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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DIANE ADOMA,

NO. CIV. S-10-0059 LKK/GGH

Plaintiff,

v.

O R D E R

THE UNIVERSITY OF PHOENIX,
INC., et al.,

Defendants.

_____/

Plaintiffs seek class certification on state law wage and hour claims. On August 13, 2010, the court declined to exercise jurisdiction over plaintiffs' federal Fair Labor Standards Act claims, pursuant to the first-to-file rule and a case proceeding in the Eastern District of Pennsylvania. (Dkt. No. 70). Because that order disposed of all federal claims and the complaint only asserted supplemental jurisdiction as a basis for jurisdiction over state law claims, the court ordered supplemental briefing regarding subject matter jurisdiction.

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1 For the reasons stated below, the court concludes that it has
2 jurisdiction over plaintiffs' state law claims under the Class
3 Action Fairness Act, 28 U.S.C. § 1332(d). Plaintiffs' motion for
4 class certification under Fed. R. Civ. P. 23(b)(3) is granted.

5 **I. Background¹**

6 Defendant University of Phoenix ("UOP") is a private,
7 for-profit educational institution that offers classes at 362
8 independent campuses throughout the United States, and through
9 online programs. Defendant Apollo Group, Inc. is the parent
10 company of UOP and handled all of the administrative functions
11 relating to payroll.

12 Plaintiffs Adoma and Abbaszadeh worked as Enrollment
13 Counselors for one or both defendants. Plaintiffs allege that
14 defendants maintained two computer systems regarding Enrollment
15 Counselors' work. One system tracked the Counselors' availability
16 for taking calls and another that was used to track overtime hours
17 worked. Plaintiffs' primary claim is that the former system may
18 be used to demonstrate that Enrollment Counselors worked overtime
19 not recorded by the latter system; this is therefore a claim for
20 "off-the-clock" unpaid overtime.

21 Plaintiffs' second theory of liability argues that defendants
22 paid the wrong hourly rate for overtime. Enrollment Counselors

23
24 ¹ The cursory factual history in this section is provided for
25 background only and does not form the basis of the court's
26 decision. The legally relevant facts relied upon by the court are
discussed within the analysis. This statement of facts is
essentially the same as that issued in the court's order filed
August 13, 2010; the facts are repeated here for convenience.

1 were offered tuition waivers for University of Phoenix coursework.
2 Plaintiffs argue that because the "time and a half" pay they
3 received for overtime was calculated without including the value
4 of this benefit, they received inadequate compensation for
5 overtime.

6 Plaintiffs' third theory is that defendants caused employees
7 to miss meal periods. It is undisputed that defendants had a
8 written policy granting employees permission to take a 60 minute
9 meal break on any day in which the employee worked five hours.
10 Plaintiffs argue that despite this policy, employees were
11 frequently obliged to miss meal periods. Finally, plaintiffs also
12 bring state law claims for waiting time penalties and for
13 inaccurate pay stubs.

14 At least two other suits have been filed claiming that the
15 University of Phoenix failed to fully pay enrollment counselors for
16 overtime work.

17 In Sabol v. The University of Phoenix, No. CV 09-03439-JCJ
18 (E.D. Pa.) ("Sabol"), plaintiffs Erik M. Sabol and Rebecca Odom
19 contend UOP's counselors routinely worked overtime hours without
20 compensation, at the direction of the supervisors. On May 12,
21 2010, the Eastern District of Pennsylvania certified a nationwide
22 FLSA collective action in Sabol. 2010 U.S. Dist. LEXIS 47145. In
23 finding that collective certification was appropriate, the Sabol
24 court relied on the uniformity of Enrollment Counselors' duties and
25 allegations a pervasive policy of requiring employees to work
26 unpaid overtime, for example, by requiring employees to attend

1 "lunch and learn" sessions or to work on Saturdays without counting
2 that time as hours worked. Id. at *14-15. The Sabol court also
3 relied on the Avaya phone records as indicia of hours worked. Id.
4 at *15. By order filed August 13, 2010, this court declined to
5 exercise jurisdiction over the FLSA claims advanced in this case,
6 instead transferring these claims to the Sabol court.

7 In Juric v. The University of Phoenix, Inc., No. 09-CV-3214
8 ODW (C.D. Cal.), plaintiff initially filed a putative class action
9 University of Phoenix and Apollo solely bringing claims under
10 California law. The complaint was filed on April 30, 2009. On
11 January 6, 2010, the Juric court issued an Order Granting
12 Stipulation for Leave to Amend. Juric subsequently abandoned his
13 state law class claims, filing an amended complaint stating claims
14 under the FLSA for unpaid overtime wages and other relief. Id.
15 This amended complaint sought collective action certification for
16 a class composed of enrollment and admission counselors, employed
17 by defendants with the past three years. Id. On February 16, 2010,
18 defendants filed a motion to dismiss, or in the alternative, stay
19 the Juric FLSA collective action claim. Id. at 6. While that
20 motion was pending, on April 27, 2010, the parties filed a notice
21 of settlement. The settlement was finalized on June 18, and the
22 case dismissed on June 21, 2010. No class or FLSA collective
23 action was ever certified, and the settlement pertains to solely
24 to defendants and the named plaintiff.

