

1 CATHERINE A. CONWAY (SBN 98266)
SCOTT J. WITLIN (SBN 137413)
2 JEREMY F. BOLLINGER (SBN 240132)
cconway@akingump.com
3 switlin@akingump.com
jbollinger@akingump.com

4 **AKIN GUMP STRAUSS HAUER & FELD LLP**
2029 Century Park East, Suite 2400
5 Los Angeles, California 90067-3012
Telephone: 310-229-1000
6 Facsimile: 310-229-1001

7 Attorneys for Defendant ConocoPhillips
Company
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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION - ROYBAL FEDERAL BLDG
13

14 UNITED STEEL, PAPER &
15 FORESTRY, RUBBER,
MANUFACTURING, ENERGY,
16 ALLIED INDUSTRIAL & SERVICE
WORKERS INTERNATIONAL
17 UNION, AFL-CIO, CLC, on behalf of its
members employed by defendants,
18 and RAUDEL COVARRUBIAS,
DAVID SIMMONS AND STEPHEN
19 S. SWADER, SR., individually and on
behalf of all similarly situated current
20 and former employees,

21 Plaintiffs,

22 v.

23 CONOCOPHILLIPS COMPANY and
DOES 1 through 10, inclusive,

24 Defendants.
25
26
27
28

Case No. CV08-2068 PSG (FFMx)

**DEFENDANT CONOCOPHILLIPS
COMPANY'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION**

[Appendix of Foreign Authorities;
Objections to Evidence and
Compendium of Evidence lodged
concurrently herewith]

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I. INTRODUCTION

The Plaintiffs in this case, three union officials and their union,¹ seek class status to recover penalty payments for missed meal periods when, as they admit in their Motion for Class Certification (“Motion” or “Mot.”), “[i]t is undisputed that all class members eat meals when they can and that they have complete discretion as to when (or even whether) to take a meal period during a shift.” Mot. 18:19-21. The essence of Plaintiffs’ claims are that certain members of the putative class are unable to leave the premises and must carry a radio during meal breaks and, thus, their breaks are subject to interruption. Given that such interruptions are infrequent, the putative class members’ duties are disparate, they are paid for all break time, and that typically the employees are permitted to restart their 30-minute meal period, such claims are far too individualized for class treatment.

Moreover, numerous other issues exist that preclude class treatment. These include the fact that Plaintiff USW proposed and bargained for the very work schedule about which it now contends violates California law. Plaintiffs Covarrubias and Swader were members of the USW bargaining committee that proposed this schedule. Plaintiff Simmons is a health and safety officer charged with eliminating unsafe or unhealthful conditions in the workplace. Covarrubias and Simmons are not even part of the class as plead in the Complaint. Finally, Plaintiffs have presented no plan as to how it intends to try a case such as this to a jury. For these reasons and the others detailed below, Plaintiffs have not met their burden and Class Certification should be denied.

II. STATEMENT OF FACTS

A. The Motion.

Plaintiffs’ Complaint and the instant Motion use two different descriptions of the putative class. *Compare* Compl. ¶¶ 9, 14 (attached to Bollinger Dec. as Ex. A) *with* Mot. 2:18-20. Using either, the putative class comprises various disparate positions in

¹ Plaintiff United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC is referred throughout as the “USW” or “Union.”

1 at least three of the four facilities.² The Complaint limits itself to the “employees of
 2 Defendants (sic) represented by the USW” whereas the Motion is not so limited. The
 3 Motion abandons claims for employees in the Warehouse, Maintenance and Accounting
 4 departments. It may also abandon claims with respect to employees who work
 5 something other than a “shift schedule,” a term Plaintiffs have not defined. Mot. 2:18-
 6 20.³ Whichever definition is used, the class includes Control Room and Field Operators
 7 who are further divided into Head Operator, Operator 1, Operator 2 and Special Project
 8 Operators positions and Lab employees. USW-M Depo. 107:19-111:12, 113:15-114:9,
 9 139:14-17; Graves Dec. ¶ 3.⁴ The Motion also includes *future* employees.⁵

10 **B. Other Procedural Motions Pending.**

11 ConocoPhillips has moved for leave to file a Counterclaim for indemnity and
 12 other relief against the USW. Bollinger Dec. ¶ 6, Ex. E. In addition, ConocoPhillips
 13 has moved for summary judgment on the claims of Simmons and Covarrubias which the
 14 Court may wish to rule on prior to its determination on class certification. *Id.* ¶ 7, Ex. F.

15 **C. ConocoPhillips’ California Refineries.**

16 Defendant ConocoPhillips operates four oil refinery facilities in California –
 17 Carson, Wilmington, Rodeo and Santa Maria. The refinery facilities vary significantly
 18 in size, organization, supervision and the number of different positions. Prosser Dec.
 19 ¶¶ 4-7. Wilmington has three Operations divisions comprised of six different units with
 20 34 different Operator position-types. *Id.* ¶ 7. Carson has three operating units with 17
 21 different Operator position-types. *Id.* ¶ 6. Wilmington has a Lab, but Carson does not.

23 ² Plaintiffs’ Complaint omits mention of the Wilmington facility although this is the
 24 facility at which two of the named Plaintiffs are employed. This omission was noted in
 25 the deposition of one of the Plaintiffs on December 1, 2008. Covarrubias Depo. 66:25-
 67:24. However, Plaintiffs have not amended their Complaint.

26 ³ The Motion suggests that a “shift schedule” is only a 12-hour shift. Mot. 7:25-27.

27 ⁴ All declarations referenced can be found in the Compendium of Evidence.

28 ⁵ “An implied prerequisite to certification is that the class must be sufficiently
 definite.” *Whiteway v. FedEx Kinko’s Office & Print Servs., Inc.*, 2006 WL 2642528, *3
 (N.D. Cal. 2006). The defects in Motion’s class description make it impossible for the
 Court to certify a “precise, objective, and presently ascertainable” class. *O’Connor v.*
Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998); Fed.R.Civ.P. 23(c)(1)(B).

1 *Id.*; USW-N Depo. 127:11-15. Rodeo has 10 operating units and 37 different Operator
 2 position-types. *Id.* ¶ 4. Rodeo has a Lab. Ambuehl Dec. ¶ 3. Santa Maria has only two
 3 operating units with 12 Operator position-types. *Id.* It has no USW-represented Lab
 4 workers. *Id.*; Swader Depo. 70:5-10. Each facility has other positions, such as Special
 5 Assignment Operators, not included in the above numbers. Prosser Dec. ¶¶ 4-7; USW-
 6 M Depo. 140:3-9. Each facility has a Health & Safety representative, like Simmons,
 7 who is nominated by the USW Negotiating Committee. Simmons Depo. 25:16-26:17,
 8 52:4-11; Swader Depo. 123:19-124:9; USW-M Depo. 126:5-7.

9 **D. The Plaintiffs.**

10 The USW is the collective bargaining representative of most of the putative class
 11 members at each facility and party to a collective bargaining agreement (“CBA”) with
 12 ConocoPhillips that sets forth wages, hours and working conditions. Each of the
 13 individual Plaintiffs is an Operator. Covarrubias and Swader are Console Operators.
 14 Swader Depo. 23:9-22; Covarrubias Depo. 32:11-14. Simmons is and for a majority of
 15 the class period has been a Health & Safety rep. Simmons Depo. 25:11-26:17. None of
 16 the Plaintiffs currently is a Head Operator, a Field Operator, a Special Project Operator,
 17 or Lab employee or any other putative class position described in the Complaint.
 18 Covarrubias and Simmons work at Wilmington. Covarrubias Depo. 67:18-24;
 19 Declaration of Robert Cantore in Support of Motion for Class Certification (“Cantore
 20 Dec.”) ¶ 4, Ex. C ¶ 1. Swader works at Santa Maria. *Id.* ¶ 5, Ex. D ¶ 1. There are no
 21 named Plaintiffs who work at Carson or Rodeo. Plaintiffs earn between \$96,000 and
 22 \$115,000 per year. Swader Depo. 139:7-14; Covarrubias Depo. 106:10-17.

23 Covarrubias and Swader both were members of the union negotiating committees
 24 in 1997 when they bargained for and won the 12-hour shift for Operators. Covarrubias
 25 Depo. 14:9-14; Swader Depo. 29:2-17; USW-M 51:24-52:18, 54:5-16.⁶ Covarrubias
 26 has been the chairperson of that committee for his refinery since 2003. Covarrubias
 27

28 ⁶ USW designated two 30(b)(6) witnesses, Howard Muto for Rodeo and James Norris for Carson and Wilmington. We refer to them as “USW-M” and “USW-N,” respectively.

