**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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No. __

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AARON SENNE ET AL.,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

*Applicants*,

v.

KANSAS CITY ROYALS BASEBALL CORP. ET AL.,

*Respondents*.

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# APPLICATION TO VACATE STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Sixty days from the filing of this application will mark the three-year anniversary of the interlocutory appeal in this wage-and-hour case. A Ninth Circuit panel split 2-1 over a state law issue, and Respondents' subsequent petition for rehearing failed to precipitate an en banc call from a single judge. Nevertheless, despite Respondents' failure to demonstrate even one of the three requirements for a stay, the court of appeals stayed its mandate in a two-sentence order, further delaying proceedings in a case that has spent half its existence on appeal.

To obtain a stay of a circuit court's mandate pending the resolution of a coming certiorari petition, the movant must show a "reasonable probability" of a grant of certiorari, a "significant possibility" of reversal, and a likelihood of irreparable harm if the mandate is not stayed. In their motion for a stay, Respondents made no pretense of satisfying these requirements; they did not even acknowledge the requirements. Nor did the court of appeals in its summary order entered just two court days after the motion to stay was filed.

In *Netherland v. Tuggle*, 515 U.S. 951 (1995) (*per curiam*), this Court vacated a stay the Fourth Circuit had entered "by summary order without opinion or discussion. Nothing indicates that the Court of Appeals even attempted to undertake the three-part inquiry required" for a stay. *Id*. at 952. "There is no hint that the court found that 'four Members of th[is] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari' or that 'a significant possibility of reversal'

existed." *Id*. Both of those things are also true here, plus the resumption of proceedings in the district court would not constitute irreparable harm nor have Respondents claimed it would.

Equally compelling is the fact that even in the exceedingly improbable event this Court were to grant review of all three questions Respondents intend to raise in a petition—and reverse on all three—this case will *still proceed* on behalf of all three state-law Rule 23(b)(3) classes and as a Fair Labor Standards Act collective, in addition to the named plaintiffs' individual claims. None of the issues Respondents have said they will present in a certiorari petition could result in a decision of this Court that would undo the class or collective certifications. The first two questions concern a single item of evidence (a survey), the admissibility of which Respondents have conceded on appeal. The third question is a Rule 23(b)(2) issue that could only impact a proposed (b)(2) class that has not even been certified yet.

There is no justification for issuing the blunt instrument of a total stay of proceedings under these circumstances. Consistent with *Netherland*, the Ninth Circuit's stay of its mandate should be vacated as an abuse of discretion. *See Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 434 U.S. 1316, 1319 (1977) (Marshall, J., in chambers) ("There is no question as to the power of a Circuit Justice to dissolve a stay entered by a court of appeals," but a stay "should be overturned only if the court can be said to have abused its discretion").

## OPINIONS BELOW

The stay order and decision of the court of appeals are reproduced in the Appendix (at 1A and 27A). The decision is also available at *Senne v. Kansas City Roy-*

*als Baseball Corp.*, 934 F.3d 918 (9th Cir. 2019). The decision of the district court is available at *Senne v. Kansas City Royals Baseball Corp.*, No. 14-CV-00608-JCS, 2017 WL 897338 (N.D. Cal. Mar. 7, 2017) and reproduced in the Appendix (at 120A).

## JURISDICTION

The Ninth Circuit issued its opinion on August 16, 2019. Respondents' petition for rehearing en banc was denied on December 30, 2019. Their motion to stay issuance of the mandate was granted on January 13, 2020. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(f). *See Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973) (citing § 2101(f) as source of authority for Circuit Justice to dissolve stay).

## STATEMENT OF THE CASE

Thousands of professional baseball players—minor leaguers—live below the poverty line. They perform months of work for no pay during training seasons. They do so because of Respondents' admitted uniform wage policies that affect every player in minor league baseball.

Respondents do not pay *any* wages during training seasons.

Respondents do not pay minor leaguers overtime. Ever.

Respondents contended below that they need not comply with wage-and-hour laws because, they said, minor leaguers are not employees. In numerous internal documents, however, Respondents frequently refer to minor leaguers as "employees." They require every minor leaguer to sign a seven-year Uniform Player Contract that uses variants of "employ" repeatedly. They also provide employee benefits, like health insurance and a pension plan. And during part of the year, they pay

players *some* wages and deduct the usual employment-related withholdings like state and federal income taxes.

The 45 players who filed this class action contend that they are employees, that professional baseball is compensable work, and that Respondents *are* therefore subject to wage-and-hour laws. Applicants' claim that Respondents' policies violate federal and state wage laws is, as the lower courts found, "a common contention … 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).

The district court certified a class of California minor leaguers who have asserted wage claims for their work during the regular season in a league known as the California League. As the name implies, league activities take place in California, so the court had no trouble concluding that California's wage-and-hour laws would apply to those claims. The court declined, however, to certify Arizona and Florida classes, classes intended to cover training seasons (like spring training) during which Respondents do not pay minor leaguers at all for their work. Similar to the California League's regular season, training seasons take place solely within either Arizona or Florida. The district court's rationale for refusing to certify those classes, while simultaneously certifying the California class, was based on ostensible choice-of-law concerns. Unlike the California class, the court believed that Arizona and Florida law might not apply to minor leaguers' wage claims, even though the work was performed exclusively in one of those two states for weeks or months at a time. On

that same rationale, the court also refused to certify a Rule 23(b)(2) class for injunctive or declaratory relief.

On appeal, the Ninth Circuit reversed the denial of certification of the Florida and Arizona classes. The court held that California, Arizona, and Florida law apply to the wage claims of the respective classes. That holding is an unremarkable application of state law choice-of-law principles in accord with a vast body of wage-and-hour cases from across the nation. By not including in their stay motion any question to be presented that touches on that holding, Respondents implicitly conceded that the Ninth Circuit's central holding is not worthy of review in this Court, even though that was the only issue discussed by the dissent below.

Instead, Respondents have indicated that among the questions they intend to present to this Court is whether evidence of players' times of arrival at and departure from the stadiums can establish the number of hours worked on a class-wide basis.[1] Even if spun to seem less fact-bound, that question will remain inescapably case-specific because the evidence of players' arrival and departure times is only part of the record evidence of the length of a typical player's workday. Applicants presented voluminous evidence on the issue, including team schedules, travel schedules, game lengths, and the testimony of dozens of witnesses.

The second question Respondents say they intend to raise is whether expert evidence proffered to establish commonality and predominance in a wage-and-hour

[1] *See* Appendix (Motion to Stay) at 3A: "Whether Evidence of Arrival and Departure Times Can Establish the Number of Hours Worked on a Class-wide Basis Is a Substantial Question."

case must be "rigorously analyzed."[2] The question is just a repackaged version of the first question because the "expert evidence" Respondents are referring to is a survey of minor leaguers that asked players (among other things) when they typically arrived at and departed from their stadiums. Significantly, Respondents did not challenge the admissibility of the survey on appeal.

Finally, Respondents have indicated they intend to raise the question of whether Rule 23(b)(2) has an extra-textual, predominance-like "cohesiveness" requirement. Respondents belatedly raised that issue for the first time in their petition for rehearing en banc. Respondents never argued for such a requirement in the district court nor on appeal until after the court of appeals issued its decision. Moreover, no (b)(2) class has yet been certified. The Ninth Circuit remanded that issue for the district court to consider anew because the parties had "advanced numerous arguments regarding (b)(2) certification" that the court of appeals "decline[d] to pass on … in the first instance." App. at 65A n.15. In the absence of the certification of an allegedly "incohesive" (b)(2) class, any opinion from this Court about (b)(2) "cohesiveness" would be premature and advisory in nature. None of the issues Respondents intend to raise in a petition are certworthy.

**REASONS FOR VACATING THE STAY**

This case is nearly six years old, and half that time has been spent on appeal. The district court stayed proceedings pending the appeals, which is yet another rea-

[2] *See* Appendix (Motion to Stay) at 3A: "Whether Expert Evidence Proffered to Establish Commonality and Predominance in a Wage-and-Hour Case Must Be Rigorously Analyzed Is a Substantial Question."

son the Ninth Circuit did not need to stay its mandate, especially since the district court is in a better position to decide what proceedings could be resumed now. The Ninth Circuit entered its decision last August and denied Respondents' petition for rehearing en banc on December 30. Not a single Ninth Circuit judge requested a vote to rehear the matter, casting doubt on the notion that four Justices of this Court would vote to grant certiorari, one of the requirements for obtaining a stay.

Before granting a stay of the mandate, a court of appeals must "undertake the three-part inquiry required by our decision in *Barefoot v. Estelle,* 463 U.S. 880, 895-896 (1983)." *Netherland v. Tuggle*, 515 U.S. 951, 952 (1995) (per curiam).

> It is well-established that there "'must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.'"

*Barefoot*, 463 U.S. at 895-96 (citations omitted); *accord Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (describing second requirement as "a fair prospect that a majority of the Court will vote to reverse the judgment below"). "The well–established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay." *Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers).

Respondents literally ignored these requirements in their stay motion. They did not even recite them perfunctorily. They did not assert "a significant possibility" or "fair prospect" of reversal or that they would suffer irreparable harm if the stay

were not granted, much less attempt to establish either. The prospects for reversal are bleak at best, and continued pretrial proceedings do not constitute irreparable harm as a matter of law. Even by their own descriptions, the questions Respondents intend to present in a petition are not certworthy. By granting a stay in the absence of even a colorable assertion of the three *Barefoot*/*Hollingsworth* requirements, the Ninth Circuit abused its discretion. The stay should be vacated.

## I. The time and expense of resumed pretrial proceedings do not justify a stay or constitute "irreparable harm."

Even if Respondents could write a certworthy question presenting a genuine circuit split, they cannot establish the requirement of irreparable harm in the absence of a stay. That indisputable fact alone required denial of the motion to stay. *Garcia-Mir v. Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers) ("There is no need to evaluate applicants' likelihood of success on the merits; they simply have not made a showing of irreparable injury …"). And instead of asserting irreparable harm, Respondents contended that "[i]n the absence of a stay, Defendants will be required to engage in burdensome litigation before the district court … that might prove to be a waste of time and resources if the Supreme Court accepts the case for review." App. at 8A. That argument fails for at least two reasons.

First, as this Court has long recognized, "'[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). So any alleged "waste of time and resources" does not, as a matter of law, justify a stay of the mandate.

But there are practical reasons for vacating the stay, too. Given the few remaining issues that could conceivably be reviewed now, this case will proceed regardless of the outcome here. The named plaintiffs' individual claims are not at issue on appeal, so those will go forward. The certification of the Fair Labor Standards Act collective is not among any of the questions Respondents intend to raise in a petition, so those collective claims will go forward. And the Rule 23(b)(3) class claims will proceed; the only question with regard to the classes is whether they will proceed with the survey, although it is unclear how the survey could be thrown out entirely given Respondents' abandonment of any challenge to its admissibility. So proceedings will continue in the district court; a stay serves only to delay that inevitability.

And unlike this Court and the court of appeals, which have only the blunt instrument of a blanket stay at their disposal, the district court could tailor the management of any resumed proceedings to avoid wasting resources. It can decide *which* pretrial proceedings should resume and when. So, for instance, if proceedings do resume, it does not follow ineluctably that class notice must issue immediately. And even if pretrial proceedings resume post haste, the case will not be anywhere close to being ready for trial before this Court decides whether to grant certiorari because discovery is not complete. Team, game, and travel schedules that have accumulated during the last three years of appellate proceedings are just some of the voluminous evidence that must still be collected and produced before the case is ready for trial. So a continued blanket stay of *all* proceedings at this stage is unwarranted simply because certain proceedings should not go forward until the Court

considers Respondents' forthcoming petition. The mandate should issue to permit the district court to decide which pretrial proceedings should resume and which should continue in abeyance.

## II. Respondents have not shown a "reasonable probability" of a grant of certiorari or a "significant possibility of reversal."

Respondents strained to conjure a genuine circuit split on any issue, much less one that is well-developed and ripe for this Court's resolution. One alleged circuit "split" is literally just days old, based on a December 24 Third Circuit decision. But the Third Circuit decided none of the issues the Ninth Circuit decided here. *See Ferreras v. Am. Airlines, Inc.*, No. 18-3143, 2019 WL 7161214 (3d Cir. Dec. 24, 2019).

A second question Respondents intend to present involves no circuit split at all, but rather an alleged misapplication of this Court's precedents—not the kind of question that poses a "reasonable probability" of a grant of certiorari. This Court's rules are explicit: petitions are "rarely granted when the asserted error consists of … misapplication of a properly stated rule of law." Sup. Ct. R. 10.

And the third question about a Rule 23(b)(2) "cohesiveness" requirement is one Respondents did not bother to address below until *after* the Ninth Circuit issued its decision. That timing is alone a strong indication of the lack of importance of the issue, at least in the context of this litigation. So far no (b)(2) class has been certified. This case is thus a poor vehicle for resolving that alleged circuit split.

Last, Respondents did not assert—much less show—a "significant possibility of reversal" on any question. Respondents' failure even to assert a fair prospect of reversal obligated the court of appeals to deny the motion to stay.

### A. The question "whether evidence of arrival and departure times can establish the number of hours worked on a class-wide basis" is a fact-bound, case-specific question that presents no circuit conflict.

It bears noting at the outset that the factual premise of Respondents' first proposed question is fatally erroneous: the survey about players' arrival and departure times from stadiums is neither Applicants' sole evidence nor even their primary evidence of the length of the workday. As the Ninth Circuit and district court observed, "team schedules alone—independent of the Main Survey or any other evidence—may suffice" to establish overtime and minimum wage violations. App. at 78A. The Arizona and Florida classes cover training "periods during which virtually all players are completely unpaid for their participation," *id.* at 73A, so *any* work represented by team schedules would entitle class members to recovery "independent of" the survey. *See* App. at 78A; at 87A ("liability may be established by showing that the players performed *any* work"); at 174A ("liability can be established simply by showing that [the] class performed *any* work"). And because Respondents never pay overtime, team schedules alone establish for the California class that players regularly worked for seven days straight without overtime pay in contravention of California law. *Id.* at 174A-175A ("with respect to the California Class, Plaintiffs may be able to establish liability as to some of their overtime claims by using schedules reflecting weeks in which teams were scheduled to play games on seven consecutive days in violation of California overtime law").

As for the survey, this Court held in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), that class action plaintiffs in a wage-and-hour case may use representative evidence "to fill an evidentiary gap created by the employer's failure to

keep adequate records. … [T]he representative evidence here was a permissible means of making … [a] showing" of individual injury. *Id*. at 1047. Here, Applicants offered a survey along with other voluminous evidence, including team schedules, travel schedules, game lengths, and the testimony of dozens of witnesses about players' long hours and frequent seven-day work weeks. Like the district court, the panel held that "a reasonable jury could find that all of plaintiffs' evidence—not just the Main Survey, but also the schedules, testimony, and payroll data—sustains a 'just and reasonable inference' as to the hours players actually worked." App. at 88A. The dissent did not disagree with this ruling.

Numerous, dispositive factual differences also account for a different outcome in the recent *Ferreras* decision. In *Ferreras*, the uncompensated time at issue was limited to work performed before and after shifts. Some workers performed such work, others did not. And American Airlines had a policy of paying for such work, so long as it was approved. 2019 WL 7161214 at *1, *6. Some workers were paid for the work and others were not, thus necessitating class-member-by-class-member inquiries. The *Ferreras* plaintiffs presented no survey nor any other evidence of the average amount of time workers performed before and after shifts. Given the above facts, the Third Circuit concluded they would be unable to furnish such evidence.

By contrast, Applicants presented uncontradicted evidence that a typical team workday started before and ended after the times reflected in team schedules. And unlike in *Ferreras*, Applicants here seek to establish the beginning and ending of the *teams'* workdays. That is what makes this case like *Tyson* and unlike *Ferreras*:

the time for which Applicants seek to recover is time players spent performing team-related activities at the stadium when the typical workday began, like drills, team stretches, throwing, fielding practice, and batting practice. Also, unlike American Airline's policy in *Ferreras* to pay for approved extra time, Respondents' policies are *not* to pay *any* wages during training seasons and never to pay overtime.

This case and *Ferreras* are thus factually dissimilar in many ways, and the Third Circuit was faced with different legal issues. Respondents identified no holdings that are in conflict, and there are none. Respondents' complaint really boils down to one about the Ninth Circuit's application of *Tyson*. But again, petitions are "rarely granted when the asserted error consists of … misapplication of a properly stated rule of law." Sup. Ct. R. 10.

### B. The question "whether expert evidence proffered to establish commonality and predominance in a wage-and-hour case must be rigorously analyzed" was answered in *Tyson*.

The "expert evidence" to which Respondents refer is the same class member survey just discussed. The "rigorous analysis" of the survey that Respondents demand is what they called a "heightened 'admissibility-plus' standard" in their opening appellate brief. Doc. 38 at 24, 45. Subsequently they dropped that more candid version of their argument because it finds no support in the law. In any event, *Tyson* settled this question: "Once a district court finds [representative evidence of hours worked] to be admissible, its persuasiveness is, in general, a matter for the jury." 136 S. Ct. at 1049. "Reasonable minds may differ as to whether the average time … calculated is probative as to the time actually worked by each employee. Resolving that question, however, is the near-exclusive province of the jury." *Id*. So

with respect to the kind of evidence at issue here—representative evidence of hours worked by employees in a wage-and-hour class action—the question has been answered. Respondents lost their *Daubert* challenge to the survey in the district court, and on appeal they abandoned that challenge altogether, which means the persuasiveness of the survey is now "a matter for a jury."

Respondents also rely on *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), arguing that the lower courts should have "rigorously analyzed" the survey beyond just its admissibility, *Tyson* notwithstanding. But *Wal-Mart* does not stand for the proposition that representative evidence must be "rigorously analyzed" in isolation. To the contrary, it stands for the proposition that a district court must undertake a "rigorous analysis" of *all* the evidence to ensure the requirements of Rule 23(a) are met. *Id*. at 350-51 ("certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied'"). As in *Tyson*, Respondents' "reliance on *Wal-Mart*[] is misplaced." *Tyson*, 136 S. Ct. at 1048 ("*Wal-Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability").

At bottom, Respondents' argument is that the Ninth Circuit misapplied *Tyson* and *Wal-Mart*. Even if that were true, petitions are, again, "rarely granted" for "misapplication of a properly stated rule of law." Sup. Ct. R. 10.

### C. Resolution of any Rule 23(b)(2) "cohesiveness" question would be premature and constitute an impermissible advisory opinion.

The last question Respondents intend to raise in their petition is, as noted, one they first raised belatedly in their petition for rehearing: that the Ninth Circuit

should have, like some circuits, grafted an extra-textual, predominance-like "cohesiveness" requirement onto Rule 23(b)(2).[3] They contended in their motion to stay that the Ninth Circuit's refusal to do so "presents a substantial question that implicates an entrenched conflict amount the Circuits."

But no (b)(2) class has yet been certified. The Ninth Circuit remanded for the district court to consider the parties' "numerous arguments regarding (b)(2) certification" that the court of appeals "decline[d] to pass on … in the first instance." App. at 65A n.15. Unless and until an allegedly "incohesive" (b)(2) class is certified, any opinion from this Court about (b)(2) "cohesiveness" would be premature. *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). It would also be an advisory opinion on an abstract question of (b)(2) "cohesiveness" that might have no effect on these litigants or this case. *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975) (holding Article III's case-or-controversy requirement does not permit courts "to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them'").

Finally, whether there is anything more than a semantic difference between the Ninth Circuit's rejection of a predominance-like cohesiveness requirement and other circuits' recognition of a (b)(2) cohesiveness requirement is far from clear. As this Court has recognized, a (b)(2) class is inherently cohesive without the need for any

[3] *See* Appendix at 64A ("courts that have imposed such a test treat it similarly to Rule 23(b)(3)'s predominance inquiry").

additional, extra-textual "cohesiveness" requirement: "When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether [a] class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident." *Wal-Mart*, 564 U.S. at 362-63. The Ninth Circuit did not deviate from that understanding of (b)(2) in the slightest.

The first court to mention cohesiveness in relation to (b)(2) did not make it a distinct, predominance-like requirement; rather, it too described cohesiveness as inherent in the nature of a (b)(2) class, while holding that (b)(2) has "no predominance or superiority requirements." *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) ("[b]y its very nature, a (b)(2) class must be cohesive"); *see also Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016) ("Although a Rule 23(b)(2) class need not meet the additional predominance and superiority requirements of Rule 23(b)(3), 'it is well established that the class claims must be cohesive.'") (citing *Barnes*). To the extent there is any split on this issue, it is shallow and undeveloped, and this case is a particularly poor vehicle for attempting to resolve it.

## CONCLUSION

For the foregoing reasons, the stay entered by the court of appeals should be vacated with instructions to issue that court's mandate forthwith.

Respectfully submitted,

Dated: January 21, 2020

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# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 13 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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| AARON SENNE; et al.,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>KANSAS CITY ROYALS BASEBALL CORP.; et al.,<br><br>Defendants-Appellees. | Nos. 17-16245, 17-16267, 17-16276<br><br>D.C. No. 3:14-cv-00608-JCS<br>Northern District of California,<br>San Francisco<br><br>ORDER |

Before: M. MURPHY,* PAEZ, and IKUTA, Circuit Judges.

Appellees have filed a motion to stay the issuance of the mandate in this case pending the filing and disposition of a petition for certiorari to the United States Supreme Court. Dkt. #103. We GRANT the motion pursuant to Fed. R. App. P. 41(d).

* The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

**Nos. 17-16245, 17-16267, 17-16276**

# United States Court of Appeals for the Ninth Circuit

AARON SENNE, et al.,
on behalf of himself and all others similarly situated,

*Plaintiffs-Appellants/Cross-Appellees,*

– v. –

KANSAS CITY ROYALS BASEBALL CORP., et al.,

*Defendants-Appellees/Cross-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE JOSEPH C. SPERO, M.J., CASE NO. 3:14-CV-00608-JCS
(CONSOLIDATED WITH 3:14-CV-03289-JCS)

## MOTION TO STAY THE MANDATE

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Pursuant to Federal Rule of Appellate Procedure 41(d)(1) and Ninth Circuit Rule 41-1, Defendants-Appellees/Cross-Appellants Major League Baseball and its Clubs (collectively, "Defendants") respectfully request that the Court stay the issuance of the mandate in this appeal until Defendants' anticipated petition for a writ of certiorari is resolved by the Supreme Court. Plaintiffs oppose this motion.

## PRELIMINARY STATEMENT

In a divided Panel opinion, this Court ruled that: (1) the class-action requirements of commonality and predominance concerning the hours worked by a group of workers can be established simply on the basis of representative evidence about their arrival and departure times from the workplace; (2) the reliability of expert evidence offered in support of class certification need not be rigorously analyzed; and (3) a Rule 23(b)(2) class need not satisfy cohesiveness. Each of these rulings has created a circuit split or a conflict with a decision of the Supreme Court. The first conflicts with a recent decision by the Third Circuit that mere arrival and departure times *cannot* establish commonality and predominance if the employees also engaged in individualized non-compensable activities while at the worksite. The second conflicts with the holding of *Wal-Mart v. Dukes*, 564 U.S. 338 (2011), and numerous appellate decisions, that the evidence proffered to satisfy Rule 23 must *always* be rigorously examined. And the third creates a split

with seven other Circuits that have held that a 23(b)(2) class cannot be certified absent cohesiveness.

Because this case presents three substantial questions implicating Circuit conflicts, there is a significant chance that the Supreme Court will grant review. In the absence of a stay, Defendants will be required to engage in burdensome litigation before the district court—including issuing notice to potentially thousands of class members, completing class-wide discovery, and even conducting a trial—that might prove to be a waste of time and resources if the Supreme Court accepts the case for review. Any stay would be limited in duration, as the petition will be either granted or denied within a few months, and cause no prejudice to Plaintiffs. Accordingly, the Court should stay issuance of the mandate.

## BACKGROUND

Plaintiffs are current and former minor league baseball players who seek, on behalf of themselves and thousands of other putative class members, minimum wage and overtime under the Fair Labor Standards Act ("FLSA") and the wage-and-hour laws of various states. To prove their claims on a class-wide basis, Plaintiffs will need to establish how many hours each of the class members spent on compensable activities and compare them to the compensation that each class member received.

In an effort to establish the number of hours that each class member spent on compensable activities, Plaintiffs submitted a survey (the "Main Survey") that asked a sample of players what time they "most often" arrived at and left the ballpark or training facility. The deposition testimony of the named plaintiffs established that players often arrived early or stayed late to engage in non-compensable activities like socializing with teammates, watching television, or relaxing in the clubhouse, and therefore that arrival and departure times were not a reliable measure of time spent on compensable activities.

Relying primarily on the Main Survey, Plaintiffs moved to certify an FLSA collective and three separate Rule 23 classes comprised of: (1) players who played for teams in the California League during the regular season (also known as the "championship season"); (2) players who participated in spring training, extended spring training, and the instructional leagues in Arizona; and (3) players who participated in spring training, extended spring training, and the instructional leagues in Florida.

The district court held that Plaintiffs could use the Main Survey to prove the number of hours worked for each class member under the continuous workday doctrine—which provides that a worker is generally entitled to compensation for the time between his first compensable activity of the day and his last. The court thus certified a Rule 23(b)(3) class and an FLSA collective comprised of players

who played in the California League for at least seven days. The district court declined to certify Rule 23(b)(2) or (b)(3) classes comprised of players who trained in Arizona and Florida, however, because individualized choice-of-law questions would predominate over common questions under Rule 23(b)(3) and would undercut the cohesiveness required by Rule 23(b)(2).

A divided Panel of this Court recently affirmed the district court's certification of the California class and FLSA collective, reversed the denial of certification of the Arizona and Florida Rule 23(b)(3) classes, and remanded for reconsideration of the Rule 23(b)(2) classes. Defendants filed a petition for rehearing en banc (Dkt. No. 93), which was denied on January 3, 2020 (Dkt. No. 102). (Judge Ikuta voted to grant the petition for rehearing en banc.) The mandate is currently scheduled to issue on January 10. Defendants plan to file a petition for certiorari seeking Supreme Court review of the Panel's decision.

## ARGUMENT

This Court has "often" stayed the issuance of the mandate while a party petitions for certiorari from the Supreme Court. *United States v. Pete*, 525 F.3d 844, 850 (9th Cir. 2008). A stay is appropriate where "the certiorari petition would present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(1). Both requirements are satisfied here. Any stay would remain in effect

only for as long as it takes the Supreme Court to resolve Defendants' anticipated petition—which likely would occur within a few months.

## I. DEFENDANTS' PETITION FOR CERTIORARI WILL PRESENT SEVERAL SUBSTANTIAL QUESTIONS.

Defendants' anticipated petition for certiorari will present three questions on which there is a split among the Circuits, thereby easily satisfying the "substantial question" standard. *See* Sup. Ct. R. 10(a) (listing as the primary criterion for certiorari whether "a United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter"). Moreover, some of the questions concern issues on which the Panel's decision conflicts with Supreme Court precedent, which further establishes their substantiality. *See* Sup. Ct. R. 10(c) (noting that Supreme Court is more likely to grant a petition where a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

*First*, the petition will ask the Supreme Court to review the Panel's holding that a putative class of workers in a wage-and-hour suit can establish commonality and predominance merely using evidence of their arrival and departure times. That holding directly conflicts with the Third Circuit's recent holding in *Ferreras v. American Airlines, Inc.*, No. 18-3143, 2019 U.S. App. LEXIS 38369, at *13-16 (3d Cir. Dec. 24, 2019), that evidence of arrival and departure times cannot establish commonality and predominance where (as here) the record shows that the

employees often did not perform work while present at the workplace. The Panel also misapplied the Supreme Court's teaching in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016), which held that representative evidence can be used to establish the number of hours each class member in a wage-and-hour case worked only where (unlike here) the activity measured by the representative evidence is clearly compensable.

*Second*, the petition will present the question of whether expert evidence used to establish commonality and predominance in a wage-and-hour case must be analyzed "rigorously," as *Dukes* requires, or only under the more relaxed standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Supreme Court in *Dukes* held that a court must rigorously scrutinize any evidence proffered to establish commonality and predominance. 564 U.S. at 350-51. The Panel, however, held that *Tyson Foods* sub silentio created an exception to that requirement in wage-and-hour cases. Slip op. at 53 (citing *Tyson Foods*, 136 S. Ct. at 1048). The tension between *Dukes* and the Panel's reading of *Tyson Foods* alone raises a substantial issue. The Panel's decision also conflicts with the rule in several other Circuits that expert evidence proffered to establish commonality and predominance is always subject to a rigorous-analysis standard, not the *Daubert* standard. *See* pp. 10-13, *infra* (citing cases).

*Third*, the petition will ask the Supreme Court to review the Panel's holding that there is no cohesiveness requirement for a Rule 23(b)(2) class—a holding that conflicts with the holdings of seven other Circuits. *See* pp. 13-14, *infra* (citing cases).

Since the petition will present three questions on which the Circuits are split, the substantiality of the questions is plain.

### A. Whether Evidence of Arrival and Departure Times Can Establish the Number of Hours Worked on a Class-wide Basis Is a Substantial Question.

The Panel's decision conflicts with a decision of the Third Circuit on the issue of whether workers in a putative wage-and-hour class action can establish the number of hours each class member worked on a class-wide basis using representative evidence of arrival and departure times, where the record shows that workers were often not engaged in compensable activities while at the workplace. The limits of representative evidence to establish commonality and predominance in wage-and-hour cases is an important question that has frequently arisen following the Supreme Court's decision in *Tyson Foods*. The Panel here and the Third Circuit in *Ferreras* have reached diametrically opposed answers concerning whether mere arrival and departure times permit class-wide inferences as to how long each employee worked. The conflict is sharp and direct and well positioned for the Supreme Court's review.

In *Tyson Foods*, the Supreme Court held that in some circumstances, "representative" evidence can be used to establish the number of hours each member of a putative class spent on a compensable activity. 136 S. Ct. at 1045. There, the class members were required to establish the time spent donning and doffing protective gear—an activity that was indisputably compensable. *Id*. at 1043. They offered a study that measured donning and doffing times among sample groups of employees, all of whom fell within the parameters of the class definition. The Supreme Court held that representative evidence of that sort permitted an inference about the time each individual class member spent on those activities—thus obviating any concerns about commonality and predominance. *Id.* at 1048.

Here, on the other hand, the Panel extended the holding of *Tyson Foods* to cover situations where the proffered representative evidence included time spent on activities that were *not* compensable and were indisputably individualized. Specifically, the Panel held that the Main Survey—which measured "most often" arrival and departure times—was adequate representative evidence of the hours that each individual worked. Slip op. at 53. The Panel reached that conclusion despite extensive evidence in the record showing that players often did not engage in compensable activities when they arrived early at the ballpark or stayed later than required. *See, e.g.*, SER926–27 (player enjoyed arriving early because batting

cage was less crowded); SER386–87 (player arrived early, in part, because he was a free agent and wanted to "outwork[]" other players); SER336 (player arrived up to two-and-a-half hours prior to games to eat and digest his meal); SER931–32 (player would always take an early bus to facility to either work out, "relax in the locker room" or "maybe watch some baseball if it was on TV at the time"); SER407–09 (player arrived early on certain days so that his roommate could drive him to the ballpark); SER471–72 (after games, player needed to decompress, eat, and shower before departing the facility and was not "in any rush"); *see also* SER349–51, 369–71, 842–44, 894, 900–02, 974–76, 943, 996. Accordingly, unlike in *Tyson Foods*, the representative evidence proffered to establish commonality and predominance in this case was not limited to showing time spent on compensable activities but instead included within its scope time spent on activities that were not compensable.

Faced with nearly identical facts, the Third Circuit reached the opposite holding in *Ferreras*. There, the Court decertified a class of airport workers who claimed that they were not compensated for work performed while clocked-in but before and after their designated shift times. As here, the record in *Ferreras* showed that the class members often did not perform work during those periods when they were present at the workplace earlier or later than required—spending it instead, for example, "chat[ting] with co-workers" or "watch[ing] TV." 2019 U.S.

App. LEXIS 38369, at *16. The Third Circuit held that because the employees were not necessarily working when they arrived early or stayed later than required, evidence of arrival and departure times could not establish the number of hours worked on a class-wide basis. *Id.*, at *15-16. Instead, each class member "will have to offer individualized proof to show they were actually working during the various time periods at issue." *Id.*, at *15. According to the Third Circuit, *Tyson Foods* is limited to situations where class members all performed the *same* compensable tasks. *Id.*, at *17.

The Third Circuit's reading of *Tyson Foods* cannot be reconciled with the Panel's holding here. Because the Circuits are split on the issue, the question of whether representative evidence of arrival and departure times can establish commonality and predominance in a wage-and-hour case is a substantial one that the Supreme Court is likely to take up.

### B. Whether Expert Evidence Proffered to Establish Commonality and Predominance in a Wage-and-Hour Case Must Be Rigorously Analyzed Is a Substantial Question.

The Panel's decision also conflicts with the Supreme Court's case law and the decisions of numerous courts of appeals on the question of whether a court must rigorously analyze expert evidence proffered to satisfy Rule 23 in a wage-and-hour case. That question is substantial because the Panel's holding that there

is no rigorous analysis requirement in wage-and-hour cases conflicts with Supreme Court precedent and decisions from several other Circuits.

In *Wal-Mart v. Dukes*, the Supreme Court held that, at the class-certification stage, a court must conduct a "rigorous analysis" to determine whether plaintiffs have proffered class-wide evidence capable of satisfying the requirements of Rule 23, even if such a probing review would "entail some overlap with the merits of the plaintiff's underlying claim." 564 U.S. 338, 351 (2011). This Court confirmed that principle in *Ellis v. Costco Wholesale Corp*, 657 F.3d 970, 984 (9th Cir. 2011). Other Circuits have followed suit. *See Ferreras*, 2019 U.S. App. LEXIS 38369 (at the class certification stage, a court must conduct "[a] rigorous analysis [that] requires that factual determinations be made by a preponderance of the evidence"); *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 128 (3d Cir. 2018) (vacating and remanding because the district court failed to conduct a "rigorous assessment of the available evidence and the method or methods by which [the] plaintiffs propose to use the evidence to prove those elements"); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) ("It is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so 'requires inquiry into the merits of the claim.'"); *Unger v. Amedisys Inc.*, 401 F.3d 316, 320-21 (5th Cir. 2005) (courts must conduct a "rigorous analysis of Rule 23 prerequisites … in making its Rule 23 decision");

*West v. Prudential Secs. Inc*., 282 F.3d 935, 938 (7th Cir. 2002) ("A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided[.]").

The Panel nevertheless held that *Tyson Foods* eliminated the rigorous-analysis requirement in wage-and-hour cases as long as Plaintiffs offer admissible "representative evidence" from an expert. Slip op. at 58 (holding that "*Tyson* requires that we reject this argument" that "the district court was required to 'rigorously analyze' the Main Survey"). The Court concluded that in such cases a court may only deny class certification if "'no reasonable juror' could find [the evidence] probative of whether an element of liability was met." Slip op. at 58. That holding diverges from the view of the other Circuits and has no support in *Tyson Foods*. To the contrary, *Tyson Foods* specifically rejected the "adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions," 136 S. Ct. at 1040, and recognized that courts must "give *careful scrutiny* to the relation between common and individual questions in a case" to ensure that the former predominate. *Id*. at 1045 (emphasis added). Notably, the Third Circuit in *Ferreras*—also a wage-and-hour case decided after *Tyson Foods*—subjected representative evidence to a rigorous analysis, notwithstanding *Tyson Foods*.

Because the Panel's decision not to rigorously analyze the Main Survey proffered to satisfy Rule 23 is at odds with decisions of the Supreme Court and other Circuits, the second question that will be raised in Defendants' petition for certiorari is a substantial one.

### C. Whether Rule 23(b)(2) Requires Cohesiveness Is a Substantial Question.

Finally, this case presents a substantial question that implicates an entrenched conflict amount the Circuits: whether a class can be certified under Federal Rule of Civil Procedure 23(b)(2) without satisfying a cohesiveness requirement. Cohesiveness measures whether a single injunctive or declaratory judgment would provide relief to each class member at once. *Dukes*, 564 U.S. at 360. The Panel held that Rule 23(b)(2) does not require cohesiveness. Slip op. at 38 ("We further hold that the district court erred in imposing a 'cohesiveness' requirement for the proposed Rule 23(b)(2) class."). Seven other Circuits have reached the opposite conclusion, however, holding that a Rule 23(b)(2) class cannot be certified absent cohesiveness. *See, e.g.*, *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016) ("Although a Rule 23(b)(2) class need not meet the additional predominance and superiority requirements of Rule 23(b)(3), 'it is well established that the class claims must be cohesive.'"); *M.D. v. Perry*, 675 F.3d 832, 847 (5th Cir. 2012) ("[T]he proposed class lacks cohesiveness to proceed as a 23(b)(2) class."); *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 826 (7th Cir. 2011)

(discussing cohesiveness requirement); *Gates v. Rohm & Haas Co*., 655 F.3d 255, 263–64 (3d Cir. 2011) (same); *Blackman v. District of Columbia*, 633 F.3d 1088, 1094 (D.C. Cir. 2011) (same); *DG v. Devaughn*, 594 F.3d 1188, 1199 (10th Cir. 2010) (same); *Romberio v. UNUMProvident Corp*., 385 F. App'x 423, 433 (6th Cir. 2009) (same). Because the Circuits disagree on whether Rule 23(b)(2) requires cohesiveness, the question of whether there is a cohesiveness requirement is a substantial one.

