

1 Kelly M. Dermody (State Bar No. 171716)  
 kdermody@lchb.com  
 2 Daniel M. Hutchinson (State Bar No. 239458)  
 Anne B. Shaver (State Bar No. 255928)  
 3 Katherine M. Lehe (State Bar No. 273472)  
 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP  
 4 275 Battery Street, 29th Floor  
 San Francisco, CA 94111  
 5 Telephone: (415) 956-1000  
 Facsimile: (415) 956-1008

6 Steven M. Tindall (State Bar No. 187862)  
 steventindall@rhdtlaw.com  
 7 Angela Perone (State Bar No. 245793)  
 RUKIN HYLAND DORIA & TINDALL LLP  
 8 100 Pine Street, Suite 2150  
 9 San Francisco, CA 94111  
 Telephone: (415) 421-1800  
 10 Facsimile: (415) 421-1700

11 *Counsel for Plaintiffs and the Proposed Class*

12  
 13 UNITED STATES DISTRICT COURT  
 14 NORTHERN DISTRICT OF CALIFORNIA

16 GOPI VEDACHALAM and KANGANA  
 17 BERI, on behalf of themselves and all  
 others similarly situated,

18 Plaintiffs,

19 v.

20 TATA CONSULTANCY SERVICES,  
 LTD, an Indian Corporation; and TATA  
 21 SONS, LTD, an Indian Corporation,

22 Defendants.

CASE NO. C 06-0963 (CW)

**PLAINTIFFS' [REVISED] REPLY IN  
 SUPPORT OF MOTION FOR CLASS  
 CERTIFICATION**

Judge: Hon. Claudia Wilken  
 Hearing Date: November 17, 2011  
 Hearing Time: 2:00 p.m.  
 Courtroom: 2

23  
 24  
 25  
 26  
 27  
 28

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<b>Page</b>
I. INTRODUCTION .....	1
II. ARGUMENT .....	2
A. The National Class Satisfies Rule 23(a).....	2
1. Resolution Of Plaintiffs’ Breach Of Contract Claim Depends On The Answers To Common Questions .....	2
a. The Standardized Contract Should Be Interpreted Uniformly.....	3
b. Tata’s Indian Salary Deduction Policy Was Uniform.....	7
c. Tata’s Tax Refund Recoupment Policy Was Classwide .....	8
d. Resolution Of Tata’s Common, Merits-Based Defenses Will Depend On The Answers To Common Questions.....	8
2. Plaintiff Vedachalam And Beri’s Claims Are Typical .....	9
a. Vedachalam And Beri Are Typical Of Class Members Both With And Without A Specific Salary Term In Their Uniform DTAs .....	9
b. Defenses Against Beri Do Not Defeat Typicality, And Evidence Shows That Tata’s Mutual Mistake Defense Is Not Viable .....	11
B. The National Class Satisfies Rule 23(b)(3).....	12
1. Tata’s Form Contracts Make Common Issues Likely To Predominate .....	12
2. Tata’s Standard (and Admitted) Tax Refund Recoupment Policy .....	15
3. Tata’s Standard Indian Salary Deductions.....	16
4. Common Issues Of Uniform Contract Interpretation Predominate Over Any Defenses To Certain Class Members’ Claims.....	16
5. Individual Damages Calculations Do Not Defeat Predominance.....	18
C. The California Class Satisfies Rule 23(a) .....	19
1. Plaintiffs Raise Questions Capable Of Generating Common Answers.....	19
a. Commonality With Regard To The Labor Code § 221 Claim.....	20
b. Commonality With Regard To The Labor Code § 226 Claim.....	21
c. Commonality With Regard To The Labor Code § 203 Claim.....	22
2. Plaintiffs’ Claims Are Typical Of The California Class.....	22

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
3. Predominance Is Satisfied As To The California Class .....	22
a. Itemized Wage Statement Claim Under Labor Code	
§ 226.....	23
b. Waiting Time Penalty Claim Under Labor Code	
§ 203.....	23
D. Plaintiffs’ Damages Do Not Weigh Against Superiority.....	24
E. The Court May Rely On The Class Member Declarations .....	25
III. CONCLUSION .....	25