1 Depo. 15:11-13. Swader was the chairperson of the negotiating committee from his
2 refinery until 2005 or 2006. Swader Depo. 34:5-20. He has been the union president
3 for the last five years. *Id.* 35:7-12. Simmons is on the executive board of his local
4 union, he has been a USW unit designee since 2006 and attends national bargaining
5 meetings. Simmons Depo. 55:9-25.

6 **E. The USW Negotiated 12-Hour Shift Agreement.**

7 Many but not all of the putative class members work pursuant to a USW proposed
8 and negotiated “12-Hour Shift Agreement.” Cantore Dec. ¶ 2, Ex. A at 72. This
9 agreement was proposed by the USW in 1997 and renegotiated in 2002. USW-M Depo
10 55:11-22; Swader Depo. 29:2-17. It has remained unchanged since 2002 although the
11 CBA was renegotiated in 2005. Muto, the USW bargaining committee chair, testified
12 that he now is personally opposed to the Agreement, but admitted that a majority of
13 employees favor continuing it. USW-M Depo. 58:21-59:4. The Agreement provides
14 that “12-hour shift employees” work “12 consecutive hours *exclusive of meal period.*”
15 Cantore Dec. ¶ 2, Ex. A at 72 (emphasis added). Most employees rotate from day to
16 night shifts. USW-M Depo. 31:23-32:2, USW-N Depo. 42:18-43:3.

17 **F. CBA Health & Safety Provisions.**

18 The CBA provides that the USW is responsible for helping to ensure a healthy
19 and safe work environment. To that end, the USW agreed that a Joint Committee is to
20 address and correct any health and safety issues at the refineries. Cantore Dec. ¶ 2, Ex.
21 A at 24, 47 (Art. 20 and Side Agreement #1). This Committee meets at least once a
22 month for the “purpose of jointly considering, inspecting, investigating and reviewing
23 health and safety conditions and practices” as well as making recommendations to
24 implement corrective measures to “eliminate unhealthy and unsafe conditions and
25 practices.” *Id.* at 25 ¶ 8 (Art. 20). Moreover, USW members can refuse to perform
26 services that are deemed “unsafe.” *Id.* at 24 (Art. 19.). A USW Member (such as
27 Simmons) at each facility is assigned to investigate, review and improve the health and
28 safety conditions and practices at the refineries. *Id.* at 48 (Side Agreement #2).

1 **G. The Multitude of Disparate Units in Putative Class.**

2 As discussed above, the putative class involves either three or four facilities
3 throughout California. Each of the facilities has at least two of the same Operations
4 departments at issue: a process department and a bulk department. Prosser Dec. ¶¶ 4-7.
5 Three of the facilities have a Lab. *Id.* The facilities have differing processing units
6 which have different staffing needs. *Id.* Most but not all of the units have both Console
7 (inside) Operators and Field (outside) Operators, whose responsibilities differ. USW-N
8 Depo. 45:3-47:3. The staffing in each unit varies and may impact the frequency of
9 when relief is available. *Id.*; Compendium Ex. 33. There are at least ten different kinds
10 of units and 36 position-types employed in those units. Prosser Dec. ¶¶ 4-7. Not all
11 facilities use the same units for the same functions. *Id.* ¶ 7.

12 Most of the employees in the Complaint class are USW represented, but the Santa
13 Maria Lab employees are not. Swader Depo. 70:5-10. Each unit requires unit-specific
14 training. The skills involved, the staffing level and the work day for each Operator will
15 vary from unit to unit and from Operator to Operator. USW-M Depo. 146:16-147:12,
16 149:1-150:5. Many but not all units must structure their work assignments to
17 accommodate “releasable positions” which are designated to respond to emergencies.
18 Such units could operate for at least an hour without the Operator. *Id.* 159:5-161:5;
19 Whitney Dec. ¶¶ 19, 20. Console Operators can and do direct Field Operators including
20 when to take meal breaks.⁷ Field Operators interact more directly with Maintenance
21 employees who have a scheduled meal period. USW-M Depo. 59:22-61:7. As a result,
22 they may choose to take their breaks at the same time as Maintenance.⁸

23 A variety of Operator positions pose idiosyncratic constraints or freedoms on the
24 Operator’s ability to choose when to take a meal break. For example, the Sulfur Plant
25 Operator may have more difficulty finding relief help because fewer people are
26

27
28 ⁷ USW-M Depo. 144:19-145:22; Martin Dec. ¶ 5; Nelson Dec. ¶ 8; Moberg Dec. ¶ 4.

⁸ Bates Dec. ¶¶ 9, 10, Just Dec. ¶ 5; Lopez Depo. 21:3-12; Magday Dec. ¶ 7; Miller
Dec. ¶ 5; Moreno Dec. ¶ 7; Salaiz Dec. ¶ 9; Cope Dec. ¶ 13; Nelson Dec. ¶ 6.

1 qualified in that position. Salaiz Dec. ¶ 8. By contrast, Decoker Operators are better
2 able to preplan meals “because the decoking process is on a set cycle and certain tasks
3 are done at certain times.” Trevino Dec. ¶ 5. And, the Marine Terminal Operator in
4 Wilmington is stationed at a stand alone facility several miles from the refinery where
5 he performs unique tasks related to the transfer of product from seafaring vessels that
6 may impact the timing of his meal breaks. Magee Dec. ¶¶ 8-12, 15; *see also*
7 Compendium Ex. 34 (comparing additional Operator declarations).

8 **H. Meal Periods and Practices Vary Throughout the Refineries.**

9 Given the multitude of facilities, units and positions, it is not surprising that there
10 is a significant variation in the experiences of witnesses with respect to taking meal
11 periods. Each of the individual Plaintiffs admitted in deposition that they can and do
12 take 30-minute meal periods. Swader Depo. 47:24-48:3, 160:10-161:3; Simmons Depo.
13 98:11-13; Covarrubias Depo. 35:15-36:1, 86:12-24; USW-M Depo. 21:13-20. While
14 each insists that he has missed meal periods, two could not recall specific instances of
15 when they were not able to take a 30-minute uninterrupted meal period. Simmons
16 Depo. 117:10-21; Covarrubias Depo. 76:2-6. While some declarants have missed meal
17 periods, the testimony confirms that such instances are rare. USW-M Depo. 94:17-
18 95:19 (no missed meals recalled prior to 1998); Compendium Ex. 35.⁹

19 Some in the putative class work 8-hour shifts; some work 12-hours. Ambuehl
20 Dec. ¶ 5. Some of these employees have regularly scheduled unpaid meal periods;
21 others do not. Simmons Depo. 98:7-13; Prosser Dec. ¶ 8; Griffith Dec. ¶ 10. While
22 most class members are not permitted to leave the refinery, some have that ability.

23
24 ⁹ At deposition, Plaintiffs contended that they have greater difficulty taking meal
25 breaks during turnarounds—periods of major maintenance. Simmons Depo. 114:23-
26 116:1; Covarrubias Depo. 72:12-74:10; Swader Depo. 88:22-91:4. This experience is
27 by no means universal. Operations departments often double-staff Operators and eat at
28 the scheduled break for Maintenance to afford Operators time to eat. Compendium Ex.
41; Martin Dec. ¶ 7; Cope Dec. ¶ 18; Whitney Dec. ¶ 17; Salaiz Dec. ¶ 10; Covarrubias
Depo. 74:3-10; Bates Dec. ¶ 9; Miller Dec. ¶ 7; Just Dec. ¶ 10; Moreno Dec. ¶ 9;
Zumbro Dec. ¶ 9. Many Operators state that they never have missed a meal break
during a turnaround. Miller Dec. ¶ 7; Magday Dec. ¶ 15; Holloway Dec. ¶ 12; Lopez
Depo. 40:16-18. Labs slowdown during a turnaround because there are fewer requests
for sample analysis. Ambuehl Dec. ¶ 13; Graves Dec. ¶ 10.

1 Magee Dec. ¶ 16; Simmons Depo. 99:6-17; Graves Dec. ¶ 7. Nonetheless, they are paid
 2 for all hours whether they are working or not. Prosser Depo. 48:24-49:9. Contrary to
 3 Plaintiffs contention (Mot. 17:27-18:1), shift employees are free to move about the
 4 facility and utilize a variety of break and dining facilities. Prosser Dec. ¶¶ 9-13, Exs. 1-
 5 5 (photos of Rodeo Lab employee and four Operators in cafeteria, including two from
 6 same unit). As conceded by Plaintiffs, employees can take their meals as and when they
 7 see fit. Mot. 18:19-21; Simmons Depo. 76:24-77:1. In fact, some employees routinely
 8 take meal breaks at the same time each day. Ambuehl Dec. ¶ 7; Graves Dec. ¶ 6.

