATED this 27th day of August, 2018.

TIMOTHY BRADSHAW
SUPERIOR COURT JUDGE

Presented by:

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