IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MICHAEL MAKANEOLE,

Plaintiff,

v.

3:14-CV-1528-PK

FINDINGS AND RECOMMENDATION

SOLARWORLD INDUSTRIES AMERICA, INC., SOLARWORLD INDUSTRIES AMERICA, LP, SOLARWORLD INDUSTRIES SERVICES, LLC, SOLARWORLD POWER PROJECTS, INC., and RANDSTAD US, LP,

Defendants.

PAPAK, Magistrate Judge:

Plaintiff Michael Makaneole brought this putative class action against defendants Solarworld Industries America, Inc., SolarWorld Industries America, LP, SolarWorld Industries Services, LLC, SolarWorld Power Projects, Inc. (collectively with Solarworld Industries America, Inc., SolarWorld Industries America, LP, and SolarWorld Industries Services, LLC, "SolarWorld" or the "SolarWorld defendants"), Randstad US, LP ("Randstad")[1], and Kelly

[1] Makaneole inaccurately identified Randstad as "Randstad Professionals US, LP" in his complaint as originally filed, and notwithstanding that Randstad has noted the error in virtually every document it has since filed with the court, Makaneole continues to so misidentify Randstad in his current pleading.

Services, Inc. ("Kelly" or "KSI"), in the Multnomah County Circuit Court on August 26, 2014. Defendant Randstad removed Makaneole's action to this court effective September 24, 2014. Subsequent to removal, Makaneole amended his complaint in this court effective April 6, 2015.

By and through his amended complaint, Makaneole alleges that the SolarWorld defendants are in the business of manufacturing and selling photovoltaic products, and that defendants Kelly and Randstad are both in the business of providing temporary workers to employers in need of short-term staff. Makaneole alleges that he was employed first by Kelly, then by Randstad, and then by SolarWorld, and while serially employed by the three employers performed services on behalf of SolarWorld at a SolarWorld facility in Oregon. It is Makaneole's allegation that during all three periods of employment, SolarWorld engaged in a practice of programming an electronic time-keeping system to deduct minutes from his hours worked prior to reporting them to payroll for purposes of computing his compensation, and that Kelly and Randstad used the hours reported to them by SolarWorld following such deduction in calculating his compensation during the periods when he worked for those employers; it is further Makaneole's position that each of the three employers treated all of their similarly situated employees' hours worked in the same fashion during approximately the same time period. Arising out of that practice, Makaneole alleges all defendants' liability for violation of Oregon's Or. Rev. Stat. 652.120 and 653.010 by failing to pay all wages owed, for violation of Oregon's Or. Rev. Stat. 652.120 and 653.010 by failing to pay overtime wages owed, and for violation of Oregon's Or. Rev. Stat. 652.140 by failing to pay all wages owed at the termination of employment. Makaneole seeks damages for unpaid wages in an unspecified amount, as well as award of his attorney fees and costs. This court has original federal subject-matter jurisdiction

over Makaneole's putative class action pursuant to 28 U.S.C. § 1332(d)(2).

On September 2, 2016, I recommended that the court issue summary judgment in Kelly's favor as to all of Makaneole's claims against it, and in Randstad's favor as to Makaneole's Section 652.120 claim against it for failure to pay overtime wages owed. On January 17, 2017, Judge Brown adopted those recommendations without modification. Judge Brown entered final judgment as to Makaneole's claims against Kelly on February 28, 2017. Effective January 4, 2018, Makaneole and Randstad reported their settlement in principle of Makaneole's claims against Randstad, but the parties have not yet reported that all of the terms of such settlement have been finalized.

Now before the court is Makaneole's motion (#164) to certify the class that he putatively represents, to be appointed as the putative class's representative, and to appoint his counsel as class counsel. I have considered the motion, oral argument on behalf of the parties, and all of the pleadings and papers on file. For the reasons set forth below, Makaneole's motion (#164) for class certification should be granted.

LEGAL STANDARD

Federal Civil Procedure Rule 23 "provides district courts with broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1176 (9th Cir. 2007). The party seeking certification bears the burden of showing that the proposed class meets the requirements of Federal Rule of Civil Procedure Rule 23(a) and (b). *See id.* Although the district court accepts the substantive allegations of the complaint as true, the court also must consider the nature and range of proof necessary to establish those allegations and conduct a

"rigorous analysis" to determine whether the claim satisfies Rule 23(a) requirements. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982); *see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Thus, the court may look to supplemental information to "allow an informed judgment" on the Rule 23 requirements. *Id.* Although a court may need to inquire into the substance of a case to ascertain satisfaction of the Rule 23 requirements, the court should not "advance a decision on the merits to the class certification stage." *Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003).

