The Honorable James L. Robart

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

Joseph J. Hesketh III, *on his behalf and on behalf of other similarly situated persons* Plaintiff, v. Total Renal Care, Inc, on its own behalf and on behalf of other similarly situated persons, Defendants.	Case No: 2:20-cv-01733-JLR MOTION TO CERTIFY PLAINTIFFS' CLASS Noted For Hearing: JULY 16, 2021 (Oral Argument Requested)

Plaintiff, Joseph J. Hesketh III, individually, and on behalf of all other similarly situated, moves the Court to certify a class of Plaintiffs pursuant to Fed. R. Civ. P. Rule 23(a) and (b)(3) to assert claims against the Defendant, Total Renal Care, Inc. ("Total") and the Class of Defendants sought by a separate motion.

I. OVERVIEW

Plaintiff is an employee of Total. Total provides its employees a "Teammates Policies" created by Total's parent corporation, DaVita Inc. ("DaVita"). ECF No. 40, Second Amended Complaint ("SAC"), ¶ ¶ 9-10 and ECF No. 41, Defendant's Answer ¶¶ 9-10. DaVita is a corporation that over time has acquired various entities, including Total. SAC, ¶¶ 2-6, Defendant's Answer ¶¶ 2-6. DaVita describes itself as entity that "...provide[s] dialysis and administrative services and related laboratory services

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throughout the U.S. via a network of 2,753 outpatient dialysis centers in 46 states and the District of Columbia,..." [1]

Among other things, the Teammates Policies sets forth the companies' Pay Practices that apply during their employment. SAC, ¶ 30, Defendant's Answer, ¶ 30. The Pay Practices include a specific Disaster Relief Policy. SAC, ¶ 36, Defendant's Answer, ¶ 36. That written policy that is at the heart of this case. The Disaster Relief Policy states:

> "[a] declared emergency or natural disaster shall be proclaimed by either the President of the United States, a state Governor or other elected official, or if local leadership (DVP/Palmer) deems it appropriate. In the event of a state or federally declared natural disaster, this policy provides information relative to pay practices, work schedules and facility or business office coverage."

Id. at ¶¶ 37-38 and Defendant's Answer at ¶¶ 37-38.

Under the section titled "Pay Practices For Non-Exempt Teammates" DaVita establishes the pay practices for the following scenario where DaVita's offices remain open:

> If a designated facility or business office is open during the emergency time frame, teammates who report to their location and work their scheduled hours will be paid premium pay for all hours worked. Unless state law requires otherwise, premium pay will be one-and-one-half (1.5) times the teammate's base rate of pay.

SAC at ¶ 39, Defendant's Answer at ¶ 39.

Shaun Zuckerman, a Director of Shared Services within DaVita when asked why the Teammates Policies is provided to employees explained it was to set forth expectations of DaVita and also provides the employees expectations of how they would be treated by DaVita. *See* Deposition of Scott C. Borison ("Borison Dec."), at ¶ 12, Exhibit 1, Excerpts of Deposition of Shaun Zuckerman, at pages 6, 52 and 53.

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[1] *See* DaVita, Inc.'s 2019 10k available at https://www.sec.gov/ix?doc=/Archives/edgar/data/927066/000092706620000014/dva-12311910k.htm#s967C77CBE804541FAE5B78B764C16026

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On January 31, 2020 there was a federal declaration of an emergency. SAC, ¶ 49. Plaintiff contends that the declaration met the requirements to trigger the application of the Disaster Relief Policy but neither he nor any other employees has been paid the premium pay promised for work performed. SAC, ¶ 57.

Plaintiff has sued individually and on behalf of the other employees subject to the same DaVita Disaster Relief Policy. Whether the Disaster Relief Policy can be enforced resolves any claims of the employees of Total and all of employees of the other DaVita controlled entities. The claims of every class member are identical and if Plaintiff is entitled to the premium pay for the hours he worked pursuant to the Disaster Relief Policy then all of the employees that worked under DaVita's Disaster Relief Policy are also entitled to the premium pay promised in the Teammates Policies. The Plaintiff and the other employees have the same claim and are entitled to the same relief. This case is not about whether the DaVita Teammates Policies provide Plaintiff or any of the employees the right to continued employment. All of the claims arise from during their employment as at will employees. The terms of the Pay Practice Policy distributed to the employees "...set[s] forth the entire employment arrangement between me and DaVita with respect to the at-will nature of my employment relationship with DaVita." ECF No. 12 at p.15.