9 While Plaintiffs contend that there is no written “policy” that employees can take
 10 meals (Mot. at 7:4), the CBA plainly provides that even 12-hour shift employees would
 11 work 12 hours “*exclusive of meal period.*” Cantore Dec. Ex. A at 72. None of the
 12 Plaintiffs or their witnesses¹⁰ stated at deposition that they have ever been told to skip a
 13 meal break.¹¹ Plaintiffs’ testimony is that no one ever complained about an inability to
 14 take meal breaks.¹² Indeed, a majority prefer the 12-hour shifts.¹³

15 Further, all Plaintiffs and other witness are aware of their right to take meals.¹⁴
 16 All conceded they had ample time to take a 30-minute uninterrupted meal period.
 17 Compendium Ex. 36.¹⁵ Many Operators, including some Plaintiffs, admit to having the
 18 opportunity to take two or more meal breaks during a 12-hour shift. Compendium Ex.
 19 37. While a meal period is subject to interruption, such interruptions in fact are rare.
 20 Covarrubias Depo. 86:12-24; Compendium Ex. 35. The rate that such interruptions
 21 occur also may vary depending upon whether the employee is a Field or Console
 22 Operator. Nelson Dec. ¶ 10; Salaiz Dec. ¶ 8; Fejer Dec. ¶ 7. For example, Covarrubias
 23 admitted he had not been interrupted as a Field Operator. Covarrubias Depo. 86:12-24.

24
 25 ¹⁰ Former USW members George Lopez and George Nelson retained Plaintiffs’
 26 counsel in this lawsuit. Lopez Depo. 10:16-11:11; Bollinger Dec. ¶ 3, Ex. B.

27 ¹¹ Simmons Depo. 89:15-19; Swader Depo. 79:17-24; Covarrubias Depo. 42:14-16,
 98:18-20; Lopez Depo. 38:13-16; USW-N Depo. 99:24-100:16, 107:19-108:1.

28 ¹² Swader Depo. 115:11-16; Covarrubias Depo. 57:22-25, 86:25-87:6; USW-M Depo.
 67:5-24, 18:20-19:3; *see also* Lopez Depo. 32:17-19.

¹³ USW-N Depo. 40:5-11; USW-M Depo. 58:21-59:4; Covarrubias Depo. 60:9-11.

1 In instances when employees' meal periods are interrupted, they can and do take a new
 2 30-minute uninterrupted meal break.¹⁶ Often it is the Operator's own choice to skip or
 3 interrupt their meal break. Compendium Ex. 38. Indeed, most Operators, including the
 4 Plaintiffs never or rarely miss a meal. Compendium Ex. 35.¹⁷

5 Putative class members' ability to take 30-minute uninterrupted meal periods is
 6 confirmed by empirical data supplied by "alarm" records. *See* Inserni Dec. ¶¶ 9-18,
 7 Exs. A-D. An analysis of this data shows that alarms are sporadic. Even when such
 8 repeated alarms do occur, they may be due to a single issue that is quickly identified, is
 9 already being addressed, and, thus, does not need the further attention of an Operator.
 10 *Id.* ¶¶ 9, 14, 17-19. Plaintiffs admit that most of these are "nuisance" alarms. USW-N
 11 Depo. 59:12-60:14; Swader Depo. 73:4-18, 168:2-23.¹⁸ In any event, the alarm reports
 12 reveal that there are numerous and frequent stretches of time that allow for one or more
 13 30-minute uninterrupted meal period. Inserni Dec. ¶¶ 8-16.

14 The necessity for any particular Operator to have to respond to an alarm also will
 15 vary from unit to unit. Inserni Dec. ¶¶ 9, 10; USW-M Depo. 108:10-111:12 (describing
 16 operators at each unit); Compendium Exs. 35, 39. The number and frequency of alarms
 17 varies from unit to unit and from day to day. Inserni Dec. ¶¶ 10-18, Exs. A-D. The
 18 staffing at each unit and at each facility varies in terms of how many other Operators in
 19 each classification are staffed on each shift. USW-M Depo. 108:10-111:12;
 20 Compendium Ex. 33. Each unit has a training requirement and the skill level of each
 21 employee on each shift in each unit impacts how interchangeable unit employees are for
 22

23 ¹⁴ Bates Dec. ¶ 4; Magday Dec. ¶ 5; Moreno Dec. ¶ 6; Miller Dec. ¶ 4; Holloway Dec.
 24 ¶ 5; Swader Depo. 47:24-48:3; Simmons Depo. 98:11-13; Covarrubias Depo. 35:15-
 36:1, 86:12-24.

25 ¹⁵ Swader Depo. 47:24-48:3; Simmons Depo. 98:11-13; Covarrubias Depo. 35:15-36:1,
 86:12-24;

26 ¹⁶ USW-N 106:12-15; Swader Depo. 48:25-49:6; Covarrubias Depo. 84:10-85:19;
 27 Simmons Depo. 78:20-79:14; Lopez Depo. 31:10-16; Just Dec. ¶ 7; Miller Dec. ¶ 9;
 Moreno Dec. ¶ 8; Nelson Dec. ¶ 6; Salaiz Dec. ¶ 6; Trevino Dec. ¶ 3.

28 ¹⁷ USW-M Depo. 169:4-8; USW-N Depo. 97:10-13; Bates Dec. ¶ 4; Holloway Dec.
 ¶ 6; Moberg Dec. ¶ 7; Nelson Dec. ¶ 6.

¹⁸ Operators have deactivated alarms that are nuisances. USW-M Depo. 37:24-38:20.

1 one another. Thus, if an Operator is on a break there may well be other Operators who
2 can respond to an issue. USW-M Depo. 159:5-21, 163:1-164:21; Compendium Ex. 40.

3 The availability and variety of kitchen and dining facilities is different at each
4 refinery and among units at the same refinery. Some have fully equipped kitchens;
5 some do not.¹⁹ Some facilities have cafeterias and others do not.²⁰ Some employees go
6 to the cafeteria and bring back food for the Operators in their unit. USW-M Depo.
7 139:2-17, 141:23-25; Prosser Dec. ¶¶ 9-13, Exs. 1-5. Some employees order food
8 delivered. Fejer Dec. ¶ 9; Magee Dec. ¶ 13. Many units have outside fire pits and
9 barbeques.²¹ Some units host “gourmet” meals and others plan potlucks or “feeds.”²²

10 Many Lab employees work 12-hour shifts and are paid for their meal breaks.
11 Graves Dec. ¶ 4. However at Rodeo, only four of the 13 Lab employees work 12-hour
12 shifts. Ambuehl Dec. ¶¶ 3, 5. The remaining union employees work 8-hour shifts, with
13 paid meal periods. *Id.* ¶ 5. Lab employees routinely eat on a regular schedule and take
14 more than 30-minute meal breaks. *Id.* ¶ 7; Graves Dec. ¶¶ 6, 7.

15 **III. STANDARD FOR CLASS CERTIFICATION**

16 Plaintiffs as proponents of certification have the burden of providing facts
17 sufficient to satisfy the Rule 23 requirements. *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d
18 1304, 1308-09 (9th Cir. 1977); *Blackwell v. SkyWest Airlines, Inc.*, 245 F.R.D. 453, 459
19 (S.D. Cal. 2007). The Court must analyze those facts rigorously to determine if that
20 burden has been met. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982); *accord*,
21 *Blackwell*, 245 F.R.D. at 459. It is “not merely a ‘threshold showing’ by a party, that
22 each requirement has been met.” *In re Hydrogen Peroxide Antitrust Litig.*, No. 07-1689,
23 *5 (3d Cir. Dec. 30, 2008). “The task for plaintiffs at class certification is to

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25
26 ¹⁹ Covarrubias Depo. 33:19-34:22; Smith Dec. ¶ 10; Salaiz Dec. ¶ 11; Cope Dec. ¶ 13;
Just Dec. ¶ 8; Nelson Dec. ¶ 9; USW-M Depo. 87:19-21.

27 ²⁰ USW-M Depo. 122:22-24; USW-N Depo. 45:3-13, 134:16-17; Stake Dec. ¶ 11.

28 ²¹ Smith Dec. ¶ 11; Trevino Dec. ¶ 4; Cope Dec. ¶ 13; USW-M Depo. 88:2-5.

²² Swader Depo. 48:4-19; Magday Dec. ¶ 8; Miller Dec. ¶ 6; Smith Dec. ¶ 11; Salaiz
Dec. ¶ 11; Just Dec. ¶ 8, 9.