## II. THERE IS GOOD CAUSE FOR A STAY.

Under Rule 41(d), a stay is warranted if "good cause" exists. Fed. R. App. P. 41(d)(1). In considering whether there is good cause to stay the mandate, courts "balance the equities" by evaluating "the harm to each party if a stay is granted." *Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001) (Ripple, J., in chambers). "Ordinarily, . . . a party seeking a stay of the mandate following this court's judgment need not demonstrate that exceptional circumstances justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989).

The equities favor a stay in this case. If the mandate issues and the case is remanded to the district court, the parties will likely be asked to complete class-wide fact and expert discovery, prepare dispositive motions, and prepare for a class-action trial. Much of this effort would be a waste of time and resources if Defendants' anticipated petition is granted and the Supreme Court decertifies the

California, Arizona, or Florida classes. Trial-court proceedings are often stayed when there is a potential appellate reversal of a class certification order because otherwise the parties might waste "substantial time and resources . . . on the litigation, particularly expert discovery, dispositive motions and trial preparation on class claims." *Gray v. Golden Gate Nat'l Recreational Area*, No. 08-00722, 2011 WL 6934433, at *3 (N.D. Cal. Dec. 29, 2011); *see also Pena v. Taylor Farms Pac., Inc.*, No. 13-cv-01282, 2015 WL 5103157, at *4 (E.D. Cal. Aug. 31, 2015) (holding that a stay is warranted when it "would avoid, substantial, unrecoverable, and wasteful discovery costs [and] when the costs would impose 'serious burdens' that an appeal would avoid") (collecting cases).

Additionally, on remand the parties will likely have to undertake the time-consuming and expensive task of issuing notice to class members under Rule 23(c)(2)(B) for classes that may cease to exist if the Supreme Court accepts Defendants' petition. *See Glidden v. Chromally Am. Corp.*, 808 F. 2d 621, 628 (7th Cir. 1986) (noting that class-wide notice "could be an exceedingly costly burden"). A reversal of any part of this Court's order by the Supreme Court would alter the membership as well as the size of the classes. *See, e.g.*, *Chavez v. IBP, Inc.*, No. 01-5093, 2002 WL 32145647, at *1 (E.D. Wash. Dec. 23, 2002) (ruling on a motion to stay that "the balance of the hardships favors the Defendants" because if the appellate court reverses all or part of the class certification ruling

"the number of class members would be substantially altered"). Issuing a notice that may need to be withdrawn or revised will confuse the class and collective members and waste valuable resources. Indeed, it is well settled that "dissemination of class notice [should be stayed] to avoid the confusion and the substantial expense of renotification that may result from appellate reversal or modification." Federal Judicial Center, Manual for Complex Litigation § 21.28 at 387 (4th ed. 2008).

Conversely, Plaintiffs will not suffer any harm from a brief stay pending the resolution of Defendants' petition. Under Federal Rule of Appellate Procedure 41, any stay would remain in place only until the petition is finally resolved. Defendants are required to submit their petition within 90 days. Assuming that Plaintiffs file a timely response, the petition would likely be granted or denied in about five months. Plaintiffs cannot show that this brief delay would prejudice their interests.

In light of those considerations, this Court recently granted a motion to stay issuance of the mandate pending a petition for writ of certiorari in *Ninth Inning, Inc. v. DIRECTV, LLC*, No. 17-56119, Dkt. No. 74 (9th Cir. Oct. 16, 2019). As in that case, absent a stay Defendants here will be forced to engage in costly litigation proceedings before the district court that may prove to be unnecessary if the Supreme Court reverses on any of these class-certification issues. *See DeMartini*

*v. Johns*, 693 F. App'x 534, 538 (9th Cir. 2017) (holding that a stay of the mandate may be granted to "promote judicial economy"). Conversely, Plaintiffs would not be harmed by a brief pause in the litigation to allow the Supreme Court to review Defendants' petition, which will raise numerous substantial questions.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court stay the issuance of the mandate pending the filing and disposition of a petition for a writ of certiorari.

January 9, 2020

Respectfully submitted,

*/s/Elise M. Bloom*

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**CERTIFICATE OF COMPLIANCE**

I certify that this motion complies with the type-volume limitation set forth in Circuit Rule 27-1(d) and Federal Rule of Appellate Procedure 27(d)(2)(A). This motion uses a proportional typeface and 14-point font, contains 3,822 words and is 17 pages.

/s/ *Elise M. Bloom*
Elise M. Bloom

**CERTIFICATE OF SERVICE**

I hereby certify that on January 9, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kirstin E. Largent

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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| AARON SENNE; MICHAEL LIBERTO; OLIVER ODLE; BRAD MCATEE; CRAIG BENNIGSON; MATT LAWSON; KYLE WOODRUFF; RYAN KIEL; KYLE NICHOLSON; BRAD STONE; MATT DALY; AARON MEADE; JUSTIN MURRAY; JAKE KAHAULELIO; RYAN KHOURY; DUSTIN PEASE; JEFF NADEAU; JON GASTON; BRANDON HENDERSON; TIM PAHUTA; LEE SMITH; JOSEPH NEWBY; RYAN HUTSON; MATT FREVERT; ROBERTO ORTIZ; WITER JIMENEZ; KRIS WATTS; MITCH HILLIGOSS; DANIEL BRITT; YADEL MARTI; HELDER VELAQUEZ; JORGE JIMENEZ; JORGE MINYETY; EDWIN MAYSONET; JOSE DIAZ; NICK GIARRAPUTO; LAUREN GAGNIER; LEONARD DAVIS; GASPAR SANTIAGO; GRANT DUFF; OMAR AGUILAR; MARK WAGNER; DAVID QUINOWSKI; BRANDON PINCKNEY, Individually and on Behalf of All Those Similarly Situated; JAKE OPITZ; BRETT NEWSOME,<br>*Plaintiffs-Appellants*,<br><br>v. | Nos. 17-16245<br>17-16267<br>17-16276<br><br>D.C. No.<br>3:14-cv-00608-JCS<br><br>OPINION |

KANSAS CITY ROYALS BASEBALL CORP.; MARLINS TEAMCO LLC; SAN FRANCISCO BASEBALL ASSOCIATES, LLC; OFFICE OF THE COMMISSIONER OF BASEBALL, DBA Major League Baseball, an unincorporated association; ALLAN HUBER SELIG, "BUD"; ANGELS BASEBALL LP; ST. LOUIS CARDINALS, LLC; COLORADO ROCKIES BASEBALL CLUB, LTD.; CINCINNATI REDS, LLC; HOUSTON BASEBALL PARTNERS LLC; ATHLETICS INVESTMENT GROUP, LLC; ROGERS BLUE JAYS BASEBALL PARTNERSHIP; PADRES L.P.; SAN DIEGO PADRES BASEBALL CLUB, L.P.; MINNESOTA TWINS, LLC; DETROIT TIGERS, INC.; LOS ANGELES DODGERS LLC; STERLING METS L.P.; AZPB L.P.; NEW YORK YANKEES P'SHIP; RANGERS BASEBALL EXPRESS, LLC; MILWAUKEE BREWERS BASEBALL CLUB, INC.; CHICAGO CUBS BASEBALL CLUB, LLC; PITTSBURGH ASSOCIATES, LP; BASEBALL CLUB OF SEATTLE, LLP; LOS ANGELES DODGERS HOLDING COMPANY LLC; RANGERS BASEBALL, LLC,

*Defendants-Appellees*.

Appeals from the United States District Court
for the Northern District of California
Joseph C. Spero, Magistrate Judge, Presiding

Argued and Submitted June 13, 2018
San Francisco, California

Filed August 16, 2019

Before: Michael R. Murphy,* Richard A. Paez,
and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Paez;
Dissent by Judge Ikuta

* The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

## SUMMARY**

**Labor Law / Class and Collective Certification**

The panel affirmed in part and reversed in part the district court's orders certifying a class and a collective action for wage-and-hour claims brought by minor league baseball players under the Fair Labor Standards Act and state law.

The district court certified a California class under Federal Rule of Civil Procedure 23(b)(3) but denied certification for Arizona and Florida classes and for a Rule 23(b)(2) class. The district court also certified an FLSA collective.

The panel held that, as to the state law claims, California choice-of-law rules applied. The panel held that under *Sullivan v. Oracle Corp.*, 254 P.3d 237 (Cal. 2011), California law applied to the Rule 23(b)(3) California class. The panel reversed the district court's determination that choice-of-law considerations defeated the predominance and adequacy requirements for the proposed Arizona and Florida Rule 23(b)(3) classes. Applying California's three-step governmental interest analysis for choice-of-law questions, the panel concluded that Arizona law should apply to the work performed in Arizona, and Florida law to the work performed in Florida.

The panel reversed the district court's refusal to certify a Rule 23(b)(2) class for unpaid work at defendants' training

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

facilities in Arizona and Florida on the basis that choice-of-law issues undermined "cohesiveness" and therefore made injunctive and declaratory relief inappropriate. The panel concluded that the district court's errors in its choice-of-law analysis relating to the proposed Arizona and Florida Rule 23(b)(3) classes applied equally to its refusal to certify the Rule 23(b)(2) class. The panel further held that the district court erred in imposing a "cohesiveness" requirement for the proposed Rule 23(b)(2) class. The panel remanded for the district court to consider anew whether to certify the Rule 23(b)(2) class.

The panel held that plaintiffs could meet the predominance requirement for the proposed California, Florida, and Arizona Rule 23(b)(3) classes through a combination of representative evidence and application of the "continuous workday" rule. The panel applied the *Mt. Clemens* burden-shifting framework and the holding of *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016), that representative evidence may be used at the class certification stage and may be used to establish liability in addition to damages. The panel explained that the continuous workday rule presumes that once the beginning of the workday is triggered, an employee performs compensable work throughout the rest of the day until the employee completes their last principal activity. Any activity that is "integral and indispensable" to principal activities triggers the beginning of the workday. As to the Arizona and Florida classes, covering alleged minimum wage violations in the lack of any pay for time spent participating in spring training, extended spring training, and instructional leagues, the panel affirmed the determination that the predominance requirement was met. As to the California class, covering overtime and minimum wage claims relating to work performed during the championship season, the panel held that the district court

did not abuse its discretion in concluding that defendants' uniform pay policy, the team schedules, and representative evidence, including an expert survey known as the "Main Survey," established predominance. The panel held that the district court was not required to "rigorously analyze" the Main Survey, rather than evaluating its admissibility under *Daubert* and its appropriateness for meeting class certification requirements under *Tyson*.

Affirming the district court's certification of the FLSA collective action, the panel applied the standard set forth in *Campbell v. City of L.A.*, 903 F.3d 1090 (9th Cir. 2018), which postdated the district court's ruling, and held that the district court's use of the ad hoc approach was harmless error. The panel concluded that collective certification was proper because plaintiffs shared similar issues of law or fact material to the disposition of their FLSA claims and thus were similarly situated.

The panel affirmed the district court's certification of the California Rule 23(b)(3) class and the FLSA collective action, reversed the district court's refusal to certify Arizona and Florida classes and a Rule 23(b)(2) class, and remanded for further proceedings.

Dissenting, Judge Ikuta wrote that the district court correctly concluded that consideration of plaintiffs' claims on a classwide basis would be overwhelmed by individualized choice-of-law inquiries. She wrote that the majority's rule, applying the law of the jurisdiction where the work took place, was contrary to the court's framework for analyzing the intersection of class action and choice-of-law issues, overlooked the complexity of California's choice-of-law rules, and created significant practical and logistical problems.

**COUNSEL**

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## OPINION

PAEZ, Circuit Judge:

It is often said that baseball is America's pastime. In this case, current and former minor league baseball players allege that the American tradition of baseball collides with a tradition far less benign: the exploitation of workers. We are tasked with deciding whether these minor league players may properly bring their wage-and-hour claims on a collective and classwide basis.

## BACKGROUND

### I.

Most major professional sports in America have their own "farm system" for developing talent: for the National Basketball Association, it's the G-League; for the National Hockey League, it's the American Hockey League; and for Major League Baseball (MLB), it's Minor League Baseball. MLB and its thirty franchise teams rely heavily on this extensive minor league system, which has nearly 200 affiliates across the country and employs approximately 6,000 minor league players. Nearly all MLB players begin their careers in the minor leagues. Each minor league club is associated with one of the thirty franchise MLB teams.

The minor league system is governed by the Major League Rules (MLRs), which dictate the terms of employment and compensation for both minor and major league players. Under the MLRs, all minor league players are required to sign a seven-year Uniform Player Contract (UPC). Ostensibly, players are required to sign the UPC for "morale" and "to produce the similarity of conditions necessary for keen competition."

The UPC "obligates Player[s] to perform professional services on a calendar year basis, regardless of the fact that salary payments are to be made only during the actual championship playing season." It describes its scope as setting "the terms and conditions of employment during all periods in which Player is employed by Club as a Minor League Player." Players are paid by the MLB franchise affiliated with the minor league team for which they play. Under the UPC, first-year players are paid a fixed salary of $1,100 per month during the regular ("championship") season that runs from April through September. In addition to their salaries during the championship season, some players receive signing or performance-related bonuses and college scholarships.

Beginning in early March each year, the minor league affiliates conduct spring training in Arizona and Florida; every MLB franchise operates a minor league training complex in one of these two states. The parties dispute whether spring training is required, but the UPC strongly indicates that it is mandatory.[1] Virtually all players are unpaid during spring training.

Spring training lasts approximately four weeks, until the championship season begins in April. Some players attest that spring training entails working seven days a week, with no days off. During spring training, teams typically have

[1] The UPC provides that "Player's duties and obligations under [the UPC] continue in full force and effect throughout the calendar year, including Club's championship playing season, Club's training season, Club's exhibition games, Club's instructional, post-season training or winter league games, any official play-off series, any other official post-season series in which Player shall be required to participate . . . and any remaining portions of the calendar year."

scheduled activities in the morning prior to playing games in the afternoon. For example, a team spring training schedule for one of the San Francisco Giants' affiliates describes that at 6:30 AM, there was an "Early Van for Treatment and Early Work" [2]; at 7:00 AM, the "Regular Van" departed; at 7:45 AM, the "Early Work" began; and then between 9:00 AM and 11:00 AM, the team would perform activities such as "Stretch," "Throwing Program," and "Batting Practice." Lunch was to be at 11:00 AM, before a 12:10 PM bus to a neighboring city for a 1:00 PM away game.

At the conclusion of spring training in early April, some players are assigned to minor league affiliates, and begin playing games in the championship season. During the championship season, minor league teams play games either six or seven days per week. The championship season lasts around five months, beginning in April and ending in September. One of the regular season leagues within minor league baseball is the California League, which—as the name implies—plays games exclusively within California.

Players who are not assigned to play for affiliates in the championship season stay at the Arizona or Florida facilities for "extended spring training." Extended spring training continues until June, and involves similar activities to spring training. Although most players do not get paid during extended spring training, as many as seven MLB clubs do pay for work during extended spring training due to an ambiguity in the MLRs over when players are permitted to be paid.

[2] The schedule instructed players to "CHECK [the] BOARD FOR EARLY WORK."

After the championship season ends in September, some players participate in the "instructional leagues," which run from approximately mid-September to mid-October. The parties dispute whether participation in the instructional leagues is mandatory for the players involved, although as with spring training, the UPC strongly implies that participation is required. Activities and schedules during the instructional league are similar to spring training. And just as with spring training, players are virtually never paid for participation in the instructional league.

**II.**

Plaintiffs are forty-five current and former minor league baseball players who bring claims under the federal Fair Labor Standards Act (FLSA) and the wage-and-hour laws of California, Arizona, and Florida against MLB, MLB Commissioner Bud Selig, and a number[3] of MLB franchises. Plaintiffs allege that defendants do not pay the players at all during spring training, extended spring training, or the instructional leagues. They further allege that because players are "employees" and the activities the players perform during those periods constitute compensable work, defendants have unlawfully failed to pay them at least minimum wage. And according to plaintiffs, while the players are paid—albeit not much—during the championship season, they routinely work overtime, for which they are never compensated as a matter of policy.

In May 2015, plaintiffs filed their Second Amended Consolidated Class Action Complaint, which alleged wage-

[3] Plaintiffs originally named all 30 MLB franchises as defendants, but eight of the franchises were subsequently dismissed for lack of personal jurisdiction.

and-hour claims under the laws of eight states and the FLSA; plaintiffs also sought certification of a FLSA collective action. The district court preliminarily certified the FLSA collective in October 2015. Notice was sent to approximately 15,000 current and former minor league players, of which more than 2,200 opted in.

In 2016, defendants moved to decertify the FLSA collective, while plaintiffs moved to certify a Rule 23(b)(2) class as well as Rule 23(b)(3) classes under the laws of eight states. The district court denied certification for all proposed Rule 23(b)(3) classes, concluding that predominance was not satisfied for two primary reasons. *Senne v. Kansas City Royals Baseball Corp.*, 315 F.R.D. 523, 572, 577–84 (N.D. Cal. 2016). First, the court concluded that predominance was defeated by the choice-of-law issues presented by the proposed classes, given that (1) the winter off-season training claims entailed work performed in dozens of different states with no common schedule or situs; and (2) the championship season claims involved frequent travel between state lines for away games. *Id.* at 580–81. The district court also determined that the inclusion of claims for winter off-season work fatally undermined predominance, as the court would be required to undertake an overwhelming number of individualized inquiries to determine which activities constituted compensable "work" and how much time was spent doing "work." *Id.* at 577–84. For similar reasons, the court held that plaintiffs were not "similarly situated" and therefore decertified the FLSA collective. *Id.* at 585–86. The court also granted the defendants' motion to exclude an expert survey (the "Pilot Survey") submitted by plaintiffs, finding that its methodology and results did not satisfy the requirements of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Id.* at 586–90. The court further refused to

certify the proposed Rule 23(b)(2) class, concluding that because the plaintiffs were all former—rather than current—players, they lacked standing to represent a (b)(2) class. *Id.* at 584–85.

Plaintiffs moved for reconsideration, narrowing their proposed classes significantly in response to the concerns the district court expressed in its initial certification order. Plaintiffs requested Rule 23(b)(3) certification of an Arizona class and a Florida class for work performed during spring training, extended spring training, and the instructional leagues in those states. Plaintiffs also moved for certification of a 23(b)(3) California class, covering players who participated in the California League during the championship season. Additionally, plaintiffs sought to certify a reworked FLSA collective of players who participated in the California League or in spring training, extended spring training, and the instructional leagues. In addition to the 23(b)(3) classes and FLSA collective, plaintiffs requested certification of a Rule 23(b)(2) injunctive relief class consisting of current minor league players who participate in spring training, extended spring training, or the instructional leagues in Florida or Arizona. To cure the court's earlier concerns about standing, four current minor league players moved to intervene to represent the proposed (b)(2) class.

On reconsideration, plaintiffs argued that they could meet Rule 23(b)(3)'s predominance requirement and FLSA's "similarly situated" requirement through a combination of the use of representative evidence and application of the so-called "continuous workday" rule.[4]

[4] As we shall explain, the continuous workday rule presumes that once the beginning of the workday is triggered, an employee performs

Plaintiffs' representative evidence took a variety of forms, including an expert survey (the "Main Survey"), hundreds of team schedules, payroll data, and testimony from both players and league officials. The most controversial piece of evidence was the Main Survey, which plaintiffs argued served as representative evidence of hours worked, particularly when used in concert with a continuous workday theory.

The Main Survey asked players to report the times they "most often" arrived and departed from the ballpark or training facility during the championship season, spring training, extended spring training, and the instructional leagues, and asked players to estimate how much time they spent eating meals while at the ballpark. The survey did not, however, ask players about the kinds of activities they performed at the facilities, or how much time they spent performing particular activities. Given these purported shortcomings, defendants moved to exclude the Main Survey, and further argued that even if the survey were admissible under *Daubert*, it still could not be used to meet the predominance and "similarly situated" requirements due to its alleged flaws. The district court denied defendants' motion to exclude the Main Survey, finding it admissible under *Daubert* and concluding that defendants' challenges went "to the weight of the Survey and not its admissibility" and were "better left to a jury to evaluate." The district court further concluded that the Main Survey could be used in combination with other evidence—such as team schedules, testimony, and payroll data—to meet Rule 23(b)(3)'s

compensable work throughout the rest of the day until the employee completes their last principal activity or the last activity which is "integral and indispensable" to the employee's principal activities. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28, 32–37 (2005).

predominance and FLSA's "similarly situated" requirements, observing that certifying the classes and the FLSA collective "will not preclude Defendants from challenging the sufficiency of the Main Survey and Plaintiffs' damages model on summary judgment and/or at trial."

Because it concluded that the predominance and "similarly situated" requirements could be met with the use of representative evidence and application of the continuous workday rule, the district court recertified the narrowed FLSA collective and certified a California (b)(3) class. However, the district court denied certification for the Arizona, Florida, and (b)(2) classes, holding that choice-of-law concerns defeated predominance for the Arizona and Florida classes and undermined "cohesiveness" for the (b)(2) class.

At defendants' request, the district court certified the FLSA collective certification order for interlocutory review under 28 U.S.C. § 1292. Plaintiffs petitioned us for permission to appeal the denial of certification for the Arizona, Florida, and Rule 23(b)(2) classes, and defendants likewise petitioned to appeal the certification of the California class; we granted both petitions, consolidating those cross-appeals with the FLSA collective appeal.

## STANDARD OF REVIEW

We review for abuse of discretion the district court's class certification rulings, and review for clear error any findings of fact the district court relied upon in its certification order. *Parsons v. Ryan*, 754 F.3d 657, 673 (9th Cir. 2014). A district court's choice of law determinations, however, are reviewed de novo. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012). A district court

abuses its discretion where it commits an error of law, relies on an improper factor, omits a substantial factor, or engages in a clear error of judgment in weighing the correct mix of factors. *Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1113 (9th Cir. 2014) (citing *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010)). When we review a grant of class certification, "we accord the district court noticeably more deference than when we review a denial." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013) (quoting *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010)).

**ANALYSIS**

To paraphrase the Chief Justice, these complex appeals require us to call a great number of balls and strikes, as both parties raise numerous challenges to the district court's certification order. For their part, plaintiffs challenge the district court's decision to deny certification for the Arizona and Florida Rule 23(b)(3) classes and the Rule 23(b)(2) class on the grounds that choice-of-law issues defeated the predominance requirement for the Arizona and Florida (b)(3) classes and also thwarted "cohesiveness" for the proposed (b)(2) class. Defendants, on the other hand, contest the district court's certification of the California (b)(3) class, arguing first that choice-of-law issues defeat both predominance and adequacy, and second, that plaintiffs cannot meet the predominance requirement through the use of their proffered representative evidence: the Main Survey, team schedules, payroll records, deposition testimony, and declarations. Defendants further charge that the district court erred in certifying the FLSA collective because plaintiffs' representative evidence does not show that the collective members are "similarly situated." Defendants also contend that the district court erred by not "rigorously

analyzing" plaintiffs' expert evidence at the class and collective certification stage. We address each argument in turn.

**I.**

Class certification is governed by Federal Rule of Civil Procedure 23. As a threshold matter, a party seeking class certification must satisfy the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.[5] "Class certification is proper only if the trial court has concluded, after a 'rigorous analysis,' that Rule 23(a) has been satisfied." *Parsons*, 754 F.3d at 674 (quoting *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542–43 (9th Cir. 2013)).

In addition to the requirements of Rule 23(a), a proposed class must also meet the requirements of one or more of the "three different types of classes" set forth in Rule 23(b). *Leyva v. Medline Industries, Inc.,* 716 F.3d 510, 512 (9th Cir. 2013). Here, plaintiffs proposed classes under two of Rule 23(b)'s class types: Rule 23(b)(3) and 23(b)(2). A class may be certified under Rule 23(b)(3) only if the district 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). Of these two requirements—predominance and superiority—only predominance is at issue on appeal. "The predominance inquiry focuses on 'the relationship between

[5] Of Rule 23(a)'s four requirements, defendants contest only adequacy on appeal; their arguments pertaining to adequacy have to do with choice-of-law issues.

the common and individual issues' and 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)). In determining whether the predominance requirement is met, courts have a "duty to take a close look at whether common questions predominate over individual ones" to ensure that individual questions do not "overwhelm questions common to the class." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (internal quotation marks and citation omitted).

Rule 23(b)(2), on the other hand, requires only that "the party opposing the class ha[ve] acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Although 23(b)(2) classes are most common in the civil rights context, "we have certified many different kinds of Rule 23(b)(2) classes." *Parsons*, 754 F.3d at 686.

**II.**

We first address whether choice-of-law issues fatally undermine plaintiffs' proposed Rule 23 classes. The district court's decision was split on the impact of choice-of-law questions: as to the proposed Rule 23(b)(3) California class, the court held that choice-of-law concerns defeated neither Rule 23(b)(3)'s predominance requirement nor Rule 23(a)'s adequacy requirement. Yet as to the proposed 23(b)(3) Arizona and Florida classes, the district court held the opposite: that choice-of-law issues posed an insurmountable hurdle to meeting both predominance and adequacy. Similarly, the court determined that choice-of-law questions

made certification of the proposed Rule 23(b)(2) class inappropriate.

Concerns over which state's laws apply to a proposed class "do not necessarily preclude a 23(b)(3) action." *Hanlon*, 150 F.3d at 1022. But "[u]nderstanding which law will apply before making a predominance determination is important when there are variations in applicable state law," and potentially varying state laws may defeat predominance in certain circumstances. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001). We have been particularly concerned about the impact of choice-of-law inquiries in nationwide consumer class actions and products liability cases. *See, e.g.*, *Mazza*, 666 F.3d at 585, 591–94; *Zinser*, 253 F.3d at 1184–90.

A district court considering state law claims brought in federal court must utilize the choice-of-law rules of the forum state—here, California. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496–97 (1941). "By default, California courts apply California law unless a party litigant timely invokes the law of a foreign state, in which case it is the foreign law proponent who must shoulder the burden of demonstrating that foreign law, rather than California law, should apply to class claims." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 561 (9th Cir. 2019) (en banc) (internal quotation marks and citations omitted). To meet their burden, the objectors must satisfy California's three-step governmental interest test, used to resolve choice of law issues. *Id.*

> First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or

> different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be the more impaired if its law were not applied.

*Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006) (internal quotation marks and citations omitted); *see also Hairu Chen v. Los Angeles Truck Centers, LLC*, No. S240245, 2019 WL 3281346, at *3 (Cal. July 22, 2019).

In making its choice-of-law determinations, the district court relied heavily on the California Supreme Court's decision in *Sullivan v. Oracle Corp.*, 254 P.3d 237 (Cal. 2011), and the parties do not dispute that *Sullivan* provides the most helpful guidance for the choice-of-law questions before us. In *Sullivan*, the California Supreme Court answered a certified question from this court regarding whether California overtime law applied to non-resident employees of a California corporation who worked primarily in their home states of Colorado and Arizona, but also worked in California (and several other states) for "entire days or weeks" at a time. *Id.* at 239, 243. *Sullivan* first concluded that as a matter of statutory construction, California law applied to all work performed for days or

weeks at a time within the state's borders, regardless of whether it was performed by residents or non-residents. *Id.* at 241–43. Next, *Sullivan* undertook California's three-step governmental interest analysis for choice-of-law questions. *Id.* at 244–47. At the first step of the analysis—whether the relevant laws differed—the court noted that California's overtime law "clearly" differed from the laws of the plaintiffs' home states. *Id.* at 245.

At the second step—whether a "true" conflict existed—the court held that the existence of a true conflict was "doubtful, at best." *Id.* The court explained that the second step involves examining "each jurisdiction's interest in the application of its own law under the circumstances of the particular case," noting that a court "may make [its] own determination of the relevant policies and interests, without taking 'evidence' as such on the matter." *Id.* (internal quotation marks, alterations, and citations omitted). *Sullivan* observed that "California has, and has unambiguously asserted, a strong interest in applying its overtime law to all nonexempt workers, and all work performed, within its borders." *Id.* at 245. The court concluded that "neither Colorado nor Arizona has a legitimate interest in shielding Oracle from the requirements of California wage law as to work performed here." *Id.* at 246.

In so holding, the court rejected two specific arguments advanced by Oracle. First, Oracle contended that because Arizona and Colorado have workers' compensation statutes with express extraterritorial application, those statutes indicate an interest in extending the protection of their employment laws to their residents working outside the state. *Id.* Not so, *Sullivan* held. While "a state has such an interest, at least in the abstract, when the traveling, resident employee of a domestic employer would otherwise be left

without the protection of another state's law," the states had "expressed no interest in disabling their residents from receiving the full protection of California overtime law when working here, or in requiring their residents to work side-by-side with California residents in California for lower pay." *Id.*

Second, Oracle argued that Arizona and Colorado "have an interest in providing hospitable regulatory environments for their own businesses" and thus "also have an interest in shielding their own businesses from more costly and burdensome regulatory environments in other states." *Id.* Relying on principles of federalism, *Sullivan* dismissed this argument. While "a state can properly choose to create a business-friendly environment within its own boundaries," the federal Constitution does not require a state to substitute "'the conflicting statute of another state'" for its own laws that are "'applicable to persons and events'" within that state. *Id.* (quoting *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 822 (1985)). Nor does the Constitution "permit one state to project its regulatory regime into the jurisdiction of another state." *Id.* (citing *Healy v. Beer Insti., Inc.*, 491 U.S. 324, 336–37 (1989)).

Finally, although *Sullivan* held that there was almost certainly no true conflict because neither Arizona nor Colorado had a "legitimate interest" in blocking the application of California law to the work performed in California, the court nonetheless proceeded to the third step of the analysis "for the sake of argument." *Id.* at 246–47. *Sullivan* concluded that the analysis at the third step—determining which state's interest would be more impaired if its policy were subordinated to the policy of the other state—yielded a straightforward answer:

> [T]o subordinate California's interests to those of Colorado and Arizona *unquestionably* would bring about the greater impairment. To permit nonresidents to work in California without the protection of our overtime law would completely sacrifice, as to those employees, the state's important public policy goals of protecting health and safety and preventing the evils associated with overwork. Not to apply California law would also encourage employers to substitute lower paid temporary employees from other states for California employees, thus threatening California's legitimate interest in expanding the job market. By way of comparison, not to apply the overtime laws of Colorado and Arizona would impact those states' interests negligibly, or not at all . . . Alternatively, viewing Colorado's and Arizona's overtime regimens as expressions of a general interest in providing hospitable regulatory environments to businesses within their own boundaries, that interest is not perceptibly impaired by requiring a California employer to comply with California overtime law for work performed here.

*Id.* at 247 (citations omitted) (emphasis added).

**A.**

We first conclude that the district court did not err in holding that under *Sullivan*, California law should apply to

the (b)(3) California class.[6] Although defendants correctly point out that *Sullivan* is not precisely analogous to the case at hand, the two principal differences on which defendants rely are unpersuasive. Specifically, defendants first rely on the fact that while *Sullivan* involved a California corporation, "most of the MLB Club Defendants with affiliates in the California League are located outside California." But a close reading of *Sullivan* indicates that California law should apply to the California class, even though many of the employers are not headquartered in California. For example, *Sullivan* expressly contemplated that California's overtime laws may not apply to non-resident employees of an out-of-state business who enter California only "temporarily during the course of a workday," but contrasted such a scenario with employees who work in California for "entire days and weeks," who *are* covered by California law. *Id.* at 243 (emphases, internal quotation marks, and citations omitted).

Similarly, *Sullivan* specifically left open the possibility that other California employment laws, such as pay stub requirements, may not apply to non-resident employees of out-of-state employers—with the clear implication that overtime laws *would* apply to such employees. *See id.* at 243–44. Likewise, far from limiting its holding only to non-resident employees of in-state employers, *Sullivan* merely emphasized that employees of in-state employers would *especially* be covered by California law. *See id.* at 243.

[6] Contrary to the dissent's criticism, Dissent at 74, we do not shortcut the governmental interest analysis. As we explain in the text, we believe that *Sullivan* mandates application of California law to the California class. Rather than repeating *Sullivan*'s choice of law analysis, we focus on several additional considerations that further support our decision to affirm the district court's reliance on *Sullivan*.

Second, defendants characterize *Sullivan* as resting on the court's determination that "neither Arizona nor Colorado . . . has asserted an interest in regulating overtime work performed in other states." Defendants argue that here, by contrast, "numerous" states have a competing interest in regulating work performed in California. But defendants misread *Sullivan* by erroneously presuming that its conclusion at the third step—that subordinating "California's interests to those of Colorado and Arizona unquestionably would bring about the greater impairment"—hinged entirely on whether Arizona or Colorado law had asserted an interest in extraterritorial application of their wage laws. *Id.* at 247. It is certainly accurate to say that *Sullivan*'s holding was influenced by the fact that neither Arizona nor Colorado law purported to apply extraterritorially. Yet the court's discussion at step three cannot fairly be read to support the argument that California's "strong interest in applying its overtime law to . . . all work performed within its borders," *id.* at 245, would suddenly become the *lesser*-impaired interest in the event another state expressed a clear interest in applying its wage laws to work performed in California. Rather, *Sullivan* strongly indicates that California's interest in applying its laws to work performed within its borders for days or weeks at a time would reign supreme regardless of whether another state expressed an interest in applying its own wage laws instead of California's.

Although we read *Sullivan* as clearly mandating the application of California law to the California class, two additional considerations support our conclusion today.[7]

First, because the district court found that plaintiffs had met their burden of showing that California law could constitutionally be applied—a determination defendants do not contest on appeal—the burden shifted to defendants "to demonstrate 'that foreign law, rather than California law, should apply to class claims.'" *Mazza*, 666 F.3d at 590 (quoting *Wash. Mut. Bank v. Superior Court*, 15 P.3d 1071, 1081 (Cal. 2001)). The district court held that defendants failed to meet this burden, because they had "not gone beyond speculating in a general manner that the claims of some members of the putative California Class *might* be subject to the law of another state and that the interests of another state *might* be more impaired by application of California law."

Defendants specifically point to one of the named plaintiffs—Mitch Hilligoss—as an example of the alleged "need to conduct choice of law inquiries as to every member of the California class." The district court found this example unpersuasive for several reasons, and we agree. The defendants argued that Illinois law should apply to Hilligoss' work in California because the time he spent in California was a small proportion of his overall career (around two months out of a six-year career). The district court, however, correctly read *Sullivan* as indicating that California law should nonetheless apply to Hilligoss' California work. Indeed, the proportion of time the non-

[7] Moreover, as the dissent acknowledges, the California Supreme Court has expressed a strong interest in regulating wage and hour claims within its borders. Dissent at 77.

resident employees in *Sullivan* worked in California was quite small (and in one case, even less than the proportion of Hilligoss' career spent in California): during the relevant three-year period, one worked 20 days, another 74 days, and the third 110 days. 254 P.3d at 239. Put differently, the employees in *Sullivan* worked in California approximately 1.8%, 6.7%, and 10% of the time, respectively. *Id.* What mattered in *Sullivan*—and what matters here—is that when the employees worked in California, they did so for "entire days or weeks" at a time. *Id.* at 243.

Second, practical considerations strongly support applying California law to work performed in California, at least as a general rule; to hold otherwise "would lead to bizarre and untenable results." *See* Brief for Professors Peter Hay and Patrick J. Borchers, Dkt. No. 21, at 12–13 (hereinafter "Professors' Amicus Brief"). If the law of the state in which work is performed is not the law that generally applies, employers and employees alike would be subjected to an unworkable scheme. Employers would be required to properly ascertain the residency status—itself not necessarily an easy task, as any student or seasonal worker could attest—of each of its employees. For every non-resident employee, employers would then have to determine whether the wage laws of that employee's state of residence apply extraterritorially, and then come up with *different* rules for each of its employees according to their state of residence and any extraterritorial application of their home state's laws. This would mean that at a single worksite, employees working side-by-side in the same position would not only be owed vastly different minimum wages, but also that an employer would need to set different rules for meal and rest breaks for different employees, and so on and so forth. It cannot be in any state's legitimate "interest" to foist such an

administrative nightmare upon both employers and employees.

Such a scenario would also result in an enormous competitive advantage—or disadvantage—for prospective employees based solely on their state of residency. Employers would be incentivized to hire residents of states with low minimum wages and otherwise employer-friendly wage laws, while residents of states with higher minimum wages and more protective employment laws would suddenly be far less appealing. Amici Professors Hays and Borchers persuasively point out that as defendants would have it, a college student still domiciled in Seattle while attending a Nebraska university would have to be paid $15 per hour at a part-time job in Nebraska, "nearly double Nebraska's minimum wage of $8 per hour." Professors' Amicus Brief at 13. This, of course, would put the student at a crushing disadvantage; what rational employer would hire her?