FACTUAL BACKGROUND

I. The Parties

Defendant Solarworld Industries America, Inc., is an Oregon corporation with its principal place of business in Hillsboro, Oregon. Defendant SolarWorld Industries America, LP, is a limited partnership organized under the laws of the State of Delaware with its principal place of business in Bonn, Germany. Defendant SolarWorld Industries Services, LLC, is a limited liability company organized under the laws of the State of Delaware with its principal place of business in Hillsboro, Oregon. Defendant SolarWorld Power Projects, Inc., appears to have ceased to exist following an October 2012 merger with a sister company (SolarWorld Americas, LLC, a limited liability company organized under the laws of the State of California with its principal place of business in Hillsboro, Oregon), and appears formerly to have been a California corporation with its principal place of business in Camarillo, California. The SolarWorld defendants are collectively in the business of manufacturing and marketing photovoltaic products, and appear to operate as U.S. subsidiaries of SolarWorld AG, a German Aktiengesellschaft with its principal place of business in Bonn, Germany.

Defendant Randstad is a limited partnership organized under the laws of the State of Delaware with its principal place of business in Woburn, Massachusetts. Randstad is in the business of providing temporary employees to employers in need of short-term staff.

Plaintiff Makaneole is a former employee of former defendant Kelly and of defendant Randstad and one or more of the SolarWorld defendants. Whether employed directly by Kelly, by Randstad, or SolarWorld, at all material times Makaneole provided services to SolarWorld at a SolarWorld facility in Oregon.

II. History Underlying the Parties' Dispute

Beginning in March 2009, prior to the date Makaneole first began providing employment services to any defendant or former defendant in this action, the SolarWorld defendants implemented an "electronic time and attendance system" which they intentionally programmed to "adjust" hourly employees' record of hours worked according to a so-called "5-minute rule." Declaration (#165) of David A. Schuck ("Schuck Decl."), Exh. 4 (Declaration of Robin Nelson dated September 20, 2012 ("Nelson Decl. I")), ¶¶ 4-5. Pursuant to the 5-minute rule, in the event an hourly employee clocked in 1-5 minutes earlier than the scheduled beginning of that employee's work shift or clocked out 1-5 minutes later than the scheduled end of that employee's work shift, the system deducted those 1-5 minutes in their entirety from the employee's record of hours worked before the record of hours worked was transmitted to SolarWorld's payroll department to be used as the basis for calculating the employee's entitlement to compensation. *See id.* The record of hours worked for employees who clocked in either six or more minutes earlier than the scheduled beginning of their work shifts or any number of minutes after the scheduled beginning of their work shifts were not adjusted prior to transmission to the payroll

department, and the record of hours worked for employees who clocked in either six or more minutes after the scheduled end of their work shifts or any number of minutes before the scheduled end of their work shifts were likewise not adjusted prior to transmission to the payroll department. *See id.*, ¶ 5. SolarWorld advised employees working on its behalf to clock in and out within five minutes of the beginning and end of their scheduled work shifts, the SolarWorld employee handbook instructed hourly employees to report to work no more than five minutes prior to their scheduled start time and not to stay more than five minutes past their scheduled stop time without express prior authorization, and SolarWorld posted a poster over each of its time clocks so advising its hourly employees. *See id.*, ¶¶ 9-10; *see also id.*, Exh. A at 2, Exh. B. It is SolarWorld's position that adjusting employee time records pursuant to the 5-minute rule captured the actual time employees spent working as opposed to "traveling to and from their work areas" or on "personal activities" like "using the restroom, socializing with their co-workers, . . . buying food and beverages from . . . vending machines [or] putting on coveralls that many of them wore on the production floor" before and after their shifts.[2] *Id.*, ¶¶ 6, 8. It is undisputed that hourly employees working on behalf of SolarWorld were not paid for any minutes deducted from their record of hours worked pursuant to the 5-minute rule. *See* Schuck Decl., Exh. 6 (Deposition of Robin Nelson dated May 6, 2014 ("Nelson Depo.")), 19:24 – 20:13. It appears to be undisputed that the 5-minute rule remained in effect during the entirety of Makaneole's employment at the SolarWorld facility.