1 demonstrate that the elements [of the cause of action are] capable of proof at trial
2 through evidence that is common to the class rather than individual to its members.” *Id.*
3 at *16-17. “Factual determinations necessary to make Rule 23 findings must be made
4 by a preponderance of the evidence.” *Id.* at *39.

5 Rule 23(a) requires Plaintiffs prove each: (1) numerosity; (2) commonality; (3)
6 typicality *and* (4) adequacy of representation. *See* Fed.R.Civ.P. 23; *In re Mego Fin.*
7 *Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000); *Maddock v. KB Homes, Inc.*, 248
8 F.R.D. 229, 235 (C.D. Cal. 2007). If Plaintiffs meet their Rule 23(a) burden, they must
9 also prove that one of the requirements of Rule 23(b) is met. Plaintiffs have moved only
10 under Rule 23(b)(2) and (3). Plaintiffs have failed to satisfy their burden of proof here.

11 **A. Plaintiffs Cannot Meet Their Rule 23(a) Burden.**

12 **1. Lack of Commonality.**

13 Plaintiffs cannot satisfy their burden of demonstrating that there are significant
14 questions of law and fact common to the putative class. Fed.R.Civ.P. 23(a)(2); *Hanlon*
15 *v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). A common question of law or
16 fact is a question that is “applicable in the same manner to each member of the class.”
17 *Falcon*, 457 U.S. at 155 (*quoting Califano v. Yamaski*, 422 U.S. 682, 701 (1979)).
18 While Plaintiffs attempt to use “cookie cutter” declarations to establish that no members
19 of the putative class ever get meal breaks, the deposition testimony of these very
20 individuals as well as other witnesses demonstrate that they routinely get meal breaks.
21 Such manufactured testimony cannot create commonality when those declarations are
22 contradicted by the witnesses’ own deposition testimony. *See Lanzarone v. Guardsmark*
23 *Holdings, Inc.*, No. CV06-1136, 2006 U.S. Dist. LEXIS 95785, *19 (C.D. Cal. Sept. 7,
24 2006) (denying certification where Plaintiff’s declaration contradicts his deposition
25 testimony holding it “a sham [that] cannot be credited”); *Evans v. IAC/Interactive Corp.*,
26 244 F.R.D. 568, 578 (C.D. Cal. 2007) (counsel’s attempt to establish commonality and
27 typicality through copying and pasting numerous paragraphs into the various
28 declarations improper). Even if Plaintiffs’ declarations were credited, the testimony of

1 other witnesses that most of the putative class uniformly takes meals negates any
2 contention of commonality (as well as typicality). *See* Compendium Exs. 36, 37.

3 As a result, Plaintiffs' assertion of commonality is reduced to several contentions
4 based upon fundamental misinterpretations of law. It is generally recognized that class
5 determinations involve considerations that are enmeshed in the legal issues comprising
6 the plaintiff's cause of action. *Falcon*, 457 U.S. at 160; *Blackwell*, 245 F.R.D. at 459.
7 As such, courts are "required to consider the nature and range of proof necessary to
8 establish [plaintiffs' class] allegations." *In re Petroleum Prods. Antitrust Litig.*, 691 F.2d
9 1335, 1342 (9th Cir. 1982); *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 251 (C.D.
10 Cal. 2006). This includes evaluating competing legal theories about what must be
11 shown to establish an illicit common policy or practice capable of class treatment. *See*,
12 *e.g.*, *Brown v. Fed. Express Corp.*, 249 F.R.D. 580, 583-584 (C.D. Cal. 2008). Here
13 because Plaintiffs base their claims on a basic misinterpretation of California law, they
14 also misconstrue issues that will be common to the putative class.

15 Plaintiffs rely upon the repeatedly rejected legal contention that an employer must
16 "ensure" that employees actually take a meal period. *See* Mot. at 18-20. The weight of
17 developing authority is to the contrary and holds that "provide" means "make available"
18 meal periods and does not require an employer to "ensure" that employees take them.²³
19 Indeed, this Court rejected that view in *Kimoto v. McDonald's Corp.*, No. CV06-3032,
20 2008 U.S. Dist. LEXIS 86203, *16-17 (C.D. Cal. Aug. 19, 2008). The consistent
21 testimony that the putative class members take their meals, proves meals are provided.

22 Plaintiffs' misinterpretation of law forecloses class treatment here because there is
23 no common proof applicable to the class. Each employee's claim will depend upon
24 individual testimony and response, as to whether a meal break was "provided." In each
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26 ²³ *White v. Starbuck Corp.*, 497 F. Supp. 2d 1080, 1087-89 (N.D. Cal. 2007); *Gabriella*
27 *v. Wells Fargo Fin., Inc.*, 2008 U.S. Dist. LEXIS 63118, *8-11 (N.D. Cal. Aug. 4, 2008);
28 *Perez v. Safety-Kleen Sys., Inc.*, 253 F.R.D. 508, 512-513 (N.D. Cal. 2008); *Kohler v.*
Hyatt Corp., 2008 U.S. Dist. LEXIS 63392, *17-20 (C.D. Cal. July 23, 2008); *Salazar v.*
Avis Budget Group, Inc., 251 F.R.D. 529, 532-533 (S.D. Cal. 2008); *Brown*, 249 F.R.D.
at 586.

1 claimed instance, the *jury* will have to divine why each break was missed, delayed, or
2 shortened. The reasons certainly will vary by person and day. Such inquiries are in-
3 compatible with class treatment. *Gabriella v. Wells Fargo Fin.*, No. C 06-4347 SI, 2008
4 WL 3200190, *3 (N.D. Cal. Aug. 4, 2008); *Kimoto*, 2008 U.S. Dist. LEXIS 86203, *9.

5 Plaintiffs' other commonality theory is that class member's remain "on-duty" and
6 do not get a meal period because most must remain on refinery grounds and their meal
7 period is *subject to interruption* – even though such interruptions indisputably are rare,
8 vary in frequency by individual and can be due to one class member interrupting
9 another. *See* Compendium Exs. 35, 39.

10 Plaintiffs' theory is contrary to settled California case law. California has long
11 recognized circumstances under which an employee could be provided a meal period
12 while being required to remain at a job site. *Bono Enters. v. Bradshaw*, 32 Cal. App. 4th
13 968, 975 (1995); *Aguilar v. Ass'n for Retarded Citizens*, 234 Cal. App. 3d 21, 30 (1991)
14 (all time spent at employer's premises was compensable even if the time was spent
15 sleeping). The law simply requires that the employee be paid for such time – something
16 ConocoPhillips indisputably does. The analysis is not altered by the fact that employees
17 might have to respond to radio calls. Plaintiffs' theory seems to be that because their
18 meal periods may be interrupted, they are unable to take a 30-minute meal period.
19 Aside from being factually incorrect, Plaintiffs' theory is not supported by California
20 law. Being subject to interruption is the essence of being on "controlled stand-by" –
21 another practice long authorized by California law as long as the time is treated as
22 compensable. *See* DLSE Opinion Letter No. 2001.03.22; *Berry v. County of Sonoma*,
23 30 F.3d 1174, 1180 (9th Cir. 1994). There is no indication that the Legislature or IWC
24 intended to turn this compensable non-working time into time deserving of an additional
25 penalty – something that would result if Plaintiffs' contentions were accepted. Indeed, if
26 they were adopted, the *Aguilar* employer would have to wake up its employees to
27 ensure that they eat a meal or be forced to pay a penalty.

28 The purpose for a meal period is to provide rest and nourishment to employees

1 during the work day. *Corder v. Houston's Rests., Inc.*, 424 F. Supp. 2d 1205, 1208 (C.D.
2 Cal. 2006); *Indus. Welfare Com. v. Super. Ct.*, 27 Cal.3d 690, 719 (1980). Nothing in
3 the practice negotiated by the USW contravenes this purpose. The real issue is whether,
4 how frequently and to what extent each member of the putative class *actually* has had
5 meal periods interrupted without being allowed a new full period later in the shift.

6 Plaintiffs also contend that Defendant had no written policy directing employees
7 to take meal breaks. Holding aside the express language of the CBA, an employer is not
8 “required to schedule meal breaks for its employees or to inform employees of meal
9 break rights other than to post Wage Order posters.” *Perez v. Safety-Kleen Sys., Inc.*,
10 253 F.R.D. 508, 515 (N.D. Cal. 2008).²⁴ Only individual mini trials for each alleged
11 violation can adjudicate these claims. Thus, Plaintiffs have not met their burden.