Moreover, given the administrative cost involved in attempting to comply with a patchwork of multiple states' wage laws at a single workplace, some employers might instead choose to stick to hiring only resident employees, or perhaps only non-resident employees from a particular state (presumably one with a low minimum wage and minimally protective employment laws).[8]

[8] The California class consisted of those players who participated in the California League, which plays games exclusively within California during the championship season. The Arizona and Florida classes consisted of those who performed during spring training, extended spring training, and the instructional leagues in those states. Thus, the dissent's fear that employers will be required to research applicable state

We do not foreclose the possibility that there could be some circumstances in which a proper application of California's choice-of-law rules might lead to the application of another state's wage and hour laws to work performed in California. Nor do we create a per se rule or an unrebuttable presumption. We hold only that, given the above considerations, we are more than satisfied that the district court did not err in concluding that under *Sullivan*, California law applies to the California class.

**B.**

We next address whether the district court erred in determining that choice-of-law considerations defeated predominance and adequacy for the proposed Arizona and Florida Rule 23(b)(3) classes, and conclude that the district court's determination must be reversed. Our conclusion is animated in part by several of the considerations outlined above, which apply with equal force to the Arizona and Florida classes. Moreover, the aforementioned enormous practical implications of a contrary holding would be just as problematic and unworkable in Arizona and Florida as in California.

**1.**

With those considerations in mind, we apply California's three-step governmental interest analysis, and conclude that Arizona law should apply to the work performed in Arizona, and Florida law to the work performed in Florida. At the first step, we agree with defendants that the differences in state law are "material," meaning that "they make a

laws whenever an employee crosses state lines is overstated. Dissent at 84.

difference in this litigation." *Mazza*, 666 F.3d at 590. For example, some states have more expansive definitions of "work," others have differing available defenses, and we have previously held that the elements for a quantum meruit claim—alleged in both the Arizona and Florida classes—"vary materially from state to state." *Id.* at 591 (citing Candace S. Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 Am. U.L. Rev. 547, 558–60 (1986)).

**2.**

"Because the relevant laws differ," we must "next examine each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." *Sullivan*, 254 P.3d at 245 (alteration, internal quotation marks, and citation omitted). We are not persuaded, as defendants contend, that a "true" conflict exists.

First, under California's choice-of-law principles, "a jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders."[9] *Mazza*, 666 F.3d at 592 (internal quotation marks omitted) (quoting *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 534 (Cal. 2010)). The dissent contends that "California has long rejected" this approach. Dissent at 71. In noting these principles, we do not ignore the evolution of California's choice of law doctrine. We recognize that the California Supreme Court "renounced the prior rule, adhered to by courts for many years, that in tort actions the law of the place

[9] Wage and hour laws are typically categorized as "conduct-regulating," as opposed to "loss-allocating." *See* Professors' Amicus Brief at 15–16 (citing Hay, Borchers & Symeonides, Conflict of Laws 874–78 (5th ed. 2010)).

of the wrong was the applicable law in a California forum regardless of the issues before the court" when it adopted the governmental interest approach. *Hurtado v. Superior Court*, 522 P.2d 666 (Cal. 1974). Yet the California Supreme Court has acknowledged that while it "no longer follows the old choice-of-law rule that generally called for application of the law of the jurisdiction in which a defendant's allegedly tortious conduct occurred *without regard to the nature of the issue that was before the court* . . . California choice-of-law cases nonetheless continue to recognize that a jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders." *McCann* 225 P.3d at 534 (internal quotation marks and citation omitted) (emphasis in original).

Thus, when conducting the governmental interest analysis, we must also recognize that a state ordinarily has the predominant interest in regulating conduct within its borders. We draw this conclusion not from California's interest in regulating conduct within its own borders, but from California's choice-of-law principles.[10] Thus these

[10] *See e.g.*, *McCann*, 225 P.3d at 534, 537 (recognizing that although California no longer uniformly applied the law of the jurisdiction in which the allegedly tortious conduct occurred, Oklahoma's interests "would be more impaired if its law were not applied" as the plaintiff's exposure to asbestos occurred in Oklahoma); *Reich v. Purcell*, 67 432 P.2d 727, 730 (Cal. 1967) ("Missouri is concerned with conduct within her borders and as to such conduct she has the predominant interest of the states involved."); *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430, 442 (Cal. Ct. App. 2007) ("The accident and Castro's injury occurred within Alabama's borders, thus giving Alabama a presumptive interest in controlling the conduct of those persons who use its roadways, absent some other compelling interest to be served by applying California law."); *Hernandez v. Burger*, 162 Cal. Rptr. 564, 568 (Cal. Ct. App. 1980) ("It is true that the place of the wrong is no longer treated as a controlling factor where application of the law of another jurisdiction

principles are not limited to the California class but apply to the Florida and Arizona classes as well. *See Mazza*, 666 F.3d at 593 ("The district court did not adequately recognize that each foreign state [not just California] has an interest in applying its law to transactions within its borders."). The district court erred in ignoring these principles as a starting point, instead faulting plaintiffs for not addressing "in detail the interests of either Arizona or Florida in applying their law" and focusing on the absence of Florida or Arizona cases akin to *Sullivan*—despite the strong indications that Arizona and Florida have the "predominant interest" in applying their laws to work performed within their state. *See Mazza*, 666 F.3d at 592.

Second, *Sullivan* relied on several different considerations to arrive at its conclusion that the existence of a true conflict was "doubtful, at best": (1) the states in which the employees resided did not express an intent to apply their laws extraterritorially; (2) the employees' states of residence did not have a "legitimate interest" in shielding an employer from California's wage laws as to work performed in California; and (3) federalism and due process made extraterritorial reach doubtful under the circumstances. *See* 254 P.3d at 245–47. Although defendants vigorously argue that the first of those rationales is inapplicable here—as discussed in greater detail below—at a minimum, the second and third rationales *do* apply, and weigh against the existence of a true conflict.

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having a connection with the accident will serve a legitimate interest or policy of the other jurisdiction. However, the situs of the injury remains a relevant consideration."); *Cable v. Sahara Tahoe Corp.*, 155 Cal. Rptr. 770, 777 (Cal. Ct. App. 1979) ("The state with the 'predominant' interest in controlling conduct normally is the state in which such conduct occurs and is most likely to cause injury.").

As to the first rationale, both defendants and the dissent contend that several states have expressed an interest in applying their wage and hour laws to work performed outside the state. In support of their position, they cite to a handful of cases where courts (largely district courts or intermediate state courts, with the exceptions of West Virginia and Washington)[11] have applied one state's wage laws to work performed at least partially in another state. For several reasons, we are unpersuaded by defendants' arguments. For one, we read *Sullivan* as indicating that under California's choice-of-law principles, a state has a legitimate interest in applying its wage laws extraterritorially only in two limited circumstances, neither of which apply here: one, when a state's resident employee of that state's resident employer leaves the state "temporarily during the course of the normal workday," and two, "when the traveling, resident employee of a domestic employer would otherwise be left without the protection of another state's

[11] In *New v. Tac & C Energy, Inc.*, 355 S.E.2d 629 (W. Va. 1987), the West Virginia Supreme Court of Appeals applied its own conflict-of-laws principles—relying on the Restatement (Second) of Conflicts § 196—to conclude that while there was a presumption that the law of the state where services were rendered applies, the presumption could be overcome by showing that another state had a "more significant relationship to the transaction and the parties." *Id.* at 631. Where all parties were residents of West Virginia, the employment contract was made and partially performed in West Virginia, and the plaintiffs were only in Kentucky for the duration of the work, the court concluded that the presumption was overcome and that West Virginia "had the more significant connection to the employment relationship." *Id.* California's choice-of-law test, of course, does not utilize the "more significant relationship" test for choice-of-law questions in the wage and hour context. *See Sullivan*, 254 P.3d at 244. *New* is therefore unpersuasive here. We discuss the Washington Supreme Court case below.

law." *Id.* at 242, 246 (citations, internal quotation marks, and alterations omitted).

Moreover, the cases on which defendants and the dissent rely are, in large part, both factually and procedurally inapposite to the circumstances of this case.[12] For example, defendants rely heavily on *Bostain v. Food Exp., Inc.*, 153 P.3d 846, 851 (Wash. 2007) to argue that Washington has an interest in applying its wage laws extraterritorially. As the California Supreme Court held in *Sullivan*, however, *Bostain* "says nothing about a case such as this"—that is, a case which (1) involves work performed entirely in one state, and (2) presents an unavoidable conflict-of-laws issue. 254 P.3d at 243. In *Bostain*, by contrast, either Washington law applied to the work performed in both Washington and other states, or else no state's law applied. *Id.* at 243, 246. Significantly, *Bostain* interpreted an overtime statute that specifically delineated the circumstances under which its provisions would apply to interstate truck drivers; as the Washington Supreme Court noted, interstate truck drivers *by definition* perform some of their work out of state. 153 P.3d at 848–51. The statute at issue in *Bostain* did "not limit the requirement for overtime pay to hours worked" within the state's borders. *Id.* at 851. Similarly, here, defendants point

[12] Defendants' repeated citation to *Gonyou v. Tri-Wire Eng'g Sols., Inc.*, 717 F. Supp. 2d 152 (D. Mass. 2010) is illustrative. In *Gonyou*, a Massachusetts resident employee of a Massachusetts employer worked largely, although not entirely, in Connecticut. *Id.* at 153–54. The defendant filed a motion to dismiss on the ground that the Massachusetts overtime statute did not apply to work performed in Connecticut. *Id.* at 154–55. The court denied the motion but emphasized the limited nature of its ruling: "As is eminently clear, this is a motion to dismiss and this ruling is strictly limited to the facts and circumstances of this case and this motion." *Id.* at 155.

to no state statutes potentially applicable to the Arizona and Florida class members that limit their application to work performed within the state.

**3.**

Although the existence of a "true" conflict is questionable, we need not decide whether a true conflict exists, as the third step of California's governmental interest test yields a clear answer: the laws of Arizona and Florida should apply to the work performed wholly within their respective boundaries.[13] *See Sullivan*, 254 F.3d at 247. As the California Supreme Court has explained the step three inquiry:

> [T]he court does not "weigh" the conflicting governmental interests in the sense of determining which conflicting law manifested the "better" or the "worthier"

[13] Furthermore, in many of the cases cited by the dissent to demonstrate that some states have asserted an interest in applying their wage and hour laws outside of their borders, courts have looked closely at where the relevant work is performed. *See e.g.*, *Pierre v. Gts Holdings*, Inc., No. 15 CIV. 143 (PAC), 2015 WL 7736552, at *3–*4 (S.D.N.Y. Nov. 30, 2015) (concluding that New York labor laws apply because, among other things, the majority of the plaintiff's chauffeured rides were conducted in New York); *Baxi v. Ennis Knupp & Assocs.*, *Inc*., No. 10-CV-6346, 2011 WL 3898034, at *14 (N.D. Ill. Sept. 2, 2011) (denying a motion to dismiss Illinois labor law claims because the plaintiff, a foreign resident, performed some work in Illinois); *Friedrich v. U.S. Computer Sys., Inc.*, No. CIV. A. 90-1615, 1996 WL 32888, at *8 (E.D. Pa. Jan. 22, 1996) (concluding that a Pennsylvania labor law applies to the plaintiffs because the jury found the plaintiffs were "based in Pennsylvania," even if they were not residents of the state); *Dow*, 989 N.E.2d at 914 (concluding that Massachusetts law applied because, given the nature of the plaintiff's work, the work "sensibly may be viewed as having 'occurred' in Massachusetts").

> social policy on the specific issue. An attempted balancing of conflicting state policies in that sense is difficult to justify in the context of a federal system in which, within constitutional limits, states are empowered to mold their policies as they wish. Instead, the process can accurately be described as a problem of *allocating domains of law-making power in multi-state contexts*—by determining the appropriate limitations on the reach of state policies—as distinguished from evaluating the wisdom of those policies. Emphasis is placed on the appropriate scope of conflicting state policies rather than on the "quality" of those policies.

*McCann*, 225 P.3d at 533–34 (alterations and citations omitted) (emphasis added).

As discussed above, in *Mazza*, we faithfully applied the principle under California's choice-of-law jurisprudence that "a jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders." *Mazza*, 666 F.3d at 592 (internal quotation marks omitted) (quoting *McCann*, 225 P.3d at 534). We thus had no trouble concluding at step three that "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place." *Id.* at 594. Notably, we reached this conclusion *without* specifically inquiring into the interests potentially expressed by any state's statutory language or case law. Rather, our conclusion was dictated by the principle, discussed above, that a jurisdiction ordinarily has the predominant interest in regulating conduct within its own borders. *Id.* at 591–92 (first citing *State Farm Mut. Auto.*

*Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003); and then citing *McCann*, 225 P.3d at 534).

Moreover, in *Sullivan*, the court concluded that to subordinate California's ability to apply its own wage laws to work performed within the state would "unquestionably" cause greater impairment to California than to the states that might seek to apply their wage laws to work performed by their residents within California. 254 P.3d at 247. As described previously, while this holding was *influenced* by the absence of an expression of interest by Arizona or Colorado in applying their laws extraterritorially, it did not rise or fall on that ground. *See id.* at 244–47. And although defendants point to a handful of cases that have entertained the potential application of one state's wage laws to work performed in another state, they have not pointed to a single state with a potentially-applicable statute that expresses a clear interest in applying to work performed wholly outside the state.

But even *if* defendants were able to identify any states that had unambiguously expressed an interest in applying their wage laws to work performed entirely in another state, *Sullivan* strongly militates against concluding that such an expression of interest would be adequate to overcome the principle that the state in which the conduct at issue occurs has the "predominant interest" in applying their own law. *See Mazza*, 666 F.3d at 592–94; *Sullivan*, 254 P.3d at 245–47. Forcing Arizona or Florida to allow the application of other states' wage laws in this case would be just as destructive to the balance Arizona and Florida have struck between protecting workers and fostering a hospitable business environment within their states as allowing the application of Colorado or Arizona law in *Sullivan* would have been to the balance California struck between those

same interests. *See Sullivan*, 254 P.3d at 246–47. The district court fundamentally misunderstood the proper application of California's choice-of-law principles—which, when correctly applied, indicate that Arizona law should govern the Arizona class, and Florida law the Florida class.

**C.**

We next address whether the district court erred in refusing to certify a Rule 23(b)(2) class for unpaid work at defendants' training facilities in Arizona and Florida on the sole basis that choice-of-law issues undermined "cohesiveness" and therefore made injunctive and declaratory relief inappropriate. Because the district court's errors in its choice-of-law analysis relating to the proposed Arizona and Florida Rule 23(b)(3) classes apply equally to its refusal to certify the proposed Rule 23(b)(2) class, we also reverse the denial of the (b)(2) class.

We further hold that the district court erred in imposing a "cohesiveness" requirement for the proposed Rule 23(b)(2) class. Although we have never explicitly addressed whether "cohesiveness" is required under Rule 23(b)(2), courts that have imposed such a test treat it similarly to Rule 23(b)(3)'s predominance inquiry[14]—something we have previously rejected in no uncertain terms. *See Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) ("[W]ith respect to 23(b)(2) in particular, the government's dogged focus on the factual differences among the class members appears to

[14] The similarity between "cohesiveness" and predominance is perhaps unsurprising, given that the Supreme Court described the predominance inquiry under 23(b)(3) as testing whether a class is "sufficiently *cohesive* to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (emphasis added).

demonstrate a fundamental misunderstanding of the rule. Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under 23(b)(2)."); *see also* 2 Newberg on Class Actions § 4:34 (5th ed. 2012) (describing similarity between predominance under Rule 23(b)(3) and "cohesiveness" under Rule 23(b)(2) in courts that have adopted it). We therefore remand for the district court to consider anew whether to certify the proposed Rule 23(b)(2) class.[15]

**III.**

Having addressed the impact of choice-of-law questions, we turn to the issue next up at bat: whether the district court erred in concluding that plaintiffs could meet the predominance requirement for the proposed California, Florida, and Arizona (b)(3) classes through a combination of representative evidence and application of the "continuous workday" rule.

Rule 23(b)(3)'s predominance requirement requires courts to ask "whether the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting 2 Newberg on Class Actions § 4:49 (5th ed. 2012)). A proposed (b)(3) class may be certified as long as "one or more of the central issues in the action are common to the class and can be said to predominate . . . even though other important matters will have to be tried separately, such

[15] While the parties advanced numerous arguments regarding (b)(2) certification in the district court, and advance similar arguments—along with a few new ones—before us, we decline to pass on those other issues in the first instance. *See Stockwell*, 749 F.3d at 1113, 1116–17; *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1094–95 (9th Cir. 2014).

as damages or some affirmative defenses peculiar to some individual class members." *Id.* (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778 (3d ed. 2005)).

"[P]redominance in employment cases is rarely defeated on the grounds of differences among employees so long as liability arises from a common practice or policy of an employer." 7 Newberg on Class Actions § 23:33 (5th ed. 2012). Although the existence of blanket corporate policies is not a guarantee that predominance will be satisfied, such policies "often bear heavily on questions of predominance and superiority." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009).

Whether the district court was correct in concluding that plaintiffs had satisfied the predominance requirement hinges on the application of two longstanding wage-and-hour doctrines to this case: first, the burden-shifting framework initially set forth in the Supreme Court's seminal decision in *Anderson v. Mt. Clemens*, 328 U.S. 680 (1946) and recently expanded upon in *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016); and second, the so-called "continuous workday" rule. We address each of these doctrines and their application to this case in turn.

**A.**

In *Mt. Clemens*, the Supreme Court acknowledged the difficult bind that employees frequently confronted when seeking to bring wage-and-hour claims against their employers: if their employers had failed to maintain proper timekeeping records, proving the hours of uncompensated work often posed "an impossible hurdle for the employee." 328 U.S. at 687. *Mt. Clemens* held that such a catch-22 was

not in line with "the remedial nature of [the FLSA][16] and the great public policy which it embodies." *Id.* After all, "[s]uch a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation." *Id.*

To address this problem, *Mt. Clemens* established its landmark burden-shifting framework for actions in which the employer has kept inaccurate or inadequate records: if an employee "proves that he has in fact performed work for which he was improperly compensated" and "produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference," then the burden "shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id*. at 687–88. If the employer does not rebut the employee's evidence, damages may then be awarded to the employee, "even though the result be only approximate." *Id.* at 688.

*Mt. Clemens* explicitly rejected the notion that allowing approximate damages in such situations would be unfair due to its speculative and imprecise nature or because employers sometimes make good-faith mistakes over what constitutes compensable "work":

[16] Although *Mt. Clemens* was decided under the FLSA, its holding has been consistently applied in the context of state wage-and-hour claims as well. *See, e.g.*, *Tyson*, 136 S. Ct. at 1045–48; *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1140 (9th Cir. 2016); *Hernandez v. Mendoza*, 245 Cal. Rptr. 36, 39–40 (Cal. Ct. App. 1988) (applying *Mt. Clemens* to claims under California wage and hour law).

> The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [statutory] requirements . . . And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances . . . In such a case it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.

*Id.* (internal quotation marks and citation omitted).

Seventy years after *Mt. Clemens* addressed the use of representative evidence at the trial stage to show damages, *Tyson* extended *Mt. Clemens*' holding to answer two important questions: whether representative evidence may be used at the class certification stage, and whether representative evidence may also be used to establish liability in addition to damages. In *Tyson*, employees who worked in more than 400 jobs across three departments at a meat processing plant sued under the FLSA and an Iowa wage law, alleging that Tyson had not paid them overtime for time they spent donning and doffing protective gear; the employees also sought certification of a Rule 23 class and a FLSA collective action. 136 S. Ct. at 1041–42.

The district court certified the class and collective actions, rejecting Tyson's arguments that the claims were

inappropriate for resolution on a classwide and collective basis due to the dissimilarity in the types of protective gear worn and the variations in time spent donning and doffing that gear. *Id.* at 1042–43. Because Tyson had not kept records of the donning and doffing time, plaintiffs relied on representative evidence to demonstrate both liability[17] and damages: employee testimony, video recordings, and—most significantly—an expert study that computed an estimated amount of time spent donning and doffing for each of the three departments based on hundreds of video observations. *Id.* at 1043. Although the expert estimated that the time spent donning and doffing was 18 minutes per day for two of the departments and 21.25 minutes for the other, *id.*, the survey data showed a great deal of variation in how long it took individual employees to don and doff. *Id.* at 1055 (Thomas, J., dissenting). Specifically, the time spent donning ranged from around thirty seconds to more than ten minutes, and the time doffing varied from under two minutes to over nine minutes. *Id.* After a jury verdict in the employees' favor (albeit one that awarded less than half of the damages recommended by the employees' expert based on the survey data), Tyson moved to decertify the class and set aside the jury verdict, arguing that this variance made class and collective certification inappropriate. *Id.* at 1044–

[17] Because the employees brought only overtime claims (as opposed to minimum wage or other wage claims), "each employee had to show he or she worked more than 40 hours a week, inclusive of time spent donning and doffing, in order to recover." *Tyson*, 136 S. Ct. at 1043. That the majority permitted the use of representative evidence to establish "an otherwise uncertain element of liability"—i.e., whether class members worked more than 40 hours per week—was one of the key bases for Justice Thomas's vigorous dissent. *See id.* at 1057–59 (Thomas, J., dissenting).

45. The district court denied the motion, and the Eighth Circuit affirmed. *Id.*

Tyson sought certiorari on the grounds that using representative evidence "manufactures predominance by assuming away the very differences that make the case inappropriate for classwide resolution," "absolves each employee of the responsibility to prove personal injury," and strips the employer of their ability to "litigate its defenses to individual claims." *Id.* at 1046. Rejecting these arguments, the Supreme Court affirmed the class and collective certifications. *Id.* at 1046–47. Because of Tyson's dereliction of their recordkeeping duties, the employees were entitled to "introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records." *Id.* at 1047. The Court held that if the representative sample introduced were admissible and "could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action." *Id.* at 1046–47.

Stated another way, *Tyson* concluded that even where "reasonable minds may differ" about whether representative evidence is sufficiently probative of the requirements for liability for a particular cause of action—in *Tyson*, whether it was probative of the "time actually worked by each employee"—that question is to be resolved by the jury, *not* at the class certification stage. *Id.* at 1049 ("The District Court could have denied class certification on this ground [whether the representative evidence was "probative as to the time actually worked by each employee"] only if it concluded that *no reasonable juror* could have believed that the employees spent roughly equal time donning and doffing.") (emphasis added). If the proffered representative

evidence, however, were "statistically inadequate or based on implausible assumptions," it "could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked." *Id.* at 1048–49. But where the evidence is admissible—for expert evidence, using the *Daubert* standard—then the "no reasonable juror" standard at the class certification stage applies. *See id.* at 1049.

**B.**

Having established the parameters of when representative evidence may be used at the class certification stage, we address the second significant wage-and-hour doctrine relevant to this case: the "continuous workday" rule. The rule was first promulgated by the Department of Labor (DOL) consistent with the Supreme Court's decisions interpreting the FLSA prior to the enactment of the Portal-to-Portal Act[18] in 1947. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 27–28 (2005). It presumes that once the beginning of the

[18] In response to what Congress perceived as excessively expansive judicial interpretations of what constitutes compensable work under the FLSA, *IBP*, 546 U.S. at 27–28, it passed the Portal-to-Portal Act to exempt certain activities as compensable under FLSA:

> "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 61 Stat. 86–87 (codified at 29 U.S.C. § 254(a)).

workday is triggered, an employee performs compensable work throughout the rest of the day until the employee completes their last principal activity (or the last activity which is "integral and indispensable" to the employee's principal activities)—whether or not the employee actually engages in work throughout that entire period. *See id.* at 28, 32–37; *see also Alvarez v. IBP, Inc.*, 339 F.3d 894, 907 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005) (holding that under the continuous workday rule, "work time [is] continuous, not the sum of discrete periods").

Of course, this rule raises inevitable questions: when does the workday begin, and when does it end? The DOL defines the "workday" to generally mean "the period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6(b). The Supreme Court expanded upon this definition, interpreting "principal activity or activities" to also include "all activities which are an integral and indispensable part of the principal activities." *IBP*, 546 U.S. at 29–30 (internal quotation marks and citation omitted). Thus, any activity which is "integral and indispensable" to principal activities, even if performed outside of a scheduled shift, triggers the beginning of the "workday." *Id.* at 31–37. "Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance," 29 C.F.R. § 790.8(c), such as knife-sharpening performed outside of a scheduled shift by butchers at a meatpacking plant. *Mitchell v. King Packing Co.*, 350 U.S. 260, 261–63 (1956).

**C.**

With all of that in mind, we turn to how these two doctrines impact this case, and more specifically, whether the district court was correct in concluding that the

combination of *Tyson* and the continuous workday rule enabled plaintiffs to show that they meet Rule 23(b)(3)'s predominance requirement. Defendants contend that the district court erred in holding that plaintiffs had demonstrated predominance for two main reasons: (1) because the Main Survey asked only about arrival and departure times at the ballpark and *not* about what activities the players actually performed while at the ballpark, plaintiffs cannot rely on the continuous workday theory because there is no way to determine the beginning or end of the "workday," and (2) the Main Survey revealed significant variations in players' arrival and departure times, even among players employed by the same MLB franchise.

This task requires us to address the proposed Arizona and Florida classes separately from the California class. As an initial matter, however, we note that despite defendants' repeated suggestions to the contrary, the representative evidence offered by plaintiffs was not limited to just the Main Survey, nor are observational studies the only type of evidence permitted to fill in evidentiary gaps under *Tyson*. We reject defendants' erroneous view of the record and their cramped reading of *Tyson*.

**1.**

As to the Arizona and Florida classes, we easily affirm the district court's determination. Recall that these two classes cover time spent participating in spring training, extended spring training, and the instructional leagues—periods during which virtually all players are completely unpaid for their participation.[19] Moreover, these classes do

[19] Payroll data produced by defendants reveals that of the 21,211 players who participated in spring training between the 2009 and 2015

not bring overtime claims, but rather allege minimum wage violations.[20] Therefore—as the district court correctly held—liability can be established simply by showing that the class members performed *any* compensable work.[21] That is easily resolved on a classwide basis by answering two questions: (1) are the players employees of defendants, and (2) do the minor league team activities during these periods constitute compensable work under the laws of either Arizona or Florida? We hold that these two "common, aggregation-enabling issues in the case are more prevalent [and] important than the non-common, aggregation-defeating, individual issues," therefore making certification appropriate. *Tyson*, 136 S. Ct. at 1045 (quoting 2 Newberg on Class Actions § 4:49 (5th ed. 2012)).

Defendants do not seriously contest that their policy is to deny players compensation during spring training, extended spring training, and the instructional leagues—nor could they credibly do so, given that the MLB's own mandatory

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seasons, only 11 were paid a salary. Put differently, a mere .005% of players received a salary during spring training, and those 11 players may be identified through payroll records and appropriately excluded from the class. Likewise, a small number of MLB franchises pay players during extended spring training, but these players are identifiable through payroll records and may either be excluded from the class or, potentially, placed into a subclass.

[20] The Arizona and Florida classes also bring quantum meruit claims, and the Arizona class alleges recordkeeping violations, but the parties do not dispute that these claims are irrelevant to this portion of our predominance analysis.

[21] We also note that the Arizona class's claims are bolstered by the fact that under Arizona law, failure to keep appropriate records of hours worked "raise[s] a rebuttable presumption that the employer did not pay the required minimum wage rate." Ariz. Rev. Stat. Ann. § 23-364.

contract "obligates Player[s] to perform professional services on a calendar year basis, regardless of the fact that salary payments are to be made only during the actual championship playing season." And as we have long held, such uniform corporate policies "carry great weight for certification purposes." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d at 958. This is not the "rare[]" case where predominance is defeated despite the existence of an employer's "common practice or policy." 7 Newberg on Class Actions § 23:33 (5th ed. 2012).

We also agree with the district court that as to these classes, many of defendants' protests go to damages, not liability. Damages may well vary, and may require individualized calculations. But "the rule is clear: the need for individual damages calculations does not, alone, defeat class certification." *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016); *see Tyson*, 136 S. Ct. at 1045 (holding that where "one or more of the central issues in the action are common to the class and can be said to predominate," certification may be appropriate "even though other important matters will have to be tried separately, such as damages." (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778 (3d ed. 2005))).

We do not, however, mean to minimize defendants' criticisms of the Main Survey. Indeed, we agree that there are a number of legitimate questions about the persuasiveness of the Main Survey, especially if it were the *only* representative evidence submitted in support of certification. But as we have mentioned, the Main Survey was but one piece of the plaintiffs' representative evidence—evidence that also included hundreds of internal

team schedules and public game schedules, payroll data, and the testimony of both players and league officials.

At minimum, if the players are "employees" under either Arizona or Florida law and defendants are unable to prove that any affirmative defenses apply, the team schedules will serve to conclusively demonstrate that the players spent time working for which they were uncompensated. *See* Ariz. Rev. Stat. Ann. § 23-362; Ariz. Admin. Code. § R20-5-1202(19) ("'Hours worked' means all hours for which an employee covered under the Act is employed and required to give to the employer, including all time during which an employee is on duty *or at a prescribed work place* and all time the employee is suffered or permitted to work."); 29 C.F.R. § 778.223 ("As a general rule the term 'hours worked' will include: (a) All time during which an employee is required to be on duty *or to be on the employer's premises or at a prescribed workplace* and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so.").[22] Moreover, if plaintiffs can persuade a jury that their workday began at a particular time—either because they were required to report at that time,[23] or because they arrived of their own volition but

[22] We rely on interpretations of the FLSA here because Florida's constitution provides that "case law, administrative interpretations, and other guiding standards developed under the federal FLSA shall guide the construction of [the constitutional amendment providing for a minimum wage] and any implementing statutes or regulations." Fla. Const. art. X, § 24.

[23] *See* 29 C.F.R. § 790.6 ("If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his 'workday' commences at the time he reports there for work in accordance with the employer's requirement.").

engaged in work activities upon arriving (i.e., were "permitted" to work)—the continuous workday doctrine eliminates the need for plaintiffs to prove which activities they engaged in throughout the day.[24] *See IBP*, 546 U.S. at 28, 32–37.

Defendants should not "be heard to complain that the damages lack the exactness and precision of measurement that would be possible had [they] kept records in accordance with the [statutory] requirements," even if their "lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work." *Mt. Clemens*, 328 U.S. at 688. "Having received the benefits of such work, [defendants] cannot object to the payment for the work on the most accurate basis possible under the circumstances." *Id.*

**2.**

We next address whether the district court was correct to hold that predominance had been met for the California class. Given the differences in the types of claims brought by the California class as compared to the Arizona and Florida classes, certification of the California class is more complex and requires additional analysis. Unlike the Arizona and Florida classes, the California class brought claims relating to work performed during the championship season—a time when the players *do* get paid, albeit not much. As a result, in order to prove liability on their overtime claims, the California class must show that its

[24] A jury may also decide that for baseball players, activities like hitting practice with coaches and supervised weightlifting—much like knife-sharpening by butchers at a meatpacking plant— are "integral and indispensable" to the principal activity of playing baseball and therefore trigger the start of the "workday." *See Mitchell*, 350 U.S. at 261–63.

members worked more than 8 hours in a day, more than 40 hours in a week, and/or worked 7 days in a workweek. *See* Cal. Labor Code § 510; *Mendoza v. Nordstrom, Inc.*, 393 P.3d 375, 381–82 (Cal. 2017). Likewise, to establish liability on their minimum wage claims, the California class must demonstrate that they worked hours for which they were not paid at least minimum wage—but whereas the Arizona and Florida classes can demonstrate liability simply by showing they worked any hours, the California class's burden is made more challenging by the fact that the players receive some pay. *See* Cal. Labor Code §§ 1182 et seq; *Armenta v. Osmose, Inc.*, 37 Cal. Rptr. 3d 460, 466–68 (Cal. Ct. App. 2005). Nonetheless, a number of considerations lead us to affirm the district court's determination.

First, as with defendants' uniform policy of not paying players for participation outside of the championship season, defendants do not credibly dispute that their policy is to never pay overtime and to pay a fixed salary, regardless of the actual number of hours worked. We reiterate that common corporate policies like this "carry great weight for certification purposes," *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d at 958, and that predominance is "rarely" defeated in cases where such uniform policies exist. *See* 7 Newberg on Class Actions § 23:33 (5th ed. 2012).

Second, the team schedules alone—independent of the Main Survey or any other evidence—may suffice to show overtime liability. As the district court noted, plaintiffs' expert testified that approximately 65–85% of California League players had at least one workweek with games on all seven days, and that nearly half of all workweeks included games on all seven days. For those workweeks, the players

would be entitled to overtime pay for their work on the seventh day of the workweek. *See* Cal. Labor Code § 510.

Third, and most significantly, we are persuaded that under *Tyson*, the representative evidence plaintiffs offered was adequate to meet their burden at this stage. As we observed in the preceding section, defendants do identify multiple legitimate criticisms of the Main Survey, and it is certainly possible that a jury may not find the Main Survey—even in combination with all of plaintiffs' other evidence—adequate proof of liability (or at least not to the extent plaintiffs allege). In particular, a jury may be persuaded by defendants' arguments that players did not begin compensable work upon arriving at the ballpark or that players stopped engaging in compensable work long before they left the ballpark, such that the Main Survey's estimated arrival and departure times are insufficient to clear the preponderance hurdle. As we explain below, however, *Tyson* counsels that such criticisms do not doom certification here *unless* no reasonable jury could conclude that the combination of the Main Survey and plaintiffs' other representative evidence was probative of the amount of time players actually spent performing compensable work. *See Tyson*, 136 S. Ct. at 1046–49. And while defendants correctly point out that the Main Survey revealed meaningful variations in players' arrival and departure times, the same was true of the employees' donning and doffing times in *Tyson*—yet such variation did not preclude certification there. *See id.* at 1043; *id.* at 1055 (Thomas, J., dissenting).

Because defendants do not challenge the district court's ruling on admissibility under *Daubert*, the defects they have identified with the Main Survey could only have defeated certification upon a conclusion that all of the representative evidence offered—the Main Survey, schedules, testimony,

and the like—could not have "sustained a reasonable jury finding as to hours worked in each employee's individual action." *See Tyson*, 136 S. Ct. at 1046–47. As in *Tyson*, the district court "made no such finding," *id.* at 1049, and indeed found the opposite:

> Plaintiffs will be able to use the survey data in combination with other evidence that may be sufficient to allow a jury to draw conclusions based on reasonable inference as to when players were required to be at the ballpark and how long after games they were required to remain at the ballpark. . . . Thus, as in *Tyson Foods*, it appears that representative evidence can be combined with actual records of time spent engaged in the various activities to derive a reasonable estimate of the amount of time worked by class members.

We are then left to ask whether "the record here provides [a] basis for [us] to second-guess that conclusion." *Id.*

After reviewing the record, we are satisfied that we should not disturb the district court's determination, in part due to California's expansive definition of "employ" and "hours worked."[25] Under California law, to "employ"

[25] Unlike Arizona and Florida law—the former of which is silent on the incorporation of FLSA doctrines, and the latter of which expressly incorporates them—we are not persuaded that the continuous workday rule should apply to the California class. We view California's definition of "hours worked" as more expansive and more employee-friendly than under the FLSA, even with the incorporation of the continuous workday rule. The California Supreme Court has "cautioned against confounding federal and state labor law," and has consistently held that "absent

means "to engage, suffer, *or permit* to work." Cal. Code Regs. tit. 8, §§ 11040(2)(E), 11100(2)(E) (emphasis added).[26] "Hours worked" means "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." Cal. Code Regs. tit. 8, §§ 11040(2)(K), 11100(2)(H). Inexplicably, however, defendants claim that under California law, "time spent engaging in activities that are not required by, or under the control of, an employer is not compensable and does not begin or extend a workday." This is a tortured and wholly unsupported reading of the law, and is manifestly contrary to one of the cases defendants themselves cite in support of their argument. *See Morillion v. Royal Packing Co.*, 995 P.2d 139, 143 (Cal. 2000) ("[T]he two phrases—'time during which an employee is subject to the control of an employer' and 'time the employee is suffered or permitted to work, whether or not required to do so'—can also be interpreted as independent factors, each of which defines whether certain time spent is compensable as 'hours worked.'") (citation omitted).

convincing evidence of the [California agency's] intent to adopt the federal standard for determining whether time is compensable under state law, we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication." *Troester v. Starbucks Corp.*, 421 P.3d 1114, 1119 (Cal. 2018) (alterations, citations, and internal quotation marks omitted).

