

1
2
3
4
5 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
6 COUNTY OF KING

7 JAY MORGAN and DANIEL MYDLAND, on their
8 own behalf and on the behalf of all others
9 similarly situated,

10 Plaintiffs,

11 vs.

12 SILVERSTREAK, INC., a Washington Corporation;
13 and TINA MARIE BENSON and JOHN/JANE DOE
14 BENSON, and the marital community thereof,

15 Defendants.

NO. 19-2-08785-4 KNT

**ORDER PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

16
17 **I. INTRODUCTION**

18 This matter came before the Honorable NICOLE GAINES PHELPS on Plaintiffs' Motion
19 for Class Certification. The Court has considered the parties' briefing and supporting evidence
20 and has heard from the parties at oral argument. Unforeseen circumstances related to the COVID-
21 19 Pandemic, significantly impacted the court's ability to issue its order prior to today.

22 For the reasons set forth below, the Court GRANTS Plaintiffs' motion.

23
24 **II. BACKGROUND**

25 **A. Plaintiffs' Allegations.**
26
27

1 Named Plaintiffs Jay Morgan and Daniel Mydland worked for Silverstreak brought this
2 action individually and on behalf of a proposed class of current and former non-exempt
3 employees of Defendants Silverstreak Inc. and Tina Marie Benson, its President and CEO,
4 (collectively, "Silverstreak") ("Defendant") alleging various wage and hour abuses committed
5 by Defendants against Plaintiffs and the proposed Class. See Class Action Complaint.

6 Specifically, Plaintiffs allege Defendant has engaged in a scheme of wage and hour
7 violations common against the proposed class under Washington law, including:
8

- 9 1. Silverstreak fails to pay minimum wages to drivers for all hours worked;
- 10 2. Silverstreak fails to pay drivers at the prevailing wage rate for all work
11 performed on public works contracts;
- 12 3. Silverstreak fails to pay overtime compensation at the prevailing wage rate when
13 drivers work more than 8 hours a day on public works projects;
- 14 4. Silverstreak fails to provide rest breaks to drivers and ensure those
15 breaks are taken;
- 16 5. Silverstreak fails to provide meal breaks to drivers and ensure those breaks
17 are taken; and
- 18 6. Silverstreak makes unlawful deductions from drivers' pay.

19 Finally Plaintiffs allege that Defendant's above-mentioned violations as to the Plaintiffs
20 and proposed class were "willful" within the meaning of RCW 49.52.050 and RCW 49.52.070.

21 **B. The Proposed Class.**

22 Plaintiffs' Motion seeks to limit the proposed class from all non-exempt employees to
23 just non-exempt driver employees of Defendant. Thus, Plaintiffs assert the following definition
24 for the proposed class (the "Class"):

25 All current and former employees of Silverstreak, Inc., who at any time from March
26 29, 2016 through the date of final disposition worked as drivers for the company
27 while based or residing in the State of Washington.

1 **C. The Proposed Class' Claims**

2 Plaintiffs assert the following claims against Defendant individually and on behalf of the
3 Class members:

- 4 1. Silverstreak fails to pay minimum wages to drivers for all hours
5 worked;
- 6 2. Silverstreak fails to pay drivers at the prevailing wage rate for all
7 work performed on public works contracts;
- 8 3. Silverstreak fails to pay overtime compensation at the prevailing wage rate
9 when drivers work more than 8 hours a day on public works projects;
- 10 4. Silverstreak fails to provide rest breaks to drivers and ensure those
11 breaks are taken;
- 12 5. Silverstreak fails to provide meal breaks to drivers and ensure those
13 breaks are taken; and
- 14 6. Silverstreak makes unlawful deductions from drivers' pay; and
- 15 7. Defendants willfully committed the above violations.

16 **III. ANALYSIS**

17 The four prerequisites to class certification are numerosity, commonality, typicality, and
18 adequacy of representation. CR 23(a); *see also Moeller v. Farmer's Ins. Co., Inc.*, 173 Wn.2d
19 264, 278, 267 P.3d 998 (2011); *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 682, 267 P.3d 383
20 (2011). In addition, one of the three conditions of CR 23(b) must be met. CR 23(b); *see also*
21 *Moeller*, 173 Wn.2d at 279; *Pellino*, 164 Wn. App. at 682–83. Here, Plaintiffs seek certification
22 under CR 23(b)(3), which requires a finding that questions of law or fact common to class
23 members predominate over any questions affecting only the individual members and that a class
24 action is superior to other available methods for the fair and efficient adjudication of the
25 controversy.