1 **TABLE OF AUTHORITIES**

2 **Page**

3 **CASES**

4	<i>Akiona v. U.S.</i> ,	
5	938 F.2d 158 (9th Cir. 1991).....	4
6	<i>Babineau v. Federal Express Corp.</i> ,	
7	576 F.3d 1183 (11th Cir. 2009).....	16
8	<i>Berrien v. New Raintree Resorts Intern.</i> ,	
9	No. C-10-3125 CW, 2011 WL 3607197 (N.D. Cal. 2011).....	7, 13
10	<i>Bibo v. Federal Express, Inc.</i> ,	
11	2009 U.S. Dist. LEXIS 37597 (N.D. Cal. 2009).....	25
12	<i>Blackie v. Barrack</i> ,	
13	524 F.2d 891 (9th Cir. 1975).....	18
14	<i>Bower v. Bunker Hill Co.</i> ,	
15	114 F.R.D. 587 (E.D. Wa. 1986) .....	10
16	<i>Breeden v. Benchmark Lending Group</i> ,	
17	229 F.R.D. 623 (N.D. Cal. 2005).....	24
18	<i>Broussard v. Meineke Disc. Muffler Shops, Inc.</i> ,	
19	155 F.3d 331 (4th Cir. 1998).....	10
20	<i>Burdick v. Union Sec. Ins. Co.</i> ,	
21	2008 U.S. Dist. LEXIS 108616 (C.D. Cal. 2008).....	11
22	<i>Cameron v. E. M. Adams &amp; Co.</i> ,	
23	547 F.2d 473 (9th Cir. 1976).....	17
24	<i>Canatella v. U.S.</i> ,	
25	2011 WL 2712967 (N.D. Cal. 2011) .....	25
26	<i>Chamberlan v. Ford Motor Co.</i> ,	
27	223 F.R.D. 524 (N.D. Cal. 2004).....	25
28	<i>Discover Bank v. Sup. Ct.</i> ,	
	36 Cal. 4th 148 (2005) .....	7
	<i>Doe 1 v. AOL LLC</i> ,	
	552 F.3d 1077 (9th Cir. 2009).....	6
	<i>Endres v. Wells Fargo Bank</i> ,	
	2008 U.S. Dist. LEXIS 12159 (N.D. Cal. 2008).....	19
	<i>Ewert v. eBay, Inc.</i> ,	
	2010 WL 4269259 (N.D. Cal. Oct. 25 2010).....	7

**TABLE OF AUTHORITIES**  
(continued)

		<b>Page</b>
1		
2		
3	<i>Fireman’s Fund Ins. Co. v. Nat’l Bank for Coops,</i>	
4	849 F. Supp. 1347 (N.D. Cal. 1994) .....	14
5	<i>Fremont Indem. Co. v. Fremont Gen. Corp.,</i>	
6	148 Cal.App.4th 97 2007 .....	14
7	<i>Greenwood v. Compucredit Corp.,</i>	
8	2010 U.S. Dist. LEXIS 3839 (N.D. Cal. 2010).....	10
9	<i>Gutierrez v. Kovacevich "5" Farms,</i>	
10	2004 U.S. Dist. LEXIS 29476 (E.D. Cal. 2004) .....	2, 10, 16
11	<i>Hanon v. Dataproducts Corp.,</i>	
12	976 F. 2d 497 (9th Cir. 1992).....	11
13	<i>Harrison v. Howmedica Osteonics Corp.,</i>	
14	No. CIV 06-0745 PHX RCB, 2008 WL 906585 (D. Ariz. Mar. 31, 2008).....	6
15	<i>Helms v. Alderwoods Grp., Inc.,</i>	
16	2009 U.S. Dist. LEXIS 123527 (N.D. Cal. 2009).....	16
17	<i>Herrera v. LCS Fin. Servs. Corp.,</i>	
18	274 F.R.D. 666 (N.D. Cal. 2011) (Henderson, J.) .....	17
19	<i>Hoffman v. Construction Protective Servs., Inc.,</i>	
20	541 F.3d 1175 (9th Cir. 2008).....	4
21	<i>In re Juniper Networks Secs. Litig.,</i>	
22	264 F.R.D. 584 (N.D. Cal. 2009).....	11
23	<i>In re Visa Check/Mastermoney Antitrust Litig.,</i>	
24	280 F.3d 124 (2d Cir. 2001).....	17
25	<i>Jaimez v. DAIHOS USA, Inc.,</i>	
26	181 Cal.App.4th 1286 (2010) .....	22, 23
27	<i>Johnson v. General Mills, Inc.,</i>	
28	2011 WL 4056208 (C.D. Cal. 2011).....	9
	<i>Kerr’s Catering Serv. v. Department of Indus. Relations,</i>	
	57 Cal.2d 319 (1962) .....	20
	<i>Klay v. Humana, Inc.,</i>	
	382 F.3d 1241 (11th Cir. 2004).....	7
	<i>Kurihara v. Best Buy Co., Inc.,</i>	
	2007 U.S. Dist. LEXIS 64224 (N.D. Cal. 2007).....	2, 16
	<i>Labrador v. Seattle Mortg. Co.,</i>	
	2010 U.S. Dist. LEXIS 105716 (N.D. Cal. 2010).....	24