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[2] SolarWorld does not explain how it determined that employees arriving one minute early for their shifts tend to spend one minute on personal activities before beginning to work, employees arriving two minutes early tend to spend two minutes on personal activities, and so on through employees arriving five minutes early, whereas employees arriving six or more minutes early do not tend to spend any time on personal activities before beginning to work.

SolarWorld employees were not required to clock in prior to the scheduled beginning of their shifts. *See* Declaration (#172) of Michael Nguyen ("Nguyen Decl."), ¶ 2. Employees working in the SolarWorld wafering department could not start working their shifts until the end of a shift team meeting which usually took 3-5 minutes and usually began a few minutes after the scheduled beginning of the shift. *See id.*, ¶ 3. However, SolarWorld employees in the wafering department were required to attend the shift team meetings. *See id.*

Also beginning in March 2009, the SolarWorld electronic time and attendance system automatically deducted 30 minutes from hourly employees' working time to account for a required meal period prior to transmission of such employees' records of hours worked to payroll for calculation of compensation. *See* Schuck Decl., Exh. 5 (Declaration of Robin Nelson dated April 24, 2013 ("Nelson Decl. II")), ¶ 12. This automatic 30-minute deduction, referred to by the parties herein as the "lunch rule," was discontinued in January 2012 after SolarWorld determined that the deduction was duplicative of its requirement that hourly employees clock out for the duration of their lunch breaks. *See id.* It is Makaneole's position that in the event an hourly employee took a lunch break shorter than 30 minutes during the period when the lunch rule was in effect, the effect of the lunch rule adjustment was to deprive such an employee of compensation for time worked in the amount of the difference between the actual length of the lunch break and the 30-minute deduction.

It is undisputed that Randstad relied on the post-adjustment records of time worked for purposes of compensating its employees who provided employment services to SolarWorld. *See* Nelson Depo., 56:21 – 57:10. Moreover, Makaneole asserts, without evidentiary support, that at all material times Randstad permanently maintained an employee at the SolarWorld facility for

payroll purposes, and takes the position that that employee was necessarily aware of the posters reminding employees to comply with the 5-minute rule.

Makaneole first applied for an employment position with Kelly on February 21, 2011. *See* Declaration (#83) of Victor J. Kisch ("Kisch Decl."), Exh. A (Deposition of Michael Makaneole (collectively with Declaration (#85) of Gerald L. Maatman, Jr. ("Maatman Decl."), Exh. A, "Makaneole Depo.")), 82:16-22. Kelly accepted Makaneole's application, and Makaneole began working for Kelly on April 11, 2011. *See id.*, 91:15-21. Kelly assigned Makaneole to perform services on behalf of SolarWorld, and SolarWorld assigned Makaneole the position of Maintenance Technician I in its wafering department. *See id.*, 115:2-12. During the tenure of his employment by Kelly, Makaneole used SolarWorld's timeclocks to record his hours for compensation purposes and did not independently report his hours worked to Kelly, but rather relied on SolarWorld to notify Kelly of his hours worked. *See id.*, 123:17 – 125:14. Makaneole did not at any material time know whether Kelly had actual knowledge of the timekeeping practices complained of in Makaneole's complaint. *See id.* However, Makaneole himself was aware of the complained-of timekeeping practices from very close to the beginning of his assignment to SolarWorld, and he remained aware of the fact that those practices were impacting his compensation throughout the tenure of his employment by Kelly, Randstad, and SolarWorld. *See id.*, 37:5 – 39:17, 42:13-23. In every week during the tenure of his employment by Kelly, Makaneole worked a sufficient number of hours to be entitled to overtime compensation for at least some of his time worked. *See id.*, 130:10 – 133:18.

