

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN WHITEWAY, individually and on
behalf of all others similarly situated,

No. C 05-2320 SBA

Plaintiffs,

ORDER

v.

[Docket No. 59]

FEDEX KINKO'S OFFICE AND PRINT
SERVICES, INC., and DOES 1 through 25,
inclusive,

Defendants.

This matter comes before the Court on Plaintiff's Motion for Class Certification [Docket No. 59]. The Court has considered the parties' filings and statements made at oral argument on this Motion, which was held on September 12, 2005.

BACKGROUND

Plaintiff Stephen Whiteway works as a Center Manager ("CM") for a California retail location of Defendant FedEx Kinko's Office and Print Services, Inc. On May 19, 2005, Plaintiff filed a complaint against FedEx Kinko's in the Superior Court of the State of California. Plaintiff alleged that FedEx Kinko's improperly exempts CMs from certain employment benefits, particularly overtime compensation, by categorizing the group as "executive exempt."¹ Compl. at ¶ 12. Plaintiff

¹The executive exemption is set out in California Labor Code section 515, which states:
(a) The Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid pursuant to Sections 510 and 511 for executive, administrative, and professional employees, provided that the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. The commission shall conduct a review of the duties that meet

1 claims that Defendant's classification of CMs as executive exempt, and failure to investigate the
2 propriety of that classification, violates California Labor Code §§ 201, 202, 203, 218.5, 226, 226.7,
3 510, 512, 1174, 1194, 1198 and 1199; and California Business & Professions Code §§ 17200-17208.
4 Plaintiff seeks injunctive relief, back pay, and punitive damages.

5 On June 8, 2005, Defendant removed the action to this Court pursuant to 28 U.S.C. §§ 1441
6 and 1332. Defendant answered the complaint and filed a counterclaim for declaratory judgment on
7 November 30, 2005.

8 On May 12, 2006, Plaintiff filed the instant Motion for Class Certification. The proposed
9 class consists of "all members who are/were employed as salaried Store Managers of Kinko's, and
10 were classified thereby as overtime-exempt employees at any time between the commencement of
11 the pay period including May 19, 2001 and the present." Compl. at ¶ 14.

12 **A. Facts**

13 FedEx Kinko's operates about 200 Centers in California. The state is divided into two
14 regions, Southern California and the West Area. These regions are further divided into districts,
15 which are run by District Managers who report to the Regional Vice-President of the given region.
16 The Southern California region has eight districts and the West Area region, which covers northern
17 California, has six districts. Each district contains multiple centers or retail stores. The West Area
18 region contains about eighty-eight centers and the Southern California region contains about 112-
19 120 centers.

20 Each of these centers is run by a Center Manager. Each CM oversees an Assistant Manager
21 (Retail) and Assistant Manager (Production). Along with overseeing these two hourly managers,
22 some CMs also manage a Senior Customer Consultant and/or a Senior Technology Consultant. The

23 _____
24 the test of the exemption. The commission may, based upon this review,
25 convene a public hearing to adopt or modify regulations at that hearing
pertaining to duties that meet the test of the exemption without convening wage
boards. . . .

26 (e) For the purpose of this section, "primarily" means more than one-half of the
27 employee's worktime.
28

1 Assistant Managers manage the 12 to 18 entry-level employees in these centers, which include
2 Associate Retail Consultants, Retail Consultants, Couriers, Associate Production Operators, and
3 Production Operators. Since 2003, FedEx Kinko's has trained CMs in Dallas, Texas. The training
4 materials used in this eight week program are uniform for each center.

5 FedEx Kinko's has five different types of centers: (1) Hub Centers, (2) Spoke Centers, (3)
6 Standalone Centers, (4) Ship Centers, and (5) Commercial Processing Centers ("CPCs").

7 Hub Centers are 24-hour, full-service retail and commercial stores. Generally, Hubs are
8 larger than Spokes in terms of sales volume, headcount, machine capacity and capabilities. Hub
9 CMs are known as Senior Center Managers. They are "primarily responsible for managing the
10 overall operations of branches within the assigned local branch network, including supervision of
11 Branch Managers (Spoke) ["Spoke CMs"] and the administration of branch sales performance and
12 profitability objectives." Cole Decl., Ex G. at 31. Along with other duties, Hub CMs hire, promote,
13 discipline, and discharge employees at their own Hub Center as well as at the Spoke Center.