**TABLE OF AUTHORITIES**  
(continued)

		<b>Page</b>
1		
2		
3	<i>Leon v. IDX Sys. Corp.</i> ,	
4	464 F.3d 951 (9th Cir. 2006).....	11
5	<i>Lopez v. G.A.T. Airline Ground Support, Inc.</i> ,	
6	2010 U.S. Dist. LEXIS 95636 (S.D. Cal. 2010) .....	2, 10, 16
7	<i>McGhee v. Bank of America</i> ,	
8	60 Cal.App.3d 442 (1976).....	9
9	<i>Menagerie Prods. v. Citisearch</i> ,	
10	No. CV 08-4263 OAS, 2009 U.S. Dist. LEXIS 108768 (C.D. Cal. 2009).....	14
11	<i>Northrop Grumman Corp. v. Factory Mut. Ins. Co.</i> ,	
12	563 F.3d 777 (9th Cir. 2009).....	6, 8, 14
13	<i>Otsuka v. Polo Ralph Lauren Corp.</i> ,	
14	251 F.R.D. 439 (N.D. Cal. 2008).....	19
15	<i>Perez v. Safety-Kleen Sys., Inc.</i> ,	
16	253 F.R.D. 508 (N.D. Cal. 2008).....	23
17	<i>Price v. Starbucks Corp.</i> ,	
18	192 Cal.App.4th 1136 (2011) .....	21, 22
19	<i>Rodriguez v. ACL Farms, Inc.</i> ,	
20	2010 U.S. Dist. LEXIS 125580 (E.D. Wash. 2010) .....	17
21	<i>Rojas v. Marko Zaninovich, Inc.</i> ,	
22	2011 WL 4375297 (E.D. Cal. 2011).....	5
23	<i>Sacred Heart Health Sys. v. Humana Military Healthcare Servs.</i> ,	
24	601 F.3d 1159 (11th Cir. 2010).....	17, 18
25	<i>Sandata Techs., Inc. v. Infocrossing, Inc.</i> ,	
26	2007 WL 4157163 (S.D.N.Y. 2007).....	5
27	<i>Siemer v. Assocs. First Capital Corp.</i> ,	
28	2000 U.S. Dist. LEXIS 21244 (D. Ariz. 2000).....	10, 11
	<i>Smilow v. Southwestern Bell Mobile Sys.</i> ,	
	323 F.3d 32 (1st Cir. 2003).....	17
	<i>Smith v. Cardinal Logistics Mgmt. Corp.</i> ,	
	2008 U.S. Dist. LEXIS 117047 (N.D. Cal. 2008).....	24
	<i>Tahoe Nat'l Bank v. Phillips</i> ,	
	4 Cal.3d 11 (1971) .....	6
	<i>U.S. v. Castillo</i> ,	
	924 F.2d 1227 (9th Cir. 1991).....	5

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

**STATUTES**

California Civil Code	
§ 1638.....	6, 8, 14
California Code of Civil Procedure	
§ 337(1).....	24
California Labor Code	
§ 226(a).....	22, 23
Labor Code § 203.....	passim
Labor Code § 221.....	passim
Labor Code § 226.....	passim

**RULES**

Fed. R. Evid. 702 .....	5
Federal Rules of Civil Procedure	
Rule 23(a).....	2, 12, 19

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**  
**(continued)**

**Page**

Federal Rules of Civil Procedure Rule 23(b)(3).....	12, 17
Federal Rules of Civil Procedure Rule 23(c)(5).....	11
Federal Rules of Civil Procedure Rule 23(g).....	1
Federal Rules of Civil Procedure Rule 37(c)(1).....	4

**TREATISES**

<i>Newberg on Class Actions</i> (4th ed. 2002) § 3:16.....	10, 11
<i>Newberg on Class Actions</i> (4th ed. 2002) § 4:26.....	24

1 **I. INTRODUCTION**

2 In its Opposition, Tata does not contest that Plaintiffs have demonstrated numerosity and  
3 adequacy for the National or California Classes and does not oppose Plaintiffs' motion to appoint  
4 Class Counsel under Rule 23(g). Tata argues instead that Plaintiffs fail to establish typicality,  
5 commonality, predominance, and superiority. Tata is mistaken.

6 During the Class Period (February 14, 2002 to June 30, 2005), the following common facts  
7 applied to Plaintiffs and all Class members: (1) they entered into form employment contracts of  
8 adhesion (DTAs) that contain identical language governing their compensation; (2) Tata had a policy  
9 of deducting Indian salary from their U.S. paychecks; and (3) Tata had a policy of requiring them to  
10 pay their tax refund checks back to Tata. Both the Indian salary and tax refund policies were  
11 contrary to the terms of the DTA and support a common finding of liability to the National Class for  
12 breach of contract, and to the California Class under Labor Code § 221 (unlawful recoupment of  
13 wages), § 226 (itemized wage statements), and § 203 (waiting time penalties).

14 Tata does *not* contest the existence of the DTA or the challenged policies. Instead, relying  
15 on misleading citations to Class member testimony, Tata argues that its policies were not “uniformly  
16 applied or complied with by all putative class members.”<sup>1</sup> Boldly, Tata also relies on its own loss or  
17 destruction of DTAs—including during this litigation—to assert that certain Class members lack  
18 evidence of an employment contract. The incompleteness of its own records and isolated instances  
19 of non-compliance with company policy, however, do not negate the existence of the common  
20 policies. Moreover, predominance is satisfied even if the Court concludes that it needs to determine  
21 the specific amount owed to Class members under the DTA because the compensation amounts all  
22 fall into one of four categories, each susceptible to common proof.