Makaneole's employment with Kelly ended effective December 12, 2011, when SolarWorld began relying on Randstad rather than Kelly for provision of temporary employees

and all of Kelly's employees assigned to provide services to SolarWorld were laid off by Kelly and hired by Randstad. *See id.*, 91:22-24, 92:24 – 93:10, 107:3-10, 109:4-5, 111:3-6. Following the transfer of Kelly's employees assigned to SolarWorld to Randstad, Makaeole worked for Randstad from December 12, 2011, through February 21, 2012. *See id.*, 107:3-10, 107:17 – 109:21, 111:3-11. While employed by Randstad, Makaneole continued to provide services to SolarWorld in the capacity of a Maintenance Technician I in SolarWorld's wafering department. *See id.*, 119:7-17. In every week during the tenure of his employment by Randstad, Makaneole worked a sufficient number of hours to be entitled to overtime compensation for at least some of his time worked. *See id.*, 199:24 – 201:22.

Effective February 21, 2012, Makaneole ceased to be employed by Randstad, and began working directly for SolarWorld. *See id.*, 109:22 – 110:2, 111:7-11, 112:24 – 113:2. Following the end of his employment by Randstad, Makaneole continued to serve SolarWorld as a Maintenance Technician I. *See id.*, 119:7-17. Makaneole never provided employment services to SolarWorld in any different capacity. *See id.*, 119:21-23.

SolarWorld laid Makaneole off effective January 23, 2013, the same day that it notified him of the lay-off. *See* Makaneole Depo., 113:3-8, 189:1 – 192:1. In connection with the termination of his employment, SolarWorld presented Makaneole with a Separation and Release Agreement which provided that, in consideration for Makaneole's execution thereof, SolarWorld would pay Makaneole separation pay in the amount of $1,225.14, as well as other benefits, to which amount and benefits he would not otherwise have been entitled. *See id.*, 192:24 – 193:13. Makaneole was given a brief opportunity to review the Separation and Release Agreement, and was advised that he was under no obligation to sign it, but that he would not receive the

separation pay or other benefits provided thereunder if he did not. *See id.*, 194:4 – 195:14. The Separation and Release Agreement contained a provision under the heading "General Release" that provided in relevant part as follows:

> [Makaneole] acknowledges that [he] would not be entitled to receive the Separation Pay provided for herein absent [his] execution of and compliance with this Agreement. In consideration of the Separation Pay, [**Makaneole**], individually and on behalf of [his] spouse, heirs and assigns, to the fullest extent permitted under applicable law, **unconditionally releases and discharges SolarWorld**, its affiliates, subsidiaries, and related corporations and each entity's respective owners, directors, officers, shareholders, employees, agents, contractors, successors and assigns, **from any and all known or unknown liability, damages claims, causes of action or suits of any type, including claims under any common law theories**, including but not limited to, breach of contract or tort or tort-like theories and under any state or federal, constitutional, civil rights, labor, and employment laws, including but not limited to, Employee Retirement Income Security Act (ERISA), Title VII of the Civil Rights Act of 1964, the Post Civil War Civil Rights Acts (42 USC §§ 1981-1988), the Civil Rights Act of 1991, the Equal Pay Act, Older Workers' Benefit Protection Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Worker Adjustment and Retraining Notification Act, the Rehabilitation Act of 1973, the Uniformed Services Employment and Reemployment Rights Act, the Fair Labor Standards Act, Executive Order 11246, and the Family and Medical Leave Act, all as amended, including any regulations or guidelines thereunder.

Id., Exh. 16 ("Separation and Release Agreement"), ¶ 5 (emphasis supplied). Makaneole executed the Separation and Release Agreement and received the separation pay provided for thereunder. *See* Makaneole Depo., 195:9-14.

III. Putative Class

The proposed class is made up of all current and former hourly employees of SolarWorld and/or Randstad whose compensation was calculated based on the record of hours worked generated by SolarWorld's electronic time and attendance system at any time during the six-year period preceding the initiation of this action (August 26, 2008, through August 26, 2014), except

that persons currently or formerly employed directly by SolarWorld during that period are excluded from the class other than to the extent their compensation was calculated in reliance on the electronic time and attendance system between December 26, 2012, and August 26, 2014.