12 **2. The Named Plaintiffs Are Not Typical of Any Proposed Class.**

13 The typicality element requires the plaintiff to establish that he “possess[es] the
14 same interest and suffer[ed] the same injury as the class members.” *Falcon*, 457 U.S. at
15 156 (internal quotes omitted). Further, “there can be no class certification unless it is
16 determined by the trial court that similarly situated persons have sustained damage.
17 There can be no cognizable class unless it is first determined that members who make
18 up the class have sustained the same or similar damage.” *Caro v. Procter & Gamble*
19 *Co.*, 18 Cal. App. 4th 644, 663-665 (1993) (cited with approval in *Bristow v. Lycoming*
20 *Engines*, 2008 U.S. Dist. LEXIS 50416 (E.D. Cal. June 23, 2008)). Moreover, the
21 plaintiff is not typical where he and the putative class face different defenses. *Hanon v.*
22 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

23 As an initial matter, Simmons and Covarrubias are not members of the putative
24 class as each works in Wilmington – a facility omitted from the Complaint. *See*
25 *Bollinger Dec. Ex. A (Compl. ¶ 9)*. This prevents them from being class representatives.

26
27
28 ²⁴ ConocoPhillips posts the Wage Order at each refinery. Prosser Dec. ¶ 14. Plaintiffs attempt to make much of Prosser’s testimony that the Wage Orders were not posted in each of the *units*. Mot. at 8:6-7. However, such duplicative postings are not required. *See, e.g., Perez*, 253 F.R.D at 515.

1 “A litigant must be a member of the class which he or she seeks to represent at the time the
2 class action is certified by the district court.” *Warth v. Seldin*, 422 U.S. 490, 502 (1975);
3 *Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *EEOC v. Gen. Tel. Co. of Nw., Inc.*, 599 F.2d 322,
4 327 (9th Cir. 1979), *aff’d* 446 U.S. 318 (1980). Further, Covarrubias’ and Simmons’
5 testimony shows that they have not suffered the missed meal breaks they allege on
6 behalf of the class. Covarrubias admits that as Console Operators “we have time to
7 eat”; he decides when to eat; he has taken 45 minutes for a meal; there are times when
8 he eats a second meal in a shift and when he’s interrupted he is able to resume his meal;
9 he’s never complained that he missed a meal nor told anyone when he cut his meals
10 short; and no supervisor was aware he missed a meal. Covarrubias Depo. 33:19-34:22,
11 35:15-36:1, 49:13-19, 53:16-22, 79:14-80:2, 84:10-85:19. Simmons could not recall
12 any time in the past 5 years that he had missed a meal break. Simmons Depo. 117:6-9.²⁵

13 All three Plaintiffs are atypical of the class because of their unique positions in
14 the USW. Swader and Covarrubias on behalf of the USW negotiated the 12-hour shift
15 schedule in which they now find fault. Swader Depo. 29:2-17; Covarrubias Depo. 14:9-
16 14. Likewise, Simmons is the USW Health & Safety Rep at Wilmington and has held
17 this position for all but 16 months of the last five years. Simmons Depo. 24:19-25:18,
18 25:11-26:12.²⁶ As the USW Health & Safety Rep in Wilmington, Simmons “[e]nsur[es]
19 compliance with Refinery policies and procedures, company safety requirements and
20 applicable government safety and health regulations.” Bollinger Dec. ¶ 5, Ex. D; see
21 also Cantore Dec., Ex A (Art. 20); Covarrubias Depo. 96:17-97:23. The USW considers
22 the provision of meal periods to be a Health & Safety issue and files grievances when it
23 is aware of incidents that compromise the health and safety of its members. USW-N
24 Depo. 141:18-142:19; Simmons Depo. 97:8-16. Accordingly, Simmons is atypical of
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26
27 ²⁵ Simmons could only recall three times where he missed a meal. Simmons Depo.
114:23-116:15. All were prior to 2001 and well before the statute of limitations. *Id.*

28 ²⁶ As the Health & Safety rep, it is Simmons’ regular practice to take a 30-minute break
for lunch. Simmons Depo. 98:11-13. Whenever he misses a lunch break, he has been
paid overtime. Simmons Depo. 98:14-99:5, 100:24-101:3.

1 the class because, he has been responsible for ensuring compliance with policies and
2 regulations that he now contends have been violated, but took no action to stop.

3 The USW is atypical because it fails to meet the third prong of the standing test—
4 that “neither the claim asserted nor the relief requested requires the participation of
5 individual members in the lawsuit.” *See* Mot. at 12. In *United Union Roofers v. Ins.*
6 *Corp of Am.*, the Ninth Circuit held that a plaintiff union lacked standing because it
7 “seeks monetary relief requiring the participation of individual members.” 919 F.2d
8 1398, 1400 (9th Cir. 1990). The same is true here where the Plaintiffs’ own testimony
9 shows that each class member will have to establish liability and prove damages. As
10 such, the USW lacks standing to bring these representative claims.²⁷

11 **3. Inadequate Representation by Plaintiffs and Plaintiffs’ Counsel.**

12 Adequacy of representation under Rule 23(a)(4) involves two elements: (1) that
13 the party’s attorney be qualified, experienced, and generally able to conduct the
14 litigation; and (2) that the suit not be collusive and that the plaintiffs’ interests not be
15 antagonistic to those of the remainder of the class. *See Lerwill v. Inflight Motion*
16 *Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). “Rule 23(a)(4) requires a plaintiff
17 seeking certification to establish not only that he has retained able counsel, but also that
18 he and the absent class members have no antagonistic or conflicting interests.”
19 *Lanzarone*, 2006 WL 4393465, at *7; *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir.
20 1997) (denying certification where named plaintiffs’ interest in ending participation in a
21 DNA program was likely opposed by members of the class).²⁸ Each of the Plaintiffs and
22 their counsel has serious deficiencies with respect to representing the potential class.

23 _____
24 ²⁷ Plaintiffs try to distinguish *United Union* by claiming “the court held that ‘courts
25 have not generally declared a *per se* rule against granting an association standing to seek
26 money damages.’” Mot. at 13 n.5. But, the court held no such thing. Plaintiffs merely
27 quote the union’s argument which was found “unpersuasive.” 919 F.2d at 1400.

28 ²⁸ Antagonism or conflict among class members, if serious and irreconcilable, may
defeat adequacy of representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626
(1997); *Rutherford v. City of Cleveland*, 137 F.3d 905, 909 (6th Cir. 1998); *Denney v.*
Deutsche Bank AG, 443 F.3d 253, 268 (2d Cir. 2006). A potential conflict is enough to
defeat class cert on inadequacy grounds. *See Retired Chicago Police Ass’n v. City of*
Chicago, 7 F.3d 584, 598 (7th Cir. 1993) (union inadequate rep where some class
members potentially would object); *Telecomm Tech. Servs., Inc. v. Siemens Rolm*

1 **a) The USW Is Not an Adequate Representative.**

2 That USW proposed and negotiated for the work schedule of “12 hours exclusive
3 of meals” forecloses it from being the class representative. USW is party to the CBA
4 that dictates the very conduct that it now seeks to challenge. USW-M Depo. 55:11-22.
5 Further, USW admits a majority of its members favor the present 12-hour shift system.
6 USW-M Depo. 58:21-59:4. In addition, the CBA provides for a Joint Committee that
7 vests USW with the authority and the mechanism to challenge any practice or policy
8 that jeopardizes the health and safety of members of the bargaining unit. Cantore Dec.
9 ¶ 2, Ex. A (Art. 20). USW never utilized this procedure. USW-M Depo. 67:15-68:4.

10 Further, ConocoPhillips has moved for leave to file a counterclaim against USW
11 including a claim for indemnity/contribution. Bollinger Dec. ¶ 6, Ex. E. As a result,
12 USW could be liable for some of any recovery by the putative class. Thus, there is a
13 conflict between USW and the putative class which cannot be waived by the absent
14 class members. *Johnson v. Vancouver Plywood Co.*, 21 FR Serv 2d 707 (W.D. La.
15 1976) (union not permitted to be class rep in suit where it may be liable for damages the
16 class members may have sustained resulting from CBA). Mr. Cantore, on behalf of
17 USW has indicated that he intends to oppose ConocoPhillips’ motion for leave to file
18 the Counterclaim (Bollinger Dec. ¶ 4, Ex. C), eliminating an additional defendant from
19 whom the putative class could seek recovery. For each of these reasons, USW is an
20 inadequate representative.