23 Finally, Tata's superiority argument—that Class members (many of whom live abroad and  
24 have modest damages) have adequate financial incentive to sue a well-funded, multi-national entity  
25 like Tata—has been rejected in similar circumstances by courts within this Circuit.

---

27 <sup>1</sup> Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Class  
28 Certification (“Defs.’ Opp.”), Electronic Docket Number (“Dkt.”) 243 at 16.

1 **II. ARGUMENT**

2 **A. The National Class Satisfies Rule 23(a)**

3 Plaintiffs satisfy the “rigorous analysis” of Rule 23(a) factors under *Wal-Mart Stores, Inc. v.*  
4 *Dukes*, 131 S.Ct. 2541 (2011).

5 **1. Resolution Of Plaintiffs’ Breach Of Contract Claim Depends On The**  
6 **Answers To Common Questions**

7 “[W]hat matters to class certification is not the raising of common ‘questions’ . . . but, rather  
8 the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the  
9 litigation.” *Dukes*, 131 S.Ct. at 2551. A classwide proceeding here can do precisely that. At a Class  
10 trial, the Court and jury will resolve the following three questions that relate to all National Class  
11 members and are critical to the Class’s breach of contract claim:

- 12 (1) Whether under the terms of the employees’ standard employment contracts (the DTAs),  
13 employees are entitled to “gross” compensation in the United States “[i]n addition to the  
14 compensation” employees receive in India, such that their Indian salary should not be  
15 deducted from their U.S. salary;
- 16 (2) Whether under the DTA’s compensation terms, employees are entitled to *gross*  
17 *compensation* such that any over-withheld taxes belong to the employee, or *net*  
18 *compensation* that is “grossed up” to include taxes paid by Tata such that any over-withheld  
19 taxes belong to Tata; and
- 20 (3) Whether Tata’s uniform practices of Indian salary deductions and tax refund recoupment  
21 constitute breaches of these two contract provisions.

22 In support of these common questions, Plaintiffs submitted evidence that the compensation  
23 provisions of the DTAs and Tata’s two policies of reducing its employees’ salaries are common to  
24 each Class member. Courts have repeatedly found that commonality exists where plaintiffs  
25 challenge the lawfulness of an employer’s standard policy.<sup>2</sup> As in *Gutierrez*, the common question  
26 at the epicenter of this case is whether Tata’s policies of Indian salary deduction and tax refund  
27 recoupment are proper under the uniform DTA language.<sup>3</sup>

28 <sup>2</sup> See, e.g., *Gutierrez v. Kovacevich "5" Farms*, 2004 U.S. Dist. LEXIS 29476, \*28 (E.D. Cal. 2004)  
 (“[T]here is a common question that lies at the epicenter of the case: whether Defendants’  
 compensation practices were lawful.”); *Kurihara v. Best Buy Co., Inc.*, 2007 U.S. Dist. LEXIS  
 64224, \*17 (N.D. Cal. 2007) (Patel, J.) (same); *Lopez v. G.A.T. Airline Ground Support, Inc.*, 2010  
 U.S. Dist. LEXIS 95636, \*24-25 (S.D. Cal. 2010) (same).

<sup>3</sup> In past Court filings and oral argument, Tata repeatedly stated its position that Class members did  
 not receive gross compensation but a *net* salary which Tata “grossed up” by paying any taxes owed.  
 See Dkt. 150 at 5 (“TCS agreed to pay all federal, state and local income taxes . . . . [T]he employee  
 received an advance net monthly payment from TCS.”); 5-6 (“Any excess taxes paid by TCS on

1                    **a.     The Standardized Contract Should Be Interpreted Uniformly**

2                    During the entire Class period, it is uncontested that Tata used the same standard  
 3 employment contract for deputed employees. *See* Declaration of Daniel M. Hutchinson  
 4 (“Hutchinson Decl.”) (Dkt. 186, 189), Exs. 1-6.<sup>4</sup> Tata’s corporate designee confirmed that under  
 5 Tata’s standard deputation process, each employee signed a DTA before being deputed. *Id.*, Ex. B at  
 6 Tr. 143:8-144:12. Tata’s counsel also acknowledged this practice in open court. William Escobar,  
 7 Oral Argument on Defendants’ Motion for Summary Judgment (“Hearing Tr.”), at Tr. 4 (Apr. 28,  
 8 2011) (“they generally have both [a DA and a DTA], Your Honor”). The compensation provisions  
 9 for each DTA are identical other than the specific salary amount. *See* Dkt. 191, ¶¶2-4. Tata does not  
 10 deny this fact. Of the many thousands of DTAs that Tata acknowledged Class members signed, Tata  
 11 has not presented a single DTA containing different compensation language.