ANALYSIS

A class may properly be certified only if the requirements of both Federal Civil Procedure Rule 23(a) and Federal Civil Procedure Rule 23(b) are satisfied. Federal Civil Procedure Rule 23(a) provides that plaintiffs may represent a class of similarly situated persons in a class action lawsuit only where:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). As to the "numerosity" requirement, Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The courts of the District of Oregon have held that, within this District, "as a 'rough rule of thumb,' approximately forty members is sufficient to satisfy the numerosity requirement." *Wilcox Dev. Co. v. First Interstate Bank, N.A.*, 97 F.R.D. 440, 443 (D. Or. 1983) (citation omitted). However, courts from other jurisdictions have variously held, *e.g.*, that "as few as 25-30 class members should raise a presumption that joinder would be impracticable, and thus the class should be certified," *EEOC v. Printing Industry of Metropolitan Washington, D.C., Inc. etc.*, 92 F.R.D. 51, 53 (D.D.C. 1981), and that "[a]s a general rule, classes numbering greater than 41 individuals

satisfy the numerosity requirement," *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 637 (N.D. Cal. 2007), *citing* 5 James Wm. Moore *et al.*, Moore's Federal Practice § 23.22[1][b] (3d ed. 2004). Here, it is Makaneole's position, which no defendant appears to challenge, that the proposed class herein is in excess of 1,000 persons. In support of that proposition, I note that Judge Nelson of the Multnomah County Circuit Court found that in 2013 a similar class contained in excess of 900 members employed directly by SolarWorld, *see* Schuck Decl., Exh. 1 ("MCCC Order dated August 27, 2013"), and Makaneole's forensic accounting expert Jennifer Murphy has analyzed the data from previous class action litigation against SolarWorld arising out of the same timekeeping practices at issue herein and determined that 942 class members were employed directly by SolarWorld, *see* Schuck Decl., Exh. 8 ("Murphy Opinion"). In addition, it appears that at least 100 employees of Randstad performed employment services for SolarWorld during the class period. *See* Nelson Depo., 56:21 – 57:19. It appears clear that the Rule 23(a)(1) numerosity requirement is satisfied here.

As to the "commonality" requirement:

> A class has sufficient commonality "if there are questions of fact and law which are common to the class." Fed. R. Civ. P. 23(a)(2). The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion requirements of Rule 23(b)(3). Indeed, Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). Here, it is Makaneole's position that because all class members were subject to adjustments to their records of hours worked pursuant to uniform applications of the 5-minute rule and of the lunch rule, and because the

lawfulness or unlawfulness of those adjustments will be determined pursuant to the same body of Oregon law, and because in the event the adjustments are deemed unlawful, damages will be calculated pursuant to a formula applicable to all class members in common, the commonality requirement is satisfied. I agree.

Oregon law defines "work time" as "both time worked and *time of authorized attendance*," Or. Rev. Stat. § 659.010(11) (emphasis supplied), *see also* O.A.R. § 839-020-004(19) ("'Hours worked' means all hours for which an employee is employed by and required to give to the employer and includes. . . all time the employee is suffered or permitted to work. 'Hours worked' includes 'work time' as defined in ORS 653.010(11)"). The phrase "time of authorized attendance" was recently discussed by the Oregon Court of Appeals in the context of the commonality requirement for class actions under Oregon law:

> [S]imply because there was witness testimony of time spent on personal tasks, such as putting on a coat, stowing lunches, or using the bathroom, defendant was not entitled to individualized inquiries to determine what class members were doing with their time during unpaid work periods. Defendant has not provided the legal basis for why a "personal task" such as putting away a coat or using the bathroom is time that is not compensable. **Under the wage and hour statutes, "work time" includes "both time worked and time of authorized attendance."** ORS 653.010(11). "Hours worked" means
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> > "all hours for which an employee is employed by and required to give to the employer and includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place and all time the employee is suffered or permitted to work. 'Hours worked' includes 'work time' as defined in ORS 653.010(11)."
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> OAR 839-020-0004(19). Plaintiff's off-the-clock claim is that employees were required to be on defendant's premises before they were able to clock in and after they clocked out. Defendant fails to develop an argument that, under Oregon's wage and hour laws, time spent on "personal tasks" during the time an employee is required to be on his or her employer's premises is time that is not compensable.