A. The Court Should Grant Hesketh's Motion for Class Certification

Hesketh seeks to certify the following class of Plaintiffs:

The class is comprised of all non-exempt employees of DaVita as the umbrella corporation of the captive Defendant Class Members who:

a. Worked their regularly scheduled hours for Defendant from January 31, 2020;

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b. Were not paid the premium pay equal to one and ½ times their base rate, for any work performed after the declaration of emergency on January 31, 2020.[2]

This definition seeks to only include those employees who fall under the provision of the Disaster Relief Policy that is set forth above. It is not intended to include any employees that may fall under the other categories set forth in the Disaster Relief Policy.

The court should grant Hesketh's motion to certify the proposed class. If a proposed class meets all the necessary requirements for certification, the court should grant a motion to certify the class. *B.K. v. Snyder*, 922 F.3d 957, 972 (9th Cir. 2019) (affirmed class certification where the district court did not abuse its discretion). The court must conduct a rigorous analysis to determine if the requirements for class certification are met. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018). A proposed class must satisfy all four requirements of Rule 23(a) and at least one requirement of Rule 23(b). Fed. R. Civ. P. 23(a)-(b); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). It is plaintiff's burden to show the certification requirements are met. *Id. at* 350.

The plaintiff must establish the requirements for class certification by a preponderance of the evidence. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, No. 19-56514, at *12-13 (9th Cir. Apr. 6, 2021). The court can consider the merits of the plaintiffs' claims to the extent necessary to determine whether the proposed class satisfies the requirements of Rule 23. *Dukes, supra,* 350-51.

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[2] Plaintiff recognizes that the proposed definitions presumes certification of a defendants class. If that does not occur, the Court may modify the definition to include employees of this Defendant, which would narrow the class. See e.g. *Jammeh v. HNN Associates, LLC*, 2020 WL 5407864, at *12 (W.D.Wash., 2020) collecting case law setting forth that the Court may make modifications to a proposed class definitions.

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1. The Proposed Class Is Ascertainable Under Any Standard

Some courts have applied a test of ascertainability. The Ninth Circuit has refused to apply an independent ascertainability standard. *Walker v. Life Insurance Company of the Southwest*, 953 F.3d 624, 633 (C.A.9 (Cal.), 2020) ("...we joined the Sixth, Seventh, and Eighth Circuits in declining to adopt a separate administrability requirement. Id. at 1133.) There are no ascertainability issues here since the class is comprised of employees and their identities are readily ascertainable as well as their hours worked to determine the amounts alleged to be due under the Teammates Policy's Pay Practices.

2. The Proposed Class Satisfies All Four Rule 23(a) Requirements

The proposed class meets each of the four requirements for certification under Rule 23(a). To certify a class, the court must find that the class satisfies each of the requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011); *Lozano v. Wireless Servs.*, 504 F.3d 718, 724 (9th Cir. 2007).

a) The Proposed Class Is Sufficiently Numerous

There is no dispute that the proposed class is sufficiently numerous, and any argument to the contrary fails. To satisfy the numerosity requirement of Rule 23(a)(1), the class must be so large that the joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). There is no specific number of class members necessary to satisfy the numerosity requirement. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980); *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010). A class with 40 or more members is presumed to satisfy the numerosity requirement. *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 485 (E.D. Cal. 2006); *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). In this action, the Defendant removed this action under the Class action Fairness Act, 28 U.S.C.A. §1332(d) and included a declaration that the proposed class consisted of more than 100 persons. See ECF No. 1-2.

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b) The Proposed Class Satisfies the Commonality Requirement

The proposed class satisfies the commonality requirement. Under Rule 23(a)(2), the class must share a common question of law or fact. Fed. R. Civ. P 23(a)(2). A common question is one that can be answered by generalized proof. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1051 (2016); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1164-65 (9th Cir. 2014). The commonality requirement is satisfied by even a single common question. *Dukes*, supra, at 359; *Jimenez at* 1165 (same). Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. *Dukes*, 349-350; *Willis v. City of Seattle*, 943 F.3d 882, 885 (9th Cir. 2019).