12                    Ignoring the testimony of its own corporate designee and the statements of its counsel, and  
 13 relying on a 2006 audit of DTAs (disclosed for the first time in Defendants’ Opposition), Tata asserts  
 14 that certain employees never entered into a DTA. Defs.’ Opp. at 5-8. Tata’s assertion is without  
 15 basis, and its reliance on the audit is misplaced. Plaintiffs object to the admission of the audit on  
 16 several grounds. First, the audit is not reliable because it reviewed documents outside the Class  
 17 period, including (1) two years before the Class period (2000 and 2001), when DTAs did not exist at  
 18 Tata; and (2) one year after the Class period (2006). Second, the audit is unreliable because Tata has  
 19 *lost or destroyed* 75% of the underlying DTAs, and can now only account for 672 of the 2,700 cited  
 20 in the audit, making it impossible for Plaintiffs to verify or challenge the audit’s findings.<sup>5</sup> Third,

21 *behalf of the employee are returned to TCS”*); 20 (“as was agreed between TCS [and Plaintiffs] . . .  
 22 TCS paid any federal, state and local taxes on [their] behalf”); *see also* Hearing Tr. at 41 (“the taxes  
 23 were paid by TCS. If the taxes were paid by TCS, the refund goes to TCS. It’s not a deduction out  
 24 of their salary because we paid the taxes.”), 39 (“TCS is the one that pays the taxes. The gross  
 25 amount is grossed up, and we pay the taxes.”).

26 <sup>4</sup> Because there is not evidence showing that persons deputed only before 2002 signed DTAs, the  
 27 proposed Class does not include employees deputed before 2002, but is defined as follows: All non-  
 28 U.S. citizens who were employed by Tata in the United States at any time from February 14, 2002  
 through June 30, 2005 and who were deputed to the United States after January 1, 2002.

<sup>5</sup> Dkt. 255 at ¶¶34, 36, Ex. T. Tata produced 184 DTAs before, and 488 after, Plaintiffs’ reply  
 deadline, for a total of 672, or less than 25% of the DTAs Tata purportedly reviewed for the audit.  
 Moreover, of the audited DTAs produced by Tata, over 64% are from *outside* of the Class period  
 (that is, before 2002 or after 2005). Plaintiffs file concurrently with this reply brief a Notice of Errata

1 Tata improperly concealed and withheld the audit from discovery for years. Although Tata  
 2 conducted the audit after the filing of the complaint and before its Rule 26 disclosures, Tata failed to  
 3 produce it in its initial or revised disclosures,<sup>6</sup> in response to Plaintiffs' explicit document requests  
 4 relating to such audits,<sup>7</sup> and even in response to the Court's Order addressing audits.<sup>8</sup> Tata's failure  
 5 to include the audit in its disclosures prohibits Tata from relying on it here and subjects Tata to an  
 6 automatic sanction of evidence preclusion. *See* Rule 37(c)(1), *Hoffman v. Construction Protective*  
 7 *Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir. 2008); *Yeti by Molly, Ltd., v. Deckers Outdoor Corp.*, 259  
 8 F.3d 1101, 1106 (9th Cir. 2001). Tata also misled Plaintiffs and the Court regarding the existence of  
 9 the audit and the purported burden of collecting employee documents that *it had already collected*.<sup>9</sup>  
 10 Because Tata violated discovery and disclosure rules, the Court should strike evidence in the  
 11 Mukherjee declaration referring to the 2006 audit, including ¶¶7, 8, and 9 and Exhibit A thereto.

12 In addition, Tata mischaracterizes declarants' testimony, asserting that certain declarants  
 13 never entered into a DTA. Plaintiffs have responded to every such allegation (Shaver Decl., ¶45)  
 14 and have shown that the declarants uniformly testified that they signed a group of documents prior to  
 15 their deputation, even if they did not remember the documents' specific names. *See also* footnote  
 16 15, *infra*. Therefore, Tata has not presented any reliable evidence countering its admitted practice of  
 17 requiring deputees to sign DTAs during the Class period.

18 Tata attempts to undermine the validity of the U.S. compensation amount in its own DTAs in  
 19 three ways. First, Tata presents the September 15, 2011 Report of Bernard Siskin, a statistician with  
 20 no previous background in this case. The Court should not consider Siskin's report—and Plaintiffs  
 21 hereby object to it—because it is required no expert skill, is riddled with errors, and contains legal

---

22 correcting the title of Dkt. 255. Given the Court's Nov. 2 Order [Dkt. No. 261], Dkt. 255 should  
 23 have been filed in support of Plaintiffs' reply brief [Dkt. 257], and should be titled accordingly.

24 <sup>6</sup> *See* Dkt. 255, ¶3, Ex. B, ¶¶4, 5, Ex. C.

25 <sup>7</sup> *See* Dkt. 255, Ex. D, Request Nos. 6, 9, 24.