25 **II. Jurisdiction**

26 The Class Action Fairness Act, 28 U.S.C. § 1332(d), provides

1 that

2 The district courts shall have original
3 jurisdiction of any civil action in which the
4 matter in controversy exceeds the sum or value
5 of \$5,000,000, exclusive of interest and
6 costs, and is a class action in which . . .
any member of a class of plaintiffs is a
citizen of a State different from any
defendant;

7 28 U.S.C. § 1332(d)(2). The court may exercise jurisdiction under
8 this section over putative class actions in which no class
9 certification order has yet been entered. § 1332(d)(8). The
10 parties' filings demonstrate that defendants are citizens of
11 Arizona, that the named plaintiffs are citizens of California, and
12 that the exceptions to jurisdiction in paragraphs (d)(4), (d)(5),
13 and (d)(9) do not apply.

14 The remaining issue is whether the \$5,000,000 amount in
15 controversy requirement has been satisfied. Under CAFA, the court
16 aggregates potential class members' claims. § 1332(d)(6).
17 Jurisdiction is proper unless there is a "legal certainty" that the
18 claim is for less than this amount. St. Paul Mercury Indem. Co. v.
19 Red Cab Co., 303 U.S. 283, 289 (1938), Singer v. State Farm Mut.
20 Auto. Ins. Co., 116 F.3d 373, 375 (9th Cir. 1997).

21 The potential class includes well over one thousand members.
22 On the "off-the-clock" overtime claim for which named plaintiff
23 Adoma seeks class certification, she alleges individual
24 compensatory damages in excess of \$34,000 and claims that evidence
25 already produced demonstrates \$4,732.47 in liability. On
26 plaintiffs' claim for statutory waiting time penalties, plaintiffs

1 seek up to the statutory maximum of \$4,000 per employee (albeit
2 only for a sub-class estimated to include 500 to 700 employees).
3 Defendants argue that Adoma's evidence does not demonstrate
4 liability, and alternatively that she is entitled to no more than
5 \$1,750 in waiting time penalties. Despite this dispute, at least
6 the lesser amounts are "in controversy."

7 Even the reduced figures (which are less than what plaintiffs
8 seek), if typical and aggregated, exceed the jurisdictional
9 amount.² Defendants respond that the evidence does not demonstrate
10 that other class members' claims for damages will be as high.
11 While plaintiffs may fail to prove damages for class members in
12 excess of these amounts, the amount "in controversy" for these
13 claims exceeds the statutory threshold. Jurisdiction over class
14 claims is therefore proper under 28 U.S.C. § 1332(d). The court
15 exercises supplemental jurisdiction over the individual claims (not
16 at issue in the pending class certification motion) pursuant to 28
17 U.S.C. § 1367.

18 **III. Class Certification**

19 A party seeking to certify a class must demonstrate that it
20 has met all four requirements of Rule 23(a) and at least one of the
21 requirements of Rule 23(b). *Zinser v. Accufix Research Inst.,*
22 *Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Beginning with Rule
23 23(b), plaintiffs assert that class certification is proper under
24 (b) (1) or (b) (3). As explained below, (b) (1) is inapplicable here.

25
26 ² E.g., $1,000 * \$4,700 + \$1,750 * 500 = \$5,575,000$

1 Subsection (b) (3) requires a showing that common issues
2 "predominate" and that class adjudication is "superior" to other
3 methods of adjudication. Predominance overlaps with, but is not
4 identical to, the requirements of commonality and typicality under
5 Rule 23(a). The court therefore discusses these issues together.
6 The remaining Rule 23(a) requirements, of numerosity and adequacy,
7 are not in dispute. The court concludes that class certification
8 is warranted under Rule 23(b) (3).

9 **A. Certification under Rule 23(b) (1) Is Inappropriate**

10 Fed. R. Civ. P. 23(b) (1) provides for certification of a class
11 where individual litigation would either risk establishing
12 "incompatible standards of conduct" for the party opposing
13 certification or be dispositive of the interests of other potential
14 class members. This requires more than "a risk that separate
15 judgments would oblige the opposing party to pay damages to some
16 class members but not to others or to pay them different amounts.
17 . . . [and] is therefore not appropriate in an action for damages."

18 Zinser, 253 F.3d at 1193.³ The mere possibility that individual
19 adjudications will have precedential or stare decisis effects is
20 insufficient. La Mar v. H & B Novelty & Loan Co., 489 F.2d 461,
21 467 (9th Cir. 1973). Nor is this a case where plaintiffs allege
22 that the defendant has a "limited fund" that may be inadequate to
23

24 ³ Plaintiffs suggest that Hilao v. Estate of Marcos, 103 F.3d
25 767 (9th Cir. 1996) is to the contrary. Although Hilao certified
26 a class in which damages were sought, that opinion did not discuss
Rule 23(b) (1). The court discusses Hilao in greater detail below.

