The Honorable RICHARD J. McDERMOTT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

CATHLEEN ROBERTSON, SCOTT CASTONGUAY and ANDREA RAKER, for themselves, and for all others similarly situated,

Plaintiffs,

v.

VALLEY COMMUNICATIONS CENTER,

Defendant.

NO. 16-2-06437-0 KNT

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

~~[PROPOSED]~~

I. Proposed Class and Legal Standards

Plaintiffs, Cathleen Robertson, Scott Castonguay, and Andrea Raker (hereafter "Plaintiffs"), have moved the Court, pursuant to Superior Court Rule CR 23, for an order certifying the above-entitled matter as a class action under CR 23(b)(3), seeking monetary compensation for past and ongoing claims, for the following proposed class:

> All persons who are or have been employed by Valley Communications Center in the state of Washington as a CO I (call receiver) or a CO II (dispatcher) during the Class Period.

The "Class Period" includes claims accruing in the three years from the filing date of March 17, 2016 and "extending until this Court certifies this matter as a class action, and notice is mailed."

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

Washington has a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). The Washington state legislature has "evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive statutory scheme to ensure payment of wages." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998) (internal citations omitted).

Washington's remedial statutes are "liberally construed to advance the Legislature's intent to protect employee wages and assure payment." *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002) (quoting *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 520, 22 P.3d 795 (2001)); *see also Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012) ("[a]s remedial legislation, the [Minimum Wage Act] is given a liberal construction"); *Bates v. City of Richland*, 112 Wn. App. 919, 939, 51 P.3d 816 (2002) (wage statutes "must be construed liberally in favor of the employee").

Class certification is a special statutory procedure based in equity in which this Court determines if the statutory requirements of CR 23(a) and (b) are met. *Washington Ed. Assoc. v. Shelton School Dist. No. 309*, 93 Wn.2d 783, 789, 613 P.2d 769 (1980) ("WEA"). CR 23(a) has four familiar requirements which must be met "numerosity, commonality, typicality, and fair and adequate protection of class interests by the class representatives." *Moeller vs. Farmers Ins. Co. of Wa.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011). A class may be certified under CR 23(b) if a class action for damages is superior to individual litigation. *Id.*; *Oda v. State*, 111 Wn. App. 79, 89 n.2, 44 P.3d 8 (2002). As was noted in *Moeller*:

> CR 23 is liberally interpreted because the "`rule avoids multiplicity of litigation, "saves members of the class the cost and trouble of filing individual suits[,] and . . . also frees the defendant from the harassment of identical future litigation."'" *Weston v. Emerald City Pizza, LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007) (alterations in original) (quoting *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.3d 665 (2002) (quoting *Brown v. Brown*, 6 Wn. App. 249, 256-57, 492 P.2d 581

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

> (1971))). A class is always subject to later modification or decertification by the trial court, and hence the trial court should err in favor of certifying the class. *Id.*

Moeller, 173 Wn.2d at 278. Courts "resolve close cases in favor of allowing or maintaining the class." *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003); *Smith v. Behr Process*, 113 Wn. App. 306, 319, 54 P.3d 665 (2002).

The issue before the court on a motion for class certification is whether the requirements of CR 23 are met, the Court does resolve the merits of the case, nor has the Court done so in this case. *WEA*, 93 Wn.2d at 790; *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 300, 38 P.3d 1024 (2002). In making the initial class certification determination, this court takes the substantive allegations of the complaint as true. *Smith v. Behr. Process Corp.*, 113 Wn. App. at 320 n. 4. However, courts may, and this Court has, gone beyond the pleadings and "rigorously" considered both parties' legal and factual claims, in light of the legal standards which are likely to apply to the underlying claims, to determine whether the requirements of CR 23 are met. *Miller v. Farmers Bros. Co.*, 115 Wn. App. 815, 820, 64 P.3d 49 (2003). Plaintiffs accordingly bear the burden of demonstrating CR 23's requirements are met. *Weston v. Emerald City Pizza LLC*, 137 Wn.App. 164, 168, 151 P.3d 1090 (2007).