14 Spoke Centers are connected with a Hub branch, which oversees the Spoke Center's
15 operations. The Hub Center coordinates with the Spoke Center for overnight customer coverage.
16 Spokes vary by size, revenue, and number of employees.

17 Standalone Centers are not connected to a Hub because of their geographic remoteness.
18 They can have a structure that is similar to either a Hub or a Spoke in terms of the commercial/retail
19 mix, revenue, and number of employees. Standalones are generally open 24 hours, but can close
20 during certain hours based on customer traffic and needs. Standalone CMs are "primarily
21 responsible for managing the overall branch operation, including supervision of team members and
22 the administration of branch sales performance and profitability objectives." Cole Decl., Ex. G at
23 35. The Standalone CMs' job responsibilities are similar to those of Spoke CMs.

24 Ship Centers are primarily shipping facilities, and are typically smaller than other centers.
25 CPC Centers service other FedEx Kinko's Centers, rather than the general public. CPC centers are
26 primarily responsible for large print jobs or print jobs needing a quick turnaround.

27 Hub, Spoke, and Standalone CMs are required to achieve the company's sales and profit
28 objectives, supervise employees, hire employees, train employees, evaluate workers, recommend

1 wage increases, recommend promotions, initiate disciplinary proceedings, terminate employees,
2 maintain the Defendant's fiscal reporting procedures, supervise marketing initiatives, manage
3 inventory, manage machinery, comply with Federal/State law safety requirements, and ensure
4 subordinate employees are consistently applying Kinko's Policies and Procedures. Cole Decl. Ex G.
5 at 31-35 (FedEx Kinko's Standard Roles & Job Descriptions: Implementation Guide February 2002).
6 District Managers evaluate CMs' performance based on leadership skills and business results. Cole
7 Decl., Ex. K (FedEx Kinko's Performance Appraisal for Center Managers).

8 LEGAL STANDARD

9 **I. Class Certification**

10 Class certification is governed by Federal Rule of Civil Procedure 23, which sets forth a two-
11 step procedure. First, the Court must determine that the following four requirements of Rule 23(a)
12 have been satisfied: (1) numerosity; (2) common questions of law and fact; (3) typicality; and (4)
13 fair and adequate representation. Fed. R. Civ. P. 23(a). Once these requirements are met, the
14 plaintiff must also show that the lawsuit qualifies for class action status under one of the criteria
15 found in Rule 23(b). *See Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir.
16 2001), *amended and superceded on denial of rehearing by Zinser v. Accufix Research Institute, Inc.*,
17 273 F.3d 1266 (9th Cir. 2001) (noting that Plaintiff "bears the burden of demonstrating that [he] has
18 met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b)").

19 Rule 23(b) requires that the plaintiff establish that either: (1) there is a risk of inconsistent
20 adjudication, or adjudication of individual class member's claims would substantially impair non-
21 party members' ability to protect their interests; (2) the defendant acted on grounds generally
22 applicable to the class; or (3) common questions of law or fact predominate and class resolution is
23 superior to other available methods. Fed. R. Civ. P. 23(b).

24 The plaintiff bears the burden of proving that certification is appropriate. *See Hawkins v.*
25 *Comparet-Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001). The Court maintains great discretion in
26 certifying a class action. *Vizena v. Union Pac. R. R. Co.*, 360 F.3d 496, 502 (5th Cir. 2004). The
27 Court must rigorously analyze whether the class action allegations meet the requirements of Rule 23.
28 *See General Telephone Co. Of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). However,

1 "[b]ecause the early resolution of the class certification question requires some degree of speculation
 2 . . . all that is required is that the Court form a 'reasonable judgment' on each certification
 3 requirement." *In re Citric Acid Antitrust Litig.*, 1996 WL 655791 *2 (N.D. Cal. 1996). "In
 4 formulating this judgment, the Court may properly consider both the allegations of the class action
 5 complaint and the supplemental evidentiary submissions of the parties." *Id.* at * 2. The Court may
 6 also consider how the plaintiffs' claims will be tried. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744
 7 (5th Cir. 1996).

8 ANALYSIS

9 **A. Class Period**

10 California CMs sued Defendant's predecessor Kinko's in California Superior Court on March
 11 14, 2000, for failure to pay overtime to nonexempt employees who had been misclassified as exempt
 12 employees. *See Sanders v. Kinko's*, Case No. 00CC03304. Kinko's settled this case and certified the
 13 CMs as a class for settlement purposes only. Counterclaim at ¶ 14.² The parties agreed at oral
 14 argument that April 18, 2002, the effective date of the *Sanders* settlement, is the cut-off date for this
 15 class.