26 <sup>8</sup> *See* Dkt. 255, ¶¶6-24; Order, Dkt. 142 (finding that Plaintiffs' request for audits regarding TCS's  
 27 compliance with state and/or federal wage and hour laws "meet[s] the requirements of FRCP  
 26(b)(1)" and requiring Tata to produce "a privilege log for all documents subject to production . . .  
 over which they claim a privilege."); *See Akiona v. U.S.*, 938 F.2d 158, 160-61 (9th Cir. 1991)  
 (sanctions for evidence destruction include adverse inference regarding the evidence).

28 <sup>9</sup> *See* Dkt. 255, ¶16; Dkt. 168.

1 conclusions unhelpful to the Court and for which the expert is not qualified.<sup>10</sup> *See* Fed. R. Evid. 702.  
2 The report purports to contain “statistical analyses” of a sample of DTAs from 200 employees, but it  
3 amounts to no more than tallying up the number of DTAs that contain his subjectively-defined  
4 categories of compensation amount and dividing the tally into the total number of DTAs to derive a  
5 percentage for each category.<sup>11</sup> Such basic arithmetic is not properly the subject of expert testimony.  
6 *U.S. v. Castillo*, 924 F.2d 1227, 1232-33 (9th Cir. 1991). Moreover, the Siskin report is flawed and  
7 unreliable because, by his own admission, he failed to review 50 to 75 percent of the documents he  
8 purports to summarize; he miscoded, omitted, or failed to code many documents; and he did not  
9 restrict his analysis to the Class Period.<sup>12</sup>

10 In addition, Siskin opines on a matter well outside his expertise—the meaning of the  
11 contractual language in the DTA—and gives his subjective opinions based solely on his staff’s  
12 coding of a single term in the DTAs. Siskin’s opinions that (1) “no sufficiently common documents  
13 exist to permit a determination on a class-wide basis that TCS failed to pay compensation that was  
14 allegedly promised to the [Class]” and (2) the \$50,000 term “represents a ‘sample’ instruction, not an  
15 actual compensation amount” are not a proper subject for expert testimony because the Court is  
16 more than capable of both understanding the facts associated with the DTAs—all of which could be  
17 established by documentary evidence or lay testimony—and determining whether commonality  
18 exists. *Castillo*, 924 F.2d at 1232-33 (expert testimony does not involve a proper subject if the  
19 factfinder is “capable of comprehending the primary facts and of drawing correct conclusions from  
20 them”). In addition, Siskin cites no scientific methodology, academic literature, training, or  
21

22 <sup>10</sup> *See* Dkt. 255, Ex. A, 24:23-25:9, 25:20-21, 31:1-3, 41:22-24, 56:5-9, 56:16-20, 59:14-18, 64:16-  
65:2, 66:19-67:4, 67:9-17, 91:6-24, 98:20-99:4, 128:7-10, 128:11-20.

23 <sup>11</sup> *See* Dkt. 255, Ex. A, 56:5-9; 16-20.

24 <sup>12</sup> Dkt. 255, Ex. A, 59:14-18, 98:20-99:4, 128:7-10. Siskin admits the mistakes he made and attempts  
25 to correct them in his supplemental report, which Tata filed nearly six weeks after its opposition was  
26 due. Plaintiffs object to the supplemental report because it is untimely, improper, and suffers from  
27 the same deficiencies as his original report. *See Rojas v. Marko Zaninovich, Inc.*, 2011 WL  
28 4375297, \*6 (E.D. Cal. 2011) (refusing to consider supplemental expert report where expert  
submitted it after deposition exposed errors in data because the information was available to expert  
at the time of original report); *Sandata Techs., Inc. v. Infocrossing, Inc.*, 2007 WL 4157163, \*7  
(S.D.N.Y. 2007) (rejecting as untimely supplemental report that benefitted only the producing party).

1 experience that would allow him to make conclusions regarding commonality of documents or  
2 whether the \$50,000 amount is a “sample” instruction.<sup>13</sup>

3 Second, Tata points to the 2006 audit as evidence that not all DTAs listed a salary amount.  
4 This evidence is unreliable for the reasons stated above.

5 Third, Tata mischaracterizes declarants’ testimony, asserting that certain declarants testified  
6 that they never expected to receive the amount set forth in their DTAs. Defs.’ Opp. at 5-12.  
7 Plaintiffs have responded to every such allegation (Shaver Decl., ¶45) and have shown that reliance  
8 is not relevant to their claims. *See* Section II.A.1.d., *infra*. Tata has presented no reliable basis upon  
9 which the Court should disregard the plain terms of the DTAs.

10 Under California contract law that Tata has not questioned, the DTA’s terms govern its  
11 interpretation. Cal. Civ. Code § 1638; Dkt. 185 at 13-14 & n.17 (citing cases); *Northrop Grumman*  
12 *Corp. v. Factory Mut. Ins. Co.*, 563 F.3d 777, 783 (9th Cir. 2009). This is particularly true where, as  
13 here, Tata has drafted the standard, form employment contract. *See, e.g., Doe 1 v. AOL LLC*, 552  
14 F.3d 1077, 1082 n.10 (9th Cir. 2009) (ambiguous terms must be construed against the drafter);  
15 *Tahoe Nat’l Bank v. Phillips*, 4 Cal.3d 11, 20 (1971) (same).