In this action the common, and as discussed below, predominant issue is whether or not the Plaintiff and class members are entitled to premium pay for hours they worked after the declaration of an emergency until such time as the Disaster Pay Policy was amended to exclude Covid 19 from its scope. The claim is based on a specific writing and the actions of Davita Inc. If Plaintiff can establish entitlement to premium pay for the hours he worked, then the class members are also entitled to premium pay for the hours they worked. The claims of the Plaintiff and the class members rest on the same and common legal and factual issues.

c) Hesketh's Claims Satisfy the Typicality Requirement

Hesketh's claims and defenses satisfy the typicality requirement because they are sufficiently similar to those of absent class members. Under Rule 23(a)(3), the claims or defenses of the class representative must be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). A class representative's claims are typical of the class if they generally share the same legal and factual basis. *Castillo v. Bank of Am.*, No. 19-56228, at *11 (9th Cir. Nov. 18, 2020); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011). While a class representative's claims do not need to be identical to those of other class members, they are the same claims under the same facts and legal

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arguments in this instance. See *Castillo v. Bank of Am.*, No. 19-56228, at *11 (9th Cir. Nov. 18, 2020); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

d) Hesketh Satisfies the Adequacy Requirement

Hesketh is an adequate class representative because Hesketh satisfies both criteria for adequacy. Under Rule 23(a)(4), the class representative must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). A class representative is adequate if the representative does not have a conflict of interest with other class members and commits to vigorously prosecute claims on behalf of the class. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011).

(1) There Is No Conflict of Interest That Bars Hesketh From Serving As the Class Representative

Hesketh does not have any conflict of interest that prevents Hesketh from serving as the class representative. *See* Hesketh Declaration, at ¶ 6. A class representative who does not have a conflict of interest with other class members satisfies the first requirement for adequacy. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-626 (1997); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). A conflict of interest will not bar a plaintiff from serving as a class representative if the conflict is speculative or immaterial. *Resnick v. Frank*, 779 F.3d 934, 942 (9th Cir. 2015).

(2) Hesketh Will Vigorously Prosecuted Claims on Behalf of the Class

Hesketh's conduct in this case shows that Hesketh is committed to vigorously prosecuting claims on behalf of the class. A class representative only needs a basic understanding of the litigation to prosecute claims on behalf of the class. *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 619 (C.D. Cal. 2008); *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000) (holding that the district court erred by requiring a higher level of knowledge). Hesketh has already engaged in discovery and sat for a deposition. He stands ready to continue to actively prosecute this action. *See* Hesketh Declaration, at ¶ 4-6.

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3. The Proposed Class Satisfies at Least One Rule 23(b) Requirement

In addition to meeting the four requirements for certification under Rule 23(a), the plaintiff must show that the class qualifies under at least one of the three categories in Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011) (explaining the burden of proof of the party seeking certification); *Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.)*, 881 F.3d 679, 690 (9th Cir. 2018). The proposed class satisfies at least one of the requirements for certification under Rule 23(b).

a) The Proposed Class Satisfies Rule 23(b)(3)

The court should certify the class under Rule 23(b)(3) because both requirements for certification under that rule are satisfied. To satisfy Rule 23(b)(3), the plaintiff must show that common questions predominate and that a class action is superior to other available methods of adjudication. Fed. R. Civ. P. 23(b)(3); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997); *Vinole v. Countrywide Home Loans*, 571 F.3d 935, 944 (9th Cir. 2009). Certification under Rule 23(b)(3) is primarily intended for cases where class members are not likely to bring individual actions because each member's potential damages are not high. *Amchem Prods.,* 521 U.S. at 617. The purpose of certification under Rule 23(b)(3) is to allow for a class action when it will achieve economies of time, effort, and expense, and promote uniformity of decision among similarly situated individuals without sacrificing procedural fairness or bringing about other undesirable results. *Amchem Prods.,* 521 U.S. at 615.