16 **I. Ascertainability**

17 An implied prerequisite to certification is that the class must be sufficiently definite. *See*
 18 *DeBremaeker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). An identifiable class exists if its members
 19 can be ascertained by reference to objective criteria. *See id.* at 734-35 (declining to certify a class
 20 made up of Texas residents "active in the peace movement" because identification of members was
 21 dependent on their subjective states of mind). *See also Lukovsky v. City and County of San*

22
 23 ²The settlement class included: "All current and former employees of Defendant who worked
 24 in the position of [Center] Manager within the State of California between March 14, 1996 and the
 25 Effective Date (as defined in the Agreement)(the "Class Period")." The "Effective Date" was defined
 26 as "the date upon which the Judgement becomes Final." Counterclaim, Ex. B at 3. The Superior Court
 27 signed the Final Judgement and Order of Dismissal on April 18, 2002. Defendants request that this
 28 Court take judicial notice of the *Sanders* settlement. That request is granted. Judicial notice may be
 taken of facts "not subject to reasonable dispute" because they are either "(1) generally known within
 the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort
 to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The existence of
 the *Sanders* settlement is not disputed by the parties, and it is readily verifiable through examination of
 the court file in that case.

1 *Francisco*, 2006 WL 140574 at *2 (Jan. 17, 2006). The Court must be able to determine class
 2 members without having to answer numerous fact-intensive questions. *Daniels v. City of New York*,
 3 198 F.R.D. 409, 414 (S.D.N.Y. 2001).

4 Plaintiff plans to determine class membership by analyzing employee, payroll, and other
 5 records maintained by Defendant. Compl. at ¶ 23(a). This is a reasonable, objective method of
 6 ascertaining those individuals Defendant employed as CMs in a California retail location at any
 7 point between April 18, 2002 and the present. Accordingly, Plaintiff has satisfied the
 8 ascertainability requirement for class certification.

9 **II. Federal Rule 23(a) Requirements**

10 **A. Numerosity**

11 Rule 23(a)'s first requirement is that the proposed class must be so numerous that joinder of
 12 all members is "impracticable." Fed. R. Civ. P. 23(a)(1). "Impracticable" does not mean
 13 "impossible," and a plaintiff only need establish the difficulty or inconvenience of joining all
 14 members of the class to meet the numerosity requirement. *Harris v. Palm Springs Alpine Estates,*
 15 *Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). There is no set numerical cutoff; a court must examine
 16 the specific facts of each case to determine whether numerosity has been satisfied. *General Tel. Co.*,
 17 446 U.S. at 329-30. Moreover, a plaintiff need not allege the precise number of class members, "but
 18 may instead [make a reasonable] estimate on the basis of the size of a disputed offering." *Brosious*
 19 *v. Children's Place Retail Stores*, 189 F.R.D. 138, 145 (D.N.J. 1999).

20 Given the parameters of the proposed class, the parties agree that it will include several
 21 hundred individuals. This is sufficient to meet the numerosity requirement.³

22 **B. Commonality**

23 To prevail on his Motion for Class Certification, Plaintiff must establish that there are
 24

25 ³Although neither Rule 23(a) nor the courts have imposed an absolute "magic number," some
 26 courts have held that numerosity may be *presumed* at a level of forty members. *See, e.g., Consolidated*
 27 *Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). On the other hand, classes of fifteen
 28 or fewer people have frequently been rejected as too small for certification. *See, e.g., General Tel. Co.*
v. EEOC, 446 U.S. 318, 329-30 (1980) (fifteen affected employees "would be too small to meet the
 numerosity requirement"); *Harik v. Cal. Teachers Ass'n*, 298 F.3d 863, 872 (9th Cir. 2002) (certification
 of classes of seven, nine, and ten members vacated on numerosity grounds).