16 Because the DTA language governing deputees’ compensation is identical, the Court can, in  
17 a class proceeding, determine the proper interpretation of this contract language for all deputees,  
18 regardless of the salary amount stated in the DTA—specifically, (1) does the promise of gross  
19 compensation in the U.S. “in addition to” Indian salary (hereinafter, the “In-Addition-To Provision”)  
20 mean that the employee should be paid *both* the Indian salary and the amount of the gross U.S.  
21 compensation? and (2) does the reference to “gross” compensation (hereinafter, the “Gross  
22 Compensation Provision”) mean that compensation withheld for taxes that is not needed for taxes  
23 should be returned to the deputees, or does this language support Tata’s position that it is entitled to  
24 any over-withheld taxes? The Court can and should decide these questions—which are critical to

25 \_\_\_\_\_  
26 <sup>13</sup> *Compare Harrison v. Howmedica Osteonics Corp.*, 2008 WL 906585, at \*14 (D. Ariz. 2008)  
27 (“bald assertion, without more” is not sufficient); *Williams v. Lockheed Martin Corp.*, 2011 WL  
28 2200631, at \*18-19 (S.D. Cal. 2011) (same) *with* Dkt. 255, Ex. A, 24:23-25:9; 25:20-21; 31:1-3  
(conceding that he has no law degree and is neither a labor economist nor a contract law expert);  
103:3-9, 91:6-24 (conceding that typed \$50,000 term in DTA was *not* a sample instruction).

1 establishing a classwide breach of contract—for all Class members because this language is  
2 contained in all Class members’ DTAs.<sup>14</sup>

3 As Judge Whyte held in *Ewert v. eBay, Inc.*, a standardized agreement like the DTAs should  
4 be “interpreted wherever reasonable as treating alike all those similarly situated, without regard to  
5 their knowledge or understanding of the standard terms of the writing.” 2010 WL 4269259 \*7 (N.D.  
6 Cal. Oct. 25 2010) (internal quotation marks omitted). In construing it, the Court should “seek to  
7 effectuate the *reasonable expectations* of the *average member* of the public who accepts it.” *Id.*  
8 (emphasis added). As such, the Court can interpret the DTA language for all Class members  
9 regardless of their individual circumstances. *See Berrien v. New Raintree Resorts Intern.*, 2011 WL  
10 3607197 (N.D. Cal. 2011) (Wilken, J.) (no need to conduct individual inquiries).

11 **b. Tata’s Indian Salary Deduction Policy Was Uniform**

12 It is undisputed that until July 2005, Tata’s standard company practice was to deduct  
13 deputees’ Indian salary from the compensation they were paid in the United States. *See Shaver*  
14 *Decl.*, Ex 38 at Tr. 157:11-24 (corporate designee testifying that deducting Indian salary from U.S.  
15 pay was company practice); Declaration of Anne B. Shaver In Support of Plaintiffs’ Motion for  
16 Class Certification (Dkt. 190), ¶8 (100% of 125 sets of earnings statements show Indian salary  
17 deduction). Moreover, after examining Plaintiff Vedachalam’s DTA (which, like all DTAs,  
18 contained the In-Addition-To Provision), this Court stated that “[n]othing in Vedachalam’s  
19 employment contracts suggests that his Indian salary could be deducted from his United States  
20 paychecks.” Dkt. 215 at 11. Tata has not disputed the Court’s conclusion or contested that Indian  
21 salary was deducted from Class members’ U.S. paychecks. Thus, the only question remaining—  
22 whether the Indian salary deduction constitutes a breach of the DTAs—“[will] generate [a] common  
23 answer[] apt to drive the resolution of the litigation.” *Dukes*, 131 S. Ct. at 2551.

24  
25 <sup>14</sup> The interpretation of a form contract is particularly appropriate for class treatment because such  
26 contracts should be interpreted uniformly for all who signed the agreement. *See Klay v. Humana,*  
27 *Inc.*, 382 F.3d 1241, 1263 (11th Cir. 2004) (“claims arising from interpretations of a [...] form  
28 contract appear to present the classic case for treatment as a class action, and breach of contract cases  
are routinely certified as such”); *Discover Bank v. Sup. Ct.*, 36 Cal. 4th 148, 157 (2005) (*overruled*  
*on other grounds by AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011)) (same).

1                                    **c.     Tata’s Tax Refund Recoupment Policy Was Classwide**

2             Tata’s policy of tax refund recoupment cannot be reasonably disputed. As conceded by  
 3 Tata’s corporate designee, the standard company policy during the Class period was to require  
 4 deputees to endorse and return their tax refund checks. Shaver Decl., Ex. 38 at Tr. 153:15-18  
 5 (“[O]nce the refund checks are received by the company, we would send it out to the employees with  
 6 a cover note requesting them to endorse the checks and send it back.”); *see* footnote 3, *supra*.