[26] The California Industrial Welfare Commission's wage orders "have the force of law." *Alvarado v. Dart Container Corp. of Cal.*, 411 P.3d 528, 532 (Cal. 2018). We need not decide today which wage order applies to minor league players, as all of the most relevant orders define "employ" and "hours worked" the same way.

Indeed, *Morillion* counsels that "hours worked" includes all time the employer "permit[s]" an employee to work, even if the work is *not* required and the employee is *not* under the employer's control. *See id.* Thus, a player who arrives early or stays late at the ballpark of their own volition and performs "work" activities during that time is still owed compensation because the player was "permitted" to work, despite the work not being required.

Likewise, under *Morillion*, if players were expected to arrive or depart at a particular time—whether that requirement was de facto or official—it is immaterial what activities the players actually engaged in while at the ballpark. Even if the players spent their time at the ballpark doing things like eating or showering, they were still under their employer's control and unable "to use the time effectively for their own purposes," and thus were owed compensation. *See id.* at 146. Indeed, *Morillion* explicitly rejected an analogous argument by the employer in that case:

> We reject Royal's contention that plaintiffs were not under its control during the required bus ride because they could read on the bus, or perform other personal activities. Permitting plaintiffs to engage in limited activities such as reading or sleeping on the bus does not allow them to use the time effectively for their own purposes . . . Plaintiffs were foreclosed from numerous activities in which they might otherwise engage if they were permitted to travel to the fields by their own transportation. Allowing plaintiffs the circumscribed activities of reading or sleeping does not affect, much less eliminate, the control Royal exercises by

> requiring them to travel on its buses and by prohibiting them from effectively using their travel time for their own purposes. Similarly . . . listening to music and drinking coffee while working in an office setting can also be characterized as personal activities, which would not otherwise render the time working noncompensable.

*Id.* (alterations, internal quotation marks, and citations omitted). Thus, if plaintiffs use their representative evidence—especially the Main Survey and the testimony of players and league officials—to persuade a jury that they were required to be at the ballpark at particular times, they need not show how the players spent that time.

The fourth and final consideration weighing in favor of affirming the district court's determination is our standard of review. Abuse of discretion is always a relatively deferential standard, but when we review a grant of class certification, "we accord the district court noticeably more deference than when we review a denial." *Abdullah*, 731 F.3d at 956 (citation omitted). Were we to review de novo, this would likely be a closer call. But as they say, tie goes to the runner—and, under our deferential standard, to the district court.

**D.**

Finally, defendants, citing to *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011), contend that the district court was required to "rigorously analyze" the Main Survey, rather than evaluating its admissibility under *Daubert* and its appropriateness for meeting class certification requirements under *Tyson*. *Tyson* requires that we reject this argument. There, the Court explicitly distinguished the use of

representative evidence to establish hours worked in wage and hour claims from the use of representative evidence in cases like *Wal-Mart*. *Tyson*, 136 S. Ct. at 1048. Specifically—as we have explained—for wage and hour cases where the employer has failed to keep proper records, *Tyson* holds that once a district court has found expert evidence to be admissible, it may only deny its use to meet the requirements of Rule 23 certification if "no reasonable juror" could find it probative of whether an element of liability was met. *Id.* at 1049. Given the similarities between this case and *Tyson*, the rule set forward in *Tyson* controls, and "[defendants'] reliance on *Wal-Mart* is misplaced."[27] *Id.* (citation omitted).

**IV.**

We next address whether the district court properly certified the FLSA collective action.

FLSA permits employees to bring lawsuits on behalf of "themselves and other employees similarly situated." 29 U.S.C. § 216(b). We recently delineated the appropriate standard for FLSA collective certification in *Campbell v. City of Los Angeles*, 903 F.3d 1090 (9th Cir. 2018). As we explained in *Campbell*, "there is no established definition of the FLSA's 'similarly situated' requirement, nor is there an established test for enforcing it." *Id.* at 1111 (citing *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001)). In *Campbell*, we rejected both the minority approach to FLSA collective certification—which treats a FLSA collective as analogous to a Rule 23(b)(3) class—and

[27] *Tyson* expressly cautioned that this rule should be read narrowly and not assumed to apply outside of the wage and hour context. 136 S. Ct. at 1049.

the majority "ad hoc" approach. *Id.* at 1111–1117. The former approach, we observed, is inconsistent with the statute itself, as well as the choice of Congress and the Advisory Committee on Rules to distinguish FLSA collectives from Rule 23 class actions. *Id.* at 1111–1113. And while the latter approach—the so-called ad hoc approach—is a "significant improvement" over the minority approach, it has two major flaws that led us to decline to adopt it. *Id.* at 1113–1116. First, this approach inappropriately "focus[es] on differences rather than similarities among the party plaintiffs," leading district courts to "treat[] difference as disqualifying," rather than "treat[ing] the requisite kind of similarity as the basis for allowing partially distinct cases to proceed together." *Id.* at 1117. Second, because the ad hoc approach allows district courts to weigh "fairness and procedural considerations," it "invites courts to import, through a back door, requirements with no application to the FLSA," such as Rule 23's predominance, adequacy, and superiority requirements. *Id.* at 1115.

Because of the flaws in the two predominant approaches to FLSA collective certification, we instead developed our own standard: "[p]arty plaintiffs are similarly situated, and may proceed in a collective, to the extent they share a similar issue of law or fact material to the disposition of their FLSA claims." *Id.* at 1117. Significantly, as long as the proposed collective's "factual or legal similarities are material to the resolution of their case, dissimilarities in other respects should not defeat collective treatment." *Id.* at 1114 (emphasis omitted).

The district court here did not have the benefit of our opinion in *Campbell*, and instead followed the vast majority of district courts in this circuit by applying the ad hoc

approach. *See, e.g.*, *Lewis v. Wells Fargo & Co.*, 669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009) ("Although various approaches have been taken to determine whether plaintiffs are 'similarly situated,' district courts in this circuit have used the *ad hoc,* two-tiered approach."). While legally incorrect, we conclude that the district court's erroneous use of the ad hoc approach was harmless under the circumstances,[28] and we affirm the collective's certification.

The district court found that plaintiffs met their burden of demonstrating they were "similarly situated," reasoning:

> First, by eliminating the winter conditioning claims and pursuing on a classwide basis only claims that are based on the continuous workday doctrine, Plaintiffs have significantly reduced the need to engage in individualized inquiries relating to the type of work performed. Second, the Court is now persuaded that the payroll records maintained by Defendants will allow any variations in compensation to be analyzed without burdensome individualized inquiries. This is especially true as to the spring training, extended spring training and instructional league claims because players generally were not compensated for their participation in these activities and the small fraction of players who *did* receive compensation for

[28] As we explained in *Campbell*, the ad hoc approach imposes a higher bar for certification than the FLSA requires. *See Campbell*, 903 F.3d at 1114–1116. Thus, if the collective was appropriately certified under the more stringent ad hoc approach, *a fortiori* the collective would be appropriately certified under *Campbell's* more lenient approach to "similarly situated." *See id.*

> these activities can be identified using payroll records maintained by Defendants. Third, as discussed above, the Court finds that the defenses asserted by Defendants to the FLSA present common questions that are not likely to be overwhelmed by the need to conduct individualized inquiries. Finally, the possibility that the Court will be required to apply the laws of numerous states (or at a minimum, conduct numerous choice of law inquiries) is not present as to the FLSA class, which will require the Court to apply only federal wage and hour law.

Defendants' arguments in support of reversal echo those they make in relation to the Rule 23(b)(3) classes, and we reject them for largely the same reasons. *Cf. Tyson*, 136 S. Ct. at 1036 ("For purposes of this case . . . if certification of respondents' class action under [Rule 23] was proper, certification of the collective action was proper as well."). We therefore expand on our earlier reasoning only briefly.

Because the FLSA collective covers work performed during spring training, extended spring training, and the instructional leagues—that is, work for which the players received no pay—we affirm the certification of the collective for that work. Specifically, for these time periods, two common legal questions drive the litigation: are the players employees, and do the activities they perform during those times constitute compensable work? As nearly all players are unpaid during these time periods, if the answers to those two questions are resolved in plaintiffs' favor, liability may be established by showing that the players performed *any* work.

We also affirm the district court's certification of the FLSA collective as to plaintiffs' overtime claims, although this holding requires additional explanation. Critical to our decision is that plaintiffs allege a single, FLSA-violating policy—the failure to pay overtime under any circumstances—and argue a common theory of defendants' statutory violations: that defendants "suffer or permit" plaintiffs to perform compensable work before and after scheduled practice and game times. These are "similar issue[s] of law or fact material to the disposition of their FLSA claims," thus making plaintiffs "similarly situated." *Campbell*, 903 F.3d at 1117. And as previously discussed, we believe a reasonable jury could find that all of plaintiffs' evidence—not just the Main Survey, but also the schedules, testimony, and payroll data—sustains a "just and reasonable inference" as to the hours players actually worked. *See Tyson*, 136 S. Ct. at 1046–47.

Specifically, there are several overlapping ways that plaintiffs may be able to rely on their representative evidence to persuade a jury that they have worked overtime hours for which they were not compensated. Under any of these scenarios, the continuous workday rule lends significant assistance to plaintiffs by eliminating the need for plaintiffs to prove exactly which activities they engaged in throughout the day. *See IBP*, 546 U.S. at 28, 32–37.

First, plaintiffs could potentially use their evidence—particularly the Main Survey, but also the testimony of players and league officials—to establish approximate times that they were *required* to arrive at and depart from the ballpark. This would obviate the need for plaintiffs to demonstrate which activities they engaged in upon arrival or prior to departure. *See* 29 C.F.R. § 790.6 ("If an employee is required to report at the actual place of performance of his

principal activity at a certain specific time, his 'workday' commences at the time he reports there for work in accordance with the employer's requirement."); 29 C.F.R. § 778.223 ("As a general rule the term 'hours worked' will include . . . [a]ll time during which an employee is required to be on duty *or to be on the employer's premises or at a prescribed workplace*.") (emphasis added).

Second, plaintiffs could rely on their representative evidence to demonstrate that before and after the times they were *required* to be at the ballpark, they still performed activities at the ballpark that were "an integral and indispensable part of [their] principal activities" and were therefore compensable. *See IBP*, 546 U.S. at 29–30. As mentioned previously, a jury may well determine that activities like batting practice or supervised weightlifting are to baseball players what knife-sharpening is to butchers at a meatpacking plant—that is, activities that are "integral and indispensable" to the principal activity of playing baseball. *See Mitchell*, 350 U.S. at 261–63. If so, such activities would trigger the start of the "workday" within the meaning of the FLSA. Plaintiffs may have somewhat of an uphill battle proceeding under this second theory on a collective-wide basis, but we are certainly not prepared to say that *no* reasonable jury could find defendants liable for overtime violations under this theory. *See Tyson*, 136 S. Ct. at 1048–49; *cf. Campbell*, 903 F.3d at 1117–1119 (explaining that post-discovery decertification motions should be evaluated under the summary judgment standard where "overlap exists between the availability of the collective action mechanism and the merits of the underlying claim").

Finally, if internal team schedules establish that plaintiffs had required team-related activities for forty hours

a week,[29] then plaintiffs can establish liability simply by showing that they performed *any* additional work beyond those officially-scheduled times. *Cf. Tyson*, 136 S. Ct. at 1036 (Thomas, J., dissenting) (explaining that in *Mt. Clemens*, the employer was "presumptively liable to all employees because they all claimed to work 40 hours per week. All additional uncompensated work was necessarily unpaid overtime.") (citation omitted).

Under any of these theories, damages will inevitably be individualized, at least to some extent. But just as the need for individualized damage calculations is insufficient to defeat Rule 23 certification, "[i]ndividual damages amounts cannot defeat collective treatment under the more forgiving standard" for FLSA collective certification. *See Campbell*, 903 F.3d at 1117 (citing *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013)). District courts are well-equipped to deal with issues of individualized calculations in the wage-and-hour context, and may use "any of the practices developed to deal with Rule 23 classes facing similar issues." *Id.* at 18 (citing *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014)).

[29] Given the internal team schedules in the record, this may be an easy task, particularly for spring training and extended spring training. For example, a spring training schedule for one of the San Francisco Giants' affiliates involved a workday beginning at 6:30 AM on the day of a 1:00 PM away game, with a 50 minute window provided for transit between the training facility and the ballpark. Assuming for the sake of argument that the 1:00 PM game lasted 2.5 hours and that the return trip to the training facility took the same amount of time—50 minutes—as the outgoing trip, that day alone entailed approximately 10 hours of work *if* the players left the training facility immediately upon their return (and based on the testimony in the record, that assumption seems implausible).

As is true in all FLSA cases, underlying our decision today is the background principle that "because the FLSA is a remedial statute, it must be interpreted broadly." *Lambert v. Ackerley*, 180 F.3d 997, 1003 (9th Cir. 1999) (en banc) (citing *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)). After all, the FLSA does not deal "with mere chattels or articles of trade but with the rights of those who toil." *Tennessee Coal*, 321 U.S. at 597. We are satisfied that certification of the collective is not only appropriate under our interpretation of "similarly situated," but also that it is consistent with "the great public policy" embodied by the FLSA. *Mt. Clemens*, 328 U.S. at 687.

**V.**

For the reasons explained above, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for further proceedings consistent with this opinion.

Plaintiffs-Appellants/Cross-Appellees shall recover their costs on appeal.

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IKUTA, Circuit Judge, dissenting:

The proposed classes here comprise employees who reside in at least 19 states, who are suing employers who are headquartered in at least 22 states, relating to work that took place in three different states. Determining whether to certify a class in these cases would (among other things) require identifying the relevant laws of each of the potentially affected jurisdictions, examining each jurisdiction's interest in the application of its own law to determine whether a true conflict exists, and then deciding which jurisdiction's interest would be most impaired if its

law were not applied. *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1202–03 (2011). No wonder the district court concluded that consideration of the plaintiffs' claims on a classwide basis would be overwhelmed by individualized choice-of-law inquiries.

Yet the majority feels empowered to cut through all these complexities by applying a simple rule of its devise: just apply the law of the jurisdiction where the work took place. Under this simple formula, each class can readily be certified without any fuss. One may admire the simplicity of this rule—but unfortunately, it is contrary to our framework for analyzing the intersection of class action and choice-of-law issues, overlooks the complexity of California's choice-of-law rules, and creates significant practical and logistical problems. I therefore dissent.

**I**

The plaintiffs in this case are current or former Minor League Baseball players who played during the period from 2009 to 2015. They sued Major League Baseball (MLB) (which they argue is a joint employer of all minor league players) and the MLB Clubs for which they worked for violations of federal and state labor laws, including the federal Fair Labor Standards Act, state minimum wage laws, and state overtime laws. The plaintiffs argue that they were entitled to the minimum wage and overtime rates established by California, Arizona, or Florida for work they performed in those states.

MLB is an unincorporated association headquartered in New York. The MLB Clubs, which are corporate entities that own MLB teams, are members of the MLB. All told, there are 30 MLB Clubs, based in 17 states throughout the United States (with one Club located in Canada). The MLB

Clubs employ around 6,000 minor league players. Each of these players signs a Uniform Player Contract, which governs the employment relationship between the player and an MLB Club. The Uniform Player Contract contains a New York choice-of-law provision.

Each MLB Club is associated with at least six minor league affiliate teams; most Clubs have seven or eight. Minor league affiliate teams are loose associations or groups, rather than corporate entities; they do not function as employers. The minor league teams are located in one of 44 different states.

Each spring, each Major League Club sends its minor league players to spring training in either Arizona or Florida. Following spring training, the Club assigns selected employee-players to play on one or more of its minor league affiliate teams. Employees who are not selected to play on an affiliate team remain at the Arizona or Florida facilities for extended spring training. The Clubs reassign their employee-players to different minor league affiliate teams throughout the five-month championship season, sometimes playing on a minor league team for only a single game.

During each championship season, the affiliate minor league teams play against other teams in one of several minor leagues. One of these minor leagues, the California League, is comprised of eight to ten minor league affiliate teams. During the 2010 through the 2015 championship seasons, a total of 2,113 minor league players were assigned to play for affiliate teams in the California League. While the California League plays its championship season games only in California, the players participating in the California League are employees of MLB Clubs located in one of six different states: California, Arizona, Ohio, Colorado, Washington, or Texas. Several of the plaintiffs in this appeal

who played in the California League during the championship season worked for MLB Clubs located outside of California. For example, Ryan Kiel, who played in the California League on the Bakersfield Braves during part of the 2012 championship season, is a resident of Florida and an employee of the Cincinnati Reds, a Club headquartered in Cincinnati, Ohio. Brad McAtee, a New York resident and another representative of the California class, worked for the Colorado Rockies, a club headquartered in Denver, Colorado; he trained or played in Washington, Arizona, California, and New York. And another California class representative, Mitch Hilligoss, resides in Illinois and was employed by both the New York Yankees and the Texas Rangers. He played not only in California, but also in Arizona, Texas, and South Carolina during the 2010 and 2011 seasons. In short, the potentially affected jurisdictions include: (1) Arizona and Florida, where the employees trained for varying lengths of time; (2) the states in which the players reside, which includes at least 19 states (only accounting for the 61 class representatives); and (3) the states in which the players' employers (the 22 MLB Clubs) are located. Because the employees argue that MLB (headquartered in New York) is also an employer, and because the Uniform Player Contract provides that the laws of New York apply to any dispute under the contract, New York minimum wage and overtime law is likewise applicable.

Plaintiffs initially sought certification of eight classes under Federal Rule of Procedure 23(b)(3): a California class, a Florida class, an Arizona class, a North Carolina class, a New York class, a Pennsylvania class, a Maryland class, and an Oregon class. The district court declined to certify the plaintiffs' proposed classes, in part because they presented significant choice-of-law problems that could not

be handled on a classwide basis. The plaintiffs then moved for reconsideration, narrowing the proposed classes to the Florida and Arizona classes,[1] and the California class.[2] The proposed Arizona class consists of players who are employees of Major League Baseball Clubs located in 14 states, who are residents of at least 13 states (only accounting for the 25 class representatives), and who were assigned to spring training in Arizona for four weeks or more. The proposed Florida class consists of players who are employees of Major League Baseball Clubs located in 17 states, who are residents of at least 13 states (only accounting for the 29 class representatives), and who were assigned to spring training in Florida for four weeks or more. The proposed California class consists of 2,113 players who are employees of the 11 Major League Baseball Clubs that had affiliate teams in the California League during the 2010 through 2015 championship seasons, who are residents of at least 11 states (only accounting for the named class representatives), and who played on an affiliate team in the California League during the 2010 through 2015 championship seasons.

[1] The Florida and Arizona classes were defined (respectively) as including "[a]ny person who, while signed to a Minor League Uniform Player Contract, participated in spring training, instructional leagues, or extended spring training in [Florida or Arizona] on or after Feb 7, 2009, and had not signed a Major League Uniform Player Contract before then."

[2] The California class was defined as "[a]ny person who, while signed to a Minor League Uniform Player Contract, participated in the California League on or after February 7, 2010, and had not signed a Major League Uniform Player Contract before then."

The district court declined to certify a Florida class and an Arizona class of plaintiffs under Rule 23(b)(3) of the Federal Rules of Civil Procedure.[3] It held that under California choice-of-law principles, the problems that would have to be navigated in order to adjudicate the claims of the Florida and Arizona classes presented significant individualized issues that could not be handled on a classwide basis. We review this determination for abuse of

[3] Rule 23(b)(3) provides that:

> A class action may be maintained if Rule 23(a) is satisfied and if: . . .
>
> > (3) 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. The matters pertinent to these findings include:
> >
> > (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > (D) the likely difficulties in managing a class action.

Fed. R. Civ. Proc. 23(b)(3).

discretion. *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 956 (9th Cir. 2013).

**II**

A brief summary of the legal framework for deciding whether choice-of-law issues preclude certifying a class under Rule 23(b)(3) is helpful here. In short, before certifying a class under this provision, the court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). When the plaintiffs bring a class action involving multiple jurisdictions, a court must consider the impact of potentially varying state laws. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188–89 (9th Cir. 2001). If the forum state's substantive law may be constitutionally applied to parties in other states, the district court must apply the forum state's choice-of-law rules to determine which laws apply. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589–90 (9th Cir. 2012). After applying the forum state's choice-of-law rules, if the district court determines that the laws of only one state apply, then variations in state law do not raise a barrier to class certification. *See id.* at 590–91. But if the plaintiffs' claims must be adjudicated under the laws of multiple jurisdictions, the district court will have to determine whether the complexities and managerial problems defeat predominance. *See Zinser*, 253 F.3d at 1188–89.

The forum state here is California, and thus California's choice-of-law rules apply. A brief dive into the history of California's choice-of-law jurisprudence indicates that California has long rejected the approach that the majority now adopts.

In the first half of the twentieth century, California courts agreed that it was "the settled law in the United States that an action in tort is governed by the law of the jurisdiction where the tort was committed." *Loranger v. Nadeau*, 215 Cal. 362, 364–66 (1932), *overruled in part by Reich v. Purcell*, 67 Cal. 2d 551 (1967). California courts would therefore generally "determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where the tortious acts occurred, unless it [was] contrary to the public policy of" California. *Grant v. McAuliffe*, 41 Cal. 2d 859, 862 (1953). This typical approach was reflected in the Restatement (First) of the Conflict of Laws. *See* Restatement (First) of Conflict of Laws § 377 (1934) (applying the law of "[t]he place of the wrong"). California courts "assumed that the law of the place of the wrong created the cause of action and necessarily determined the extent of the liability." *Reich*, 67 Cal. 2d at 553. Therefore, when the injury at issue occurred in California, courts would generally apply California law. *See Loranger*, 215 Cal. at 364–66.

But this approach came under fire for being an inflexible and mechanical rule. *See Travelers Ins. Co. v. Workmen's Comp. Appeals Bd.*, 68 Cal. 2d 7, 14 n.6 (1967). Moreover, "[i]n a complex situation involving multi-state contacts," California courts realized that "no single state alone can be deemed to create exclusively governing rights." *Reich*, 67 Cal. 2d at 553. In response, California courts began adopting a more flexible approach. *See, e.g.*, *id.*; *Hurtado v. Super. Ct. of Sacramento Cty.*, 11 Cal. 3d 574, 581–82 (1974). In a "landmark opinion . . . for a unanimous court in *Reich v. Purcell*," the California Supreme Court "renounced the prior rule, adhered to by courts for many years, that in tort actions the law of the place of the wrong was the applicable law in a California forum regardless of the issues before the court."

*Hurtado*, 11 Cal. 3d at 579. Instead, California concluded that each state's interest in applying its own law must be evaluated. *See id.* In 1971, the Restatement (Second) of Conflict of Laws reflected the general movement away from the law-of-the-situs approach espoused by the First Restatement by replacing it with a more flexible approach that considered each state's interest in applying its own laws. *See* Restatement (Second) of Conflict of Laws § 6 (1971); *see also id.* introduction (describing the revised approach as an "enormous change" from the "rigid rules" laid out in the First Restatement). California courts described the new approach to choice-of-law principles, which reflected the approach of the Second Restatement, as a "governmental interest approach" that required consideration of the interests of all the involved states. *See, e.g.*, *Dixon Mobile Homes, Inc. v. Walters*, 48 Cal. App. 3d 964, 972 (1975). In *Offshore Rental Co. v. Continental Oil Co.*, the California Supreme Court definitively announced that "[q]uestions of choice of law are determined in California . . . by the 'governmental interest analysis,'" which requires the court to "search to find the proper law to apply based upon the interests of the litigants and the involved states." 22 Cal. 3d 157, 161 (1978).

Today, California courts no longer apply "the old choice-of-law rule that generally called for application of the law of the jurisdiction in which a defendant's allegedly tortious conduct occurred *without regard to the nature of the issue that was before the court*." *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 97 (2010) (emphasis in original). Instead, California courts apply the three-step governmental interest test. *Hairu Chen v. Los Angeles Truck Ctrs., LLC*, No. S240245, 2019 WL 3281346, at *3 (Cal. July 22, 2019). "First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the

particular issue in question is the same or different." *Id.* (internal quotation marks omitted). If there is a difference, "the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." *Id.* (internal quotation marks omitted). As the final step, "if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be the more impaired if its law were not applied." *Id.* (cleaned up).

Although California choice-of-law cases "continue to recognize that a jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders," *see McCann*, 48 Cal. 4th at 97–98 (internal quotation marks omitted), California courts have not relied on this general principle to shortcut the required three-part analysis, *see, e.g.*, *Sullivan*, 51 Cal. 4th at 1202. Indeed, in *McCann*, a case on which the majority relies for its rule, Maj. Op. at 30–31, the California Supreme Court walked through each of the steps of the governmental interest analysis to determine whether to apply the law of Oklahoma (where the tort occurred) or California (where the plaintiff resided). 48 Cal. 4th at 96–98. Only after determining at the second step that "each state has an interest in having its law applied under the circumstances of the present case," *id.* at 96, did the court proceed to the third step and determine that Oklahoma law applied, in part because "a failure to apply California law *on the facts of the present case* will effect a far less significant impairment of California's interest," *id.* at 99 (emphasis added). In short, as the California Supreme Court recently

explained, "the governmental interest test is far from a mechanical or rote application of various factors," *Hairu Chen*, 2019 WL 3281346, at *5, and California courts must scrupulously apply each step of the three-step test.[4]

California courts also apply the governmental interest analysis in cases where plaintiffs and defendants raise choice-of-law issues, even outside the tort context. In *Sullivan*, the California Supreme Court applied the governmental interest analysis to a wage-and-hour dispute, in a case where plaintiffs contended California's overtime law governed their work in California, and the defendant contended the laws of plaintiffs' home states governed. 51 Cal. 4th at 1202. *Sullivan* did not merely apply California's overtime law, although California was the site where the work occurred. *See id.* As explained below, *Sullivan* made a detailed analysis of each of the three steps of the governmental interest test. *See id.*

At the same time as California courts were migrating towards the multifaceted governmental interest test espoused by the Second Restatement, California courts also adopted the Second Restatement's approach to contractual choice of law provisions. *See Gamer v. duPont Glore Forgan, Inc.*, 65 Cal. App. 3d 280, 287–88 (1976). Under this test, courts would generally defer to the law of the state chosen by the parties unless either "the chosen state has no substantial relationship to the parties or the transaction and

[4] Indeed, in the California class action context, the California Supreme Court has made clear there are no presumptive choice-of-law rules. Rather, a "trial court cannot reach an informed decision on predominance and manageability without first determining whether class claims will require adjudication under the laws of other jurisdictions and then evaluating the resulting complexity where those laws must be applied." *Hairu Chen*, 2019 WL 3281346, at *5.

there is no other reasonable basis for the parties choice, or . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties." *Nedlloyd Lines B.V. v. Super. Ct. of San Mateo Cty.*, 3 Cal. 4th 459, 465 (1992).

In undertaking the predominance analysis under Rule 23(b), the court is required to consider the full scope of California's choice-of-law framework, including each state's interest in applying its own law, as well as the contractual choice-of-law provision. *See Mazza*, 666 F.3d at 590–91. If individualized choice-of-law inquiries swamp predominance, then the class cannot be certified. *See id.*

**III**

In addressing the choice-of-law framework in the context of a Rule 23(b) inquiry, the majority concedes that the differences in state law involved in this case are material. Maj. Op. at 29–30. But instead of undertaking California's choice-of-law analysis by identifying the relevant laws of each potentially affected jurisdiction and examining each jurisdiction's interest in the application of its own law, the majority sidesteps this analysis entirely by relying solely on its general rule that the jurisdiction where an employee's work occurs has the predominant interest in regulating conduct that occurs within its borders. Maj. Op. at 30–35. Not only is this approach contrary to substantive California law, but the majority's justification of this approach on practical grounds is entirely misguided.

**A**

First, as the above description of California law makes clear, the majority misreads and misapplies substantive California law. In considering whether the district court erred in declining to certify the Arizona and Florida classes, the majority interprets California's choice-of-law rules as establishing the general principle that California has the predominant interest in regulating conduct occurring within its borders. Maj. Op. at 31. In this vein, the majority asserts that *Sullivan* "strongly militates" against concluding that any other state has an interest in wage and hour laws that "would be adequate to overcome the presumption that the state in which the conduct at issue occurs has the 'predominant interest' in applying their own law." Maj. Op. at 37. These conclusions are wrong in two different ways.

Most important, the majority misreads California's choice-of-law rules to conclude that the law of the situs where the work took place controls. This is clearly contrary to California law: as shown above, California courts have expressly rejected the blanket rule that the law of the situs applies, *Travelers*, 68 Cal. 2d at 11, and "when application of the law of the place of the wrong would defeat the interests of the litigants and of the states concerned," they do not apply that law. *Reich*, 67 Cal. 2d at 554; *see also Berhard v. Harrah's Club*, 16 Cal. 3d 313, 316, 323 (1976) (applying California law where the tort occurred in Nevada but the harm was felt in California).[5] Even where, as here, a

[5] The majority also errs in applying substantive California law to determine Arizona's and Florida's interests in the application of their own laws, the second step of California's governmental interest test. Maj. Op. at 30–32. In other words, because the California Supreme Court has expressed a strong interest in regulating wage and hour claims

contractual choice-of-law provision is involved, California applies the law of the parties' choosing only after considering the relevant state interests. *See Nedlloyd*, 3 Cal. 4th at 465. For example, in *Washington Mutual Bank, FA v. Superior Court*, the California Supreme Court analyzed a state class action that involved both a contractual choice-of-law provision and the applicability of the governmental interest test. 24 Cal. 4th 906, 915 (2001). The court determined that the test from the Restatement (Second) of Conflict of Laws under *Nedlloyd* applied to the class action, *id.* at 918, and that if the choice-of-law provision did not apply under *Nedlloyd*, the court must undertake the governmental interest analysis, *id.* at 919–21.

Second, in the context of wage-and-hour disputes, the majority wildly overreads *Sullivan.* In *Sullivan*, the California Supreme Court expressly limited its ruling to the situation before it: the state's interest in applying California labor law to nonresident employees working for a California employer. *Sullivan*, 51 Cal. 4th at 1194–95. The court was careful not to address any other scenario. *See id.* Therefore, the majority's extension of *Sullivan* to establish a general rule that California has a superior interest in applying its law to wage-and-hour claims that arise within its borders, Maj. Op. at 37–38, (let alone generalizing the majority's

within its borders, the majority assumes that Arizona and Florida have the exact same interest. To support this assumption, the majority cites California cases which determined—after the application of the governmental interest test—that a particular foreign state had a superior interest in having its law applied. The majority fails to identify any Arizona or Florida opinion expressing such an interest, however. This is clearly wrong. Although the district court is bound to apply the *choice-of-law* provisions of California (the forum state), the district court may not impute California's interest in regulating conduct within its borders to Arizona and Florida.

extrapolation of California's rule to all other states) is not supported by *Sullivan.*

A brief description of *Sullivan* reveals the majority's error. In *Sullivan*, the California Supreme Court responded to a certified question regarding whether California labor law applied to nonresident employees who worked both in California and in other states for a California-based employer. 51 Cal. 4th at 1194. The employees at issue worked as instructors for Oracle Corporation, a large California-based company. *Id.* at 1194–95. Two of the employees were residents of Colorado; while they worked primarily in Colorado, they were required to travel and work in other states, including California. *Id.* at 1195. A third employee was an Arizona resident, but worked 20 days in California. *Id.* Oracle did not pay these employees overtime on the ground that they were exempt under California and federal overtime laws as instructors. *Id.* The employees sued Oracle, seeking unpaid overtime compensation. *Id.* The question certified to the California Supreme Court was whether California overtime law applied to the employees' work in California. *Id.* at 1196.

In its response to the certified question, the California Supreme Court addressed two distinct inquiries: first, whether, as a matter of statutory construction, the California Labor Code's overtime provisions applied to work performed in California by nonresidents, *id.* at 1196–97, and second, whether California's choice-of-law principles directed the court to apply the California Labor Code to the plaintiffs, *id.* at 1202–06. *Sullivan* focused on the question whether a California employer had to pay its employees under California's overtime law or under the overtime law of the state where the employees resided during the period when the employees worked in California. *See id.* at 1196.

Because the employer in that case was Oracle, a resident of California, the court did not have to consider whether the overtime law of the state of a nonresident employer (the issue in our case) might apply.

*Sullivan* first made a point of carefully examining California's overtime statute to ensure it applied to nonresident employees of a California employer. *Id.* at 1197. The court noted that the plain text of the applicable overtime statute stated that the statute applied to "all individuals," which would include residents and nonresidents alike. *Id.* It also noted that the legislature knew how to exclude nonresidents when it wanted to do so, because it had expressly exempted some out-of-state employers from complying with workers' compensation provisions. *Id.* Therefore, *Sullivan* held the overtime statute would apply to the plaintiffs in the case before it.

Because the statute was potentially applicable to nonresidents by its terms, the California Supreme Court then applied California's three-step governmental interest test to determine which state's law applied. *Id.* at 1202–03. *Sullivan* first asked whether the overtime law of California was the same or different than the overtime laws of Colorado and Arizona, where the employees resided. *Id.* at 1203. The court determined that the laws were different. *Id.* Federal overtime law applied in Arizona, and federal law required less overtime compensation than California. *Id.* Colorado overtime law applied in Colorado, but it too required less compensation than California. *Id.*

*Sullivan* next examined "each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." *Id.* at 1203. Relying on the California statute and case law, *Sullivan* first noted that "California has, and has

unambiguously asserted, a strong interest in applying its overtime law to all nonexempt workers, and all work performed, within its borders." *Id.* Arizona had no overtime law, and Colorado's statute expressly did not apply out of state, so the court found that neither Arizona nor Colorado had "asserted an interest in regulating overtime work performed in other states." *Id.* at 1204. Therefore, there was no true conflict. *See id.* The court acknowledged, however, that states could have an interest in the extraterritorial application of their employment laws under certain limited circumstances. *See id.* at 1199.

The final step in the governmental interest analysis was to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. *See id.* at 1205–06. The court concluded that California's interests would be more impaired if nonresidents employed in California were covered only by the law of the nonresident's state. *Id.* Among other considerations, *Sullivan* reasoned that adopting a different rule might encourage California employers to hire nonresidents of California to work in California. *Id.* at 1206. By contrast, Colorado and Arizona had no interest in applying their overtime laws to their residents working in California. *See id.*

*Sullivan* therefore concluded that California's overtime law "does apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs in the circumstances of this case." *Id.* The court did not address whether the same rule would apply for a nonresident employer.

Contrary to the majority's conclusion, *Sullivan* did not establish a rule that every California wage-and-hour law applies to all persons working in California regardless of

their state of residence or their employer's state of residence. To the contrary, rather than enunciate such a rule, *Sullivan* carefully analyzed the law and policy of each relevant jurisdiction, consistent with California's governmental interest test. *See id.* at 1202–06. *Sullivan* expressly limited its analysis to the particular facts of the case before it: a case involving California overtime law, a California employer, and employees residing in Arizona and Colorado. *See id.* *Sullivan* specified that it was not applying its rule to out-of-state employers, as is the case here. *Id.* at 1201 (noting that the court did not need to address "the asserted burdens on out-of-state businesses to which Oracle refers," in part because "no out-of-state employer is a party to this litigation[, and] Oracle itself is based in California"). Further, *Sullivan* clarified that its holding did not apply to any California labor law other than the overtime law, explaining, "[w]hile we conclude the applicable conflict-of-laws analysis does require us to apply California's overtime law to full days and weeks of work performed here by nonresidents one cannot necessarily assume the same result would obtain for any other aspect of wage law." *Id.* at 1201 (citation omitted). Indeed, "California's interest in the content of an out-of-state business's pay stubs, or the treatment of its employees' vacation time, for example, may or may not be sufficient to justify choosing California law over the conflicting law of the employer's home state." *Id.*

Moreover, *Sullivan* acknowledged that different outcomes could result under different circumstances. By beginning its analysis with the statutory language, *Sullivan* indicated that the state legislature could decide not to apply its employment laws to some employees who work in-state, *id.* at 1197 (conducting statutory analysis to confirm that the California overtime legislation applied to "any individual"), or could exempt out-of-state employers who send employees

into California from complying with California law, as it did in the case of workers' compensation law, *id.*, or could choose not to apply overtime law to employees who reside out of state, *id.* at 1198. Similarly, *Sullivan* acknowledged that a truck driver employee based at a Washington facility of a California employer could be entitled to overtime compensation under Washington law for the time he spent driving outside the state. *See id.* at 1200, 1204.

In fact, *Sullivan* expressly rejected the arguments that it was adopting a general rule that California's employment laws applied in all contexts, holding instead that disputes in each different context would be "resolved under the applicable conflict of laws analysis." *Id.* at 1200. "In any event," the court explained, "to the extent other states have legitimate interests in applying their own wage laws to their own residents for work performed in California, the applicable conflict-of-laws analysis takes those interests into account." *Id.* at 1202. In other words, *Sullivan* rejected the very approach that the majority now adopts, and instead, *Sullivan* stands for the proposition that the determination of which state's law applies requires a careful analysis of each relevant state's law and policies.