26 CR 23 is liberally interpreted because the “rule avoids multiplicity of litigation, saves
27 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

1 is always subject to later modification or decertification, “the trial court should err in favor of
2 certifying the class.” *Id.*; see also *Hill v. Garda CL Nw., Inc.*, 198 Wn. App. 326, 340, 394 P.3d
3 390, 398 (2017), review granted in part, denied in part, 189 Wn.2d 1016, 403 P.3d 839 (2017)

4 **B. Plaintiffs Satisfy the Requirements for Class Certification Under Rule 23(a).**

5 1. The Numerosity Requirement Is Satisfied.

6 The first prerequisite for certification is that the class is “so numerous that joinder of all
7 members is impracticable.” CR 23(a)(1). Although there is no fixed rule, more than 40 members
8 generally suffice. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 821-22, 64 P.3d 49 (2003).

9 Here, the Class consists of at least 171 current and former drivers of Defendant.
10 Numerosity has been satisfied.

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

12 The second prerequisite for class certification is the existence of “a single issue common
13 to all members of the class.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320, 54 P.3d 665
14 (2002); see also CR 23(a)(2). Washington courts have noted, “there is a low threshold to satisfy
15 this test.” *Behr Process*, 113 Wn. App. at 320. If a defendant has “engaged in a ‘common course
16 of conduct’ in relation to all potential class members,” class certification is appropriate regardless
17 of whether “different facts and perhaps different questions of law exist within the potential class.”
18 *Brown v. Brown*, 6 Wn. App. 249, 255, 492 P.2d 581 (1971); accord *Miller*, 115 Wn. App. at
19 825. Furthermore, a common course of conduct need not affect all potential class members
20 uniformly. Instead, a “common” question is one that is “characteristic of a usual type or standard:
21 representative of a type.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 875,
22 281 P.3d 289 (2012) (emphasis in original) (citation omitted).

23 “[C]laims by workers that their employers have unlawfully denied them wages to which
24 they were legally entitled have repeatedly been held to meet the prerequisites for class
25 certification[],’ including commonality.” *Mendis v. Schneider Nat’l Carriers, Inc.*, C15-0144-
26 JCC, 2017 WL 497600, at *2 (W.D. Wash. Feb. 7, 2017) (quoting *Ramos v. SimplexGrinnell LP*,
27

796 F. Supp. 2d 346, 355 (E.D.N.Y. 2011)).¹ Washington courts have a long history of favoring class actions for wage and hour claims, including the claims alleged here. *See e.g., Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 511, 415 P.3d 224 (2018) (reversing trial court's failure to certify a class of nurses for unpaid rest breaks); *Pellino*, 164 Wash. App. 668, 699 (2011) (affirming class certification as to employer's common policy related driver employees' mandatory breaks); *Mendis v. Schneider Nat'l Carriers, Inc.*, C15-0144-JCC, 2017 WL 497600, at *2-*7 (W.D. Wash. Feb. 7, 2017) (certifying a class of drivers as to employer's common policies related to rest breaks, unlawful wage deductions, and overtime violations under Washington wage laws); *Miller*, 136 Wn.App. at 657-665 (affirming class certification as to employer's common policy related to overtime).

Common questions of law and fact arise from Defendant's conduct as to the Class, including whether Defendants and their policies lead to:

- failing to properly compensate drivers for all hours worked;
- failing to pay prevailing wages to drivers for all hours of work performed on public works contracts;
- failing to pay all overtime wages owed to drivers for hours worked in excess of forty per workweek;
- failing to pay all overtime wages owed to drivers for hours worked beyond eight per day on public works contracts;
- failing to provide drivers with the rest and meal breaks to which they are entitled;
- of failing to ensure drivers have taken the rest and meal breaks to which they are entitled;
- making unlawful deductions from the wages of drivers; and
- willfully violating the above wage and hour violations.

Due to these common questions among the 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).

1 3. The Claims of Plaintiffs are Typical of the Class Claims.

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

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

15 4. The Named Plaintiffs and Thier Counsel Will Fairly and Adequately
16 Protect the Interests of the Class.