21 **b) The Individual Plaintiffs Are Not Adequate**
22 **Representatives.**

23 As discussed in the prior section, Plaintiffs’ leadership roles in the USW and their
24 potential conflicts with the putative class sets them apart from the class they seek to
25 represent. Swader and Covarrubias’ participation in the negotiation of the 12-Hour
26 Agreement they now contest as unlawful and Simmons for his inaction as the USW
27

28 *Comms., Inc.*, 172 F.R.D. 532, 545 (N.D. Ga. 1997) (same); *Yeager’s Fuel, Inc. v. Penn.*
Power & Light Co., 162 F.R.D. 482, 486 (E.D. Pa. 1995) (same); *Plekowski v. Ralston*
Purina Co., 68 F.R.D. 443, 452 (M.D. Ga. 1975) (same).

1 Safety rep. Moreover, the discrepancies between the declarations they submitted in
2 support of their Motion and their subsequent deposition testimony raise questions about
3 their competency as class representatives. These discrepancies are discussed below.

4 **c) Plaintiffs' Counsel Is Inadequate.**

5 As Plaintiffs' counsel currently represents the USW and seeks to represent the
6 putative class members, this same conflict renders Plaintiffs' counsel inadequate.
7 Absent putative class members are not present to waive any potential conflict. Class
8 counsel is not adequate where there is a conflict of interest. *Bachman v. Pertschuk*, 437
9 F. Supp. 973 (D.D. Col. 1977); *Kamean v. Local 363, Int'l Bhd. of Teamsters*, 109
10 F.R.D. 391, 397 (S.D.N.Y. 1986); *In re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14, 18
11 (2d Cir. 1986) (holding class counsel owes a fiduciary duty to each class member). Mr.
12 Cantore already has advocated a position adverse to that of the absent putative class
13 members by expressing opposition to the Counterclaim.

14 The discrepancies between Plaintiffs' deposition testimony and their cookie cutter
15 declarations raise additional concerns about Plaintiffs' counsel's early conduct of this
16 litigation. *Evans*, 244 F.R.D. at 578 (discrepancies "might well cause a fact finder to
17 'focus on [Plaintiff's] credibility to the detriment of the absent class members'
18 claims.>"). This is especially so where the deposition testimony supports summary
19 judgment for the defendant. *Id.* The *Evans* court separately cited counsel's failure to
20 dismiss plaintiffs who had no involvement in class certification. *Id.* at 579 ("Plaintiffs'
21 counsel are—at best—unconcerned that their acts or omissions cause delay, confusion,
22 and unnecessary work for opposing counsel and the Court.").

23 Similarly here, Plaintiffs' counsel did not advise Defendant that several positions
24 recited in the Complaint and subject to discovery were to be omitted from their Motion.
25 As a result, discovery focused on all USW-represented employees, including
26 Maintenance, Warehouse and Accounting employees. Counsel required ConocoPhillips
27 to produce a 30(b)(6) witness knowledgeable about those employees. ConocoPhillips
28 devoted substantial time and resources during discovery, including obtaining witness

1 declarations related to the claims of the now-omitted job categories. Plaintiffs' counsel
2 perpetuated these efforts through the day they filed the Motion even though they were
3 aware Plaintiffs would not seek to cover these employees in their Motion. Indeed, on
4 that day, Mr. Young called defense counsel to discuss a dispute over the declaration of a
5 Maintenance employee whom he purported to represent. *See Bollinger Dec.* ¶ 3.

6 **B. Plaintiffs Fail to Meet Their Rule 23(b) Burden**

7 Plaintiffs also fail to satisfy the requirements of Rule 23(b)(2) and 23(b)(3).

8 **1. There Is No Basis for Injunctive or Declaratory Relief**

9 Without rigorous analysis or detailing the relief that they seek, Plaintiffs assert
10 that they are entitled to injunctive or declaratory relief. Mot. at 24-25. Such claims fail.
11 California law does not bar employees from working through a meal period; it imposes
12 a regulatory scheme which requires an employee to be compensated for working beyond
13 a set number of hours without a meal period. *Murphy v. Kenneth Cole Prods., Inc.*, 40
14 Cal.4th 1094, 1110 (2007) (“The IWC intended that, like overtime pay provisions,
15 payment for missed meal and rest periods be enacted as a premium wage to compensate
16 employees, ...”). Thus, any injunction to enforce California law, at most, could not bar
17 the schedules the USW agreed to in the CBA. The only remedy would be damages, not
18 injunctive relief.

19 In any event, this Court lacks jurisdiction to do so “in any case involving or
20 growing out of a labor dispute” pursuant to the Norris-LaGuardia Act. 29 U.S.C. § 104.
21 In particular, Section 104(c) prohibits the Court from enjoining any person from
22 withholding from any person “... other monies or things of value.” A “labor dispute”
23 includes any controversy concerning terms or conditions of employment, or concerning
24 the association or representation of persons in negotiating, fixing, maintaining, changing
25 or seeking to arrange terms or conditions of employment, regardless of whether or not
26 the disputants stand in the proximate relation of employer and employee.” 29 U.S.C. §
27 113(c); *Reuter v. Skipper*, 4 F.3d 716, 718-719 (9th Cir. 1993). The Supreme Court has
28 fashioned an “expansive” test for determining whether a particular controversy is a

1 labor dispute: “Simply, “the employer-employee relationship [must be at] the matrix of
 2 the controversy.” ’ [Citations].” *Burlington N. Santa Fe Ry. Co. v. Int’l Bhd. of*
 3 *Teamsters Local 174*, 203 F.3d 703, 709 (9th Cir. 2000); *see also Briggs Transp. Co. v.*
 4 *Int’l Bhd. of Teamsters*, 40 B.R. 972, 973 (D.C. Minn. 1984) (“Nothing could be more
 5 central to the employer-employee relationship than the wages and fringe benefits
 6 employees will receive for their services.”).²⁹ Further, 23(b)(2) certification is only
 7 available when injunctive and declaratory relief “predominate.” *E.g., Molski v. Gleich*,
 8 318 F.3d 937, 949-50 (9th Cir. 2003); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402,
 9 411 (5th Cir. 1998);³⁰ *see also Westways World Travel, Inc. v. AMR Corp.*, 265 Fed.
 10 Appx. 472, 476 (9th Cir. Jan. 2, 2008) (decertifying class, in part, “in light of the
 11 predominance of the Travel Agents’ claims for money damages). Here, monetary
 12 damages are not automatic. Plaintiffs’ main motivation in bringing this lawsuit was the
 13 windfall recovery they hope to achieve. Covarrubias Depo. 90:9-91:16. Moreover,
 14 each individual class member will have to establish an entitlement to damages.

15 **2. Individual Questions of Fact Predominate.**

16 Plaintiffs fail to meet the Rule 23(b)(3) burden because questions of law or fact
 17 common to the class do not predominate over individual questions.” This predominance
 18 inquiry under Rule 23(b) “is more rigorous, [as it] ‘tests whether the proposed classes
 19

20
 21 ²⁹ *Retail Clerks Union Local 1222, AFL-CIO v. Alfred M. Lewis, Inc.*, 327 F.2d 442,
 22 448 (9th Cir. 1964) is not to the contrary. Jurisdiction in *Lewis* arose under § 301(a) of
 23 the Labor Relations Management Act conferring upon the district courts the authority to
 24 enforce collective bargaining agreements. *Lewis*, 327 F.2d at 448. As such, *Lewis* can
 25 be interpreted as finding § 301 as creating an exception to the Norris-LaGuardia
 26 prohibition. No such exception applies here in this case arising in diversity. Moreover,
 27 long after *Lewis* was decided, the Supreme Court refused to narrow the definition of
 28 “labor dispute” found in § 113(c). *Burlington N. R.R. v. Bhd. of Maint. of Way*
Employees, 481 U.S. 429, 441-42 (1987); *Burlington N. Santa Fe Ry.*, 203 F.3d 703, 709
 (9th Cir. 2000) (citing *Bhd. of Maint. Of Way Employees*, 481 U.S. at 441). Further,
 several circuits since then have rejected *Lewis*. *Dist. 29, United Mine Workers of Am. v.*
New Beckley Min. Corp., 895 F.2d 942, 945 (4th Cir. 1990); *Lukens Steel Co. v. United*
Steelworkers of Am., 989 F.2d 668 (3d Cir. 1993).

³⁰ Other circuits also follow *Allison* or apply an even stricter standard. *Lemon v. Int’l*
Union of Operating Eng’rs, Local No. 139, AFL-CIO, 216 F.3d 577, 581 (7th Cir.
 2000); *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001); *Reeb v. Ohio Dept. of*
Rehab. & Corr., 435 F.3d 639, 650-651 (6th Cir. 2006).