**B**

Second, the majority's argument that practical considerations compel the adoption of a general rule has the situation entirely backwards.

The only practical consideration flagged by the majority is that, absent a rule that the hours and wage laws of the situs always apply to workers within its borders, Maj. Op. at 35–36, employers would be required to properly ascertain the residency status of each of its employees, to track applicable state laws, and to determine which law applies, Maj. Op. at

27–28**.** Such a concern does not arise if the state law at issue merely requires a resident employer to pay each of its employees according to the resident state's laws, even when the employee is working temporarily in another state. In other words, if an MLB Club in Ohio paid each of its player–employees pursuant to Ohio overtime law, the MLB Club would have no extra burden at all. Unlike *Sullivan*, the majority fails to recognize that states may enact many different types of laws, and that conflicts between state laws can be resolved through the application of choice-of-law rules. *Cf. Sullivan*, 51 Cal. 4th at 1201–02.

On the other hand, the rule the majority establishes today could have dire consequences for employers and employees. For example, a rule requiring that the law of the situs always applies would require employers to research and comply with various states' laws whenever their employees traveled for short conferences or business meetings. An employer would have to research applicable state law whenever an employee traveled across state lines, including when an employee was in transit. Presumably, when an employee traveled across state lines by car or airplane, the employer would need to track the amount of time the employee spent in each state during travel in order to comply with this rule. Such a rule would make it difficult for employers to compensate interstate truck drivers or traveling salespersons. Moreover, the majority's rule would also burden employees who would no longer be protected by the laws of their resident state or employer's state while traveling for work, forcing the employees to earn less money for work travel. Rather than adopting a rule that the law of the situs applies, the better solution is faithfully adhering to long-established choice-of-law principles, which resolve the issue in a reasonable and time-tested way.

**IV**

Because it is not possible to derive a general rule from *Sullivan*, and California's choice-of-law rules weigh against any such rule, the majority should have considered the applicability of California's choice-of-law rules to the plaintiffs' claims.

Given that a minimum of 22 states potentially have an interest in applying their wage and hour laws, and that (as the majority concedes) there are material differences between the states, applying California's three-step governmental interest test would be a significant task.

First, as a threshold matter, the court must analyze the contractual choice-of-law provision (i.e., New York) in the governmental law analysis under *Nedlloyd*, 3 Cal. 4th at 466, and the Restatement (Second) of Conflict of Laws. This would require the court to analyze whether New York law has a substantial relationship to the parties or transactions here and whether application of New York law would be contrary to Arizona's or Florida's interests. *See id.* at 465.

Second, if the contractual choice-of-law provision does not govern, a court applying *Sullivan* would first have to determine whether the minimum wage laws and overtime laws of Arizona and Florida apply by their terms to nonresident employees who work for nonresident employers, *Sullivan*, 51 Cal. 4th at 1202–03. Assuming the laws did apply, the court would then have to identify the relevant laws of each of the potentially affected jurisdictions. *See id.* at 1203. It would then have to determine whether there is a conflict between the laws of Arizona and Florida, on the one hand, and the laws of the different states in which the employees and employers reside. *See id.*

If there is a true conflict, then the court would have to compare the nature and strength of each jurisdiction's interest in the application of its own law to determine whether a true conflict exists under the circumstances of the particular case. *See id.* at 1203–05. Contrary to the majority, Maj. Op. at 34–35, other states have an interest in applying their wage and hour laws outside their borders. For example, the Boston Red Sox is an MLB Club headquartered in Boston, Massachusetts, and a franchise defendant in this lawsuit. Massachusetts has previously applied its wage-and-hour laws extraterritorially. *See Dow v. Casale,* 989 N.E. 2d 909 (Mass. App. Ct. 2013). Moreover, MLB Clubs in Illinois, Pennsylvania, New York, and Washington are also defendants in this proposed class action, and courts have applied wage-and-hour laws in those states extraterritorially. *See Baxi v. Ennis Knupp & Assocs., Inc.*, No. 10-cv-6346, 2011 WL 3898034, at *14–15 (N.D. Ill. Sept. 2, 2011); *Truman v. DeWolff, Boberg & Assocs.*, No. 07-cv-1702, 2009 WL 2015126, at *2 (W.D. Pa. July 7, 2009); *Friedrich v. U.S. Comput. Sys., Inc.*, No. 90-cv-1615, 1996 WL 32888, at *8 (E.D. Pa. Jan. 22, 1996); *Pierre v. Gts Holdings, Inc.*, No. 15-cv-143, 2015 WL 7736552, at *1, *5 (S.D.N.Y. Nov. 30, 2015); *Bostain v. Food Express*, *Inc.*, 159 Wash.2d 700, 709–711 (Wash. 2007) (en banc).[6]

It is not surprising that the district court determined that this type of analysis would defeat the predominance that Rule 23(b)(3) requires. No two player-employees'

[6] The majority notes that, in many cases, state "courts have looked closely at where the relevant work is performed" to determine whether to apply the state's laws extraterritorially. Maj. Op. at 35 n.13. Certainly, state courts look to where the work is performed as one factor to determine which state's law applies. The majority errs by concluding that where the work is performed is effectively the *only* relevant factor in the choice-of-law analysis.

circumstances are alike; the players hail from at least 19 resident states, worked for one or more MLB Clubs based in one of 22 states for varying lengths of time, and played on one or more minor league affiliate teams in an assortment of states for as little as one day or as long as an entire season. *Sullivan* and California's choice-of-law analysis require the court to consider all of the relevant states' laws and weigh the commensurate state interests in applying those laws. The highly individualized nature of the choice-of-law inquiry with respect to each player could swamp the predominance required for certification under Rule 23(b)(3). *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998); *Wash. Mut. Bank, FA*, 24 Cal. 4th at 922. In any event, the district court did not abuse its discretion by refusing to certify the Florida and Arizona classes.

For the same reason, the district court erred in certifying the California class without completing its choice-of-law analysis. *Sullivan*'s conclusion does not control where the relevant employer is not a California-based employer. 51 Cal. 4th at 1197–98. While *Sullivan* held that California's overtime laws apply to employees of a California employer who are residents of Arizona and Colorado but work occasionally in California, *Sullivan* did not address the application of both overtime and minimum wage laws to employees of out-of-state employers who work occasionally in California. *Id.* at 1197–98. Instead, *Sullivan* requires a court to apply the three-part governmental interest analysis, including weighing the interests of the employees' and employers' resident states in applying their own laws. *Id.* at 1202–03.

Here, more than half of the MLB Clubs with minor league affiliates that play in the California League are out-of-state employers. Moreover, the plaintiffs argue that the

MLB, a New York-based entity, is also an employer. The players themselves hail from at least 11 states, even if only the 26 class representatives named in this lawsuit were included in the class. In addition, 68.7% to 74.7% of the players who were assigned to a minor league affiliate in the California League also played as a member of a minor league affiliate in a different state during the 2010 to 2015 championship seasons. Approximately 11% of the proposed class members from the 2010 championship season were assigned to an affiliate in the California League for one week or less. *Sullivan* requires that the court weigh each relevant jurisdiction's interest in applying its laws, including all of the relevant variables: whether the players are employed by an out-of-state MLB Club; whether the players are nonresidents of California; whether the players spent only a short time in California; whether any other state's law might apply; and whether that state's interest in applying its own law outweighs California's interest. *See* 51 Cal. 4th at 1202–03. Because the choice-of-law inquiries cannot be neatly solved with a law-of-the-situs rule as the majority suggests, individual choice-of-law issues also appear to defeat predominance for the California class.

**V**

No doubt the analysis of the intersection between Rule 23(b)(3)'s predominance inquiry and California's choice-of-law inquiry is multilayered and complex, particularly in a case like this one, involving different types of wage and hour claims, employers residing in multiple states, employees residing in multiple states, and three states where work was performed. But the majority errs in attempting to sidestep the analysis entirely in one fell swoop by the simple expedient of declaring that each jurisdiction generally has a predominant interest in regulating conduct that occurs within

its borders, a conclusion that is contrary to the requirement that California courts undertake the governmental interest analysis in every case. Although the majority gives lip service to the possibility of exceptions to this rule, its failure to consider all the variables in this case to determine whether any exception was applicable here gives the lie to such claimed flexibility. Because the majority's conclusion that courts can sidestep a choice-of-law analysis by relying on a general rule is contrary to our precedents, and because it will impose burdens on employers and disadvantage employees in many circumstances, I dissent.

**United States Court of Appeals for the Ninth Circuit**

**Office of the Clerk**
95 Seventh Street
San Francisco, CA 94103

**Information Regarding Judgment and Post-Judgment Proceedings**

**Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

**Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)**

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

**Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**
**Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)**

**(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

**B. Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

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# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AARON SENNE, et al.,

Plaintiffs,

v.

KANSAS CITY ROYALS BASEBALL CORP., et al.,

Defendants.

Case No. 14-cv-00608-JCS

**ORDER RE: 1) MOTION FOR RECONSIDERATION REGARDING CLASS AND COLLECTIVE CERTIFICATION; 2) MOTION TO EXCLUDE; 3) MOTION TO INTERVENE; AND 4) MOTION FOR LEAVE TO FILE SUR-REPLY**

Re: Dkt. Nos. 719, 720, 724, 768

## I. INTRODUCTION

On July 21, 2016, the Court denied Plaintiffs' request for class certification under Rule 23 of the Federal Rules of Civil Procedure and decertified the FLSA collective it had preliminarily certified. *See* Docket No. 687 ("Class Certification Order" or "July 21 Order"). In the same Order, it granted Defendants' request to exclude the testimony of Plaintiffs' expert, Dr. J. Michael Dennis, under Rule 702 of the Federal Rules of Evidence and *Daubert*. Plaintiffs brought a Motion for Leave to File a Motion for Reconsideration ("Motion for Leave") on August 4, 2016. The Court granted in part and denied in part the Motion for Leave on August 19, 2016, allowing Plaintiffs to "file a renewed motion . . . for class certification under Rule 23 in which Plaintiffs will propose narrower classes and address the concerns articulated by the Court in its July 21 Order, including those related to the survey conducted by their expert and the expert opinions that were based on the survey." Docket No. 710 ("August 19 Order") at 1. Under the August 19 Order, Plaintiffs were also permitted to "seek (re)certification of narrower FLSA classes than the ones the Court decertified in its July 21 Order." *Id*.

Presently before the Court are the following motions ("Motions"): 1) Plaintiffs' Motion for Reconsideration Regarding Class and Collective Certification ("Motion for Reconsideration");

2) Motion to Intervene by Shane Opitz, Corey Jones, Brian Hunter, Kyle Johnson, and Aaron Dott; 3) Defendants' Motion to Exclude the Declaration and Testimony of J. Michael Dennis, Ph.D. ("Motion to Exclude"); and 4) Defendants' Motion for Leave to File Sur-Reply. A hearing on the Motions was held on December 2, 2016 at 9:30 a.m. The Court's rulings are set forth below.[1]

## II. BACKGROUND

### A. The Class Certification Order

In their original class certification motion, Plaintiffs asked the Court to certify under Rule 23(b)(3), or in the alternative, Rule 23(b)(2), classes consisting of "[a]ll persons who under a Minor League Uniform Player contract, work or worked for MLB or any MLB franchise as a minor league baseball player within the relevant state at any time" during the applicable statutory period. *See* Motion to Certify Class, Docket No. 496. These classes asserted wage and hour claims under the laws of eight different states based on a variety of activities the putative class members perform throughout the year, including spring training, extended spring training, the championship season, instructional leagues, and winter conditioning. Class Certification Order at 3-4, 7-9. To show that their claims were amenable to class treatment, Plaintiffs offered a declaration by their expert, Dr. J. Michael Dennis, describing a survey questionnaire ("Pilot Survey") he conducted to show that it would be possible to conduct a "main survey" ("Main Survey") that would produce reliable results and would address the issues in this case through common proof. *See* Declaration of J. Michael Dennis, Ph.D. in Support of Plaintiffs' Motion for Class Certification, Docket No. 498 ("March 3, 2016 Dennis Decl.").

Defendants argued, *inter alia*, that the classes should not be certified under Rule 23 because the experiences of the putative class members varied widely. *See generally*, Defendants' Opposition to Plaintiffs' Motion for Class Certification Under Federal Rule of Civil Procedure 23, Docket No. 628. Similarly, they argued that the FLSA collective should be decertified because the

[1] The parties to this action have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c). The individuals who seek to intervene also have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c). *See* Docket No. 728.

named Plaintiffs were not similarly situated, either to each other or the opt-in plaintiffs. *See generally,* Motion to Decertify the Fair Labor Standards Act Collective, Docket No. 495. Finally, Defendants sought to exclude the testimony of Plaintiffs' expert, Dr. Dennis, on the grounds that it was unreliable, and to exclude the testimony of Plaintiffs' damages expert, Dr. Kriegler, to the extent he relied on Dr. Dennis's survey results. *See* Motion to Exclude Plaintiffs' Expert Declarations and Testimony of J. Michael Dennis, Ph.D and Brian Kriegler, Ph.D filed In Support of Plaintiffs' Motion for Class Certification, Docket No. 632.

The Court agreed with Defendants that the classes, as proposed, could not be certified under Rule 23. First, it found that one of the requirements of Rule 23(a), ascertainability, was not satisfied because of the "problems associated with determining membership in the State Classes based on winter training." Class Certification Order at 59. These problems arose from the wide variations as to the types of activities in which the players engaged to meet their winter conditioning obligations, the fact that many players performed these activities in more than one state, the absence of official records documenting these activities, and the difficulty players would likely have remembering the details relating to their winter conditioning activities, including, in some cases, the state or states where they performed them. *Id*.

The Court went on to hold that Plaintiffs' proposed classes did not meet the requirements of Rule 23(b)(3) because of the highly individualized inquiries that would have been required to evaluate the claims of the class members. *Id*. at 81. The Court pointed to variation in the types of activities in which the minor leaguers engage, finding that these variations were "particularly striking as to winter training." *Id*. The Court also pointed to variations as to the hours and activities of minor league players during the championship season and variations with respect to salaries, bonuses and other forms of compensation. *Id*. at 81-82. The Court found that these variations went not only to damages but also liability, reasoning that "[c]lass members can demonstrate minimum wage and overtime violations only by demonstrating that their rate of pay fell below the minimum wage rate and that they worked the requisite number of hours to be entitled to overtime pay, both of which will turn on the number of hours of compensable work they performed and the amount of compensation they received for that work." *Id*. at 82.

The individualized choice-of-law determinations that would be required to address the claims of the putative class members were also a source of significant concern to the Court. *Id*. at 86-87. Again, the Court found that winter training was particularly problematic as players are permitted to perform their conditioning wherever they choose and the evidence shows that many players perform their conditioning in more than one state. *Id*. The Court also found that individualized inquiries related to the seasonal amusement and recreational establishment defenses and the creative professionals exemption would "increase the likelihood that class treatment of Plaintiffs' claims will be overwhelmed by the individual inquiries." *Id*. at 84-86. The Court noted as to both of these defenses, however, that they would not be sufficient, on their own, to warrant denial of class certification. *Id*.

In the end, the Court concluded that the variations were too significant to meet the predominance requirements of Rule 23(b)(3) and that the survey results on which Plaintiffs intended to rely constituted an impermissible attempt to "paper over significant material variations that make application of the survey results to the class as a whole improper." *Id*. at 91. In reaching this conclusion, the Court rejected Plaintiffs' reliance on *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016), in which the Supreme Court found, applying the rule of its seminal *Mt. Clemens* decision, that the plaintiffs could demonstrate their work based on representative evidence sufficient to support a "just and reasonable inference" where the employer had not kept adequate records of their work. *Id*. at 88. The undersigned found that "[a]llowing Plaintiffs to rely on the survey evidence obtained by Dr. Dennis (whether the Pilot Survey or the future survey he planned to conduct using the same methodology) would be inappropriate under the circumstances here because doing so would enlarge the rights of Plaintiffs and deprive Defendants of the right to litigate the individual issues discussed above." *Id*. at 91.

With respect to Plaintiffs' request that the Court certify the same proposed classes under Rule 23(b)(2), the Court found that Plaintiffs did not have standing to pursue injunctive relief claims under Rule 23(b)(2) because none of the named Plaintiffs was a current minor leaguers and therefore, Plaintiffs could not demonstrate a likelihood of future harm. Class Certification Order at 92-93. The Court further found that "the absence of any current minor league players among

named Plaintiffs reflects that any interest they may have in obtaining injunctive relief for future players is incidental to their request for money damages." *Id*. at 93.

The Court also decertified the FLSA collective that it had previously certified, finding that the collective members were not "similarly situated" because of the many individualized inquiries that would be required to resolve those claims. *Id*. at 95.

Finally, on Defendants' motion to exclude, the Court found that some of the problems identified by Defendants with respect to Dr. Dennis's Pilot Survey, including alleged coverage error and non-response bias, were "exaggerated or remediable." *Id*. at 97-99. On the other hand, the Court was "troubled by the format of [a] question flagged by" Defendants' expert, Dr. Ericksen, that asked respondents to "go through a difficult series of questions to come up with an answer," possibly leading them to "satisfice" or give "best guesses." *Id*. at 99. Specifically, Dr. Ericksen pointed to a question that asked respondents to provide the total amount of time they spent on a variety of activities for each of the four weeks of spring training. *Id*. (citing Ericksen Decl. ¶¶ 36-38). The Court found that the "satisficing" problem was compounded by: 1) the fact that all of the respondents of the Pilot Survey had opted in to the FLSA class, giving them a vested interest in the results of the survey; and 2) the likelihood of recall bias, given that respondents were asked to remember mundane events that occurred more than a year earlier and often several years earlier, such as when they arrived at and left the stadium each day. *Id.* at 100-101.

As a consequence, the Court held that Dr. Dennis's Pilot Survey (as well as Dr. Kriegler's expert report to the extent he relied on Dr. Dennis's opinions) was not sufficiently reliable to meet the requirements of *Daubert* and Rule 702 of the Federal Rules of Evidence. *Id*. at 103. In particular, the Court concluded that "both the methodology and the results of the Pilot Survey [conducted by Dr. Dennis and offered in support of Plaintiffs' request for class certification] are unreliable and . . . any future survey that applies a similar methodology is likely to yield unreliable results as well, especially in light of the problems . . . as to its failure to adequately ensure objectivity and its reliance on the players' ability to recall details of activities and events that occurred many months (and often years) ago." *Id*.

**B. The August 4, 2016 Dennis Declaration**

In support of their Motion for Reconsideration, Plaintiffs filed a new declaration by Dr. Dennis in which he responded to the concerns expressed by the Court in its July 21, 2016 Order and described the "findings, methodology and results" of the Main Survey. Declaration of J. Michael Dennis Ph.D., Docket No. 696 ("August 4, 2016 Dennis Decl."). According to Plaintiffs, the Main Survey and Dr. Dennis's opinions in the August 4, 2016 Declaration "lay to rest" the Court's concerns regarding the Pilot Survey. Motion for Leave at 2.

In the Main Survey, Dr. Dennis collected responses from 720 Minor Leaguers between July 9, 2016 and July 27, 2016. August 4, 2016 Dennis Decl. ¶ 3. According to Dr. Dennis, he took numerous measures to improve the methodology of the Main Survey, using lessons he had learned from the Pilot Survey, "including conducting cognitive interviews with actual English- and Spanish-speaking minor league players, sampling Non Opt-in class members for the main survey, creating a study website for respondents to use to access the survey, translating the survey into Spanish language, and setting up an outbound telephone campaign to support survey participation." *Id.* These measures were, among other things, intended to avoid self-interest bias, recall bias or non-response bias in the Main Survey results and/or allow Dr. Dennis to determine whether the survey results were affected by any of these forms of bias. *See generally id.* ¶¶ 3-12. Dr. Dennis concluded that the results of the Main Survey are a reliable measure of the hours worked by minor league players and that they are not infected by any of these forms of bias. *Id.* ¶¶ 7, 9, 47.

On the question of self-interest bias, Dr. Dennis points to the fact that non opt-in minor leaguers made up 87.2% of the 7,762 randomly sampled class members selected to receive the survey and that the majority of those who responded (66%) were non opt-ins. *See id.* ¶¶ 4, 41. In addition, to the extent that the percentage of opt-ins who responded relative to non opt-ins resulted in over-representation of the opt-ins, Dr. Dennis performed a statistical adjustment so that the opt-ins in the survey would represent the same share of the survey results as they do the total class, that is, 15%. *Id.* ¶¶ 18, 46. The high proportion of non opt-in survey respondents reduces the likelihood of self-interest bias, according to Dr. Dennis, because "[n]on Opt-ins have the lowest

potential for self-interest bias as evidenced by their not having joined the lawsuit. Although they may be aware of the lawsuit, they have not expressed interest in joining or participating in the litigation." *Id*. ¶¶ 4, 13. At the same time, Dr. Dennis opines that "reliable surveys can be done with respondents who are also plaintiffs in a lawsuit." *Id*. ¶ 12. He cites The Reference Manual on Scientific Evidence (3d Edition) ("the Reference Guide") as the "authoritative guide to the acceptable use of scientific evidence in litigation," noting that the Reference Guide "cites employee surveys as an example of litigation surveys conducted with the 'appropriate universe' and again in the context of survey questionnaire design (p. 389)."

Dr. Dennis also took measures to avoid recall bias in the Main Survey. *Id*. ¶ 4. First, he added "aided prompt" survey questions to "improve the accuracy of respondents' recall of time spent on baseball related activities." *Id*. ¶¶ 4, 33-38. He explains that these questions are designed to "cue" the respondent to trigger recall of past events, a technique that has been found to be effective in the literature on survey research methods in helping a respondent to recall events more accurately. *Id*. The aided recall questions used in the Main Survey related to housing, roommate status and transportation were asked in connection with each year in which the respondent participated in baseball-related activities. *Id*. ¶ 35. According to Dr. Dennis, the eight cognitive interviews he conducted led him to conclude that these aided prompt questions "were effective in stimulating the respondents to think about the reference period (i.e., the year that the baseball activity took place)." *Id*. ¶ 44.

Dr. Dennis further states that he reduced the potential for recall bias by adjusting the spring training questions in the Main Survey. *Id*. ¶ 37. These questions had been flagged by Dr. Ericksen (and the Court) as being overly burdensome to the extent they asked players to recall the number of hours they worked for each week in which they participated in spring training. *See* Class Certification Order at 99 (citing Ericksen Decl. ¶¶ 36-38). In the Main Survey, Dr. Dennis instead asked players to answer questions about the times they arrived at and left the ballpark on game days and non-game days. August 4, 2016 Dennis Decl. ¶ 37. Dr. Dennis states, "[b]ecause the main survey questions asked the respondent to recall routines and daily schedules instead of an abstract number of hours worked in a week, the spring training questions then mirrored the

structure of the other non-off-season questions that also place less recall burden on the respondents." *Id.* In support of this conclusion, he cites survey research literature that has found that "[w]ith respect to routine tasks, . . . recall is likely to be more accurate for situations that occur more regularly." *Id.* ¶ 31. He also points to deposition testimony and schedules produced by Defendants that he contends establish that the work of minor league players "tends to be predictable and based on routines, particularly for spring training, extended spring training, the regular season, and fall instructionals." *Id.* ¶ 32.

Dr. Dennis also notes that because the Main Survey was conducted in July 2016, the most recent "survey modules included the 2016 reference year for both spring training and extended spring training, placing a lower recall burden on the respondents for those that participated in 2016." *Id.* ¶ 38. According to Dr. Dennis, "[s]ince 36% of respondents indicated they had participated in spring training earlier in 2016 and another 15% participated in 2015, a majority of the main survey respondents were recalling events that occurred as little as three to 16 months ago." *Id.*

Dr. Dennis analyzed the results of the Main Survey to determine whether they were affected by self-interest bias or recall bias by identifying a "Control Group" of respondents for whom there was the lowest potential for these types of bias. *Id.* ¶¶ 5, 13-21. The Control Group consisted of respondents who met two criteria: 1) they had not opted in to the FLSA collective; and 2) they participated recently in baseball activity – either in 2015 or 2016. *Id.* He compared the survey results for the Control Group to the results based on all of the interviews and found that they were very similar, leading him to conclude that self-interest bias and recall error had little impact on the results. *Id.* ¶ 6. In particular, he found that the average hours worked for the Control Group was 17 minutes less than the hours worked estimate for the total sample. *Id.* According to Dr. Dennis, the difference was only 6 minutes for regular season hours at the ballpark for non-playing day away games and 9 minutes for home game days. *Id.* Even if this discrepancy were considered unacceptably high, the damages expert could use the data from the Control Group to avoid any self-interest or recall bias, Dr. Dennis opines. *Id.* at 21.

Dr. Dennis also conducted a non-response analysis to ensure that there was no error in the

Main Survey caused by low response rate. *Id.* ¶¶ 9, 22-25. He cites the Reference Guide in support of the opinion that "while surveys may achieve reasonable estimates even with relatively low response rates,' even surveys with high response rates still need to [be] examined since they 'may seriously underrepresent' some portions of the population." *Id.* ¶ 8 (citation omitted). Dr. Dennis conducted his non-response analysis by using administrative data he obtained from Baseball-Reference.com to compare respondents and non-respondents with respect to age, the year they last played in the minor leagues for a major league team, and fielding position. *Id.* He also reviewed the Baseball-Reference.com database to ensure that there were at least ten completed interviews for each MLB franchise. *Id.* ¶ 9. Based on his analysis, Dr. Dennis concluded that "error was not introduced via nonresponse." *Id.*

Dr. Dennis conducted two tests to validate the Main Survey data. *Id.* ¶ 26. First, he looked at a set of 85 documents, many of which are daily itineraries produced by Defendants, that contained information about start and end times, with about half referring to game days and half to non-game days. *Id.* From these documents Dr. Dennis "ascertained when the first and last activities of the particular workday were scheduled to occur, both for 'anyone' and 'everyone.'" *Id.* Based on his analysis of these documents, Dr. Dennis concluded that the "documents align with the survey results." *Id.* ¶ 27. He explains his conclusion as follows:

> Looking at game days, the data obtained from the validating documents do not include game durations or travel times to away games. Without including this time for game durations or travel, the average time spent performing activities on a spring training game day amounts to between 4.13 and 5.76 hours. . . . Given that deposition testimony indicates that the duration of a spring game is close to three hours, the documents therefore show that the average workday for a spring game day would be between roughly 7 and 8.5 hours, not including travel. The survey data indicated that respondents spent between 7.91 and 8.76 hours at the workplace on spring game days (depending on whether it was a home game or away game). This data therefore validates the survey results.

*Id.*

Dr. Dennis acknowledges that "[o]n some measures, the survey data is somewhat higher than the data extracted from the validating documents." *Id.* In particular, the documents "yield a lower average number of hours than the survey data" for non-game-days during spring training

and extended spring training." *Id*. He opines that this may be because the documents "do not include time spent changing into uniforms, time spent performing extra work, and often do not include time spent performing strength workouts." *Id*. He further suggests that "it is possible that minor leaguers perform more of this extra work and strength conditioning on non-game-days during these periods, which would explain the differences in the data." *Id*.

Because fewer daily itineraries were produced for the championship season, Dr. Dennis conducted another validation test for that period. *Id*. ¶ 29. In particular, he "looked at the deposition testimony from Defendants' own witnesses to validate the survey data for the championship season." *Id*. According to Dr. Dennis, "[t]hese witnesses testified that players generally arrived to work between 3 and 4.5 hours before a night game, depending on whether the game was home or away." *Id.* While these estimates would "yield a smaller number of hours than the survey data yields," Dr. Dennis opined, the difference would not be substantial. *Id.* Dr. Dennis suggests that "[a] conservative measure of the survey data, such as the tenth percentile, could be used if needed to more than account for any differences." *Id*.

In sum, Dr. Dennis concludes that the Main Survey was conducted using a methodology that is consistent with generally accepted methods for survey research and that its results are reliable. *Id*. ¶ 47.

**C. The Motion for Reconsideration**

In their Motion for Reconsideration, Plaintiffs ask the Court to certify a set of classes that they contend will address the concerns expressed by the Court in the Class Certification Order. The proposed classes are defined as follows:

> *Florida Class*: Any person who, while signed to a Minor League Uniform Player Contract, participated in spring training, instructional leagues, or extended spring training in Florida on or after February 7, 2009, and had not signed a Major League Uniform Player Contract before then.
>
> *Arizona Class*: Any person who, while signed to a Minor League Uniform Player Contract, participated in spring training, instructional leagues, or extended spring training in Arizona on or after February 7, 2011, and had not signed a Major League Uniform Player Contract before then.
>
> *California Class*: Any person who, while signed to a Minor League

> Uniform Player Contract, participated in the California League on or after February 7, 2010, and had not signed a Major League Uniform Player Contract before then.
>
> *California Waiting Time Subclass*: Any California Class Member who played in the California League since February 7, 2010, but who is no longer employed by MLB or its franchises as a minor league player.

Motion for Reconsideration at i-ii. Plaintiffs also propose a separate Rule 23(b)(2) injunctive relief class, defined as follows:

> Any person who is a) signed to a Minor League Uniform Player Contract, b) has never signed a Major League Player Contract, and c) participates in spring training, instructional leagues, or extended spring training in Florida or Arizona.

*Id.* at ii. The proposed class representatives for each of these classes is listed in the Declaration of Garrett Broshuis in Support of Motion to Reconsider Regarding Class Certification ("Broshuis Decl."), Ex. E. Their participation in Arizona and Florida spring training, extended spring training and instructional leagues and in the California League, is set forth in Exhibit F to the Broshuis Declaration.

Finally, Plaintiffs seek (re)certification of an FLSA collective and propose the following definition:

> Any person who, while signed to a Minor League Uniform Player Contract, participated in the California League, or in spring training, instructional leagues, or extended spring training, on or after February 7, 2011, and who had not signed a Major League Uniform Player Contract before then.

*Id*.

According to Plaintiffs, the "streamlined class structure" that they now propose will eliminate the problems associated with winter conditioning work because they no longer seek certification as to those claims. *Id*. at 1. Further, with respect to the California Class, Plaintiffs seek certification only as to the California League championship season, which they contend involves no interstate travel. *Id*. Moreover, Plaintiffs argue, for all the proposed classes the work at issue was performed only in a single state and therefore, the choice-of-law determination will be simplified; in particular, Arizona law will be applied to the training season work performed in Arizona, Florida law will be applied to the training season work performed in Florida, and

California law will be applied to work performed in the California League. *Id*. at 1, 3-5.

Plaintiffs also argue that their new Rule 23(b)(3) classes "eliminate concerns about the variations in the work class members performed." *Id*. at 1. This is because the "three proposed classes are focused exclusively on work class members performed as teams at team complexes, under the direct control and supervision of Defendants." *Id*. This means that an activity-by-activity inquiry will not be necessary and instead, the common question will be, when did the team's workday begin and end. *Id*. at 1, 6-10. This approach is consistent with the "whistle to whistle" measure of the workday that is applied under the "continuous workday" doctrine, Plaintiffs argue. *Id*. According to Plaintiffs, under this doctrine, all activities that occur during the workday are compensable. *Id*. They further assert that it is permissible to rely on the Main Survey to establish the average length of the workday and that that survey is sufficiently reliable to meet the requirements of Rule 702 and *Daubert*. *Id*. at 11-13. In light of *Mt. Clemens* and *Tyson Foods*, they assert, this evidence will allow a jury to draw "just and reasonable" inferences about when the work day began and ended for class members. *Id*. at 14-17.

Plaintiffs also argue that differences in compensation among minor league players do not give rise to individualized issues that defeat certification because these variations go to damages rather than liability. *Id*. at 17-18. Plaintiffs acknowledge that the Court treated these variations as relating to liability in its Class Certification Order but contend that under the Ninth Circuit's decision in *Torres v. Mercer Canyons, Inc*., 835 F.3d 1125 (9th Cir. 2016), which this Court cited elsewhere in its opinion, this issue is more appropriately treated as one going to damages. *Id*.

Plaintiffs further contend that the two main affirmative defenses that Defendants assert as to the class claims – the seasonal amusement or recreational establishment defense and the creative professional defense – do not raise sufficient individualized issues or manageability problems to preclude certification of their proposed classes. *Id*. at 19-21. As to the former, which applies only under Florida law and the FLSA,[2] Plaintiffs address the Court's suggestion that it

[2] Plaintiffs correctly note that the Court erred in its Class Certification Order when it stated that California law provides for a seasonal amusement or recreational establishment exemption. Motion for Reconsideration at 19 n. 16. In fact, it does not.

might be "swamped" by the individual inquiries necessary to determine whether a multitude of "establishments" qualified for the exemption. *Id*. at 19 (citing Class Certification Order at 85). They point out that these inquiries rely on common evidence and therefore are not individualized in the sense that the issue must be addressed on a class-member-by-class-member basis. *Id*. at 20. In any event, they argue, the number of "establishments" at issue under the narrower class definitions they now propose is significantly reduced because there are "at most 15 facilities in Florida, 15 facilities in Arizona, and 10 facilities in California." *Id*.

With respect to the creative professionals exemption, Plaintiffs argue that neither of the two prongs of the applicable test – the first relating to an individual's primary duties and the second setting a minimum compensation requirement of $455/week – requires individualized inquiries. *Id*. at 20-21. Plaintiffs note that the Court already concluded that there are no individualized inquiries as to the "primary duties" prong of the test but found that the "compensation" prong of the test would require individualized inquiries. *Id*. Plaintiffs argue that in fact, the second prong of the test also will not require individualized inquiries because there are employment and payroll records that can be used to determine whether any particular class member meets this requirement. *Id*. at 21 (citing *Minns v. Advanced Clinical Employment Staffing LLC*, No. 13-CV-03249-SI, 2015 WL 3491505, at *8 (N.D. Cal. June 2, 2015)). Plaintiffs also point out that the Court already found that any individualized inquiries associated with this defense would not, on their own, be sufficient to defeat class certification. *Id*. (citing Class Certification Order at 86).

Plaintiffs contend their more narrowly crafted classes also satisfy all of the requirements of Rule 23(a) and solve the ascertainability problem identified by the Court in its Class Certification Order. *Id*. at 21-22. In particular, Plaintiffs argue that because they are no longer asking to certify any classes to pursue the winter conditioning claims, the problems associated with determining who is a member of the State Classes based on that work is eliminated. *Id*.

Plaintiffs also argue that the Court should certify its proposed Rule 23(b)(2) class to pursue injunctive relief. *Id*. at 22-23. They contend the problem with standing identified by the Court has been remedied by the (requested) intervention of four current minor league players. *Id*. at 22.

They further assert that in order for a Rule 23(b)(2) to be certified, Plaintiffs need only establish that Defendants have "acted or refused to act on grounds that apply generally to the class" and need not demonstrate that they have suffered the same injury. *Id*. (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010)). Plaintiffs assert this requirement is met, citing Defendants' compensation policies, including failure to pay wages outside of the championship season and failure to pay overtime during the championship season. *Id*. at 23. According to Plaintiffs, "[t]he adjudication of the legality of these practices will not only resolve a central issue 'in one stroke' . . . , it will conclusively determine whether the (b)(2) plaintiffs and class members are entitled to the injunctive and declaratory relief they seek, namely, an order compelling Defendants to pay current minor leaguers in compliance with applicable state wage laws." *Id*. (citation omitted).

With respect to the requirement that any monetary relief sought by a Rule 23(b)(2) class must be incidental to the injunctive relief sought by that class, Plaintiffs contend this issue is not a concern because the (b)(2) class they propose is requesting *only* injunctive relief. *Id*. at 23 (citing *In re NCAA Student-Athlete Name & Likeness Licensing Litig*., No. C 09-1967 CW, 2013 WL 5979327, at *7 (N.D. Cal. Nov. 8, 2013)). According to Plaintiffs, courts have found that "[i]t is permissible to seek both a damages class under Rule 23(b)(3) and a separate injunctive relief class under Rule 23(b)(2)" and when such an approach is taken it is not necessary to address whether damages are "incidental" to injunctive relief. *Id*. (citing *In re NCAA Student-Athlete Name & Likeness Licensing Litig*., No. C 09-1967 CW, 2013 WL 5979327, at *7 (N.D. Cal. Nov. 8, 2013); *Ellis v. Costco Wholesale Corp*., 285 F.R.D. 492, 503, 536–37 (N.D. Cal. 2012); *Aho v. AmeriCredit Fin. Servs., Inc*., 277 F.R.D. 609, 619, 623 (S.D. Cal. 2011)).

Even if the Court declines to certify Plaintiffs' proposed 23(b)(2) and (b)(3) classes, Plaintiffs request that the Court certify a Rule 23(c)(4) class to address common issues, including the following:

- Whether minor leaguers are employees under the wage-and-hour laws, and, relatedly, whether MLB jointly employs them;
- Whether minor leaguers are performing "work" during the training seasons and the championship season;

- Whether the creative artist exemption applies to minor leaguers under Florida and California law;
- Whether the seasonal and amusement exemption applies under Florida law.

*Id*. at 24-25.