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

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

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

1 The adequacy requirement is satisfied.

2 **C. Plaintiffs Meet the Requirements for Certification under Rule 23(b)(3).**

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

5 The predominance requirement "is not a rigid test, but rather contemplates a review of
6 many factors, the central question being whether 'adjudication of the common issues in the
7 particular suit has important and desirable advantages of judicial economy compared to all other
8 issues, or when viewed by themselves.'" *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn.App.
9 245, 254, 63 P.3d 198 (2003) (quoting 1 Newberg & Conte, *Newberg on Class Action*, § 4:25,
10 at 4-86(3rd ed. 1992). The requirement "is not a demand that common issues be dispositive, or
11 even determinative '[A] single common issue may be the overriding one in the litigation,
12 despite the fact that the suit also entails numerous remaining individual questions.'" *Id.* In
13 deciding whether common issues predominate, the Court "is engaged in a pragmatic inquiry into
14 whether there is a common nucleus of operative facts to each class member's claim." *Behr*
15 *Process*, 113 Wn. App. at 323.

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

20 While the amount of damages to which the members of the Class are entitled must be
21 calculated, the fact that those damages may be varied does not preclude class certification. See
22 *Chavez* 190 Wash. 2d at 523 ("Where individual damages are small, the class vehicle is usually
23 deemed to be superior"); see also, *Rodriguez v. Carlson*, 166 F.R.D. 465, 479 (E.D. Wash. 1996).
24 Because common issues predominate over any individualized issues, the predominance
25 requirement is satisfied.
26
27

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 171 drivers. Joinder of all drivers would be inferior to a class action. It would be a burden on the Court to manage the claims of 171 separate Plaintiffs. Also filing 171 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* 190 Wash. 2d at 522-23. Here, forcing numerous plaintiffs to litigate the 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.*

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, a class action is the most appropriate means of adjudicating the claims arising out of Defendants’ common course of conduct.

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

4 3. This Case Presents No Management Difficulties.

5 “[O]ne of the elements that goes into the balance to determine the superiority of a class
6 action in a particular case” is “manageability.” *Sitton*, 116 Wn. App. at 257 (citation omitted).
7 Trial courts have a "variety of procedural options to reduce the burden of resolving individual
8 damage issues, including bifurcated trials, use of subclasses or masters, pilot or test cases with
9 selected class members, or even class decertification after liability is determined." *Chavez*, 190
10 Wash. 2d at 521 (*citing Sitton*, 116 Wn. App. at 255).

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

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

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

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

23 F. If the parties are unable to agree on the form of notice, Plaintiffs shall present
24 their proposed form to the Court for approval.
25
26
27

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 employees of Silverstreak, Inc., who at any time from March 29, 2016 through the date of final disposition worked as drivers for the company while based or residing in the State of Washington.

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. Plaintiffs Mydland and Morgan are designated and appointed as representatives for the Class;

4. The law firm Rekhi & Wolk, P.S. and Terrell Marshall Law Group PLLC 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.

For the reasons set forth above, NOW, THEREFORE, IT IS SO ORDERED.

DATED this ____ day of _____, 2020.

THE HONORABLE NICOLE GAINES PHELPS

PRESENTED BY:

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Toby J. Marshall, WSBA #32726

Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
Maria Hoisington-Bingham, WSBA #51493
Email: mhoisington@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

By: /s/ Hardeep S. Rekhi, WSBA #34579

Hardeep S. Rekhi, WSBA #34579
Email: hardeep@rekhiwolk.com
Gregory A. Wolk, WSBA #28946
Email: hardeep@rekhiwolk.com
Jaime Heimerl, WSBA #49100
Email: jaime@rekhiwolk.com
Daniel Cairns, WSBA 49950
Email: daniel@rekhiwolk.com
REKHI & WOLK, P.S.
529 Warren Ave North, Suite 201
Seattle, Washington 98109
Telephone: (206) 388-5887
Facsimile: (206) 577-3924

Attorneys for Plaintiffs

King County Superior Court
Judicial Electronic Signature Page

Case Number: 19-2-08785-4
Case Title: MORGAN vs SILVERSTREAK ET ANO
Document Title: ORDER RE ORDER GRANTING CLASS CERTIFICATION
Signed By: Nicole Phelps
Date: January 14, 2021



Judge/Commissioner/Pro Tem: Nicole Phelps

This document is signed in accordance with the provisions in GR 30.

Certificate Hash: 5CEAF99B5D813355B7C04C2624CC7F995025711C
Certificate effective date: 1/3/2017 2:31:39 PM
Certificate expiry date: 1/3/2022 2:31:39 PM
Certificate Issued by: C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA,
O=KCDJA, CN="Nicole Phelps:
4CVHUKnx4xGNHB4Ahl1GsA=="