1 pay all claims. Wright and Miller, 7AA Fed. Prac. & Proc. Civ. §
2 1774 (3d ed.). Accordingly, certification is not appropriate under
3 Rule 23(b) (1).

4 **B. Commonality, Typicality, and Predominance**

5 The court therefore turns to Rule 23(b) (3). Rule 23(b) (3)
6 provides for class certification where "questions of law or fact
7 common to class members predominate over any questions affecting
8 only individual members, and . . . a class action is superior to
9 other available methods for fairly and efficiently adjudicating the
10 controversy." This inquiry relates to, but is in some ways
11 distinct from, the Rule 23(a) requirement that there be "questions
12 of law or fact common to the class" and that the representative
13 party's claim be typical of the class claims.

14 In determining whether common *questions* exist, the court need
15 not determine whether these questions will be *answered* in
16 plaintiffs' favor. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571,
17 594 (9th Cir. 2010) (en banc). Determining whether there are
18 common questions "will often, though not always, require looking
19 behind the pleadings to issues overlapping with the merits of the
20 underlying claims." Id. The court may not, however, "analyze any
21 portion of the merits of a claim that do not overlap with the Rule
22 23 requirements." Id. As to the Rule 23 requirements, the court
23 must perform a "rigorous analysis," but the courts "retain wide
24 discretion in class certification decisions, including the ability
25 to cut off discovery to avoid a mini-trial on the merits at the
26 certification stage." Id. As explained below, plaintiffs have

1 shown predominance, commonality, and typicality as to each of the
2 five state-law claims for which plaintiffs seek class
3 certification.

4 **1. Off-the-Clock Time**

5 California law requires that an employer pay for all hours
6 that it "engage[s], suffer[s], or permit[s]" an employee to work.
7 Morillion v. Royal Packing Co., 22 Cal. 4th 575, 586 (2000)
8 (quoting a California Wage Order). This definition is equivalent
9 to the FLSA obligation to pay for work the employer "knows or has
10 reason to believe" the employee performs. Id. at 585 (quoting 29
11 C.F.R. § 785.11 (1998)). Thus, a plaintiff may establish liability
12 for an off-the-clock claim by proving that (1) he performed work
13 for which he did not receive compensation; (2) that defendants knew
14 or should have known that plaintiff did so; but that (3) the
15 defendants stood "idly by." Lindow v. United States, 738 F. 2d
16 1057, 1060-62 (9th Cir. 1984) (citing Forrester v. Roth's I.G.A.
17 Foodliner, Inc., 646 F.2d 413, 414 (9th Cir. 1981)).⁴

18 Plaintiffs state that they will prove these facts using
19 records in the Avaya computer system. The court therefore
20 summarizes the pertinent details of this system before addressing
21 whether the system provides a means of common proof, and if so,
22

23 ⁴ In opposing class certification, defendants argue that
24 "[t]here is no evidence that [defendants] had a widespread practice
25 of *requiring* [Enrollment Counselors] to work off-the-clock." *Opp'n*
26 *to Class Cert.*, 12 (emphasis added). Although such a policy, if
proven, would provide evidence in support of the test identified
above, such a policy is neither necessary to the individual
plaintiffs' claims nor for a showing of predominance.

1 whether such commonalities predominate.

2 **a. The Avaya Phone Records System**

3 When a potential student calls the University of Phoenix, the
4 call is first routed to a nationwide call center located in
5 Phoenix, Arizona. The call center representative identifies the
6 caller's preferred region. The Avaya system then transfers the
7 call to an Enrollment Counselor in that region who is available to
8 receive calls.

9 The computer system therefore needs to track when Enrollment
10 Counselors are available to receive calls. Enrollment Counselors
11 first indicate their availability by logging in to the computer
12 system using an individual code at the start of their shift. The
13 system then assumes that the employee is available to receive calls
14 until the employee logs out at the end of the day or unless the
15 employee has entered one of nine "aux codes" which indicate
16 unavailability. These codes correspond to particular activities,
17 including "meal break," "personal break," "meeting,"
18 "administrative" duties, and "student meetings." Of the nine aux
19 codes, only the "meal break" pertains to activities for which
20 employees are potentially not entitled to compensation.⁵ If the
21 employee is logged in, has not entered an aux code, but nonetheless

22
23 ⁵ Under California law, if an employee is relieved of all duty
24 during a meal period and not obliged to remain at the work site,
25 the meal period is not counted as hours worked. See, e.g., Bono
26 Enterprises, In. v. Bradshaw, 32 Cal. App. 4th 968 (1995). As
explained below, the parties dispute whether Enrollment Counselors
were consistently relieved from duty during meal periods. The
parties nonetheless agree that at least some meal periods were
properly excluded from hours worked.

1 does not answer the phone after three rings, the call is
2 transferred to another Enrollment Counselor.