> **Accordingly, we reject defendant's contention that whether an employee spent time on personal tasks during the opening and closing of stores is an individualized and material fact that predominates over common issues of fact.**

Migis v. AutoZone, Inc., 282 Or. App. 774, 787-788 (2016). It is apparent under the plain language of SolarWorld's 5-minute rule that minutes deducted from employee's records of time worked constitute time of authorized attendance (the SolarWorld employee handbook expressly instructed hourly employees to report to work no more than five minutes prior to their scheduled start time and not to stay more than five minutes past their scheduled stop time without express prior authorization, and SolarWorld posted a poster over each of its time clocks so advising its hourly employees, *see* Nelson Decl. I, ¶¶ 9-10; *see also id.*, Exh. A at 2, Exh. B; the 5-minute rule operated to deduct minutes from hourly employee time records only to the extent such employees permissibly clocked in 1-5 minutes prior to the scheduled beginning of their shifts, *see id.*, ¶¶ 4-5). Similarly, it is apparent that uniform application of the lunch rule to defendants' hourly employees providing employment services to SolarWorld resulted in the deduction of "work time" from their time records for compensation purposes. Under *Migis*, it appears highly likely that once SolarWorld has permitted its hourly employees to clock in for the purpose of working their shifts, they are on "work time" as that term is defined in Section 653.010(11).

Because the complained-of deductions were effected pursuant to rules of common application to all putative class members, and because the lawfulness or unlawfulness of the deductions is to be determined according to legal principles likewise of common application to all putative class members, it follows that the Rule 23(a)(2) commonality requirement is necessarily satisfied here. *See Hanlon*, 150 F.3d at 1019.

As to the "typicality" requirement:

> The typicality prerequisite of Rule 23(a) is fulfilled if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Under the rule's permissive standards, representative claims are "typical" if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.

Hanlon, 150 F.3d at 1020. It is Makaneole's position that, because the complained-of deductions were effected pursuant to rules of common application to all putative class members, and because the lawfulness or unlawfulness of the deductions is to be determined according to legal principles likewise of common application to all putative class members, his claims and the potential defenses that defendants may raise to them are necessarily typical of those of the absent putative class members. I disagree with Makaneole that the typicality analysis is quite so simple as that, in that (as noted above) Makaneole signed a severance agreement which absent class members may or may not have signed, giving rise to a potential estoppel defense to his claims that may or may not be applicable to the claims of absent class members. In addition, there is colorable argument that Makaneole's claims to the extent alleged against Randstad may be time-barred in whole or in part, giving rise to a further potential defense against Makaneole's claims that may or may not be applicable to the claims of absent class members; moreover, as noted above this court has already determined that Makaneole cannot pursue an overtime claim against Randstad. However, because substantial identity of claims and defenses is not required under the permissive standard of Rule 23(a)(3), and because the requirements of the rule are satisfied when there is merely reasonable co-extensiveness of claims and defenses, I agree with Makaneole that the Rule 23(a)(3) typicality requirement is satisfied here.

As to the "representativeness" requirement:

> To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them. *See Hansberry v. Lee*, 311 U.S. 32, 42-43, 85 L. Ed. 22, 61 S. Ct. 115 (1940). Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

Hanlon, 150 F.3d at 1020.

Class counsel must additionally satisfy the requirements set forth in Federal Civil Procedure Rule 23(g)(1) and (g)(4). *See* Fed. R. Civ. P. 23(g)(2). Rule 23(g)(4) provides that "[c]lass counsel must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). Rule 23(g)(1) provides, in relevant part, that the court:

> (A) must consider:
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> (i) the work counsel has done in identifying or investigating potential claims in the action;
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> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
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> (iii) counsel's knowledge of the applicable law; and
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> (iv) the resources that counsel will commit to representing the class;
>
> (B) may 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). Relevant to the inquiry whether proposed class counsel may adequately represent a proposed class is the Supreme Court's instruction that "an attorney who represents another class against the same defendant may not serve as class counsel" for a second proposed class. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999).

Here, no party has raised any argument or proffered evidence tending to suggest that

either Makaneole or his counsel has any conflict of interest, and while Makaneole's counsel has previously represented a class against the defendants herein, he is not currently representing any such class. In addition, Makaneole and his counsel have represented to the court their intention to prosecute all class claims vigorously on behalf of the absent class members notwithstanding the fact that Makaneole lacks the full panoply of class claims against Randstad, and no party has offered argument or evidence tending to call the accuracy of that representation into question. In particular, Makaneole has no conflict of interest as to resolution of any absent class members' claims against Randstad, and no incentive to fail to prosecute class claims vigorously. Finally, the evidence of record tends to establish that Makaneole's counsel has all requisite expertise and capacity to prosecute the class claims. On that basis, I find that the Rule 23(a)(4) and 23(g) representativeness requirements are satisfied here.