II. Common Facts and Practices and Legal Standards at Issue.

Defendant Valley Communications Center ("VCC") is the Regional 9-1-1 Center, located in Kent, that provides emergency communications services to South King County. VCC employees two group of employees which are members of the proposed Class (1) "Communications Officer I – Public Safety" ('Call Receivers') and (2) "Communications Officer II – Public Safety" ('Dispatchers'), The approximately 130+ people who are currently employed by VCC, or who were employed by VCC within the Class Period, typically work four ten hour shifts per week. Shifts start "at the top of the hour."

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

It is not disputed that VCC's Attendance and Tardiness Policy (SOP#300) applies to all members of the proposed Class, stating that:

> Tardy is defined as **not being prepared** for assigned responsibilities **one second past** the start of a scheduled shift or training. **Employees are expected to take personal responsibility for making the necessary preparations** prior to the start or the scheduled shift or training. (Bolding added).

The timeliness uniformly policy is enforced, and being tardy - *by even one second* - twelve times in three years will result in termination. Vonnie Mayer Depo at 89:14-91:24

A further document, which at the hearing VCC's counsel *asserted* was not currently in effect, stated that:

> Dispatchers are to be either sitting at their assigned console, or if being briefed, standing behind the person they are relieving at the top of the hour (as in 1600 not 1601). Call receivers should be sitting at their console, signed on to Cad and their phone and ready to receive the next incoming 911 call by the top of the hour. All other miscellaneous duties, such as signing up for breaks, filling out your daily dose, or perusing through the dailies, should be completed before you sit down or at the next earliest convenience.

VC016495. As VCC's CR30(b)(6) witnesses Vonnie Mayer stated, VCC provides no list of necessary "pre-shift preparation," and VCC left it up to each employee to figure out how much time *before* their shift they needed to allot for "necessary preparations" so as not to be late at the top of the hour. As Ms. Mayer testified, "[s]ome people have differing routines. Some people like to do things prior to their shift. It's not up to me to tell them how or when they are going to do those activities." However, as Ms. Meyer also made clear, the failure to set aside *enough time* before the shift, and not being ready at the top of the hour, would result in a tardy. Meyer Depo at 9:13-23, 10:18-11:19, 12:8-15.

While the parties dispute how *much* time the pre-shift preparation typically takes (VCC contends it is "*de minimus*" time, and some of the preparation can at times be done after the shift begins, Plaintiffs argue it is as much as 15 minutes before shift, but acknowledge it can vary day-

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

to-day, noting that the unpredictability of the circumstances on any given day requires employees to arrive early so as not to be tardy) it is undisputed that employees are expected and required to perform *some* preparatory work without *pay*. Further, while the amount of extra time employees allow, so as to be "ready at the top of the hour," varies (some employees try to arrive close to their shift times, others, including the Plaintiffs and many of VCC's declarants, testified to arriving 15 or more minutes early) it is undisputed that *all* employees, upon threat of discipline, must arrive for their shifts early, so as to be ready.

As VCC admits "Management does not tell employees how early to arrive for work." Opposition at 9.

While members of the proposed Class use a biometric ID on three separate doors in succession prior to entering the "Comm Room", they also log into an ADP payroll system with a biometric hand punch in the "Comm Room" before the start of their shift. Despite having these clock-in times, VCC sets its payroll systems (to, in VCC's words), "grace" the time to the top of the hour so that all pre-shift work is *not paid*. Under the "gracing" policy, any post-shift work is only paid if it lasts past 7.5 minutes after the shift ends.[1]

Notably, given Plaintiffs' (and putative class members') role and responsibility for the safety of the public, as well as the safety of law enforcement and first responders, Plaintiffs do not challenge, and told the Court in oral argument, the requirement that VCC's employees be

[1] As VCC's CR 30(b)(6) witness, Ms. Laura Hall, testified:
Q Okay. And if an employee Hand Punches in 15 minutes before shift and then Hand Punches out at the end of their shift -- it's a 10-hour shift; right?
A Uh-huh.
Q -- do they get paid, then, for 10 hours and 15 minutes?
A No. There is a system setup that is done that does gracing and rounding. Prior to the start of the shift, they are allowed to punch in up to 30 minutes early. The grace then -- it still shows the punch; however, it rolls the calculation up to the hour.