3 **b. Defendants' Arguments As to The Need for**
4 **Individualized Inquiries**

5 Defendants make four arguments as to why this system's records
6 are poor indicators of the time an employee spent working. The
7 court summarizes these arguments in this section, then addresses
8 plaintiffs' reply in the following section. First, defendants
9 argue that the login/logout times are inadequate. Defendants
10 contend that employees sometimes login before they begin doing work
11 and that employees sometimes perform non-employment work (such as
12 non-compensable work on University of Phoenix courses the employee
13 is taking) before logging out. Similarly, employees often forget
14 to logout, in which case the employee remains logged in overnight
15 unless the employee calls someone else who will log out for them.
16 The phone system itself is sometimes inoperative, preventing login
17 and logout. Finally, when employees work from non-standard
18 locations they can be prevented from logging in and out.

19 Another court has held that similar computerized data could
20 not demonstrate predominance of common issues where the data did
21 not "take into account the possibility that an employee may not
22 have actually worked between the punch-in time and start time or
23 between the end-time and punch-out time." Forrand v. Federal Exp.
24 Corp., No. CV 08-1360, 2009 WL 648966, *4, 2009 U.S. Dist. LEXIS
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1 22912, *12 (C.D. Cal. Feb. 18, 2009).⁶ Plaintiffs in this suit
2 apparently concede that the login/logout times are therefore an
3 inadequate indicator of time worked, although it is unclear whether
4 plaintiffs forswear reliance on this information entirely.

5 Plaintiffs argue that rather than relying on login/logout
6 times, they can look at records of calls made in combination with
7 the aux codes to determine what work an employee was actually doing
8 and when.⁷ Defendants respond that the aux codes are also
9 unreliable. Some evidence, including depositions of the named
10 plaintiffs, indicates that employees often fail to enter the
11 appropriate aux code or change in aux code when the employee leaves
12 for or returns from lunch, especially when the employee is in a
13 meeting or engaged in another "aux" activity immediately prior to
14 or after lunch. Although defendants further argue that employees
15 inappropriately fail to distinguish between other aux codes, the
16 "meal break" code is the only potentially non-compensable code, so
17 ambiguity among the others is not relevant to the reconstruction
18 of hours worked. Plaintiffs acknowledge that employees sometimes
19

20 ⁶ This was one of many difficulties relied upon by Forrand.
21 That court further observed in a footnote immediately following the
22 above that the electronic records were only available for employees
23 explicitly excluded from the purported class. Forrand, 2009 WL
24 648966, *4 n.7, 2009 U.S. Dist. LEXIS 22912, *12 n.7. In light of
25 the litany of issues in that case, it is difficult to determine
26 which particular factors the Forrand court held were dispositive.

⁷ It appears to the court, at least initially, that reliance
solely on aux codes and records of calls actually received would
not account for time an employee spent waiting to receive calls
when no calls were actually received, but that this time should be
counted as hours worked.

1 improperly record meal periods. Plaintiffs nonetheless argue that
2 the question is whether an employee, or employees generally,
3 "regularly forgot to log out for lunch." The court cannot agree.
4 Plaintiffs' claim is for failure to pay for hours actually worked,
5 and this is a fact specific inquiry. This is not to say that
6 individual issues predominate: trends may establish, by a
7 preponderance of evidence, that most days in which meal periods
8 were not recorded, the employee in fact took no meal period. The
9 issue, however, is whether the trend is evidence of individual
10 days, not vice versa.

11 Defendants contend that these inaccuracies require individual
12 inquiries. For example, defendants argue that when phone records
13 indicate that an employee did not take a meal period on a certain
14 day, an individual inquiry will be required to determine whether
15 the employee in fact took a meal period but failed to record it,
16 such that the employee is not entitled to compensation for that
17 time, or whether instead the employee worked through the day
18 without taking a meal period. Forrand, discussed above, addressed
19 this issue as well, holding that the need for this sort of
20 individualized inquiry was one reason why common issues did not
21 predominate. Forrand, 2009 WL 648966, *3, 2009 U.S. Dist. LEXIS
22 22912, *9 ("individualized fact inquiries are necessary to
23 determine which mechanics did take a lunch break in accordance with
24 the . . . record.")

25 Defendants' third argument about individual inquiries is that
26 compensation is not owed for de minimis overtime, and that whether

1 time was de minimis must be calculated on a fact specific basis.
2 The need to determine whether overtime was de minimis does not
3 itself preclude class or collective certification. Kurihara v. Best
4 Buy Co., No. C 06-01884, 2007 WL 2501698, *10-11, 2007 U.S. Dist.
5 LEXIS 64224, at *29-31 (N.D. Cal. Aug. 29, 2007).

6 Defendants' fourth argument is that plaintiffs have not shown
7 that the Avaya phone records are more reliable than the records
8 contained in the MyHR system. Employees have an opportunity and
9 incentive to review the MyHR records to correct errors and
10 omissions, but employees have no such opportunity with regard to
11 the Avaya records. Moreover, on some days, the Avaya records show
12 employees working substantially less than eight hours a day, but
13 the employee nonetheless received compensation for eight hours.
14 Opp'n to Class Cert., at 14, n.11. Plaintiffs have not explained
15 how they purport to address this situation.