1 are sufficiently cohesive to warrant adjudication by representation.” *Blackwell, Inc.*,
 2 245 F.R.D. at 467. For this element, the Court must look to “the substantive issues
 3 raised by Plaintiffs and . . . the proof relevant to each issue.” *Jimenez*, 238 F.R.D. at
 4 251. If the substantive issues require individual proof for each member’s claims, then
 5 class certification is inappropriate. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180,
 6 1189 (9th Cir. 2001) (*quoting* 7A Wright, Miller & Kane, Fed. Pract. & Proc. § 1778,
 7 535-539 (2d ed. 1986)). Here, as discussed above at pp. 5-9, a jury will be required to
 8 make a variety of individualized findings to adjudicate each class member’s claim.

9 **a) Plaintiffs’ Own Testimony Proves the Disparity of the**
 10 **Putative Class Members’ Claims.**

11 Plaintiffs’ depositions highlight the need for individualized inquiry. For example,
 12 Simmons and Covarrubias each admit they have never complained to a supervisor about
 13 having less than 30 uninterrupted minutes to eat a meal. Simmons Depo. 118:15-
 14 119:12; Covarrubias Depo. 49:13-19, 79:14-80:2. Swader testified that supervisors had
 15 interrupted his meals several times, but he had not told them that he was on a meal
 16 break at the time. Swader Depo. 79:25-80:23; *see also* Compendium Ex. 42 (same for
 17 most putative class members). The Plaintiffs claim varying frequencies of such
 18 interruptions. Swader claims that 60 to 70 percent of his meals are interrupted. Swader
 19 Depo. 71:22-72:18. In contrast, Simmons admits he cannot remember the last time his
 20 meal was interrupted. Simmons Depo. 78:17-19. He could only recall one interruption
 21 with any specificity. *Id.* at 79:15-81:21. Covarrubias admits that the majority of the
 22 time his meals are *not* interrupted, and could not recall an alarm disrupting a meal in the
 23 last year and a half. Covarrubias Depo. 76:2-6, 86:12-24. Muto could not recall any
 24 missed meal in the last five years and the last specific such incident he could recall was
 25 prior to 1998. USW-M Depo. 169:4-8; 94:17-95:19. Norris testified that missed meal
 26 breaks are “infrequent,” “maybe once or twice a year.” USW-N Depo. 96:23-97:13.³¹

27
 28 ³¹ Plaintiffs present no evidence of any Lab workers being denied a meal period. Norris testified that Lab workers at Carson and Wilmington “get a chance to eat.” USW-N Depo. 127:25-128:2. Muto was unable to provide any evidence of meal

1 **b) Other Witnesses' Declarations Refute Plaintiffs' Premise.**

2 The witness declarations submitted by ConocoPhillips contradict any allegations
3 of widespread missed, late or incomplete meal periods. During day shifts, most
4 Operators self-schedule their meal period at the same time as the scheduled meal period
5 for Maintenance and contract workers.³² While meal times on nights can vary among
6 Operators, many state that they take their meal breaks around the same time each night.
7 Holloway Dec. ¶ 7; Lopez Depo. 27:2-9. Plaintiffs' witness Nelson stated that he
8 skipped or cut short his lunch breaks "no more than 5% of the time." Nelson Dec. ¶ 6.
9 Plaintiffs' witness Lopez testified that his meals were interrupted two to three times a
10 month, but he was always able to finish his meal later and cannot remember any time
11 that he did not have the opportunity to eat a meal. Lopez Depo. 30:21-24, 31:10-16.

12 **(1) Claimed Disparity in Ability to Avoid Interruptions.**

13 Plaintiffs claim that they have no ability to avoid interruptions. Swader testified,
14 "[i]f someone asked me to do something, I stopped my meal because that was what my
15 job was requiring of me." Swader Depo. 79:11-16. Other Operators, however, testified
16 to a great deal of discretion in whether they permit their breaks to be interrupted. *See*
17 *Compendium Ex. 38.*³³ For example, Magday states that "[u]nless [a Maintenance
18 request] was critical, I usually told [Maintenance] to go ahead and start setting up and
19 that I would be over in about 15 minutes when I finished my break." Magday Dec. ¶ 9.

20 **(2) Variations in Number and Length of Meal Breaks.**

21 Plaintiffs allege that there is not enough time for one uninterrupted 30-minute
22 meal break in a 12-hour shift, but their own deposition testimony and that of the
23 declarants demonstrate the wide variation amongst the putative class. Norris testified
24

25 violation for Rodeo Lab workers. USW-M Depo. 125:23-126:1; 137:5-16. No Lab
26 worker at Carson or Wilmington has complained about a missed a meal break. None
has been told not to take a meal break. USW-N Depo. 128:16-20, 132:1-17.

27 ³² Lopez Depo. 21:3-15; Miller Dec. ¶ 5; Moreno Dec. ¶ 7; Magday Dec. ¶ 7; Just Dec.
28 ¶ 5; Nelson Dec. ¶ 6; Salaiz Dec. ¶ 9; Cope Dec. ¶ 13.

³³ Nelson Dec. ¶¶ 6, 7; Bates Dec. ¶ 5; Holloway Dec. ¶ 6; Just Dec. ¶ 7; Lopez Depo.
28:5-11; Moberg Dec. ¶ 7; Moreno Dec. ¶ 8.

1 that he usually eats one meal, but will take “three if I can get it.” USW-N Depo. 95:1-3.
 2 Swader admitted seeing others eat more than one meal per shift. Swader Depo. 49:25-
 3 50:3. Covarrubias admitted he has eaten a second meal in a shift. Covarrubias Depo.
 4 53:16-22. Lopez testified that he ate breakfast and lunch on day shifts and could have
 5 take as much as 30 minutes for each meal if he wanted. Lopez Depo. 21:13-23:25,
 6 24:1-25:9. On the night shift, Lopez says he ate dinner and a snack later in the evening,
 7 and that it is his choice not to have a second meal break. *Id.* 28:5-11. In fact, many
 8 Operators at each refinery state they have the opportunity to take multiple uninterrupted
 9 30-minute meal breaks in a 12-hour shift. Compendium Exs. 37, 43.³⁴

10 Numerous other individual issues impact how different Operators take meal
 11 breaks. Whether an Operator cooks impacts the length of a break because cooking
 12 generally requires more than 30 minutes.³⁵ The number of alarms that disrupt an
 13 Operator’s break varies among operators. Plaintiffs claim it “happened a lot where the
 14 upsets affected your eating a meal.” Covarrubias Depo. 85:1-13; Simmons Depo. 78:20-
 15 80:5. Others, including USW’s Norris, recall far fewer or even no such interruptions.³⁶

16 The opportunity to take a meal break also will vary with the availability of others
 17 to provide relief. Covarrubias admits that Operators can cover his console and that he
 18 has done the same for other Operators. Covarrubias Depo. 72:1-11; Zumbro Dec. ¶ 12.
 19 Swader performs the same courtesy for other Operators, and admits that 50% of the time
 20 there is someone to cover for him for up to an hour. Swader Depo. 43:1-44:14, 131:17-
 21 132:8; USW-N Depo. 154:18-21 (same). Lopez and Nelson also covered for others at
 22

23 ³⁴ Cope Dec. ¶ 13; Trevino Dec. ¶ 3; Martin Dec. ¶ 3; Salaiz Dec. ¶ 5; Smith Dec. ¶ 7;
 24 Just Dec. ¶ 4; Fejer Dec. ¶ 5; Zumbro Dec. ¶ 5; Holloway Dec. ¶ 6; Nelson Dec. ¶ 7;
 Whitney Dec. ¶ 9; Moberg Dec. ¶ 5; Bates Dec. ¶ 10; Griffith Dec. ¶¶ 10, 13.

25 ³⁵ Nelson Dec. ¶ 9; Miller Dec. ¶ 6; Magee Dec. ¶¶ 4-5; Smith Dec. ¶ 11; Trevino Dec.
 ¶ 4; Salaiz Dec. ¶ 11.

26 ³⁶ USW-N Depo. 96:23-97:13; Whitney Dec. ¶ 18; Martin Dec. ¶ 6; Bates Dec. ¶ 8;
 27 Griffith Dec. ¶ 14; Holloway Dec. ¶ 8; Miller Dec. ¶ 8; Salaiz Dec. ¶ 7; Zumbro Dec.
 28 ¶ 8; Just Dec. ¶ 7; Magday Dec. ¶ 11; Fejer Dec. ¶ 10; Bates Dec. ¶ 8; *see also* Inerni
 Dec. ¶¶ 10-18, Exs. A-D; Compendium Ex. 39. Some Operators attribute the decreased
 frequency and severity of emergency situations at their refineries in part to upgrades in
 equipment and technology, (Miller Dec. ¶ 10 (Wilm.); Martin Dec. ¶ 6 (Santa Maria)),
 issues also requiring individual inquiry.