Hall deposition; Pages 27:21 to 28:6. Conversely, if an employee punches out at the end of shift at any time prior to 7.5 minutes after the end of the schedule shift, the time is "rolled back" to the end of the hour and no overtime is paid. Hall deposition; Page 28:11 to 28:17.

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

"fully prepared" and to have completed all necessary pre-shift activities done by the top of the hour. Nor do they challenge the requirement that employees be signed in to all systems and able to receive calls at the top of the hour. Nor do they challenge the requirement that employees remain after their shifts to complete calls, or other tasks. Plaintiffs, instead, contend that VCC was obligated to have paid for the actual pre-shift (and post-shift) time which was sufficient to complete the pre-shift tasks that VCC instructed was necessary. Having failed to do so, Plaintiffs contends that VCC is liable for either the actual ADP log in times (if the Court so rules), or, based upon collective proof, for the average time reasonably necessary to complete pre-shift preparations as determined in a time study along with any post-shift time.

Plaintiffs argue that the measure of damages need not, and should not, be determined at this time, but point the Court to some of the areas of case law under which the legal standard applicable to this case can be determined, on a common basis. See e.g. *Levias v. Pacific Maritime Ass'n*, 760 F.Supp.2d 1036, 1046 & 1055 (W.D. Wa 2011) (discussed extensively at oral argument; discussing test of when off the clock work is "de minimis" and test for when employee is "effectively under the control of their employer" so that pre-shift wait time is compensable).

In this respect, the Court notes that the common issues in this case must be considered in light of Washington's law on "hours worked," which includes:

> all work requested, suffered, permitted or allowed and includes travel time, training and meeting time, wait time, on-call time, **preparatory and concluding time,** and may include meal periods. "Hours worked" includes all time worked regardless of whether it is a full hour or less. "Hours worked" includes, for example, a situation where an employee may voluntarily continue to work at the end of the shift. The employee may desire to finish an assigned task or may wish to correct errors, prepare time reports or other records. The reason or pay basis is immaterial. **If the employer knows or has reason to believe that the employee is continuing to work, such time is working time.**

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

State of Washington Department of Labor and Industries, *Administrative Policy Number ES.C.2* (bolding added). Further,

> An employer may not avoid or negate payment of regular or overtime wages by issuing a rule or policy that such time will not be paid or must be approved in advance. If the work is performed, it must be paid. **It is the employer's responsibility to ensure that employees do not perform work that the employer does not want performed.**

Id.; RCW 49.12; WAC 296-126-002(8) (bolding added).

To establish a claim for unpaid wages, a Plaintiff must show that the employer did not pay him/her them their regular wage, or overtime when applicable, for all the time they were "employed." Under the wage and hour statutes, "to employ" includes "to permit to work." RCW 49.46.010(3). *United Food & Commercial Workers Union Local 1001 v. Mut. Ben. Life Ins. Co.*, 84 Wn. App. 47, 52, 925 P.2d 212 (1996), *abrogated on other grounds by Seattle Prof'l Eng'g Emples. Ass'n v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000). As a result, an employee may sue under the Washington Minimum Wage Act ("MWA") to recover for work performed "off the clock" if the employer "ha[d] either actual or constructive knowledge of the allegedly uncompensated work." *Id.*

An employer "permits" its employee to work "off the clock" (and must compensate the employee) when the employer has either actual or constructive knowledge of the allegedly uncompensated work. *United Food,* 84 Wn. App. at 52 (internal citations omitted). Here, there is no doubt that VCC knew about the alleged work in question.