Finally, Plaintiffs argue that the FLSA collective should be recertified "with the exception that Plaintiffs propose limiting the Collective in the same manner as their proposed narrowing of the Rule 23 classe[s] (*ie.,* eliminating the winter offseason claims and limiting the Collective to minor leaguers who participated in spring training, extended spring training or instructional leagues in Arizona or Florida or who worked in the California League.)." *Id*. at 25.

In their Opposition brief, Defendants argue that Plaintiffs' proposal does not remedy any of the deficiencies identified by the Court in its Class Certification Order and that Plaintiffs have even introduced new problems relating to certification of their proposed classes. Opposition to Motion for Reconsideration at 1. First, Defendants contend that even the more limited classes proposed by Plaintiffs will require the Court to conduct individualized choice of law inquiries to compare the relative interests of the states that might potentially have an interest in applying their laws, which will depend on the circumstances of each individual player. *Id*. at 1, 3-9. They reject Plaintiffs' assertion that the law of the situs where the relevant work was performed can be applied to each of the three proposed Rule 23(b)(3) classes. *Id*. at 5.

With respect to the Arizona and Florida Classes, Defendants assert that the players who participate in spring training and instructional leagues typically do not reside in these states and spend only about four weeks there during spring training. *Id*. at 6. Under these circumstances, they contend, there will be other states that have an interest in applying their law and therefore, a balancing test will have to be applied for each player in the class. *Id*. at 6-7. Similarly, they assert, there will be choice of law questions requiring individualized inquiries as to the California Class. *Id*. at 7-9. Defendants contend the application of California law to these class members should not be assumed, given that the majority of MLB Clubs with affiliates in the California League are not based in California and the putative members of this class spend varying amounts of time in the California League – some as little as a single day. *Id*. at 8. Defendants support their

argument with an expert declaration by Mr. Paul K. Meyer, who reviewed and analyzed player transaction records for the 11 MLB Clubs that had a minor league baseball affiliate in the California League between the 2010 and 2015 Championship Seasons. Declaration of Paul K. Meyer in Support of Defendants' Opposition to Plaintiffs' Renewed Motion for Class and Collective Certification Under Federal Rule of Civil Procedure 23 and the FLSA ("Meyer Decl.") ¶ 11.

According to Mr. Meyer, he analyzed over 469,000 data rows of player transaction history information. *Id*. The "detailed transaction records contain information on the affiliates and/or MLB Clubs to which a player was assigned, including when the player was transferred from one affiliate and/or MLB Club to another." *Id*. ¶ 12. They also contain information about when a player: 1) signed a Major or Minor League contract; 2) was placed on the disabled list; 3) was placed on rehabilitation assignment; 4) was placed on an inactive list; or 5) was released by a Club. Mr. Meyer found that a total of 2,113 players were assigned to affiliates in the California League between the 2010 and 2015 championship seasons. *Id*. ¶ 15. He further found that between 68% and 75% of those players played for affiliates outside of California during the *same* championship season in which they played for the California League. *Id*. ¶¶ 16-17. These players spent varying amounts of time playing in California. *Id*. For example, for the 2010 championship season, Mr. Meyer found a range of between one day and 151 days, with approximately 11% of the 364 players who were assigned to the California League that season spending one week or less playing in California. *Id*. ¶ 19.

Mr. Meyer also found that of the players who were assigned to play in the California League and other affiliates outside of California in the same season, over 50% spent more time assigned to affiliates outside of California than they spent assigned to play for the California League. *Id*. ¶¶ 20-21. He also performed an analysis to determine how many different states putative class members were assigned to during the championship season in addition to the California League, both individually and collectively. *Id*. ¶¶ 22-24. He found that "many players played in multiple states during the same season" and that between 2010 and 2015 putative class members played for between 27 and 33 different states during the same seasons in which they

were assigned to the California League. *Id.*

Finally, Mr. Meyer analyzed the transaction histories to determine what percentage of the California League were first-year players. *Id.* ¶¶ 25-26. He concluded that less than five percent of the California League players were first year players during the period of 2010 and 2015. *Id.* Based on Mr. Meyer's findings Defendants contend "it is clear that there is no basis for the global application of California law" because "[t]he players' ephemeral contacts with the state of California must always be balanced against the interests of the other states where they, for example, reside, play, train, and where their MLB Club is located." Opposition at 8-9.

Next, Defendants argue that Plaintiffs have not addressed the problem that there is a "plethora of individualized issues requiring resolution in order to determine the amount of compensable time." *Id.* Defendants reject Plaintiffs' assertion that they have eliminated this problem by "focus[ing] only on team work periods" and that their Main Survey "provides reliable representative evidence that eliminates the need for player-by-player review." *Id.* Instead, they argue that individualized liability issues still predominate, despite Plaintiffs' reliance on the "continuous workday" doctrine and "representative evidence" that allegedly demonstrates "average" time players spent working based on responses to the Main Survey. *Id.* at 1-2, 9-16.

With respect to Plaintiffs' reliance on the "continuous workday" doctrine, Defendants contend this theory does not help Plaintiffs because there "is no common continuous workday;" instead, they assert, "[d]etermining what constitutes a 'continuous workday' for a single player depends not only on when the day begins and ends [but] also requires an individualized analysis of what activities are 'principal' and 'integral and indispensable'" in order to determine whether they are "compensable at all or part of a continuous workday." *Id.* at 10 (citing *Bryant v. Service Corp. Int'l*, No. C 08-01190 SI, 2011 WL 855815 (N.D. Cal. Mar. 9, 2011)).

Defendants also reject Plaintiffs' assertion that they can use the Main Survey results to provide representative evidence of a "common workday for all minor league players." *Id.* at 11. According to Defendants, even if the Main Survey survived scrutiny under *Daubert*, it cannot properly be used for this purpose because it does not take into account variations in player circumstances. *Id.* Defendants argue that the Main Survey does not address "team related

activities," contrary to Plaintiffs' assertions, pointing out that it does not ask minor league players about the specific activities in which they engaged while at the ballpark and only asked them to recall their "most often" arrival and departure times. *Id*. Consequently, they contend, the Main Survey does not provide evidence of "hours worked" at all. *Id*. at 12. *Id*. In addition, they argue, relying on "averaging" will result in significantly understating or overstating the players' hours because of the variations among players. *Id*.

Defendants offer two expert declarations that address the variations in responses to the Main Survey, one by Dr. Jonathon Guryan and another by Dr. Denise M. Martin. *See* Declaration of Jonathon Guryan, Ph.D. in Support of Defendants' Opposition to Plaintiffs' Renewed Motion for Class and Collective Certification under Rule 23 and the FLDA, Docket No. 749 ("Guryan Decl."); Declaration of Denise N. Martin, Ph.D. in Support of Defendants' Opposition to Plaintiffs' Renewed Motion for Class and Collective Certification under Rule 23 and the FLSA, Docket No. 750 ("Martin Decl."). Dr. Guryan opines that there is substantial variation among respondents to the Main Survey as to arrival and departure times for each of the types of day at issue (e.g., non-game days, home game days, away game days) and between the hours reported at the 10th percentile and the 90th percentile. Guryan Decl., ¶ 8. He finds that as a result of these variations, reliance on the "average" hours worked could result in significantly overstating or understating the hours worked for a substantial portion of respondents. *Id.* Dr. Guryan also finds significant differences for hours reported across Clubs and from year to year. *Id*. Finally, he finds significant variations even among players who played for the same Club in the same year, which he contends renders the Main Survey unreliable for proving classwide damages. *Id*. ¶¶ 11-16.

Dr. Martin updates her earlier opinions with regard to whether the results of Dr. Dennis's survey (previously, the Pilot Survey, now the Main Survey) can be used in the "formulaic model proposed by Dr. Kriegler to generate a reliable classwide estimate of the number of 'hours worked' . . . and, therefore, allow determination of the extent to which each player was not paid at least the applicable minimum wage and/or worked uncompensated overtime." Martin Decl. ¶ 6. Dr. Martin concludes that they cannot. *Id*. ¶ 8. First, she agrees with Dr. Ericksen that recall and self-interest bias, combined with respondent burden, will cause the estimate of hours worked

derived from the Main Survey to be inflated. *Id.* ¶ 9. She further opines that variability among responses as to arrival and departure times is a reflection of the discretionary activities in which players engage before and after team-related activities; to the extent the Main Survey results include these activities, "the inclusion of such hours in any formulaic model would inflate the estimate of any 'hours worked' to an unknowable degree." *Id.* ¶¶ 11, 19-30.

Dr. Martin also rejects the validation tests conducted by Dr. Dennis as having "no value." *Id.* ¶ 12. This is because the schedules upon which Dr. Dennis relied were merely "aspirational and do not reflect what happened on a given day," according to Dr. Martin. *Id.* In any event, she contends, any test to validate the results of the Main Survey that used the schedules should have compared the survey responses of players on individual teams to see if the players of teams with longer scheduled hours actually reported longer hours. *Id.* Dr. Martin states that she conducted such an analysis and found no such correlation. *Id.* ¶¶ 12, 31-39.

Dr. Martin opines that the unreliability of Dr. Dennis's survey would also render any "formulaic damages model" that used these results unreliable and that no such model "could repair the infirmities embodied in the survey responses." *Id.* ¶ 14, 40-41. She bases this opinion on the fact that the Main Survey "is Plaintiffs' proposed source of 100% of the hours for spring training, extended spring training and instructional league, as well as all of the pre- and post-game hours for the Championship season." *Id.* ¶ 40.

Next, Dr. Martin challenges Plaintiffs' assertion that "standardized 'working hours' during spring training, extended spring training, instructional league and standardized pre- and post-game hours during the championship season were required by the Clubs." *Id.* ¶ 42. She opines that the Main Survey results do not support this conclusion but instead show "pronounced variability exists in the survey responses regarding hours reportedly spent at the ballpark, even for players on the same team." *Id.* This variability is indicative of the discretion players have as to their hours, she opines, giving rise to the need to conduct individualized inquiries as to whether the activities they performed at the ballpark were voluntary or required by the Clubs. *Id.* According to Dr. Martin, reliance on an average or use of 10th percentile data as a measure of hours worked would "mis-estimate liability and damages for many, if not most, individual players." *Id.* ¶ 43.

Finally, Dr. Martin opines that the data Dr. Dennis obtained from the Main Survey is distinguishable statistically from the data that was found by the Supreme Court to be acceptable in *Tyson Foods v. Bouaphakeo*. *Id.* ¶¶ 45-50. She concedes that she is "not an expert in the *Tyson* matter" but states that she has "reviewed the reports in that matter, as well as the decision rendered." *Id.* ¶ 45. She distinguishes the study at issue in *Tyson* on two main grounds.

First, Dr. Dennis notes that *Tyson Foods* involved a time and motion study in which the expert "actually watched employees engaged in discrete donning and doffing tasks, providing measurements with virtually no error." *Id.* ¶ 46. In contrast, she opines, the data from the Main Survey consists of player recollections and do not address specific tasks, resulting in a likelihood that the estimates will be inflated and infected with various forms of bias. *Id.*

Second, Dr. Dennis states that the expert in *Tyson Foods* calculated an "*average* or *mean* time spent donning and doffing, adding up all the time spent and dividing by the number of observations, while Dr. Dennis asked about the *mode* time, or the time that 'most often' occurred." *Id.* ¶ 47 (emphasis in original). She opines that "[u]se of an overall mean to estimate liability and aggregate damages is not subject to [the] same skewness/overestimation problem that can affect mode." *Id.* She further states that "the mode is systematically likely to differ from the mean for players, to the extent that shorter-than-typical days due to factors such as injuries, rain-outs, manager discretion or other unforeseen events are more likely to occur than longer-than-typical days." *Id.* ¶ 50. Therefore, she concludes, "in addition to getting the estimate of any hours worked wrong for virtually every player, use of the 'mode' results from Dr. Dennis'[s] survey (vs. the average gathered in *Tyson*) may not even offer the prospect of getting the estimate of liability or *aggregate* damages correct." *Id.*

In opposing Plaintiffs' new proposed classes, Defendants further point to the Court's reliance in its Class Certification Order on the variations in the types of activities in which the players engaged as a basis for declining to certify the proposed classes under Rule 23(b)(3). Opposition at 14 (citing Class Certification Order at 83). In espousing a "broad definition" of work based only on departure and arrival times, Defendants contend, Plaintiffs "all but ignore this aspect of the Court's decision." *Id.* Similarly, Defendants contend, Plaintiffs have not addressed

the significant variations as to compensation that the Court cited, except to argue that this variation goes to damages rather than liability. *Id*. at 14-15. According to Defendants, the Court already rejected this argument and moreover, Plaintiffs' reliance on *Torres v. Mercer Canyons, Inc*. is misplaced because that case involved informational injury that was classwide and therefore liability could be established without regard to the pecuniary loss to the plaintiffs. *Id*. at 15 (citing No. 15-35615, 2016 WL 4537378 (9th Cir. Aug. 31, 2016)).

Defendants further contend Plaintiffs' proposed classes will give rise to new defects under Rule 23. *Id*. at 16. First, they argue that because Plaintiffs have "abandoned classwide pursuit of the vast majority of the claims they are still pursuing individually," the class device is no longer the "superior means of adjudication under Rule 23." *Id*. at 16. Second, they argue that there are now "adequacy" problems relating to Plaintiffs' representation of the putative classes because Plaintiffs seek to apply the laws of Arizona, Florida and California to the proposed classes even though some class members may have an interest in having the law of some other state applied. *Id*. at 17. Defendants also argue that by limiting two of the classes to spring training and instructional leagues, when players are not compensated at all, they have revived the question of whether they are trainees or employees, which will turn on individualized inquiries relating to their expectation of compensation. *Id*. at 18. There also remain "numerous individualized inquiries that must be resolved in connection with other defenses asserted in this case," Defendants contend. *Id*.

Defendants also contend the Court should reject Plaintiffs' request to certify a separate Rule 23(b)(2) class. *Id*. at 19. First, they argue, certification of the Rule 23 (b)(2) class should be denied because the "relief the proposed intervenors seek – the future payment of money – is a claim for damages disguised as equitable relief." *Id*. According to Defendants, courts reject such attempts to transform a claim for money into one for injunctive relief. *Id*. (citing *Herskowitz v. Apple, Inc*., 301 F.R.D. 460, 482 (N.D. Cal. 2014); *Cholakyan v. Mercedes-Benz, USA, LLC*, 281 F.R.D. 534, 560 (C.D. Cal. 2012)). Second, they argue, the intervenors' request for injunctive relief is not "incidental" to the money damages they seek. *Id*. Finally, Defendants argue that adjudication of the claims of the Rule 23(b)(2) class would require "endless individualized

adjudication." *Id*. In particular, they assert that "the Court would be faced with the very same fact-intensive determinations that have rendered all of the other classes unsuitable for certification, including: what state law applies to each class member, what activities constitute compensable time (if any), which players (if any) are owed additional compensation, and the applications of the various defenses." *Id*. According to Defendants, "these individualized inquiries would necessitate a separate injunction tailored to each player" and therefore, the requirements of Rule 23(b)(2) are not met. *Id*. (citing *McKinnon v. Dollar Thrifty Auto. Grp., Inc*., No. CV 12-cv-04457-SC, 2015 WL 4537957, at *12 (N.D. Cal. July 27, 2015); *Cholakyan*, 281 F.R.D. at 560).

With respect to Plaintiffs' request that the Court certify an issues class under Rule 23(c)(4), Defendants argue that the request is an attempt to "circumvent this Court's prior denial of class certification" and that Plaintiffs have not provided sufficient details to show that the issues are amenable to classwide treatment. *Id*. at 21-23. They further contend that Plaintiffs' request does not address one of the Court's primary findings in the Class Certification Order, namely, that "key issues going to liability require individualized proof." *Id*. at 21-22. Defendants also assert that Plaintiffs have not demonstrated that the commonality requirement of Rule 23(a) would be met as to the issues classes Plaintiffs propose, which requires that Plaintiffs demonstrate not only that their claims turn on common issues of law but also that these questions are susceptible to a common *answer*. *Id*. at 22 n. 28. Moreover, Defendants argue, the issues classes Plaintiffs propose will not "significantly advance the resolution of the underlying case." *Id*. at 23 (quoting *Valentino v. Carter-Wallace, Inc*., 97 F.3d 1227, 1229 (9th Cir. 1996)).

Defendants again raise the issue of Article III standing, arguing that this is a threshold issue that should be decided before deciding whether the proposed classes should be certified. *Id*. at 23. They contend that the problem of standing is particularly significant as to the California Class and the proposed (b)(2) class. *Id*. In particular, they point to the fact that the California Class contains class representatives who played in the California League for only seven of the eleven Club Defendants. *Id*. at 24 (citing Bloom Decl., Ex. A). Similarly, they assert, the (b)(2) class contains class representatives who played for only four of the Club Defendants. *Id*.

Finally, Defendants argue that the proposed FLSA collective does not meet the heightened

"second-stage" standard for certification with respect to demonstrating that the putative opt-ins are similarly situated. *Id*. Even with the modifications proposed by Plaintiffs, Defendants contend, Plaintiffs have not solved the problems related to the "disparate factual and employment settings of the class members" and the "plethora of individualized inquiries" necessary to adjudicate their claims. Therefore, they assert, the Court should deny Plaintiffs' request to re-certify the FLSA collective just as it should deny their request to certify modified classes under Rule 23. *Id*. at 25.

In their Reply brief, Plaintiffs reject Defendants' assertion that the new proposed classes will require a multitude of choice of law analyses that defeat class certification, arguing that it is Defendants' burden to show that another state's law applies to class members' claims. Reply at 1-2. According to Plaintiffs, Defendants have not met that burden. *Id*. at 3-5.

Plaintiffs also challenge Defendants' argument that there is no common continuous work day because players do not arrive and depart at the same time each day. *Id*. at 5-6. Plaintiffs contend they have "never argued that all players arrive and depart at the same time each day" and in any event, it is not their burden to prove that they do; rather, they need only show that they performed work for which they were improperly compensated and present evidence from which a "just and reasonable inference" can be drawn as to the amount of work they performed. *Id*. at 6 (citing *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 687-88 (1946)). Plaintiffs also argue that Defendants are incorrect in reading *Tyson Foods* as requiring that a representative sample must be based on an observational study, or that it must measure every discrete activity, in order to be considered in the class action context. *Id*. Moreover, they contend, *Tyson Foods* itself allowed the use of representative evidence where there were material variations between employees as to the time spent donning and doffing of equipment. *Id*.

Plaintiffs contend they can provide a reasonable estimate of hours worked based on the model offered by Dr. Kriegler. *Id*. at 7-8.[3] Dr. Kriegler offered a declaration in support of

[3]Defendants object to Plaintiffs' introduction of Dr. Kriegler's Rebuttal Declaration (Docket No. 755) and ask the Court to strike that declaration, as well as all of the arguments in Plaintiffs' Reply brief that rely on Dr. Kriegler's declaration. *See* Docket No. 767 ("Objection"). They further request leave to file a sur-reply in the event the Court decides to consider this material. *See* Docket No. 768 ("Motion for Leave to File Sur-Reply"). In support of their request that the Court strike the Kriegler Rebuttal Declaration, Defendants contend Dr. Kriegler's declaration violates

Plaintiffs' original class certification motion and has now updated that declaration to address the expert declarations of Defendants' experts and explain how he would use the results of the Main Survey, in combination with other available information, to come up with a classwide estimate of damages. *See* Kriegler Rebuttal Decl. ¶¶ 1-12.

In his rebuttal declaration, Dr. Kriegler explains that MLB's eBis data, which contains the transactional history for each player, will allow him to determine for each day during the class period each class member's status and the team for which he was playing. *Id.* ¶ 14. This information is the starting point for his damages model and "combined with the technical capabilities of computational software programs" such as the one used by Defendants' expert, Mr. Meyer, will enable him to "perform very precise calculations for every player for any time period." *Id.* ¶¶ 14, 18. Dr. Kriegler states that he intends to cross-reference the transactional data with other information, including: 1) for game days, the game duration times, which are available on MiLB.com; 2) for away games, the travel commute times, which can be obtained using Google maps; 3) the type of workday, which can be determined from information on MiLB.com and organizational schedules; 4) estimated hours worked given the type of workday. *Id.* ¶ 14. Dr. Kriegler states that organizational schedules will allow him to categorize workdays during the

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the Court's instructions at the August 19, 2016 hearing, when it addressed the question of whether Plaintiffs would be permitted to offer any additional expert declarations beyond the declaration of Dr. Dennis addressing the main survey. *See* Objection, Ex. B (August 19, 2016 hearing transcript) at 42-46. At that hearing, the Court opined that it was unlikely that any additional expert opinions would be helpful if it found that the Main Survey was deficient because of the problems related to individual players' recall of relevant events. *See id.* at 42. As discussed below, however, the Court now finds that the Main Survey meets *Daubert*'s threshold reliability requirement and therefore the Court must resolve the critical question of whether the claims of the new classes proposed by Plaintiffs can be proven on a classwide basis through common evidence. The answer to that question turns, in part, on how the data obtained from the Main Survey will be used, in conjunction with other evidence, to establish the amount of work performed by the proposed classes. Defendants have offered two expert declarations offering opinions on this question, including one that is based on an entirely new and very extensive study of the player transaction records. Under these circumstances, it is appropriate that Plaintiffs be permitted to introduce a rebuttal declaration by Dr. Kriegler explaining why the opinions of Defendants' experts are incorrect. The Court also finds that Defendants' assertions the Dr. Kriegler has offered a "new" damages model are exaggerated and that many of the approaches he explains in his rebuttal declaration, such as his use of a percentile method, were also described in his earlier declaration. Therefore, the Court declines to strike Dr. Kriegler's declaration. To alleviate any possible prejudice to Defendants, however, the Court will consider Defendants' Sur-Reply. Therefore, the Motion for Leave to File a Sur-Reply is GRANTED.

championship season depending on whether games were home or away and whether they were night games or day games. *Id*. ¶ 14. Similarly, with respect to spring training, he will be able to use Club training schedules to distinguish between camp days and game days. *Id*. ¶¶ 9-10.

Plaintiffs further contend that Defendants' criticisms of the Main Survey are not sufficient to warrant denial of class certification. *Id*. at 8-10. First, Plaintiffs reject Defendants' assertion that the Main Survey cannot be relied upon to determine the amount of work conducted by class members because it does not attempt to evaluate the specific tasks the players were performing throughout the day and does not take into account the fact that some players arrived at the ballpark early (ie., before they were required to be at the ballpark). *Id*. at 8. According to Plaintiffs, under the continuous workday doctrine, it is neither necessary nor appropriate to assess the compensability of each discrete activity. *Id*. To the extent that there are variations as to arrival time, Plaintiffs contend, these should not defeat class certification. *Id*. In particular, Plaintiffs assert, both California and Arizona law treat all hours at the ballpark as being compensable, with Arizona law defining "hours worked" as "all time . . . *at a prescribed workplace*," *id*. (quoting Ariz. Admin. Code § R20-5-1202(9)) (emphasis added in Plaintiffs' brief) and California law defining hours worked as all time an employee is "permitted to work, *whether or not required to do* so" and further providing that an employee "subject to an employer's control does not have to be working during that time." *Id*. (quoting *Morillon v. Royal Parking Co*., 995 P.2d 139, 143 (Cal. 2000)).

As to Florida and federal law, Plaintiffs contend, variations in arrival times also do not preclude certification because they lie "at the fringe of the workday." *Id*. Citing the testimony of Defendants' witnesses, Plaintiffs contend "[t]here is a core work routine across minor league baseball that consists of some form of early work or team fundamentals, a stretch, throwing, batting practice, and then a game." *Id*. Much of this workday can be established through common evidence other than the Main Survey, Plaintiffs contend, such as schedules. *Id*. The Main Survey, however, captures time at the beginning and end of the workday that is spent performing required activities that is not reflected on the schedules. *Id*. at 9. As to this time, Plaintiffs argue that much of the variation can be taken care of using averages, which will eliminate outliers. *Id*. If the Court

is concerned about the players whose arrival and departure times were significantly above the average, Plaintiffs suggest, the class notice can alert class members that the class claims will be based on averages and that class members may be able to recover more in an individual action if they opt out of the class. *Id*.

Plaintiffs argue further that conservative estimates can be used to measure this time, such as the 10th percentile. *Id*. at 9. Plaintiffs contend that Defendants "do not genuinely dispute that there was a time by which all team members *had* to arrive to begin work activities, so the continuous workday must begin no later than that time." *Id*. at 9. According to Plaintiffs, "[t]he 10th percentile can be used to reveal when the *required* team work began because it represents the time by which 90% of respondents had already arrived at work. *Id*. at 10 (citing Kriegler Rebuttal Decl. ¶¶ 7, 34-35).[4] Plaintiffs argue that while Defendants are "free to try to rebut this evidence . . . the persuasive value of the evidence is a jury question, not a question of class certification." *Id*. (citing *Tyson Foods*, 136 S. Ct. at 1049; *Villalpando v. Exel Direct Inc*., 12-CV-04137-JCS, 2016 WL 1598663, at *21 (N.D. Cal. April 21, 2016)).

Next, Plaintiffs reject Defendants' reliance on variations in pay as a reason for denying class certification. *Id*. at 10. Plaintiffs note that Defendants make this argument only as to the California Class. *Id*. This is because the Arizona and Florida Classes focus on periods when players receive no compensation. *Id*. n. 6. As to the California Class, Plaintiffs do not dispute that

[4] Dr. Kriegler states in his declaration that "the 10th percentile for hours worked closely tracks (and in some instances is lower than) the required work hours according to daily schedules and depositions." Kriegler Rebuttal Decl. ¶ 13. To illustrate this point, he provides bar charts for each of the seven types of workdays in which games are played (spring training, extended spring training, instructional league and the four types of championship season game days – home, away, day and night games). *Id*. ¶ 35 & Exhibit A-G. According to Dr. Kriegler, these bar charts reveal that the Main Survey results at the 10th percentile are generally at or below the hours reported in the schedules. *Id*. He acknowledges that the 10th percentile is higher than the hours reflected on some of the daily schedules for home night games (depicted in Exhibit 4G to his declaration) but opines that this is not a cause for concern because the schedules for these days include pre-game stretching, throwing, batting practice and fielding practice but do not include conditioning, weight lifting, team meetings, video review, training room treatment, or putting on uniforms, even though deposition testimony reflects these activities were required. *Id*. ¶ 36. Dr. Kriegler opines that the close correlation between the times reflected on the schedules and the results of the Main Survey at the 10th percentile "supports the notion that, while some Minor Leaguers may have performed more early activities than others, survey data can be relied upon to estimate hours worked, and there is a minimum expectation for the number of work hours that is common to all class members." *Id*. ¶ 13.

the vast majority of class members are beyond their first year – which means that their salaries will not be uniform – but point out that this also means that fewer class members will be subject to the variations in signing bonuses that characterize first year players. *Id*. In any event, they argue, variations in compensation do not defeat predominance because there are common payroll records that can be used to assess a player's rate of pay and damages for each week. *Id*. (citing Kriegler Rebuttal Decl. ¶ 40). In fact, they contend, the existence of computerized payroll records has been found to *support* class certification because it allows class claims to be evaluated on the basis of generalized proof. *Id*. (citing *Minns v. Advanced Clinical Employment Staffing LLC*, No. 13-CV-03249-SI, 2015 WL 3491505, at *8 (N.D. Cal. June 2, 2015); *Leyva v. Medline Indus*., 716 F.3d 510, 514 (9th Cir. 2013); Newberg § 450 (5th ed)).

Plaintiffs further contend that under their new proposal there are no defenses that require individualized analyses. *Id*. at 11. The only defense under Arizona law is that the players are not employees, Plaintiffs contend, and the Court has already held that this issue can be decided based on common evidence. *Id*. Plaintiffs also argue that the creative artist exemption under California law will depend on common proof of the players' duties and that the seasonal and amusement exemptions will not require any individualized analysis. *Id*.

Plaintiffs also argue that to the extent individualized inquiries exist, they relate to damages and therefore do not defeat class certification. *Id*. at 11. First, as to the Arizona and Florida Classes, the players are not compensated, so liability will be established once the defenses are resolved and the players show that they performed *any* work, Plaintiffs contend. *Id*. at 11-12. If these classes establish liability, calculation of their damages will simply require that the minimum wage is multiplied by the hours worked. *Id*. at 12. Similarly, they contend, for the California Class, the game schedules show that players were commonly scheduled to work seven days a week in violation of California law; consequently, they contend, liability will be easily established as to the overtime claim simply by looking to game schedules. *Id*. (citing Kriegler Rebuttal Decl. ¶¶ 24-26). Thus, the calculation of hours worked and pay will relate only to damages, they contend. *Id*. Plaintiffs assert that it is well settled under Ninth Circuit law that the need to make individualized findings as to the amount of damages does not defeat class certification. *Id*. (citing

*Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016)).

Plaintiffs argue that Defendants' assertions of "new defects" are also incorrect. *Id.* at 12-13. As to their argument that the class claims are too limited relative to the many individual claims that would remain to be litigated, Plaintiffs argue that there is no requirement that all of the claims asserted in a class action be litigated on a classwide basis. *Id.* Moreover, they argue, the claims they seek to certify relate to a core part of their case, challenging Defendants' failure to pay any compensation at all for spring training, extended spring training and instructional leagues and providing an opportunity for the over 2,000 members of the California League to seek a remedy for Defendants' alleged violations of class members' rights under California wage and hour law. *Id.* at 13. Plaintiffs also reject the argument that the proposed class representatives are inadequate to the extent they seek to apply a single state's law to the entire class when there might be individual class members who could assert their claims under the laws of other states with laws more favorable to them. *Id.* This argument is simply a "recycling of their failed choice of law arguments," Plaintiffs contend. *Id.*

As to standing, Plaintiffs repeat their argument that this issue is more appropriately addressed after class certification. *Id.* at 14.

Plaintiffs also reiterate their argument that the Rule 23(b)(2) class should be certified. *Id.* They argue that the relief this class seeks is not monetary and that it is well established that class claims for back pay and injunctive relief can be pursued in the same action where two separate classes are established to do so. *Id.* (citing *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013)). Further, when such an approach is taken, it is not necessary to ask whether monetary relief is incidental to the injunctive relief because there *is* no monetary relief being sought by the injunctive relief class. *Id.* Finally, Plaintiffs reiterate their argument that the Court should certify one or more issue classes under Rule 23(c) even if it declines to certify the new proposed Rule 23(b) classes and that the Court should recertify the FLSA collective consistent with the limitations in the new proposed classes. *Id.* at 15.

In their Sur-Reply, Defendants contend Dr. Kriegler's model, as described in his rebuttal declaration, does not "come close to fixing all of the core impediments to collective or class

certification previously identified by the Court." Sur-Reply at 1. First, they challenge Dr. Kriegler's model on the basis that it relies on a survey that does not attempt to assess "team-related" activities and therefore does not provide a reliable measure of "work" for the proposed classes. *Id*. at 2. They reject Dr. Kriegler's reliance on a percentile approach to correct for the variations in the survey results, arguing that this approach will "shortchange" 90% of minor league players. *Id*. at 3. They also argue that Dr. Kriegler has failed to "explain how an approach that dismisses the majority of survey responses in an attempt to make the survey responses 'fit' with schedules is reliable." *Id*. n. 6. Defendants contend this approach also raises questions as to superiority and adequacy to the extent Plaintiffs are essentially seeking less than the amount to which they claim they are entitled. *Id*. at 3-4.

Defendants reject Dr. Kriegler's use of schedules as evidence of the "minimum amount of pregame work" in combination with survey results as evidence of pre- and post-game work, arguing that comparison of the schedules and the survey results does not address the "substantial variability" reflected in both. *Id*. at 4. First, Defendants contend the use of the schedules to demonstrate any time worked on a representative basis is improper because "each Club and its affiliates had their own schedules in varying formats, at the discretion of the Club's various minor league managers, coaches, and trainers and written schedule were not necessarily reflective of the activities planned or actually performed on a given day." *Id*. at 5. Next, Defendants challenge Dr. Kriegler's comparative approach on the basis that he made these comparisons "without controlling for team." *Id*. at 5. Moreover, Defendants assert, comparison of the survey results with the team schedules shows that the survey results "are *not* correlated with the schedules by team and there are substantial differences in the hours individual respondents reported while playing for the same Club in the same year." *Id*. (citing Guryan Decl. ¶¶ 11-12; Martin Decl. ¶¶ 36-37). Defendants also reject Dr. Kriegler's conclusion that "the majority of work performed by all Minor Leaguers was required team activities." *Id*. (quoting Kriegler Rebuttal Decl. ¶ 13). Defendants contend the Main Survey does not provide any basis for this conclusion as it does not ask about team-related activities; to the extent Dr. Kriegler relies on his belief that all players were required to perform the activities listed on the schedules, Defendants argue that the deposition testimony does not

support this conclusion. *Id*. (citing Kriegler Rebuttal Decl. ¶¶ 32-33; Bloom Opposition Decl. (Docket No. 744-2), Ex. B).

Defendants also challenge Dr. Kriegler's reliance on the eBis data as the "starting point" for his damages estimate. *Id*. at 6. According to Defendants, the transaction histories only record a player's assignment to an affiliate roster; they do not "reveal the activities a player may or may not have engaged in during that assignment, whether any of those activities constitute compensable 'work,' or how much time a player may have spent engaged in any particular activity." *Id*. Furthermore, Defendants assert, the eBis data "cannot be utilized in any way for Plaintiffs' Arizona and Florida classes, not even to track player assignments, because eBis does not contain any information regarding a player's attendance at spring training, extended spring training, or instructional leagues, let alone information regarding the nature of activities or participation therein." *Id*. The *only* thing this data can be used for, according to Defendants, is "to identify the number of players who were assigned to the roster of a particular minor league affiliate and the dates they were assigned to the roster." *Id*.

Next, Defendants contend the game schedules and rosters do not provide a sufficient basis for Dr. Kriegler to draw distinctions between different types of game days. *Id*. In particular, the game schedules do not indicate which players participated in or attended games, and the rosters reveal "only the names of active players assigned to an affiliate on a particular game day during the championship season" and "do not include information regarding the activities a player participated in, if any, or time spent on those activities." *Id*. at 7. Game schedules during spring training and instructional leagues are even less useful, Defendants contend, because "during these periods, games are modified based on the training needs of the players, and may be cut short or not played at all." *Id*.

Finally, Defendants contend Dr. Kriegler's reliance on other sources of information to "reconstruct" a workday are to no avail because they do not allow him to determine how long any particular player engaged in compensable "work." *Id*. at 7. Given the variations in the players' individual activities, Defendants argue, these sources of information could be used to measure hours worked only if Dr. Kriegler conducted an individualized inquiry as to each player. *Id*. at 8-

9. Even if this could be done, Defendants argue, the variations in forms and amounts of compensation paid to players would mean that individualized liability inquiries would still be required. *Id*. at 9.

**D. The Motion to Exclude**

Defendants contend in their Motion to Exclude that the Main Survey, like the Pilot Survey, is based on flawed methodology and that its results are similarly unreliable. Motion to Exclude at 1. Defendants challenge the reliability of the Main Survey on the following grounds:

- The Main Survey asks players only about arrival times, departure times and meal times and assumes that all time spent at the ballpark except meal times constituted "hours worked" instead of attempting to measure players' "baseball-related" or "team-related activities." Motion to Exclude at 7-9; Declaration of Eugene P. Ericksen in Support of Defendants' Motion to Exclude the Declaration and Testimony of J. Michael Dennis, Ph.D., Docket No. 726 ("Ericksen Decl.") ¶¶ 5-6. Because the Main Survey does not measure time that is spent performing compensable work, Defendants contend, the results of the Main Survey are irrelevant and unreliable.
- The questioning strategy of the Main Survey does not remedy the problem of recall bias that the Court found rendered the Pilot Survey unreliable. Motion to Exclude at 2, 10-15; Ericksen Decl. ¶¶ 4-5, 7, 13, 19-37, 54. Dr. Ericksen opines that the Main Survey results are unreliable because players were asked to recall details about mundane events (arrival and departure times and mealtimes) that occurred months or years ago. Dr. Ericksen further opines that Dr. Dennis's reliance on a "control group" of non opt-in players and use of "aided recall questions" do not solve these problems. *Id*. He opines that the recall problems are worsened by the substantial "respondent burden" arising from the fact that respondents were required to answer up to 65 questions, many of which were complex in structure and sought information about events that occurred between four months and five years before the survey interviews. Motion to Exclude at 14; Ericksen Decl. ¶¶ 20-22.
- The Main Survey does not remedy the problem of self-interest bias and Dr. Dennis's reliance on the responses of the "control group" of non opt-in players to validate his results

is not persuasive because these players have an interest in the outcome of this case even if they did not opt in to the FLSA collective as putative members of the Rule 23 classes. Motion to Exclude at 3, 16-17; Ericksen Decl. ¶¶ 4, 8 14, 38-48.