16 Summarizing these arguments, there are reasons to think that
17 any method of reconstructing records of hours worked using the
18 Avaya system will be imperfect. Recognition of these imperfections
19 invites individualized inquiries into their scope. Plaintiffs
20 acknowledge this problem, but contend that the reliability of the
21 Avaya system, and plaintiffs' proposed use thereof, may be
22 demonstrated using a few representative inquiries whose results
23 will be extrapolated to the class. Plaintiffs rely principally on
24 Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996). The court

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1 discusses this argument in the following section.⁸

2 **c. Whether Representative Inquiries May Be Used**

3 In Hilao, the Ninth Circuit upheld certification of a class
4 of “[a]ll current civilian citizens of the Republic of the
5 Philippines, their heirs and beneficiaries, who between 1972 and
6 1986 were tortured, summarily executed or disappeared while in the
7 custody of military or paramilitary groups.” Id. at 774. The
8 class claims alleged that the defendant Ferdinand E. Marcos,
9 deceased and appearing through his estate, was liable for these
10 acts. Id. at 771. As to liability, the primary question was
11 whether “Marcos was liable for any act of torture, summary
12 execution, or ‘disappearance’ committed by the military or
13 paramilitary forces on his orders or with his knowledge.” Id. at
14 774. This was a legal question in which common issues
15 predominated, although the question of proximate cause for any
16 individual’s injuries was in part fact-specific. Id. at 776-779.

17 To determine compensatory damages, the Hilao district court
18 used “a statistical sample of the class claims.” Id. at 782. The
19 court randomly selected 137 of the 9,541 potentially valid claims,
20 which was determined to be a statistically significant sample. Id.
21 A special master then deposed these claimants and their witnesses,

22
23 ⁸ Plaintiffs alternatively rely on Judge Patel’s observation
24 that “courts are comfortable with individualized inquiries as to
25 damages, but are decidedly less willing to certify classes where
26 individualized inquiries are necessary to determine liability.”
Kurihara, 2007 WL 2501698, *9, 2007 U.S. Dist. LEXIS 64224, *25-26
(collecting cases). This dichotomy appears to have limited use
with regard to plaintiffs’ off-the-clock claim, because liability
and damages cannot be easily separated.

1 to determine (1) whether the claimant had been subjected to
2 torture, summary execution, or disappearance as defined by the jury
3 instructions, (2) whether this harm was caused by the Philippine
4 military or paramilitary, and (3) whether the harm occurred within
5 the period at issue. Id. Based on these individual assessments,
6 the special master recommended average compensatory damage awards
7 for subclasses experiencing each type of injury. Id. at 783. The
8 special master's findings as to the 137 individuals and to
9 subclasses were presented to and largely adopted by the jury. Id.
10 at 784. Thus, the 137 individuals received individualized
11 compensatory damage awards and the remaining 9,404 class members
12 received average awards. Id. at 784 n.10.

13 On appeal, the Ninth Circuit considered only the argument that
14 this method was improper for determining the validity of claims.
15 The court held that appellants had waived any challenge to the
16 propriety of this method for assessing the amount of damages. Id.
17 at 784 n.11. Even on this narrow inquiry, the court recognized
18 that "serious questions" as to whether this method comported with
19 due process. Id. at 785. The court nonetheless concluded that due
20 process was provided. Id. at 786. The defendant's interest was
21 in the aggregate amount of damages; thus, provided that the average
22 was properly calculated, it was of no consequence to defendant that
23 some plaintiffs would have been entitled, in individual
24 adjudications, to more or less than this average. Hilao, 103 F.3d
25 at 786. Plaintiffs' interest in the use of averages was
26 "enormous," however, in light of the fact that individual

1 adjudications were infeasible. Id. Balancing these interests
2 under Connecticut v. Doebr, 501 U.S. 1, 10-11 (1991) and Mathews
3 v. Eldridge, 424 U.S. 319 (1976), the court concluded that the
4 method did not offend the Due Process clause.

5 The Ninth Circuit's recent en banc opinion in Dukes affirmed
6 the continuing validity of Hilao. 603 F.3d at 625-27. Dukes
7 upheld certification of a class of hundreds of thousands of female
8 Wal-Mart employees bringing claims of sex discrimination under
9 Title VII. In concluding that the class was manageable, the court
10 explained that "Because we see no reason why a similar procedure
11 to that used in Hilao could not be employed in this case, we
12 conclude that there exists at least one method of managing this
13 large class action that, albeit somewhat imperfect, nonetheless
14 protects the due process rights of all involved parties." Id. at
15 627.