III. The CR 23(a) Requirements.

A. CR 23(a)(1) Numerosity

Under CR 23(a)(1) a class must be so numerous that joinder is "impracticable." "This element is met where joinder would be "'extremely difficult or inconvenient.'" *Miller v. Farmers Bros. Co.*, 115 Wn. App. 815, 821, 64 P.3d 49 (2003). Discovery shows in excess of 130 current

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

and former employees who would be within the proposed class, and VCC does not challenge numerosity. This element is satisfied.

B. CR 23(a)(2) – Common Questions of Law and Fact and CR 23(b) Predominance.

CR 23(a)(2) requires there be "questions of law or fact common to the class." As stated in *NEWBERG ON CLASS ACTIONS* at § 3:10 (4th ed. 2002) "there need be only a single issue common to all members of the class. Therefore, this requirement is easily met in most cases." Accord, *Smith v. Behr Process Corp.*, 113 Wn. App. at 320. However, as VCC notes, Commonality often merges with CR 23(b)(3) Predominance, and the two can be addressed together. (Opposition at 15).

Plaintiffs proposed a series of common questions of fact and law that they argue predominate. These include: 1) What pre-shift activities are reasonable necessary? 2) How long does it reasonably take for these activities so as not to be tardy? 3) Is the pre-shift time "de minimus" under the legal test, and does that test apply to the MWA? 4) Do employees arrive early, and hand punch in early for the "covenience" of VCC and are the conditions of employment such that members of the proposed Class are "effectively under the control of their employer" from the point when they hand punch in, so that all time is compensable? 5) What is the measure of damages? 6) Does VCC's "gracing" policy comply with the MWA? 7) was VCC's violation of the MWA willful?

Where a defendant engages in a "common course of conduct" (here, VCC's creation and enforcement of its written policy which makes Dispatchers/Call Receivers "tardy" if not fully prepared "one second past the start of a scheduled shift or training," while requiring that "**Employees are expected to take personal responsibility for making the necessary preparations** prior to the start or the scheduled shift or training"), commonality is satisfied.

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

Brown v. Brown, 6 Wn. App. at 249; *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 682, 267 P.3d 383 (2011).

Differences in the *impact* of defendants' conduct on individual Class Members do not defeat class certification. *King*, 125 Wn.2d at 519; *Johnson v. Moore*, 80 Wn.2d 531, 535, 496 P.2d 334 (1972). Rather, the commonality requirement is satisfied if "legal principles under which the reasonableness of an action is determined are common to all members of the class," or if the "general illegality of the questioned practice" is to be determined. *Johnson*, 80 Wn.2d at 535. So, too, it is sufficient that "plaintiffs and Class Members suffer under the same allegedly [wrongful] conduct." *Brown*, 6 Wn.App. at 255-56.

Smith v. Behr Process Corp. states the test for CR 23(b)(3) predominance as follows:

> In deciding whether common issues predominate over individual ones, the court is engaged in a "'pragmatic' inquiry into whether there is a 'common nucleus of operative facts' to each class member's claim." That class members may eventually have to make individual showing of damages *does not preclude certification.*

113 Wn. App. at 323; (emphasis added; citations omitted). "'[A] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.'" *Sitton v. State Farm*, 116 Wn. App. 245, 154, 63 P.3d 198 (2003) (quoting 1 *Newberg* § 4.25). "[T]he predominance requirement is not defeated merely because individual factual or legal issues exist; rather, the relevant inquiry is whether the issue shared by the class members is the *dominant, central, or overriding issue* shared by the class." *Miller*, 115 Wn. App. at 825 (emphasis added).

Predominance is not destroyed by the possibility that less than all class members are affected by the company's violation. For example, in *Anfinson v. FedEx Ground*, 174 Wn.2d 851, 875-76, 281 P.3d 289 (2012), the Court held that plaintiffs did not have to prove that an

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

alleged wage violation affected every single member of a class to establish liability under the MWA. The Court explained that the requirement of commonality, for purposes of class certification, is different and separate from the burden of proof at the liability phase:

> CR 23 does not require commonality as to evidence for the liability phase of a class action. Commonality is a requirement at the certification phase of a class action proceeding. Under CR 23(a)(2), before certifying a class, the court must conclude that "there are questions of law or fact common to the class." In addition, the court must find that one of the alternatives under CR 23(b) is satisfied.

Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 67, 244 P.3d 32 (2010). As the Washington Supreme Court further explained,

> the term "common" can mean either "shared by ... *all* members of a group," *Merriam Webster's Collegiate Dictionary* 232 (10th ed. 1993) (emphasis added), or "characteristic of a *usual* type or standard: representative of a type," *Webster's Third New International Dictionary* 458 (2002) (emphasis added). The former definition effectively prohibits the use of representative evidence in a class action under the MWA and would be an incorrect statement of the law. Cf. *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701-02 (3d Cir. 1994) (stating that in FLSA cases, **"[c]ourts commonly allow representative employees to prove violations with respect to all employees" in collective cases);** *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) (noting the "state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice"). (Bolding added).

Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d at 875. Critically, CR 23 does not require commonality as to ***evidence*** for the liability phase of a class action. *Id.* at 159 Wn. App. 35) (Citing *Rosario v. Livaditis*, 963 F.2d 1013, 1017–18 (7th Cir.1992) ("The fact that there is some factual variation among the class grievances will not defeat a class action.")).

Applying these principles to the argument and evidence in this case, the Court finds that the common questions presented by Plaintiffs do predominate, because their resolution will impact all members of the Class, and allow for the resolution of their claims. Unlike in the cases VCC has cited, such as *Ginsburg v. Comcast Cable Communications Management LLC*, No

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

C11-1959RAJ, 2013 WL 1661483 (W.D. Wa April 17, 2013), where there was no common written policy/policies at issue, and instead different managers apparently applied very different requirements as to off the clock work, here, VCC's common written policy (which has been applied uniformly to all class members), provides the common factual and legal questions that predominate and makes this matter manageable.

As Plaintiff has shown, rulings by this Court will determine the scope of recoverable off the clock work, and if VCC's arguments, such as whether the off the clock work was "de minimus" defeat the claims, resolution of these common issues of fact and law will then allow the recovery of a common award, if necessary, relying upon a time and work study or representative testimony to establish the reasonably necessary time for pre-shift work. (See December 7, 2016 Declaration of Bernard R. Siskin at 5-6; *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 687-8 (1946) (approving of use of time study where employeer failed to keep records of actual time worked); *Tyson Foods, Inc. v. Bouaphakeo*, __ U.S.__, 136 S.Ct. 1036, 1047 (2016) (time study could be used to "fill an evidentiary gap created by the employer's failure to keep adequate records")).[2]

C. CR 23(a)(3) – Typicality

CR 23(a)(3) requires the representatives' claims "be typical" of the class claims.

> [A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. Where the same unlawful conduct is alleged to have affected both the named plaintiffs and the class members, varying fact patterns in the individual claims will not defeat the typicality requirement.

[2] The Court notes that while VCC disputes the necessary amount of time needed for pre-shift preparations, and the need for its employees to arrive early, these are factual disputes, disputes that this Court does not resolve, but notes VCC can, and the Court assumes will, present contrary evidence to dispute any such study on the merits. Doing so however, will allow the adjudication of common factual and legal questions which predominate, while not restricting VCC's ability to defend itself as to issues, including damages, as in *Moeller v. Farmers Insurance of Washington*, 173 Wn.2d at 280 (affirming certification of the class even where the defendant alleged some class members suffered no harm and it would have the right to present evidence and defend against the extent of damages, if any, suffered by individual class members).

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

Smith v. Behr Process, 113 Wn. App. at 320 (internal citations and quotations omitted). The element of typicality focuses on the *claims and defenses* of the Plaintiff, not the actual facts giving rise to the claim, nor the relief sought. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). While VCC argues that its presenting "conflicting" evidence defeats typicality (Opposition at 25), the non-Washington cases it cites are *far different* than this case, and do not involve a common written practice which impacted all members of the proposed Class. The Court further notes, that while damages may vary, the fact that damages may vary does not defeat Class Certification. *Leyva v. Medline Industries*, 716 F.3d 510, 513 - 514 (9th Cir. 2013). Further, to the extent that any of VCC's declarants does not wish to participate in this case, they can of course elect to exclude themselves.