1 meal breaks. Lopez Depo. 42:1-12; Nelson Dec. ¶ 8. However, Simmons testified that
 2 he is not aware of that practice. Simmons Depo. 88:4-89:9. Carson Supervisor Dave
 3 Cope instructs his Operators to stop working and take a meal break and facilitates relief
 4 coverage to accommodate meal breaks. Cope Dec. ¶ 14; Bates Dec. ¶ 8. Some Head
 5 Operators direct the timing of meal breaks for Field Operators.³⁷ Whether there are
 6 sufficient employees cross-trained in a unit may impact the timing of an Operator's
 7 relief. At Carson, "[m]ore than half of the operators are trained on all units." Cope
 8 Dec. ¶ 16. At other facilities, it varies by unit and position.³⁸

9 (3) Variations in the Operators Jobs.

10 The amount of available time for Operators to choose from in selecting their own
 11 meal breaks varies by position and shift. *See* Compendium Exs. 34, 43. Lopez testified
 12 that his work on average only took him 3 to 5 hours out of a 12-hour shift. Lopez Depo.
 13 28:12-29:17. Putative class member Just was able to complete his routine tasks within
 14 the first 2 to 4 hours. Just Dec. ¶ 3. Putative class member Miller's experience was that
 15 "[i]n a normal 12-hour shift, I may have had 1 to 2 hours of work-related tasks to
 16 perform." Miller Dec. ¶ 5. In contrast, other positions can require as much as 9 hours
 17 of work-related tasks. Cope Dec. ¶¶ 9, 10. Some Field Operators coordinate their lunch
 18 with Maintenance employees' set meal times. Trevino Dec. ¶ 6; Just Dec. ¶ 5. Different
 19 shifts also impact the time available for meal breaks. Many Operators have less work to
 20 do at night and on weekends because Maintenance generally is only scheduled during
 21 weekday day shifts.³⁹ Other positions are busier at nights. Trevino Dec. ¶¶ 7, 8; Smith
 22 Dec. ¶ 8. For other positions there is no difference. For example, "[b]ecause the
 23 decoking process is on a set cycle, the decoker and the drumswitcher can anticipate
 24 when they will have time to eat." Smith Dec. ¶ 9; Trevino Dec. ¶ 5 (same). Some
 25

26 ³⁷ Martin Dec. ¶ 5; Nelson Dec. ¶ 8; Moberg Dec. ¶ 4; Zumbro Dec. ¶ 8; Griffith Dec.
 27 ¶ 8; Whitney Dec. ¶ 11.

³⁸ Salaiz Dec. ¶ 8; Martin Dec. ¶ 4; Magday Dec. ¶ 11; Miller Dec. ¶ 9.

28 ³⁹ Moberg Dec. ¶ 6; Smith Dec. ¶ 8; Salaiz Dec. ¶ 9; Miller Dec. ¶ 8; Bates Dec. ¶ 10;
see also USW-M Depo. 59:22-61:2..

1 Process units have a Head Operator and one or two Operator 1s whereas Bulk units are
2 only operated by Operator 1s. USW-M Depo. 108:10-15; Simmons Depo. 131:13-20.

3 Thus, some Operators have plenty of time to do crossword puzzles (Lopez Depo.
4 40:19-41:5), and watch movies on laptop computers or portable DVD players. Magday
5 Dec. ¶ 13; Swader Depo. 158:24-159:5; USW-N Depo. 108:2-4; *see also* Stake Dec.
6 ¶ 10, Ex. 8 (photograph depicting TV/DVD in Sulfur Utility Plant break area).

7 **3. The Class Action Lacks Superiority.**

8 Rule 23(b)(3) also requires that Plaintiffs prove that the class action device is
9 superior to other methods for resolving the dispute. *Amchem Prods., Inc. v. Windsor*,
10 521 U.S. 591, 615 (1997); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1231-1232
11 (9th Cir. 1996). A class action is not “superior” if each class member has to litigate
12 numerous and substantial separate issues to establish the right to recovery. *Zinser*, 253
13 F.3d at 1192. Due to the numerous individual issues that predominate here, the
14 purported class will require testimony from many class members in order to establish
15 their claims.

16 Certification should also be denied where class members have alternative
17 remedies (*i.e.*, relief through administrative proceedings) that are superior to a class
18 action. *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 211-12 (9th Cir. 1975); *Brown v.*
19 *Blue Cross & Blue Shield of Mich., Inc.*, 167 F.R.D. 40, 43 (E.D. Mich. 1996). In the
20 present case, Plaintiffs and the potential class members have alternative, less costly and
21 more expeditious forums to pursue their remedies.

22 Plaintiffs admit that the CBA grievance process is an effective and expedient
23 method for resolving disputes with ConocoPhillips. Plaintiffs have successfully
24 resolved issues through this process within 48 hours of bringing a grievance. Swader
25 Depo. 36:14-37:20, 39:7-40:22, 89:9-91:8, 112:2-7; Covarrubias Depo. 62:15-63:4.
26 Plaintiffs considered filing such a grievance prior to filing this action. Covarrubias
27 Depo. 87:7-91:4; Swader Depo. 65:9-66:10. USW has recently brought a meal period
28

1 grievance on behalf of Maintenance employees.⁴⁰ Covarrubias Depo. 21:6-15. The
 2 apparent reason for filing this action and not a grievance was the prospect of a windfall
 3 settlement. *See id.* 90:9-91:16. Any aggrieved class member also can pursue his own
 4 claims before the Labor Commissioner at no cost (*see* Lab. Code §§ 98 *et seq.*; Swader
 5 Depo. 88:15-18), as USW has with other wage and hour issues. *E.g., id.* 82:17-87:12.

6 **4. Plaintiffs Completely Ignore All Issues Regarding a Trial Plan.**

7 A court should not certify a putative class where plaintiffs have not demonstrated
 8 how trial of class claims can be managed effectively. *See, e.g., Valentino*, 97 F.3d at
 9 1234 (denying class certification where “there has been no showing by Plaintiffs of how
 10 the class trial could be conducted”).⁴¹ Plaintiffs have presented no plan as to how the
 11 court can conduct a jury trial with the various individualized issues raised here. Instead
 12 they rely upon their own *ipsa dixit* assertion that a trial in this case would be
 13 manageable. Indeed, they contend that no individualized issues must be addressed. As
 14 shown above, that plainly is not the case.

15 **IV. CONCLUSION**

16 For the foregoing reasons, the Court should deny class certification.

17 Dated: January 8, 2009

18 By /s/Catherine A. Conway

Catherine A. Conway

Scott J. Witlin

Jeremy F. Bollinger

19 AKIN GUMP STRAUSS HAUER & FELD LLP
 20 Attorneys for Defendant ConocoPhillips Company
 21
 22
 23

24 ⁴⁰ Plaintiffs cannot argue that they are unable to grieve the meal break issue. First, the
 25 12-Hour Shift Agreement anticipates that 12-hour employees will take meal periods:
 26 “The regular workday for 12-hour shift employees shall consist of 12 consecutive hours
 27 exclusive of meal period.” Second, the USW has submitted grievances in the past that
 are unrelated or only tangentially related to a specific provisions in the CBA. *See, e.g.,*
 Butler Dec. ¶¶ 4, 5, Exs. A, B; Stake Dec. ¶¶ 4-7, Exs. 1-5.

28 ⁴¹ *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996) (abuse of discretion in
 ignoring “how a trial on the alleged causes of action would be tried”); *Sweet v. Pfizer*,
 232 F.R.D. 360, 372 (C.D. Cal. 2005); *O’Connor v. Boeing N. Am., Inc.*, 180 F.R.D.
 359, 384 (C.D. Cal. 1997); Fed.R.Civ.P. 23, 2003 Advis. Comm. Note (2006).

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, California 90067. On January 8, 2009, I served the foregoing document(s) described as: DEFENDANT CONOCOPHILLIPS COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION on the interested party(ies) below, using the following means:

All parties identified for Notice of Electronic Filing generated by the Court's CM/ECF system under the referenced case caption and number

BY ELECTRONIC MAIL OR ELECTRONIC TRANSMISSION. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the respective e-mail address(es) of the party(ies) as stated above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 8, 2009 at Los Angeles, California.

Rose Shushanyan
[Print Name of Person Executing Proof]

/s/ Rose Shushanyan