1 "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). As the Ninth Circuit stated
 2 in *Hanlon v. Chrysler Corporation*, 150 F.3d 1011, 1019 (9th Cir. 1998), the commonality
 3 requirements of Rule 23(a) are less rigorous than the companion requirements of Rule 23(b)(3). All
 4 questions of fact and law need not be common to satisfy the rule. *Id.* The existence of shared legal
 5 issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled
 6 with disparate legal remedies within the class. *Id.*; *see also Staton v. Boeing Co.*, 327 F.3d 938, 953
 7 (9th Cir. 2003) ("Rule 23(a)(2) has been construed permissively."). Factual variations or individual
 8 differences concerning damages, for example, will generally not defeat commonality. *See, e.g.*,
 9 *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (noting that differences in individual damage
 10 calculations are insufficient to defeat commonality).

11 Plaintiff asserts that commonality is established because the central question in this case –
 12 whether CMs' duties and responsibilities qualify as executive exempt – will require the Court to
 13 determine what tasks CMs, as a group, perform and the amount of time they spend on non-exempt
 14 tasks. In essence, Plaintiff's argument is that because CMs have similar job descriptions, and
 15 Defendant applies the executive exemption to all CMs, the "minimal" showing necessary to establish
 16 commonality is met. *See Hanlon*, 150 F.3d at 1020. Further, Plaintiff identifies the following
 17 common questions of law:

- 18 i. whether defendant Kinko's violated IWC Wage Orders and/or Labor Code § 510 by
 19 failing to pay overtime compensation to Store Managers who worked in excess of
 20 forty hours per week and/or eight hours per day.
- 21 ii. whether defendant Kinko's violated Business and Professions Code § 17200 by
 22 failing to pay overtime compensation to Store Managers who worked in excess of
 23 forty hours per week and/or eight hours per day.
- 24 iii. whether defendant Kinko's violated Labor Code § § 226.7 and/or 512 by failing to
 25 consistently provide meal and rest periods to its Store Managers.
- 26 iv. whether defendant Kinko's violated Labor Code § 1174 by failing to keep accurate
 27 records of employees' hours of work.
- 28 v. whether defendant Kinko's violated Labor Code § § 201-203 by failing to pay
 overtime wages due and owing at the time that certain Class Members' employment
 with Defendant terminated.
- vi. whether defendant Kinko's violated Labor Code § 226 by failing to provide the
 semimonthly itemized statements to Class Members of total hours worked by each
 and all applicable hourly rates in effect during the pay period.
- vii. whether Representative Plaintiff and the Class are entitled to "waiting time" penalties,
 pursuant to Labor Code § 203.

Compl. at ¶ 23.

1 The Court agrees that CMs share similar job duties and responsibilities regardless of center
2 type. Even assuming there are some variations among the daily tasks performed by CMs, as
3 Defendant alleges, the similarities create common questions as to whether CMs are properly
4 classified as executive exempt.

5 Defendant contends that in light of *General Telephone Company v. Falcon*, 457 U.S. 147
6 (1982), Plaintiff's reliance on uniform employment policies for all CMs does not satisfy
7 commonality. In *Falcon*, the plaintiff alleged that he was discriminated against on the basis of race,
8 and sought to certify a class composed of all Mexican-Americans employed by his employer. The
9 Supreme Court overturned the lower's court's decision to certify the class, because there was no
10 common question of law or fact. In the Court's view, "there is a wide gap between [] an individual's
11 claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported
12 allegation that the company has a policy of discrimination." *Falcon*, 457 U.S. at 157. In order to
13 find a common question, the Court would need to infer:

14 (1) that this discriminatory treatment is typical of petitioner's promotion practices, (2) that
15 petitioner's promotion practices are motivated by a policy of ethnic discrimination that
16 pervades petitioner's Irving division, or (3) that this policy of ethnic discrimination is
reflected in petitioner's other employment practices, such as hiring, in the same way it is
manifested in the promotion practices.

17 *Falcon*, 457 U.S. at 157-158. The *Falcon* Court rejected claimant's "across-the-board" allegation
18 that, as a member of a racial class, his personal experience with racial discrimination automatically
19 evidenced company-wide discrimination. Plaintiff, however, does not ask the Court to infer that
20 Defendants' allegedly illegal actions toward him translated into a company-wide policy of illegal
21 action for those sharing common characteristics. Rather, Plaintiff directly challenges FedEx Kinko's
22 undisputed company-wide policy of categorizing all CMs as exempt employees.

23 Defendant insists that simply because CMs are subject to common policies does not mean
24 that they have identical job duties. According to Defendant, commonality is destroyed by the fact
25 that different CMs supervise different numbers of employees and have different business volume
26 and mix depending on which type of center they work at. Defendant asserts that "[t]here is no single
27 "CM" job."