(1) The Proposed Class Satisfies the Predominance Requirement

The first requirement for certification under Rule 23(b)(3) is satisfied because the common questions predominate over questions that are individual to each class member. To certify a class under Rule 23(b)(3), the court must "find[] that the questions of law or fact common to class members predominate over any questions affecting only

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individual members." Fed. R. Civ. P. 23(b)(3). The predominance inquiry tests whether the interests of the proposed class are sufficiently cohesive to warrant adjudication by representation. *Amchem Prods.,* 521 U.S. at 623; *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545 (9th Cir. 2013); *Vinole v. Countrywide Home Loans*, 571 F.3d 935, 944 (9th Cir. 2009). To determine whether common questions predominate over individual questions, courts analyze the parties' claims and defenses. *Valenzuela v. Union Pac. R.R. Co.*, No. CV-15-01092-PHX-DGC, at *23 (D. Ariz. Feb. 21, 2017); *Ramirez v. Greenpoint Mortgage Funding, Inc.*, 268 F.R.D. 627, 640 (N.D. Cal. 2010). An individual question is one where members of a proposed class will need to present evidence that varies from member to member, and a common question is one where either the same evidence will suffice for each member or the question can be answered using generalized, class-wide proof. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). The predominance requirement is satisfied if the questions that are subject to generalized proof are more substantial than the questions that are subject to individualized proof. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013); *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 938 (9th Cir. 2019).

Here, the common legal and factual questions are the same for Plaintiff and each class member. The common issues of fact and law concern whether the employees who have performed their regularly scheduled hours were entitled to be paid the premium pay provided for under the Disaster Relief policy of the Teammates Policies Pay Practices provisions. They are also the predominant issues in this case that can be decided by a single action. There is nothing in the policy that makes any distinction between the employees covered by the policy. The policy is dependent on showing there was a national emergency declared and that the proposed class members performed their regularly scheduled hours until the policy was changed. There are no individual issues that will become the major focus of the litigation.

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b) The Need to Determine Damages Individually Does Not Preclude Certification

As in many class actions, the class members will be entitled to different amounts of damages if they prevail on their claims but this does not bar certification. The need to determine damages individually does not preclude a finding that common issue predominate under Rule 23(b)(3). *Comcast Corp. v. Behrend*, 569 U.S. 27, 41-42 (2013); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513-514 (9th Cir. 2013). The Defendant has already quantified and set forth the amount that would be due if the class prevails on their claims for the members of the class located in the State of Washington. *See* Declaration in Support of Removal, ECF No. 2. The Defendant has also testified that it has already prepared a report for the amounts due for all employees that meet the class definition for the entire United States. *See* Borison Declaration, at ¶ 13, Exhibit 2, Deposition of Carol Strong at pg. 5 and 22. In short, the damages here are a ministerial matter that can and already has been calculated by the defendant.

(1) A Class Action Is Superior to Other Forms of Adjudication

The proposed class satisfies the second requirement for certification under Rule 23(b)(3) because a class action is superior to other methods of adjudicating the claims of class members. To certify a class under Rule 23(b)(3), the court must find "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). To determine if a class action is superior to other methods of adjudication, courts consider, but are not limited to, the following factors: (1) the class members' interests in controlling individual and separate actions; (2) the nature and extent of any related litigation already begun by class members; (3) the desirability of concentrating the litigation in the particular forum; and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A); *Amchem Prods.,* 521 U.S. at 615.

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(2) The Class Members Do Not Have Strong Interests in Litigating Separate Actions

Because the members of the proposed class do not have strong interests in litigating separate actions, this factor supports a finding of superiority. Whether the interests of class members in litigating separate actions supports a finding of superiority depends on the specific facts of the case. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001). A class action is favored if plaintiffs are not likely to bring individual actions to vindicate their interests. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001). Here, many of the class members remain employed by the Defendant and members of the proposed Defendants class. No doubt the idea of suing your current employer inhibits individual suits by class members. See e.g., *Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 625 (5th Cir. 1999)("It also reasonably presumed that those potential class members still employed by Treasure Chest might be unwilling to sue individually or join a suit for fear of retaliation at their jobs.").