D. CR 23(a)(4) Adequacy of Representatives.

CR 23(a)(4) requires the representative party to "fairly and adequately protect the interests of the class." This is met where the class counsel and representatives' interests are not antagonistic to the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). This is met where (a) class counsel are experienced litigators, with class action experience and (b) there is no demonstrable conflict between the interests of the class representatives and the members. It is *presumed* that the interests of the representative plaintiffs do not conflict with those of the Class Members, and that counsel is adequate to represent those interests. *NEWBERG*, §3.05 at 3-25 (3d ed. 1992). VCC does not contest this element, and the Court finds it to be satisfied as to both prongs.

IV. The Further Cr 23(B)(3) Requirements Are Met.

Under CR 23(b)(3), the Court must consider whether a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." "[O]ne of the elements that goes into the balance to determine the superiority of a class action in a particular

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

case is manageability. *Sitton*, 116 Wn. App. at 257 (citation omitted). In *Sitton*, the Court of Appeals recognized that any complex class action is likely to present a challenge, but also recognized the variety of tools available to deal with [any] challenges that may arise. *Id.* at 256, 259-60; (see also *Miller*, 115 Wn. App. at 826). Superiority "is a highly discretionary determination that involves consideration of all the pros and cons of a class action as opposed to individual lawsuits," *Miller*, 115 Wn.App. at 828, and "this requirement focuses upon a comparison of available alternatives." *Sitton*, 116 Wn. App. at 245.

Courts in Washington have routinely found that class actions involving wage and hour violations are manageable. Thus, Washington courts have regularly certified wage and hour actions under CR 23. *See, e.g., Pellino,* 164 Wn. App. 668, 684, 267 P.3d 383 (2011); (certifying class of armored car employees who sought compensation for missed meal and rest breaks); *Stevens v. Brink's Home Security,* 162 Wn.2d 42, 169 P.3d 473 (2007) (class certified of 69 technicians who sued for unpaid "drive time" and pre- and post-shift work); *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 64 P.3d 49 (2003) (certifying class of delivery drivers misclassified as outside salespersons); *Anfinson v. FedEx Ground Package System, Inc.,* (supra) (same); *Nurses Ass'n v. Sacred Heart Ctr.*, 175 Wn.2d 822, 287 P.3d 516 (2012) (rest break class action).

Here, consistent with this law, and as described in the Declaration of Bernard R. Siskin, (and as *admitted* by VCC's expert Dr. Nickerson), the data from which both class wide and individual damages can be calculated is readily available and can be combined, if necessary, with testimony and a possible time and work study. This will allow a single jury to make a common award, which can in-turn be distributed to members of the proposed Class, and the Class appears manageable.

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX

VCC, while arguing that individual issues predominate because of alleged differences in the pre-shift work between employees, has provided the Court with no alternative to Class treatment, making the decision more stark. Faced with allowing a public entity to continue with a written policy which it is alleged to be a facial violation of the MWA, or adjudicating the common questions of fact and law with what appears to the Court to be a feasible method of addressing those questions presented by Plaintiffs, the Court's decision as to superiority an easy one.

Having considered the extensive record before the Court, the Court certifies the proposed Class, appoints, Cathleen Robertson, Scott Castonguay, and Andrea Raker as representatives of the Class, and appoints Stephen M. Hansen and Scott P. Nealey as Class Counsel. The Court further directs Class Counsel to prepare a notice for submission to the Court for Approval for Notification of the members of the Proposed Class of the Certification and their right to opt-out.

Based upon the above, IT IS SO ORDERED.

DATED May 18, 2017

RICHARD F. McDERMOTT
Superior Court Judge

LAW OFFICES OF
STEPHEN M. HANSEN, P.S.
1821 DOCK STREET, SUITE 103
TACOMA, WA 98402
(253) 302-5955; (253) 301-1147 FAX