28 As discussed, differences between Hub, Spoke, and Standalone CMs' job duties and

1 responsibilities appear to be minimal, according to FedEx Kinko's own manual. Further,
2 commonality is not defeated simply because CMs' job duties vary to some extent. In *Wang v.*
3 *Chinese Daily News*, 231 F.R.D. 602, 605, 613 (C.D. Cal. 2005), the court certified a class
4 consisting of employees with various job descriptions, and held that

5 Defendant cannot, on the one hand, argue that all reporters and account
6 executives are exempt from overtime wages and, on the other hand, argue
7 that the Court must inquire into the job duties of each reporter and account
8 executive in order to determine whether that individual is "exempt."
Moreover, Defendant's argument ignores the fact that Plaintiffs are
challenging Defendant's *policy* of classifying all reporters and account
executives as "exempt."

9 Defendant further argues that commonality is defeated because some, but not all, CMs signed
10 arbitration agreements. However, Defendant stated at oral argument that nearly all CMs signed
11 arbitration agreements, and that the agreements are substantially similar. As such, commonality is
12 not defeated by the arbitration agreements.

13 Plaintiff has met his burden of establishing commonality.

14 C. Typicality

15 The third requirement of Rule 23(a) is typicality. The typicality requirement focuses on the
16 similarity between the lead plaintiff's legal theories and those of the people he or she purports to
17 represent. *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1998). As such, "[t]he
18 commonality and typicality requirements of Rule 23(a) tend to merge." *Falcon*, 457 U.S. at 158
19 n.13. However, "[t]ypicality refers to the nature of the claim . . . of the class representative, and not
20 to the specific facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976
21 F.2d 497, 508 (9th Cir. 1992).

22 Defendant presents several arguments in support of its position that Plaintiff's claims are not
23 typical: (1) Whiteway did not follow the "2 Assistant Manager" policy and did not receive extensive
24 training; (2) Whiteway was a CM at a Standalone Center; (3) Whiteway was a CM from November
25 2001 to the present and, as such, not a CM during the entire proposed class period; (4) Whiteway
26 lacks standing for some of the claims.

27 Whiteway has been a CM in a California retail location of FedEx Kinko's since November
28 2001. Because the alleged injury is based on a misclassification of CMs as executive exempt, he has

1 suffered the same injuries and has the same interests as other CMs that FedEx Kinko's classified as
2 executive exempt at any point during the proposed class period. Thus, it is irrelevant whether he
3 followed the "2 Assistant Manager" policy and did not receive extensive training, as long as his job
4 duties were similar to those of other CMs. As discussed, the duties of Standalone CMs are
5 substantially similar to those of other CMs, so Whiteway's position as a Standalone Center CM is
6 also irrelevant. Whiteway does not have to have been a CM for the entire class period, as the class
7 covers those individuals who were CMs at any time during the class period.

8 This Court also rejects Defendant's argument that Plaintiff lacks standing to sue on behalf of
9 former CMs. Defendant is correct that because Plaintiff is currently employed as a CM, he cannot
10 recover under California Labor Code sections 201 to 203, which deal with an employer's "willful
11 [failure] to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and
12 205.5, any wages of an employee who is discharged or who quits." However, the fact that Plaintiff
13 is ineligible for one of several damage remedies sought does not defeat the typicality requirement.
14 A "representative's claims are 'typical' if they are reasonably co-extensive with those of absent class
15 members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Plaintiff and ex-CMs
16 are eligible to recover under California Labor Code sections 510, 226, 226.7, and 512, as well as
17 under California Business & Professions Code sections 17200-17208. Those statutes do not require
18 that the employee terminate employment with the company. Further, Defendant's argument is based
19 on a mischaracterization of the California Court of Appeals' decision in *Pfizer v. Superior Court*,
20 141 Cal. App. 4th 290 (2006). In *Pfizer*, the Court held that a plaintiff bringing a class action for
21 relief under the amended California Business & Professions Code section 17204 must have "suffered
22 injury and lost money or property" as a result of the violation of the Unfair Competition Law in
23 order to meet the statute's requirement of standing. *Id.* at 300. *Pfizer* did not hold that the named
24 plaintiff in a class action suit must be able to recover under every statute alleged to have been
25 violated by the defendant.