Further, while there is a potential recovery for each class member, there is no strong incentive for each to seek legal counsel and pursue a claim individually. The reality is that finding counsel to bring a claim that may be below $25,000 is difficult if not impossible. The unlikelihood that individual actions will be pursued by class members is also shown by the discussion of the next factor that considers the extent of other litigation.

(3) The Consideration of Existing Litigation Weighs in Favor of Certification

The consideration of existing litigation supports a finding of superiority. The second factor weighs in favor of certification when there is not any significant existing litigation that is related to the proposed class action. *Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 671 (C.D. Cal. 2009); *Ramirez v. Riverbay Corp.*, 39 F. Supp. 3d 354, 370

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(S.D.N.Y. 2014). Plaintiff is unaware that there is any other litigation being pursued for the claims being asserted in this action.

(4) It Is Desirable to Concentrate This Litigation in This Forum

Because it is desirable to concentrate this litigation in this forum, this factor supports a finding of superiority. The third factor weighs in favor of certification if the forum has a significant connection to the class members' claims. *Baghdasarian v. Amazon.com, Inc.*, 258 F.R.D. 383, 390 (C.D. Cal. 2009); *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 641 (S.D. Cal. 2010). The third factor weighs in favor of certification if proceeding as a class action will promote judicial efficiency. *Agne v. Papa John's Intern., Inc.*, 286 F.R.D. 559, 571 (W.D. Wash. 2012); *Shaw v. AMN Healthcare, Inc.*, 326 F.R.D. 247, 274 (N.D. Cal. 2018).

(5) The Benefits of a Class Action Outweigh Any Concerns About Manageability

As set forth above, this action presents common legal and factual issues that will decided whether the Plaintiff or class members are entitled to a recovery in this action. The damages if they prevail have already been calculated by the Defendant. There are no concerns over managing this action. It can and will be tried in the same manner as any individual action since consistent with *Dukes*, *supra,* resolving Plaintiff's claims will resolve the class claims.

And if there were management concerns, the benefits of a class action outweigh any concerns about manageability, this factor supports a finding of superiority. To evaluate the manageability of a class action, courts consider all relevant issues and potential difficulties. *Eisen v. Carlisle Jacquelin*, 417 U.S. 156, 164 (1974). The fourth factor weighs in favor of certification if the benefits of a class action outweigh any concerns about its manageability. *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 491 (E.D. Cal. 2006); *Ramirez v. Greenpoint Mortgage Funding, Inc.*, 268 F.R.D. 627, 643 (N.D. Cal. 2010).

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(6) The Court Should Appoint Hesketh's Counsel As Class Counsel

The court should appoint Hesketh's counsel as class counsel because an analysis of the relevant factors shows that they can adequately represent the class. To determine whether class counsel is adequate, the court must consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). In addition to the four factors listed in Rule 23(g)(1)(A), the court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(1)(B). Proposed class counsel are adequate if their background and experience indicate that they will fairly and effectively represent the class. *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1167 (9th Cir. 2013)

Plaintiff's counsel can jointly and individually show that they meet the criteria of Rule 23(g) to be appointed class counsel. As set forth in the declarations of Scott Borison and. J. Craig Jones, each have been previously appointed as class counsel by other courts. *See* Borison Dec., at ¶ 8; Deposition of J. Craig Jones ("Jones Dec."), at ¶ 8. Each have the relatively unique experience of trying class cases. Ms. Henry has not previously been appointed as class counsel, but she has substantial litigation experience in complex issues. *See* Declaration of Christina L Henry ("Henry Dec."), at ¶ 7. They are committed to devoting the resources necessary to prosecuting the action. *Id.* They have already conducted substantial discovery including a number of depositions in this action.

CONCLUSION

All of the requirements under Rule 23 are met to certify the proposed class of over 100 employees whose pay is determined by the same policies which raises common

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issues. As a fellow employee, Plaintiff's claims are identical to the class. Plaintiff and his counsel are adequate to represent the class. The common issues for the class claims are also the predominant issues and the class provides a superior method for resolution of the claims in a single action promoting justice and judicial economy.

Respectfully submitted,

Dated this 18th of June, 2021.

/s/ Christina L Henry

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