- The Main Survey is unreliable because it may suffer from non-response bias. Motion to Exclude at 17-19. Dr. Dennis began with a random sample of 994 opt-in class members and 6,769 non opt-in players; 24.6 percent of the opt-ins and 7.0 percent of the non opt-ins responded. Ericksen Decl. ¶ 47. Dr. Ericksen opines that Dr. Dennis's efforts to assess whether any large biases were created due to variations in response rates by looking at four variables (age, fielding position, most recent year played and number of games played) are not sufficient because Dr. Dennis does not explain how he selected these factors and does not acknowledge that there may be other factors that affected the response rate and that could result in bias. *Id.* ¶¶ 44, 48.
- Dr. Dennis's attempt to "validate" the Main Survey results by comparing averages of the survey responses with the daily schedules is misguided because the Main Survey and the schedules "reflect different things: the [Main] Survey asks about arrival and departure times from the ballpark while the daily schedules list activities that were planned for future days." Motion to Exclude at 3, 19-21; Ericksen Decl. ¶¶ 16, 49-50. According to Defendants, the averages of the arrival and departure times reported in the Main Survey vary significantly from the hours reflected on the schedules, especially for nongame days, and these discrepancies have not been addressed by Dr. Dennis. Motion to Exclude at 20. Furthermore, they contend, Dr. Dennis's use of averages to validate his results is "particularly insufficient" in light of the "extreme variability in responses." *Id.*

In addition to these alleged flaws, Defendants contend the Main Survey and associated Dennis Declaration should be stricken because Plaintiffs "failed to produce critical information associated with the Main Survey" including "data or back-up information regarding the cognitive interviews [Dr.] Dennis claims to have conducted to 'test' the Survey, as well as the dates and durations of the Main Survey interviews." Motion to Exclude at 3-4, 21-24. Defendants further contend that "based on the extremely limited information that [Dr.] Dennis provided in his

declaration, it is clear that [he] has grossly deviated from standard best practices regarding cognitive interviews." *Id*. at 21.

In their Opposition brief, Plaintiffs reject Defendants' assertion that the results of the Main Survey are irrelevant because the Main Survey measures only arrival and departure times and mealtimes and does not attempt to measure time spent on particular activities while at the ballpark. Opposition at 3-8. According to Plaintiffs, under Rule 702 of the Federal Rules of Evidence expert testimony need only "help the trier of fact to understand the evidence;" it need not provide conclusive proof of an ultimate fact in the case to be relevant. *Id*. at 4. Dr. Dennis's Main Survey meets this "low bar' of relevancy," Plaintiffs contend, because the Main Survey is "probative of whether minor leaguers performed any work" and it "is also probative of how much they worked." *Id*. at 4-5. In particular, under the whistle-to-whistle rule, the time minor league players spent at the ballpark offers at least a rough estimate of how much work they performed, Plaintiffs contend. *Id*. at 5 (citing *IBP, Inc. v Alvarez*, 546 U.S. 21, 36 (2005)). To the extent the estimate may not be exact, Plaintiffs assert, this is not a basis for exclusion given the fact that Defendants do not keep records of the time minor league players work and in light of the Supreme Court's admonition in *Mt. Clemens* that "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept [time] records." *Id*. (quoting 328 U.S. at 688).

Plaintiffs further contend that Dr. Dennis adhered to sound survey principals and that this is all that is required for a study to be reliable under *Daubert*, and thus admissible. *Id*. at 9 (citing *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc*., 618 F.3d 1025, 1036 (9th Cir. 2010) (recognizing that "survey evidence should be admitted as long as it is conducted according to accepted principles and is relevant" and that "technical inadequacies" in a survey, "including the format of the questions or the manner in which it was taken, bear on the weight of the evidence, not its admissibility"); Declaration of J. Michael Dennis in Support of Plaintiffs' Opposition to Motion to Exclude ("Dennis Opp. Decl.") ¶ 36; Declaration of Stanley Presser, Ph.D., in Support of Plaintiffs' Opposition to Motion to Exclude the Testimony of J. Michael Dennis, Ph.D. ("Presser Decl.") ¶¶ 4, 15. The alleged flaws cited by Defendants relating to non-

response bias, recall bias and self-interest bias are, at most, technical deficiencies that go to the weight of the evidence rather than admissibility, Plaintiffs contend. Opposition at 12-22.

In any event, the challenges Defendants bring on these grounds are exaggerated, according to Plaintiffs. *Id*. Plaintiffs cite to the expert report of Dr. Presser, who disagrees with the opinions of Dr. Ericksen as to many of the alleged deficiencies of the Main Survey, as well as to Dr. Dennis's own Opposition declaration.

Plaintiffs also assert that they have complied with their discovery obligations by turning over all of the expert data required under the rules. *Id*. at 22-23. Plaintiffs reject Defendants' assertion that Dr. Dennis did not follow best practices relating to use of cognitive interviews, citing the opinions of both Dr. Dennis and Dr. Presser. *Id*. at 23-24. Finally, Plaintiffs assert that Dr. Dennis's reliance on the schedules as a means of validating the results of the Main Survey is reasonable and supports the reliability of the survey results. *Id*. at 24-25. Plaintiffs contend —Defendants' own witnesses testified that the daily schedules are the best documents available to show what happened on a given day" and that —[i]f anything, the schedules *underestimate* the length of the workday for many class members because (as many defense witnesses have confirmed) a considerable amount of work took place in addition to that indicated on team schedules, including weightlifting, and especially on non-game days." *Id*. at 25 (emphasis in original).

In their Reply brief, Defendants reiterate their argument that the Main Survey is flawed and irrelevant because it does not attempt to measure team-related activities, even though Plaintiffs claim they are seeking to establish the amount of time worked by class members by looking at such activities. Reply at 1-4. In addition, Defendants contend, the responses to the Main Survey cannot be used to establish the *average* time worked by putative class members because the players were not asked to provide information about the average hours worked; instead, they were asked to provide the times of their arrivals and departures and mealtimes that they experienced —most often." *Id*. at 1, 5 (citing Ericksen Decl. ¶¶ 14-17, 42). According to Defendants, by requesting times based on the "mode" the Main Survey does not allow for a calculation of average hours worked. *Id*. at 5 (citing *Wallace v. Countrywide Home Loans Inc.*,

No. SACV 08-1463-JST, 2012 WL 11896333, at *5 (C.D. Cal. Aug. 31, 2012) (holding that survey that asked respondents to report how many hours they worked in a "typical" week could not be used to show *average* hours worked)).

Defendants also argue that the Main Survey, like the Pilot Survey, suffers from flawed methodology because it asks "respondents who have an interest in the outcome of the litigation to recall detailed and trivial information from months, if not years, prior to the survey concerning the very same 'mundane events' that concerned the Court previously . . . ." *Id*. at 6. Defendants reject Plaintiffs' assertion that the flaws go to the weight of the Main Survey results rather than their admissibility, arguing that Plaintiffs "ignore that it is their burden to prove that the survey satisfies *Daubert* and is reliable representative evidence for class certification *now*." *Id*. at 7 (emphasis in original). According to Defendants, use of reliable survey methods alone does not guarantee that the *results* of a survey will be reliable or that they will not be infected by self-interest, non-response or recall bias. *Id*. (citing Ericksen Decl. ¶ 6).

Defendants contend the unreliability of the results of the Main Survey can be seen in the variability of the responses from players who played for different Clubs. *Id*. at 8-9 (citing Ericksen Decl.). These variations show that the survey responses do not provide reliable evidence of "team activities," Defendants contend. *Id*. at 9. Defendants further assert that the Main Survey does not address the problems of recall bias, self-interest bias or non-response bias. *Id*. at 10-13. Nor do Plaintiffs adequately respond to the problem of respondent burden, Defendants argue. *Id*. To the extent Dr. Presser rejected Dr. Ericksen's opinion on this issue, Defendants assert, his opinion is not persuasive because he looked at only one question in the Main Survey and did not address the fact that the questions were asked up to 21 times for each respondent. *Id*. In any event, Defendants argue, Dr. Presser's declaration should be excluded because it is based only on Dr. Presser's review of the scientific literature and not a review of the Main Survey or its results. *Id*. at 13, 14-15.

Finally, Defendants reject Dr. Dennis's attempt to "validate" his survey results by comparing the "average" responses of the Control Group to "average" times reflected on schedules. *Id*. at 14-15. The Control Group responses are subject to the biases discussed above,

Defendants contend, and moreover, the Main Survey does not ask for averages and therefore cannot be used for that purpose. *Id*. Averaging the schedules is also meaningless, Defendants assert, because Plaintiffs' expert fails to account for the fact that there is variation in schedules from Club to Club and there has been no effort to link the survey respondents to particular Clubs. *Id*.

**E. The Motion to Intervene**

In the Motion to Intervene, four current minor leaguers ("Injunctive Intervenors") and a fifth intervenor who seeks to take the place of recently dismissed named Plaintiff Matt Gorgen, seek to intervene under Rule 24(a) of the Federal Rules of Civil Procedure (governing intervention as of right) or in the alternative, under Rule 24(b) (governing permissive intervention).[5] Plaintiffs contend the Motion to Intervene is timely because it is in response to the Court's Class Certification Order, which was when the Injunctive Intervenors became aware that their interests might no longer be protected by having opted in to the FLSA collective. Motion to Intervene at 5. They further contend there will be no prejudice to Defendants as minimal additional discovery will be needed and the trial dates in this case have been vacated. Plaintiffs argue that intervention as of right is warranted because the Injunctive Intervenors have a significantly protectable interest in the action that may be impaired if they are not permitted to intervene and the current named Plaintiffs, all of whom are former minor leaguers, will not adequately represent their interests.

Even if the Court were to find that intervention under Rule 24(a) is not warranted, Plaintiffs assert, the Court should allow permissive intervention under Rule 24(b) because Plaintiffs have established timeliness, commonality and a basis for jurisdiction.

Defendants oppose the Motion to Intervene, arguing that the motion is untimely and would result in severe prejudice to Defendants because of the additional discovery that would have to be conducted (including discovery related to individual claims they plan to pursue) and the

[5] The Injunctive Intervenors are Shane Opitz, Corey Jones, Brian Hunter, and Kyle Johnson. Motion to Intervene at 1. The fifth intervenor is Aaron Dott, a former minor leaguer who played for the Tampa Bay Rays' organization from 2009 to 2011 and the New York Yankees' organization from 2011 to 2015. *Id.; see also* Docket No. 719-6 (Proposed Complaint in Intervention) ¶ 3.

delay that could result as to resolving the Motion for Reconsideration. They contend leave to intervene under both Rule 24(a) and 24(b) should be denied.

## III. MOTION TO INTERVENE

### A. Legal Standards Under Rule 24

Pursuant to Rule 24(b), "[a]n applicant who seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998) (citing *Nw. Forest Resource Council*, 82 F.3d at 839). If the party seeking to intervene meets those elements, the district court has broad discretion to grant or deny the motion, but "must consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties." *Id.*; *see also* Fed. R. Civ. P. 24(b)(3).

### B. Discussion

The Court finds that the requirements of Rule 24(b) of the Federal Rules of Civil Procedure have been satisfied and therefore exercises its discretion to permit the Proposed Intervenors to intervene in this action. The Court does not reach the question of whether the requirements of Rule 24(a) have been satisfied. Defendants do not dispute that the claims of the proposed intervenors satisfy the commonality requirement or that there is a basis for jurisdiction over their claims. Rather, they contend the request to intervene is untimely and will cause undue delay or prejudice. The Court disagrees.

First, with respect to proposed intervenor Aaron Dott, the Court has already addressed a very similar issue in its July 6, 2016 Order Granting Motion to Withdraw and Dismissing Claims Without Prejudice [Docket No. 682]. There, the Court addressed whether the withdrawal of named Plaintiff Matt Gorgen would result in prejudice to Defendants such that his claims should be dismissed with prejudice. The Court found that it would not, finding that Plaintiffs timely notified Defendants of their intent to seek leave to substitute Aaron Dott for Matt Gorgen as a named Plaintiff and that Defendants had suffered no prejudice from Gorgon's withdrawal from the case. For the same reasons as are stated in that Order, and because Mr. Dott filed a motion to

intervene promptly after the Court issued its order permitting Matt Gorgen to withdraw, the Court finds that Plaintiffs have timely requested that Aaron Dott be permitted to intervene and that they will suffer no prejudice from that intervention. Therefore, the Court exercises its discretion to permit Mr. Dott to intervene as a named Plaintiff.

The Court also finds that intervention of the Injunctive Intervenors is timely and will not result in undue prejudice to Defendants. "Courts weigh three factors in determining whether a motion to intervene is timely: '(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.'" *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (quoting *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002)). "[P]rejudice is evaluated based on the difference between timely and untimely intervention—not based on the work the defendants would need to do regardless of when [the proposed intervenors] sought to intervene." *Kamakahi v. Am. Soc'y for Reprod. Med.*, No. 11-CV-01781-JCS, 2015 WL 1926312, at *4 (N.D. Cal. Apr. 27, 2015) (citing *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (paranthetical omitted)).

Here, the Injunctive Intervenors requested leave to intervene promptly after the Court issued its order decertifying the FLSA collective (of which the Injunctive Intervenors were members) and denying Plaintiffs' request for certification of the State Law Classes under Rule 23. The Supreme Court has made clear that absent class members may rely on the representation of class members and their counsel during the pendency of a putative class action until class certification is denied and that permitting them to do so is in the interests of "efficiency and economy" of litigation. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353–54 (1983) ("the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.' . . . Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action."). Therefore, the Court concludes that the Injunctive Intervenors did not unduly delay in seeking to intervene.

Nor is the Court persuaded by Defendants' assertions that they will be severely prejudiced if the Injunctive Intervenors are permitted to intervene. First, the Court rejects Defendants' complaint that the Injunctive Intervenors' request amounts to an "effort for a 'second bite' at Rule 23(b)(2) class certification." Opposition to Motion to Intervene at 1. As it is undisputed that the Injunctive Intervenors could assert these same claims in a separate action, the prejudice that would result from permitting them to intervene in *this* action is minimal. Indeed, combining the claims of the Injunctive Intervenors with those of the existing Named Plaintiffs is likely in the interest of judicial efficiency as the Injunctive Intervenors' claims are based on essentially the same theories and evidence as those of the existing Named Plaintiffs.

Second, the Court rejects Defendants' assertion that permitting the Injunctive Intervenors to intervene in this action will severely prejudice Defendants by delaying the resolution of the Motion for Reconsideration and the entire action because of the need to conduct additional discovery. The Court concludes that Defendants' concerns on this score are exaggerated. They have not pointed to anything about these four individuals that requires additional discovery to be conducted *before* the Court decides the Motion for Reconsideration. Moreover, there are no imminent deadlines relating to trial because the Court vacated the trial dates following its Class Certification ruling. And to the extent Defendants may be required to conduct discovery as to claims that these individuals do not seek to assert on behalf of the class, the same discovery would be necessary if the Court were to require them to file separate actions rather than permitting them to intervene in this one.

Accordingly, the Motion to Intervene is GRANTED.

## IV. MOTION TO EXCLUDE

### A. Legal Standards

Rule 702 of the Federal Rules of Evidence provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence . . . a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." Fed. R. Evid. 702. The Ninth Circuit has held that in applying this standard to survey evidence, such evidence "should be admitted 'as long as [it is] conducted

according to accepted principles and [is] relevant.'" *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1036 (9th Cir. 2010) (quoting *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir.1997)). Thus, a district court's treatment of a survey involves two steps. *See In re: Autozone, Inc.*, No. 3:10-MD-02159-CRB, 2016 WL 4208200, at *16 (N.D. Cal. Aug. 10, 2016) (citing *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir. 2001)). "First, the court is to determine admissibility: is there a proper foundation for admissibility, and is it relevant and conducted according to accepted principles?'" *Id.* (quoting *Click's Billiards*, 251 F.3d at 1263). "Second, once the survey is admitted, follow-on issues of methodology, survey design, reliability, the experience and reputation of the expert, critique of conclusions, and the like go to the weight of the survey rather than its admissibility.'" *Id.* (quoting *Click's Billiards*, 251 F.3d at 1263); *see also Fortune Dynamic*, 618 F.3d at 1036)("we have made clear that 'technical inadequacies' in a survey, 'including the format of the questions or the manner in which it was taken, bear on the weight of the evidence, not its admissibility.'")(quoting *Keith v. Volpe*, 858 F.2d 467, 480 (9th Cir. 1988)).

**B. Discussion**

Defendants' challenges to Dr. Dennis's Main Survey are based on alleged shortcomings in the methodology he used to conduct the survey and on the alleged unreliability of its results. The Court has carefully reviewed the opinions of both parties' experts and concludes that the Main Survey and the opinions of Dr. Dennis that are based upon it are sufficient to meet the standards set forth above. Therefore, the Court DENIES the Motion to Exclude.

**1. Evidentiary Issues**

As a preliminary matter, the Court rejects Defendants' requests to strike Dr. Dennis's report and survey under Rule 37 (c)(1) of the Federal Rules of Civil Procedure on the basis that Plaintiffs failed to comply with their discovery obligations under Rule 26(a)(2)(ii) with respect to disclosure of information on which Dr. Dennis's opinions are based. "Rule 26(a)(2) only deals with disclosure of expert witnesses that parties intend to use at trial." *Ewert v. eBay, Inc.*, No. C-07-02198 RMW, 2010 WL 4269259, at *13 (N.D. Cal. Oct. 25, 2010). "Rule 26(a)(2) does not require advance disclosure of expert witness reports for use in class certification briefing." *Id.* In

any event, the single case cited by Defendants, *Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 282 F.R.D. 655, 667 (M.D. Fla. 2012), aff'd, 725 F.3d 1377 (Fed. Cir. 2013), does not support their position. First, that case (unlike the situation here) clearly implicated Rule 26(a)(2) because it addressed whether an expert's testimony was improperly admitted at trial. 282 F.R.D. 655, 658. Second, the alleged violation of Rule 26(a)(2) was obvious and egregious – the expert acknowledged on cross-examination that his opinions were not based on the test he described in his expert report but instead, on a "completely different" test. *Id*. at 663. Under these circumstances, the court found that the disclosures in the expert report were "woefully deficient." *Id*. There is no such violation alleged here.

Similarly, the Court declines to exclude the opinions of Dr. Presser. Defendants contend it was improper for Plaintiffs to introduce this declaration in support of their opposition to Defendants' *Daubert* motion because they were already aware of Defendants' challenges to Dr. Dennis's methodology. This argument makes no sense. In the Ericksen Declaration, Defendants introduced new and specific challenges to Dr. Dennis's updated expert report based on the Main Survey. Dr. Presser's opinions were offered specifically to address the validity of Dr. Ericksen's new opinions, which Plaintiffs could not have anticipated. Therefore, the Court concludes that there was nothing improper about Plaintiffs' submission of the Presser Declaration. Furthermore, there was no prejudice to Defendants because they had an opportunity to respond to Dr. Presser's opinions in their reply papers and indeed, they did so by filing a responsive declaration by Dr. Ericksen that directly addressed Dr. Presser's criticisms of Dr. Ericksen's earlier opinions. *See* Docket No. 761.

**2. Whether the Main Survey is Relevant**

Defendants contend Dr. Dennis's opinions based on the Main Survey results are irrelevant for the purposes of Rule 702 and *Daubert* because respondents were asked only to recall their arrival and departure times and meal times and were not asked about their actual activities while they were at the ballpark to determine the amount of time they spent on team-related activities. The Court disagrees.

Dr. Dennis's questions in the Main Survey are premised on the "whistle-to-whistle" or

continuous workday doctrine, under which a workday is considered to be ―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), and consists ―in general, [of] the period between the commencement and completion on the same workday of an employee's principal activity or activities." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 36 (2005); *see also* Ariz. Admin. Code R20-5-1202 (defining ―hours worked" under Arizona minimum wage law as ―all hours for which an employee . . . is employed and required to give to the employer, including all time during which an employee is on duty or at a prescribed work place and all time the employee is suffered or permitted to work."); *Morillion v. Royal Packing Co*., 22 Cal. 4th 575, 582 (2000), as modified (May 10, 2000) (―Wage Order No. 14–80 defines ‗hours worked' as ‗the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.'" ). Consistent with this doctrine, Dr. Dennis used arrival and departure times as an indicator of when ball players' principal activities began and ended.

While the data Dr. Dennis obtained may or not be sufficient to establish the ultimate issue of how much actual work was performed by the putative classes, it will allow the jury to ascertain *whether* the class members performed work and will provide estimates of the amounts of time they worked. This evidence may be helpful to the jury, especially when considered in combination with other evidence such as the daily schedules and witness testimony, and that is all that is required to meet the relatively low relevance requirement under Rule 702. *See In re High-Tech Employee Antitrust Litig*., No. 11-CV-02509-LHK, 2014 WL 1351040, at *2 (N.D. Cal. Apr. 4, 2014) (―Rule 702 ‗mandates a liberal standard for the admissibility of expert testimony.'") (*quoting Cook v. Rockwell Int'l Corp*., 580 F.Supp.2d 1071, 1082 (D.Colo. Dec. 7, 2006); and citing *Daubert*, 509 U.S. at 588; *Dorn v. Burlington N. Sante Fe R.R. Co*., 397 F.3d 1183, 1196 (9th Cir.2005) (―The Supreme Court in *Daubert* [ ] was not overly concerned about the prospect that some dubious scientific theories may pass the gatekeeper and reach the jury under the liberal standard of admissibility set forth in that opinion[.]").

As Judge Illston explained in *Ridgeway v. Wal-Mart Stores, Inc*., ―[t]he ‗fit test' [under *Daubert*] does not require an expert to provide all of the components of a party's case." No. 08-

CV-05221-SI, 2016 WL 4728668, at *4 (N.D. Cal. Sept. 12, 2016). Therefore, in that case the court declined to exclude an expert report that measured the amounts of time class members spent on various tasks, where the expert used these times in support of a damages estimate, even though the expert did not address "whether the tasks for which he gives time estimates were performed during paid or unpaid time." *Id*. (internal quotations and citation omitted). The court concluded that this was an issue that was more appropriately addressed through "'[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof'" rather than outright exclusion. *Id*. (quoting *Daubert*, 509 U.S. at 596). The Court reaches the same conclusion here.[6]

**3. Whether Dr. Dennis Followed Accepted Principals**

Defendants point to three types of bias in support of their contention that Dr. Dennis's methodology is fatally flawed: 1) recall bias; 2) self-interest bias; and 3) non-response bias. In addition, they challenge the Survey's methodology to the extent it asks player to describe their "most often" arrival and departure times for particular periods rather than their average arrival and departure time. As discussed above, the Court cited both recall bias and self-interest bias in its Class Certification Order as reasons for concluding that the Pilot Survey was inadmissible, and went so far as to find that "any future survey that applies a similar methodology is likely to yield unreliable results as well." Class Certification Order at 103. The Court is now persuaded that the alleged flaws in Dr. Dennis's methodology have either been addressed in the Main Survey or are the type of issues that are more appropriately addressed through cross-examination, but that they do not warrant exclusion of Dr. Dennis's opinions under Rule 702 and *Daubert*.

a. Recall Bias

In its Class Certification Order, the Court was particularly concerned about the possibility of recall bias because the Pilot Survey asked players to remember mundane events that occurred, for many respondents, over a year before they participated in the survey. The problem was

[6] In finding that Dr. Dennis's opinions are relevant for the purposes of admissibility, however, the Court does *not* hold that use of the Main Survey results is a proper use of representative evidence under *Tyson Foods* and *Wal-Mart*. That issue is addressed below.

particularly pronounced, the Court found, as to a question about spring training that asked respondents to provide the total amount of time they spent on a variety of activities for each week of the four weeks of Spring training. The Court was skeptical of Dr. Dennis's assertion that he could use "memory aids" to improve recall and also rejected his assertion that the times reported by the players could be validated using other records, concluding that Dr. Dennis had not pointed to any specific types of records that might be available to validate the results of the survey. The Court concluded these problems were so severe as to warrant outright exclusion. The Court now finds that problems associated with respondents' ability to recall details in connection with the Main Survey can be addressed through cross-examination and/or the introduction of admissible evidence and that these problems are better left to a jury to evaluate.

As the Court revisits this question, it notes that there is no authority suggesting that there is a bright-line rule or cut-off with respect to how far in the past survey respondents can be asked to recall past events in order for a survey to be admissible. To the contrary, courts have found admissible surveys – including in the wage and hour context – that asked respondents to recall events that occurred many years in the past. *See, e.g., Medlock v. Taco Bell Corp.*, No. 1:07-CV-01314-SAB, 2015 WL 8479320, at *5 (E.D. Cal. Dec. 9, 2015) (finding that survey that asked respondents to report on their rest and meal breaks for an eleven year period was admissible and concluding that any issues as to memory were better addressed through cross-examination); *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2016 WL 1743116, at *8 (N.D. Cal. May 2, 2016) (holding that survey that asked respondents to recall details about their decision-making process many years before the survey was conducted did not warrant outright exclusion as the issue of imperfect recall was not "a fatal flaw of the survey methodology" and could be addressed through cross-examination or the introduction of other admissible evidence). Moreover, surveys that rely on the respondents' ability to recall detailed information are widely used by the United States Census Bureau and other "official statistical agencies, government health agencies, and academic research centers." Dennis Opp. Decl. ¶ 20 n. 2.

The Court also finds that notwithstanding the criticisms Defendants' experts have made of Dr. Dennis's approach, Dr. Dennis's efforts to improve recall accuracy and test for recall bias are

based on accepted principles in the survey research literature. For example, Dr. Dennis used memory aid questions for each year a respondent played. *See* August 4, 2016 Dennis Decl. ¶¶ 35-36. There is a body of literature that shows that aided recall questions are an accepted technique for assisting in recall. *See* Presser Decl. ¶ 7 & n. 3. He has also removed the question about spring training that the Court found was particularly burdensome and might give rise to recall bias. August 4, 2017 Dennis Decl. ¶ 37. In addition, Dr. Dennis has cited to literature indicating that even if mundane events may be more difficult for respondents to recall, routine events are more easily remembered than non-routine events. Dennis Opp. Decl. ¶ 21 & n. 3; *see* also August 4, 2016 Dennis Decl. ¶¶ 30-31. Plaintiffs have also introduced evidence that the activities of minor league players are, in fact, routinized. *See* Declaration of Garrett E. Broshuis in Support of Opposition to Motion to Exclude ("Broshuis Opposition Decl."), Ex. A (chart summarizing testimony of minor league players regarding routine nature of activities).

Dr. Dennis has also conducted various types of "checks" on his responses to determine whether the results of the Main Survey are characterized by any recall bias. First, he analyzed daily schedules produced by Defendants for both game days and non-game days and concluded that the results of these schedules are in line with the results of the Main Survey. August 4, 2016 Dennis Decl. ¶¶ 26-28. Second, he looked at the deposition testimony of Defendants' witnesses as to arrival and departure times before night games during the championship season to see how it compared with the Main Survey Results. *Id*. ¶ 29. He found that the amount of time reflected in the testimony of Defendants' witnesses was lower but not "substantially lower" and that a "conservative measure of the survey data, such as the tenth percentile, could be used if needed to account for any differences." *Id*. Finally, Dr. Dennis compared the responses of the Control Group (who played in the 2015 or 2016 season and who did not opt in to the FLSA collective) to the responses of all of the respondents and did not find that they were significantly different, leading him to conclude that recall bias was not a problem. *Id*. ¶ 6.

In light of the measures Dr. Dennis has taken to avoid recall bias and also because Defendants' experts have not been able to identify in any convincing way that the responses to the Main Survey are characterized by any *actual* recall bias, the Court concludes that the criticisms

leveled by Defendants and their experts relating to recall bias do not warrant exclusion of the Main Survey in its entirety.

b. Self-Interest Bias

In its Class Certification Order, the Court expressed concern that respondents to the Pilot Survey might have inflated their responses as to time worked because they might have believed they had a vested interest in the outcome of the survey. The Court noted that all of the respondents to the Pilot Survey had opted in to the FLSA collective and that the respondents were told that they were being asked to complete the survey *because* they had opted in. Class Certification Order at 100. The measures taken to avoid self-interest bias and test for its existence alleviate the Court's concerns and therefore, the Court concludes that the potential self-interest bias cited by Defendants does not justify exclusion of Dr. Dennis's opinions and the Main Survey.

First, in the Main Survey (in contrast to the Pilot Survey) Dr. Dennis did not tell respondents why they were being asked to complete the survey and he used a logo that suggested the survey was being conducted as independent research. *See* Dennis Opp. Decl., ¶ 12. He also attempted to reduce the possibility that respondents would connect the survey to this lawsuit by describing the survey to respondents as one about their "experiences" as minor league players and not asking directly about their hours. *Id*. Second, he sought and obtained responses from a significant number of non opt-in players; he also corrected the results statistically to ensure that the weight of opt-in and non opt in responses would correspond to the relative proportions of these groups as part of the class. August 4, 2016 Dennis Decl. ¶¶ 4, 46.

While the Court previously expressed the concern that reliance on the responses of non opt-ins to address the possibility of self-interest bias would not be effective because even these players were likely to have an interest in the outcome of this action, *see* Class Certification Order at 101-102, the Court now concludes that this is an issue that goes to the weight of the evidence and not its admissibility. *See Medlock v. Taco Bell Corp*., No. 1:07-CV-01314-SAB, 2015 WL 8479320, at *5 (E.D. Cal. Dec. 9, 2015) (rejecting *Daubert* challenge to survey based on alleged self-interest bias arising from the fact that respondents were told throughout the survey that they were members of the class and holding that any self-interest bias that might have result went to the

weight of the evidence rather than its admissibility); *Johnson v. Big Lots Stores, Inc.*, No. CIV.A. 04-3201, 2008 WL 1930681, at *7 (E.D. La. Apr. 29, 2008) ("statistical experts frequently employ surveys in which respondents have a potential interest in the outcome of the survey. . . . Potential bias by the survey respondents may affect the ultimate weight that should be accorded to Rausser's opinion, but it does not render his study unreliable.").

Finally, Dr. Dennis has also conducted tests for self-interest bias that apply accepted principles of survey research; conversely, Defendants have not established the existence of any actual self-interest bias.

The Court concludes that Plaintiffs have taken meaningful measures in the Main Survey to reduce the likelihood of self-interest bias and that while Defendants will have an opportunity to challenge Dr. Dennis on this question through cross-examination and the introduction of admissible evidence, this problem does not warrant exclusion of the Main Survey.

c. Non-response Bias

Defendants make much of the low response rate to the Main Survey. Dr. Dennis, however, has cited research survey literature (including a paper by Defendants' expert, Dr. Ericksen) that suggests that a low response rate is not likely to skew the results of a survey where, as here, the respondents were randomly selected. Dennis Opp. Decl. ¶ 31. Dr. Dennis also conducted analyses of various factors that could have led to bias as a result of the low response rate and did not find any significant bias. *See id.* ¶ 27. Although Defendants' expert suggests there might be other criteria that Dr. Dennis should have considered, *see* Ericksen Decl. ¶¶ 44, 48, he has not established that any such bias exists. Accordingly, the Court concludes this is not a shortcoming of the Main Survey that requires exclusion.

d. "Most often" arrival and departure times

Defendants have offered the expert opinion of Dr. Martin that by asking respondents to describe their "most often" arrival and departure times, rather than their average arrival and departure time, Dr. Dennis may have skewed the results of the survey. As discussed above, Dr. Martin offers a hypothetical example to illustrate how this approach might have led to an inflated result with respect to the measurement of work performed by class members. Dr. Kriegler, on the

other hand, rejects Dr. Martin's opinion that Dr. Dennis's use of the "mode" rather than the average arrival and departure times of the players leads to an unreliable result. *See* Kriegler Rebuttal Decl. at 6, 21. In particular, he contends Dr. Martin's example is misleading because she used "fictitious data and extremely small sample sizes, neither of which is based on actual data in the instant matter." *Id*. at 6. He goes on to address, in detail, why use of the mode may, in fact, give rise to a more conservative estimate of hours worked than would be obtained based on use of averages. *See id*. at 21-23. The Court concludes that this is a dispute between the experts about survey methodology and that Defendants have failed to show that the methodology used by Dr. Dennis is not within the range of accepted principals of survey design. Accordingly, Defendants' challenge goes to the weight of the Survey and not its admissibility.

Accordingly, the Motion to Exclude is DENIED.

## V. MOTION FOR RECONSIDERATION

### A. Legal Standard

"A district court . . . retains jurisdiction over an interlocutory order—and thus may reconsider, rescind, or modify such an order—until a court of appeals grants a party permission to appeal." *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001). Further, Rule 23(c)(1)(C) of the Federal Rules of Civil Procedure provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." "Accordingly, it is not uncommon for district courts to permit renewed certification motions that set out a narrower class definition or that rely upon different evidence or legal theories." *Hartman v. United Bank Card, Inc*., 291 F.R.D. 591, 597 (W.D. Wash. 2013) (citing *Bushbeck v. Chicago Title Ins. Co.*, No. C08–0755JLR, 2012 WL 405173, at *2 (W.D.Wash. Feb. 8, 2012); *In re Apple iPod iTunes Antitrust Litig*., No. 05–0037, 2011 WL 5864036, at *1–2, *4 (N.D.Cal. Nov. 22, 2011)). [7]

[7] Defendants contend, in a footnote, that Plaintiffs' Motion for Reconsideration should be denied on the ground that Plaintiffs have "completely ignored the standard governing" motions for reconsideration and that they do not satisfy that standard. Opposition at 3 n. 2. This argument fails because the Court made clear in its August 19 Order that it was granting Plaintiffs leave to file a motion that not only addressed whether the Court should reconsider aspects of its Class Certification Order but also addressed whether the Court should certify narrower classes.

**B. Certification of Rule 23 Classes**

**1. Rule 23(a)**

Rule 23(a) requires that a plaintiff seeking to assert claims on behalf of a class demonstrate: 1) numerosity; 2) commonality; 3) typicality; and 4) fair and adequate representation of the interests of the class. Fed. R. Civ. P. 23(a). While the Court treated ascertainability as a separate Rule 23 requirement in its Class Certification Order, the Ninth Circuit's recent decision in *Briseno v. ConAgra Foods, Inc*. suggests that the concerns that have led courts to conclude that classes are not ascertainable should be addressed with reference to the requirements of Rule 23 that are expressly enumerated in that rule. *See* 844 F.3d 1121, 1126 (9th Cir. 2017) (holding that "Rule 23 does not impose a freestanding administrative feasibility prerequisite to class certification" and finding that "Supreme Court precedent . . . counsels in favor of hewing closely to the text of Rule 23.").

There is no dispute that the numerosity requirement is satisfied for all of the new Rule 23 Classes proposed by Plaintiffs. The Court also finds that the commonality requirement is satisfied because the claims asserted by the proposed classes turn on a number of common and central questions that are likely to give rise to common answers, including: 1) whether the Clubs and MLB are joint employers; 2) whether the activities Minor League players perform at the ballpark and/or or in connection with games constitute "work" for the purposes of the applicable wage and hour laws; and 3) whether the common compensation policies applied to Minor Leaguers by Defendants under the Minor League Rules and Uniform Player Contracts – including failure to pay players a salary outside the championship season and failure to pay minimum wage and overtime during the championship season – violate the applicable wage and hour laws. *See Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 588 (9th Cir. 2012).

The Court also finds that the claims of the proposed class representatives meet the typicality requirement because they are "reasonably coextensive with those of the absent class members." *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); Broshuis Decl., Exs. E & F. To the extent that the Court expressed concern regarding the typicality of Named Plaintiffs' claims in connection with off-season training performed in different states, *see* Class

Certification Order at 65, that concern has been addressed by Plaintiffs' new Rule 23 Classes, which do not seek to assert claims based on off-season training on a classwide basis. For the same reason, the Court's concerns relating to the ascertainability of the proposed classes have been adequately addressed.[8]

Finally, the Court addresses whether the adequacy requirement is met by the new Rule 23 classes. The Court rejects Defendants' assertion that Plaintiffs' plan to use a conservative "percentile" approach to determine the amount of work performed by class members will result in inadequate representation of the proposed Rule 23 absent class members because the vast majority of those who responded to the Main Survey reported longer hours than the named Plaintiffs will seek to recover for the proposed classes. *See* Sur-Reply at 3-4. As in any class action, Plaintiffs must make judgment calls about what claims can be addressed on a classwide basis and what relief should be pursued for the class. So long as class members are adequately informed of their right to opt out of the class and the potential for a larger recovery if they proceed individually, the Court does not find that Plaintiffs' approach will impair their ability to adequately represent the proposed classes.