26 Further, this Court is bound to follow the Supreme Court's statement that, "to have standing
27 to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he
28 must possess the same interest and suffer the same injury shared by all members of the class he

1 represents." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974). The Court
2 declines to impose additional requirements. Whiteway and ex-CMs have suffered similar injuries if
3 misclassified as executive exempt employees during the class period. They have a similar interest in
4 recovering overtime pay and other damages. Accordingly, the Court finds that the typicality
5 requirement is met.

6 **D. Adequacy of Representation**

7 The final requirement of Rule 23(a) is that Whiteway must be able to "fairly and adequately
8 protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy of representation assures due
9 process of law to all unnamed class members; if a person is to be conclusively bound by a judgment
10 prosecuted by a representative, he must have received adequate representation. *Hansberry v. Lee*,
11 311 U.S. 32, 42-43 (1940). To establish adequacy of representation, Whiteway must show: (1) that
12 his interests are common with, and not antagonistic to, the classes' interests; and (2) that he is "able
13 to prosecute the action vigorously through qualified counsel." *Lerwill v. Inflight Motion Pictures,*
14 *Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

15 Plaintiff has established adequacy of representation. There is no evidence that Whiteway has
16 any conflicts of interest with other CMs in the class. Plaintiff's counsel has already investigated the
17 claims of the class through depositions, discovery, and interviews. Thus, Plaintiff can adequately
18 represent the interests of his fellow class members.

19 **III. Rule 23(b) Requirements**

20 After satisfying the requirements of Rule 23(a), Whiteway must also show that at least one of
21 the three requirements of Rule 23(b) is satisfied before the Court can certify the class. *Amchem*
22 *Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997). Plaintiff asserts that the Court could certify
23 the class pursuant to any of the three requirements..

24 **A. Rule 23(b)(1)**

25 Rule 23(b)(1) allows a court to certify a class when the party requesting certification meets
26 the requirements of Rule 23(a) and either (A) if trying each case separately, would create a risk of
27 "inconsistent or varying adjudications with respect to individual members of the class which would
28 establish incompatible standards of conduct for the party opposing the class," or (B) adjudication of

1 individual member's claims would substantially impair or impede non-party members' ability to
2 protect their interests. Fed. R. Civ. P. 23(b)(1).

3 According to Plaintiff, the class should be certified under Rule 23(b)(1)(A), because there is
4 a risk of inconsistent results if individual CMs' claims as to the validity of their exempt status are
5 resolved separately. FedEx Kinko's has categorized CMs as a group as executive exempt, and a
6 decision about such categorization would impact each individual CM. If the Court were to order
7 Defendant to reclassify an individual as nonexempt, granting that CM overtime, meal breaks, and
8 rest breaks, then that CM would be treated differently than her fellow CMs, and FedEx Kinko's
9 would have incompatible standards of conduct toward each CM. Although there is some force to
10 this argument, the Ninth Circuit has held, as noted by Defendant, that "[c]ertification under Rule
11 23(b)(1)(A) is . . . not appropriate in an action for damages." *Zinser*, 253 F.3d at 1193. As
12 discussed below, although Plaintiff also seeks injunctive relief, this case is best characterized as
13 primarily a suit for money damages. Thus, the Court declines to certify the class pursuant to Rule
14 23(b)(1)(A).

15 Plaintiff contends that Rule 23(b)(1)(B) also applies, because class members may pursue
16 punitive damages, and there is a limited fund from which individual class members would be able to
17 recover. Punitive damage awards for individual members could deplete the corporation's resources
18 to the point where it could not satisfy judgments against it, and later plaintiffs would be unable to
19 recover. Defendant contends that Plaintiff has not brought a claim for which the Court could award
20 punitive damages. Plaintiff responds that the facts alleged in the Complaint show intentional
21 violations of law, which give rise to a claim for punitive damages. Assuming arguendo that punitive
22 damages are available, the *Zinser* court identified a test for determining whether the existence of a
23 "limited fund" justifies certification under Rule 23(b)(1)(B):

24 The Supreme Court has held that certain characteristics are
25 "presumptively necessary, and not merely sufficient, to satisfy the limited
26 fund rationale" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999).
27 Thus, to satisfy Rule 23(b)(1)(B), a class action plaintiff must demonstrate
28 that the case involves a "'fund' with a definitely ascertained limit, all of
which would be distributed to satisfy all those with liquidated claims
based on a common theory of liability, by an equitable, pro rata
distribution." *Id.* at 841.