Federal Civil Procedure Rule 23(b) provides that a class action may only be maintained if at least one of the following three factors is satisfied:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
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> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
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> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b). Here, Makaneole intends to proceed only under the third enumerated factor, namely predominance of common questions over individual questions of law and fact and superiority of class action treatment over other possible methods of adjudication.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997), *citing* 7A Wright, Miller, & Kane 518-519.

> This analysis presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2); thus, the presence of commonality alone is not sufficient to fulfill Rule 23(b)(3). In contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship between the common and individual issues. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." Wright & Miller, supra, § 1778. Settlement benefits cannot form part of a Rule 23(b)(3) analysis; rather the examination must rest on "legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Amchem*, 117 S. Ct. at 2249.

Hanlon, 150 F.3d at 1022.

"The superiority inquiry under Rule 23(b)(3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case." *Id.* at 1023 (citation omitted). "This determination necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." *Id.*

It is Makaneole's position that, largely for reasons discussed above, common questions of law and fact will predominate over individual issues herein, in that the complained-of deductions were effected pursuant to rules of common application to all putative class members, the lawfulness or unlawfulness of the deductions will be determined according to a uniform body of law, there is no need for individual inquiry into how absent class members spent minutes deducted from employee time records pursuant to either the 5-minute rule or the lunch rule because those deducted minutes were in any event necessarily compensable as time of authorized attendance and/or otherwise as work time as a matter of Oregon law, and calculation of individual damages will be a matter of the application of a simple formula. It is Makaneole's further position that because the deductions were effected pursuant to a system relied upon by all of the hourly employees providing employment services to SolarWorld, inquiry into defendants' willfulness in effecting the deductions will be common to all class members. Makaneole additionally argues that no grounds exist for concluding that any absent class member could have any cognizable interest in individually controlling the prosecution of the action as opposed to participating in this proposed class action, that he and his counsel have no knowledge that any absent class member is pursuing individual litigation over the complained-of deductions, that in previous class-action litigation against the defendants arising out of SolarWorld's electronic timekeeping system no class member pursued individual litigation of the class claims, that this

court is a reasonable forum for litigation of the class members' claims, and that class action treatment is clearly more manageable than individual litigation of each absent class member's claims, such that class action treatment of the class members' claims would necessarily be superior to any other alternative litigation method. I agree.

Defendants argue to the contrary that individual inquiry will predominate over common questions of law and fact because of the purported need to determine how hourly employees spent the minuted deducted from their time records for compensability purposes. I find this argument unpersuasive, because as discussed above it appears highly likely on the current evidentiary record that all minutes deducted from employee time records pursuant to the 5-minute rule and/or the lunch rule were either time of authorized attendance or work time, and are therefore in either event compensable as a matter of Oregon law without need for individual inquiry.

Defendants further argue to the contrary that class action treatment is not a superior litigation method here because Makaneole purportedly intends to litigate this action on the basis of merely representative evidence in order to make the litigation appear manageable. However, it appears to be the case that Makaneole has relied on representative evidence in support of his arguments thus far in this litigation simply because defendants have provided him with no discovery as to absent class members' time records, and it is his express position that the only critical evidence upon which he intends to rely to prosecute the class members' claims is those records, which he will be able to request in discovery should this court grant his motion for class certification. Defendants' representative evidence argument thus provides no good ground for concluding that class action treatment is not a superior method for litigation of the proposed class

members' claims.

CONCLUSION

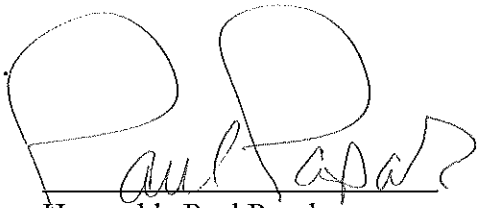
For the foregoing reasons, Makaneole's motion (#164) for class certification should be granted.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

Dated this 7th day of March, 2018.



Honorable Paul Papak
United States Magistrate Judge