On the other hand, the Court agrees, at least in part, with Defendants' primary challenge to the adequacy of representation for the new Rule 23(b) classes, which is based on the fact that Plaintiffs now ask the Court to apply the law of a single state to all members of each class. Defendants contend this creates a conflict between the named Plaintiffs and absent class members because some absent class members will forfeit their right to recover significant additional damages under the laws of other states that may potentially apply to their claims. The Court

[8] As noted above, in light of the Ninth Circuit's discussion in *Briseno*, it appears that ascertainability is not an independent requirement under Rule 23. Nonetheless, the main concerns that were the basis of the Court's conclusion in its Class Certification Order with respect to ascertainability, namely, the wide range of activities and circumstances under which minor leaguers perform their winter training and the difficulty of determining class membership based on winter training activities, are relevant to both typicality (as the Court found in its Class Certification Order) and the superiority requirement of Rule 23(b)(3), which allows courts to take into account the administrative difficulties associated with identifying class members. *See Briseno*, 844 F.3d 1121, 1127–28 (finding that a separate "administrative feasibility" requirement is unnecessary because Rule 23(b)(3) "already contains a specific, enumerated mechanism to achieve that goal: the manageability criterion of the superiority requirement").

addresses the choice of law question below, in the context of the predominance inquiry of Rule 23(b)(3). There, the Court finds that Plaintiffs have not met their burden of showing that the claims of all of the Florida and Arizona Class members are governed by the laws of those two states. Consequently, the Court agrees with Defendants that the adequacy requirement has not been met for the Florida and Arizona Classes. On the other hand, the Court finds that Plaintiffs have established that all of the claims of the California Class members can be decided under California law. Therefore, the Court concludes that the adequacy requirement is met as to that class.

Therefore, the Court concludes that the requirements of Rule 23(a) are met as to all three of the proposed Rule 23(b)(3) classes, except that the adequacy requirement is not met as to the Arizona and Florida classes.

**2. Rule 23(b)(3)**

Rule 23(b)(3) allows for certification of a class where a court finds that: 1) "questions of law or fact common to class members predominate over any questions affecting only individual members;" and 2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Defendants' challenges to Plaintiffs' new Rule 23(b)(3) classes implicate both the "predominance" requirement and the "superiority" requirement.

a. Whether the Claims of the New Rule 23(b) Classes Can be Proved Using Representative Evidence Obtained from the Main Survey

One of Defendants' primary challenges to Plaintiffs' new Rule 23(b) classes is that the claims these classes assert cannot be proven through the use of common evidence, especially in light of the variations in players' arrival and departure times, work routines and compensation. This challenge requires that the Court revisit the question of what the Supreme Court's *Tyson Foods v. Bouaphakeo* decision means at the class certification stage.

As discussed in the Court's Class Certification Order, in *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court reiterated the principle first articulated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) that "when employers violate their statutory duty to keep proper records, and employees thereby have no way to establish the time spent doing uncompensated work, the

remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making' the burden of proving uncompensated work an impossible hurdle for the employee.'" 136 S. Ct. at 1047 (quoting *Mt. Clemens*, 382 U.S. at 687). Thus, "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687-88. The *Mt. Clemens* rule is not limited to FLSA cases and has also been invoked in cases involving state law wage and hour claims based on the same reasoning that was applied to FLSA claims in *Mt. Clemens*, namely, that it would unfairly penalize employees to deny recovery because of the employer's failure to keep proper records. Class Certification Order at 88.

There is no dispute that Defendants have not kept the records of the activities that Plaintiffs contend are "work" under any potentially applicable wage and hour laws, state or federal. Thus, Plaintiffs are entitled to prove the amount of work they performed by "just and reasonable inference" so long as they can show that they did, in fact, perform work for which they were improperly compensated. The Court previously found, though, that the experiences of the players varied so widely with respect to the activities upon which their claims were based, that reliance on Dr. Dennis's Pilot Survey to draw conclusions on a classwide basis would be improper. *See* Class Certification Order at 90. The Court now reaches a different conclusion and finds that the classes have been narrowed sufficiently that any individualized issues that arise in connection with the representative evidence offered by Plaintiffs will not predominate over common issues.

As a preliminary matter, the Court notes that the "continuous workday" doctrine did not figure prominently (if at all) in the first round of briefs, addressing Plaintiffs' original class certification request. In its Motion for Reconsideration, however, Plaintiffs rely heavily on the doctrine, arguing that "[a]pplication of the continuous workday doctrine means that it does not matter *what* specific activities class members performed during the workday or whether they took short breaks." Motion for Reconsideration at 8 (emphasis in original). In other words, Plaintiffs contend, because their proposed Rule 23(b)(3) classes are "focused exclusively on work class

members performed as teams at team complexes, under the direct supervision and control of Defendants," "individualized inquiries into the activity-by-activity course of a class member's workday are unnecessary." *Id*. at 1.

"[T]he continuous workday rule . . . means that the 'workday' is generally defined as 'the period between the commencement and completion on the same workday of an employee's principal activity or activities." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005) (citing 29 C.F.R. § 790.6(b)). It dates back to the enactment of the Fair Labor Standards Act of 1938, as amended by the Portal-to-Portal Act of 1947, and is set forth in long-standing Department of Labor regulations. *See* 29 C.F.R. §§ 778.223 (providing that an employer must compensate an employee for "(a) All time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so"), 785.18 (providing that "[r]est periods of short duration, running from 5 minutes to about 20 minutes, are common in the industry" and "must be counted as hours worked") & 790.6 (defining "workday" as "the period between the commencement and completion on the same workday of an employee's principal activity or activities" "includ[ing] all time within that period whether or not the employee engages in work throughout all of that period").

Under this rule, "work" is defined relatively broadly to include "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *Alvarez v. IBP, Inc*., 339 F.3d 894, 902 (9th Cir. 2003), aff'd, 546 U.S. 21 (2005) (citing *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)). Florida law follows federal law, Fla. Stat. Ann. § 448.110 (Florida minimum wage law, incorporating terms of FLSA), while Arizona and California define work even more broadly. *See* Ariz. Admin. Code § R20-5-1202(9) (defining "hours worked" as "all hours for which an employee covered under the Act is employed and required to give to the employer, including all time during which an employee is on duty or at a prescribed work place and all time the employee is suffered or permitted to work").

Plaintiffs' original classes asserted claims that were based not only on activities in which

they engaged at the ballpark but also winter conditioning activities performed individually. The evidence in the record indicated that players had wide latitude as to what types of winter conditioning they engaged in and where and when they performed this work. Players were not required to perform their conditioning at a particular workplace and were not under the control of their employer when they performed their conditioning activities. Under these circumstances, the continuous workday doctrine was of little assistance for measuring the amount of work they performed, at least for the winter conditioning work, and therefore classwide determination of the amount of work performed by class members would have been difficult, if not impossible. Moreover, the wide variations as to players' winter conditioning activities and the broad discretion each player had as to how he would meet these requirements (including the amount of conditioning, the type of activities and the place where they were performed) were significant factors in the Court's conclusion that it would be improper to rely on the results of Dr. Dennis's survey to establish the amount of work on classwide basis. In particular, as to these activities the Court found that Plaintiffs' proposed classes – and the survey evidence they intended to use prove their claims based on these activities – amounted to the sort of "trial by formula" approach against which the Supreme Court cautioned in *Wal-Mart Stores, Inc. v. Dukes*. *See* 564 U.S. 338, 367 (2011).

Under their new proposal, Plaintiffs no longer seek to assert claims on behalf of the proposed classes based on winter conditioning work. In dropping these claims, they have significantly reduced the variations that led the Court to conclude that Plaintiffs were attempting to stretch the holding of *Tyson Foods* too far. To be sure, Defendants' experts have identified variations in the survey responses relating to arrival and departure times, hours worked by players affiliated with different clubs and even hours worked reported by players affiliated with the same clubs. *See generally* Guryan Decl. In addition, as noted by the Court in its previous order, there is evidence of other variations, including variations with respect to: 1) whether players participated in extended training, mini-camps or instructional leagues; 2) the types of activities in which players engaged when they participated in these various training opportunities; 3) practices related to travel time; 4) and salaries, bonuses and other forms of compensation received by

players. The Court concludes, however, that the remaining variations are not so significant as to preclude a jury from addressing Plaintiffs' claims on a classwide basis.

As discussed above, Plaintiffs have narrowed the range of activities on which they base their class claims by eliminating winter conditioning, instead focusing on activities that are conducted primarily on a team basis. In addition, Plaintiffs' theory of liability as to the new classes reduces the need to focus on the players' specific activities in order to quantify the amount of work performed to the extent they rely on the continuous workday doctrine. While it is likely that some individualized issues will remain as to whether certain types of activities should be included under the continuous work-day rule or are properly considered ~~"~~work" under the applicable law, the Court is not persuaded that they will overwhelm the common issues raised by Plaintiffs' claims.

The Court also revises its conclusion as to the significance of variations in salary and other forms of compensation; these variations do not present an obstacle to class treatment because sufficient payroll records have been maintained by Defendants to account for them in Plaintiffs' damages model. *See* Kriegler Rebuttal Decl. ¶¶ 38-44; *Minns v. Advanced Clinical Employment Staffing LLC*, No. 13-CV-03249-SI, 2015 WL 3491505, at *8 (N.D. Cal. June 2, 2015) (~~"~~the necessity of making individualized factual determinations does not defeat class certification if those determinations are susceptible to generalized proof like employment and payroll records") (citing Newberg on Class Actions § 4:50 (5th ed.)).

Finally, the Court finds that many of the individualized inquiries cited by Defendants go to damages and not liability, and therefore do not present an impediment to class certification. *See Vaquero v. Ashley Furniture Indus., Inc*., 824 F.3d 1150, 1155 (9th Cir. 2016) (~~"~~Under *Tyson Foods* and our precedent, therefore, the rule is clear: the need for individual damages calculations does not, alone, defeat class certification."). First, with respect to the Florida and Arizona Classes, Plaintiffs have presented evidence that virtually all players were unpaid for their participation in spring training, extended spring training and instructional leagues. *See* Kriegler Rebuttal Decl. ¶ 41 & Ex. 5. Consequently, for these classes, liability can be established simply by showing that class performed *any* work. In addition, with respect to the California Class, Plaintiffs may be able

to establish liability as to some of their overtime claims by using schedules reflecting weeks in which teams were scheduled to play games on seven consecutive days in violation of California overtime law. *See* Kriegler Rebuttal Decl. ¶¶ 24-26. According to Dr. Kriegler, approximately 65-85% of Minor Leaguers had at least one workweek in which they were scheduled for seven days. *Id*. ¶ 26.

Of particular significance to the Court's conclusion that the variations among players do not preclude certification of the new Rule 23(b)(3) classes is the fact that Plaintiffs will be able to use the survey data in combination with other evidence that may be sufficient to allow a jury to draw conclusions based on reasonable inference as to when players were required to be at the ballpark and how long after games they were required to remain at the ballpark. This evidence includes the transactional histories of the players, the daily schedules, and records of games that were played, including where the games were played and how long they lasted. Thus, as in *Tyson Foods,* it appears that representative evidence can be combined with actual records of time spent engaged in the various activities to derive a reasonable estimate of the amount of time worked by class members. The Court also notes that in *Tyson Foods* itself, there were variations among class members with respect to the time it took them to perform the donning and doffing activities that were at issue in that case – even when class members performed the *same* activities, but these were not found to preclude reliance on representative evidence. *See* 136 S. Ct. at 1055 (Thomas, J. dissenting). Moreover, the Court rejects Defendants' suggestion that under *Tyson Foods*, only observational studies are permitted to fill in evidentiary gaps. There is simply nothing in the reasoning of that decision that supports such a narrow reading of the opinion.

Furthermore, certification of the proposed classes will not preclude Defendants from challenging the sufficiency of the Main Survey and Plaintiffs' damages model on summary judgment and/or at trial. *See Tyson Foods*, 136 S. Ct. at 1047 ("When, as here, the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity – an alleged failure of proof as to an element of the plaintiffs' cause of action – courts should engage that question as a matter of summary judgment, not class certification.")(internal quotations, brackets and citations omitted). At that point, it is likely that the Court also will be in a better

position to evaluate the overarching theory of Plaintiffs' claims and whether they will be able to prove their claims on a classwide basis.

Therefore, the Court finds that individualized issues that will arise in connection with proving the claims of the new Rule 23(b)(3) classes are not sufficient to defeat the predominance requirement as to those classes.

b. Whether individualized issues related to defenses preclude certification of the Rule 23(b)(3) classes

In its previous Order, the Court found that the individualized inquiries that would be associated with Defendants' main defenses – the seasonal amusement and recreational establishment defenses and the creative professionals exemption – would not be sufficient, on their own, to warrant denial of class certification for lack of predominance. Class Certification Order at 84-86. The Court expressed some concern, however, regarding the need to conduct a multitude of inquiries to determine whether the various venues where Minor Leaguers play baseball fell within the ambit of the seasonal amusement and recreational establishment exemptions. *Id*. at 85. That concern is now significantly diminished. Under Plaintiffs' new proposal, it appears that there are only about 40 facilities that would need to be evaluated. See Motion for Reconsideration at 20. The Court concludes that any individualized inquiries required to evaluate whether facilities qualify for the exemptions are likely to be manageable and will not overwhelm the common questions raised by the new classes proposed by Plaintiffs.

With respect to the creative professionals exemption, the Court finds (as it did in its previous order) that Defendants have failed to point to any material variations in the duties of the class members with respect to the degree of creativity that characterizes their primary duties and therefore rejects Defendants' assertion that evaluation of that question would require a multitude in individualized inquiries. Further, with respect to the minimum compensation requirement that must be satisfied for this exemption to apply, the Court concludes that there are sufficient employment and payroll records to address this question on a classwide basis for the reasons discussed above. To the extent the Court previously held that the salary part of the test for the creative professional exemption will require individualized inquiries because of ~~a~~significant

variation in the players' compensation," *see* Class Certification Order at 86, the Court now concludes that it was incorrect.

Finally, the Court rejects Defendants' assertion that the new Rule 23(b)(3) classes revive the problem of addressing the joint employer question on a classwide basis for the Arizona and Florida Classes because players did not expect compensation for their participation in spring training, extended spring training and instructional leagues. Apart from the fact that the Court already rejected a very similar argument, *see* Class Certification Order at 78, Defendants' argument only highlights the common nature of the inquiry as all of the members of the Florida and Arizona classes were treated the same in this respect.

Accordingly, the Court finds that Defendants' defenses do not require the Court to engage in so many individualized inquiries that they will overwhelm the common issues and defeat the predominance requirement.

c. Individualized Issues Related to Choice of Law

A class action that requires the court to apply multiple state laws implicates the predominance requirement of Rule 23(b)(3). *Zinser v. Accufix Research Inst., Inc*., 253 F.3d 1180, 1189 (9th Cir.), opinion amended on denial of reh'g, 273 F.3d 1266 (9th Cir. 2001) (~~"~~Understanding which law will apply before making a predominance determination is important when there are variations in applicable state law."). Consequently, where plaintiffs seek certification of classes for which the laws of multiple states potentially apply, it is the plaintiffs' burden to offer a realistic plan tor trying the class claims. *Id*. Here, Plaintiffs contend their new Rule 23(b)(3) classes do not defeat predominance because for each of the proposed classes the Court need apply only the law of the state where the class performed the activities Plaintiffs contend is work. Thus, according to Plaintiffs, California law will apply to the claims of the California Class, Arizona law will apply to the claims of the Arizona class and Florida law will apply to the Florida class. The Court concludes that Plaintiffs have met their burden on this question with respect to the California Class. On the other hand, the Court finds that as to the Arizona and Florida classes, there is a danger that choice of law questions will overwhelm the common issues raised by these classes.

California choice of law principles govern the determination of which state's law should be applied to Plaintiffs' state law claims. S*ee Klaxon Co. v. Stentor Elec. Mfg. Co*., 313 U.S. 487 (1941); *SEC v. Elmas Trading Corp*., 683 F. Supp. 743 (D. Nev. 1987), *aff'd without opinion*, 865 F.2d 265 (9th Cir.1988). Under those principals, the Court asks: "(1) whether the laws of various jurisdictions differ, and (2) whether both states have an interest in applying their respective law. If the laws conflict, this Court is to apply the law of the state whose interest would be more impaired if its law were not applied." *Church v. Consol. Freightways, Inc*., No. C-90-2290 DLJ, 1991 WL 284083, at *12 (N.D. Cal. June 14, 1991) (citing *Ledesma v. Jack Stewart Produce, Inc*., 816 F.2d 482, 484 (9th Cir. 1987)).

While these basic rules are the same regardless of whether a plaintiff seeks to apply California law (as is the case for the California Class) or the law of some foreign jurisdiction (as is the case for the Arizona and Florida classes), the choice of law analysis differs somewhat in these two scenarios because "[i]n California (as in every other American jurisdiction) a court begins with the presumption that the applicable substantive rule is drawn from its own forum law." *Sullivan v. Oracle Corp*., 547 F.3d 1177, 1181–82 (9th Cir. 2008), opinion withdrawn, reh'g dismissed, 557 F.3d 979 (9th Cir. 2009), certified question answered, 51 Cal. 4th 1191 (2011). Where a party brings a constitutional challenge to the application of California law, the class action proponent bears the initial burden to show that California has "significant contact or significant aggregation of contacts" to the claims of each class member. *Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 589 (9th Cir. 2012) (citation omitted) (citing *Wash. Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 921, (Cal.2001)). "Once the class action proponent makes this showing, the burden shifts to the other side to demonstrate that foreign law, rather than California law, should apply to class claims.'" *Id.* (quoting *Wash. Mut. Bank,* 24 Cal.4th at 921).

Applying these principles to the proposed California Class, the Court finds that Plaintiffs have met the threshold requirement of showing that application of California law to their claims is constitutional. In particular, all of the class members have had significant contact with California because they have been assigned to the California League and played baseball in California with the California League. Further, Plaintiffs have proposed the addition of a temporal component to

the class definition to exclude any individuals who were assigned to the California League for less than a specified period in order to ensure that the class does not include any class members whose contacts with California were so minimal as to raise questions about the constitutionality of applying California law to their claims. The Court concludes that a seven-day minimum is sufficient to meet this objective. With this limitation, the Court finds that Plaintiffs have met their burden as to the constitutionality of applying California law to the claims of the California Class.

Because Plaintiffs have met their burden as to the constitutionality of applying California law, the burden shifts to Defendants to demonstrate that foreign law should be applied to the claims of the California Class members. In the class certification context, the Court concludes that this means that in order to defeat class certification on choice of law grounds, Defendants must make a specific and meaningful showing that the application of California law will not be appropriate under California choice of law principals to absent class members. *See Opperman v. Path, Inc.*, No. 13-CV-00453-JST, 2016 WL 3844326, at *10 (N.D. Cal. July 15, 2016), leave to appeal denied (Oct. 20, 2016) (rejecting defendants' assertion that classes should not be certified because of the complex and individualized choice of law questions that would have to be addressed, citing the fact that defendants did not ~~-i~~dentify or discuss the interests of other jurisdictions except at the greatest level of generality."). Defendants have not met that burden.

The California Supreme Court has found that California has a strong interest in applying its wage and hour laws to work performed in California even if it is performed by non-residents. *See Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1196 (2011). In *Sullivan*, the California Supreme Court agreed to answer several certified questions from the Ninth Circuit, including whether the California Labor Code applied to overtime work performed in California for a California-based employer by non-residents. *Id.* The court held, as a matter of statutory construction, that California overtime laws did apply where, as in that case, the employees asserted overtime claims based on ~~-e~~ntire days and weeks worked in California." *Id.* at 1200. In reaching that conclusion, the court rejected the employer's reliance on language in an earlier decision by the California Supreme Court, *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996), in which the court suggested that California law ~~-m~~ight follow California resident employees of California

employers who leave the state temporarily . . . during the course of the normal workday' . . . , and California law might not apply to nonresident employees of out-of-state businesses who enter California temporarily during the course of the workday.'" *Sullivan*, 51 Cal. 4th at 1199 (quoting *Tidewater*, 14 Cal. 4th at 578). The court in *Sullivan* found that "[n]othing in *Tidewater* suggests a nonresident employee, especially a nonresident employee of a California employer such as Oracle, can enter the state for entire days or weeks without the protection of California law." *Id*. at 1200.

The Court in *Sullivan* went on to address whether the laws of the states where the employees resided – Arizona and Colorado – conflicted with California law and if they did, whether California's interest in having its own law applied outweighed the interests of the other two states. *Id*. at 1202-1206. The court concluded that there was no true conflict because neither Arizona nor Colorado had expressed an interest in regulating overtime work performed in another state. *Id*. at 1204. The court also rejected the employer's argument that Arizona and Colorado law should be applied based on those states' interest in providing a business-friendly environment for their own businesses, reasoning that "every state enjoys the same power in this respect" and that "[i]t follows from this basic characteristic of our federal system that, at least as a general matter, a company that conducts business in numerous states ordinarily is required to make itself aware of and comply with the law of a state in which it chooses to do business." *Id*. at 1205 (citations omitted). Therefore, the court concluded, neither Colorado nor Arizona had a "legitimate interest in shielding [the employer] from the requirements of California overtime law as to work performed here." *Id*.

Finally, the *Sullivan* court addressed which state's interest would be more impaired by application of another state's law and concluded that California's interest would be more impaired. The court reasoned:

> Assuming for the sake of argument a genuine conflict does exist . . ., to subordinate California's interests to those of Colorado and Arizona unquestionably would bring about the greater impairment. To permit nonresidents to work in California without the protection of our overtime law would completely sacrifice, as to those employees, the state's important public policy goals of protecting health and safety and preventing the evils associated with overwork. . . . Not to apply California law would also encourage employers to

> substitute lower paid temporary employees from other states for California employees, thus threatening California's legitimate interest in expanding the job market. . . . By way of comparison, not to apply the overtime laws of Colorado and Arizona would impact those states' interests negligibly, or not at all. Colorado overtime law expressly does not apply outside the state's boundaries, and Arizona has no overtime law. . . . Alternatively, viewing Colorado's and Arizona's overtime regimens as expressions of a general interest in providing hospitable regulatory environments to businesses within their own boundaries, that interest is not perceptibly impaired by requiring a California employer to comply with California overtime law for work performed here.

*Id*. at 1205-1206.

Defendants reject Plaintiffs' reliance on *Sullivan*, asserting that case is distinguishable because it involved a California employer whereas many of the members of the putative California Class are employed by non-California affiliates. While it is true that the holding of *Sullivan* was limited to the facts of that case, the Court does not find that the reasoning of that case supports the conclusion that non-residents who perform work in California are entitled to the protections of California wage and hour laws only if they work for a California employer. To the contrary, the emphasis of the *Sullivan* court on the "state's important public policy goals of protecting health and safety and preventing the evils associated with overwork" applies equally to California employers and non-California employers. *Sullivan* also suggests that to the extent other states may have adopted labor laws that are friendlier to employers, employers from other states may not "shield" themselves from the requirements of California labor law when their employees perform work in California. *See* 51 Cal. 4th at 1205.

In the face of California's strong interest in applying its own law to work performed within the state, as recognized by the California Supreme Court, Defendants can only defeat the predominance requirement based on choice of law if they can make a meaningful and detailed showing that other states' laws are likely to apply to the class members' claims. Instead, Defendants have not gone beyond speculating in a general manner that the claims of some members of the putative California Class *might* be subject to the law of another state and that the interests of another state *might* be more impaired by application of California law.

The only specific example offered by Defendants in support of their contention that the Court will need to conduct choice of law inquiries as to every member of the California Class is

based on the experience of Named Plaintiff Mitch Hilligoss and it is not persuasive. According to Defendants, Hilligoss, a putative representative of the California Class, "spent a total of two months (out of a 6 year long career) in the state of California playing in the California League," has "never played for a California-based MLB Club, has spent many months each year allegedly performing off-season training in Illinois, and has resided in Illinois since his release." *See* Opposition at 9 n. 13. Given the California Supreme Court's guidance in *Sullivan*, in which it distinguished between work performed in the state "temporarily . . . during the course of the normal workday" (to which California wage and hour laws might not apply) and work performed "over entire days and weeks" (to which California overtime laws were found to apply), it is not at all obvious the work performed by Hilligoss in California would not be subject to California's wage and hour laws. Furthermore, to the extent Defendants are suggesting that Illinois law should apply to Hilligoss's claims, they have not cited any case law indicating that Illinois wage and hour laws would apply extraterritorially to that work; nor have they pointed to any interest on the part of the state of Illinois that might outweigh California's interest in having its own law applied. The Court therefore finds Defendants' general assertions related to the choice of law questions raised by the California Class to be unpersuasive.

On the other hand, the choice of law problem associated with the Florida and Arizona classes is significant. In support of their assertion that it is appropriate to apply Florida law to all Florida class members and Arizona law to all Arizona class members, Plaintiffs point to the fact that in many jurisdiction, "the place where the work takes place is the critical issue." *Jimenez v. Servicios Agricolas Mex, Inc*., 742 F. Supp. 2d 1078, 1099 (D. Ariz. 2010) (citing cases); *see also O'Neill v. Mermaid Touring Inc*., 968 F. Supp. 2d 572, 578–79 (S.D.N.Y. 2013) (granting summary judgment in favor of employer on wage and hour claim asserted under New York law for work performed outside of New York and holding that New York law does not apply to work performed outside New York because "[t]he crucial issue is where the employee is 'laboring,' not where he or she is domiciled."); *Killian v. McCulloch*, 873 F. Supp. 938, 942 (E.D. Pa. 1995), aff'd sub nom. *Stadler v. McCulloch*, 82 F.3d 406 (3d Cir. 1996) ("The legislature has a strong interest in enacting legislation to protect those who work in the Commonwealth, but has almost no

interest in extending that protection to those who work outside Pennsylvania."); *Mulford v. Computer Leasing, Inc*., 759 A.2d 887, 891 (N.J. Law. Div. 1999) (holding that New Jersey's interest in enforcing wage and hour laws against New York employer who employed workers in New Jersey gave New Jersey ~~the~~ the paramount interest in enforcing its law"); *Bigham v. McCall Serv. Stations, Inc.*, 637 S.W.2d 227, 231–32 (Mo. Ct. App. 1982) (holding that Missouri wage and hour law rather than Kansas law applied based, in part, on the fact that the work was performed in Missouri); *Risinger v. SOC LLC*, 936 F. Supp. 2d 1235, 1249–50 (D. Nev. 2013) (holding that Nevada wage and hour law did not apply to work performed outside Nevada); *Abdulina v. Eberl's Temp. Servs., Inc*., 79 F. Supp. 3d 1201, 1205–06 (D. Colo. 2015) (holding that plaintiff did not have standing to assert claim under Colorado's Wage Claim Act where she did not reside or work in Colorado); *Mitchell v. Abercrombie & Fitch*, No. C2-04-306, 2005 WL 1159412, at *4 (S.D. Ohio May 17, 2005) (holding that Ohio Minimum Fair Wage Standards Act could not be applied to work performed outside Ohio).

Plaintiffs have not, however, addressed in any detail the interests of either Florida or Arizona in applying their law to the claims of the class members. Nor have they cited authority comparable to *O'Sullivan* addressing the comparative interests of these states to the interests of other states whose residents come to Florida or Arizona to perform work. Further, Defendants point to numerous states in which courts have recognized an interest in applying the law of that state to residents who work outside of the state, raising the possibility that the laws of states other than Arizona and Florida should be applied to the claims of some absent class members. *See* Docket No. 740 at 3 n. 3. For example, among the states that have found that their wage and hour laws may be applied to work performed outside the state are Washington and Massachusetts. *See Bostain v. Food Exp., Inc.*, 159 Wash. 2d 700, 711 (2007); *Gonyou v. Tri-Wire Engineering Solutions., Inc*., 717 F. Supp. 2d 152, 154 (D. Mass. 2010). It is thus possible that class members from those states, e.g., minor leaguers who play for clubs affiliated with the Boston Red Sox or the Seattle Mariners, might be entitled to assert their claims under the laws of those states.

And in contrast to the California Class, there is no presumption that the law of either Arizona or Florida must be applied by this Court. Rather, as to these classes the burden is on

Plaintiffs to show that the interests of Arizona and Florida will outweigh the interests of any of the potential states that the claims of absent class members may implicate. Plaintiffs have not met that burden. Therefore, the Court concludes that the choice of law questions that are likely arise in connection with the Florida and Arizona classes defeat the predominance requirement as to those classes.

d. Superiority of Class Mechanism

In its previous Order, the Court found that most of the factors courts consider in determining whether class treatment is superior to individual actions favor class treatment in this case. *See* Class Certification Order at 91-92. The only factor that pointed away from that conclusion was the Court's finding that adjudication of Plaintiffs' claims under their previous proposal would have been unmanageable because ~~t~~too many individualized issues [would] have to be adjudicated because of the variations among the players, the choice of law issues that will have to be addressed and certain defenses asserted by Defendants to handle Plaintiffs' claims." *Id*. at 92. For the reasons discussed above, the Court concludes that Plaintiffs' proposed California Class, which is the only Rule 23(b)(3) class that meets the predominance requirement, will not require so many individualized inquiry as to make it unmanageable and that class treatment of the claims asserted by that class meets the superiority requirement of Rule 23(b)(3).

**3. Rule 23(b)(2)**

Rule 23(b)(2) allows a class action to be maintained where ~~t~~the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). While 23(b)(2) class actions have no predominance or superiority requirements, the class claims must be cohesive. *See Barefield v. Chevron, U.S.A., Inc*., No. C 86-2427 TEH, 1988 WL 188433, at *3 (N.D. Cal. Dec. 6, 1988) (noting that "[t]he trademark of the (b)(2) action is homogeneity" and explaining that "[i]t is this characteristic that allows the court to dispense with notice to the class and bind all members to any judgment on the merits without an opportunity to opt out"); *see also Barnes v. Am. Tobacco Co*., 161 F.3d 127, 142–43 (3d Cir. 1998) (noting that ~~a~~ (b)(2) class may require more cohesiveness than a (b)(3) class . . . because in

a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out"); *In re Prempro*, 230 F.R.D. 555, 569 (E.D. Ark. 2005) (noting that "[w]hile 23(b)(2) class actions do not have the predominance or superiority requirements of 23(b)(3), courts have held that the class claims under 23(b)(2) must be cohesive" and holding that this requirement was not met where claims of proposed b(2) class implicated laws of 24 to 29 states); *In re Rezulin Prod. Liab. Litig.*, 210 F.R.D. 61, 75 (S.D.N.Y. 2002) (holding that "the individual issues that defeat the predominance requirement of Rule 23(b)(3) also pose an obstacle to class certification in the Rule 23(b)(2) context" and noting that "[a]base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness"); *Santiago v. City of Philadelphia*, 72 F.R.D. 619, 628 (E.D. Pa. 1976) ("In a (b)(2) class action the court must be especially vigilant in protecting unnamed members of the class who are bound by the action without the opportunity to withdraw. As a result, the court should be more hesitant in accepting a (b)(2) suit which contains significant individual issues than it would under subsection 23(b)(3).").

Here, Plaintiffs' proposed Rule 23(b)(2) class is aimed at alleged wage and hour violations arising from spring training activities in Florida and Arizona. The problem with this class is that it seeks injunctive and declaratory relief for a class whose members come to Florida and Arizona from many different states. As discussed above, it is not apparent that is appropriate to apply the law of the states where spring training is conducted to the claims of all class members. As a consequence, the Court could not necessarily adjudicate the claims of the Rule 23(b)(2) classes or fashion a remedy (assuming Plaintiffs' claims are meritorious) based on the law of only one or two states. Instead, it could potentially be required to apply the law of numerous states to Plaintiffs' claims, which undermines the cohesiveness of the class and makes certification of Plaintiffs' proposed (b)(2) class inappropriate.

Accordingly, the Court declines to certify Plaintiffs' proposed Rule 23(b)(2) class.

**C. Recertification of the FLSA Collective**

Under Section 16 of the FLSA, workers may sue their employers for unpaid wages on their own behalf and on behalf of "other employees similarly situated." 29 U.S.C. § 216(b). District courts in the Ninth Circuit apply an "ad hoc two-tiered approach" in determining whether the

plaintiffs are similarly situated, applying a more lenient standard to determine whether a collective should be certified for the purposes of giving notice to potential opt-ins and a stricter standard once discovery has been completed. Class Certification Order at 94-95 (citations omitted). The Court applies the stricter standard to the question of whether the narrower FLSA collective that Plaintiffs now propose should be certified. Under that standard, the Court concludes that the new FLSA class meets the "similarly situated" requirement of Section 216(b).

Courts consider three factors in deciding whether plaintiffs have met their burden at the second step of the FLSA certification inquiry: "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendants with respect to the individual plaintiffs; and (3) fairness and procedural considerations." *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 772 F. Supp. 2d 1111, 1118 (N.D. Cal. 2011). While this standard is more stringent than at the conditional certification stage, it "is different, and easier to satisfy, than the requirements for a class action certified under Federal Rule of Civil Procedure 23(b)(3)." *Id.* (citing *Lewis v. Wells Fargo & Co.*, 669 F.Supp.2d 1124, 1127 (N.D. Cal. 2009)).

The Court found in the Class Certification Order that "[t]he analysis of whether Plaintiffs in the FLSA collective are similarly situated largely mirrors the analysis under Rule 23(b)(3), except that the variations in state law and potential choice-of-law questions that may arise as to those classes are not an issue for the FLSA collective." *Id.* at 95. The Court concluded that the class members were not similarly situated because there were "wide variations among the players as to the types of activities in which they engaged and the circumstances under which they engaged in them, which will give rise to a plethora of individualized inquiries relating to the determination of the amount of compensable work Plaintiffs performed." *Id.* It further pointed to the need to conduct "numerous individualized inquiries regarding the amount of compensation received by class members and the applicability of various defenses, including the amusement exemption and the creative professionals exemption." *Id.* The Court now revises those conclusions consistent with its conclusions relating to the new Rule 23(b)(3) classes.

First, by eliminating the winter conditioning claims and pursuing on a classwide basis only claims that are based on the continuous workday doctrine, Plaintiffs have significantly reduced the

need to engage in individualized inquiries relating to the type of work performed. Second, the Court is now persuaded that the payroll records maintained by Defendants will allow any variations in compensation to be analyzed without burdensome individualized inquiries. This is especially true as to the spring training, extended spring training and instructional league claims because players generally were not compensated for their participation in these activities and the small fraction of players who *did* receive compensation for these activities can be identified using payroll records maintained by Defendants.[9] Third, as discussed above, the Court finds that the defenses asserted by Defendants to the FLSA present common questions that are not likely to be overwhelmed by the need to conduct individualized inquiries. Finally, the possibility that the Court will be required to apply the laws of numerous states (or at a minimum, conduct numerous choice of law inquiries) is not present as to the FLSA class, which will require the Court to apply only federal wage and hour law.

Accordingly, the Court grants Plaintiffs' request to recertify the narrower FLSA collective proposed in its Motion for Reconsideration.

## VI. CONCLUSION

For the reasons stated above, the Motion for Leave to File Sur-Reply and the Motion to Intervene are GRANTED. The Motion for Reconsideration is GRANTED in part and DENIED in part. The Motion to Exclude is DENIED.

The Court certifies the following FLSA Collective:

> Any person who, while signed to a Minor League Uniform Player Contract, participated in the California League, or in spring training,

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[9] In addition, the Court is persuaded that the problems that were addressed at length at oral argument concerning the difficulty of identifying which minor leaguers participated in spring training, extended spring training and instructional leagues do not pose such serious problems that they render class treatment unmanageable. In particular, Plaintiffs' counsel has represented to the Court that numerous witnesses testified in depositions that the Clubs and affiliates maintained rosters listing players who participated in these activities, and that many such rosters have been produced already, albeit in redacted form. In addition, the eBis transaction records, used in combination with disabled lists and payroll records, are likely to provide relevant information that will allow the parties to determine who may have participated in spring training, extended spring training and instructional leagues.

> instructional leagues, or extended spring training, on or after February 7, 2011, and who had not signed a Major League Uniform Player Contract before then.

The parties shall meet and confer to address the specific wording of the Rule 23(b)(3) California class definition that the Court has approved, incorporating the temporal limitation discussed above. If the parties can agree, a stipulation shall be filed with the Court by **April 28, 2017** containing the revised class definition. If the parties are unable to agree, they should jointly file by the same date a statement, not to exceed five pages, setting forth the competing proposed class definitions and explaining the basis for any disagreements. In addition, the parties shall meet and confer and jointly submit a proposed schedule for the case, also to be filed by **April 28, 2017**. A Case Management Conference is set for **May 12, 2017 at 2:00 p.m.**

**IT IS SO ORDERED.**

Dated: March 7, 2017

JOSEPH C. SPERO
Chief Magistrate Judge

United States District Court
Northern District of California

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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No. __

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AARON SENNE ET AL.,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

*Applicants*,

v.

KANSAS CITY ROYALS BASEBALL CORP. ET AL.,

*Respondents*.

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## CERTIFICATE OF SERVICE

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I, Robert L. King, a member of the Supreme Court Bar, hereby certify that a copy of the attached Application To Vacate Stay Pending The Filing And Disposition Of A Petition For A Writ Of Certiorari was served by depositing it with the United States Postal Service, first-class postage prepaid, on the following parties listed below on this 21st day of January, 2020. An electronic PDF of the Application has also been sent to the following counsel via e-mail:

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