16 **d. Conclusion Regarding Off-the-Clock Claims**

17 All potential class members used both the Avaya and MyHR
18 systems. While defendants argue that the Avaya system provides an
19 inadequate indicator of the number of hours employees actually
20 worked, the types of arguments are common to all class members.
21 Hilao appears to permit a representative inquiry to determine the
22 magnitude of these effects, and at this stage, the court cannot
23 distinguish Hilao. The remaining questions are also common.
24 Notably, the question of whether the Avaya system gave defendants
25 at least constructive knowledge of the employee overtime is a
26 common question. Thus, it appears that common questions

1 predominate. Although defendants argue that the named plaintiffs
2 are not typical, the asserted atypicalities pertain to facts
3 irrelevant to the above theories of liability and proof.
4 Accordingly, plaintiffs have shown commonality, typicality, and
5 predominance of common issues as to their state law off-the-clock
6 claim.

7 **2. Adequacy of Overtime Compensation: Exclusion of the**
8 **Educational Benefit from Calculation of the "Regular**
9 **Rate"**

10 The second theory of liability for which plaintiffs seek class
11 certification is the claim that defendants compensated overtime at
12 the wrong rate. Although plaintiffs present this claim under
13 California law, plaintiffs cite only federal authorities, arguing
14 that the California law is equivalent. Defendants do not dispute
15 this characterization.

16 The FLSA requires that employees receive compensation "at a
17 rate not less than one and one-half times the regular rate at which
18 he is employed" for hours worked in excess of forty per workweek.
19 29 U.S.C. § 207(a)(1). "Calculating the regular rate entails
20 dividing the remuneration paid by the number of hours worked."
21 Ballaris v. Wacker Siltronic Corp., 370 F.3d 901, 909 (9th Cir.
22 2004). The "regular rate," for purposes of this calculation,
23 "include[s] all remuneration for employment paid to, or on behalf
24 of, the employee," subject to various exceptions. 29 U.S.C. §
25 207(e). Defendants did not include the value of the tuition
26 benefit in this calculation, and plaintiffs contend that this

1 exclusion was improper.

2 This is primarily a legal question, in that the only apparent
3 and significant employee-specific issue is whether the employee
4 took advantage of the educational benefit. This issue at most
5 divides the class in two, and the two named plaintiffs are between
6 them typical of each half of this division. As such, class issues
7 predominate as to this theory.

8 Defendants' arguments against certification of this claim
9 reduce to challenges to the merits. Dukes reiterates that courts
10 may not look to the merits of claims on class certification except
11 to the extent that such an inquiry is necessary to determine
12 whether common questions predominate. 603 F.3d at 594.

13 **3. Meal Periods**

14 Plaintiffs further argue that defendants violated their
15 statutory obligation to provide meal periods. The contours of this
16 obligation are unclear, as explained by Jaimez v. Daiohs USA, Inc.,
17 181 Cal. App. 4th 1286, 1303 (2010). Some cases have found that
18 "employers need only 'provide' meal breaks and need not ensure the
19 employee actually takes the meal break." Id. (citing Brown v.
20 Federal Express Corp., 249 F.R.D. 580 (C.D. Cal. 2008)). Other
21 cases have held that employers "have an affirmative obligation to
22 ensure that workers are actually relieved of all duty." Id.
23 (quoting Cicairos v. Summit Logistics, Inc., 133 Cal. App. 4th 949,
24 962 (2005), further internal quotations omitted). Jaimez
25 recognized that the California Supreme Court has granted review in
26 two cases where the Court is likely to address this issue. Id.

1 (citing Brinker Restaurant Corp. v. Superior Court 165 Cal. App.
2 4th 25 (2008), review granted Oct. 22, 2008, S166350, and Brinkley
3 v. Public Storage, Inc., 167 Cal. App. 4th 1278 (2008), review
4 granted Jan. 14, 2009, S168806).

5 Jaimez concerned class certification under California law.
6 The court held that although the pending California Supreme Court
7 decision would provide clarity as to the merits of the underlying
8 claims, that resolution of those merits was unnecessary to class
9 certification. Id.⁹ The court went on to hold that "common legal
10 and factual issues predominate over any individual issues with
11 respect to the meal and rest break claims." Id. at 1305.

12 It appears to this court that the pending clarification of
13 California law will affect the scope of the necessary inquiry and
14 thus the potential predominance of common issues. If employers
15 must "ensure" that meal periods are taken, the question of whether
16 an employer's actions sufficed will likely present a common
17 question. If, on the other hand, employers merely must make meal
18 periods available, then even if it is determined that many
19 employees skipped meal periods on many occasions, the court will
20 need to inquire whether employees did so for their own purposes,
21

22 ⁹ Other courts have stayed meal period claims pending
23 clarification from the California Supreme Court. See, e.g.,
24 Gong-Chun v. Aetna, Inc., No. Civ. 1:09-cv-01995, 2010 U.S. Dist.
25 LEXIS 56938 *15-16 (E.D. Cal. May 15, 2010) (Oberto, M.J.). Gong-
26 Chun involved a party's motion for a stay, and the plaintiff in
that purported class action had not yet moved for class
certification. Here, although the court declines to issue a stay
sua sponte, the court notes that class certification will not limit
the parties' ability to move for a stay.