1 *Zinser*, 253 F.3d at 1197. Plaintiff has not satisfied this test. He has identified no ascertainable limit
2 on any potential fund for payment of damages, punitive or otherwise, aside from pointing out that
3 there are due process limits on the size of punitive damage awards. In the absence of a more
4 complete showing, the Court rejects Plaintiff's argument that the class should be certified under Rule
5 23(b)(1)(B).

6 **B. Rule 23(b)(2)**

7 Rule 23(b)(2) allows a class action to be certified where Rule 23(a) is met and "the party
8 opposing the class has acted or refused to act on grounds generally applicable to the class," making
9 it appropriate to grant relief sought to the class as a whole. Fed. R. Civ. P. 23(b)(2). This subsection
10 primarily applies to suits injunctive relief, but the Court can certify a class seeking money damages
11 if "the claim for monetary damages [is] secondary to the primary claim for injunctive or declaratory
12 relief." *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003).

13 Plaintiff contends that this subsection applies, because many of the class members are current
14 employees who would benefit from injunctive relief. Plaintiff has not shown that monetary relief is
15 secondary to the injunctive relief sought. Thus, the Court will not certify the class under Rule
16 23(b)(2).

17 **C. Rule 23(b)(3)**

18 Under Rule 23(b)(3), the Court must find that the questions of law or fact common to the
19 members of the class predominate over any questions affecting only individual members, and that a
20 class action is superior to other available methods for the fair and efficient adjudication of the
21 controversy. Fed. R. Civ. P. 23(b)(3). The matters pertinent to a finding under Rule 23(b)(3)
22 include: (a) the interest of members of the class in individually controlling the prosecution or
23 defense of separate actions; (b) the extent and nature of any litigation concerning the controversy
24 already commenced by or against members of the class; (c) the desirability or undesirability of
25 concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be
26 encountered in the management of a class action. *Id.*

27 The objective behind the two requirements of Rule 23(b)(3) is the promotion of economy and
28 efficiency in actions that primarily involve monetary damages. *See* Fed. R. Civ. P. 23(b)(3) advisory

1 committee notes. When common issues predominate, true economy may be achieved through the
2 class action device, as time, effort and expense can be saved as compared to individual suits, and the
3 confusion over differing outcomes can be avoided. *Id.*

4 The Court agrees with Plaintiff that common questions of law and fact predominate.
5 "Because no precise test can determine whether common issues predominate, the Court must
6 pragmatically assess the entire action and the issues involved." *Romero v. Producers Dairy Foods,*
7 *Inc.*, 235 F.R.D. 474, 489 (E.D. Cal. 2006). The Court can more efficiently answer the question of
8 whether Defendant's exemption of all CMs is correct through a class action than through case-by-
9 case adjudication.

10 A recently-decided case, *Tierno v. Rite Aid Corp.*, No. 05-02520 (N.D. Cal Aug. 31, 2006),
11 lends support to the Court's holding on Rule 23(b)(3). In *Tierno*, a group of Rite Aid store managers
12 claimed that their classification as exempt employees violates California labor laws, and moved for
13 class certification. Judge Henderson granted the motion under Rule 23(b)(3), holding that
14 "significant aspects" of the case could be resolved on a class basis including "the actual requirements
15 of the job, the realistic expectations of the employer, the proper classification of Store Manager tasks
16 as exempt or non-exempt, and Rite Aid's state of mind, knowledge, historical actions, and policies
17 with respect to its classification and treatment of Store Managers." *Id.* at 16. *Tierno* relied on *Sav-*
18 *On Drug Stores v. Superior Court*, 34 Cal. 4th 319, 336 (2004) (holding that common questions
19 predominated in overtime case brought by chain store managers). This case presents very similar
20 issues to *Tierno* and *Sav-On*.

21 Defendants argue that Plaintiff has not and cannot establish common questions of law or fact,
22 and as such, no common questions of law or fact could predominate. That argument has been
23 discussed and rejected. Next, Defendant contends the varying characteristics of the class would
24 render the class unmanageable. Again, the class has similar characteristics except, perhaps, with
25 respect to damages. While Defendant argues that this Court should not certify this case as a class
26 action because it may have to "conduct a particularized assessment of damages for each putative
27 class member," class certification is not defeated merely because individualized damage issues may
28 remain. *See Smilo v. South Western Bell Mobil Systems*, 323 F.3d 32, 40 (1st Cir. 2003) ("Where . . .