1 or instead because the employer obliged them to. Forrand, 2009 WL
2 648966, *3, 2009 U.S. Dist. LEXIS 22912, *9.

3 Of course, the legal question regarding the scope of the
4 employer's obligation is itself a common question of law. As to
5 common questions of fact, plaintiffs contend that they will use the
6 Avaya phone records system to demonstrate how often employees
7 skipped meal periods. For the reasons stated above it appears that
8 this predicate factual question is susceptible to common proof.
9 Accordingly, common issues predominate.

10 **4. Failure to Itemize Wage Statements**

11 Plaintiffs claim that defendants violated Cal. Labor Code §
12 226. FAC ¶ 71-73. Section 226(a) obliges employers to provide all
13 all employees not exempt from overtime laws "an accurate itemized
14 statement in writing showing [inter alia] (1) gross wages earned
15 [and] (2) total hours worked by the employee" during the pay
16 period. An employee who suffers "injury as a result of a knowing
17 and intentional failure by an employer to comply with subdivision
18 (a)" may bring a claim under Cal. Labor Code § 226(e).¹⁰

19 Defendants argue that the injury and knowledge aspects of this
20 claim both require individualized inquiries. Defendants cite
21

22 ¹⁰ The court need not address defendants' argument that where
23 an off-the-clock claim provides a predicate for a wage statement
24 claim, denial of certification of the former compels denial of
25 certification of the latter. The court similarly does not address
26 defendants' challenge to the merits of the wage statement claim,
i.e., the contention that by listing as "exception hours" the
number of overtime hours worked, the pay stubs communicate to
Enrollment Counselors that the Counselors worked 40 hours plus or
minus any exception hours listed.

1 various cases that have held that class certification was improper
2 for such a claim, but each cited case is distinguishable. Two
3 rested on the fact that individualized issues predominated as to
4 whether the employees worked unpaid overtime at all--but this court
5 has found this question to be amenable to class treatment in this
6 case. See Jasper v. C.R. England, Inc., No. Civ. 08-5266, 2009
7 U.S. Dist. LEXIS 34802, *15 (C.D. Cal. Mar. 30, 2009), Blackwell
8 v. Skywest Airlines, 245 F.R.D. 453, 468 (S.D. Cal. 2007). A third
9 held that because plaintiff had not alleged that he failed to
10 receive adequate pay or that plaintiff had any need to reconstruct
11 his "pay records," and because plaintiff had not alleged any other
12 sort of injury, plaintiff had shown no injury. Villacres v. ABM
13 Indus., No. Civ. 07-5327, 2009 U.S. Dist. LEXIS 5545 (C.D. Cal.
14 Jan. 14, 2009). Plaintiffs here claim that they were underpaid and
15 prevented from realizing this fact by virtue of inaccurate wage
16 statements.

17 Thus, as to injury, the court concludes that common issues
18 predominate. It appears that the question of defendants' knowledge
19 requires no individualized inquiry, because plaintiffs assert a
20 constructive knowledge theory.

21 **5. Waiting Times**

22 Finally, plaintiffs invoke Cal. Labor Code § 203, which
23 imposes up to thirty days' wages as a penalty on an employer who
24 "willfully fails to pay" wages owed to a former employee. As with
25 other issues in this case, plaintiffs suggest that they will
26 demonstrate willfulness by showing that the Avaya system gave

1 defendants at least constructive knowledge of the unpaid overtime.
2 For the reasons stated above, the sufficiency of this type of proof
3 presents is a common question.

4 **C. Superiority of Class Adjudication**

5 A party seeking class certification under Rule 23(b)(3) must
6 also show that class adjudication is superior to other available
7 methods. In this case, the potential class is large enough to
8 demonstrate that individual adjudication is impractical; indeed,
9 defendants concede that plaintiffs have satisfied the related
10 requirement of numerosity.

11 Defendants primarily argue that plaintiffs' state law claims
12 should be heard in connection with the Sabol FLSA collective action
13 rather than as a Fed. R. Civ. P. 23 class. Assuming that such a
14 procedure is permissible, the court finds that it would not be
15 superior.¹¹ Admittedly, the California law and FLSA claims
16 implicate many of the same issues.¹² Nonetheless, there are
17 important differences between the suits. Enrollment Counselors
18 might have potentially valid claims under California law while
19 falling outside the scope of the Sabol collective action. The
20 Sabol action includes only employees who worked over 40 hours in
21 a week, whereas California law provides a right to overtime for

22
23 ¹¹ At least one court has suggested that state law claims may
24 be heard as part of an FLSA collective action, although that court
25 cited no authority or principle for this proposition. Leuthold v.
26 Destination Am., 224 F.R.D. 462, 470 (N.D. Cal. 2004).

27 ¹² Despite this overlap, "the FLSA does not preempt California
28 from applying its own overtime laws." Pacific Merchant Shipping
29 Ass'n v. Aubry, 918 F.2d 1409, 1418 (9th Cir. 1990).

1 employees who work less than 40 hours in a week but more than 8
2 hours in a day. Moreover, the meal period, wage statement, and
3 waiting time claims here present issues not currently before the
4 Sabol court. Finally, this court is presumably more familiar with
5 California law than is the Eastern District of Pennsylvania. For
6 similar reasons, the court declines to transfer the California law
7 Rule 23 class to the Sabol court under the first-to-file rule.

8 Accordingly, the court concludes that a Rule 23(b)(3) class
9 is the superior method for treatment of plaintiffs' state law
10 claims.

11 **E. Tolling**

12 The court will therefore certify classes of Enrollment
13 Counselors who worked in California. In order to determine the
14 time period encompassed by the classes, the court must determine
15 whether the Juric action tolled the statute of limitations for
16 these claims.

17 "The filing of a class action tolls the statute of limitations
18 as to all asserted members of the class." Crown v. Parker, 462
19 U.S. 345, 350 (1983) (quotation omitted). The defendants in the
20 Juric action were the same as defendants here. Plaintiffs seek
21 tolling for the period between April 3, 2009 (the date the Juric
22 action was filed) and the time this complaint was filed, on January
23 8, 2010.

24 Defendants raise several arguments regarding tolling. First,
25 they note that in Juric, the amended complaint that abandoned class
26 claims was filed on January 13, 2010, five days after the complaint

1 in this action was filed. However, the parties in Juric had filed
2 a stipulation requesting dismissal of class claims on December 30,
3 2009, and the court approved this stipulation and granted leave to
4 file an amended complaint on January 6, 2010.¹³ As such, the class
5 allegations had been dismissed in Juric prior to commencement of
6 the instant suit. The court grants tolling until January 6, 2010,
7 allowing the statute of limitations to run for two days between
8 dismissal of class claims in Juric and the filing of this suit.

9 Defendants also argue that the tolling during the pendency of
10 one class action cannot provide tolling for a subsequent class
11 action. Defendants provide no authority in support of this
12 purported rule. The general principle of tolling in this case is
13 clearly established, and if each class member is entitled to
14 tolling, the court sees no reason why the class should not be as
15 well. The court further notes that because the class claims were
16 voluntarily dismissed in Juric, this is not a case where plaintiffs
17 "attempt[] to relitigate an earlier denial of class certification,
18 or to correct a procedural deficiency in an earlier would-be
19 class." Catholic Social Servs. v. INS, 232 F.3d 1139, 1149 (9th
20 Cir. 2000).

21 Finally, tolling applies only to claims raised in the initial
22 class action, and defendants argue that plaintiffs' arguments
23 regarding the "regular rate" of pay, and the failure to include the
24 value of educational benefits therein, were not raised in Juric.

25
26 ¹³ The court takes judicial notice of the docket in Juric.

1 The court agrees. Therefore, plaintiffs are entitled to tolling
2 as to their off-the-clock, meal period, wage statement, and waiting
3 time theories of liability, but not the regular rate claim (or the
4 above claims insofar as they are predicated on the regular rate
5 claim). Although the limited scope of tolling will impose some
6 additional complexity on the calculation of damages, the court does
7 not find this complexity to be so great as to render the class
8 unmanageable.

9 **IV. Conclusion**

10 For the reasons stated above, plaintiffs' motion for class
11 certification (Dkt. No. 35) is GRANTED. Named plaintiffs' counsel
12 is appointed as class counsel. Fed. R. Civ. P. 23(g). The classes
13 are defined as follows:


- 14 1. All current or former Enrollment Counselors who worked
15 at least one week in the State of California for either
16 The University of Phoenix, Inc. or Apollo Group, Inc. at
17 any time between April 5, 2005 and August 13, 2010.
18 ("California Overtime Class") and ("California Meal
19 Break Class") and;
- 20 2. All current or former Enrollment Counselors who received
21 at least one paycheck statement for work performed in
22 the State of California for either The University of
23 Phoenix, Inc. or Apollo Group, Inc. at any time between
24 April 5, 2008 and August 13, 2010. ("California Paystub
25 Class") and;
- 26 3. All current or former Enrollment Counselors who worked

1 at least one week in the State of California for either
2 The University of Phoenix, Inc. or Apollo Group, Inc. at
3 any time between April 5, 2006 and August 13, 2010 whose
4 employment ended at least once during that same time
5 period. This class includes current employees who worked
6 during the covered time period, ceased working, and then
7 began employment again. ("California Waiting Time
8 Class.")

- 9 4. The term "Enrollment Counselors" includes employees with
10 the job title of "enrollment counselor" as well as any
11 other nonexempt employee who utilized the Avaya phone
12 system's Automatic Call Distribution system to receive
13 calls relating to enrollment.

14 IT IS SO ORDERED.

15 DATED: August 31, 2010.

16
17
18 
19 LAWRENCE K. KARLTON
20 SENIOR JUDGE
21 UNITED STATES DISTRICT COURT
22
23
24
25
26