7             Commonality is satisfied because Plaintiffs’ common contention—that the DTA promised  
 8 *gross* compensation and that Tata’s tax refund policy was contrary to the DTA—is “of such a nature  
 9 that it is capable of classwide resolution . . . [because] determination of its truth or falsity will resolve  
 10 an issue that is central to the validity of each one of the claims in one stroke.” *Dukes*, 131 S. Ct. at  
 11 2551. In one stroke, the Court can determine (1) whether under the Gross Compensation Provision,  
 12 deputees are entitled to a gross or net salary and thus whether the deputees or Tata is entitled to over-  
 13 withheld taxes; and (2) whether Tata’s tax refund policy constituted a breach of the DTA’s terms.

14                                    **d.     Resolution Of Tata’s Common, Merits-Based Defenses Will**  
 15                                    **Depend On The Answers To Common Questions**

16             Tata argues that some Class members’ testimony indicates that they did not rely on the plain  
 17 terms of their DTAs and instead believed they would receive a smaller, net amount. This argument  
 18 does not assist Tata because reliance is *not* an element of Plaintiffs’ contract claim; rather, the plain  
 19 terms of the DTA govern its interpretation. Cal. Civ. Code § 1638; Dkt. 185 at 13-14 & n.17 (citing  
 20 cases); *Northrop Grumman*, 563 F.3d at 783. In addition, the testimony cited by Tata merely reflects  
 21 Class members’ recognition that they and their colleagues received a lower-than-promised amount—  
 22 not that they did not consider the plain terms of their DTA to be enforceable. Shaver Decl., ¶45.

23             Indeed, contrary to Tata’s contention that the deposition testimony undercuts commonality,  
 24 the deponents’ testimony is consistent. All of the deponents testified to: (1) signing Tata’s standard  
 25 employment contracts prior to deputation (although some could not remember the names of those  
 26 documents);<sup>15</sup> (2) a standard tax recoupment policy;<sup>16</sup> and (3) a standard Indian salary deduction

27 <sup>15</sup> *E.g., id.*, Ex 1 at Tr. 30:3-33:4; Ex 2 at Tr. 30:18-31:10; Ex 3 at Tr. 33:12-37:17, 37:18-40:22; Ex  
 28 5 at Tr. 101:3-108:18, 119:17-133:22; Ex 6 at Tr. 34-48, 59; Ex 11 at Tr. 98:12-103:6; Ex 12 at Tr.  
 52-55, 69, 85; Ex 15 at Tr. 50:22-51:18, 58:6-59:25; Ex 18 at Tr. 9:1-33:5, 91:7-11; Ex 21 at Tr. 27-

1 policy.<sup>17</sup> In addition, many deponents detailed how Tata listed an incorrect number of tax  
 2 exemptions on their wage statements.<sup>18</sup>

3 Even if the Court found Tata's reliance-based evidence relevant to a purported mutual  
 4 mistake defense, courts often find certification is nonetheless appropriate because reliance can be  
 5 determined on a classwide basis when a form contract of adhesion such as the DTA is involved.<sup>19</sup>  
 6 *See, e.g., Johnson v. General Mills, Inc.*, 2011 WL 4056208, at \*3 (C.D. Cal. 2011) ("The Ninth  
 7 Circuit explicitly recognized in *Ticketmaster* that California law permits a court to try, and a class to  
 8 establish causation/reliance as a common issue by inference").<sup>20</sup> In *Johnson*, evidence that some  
 9 consumers did not rely on the allegedly false advertisements did not, as a matter of law, contradict a  
 10 finding that a reasonable consumer would attach importance to such information. *Id.* Here, too,  
 11 even if individual Class members disavowed the plain terms of their standardized DTAs, the Court  
 12 can still certify a class based upon the DTAs' terms and the required presumptions under California  
 13 contract law governing contracts of adhesion.

## 14 2. Plaintiff Vedachalam And Beri's Claims Are Typical

### 15 a. Vedachalam And Beri Are Typical Of Class Members Both With 16 And Without A Specific Salary Term In Their Uniform DTAs

17 Plaintiffs' claims are typical of Class members because they suffered the same injury from

---

18 29, 55-56, 60; Ex 22 at Tr. 63:12, 114:10; Ex 23 at Tr. 33:13-34:24, 58:24-59:9, 95:22-96:4; Ex 26  
 at Tr. 65:18-24, 81:24-82:6; Ex 27 at Tr. 45:7-53:6; Ex 30 at Tr. 63-64, 67-71, 91-92.

19 <sup>16</sup> *E.g., id.*, Ex 2 at Tr. 60:21-61:6, 84:7-11, 84:12-23, 110:10-19, 112:5-7, 115:21-24, 118:1-8,  
 119:25-120:11; Ex 3 at Tr. 61:11-65:17; Ex 5 at Tr. 78:22-85:8, 97:13-97:24; Ex 6 at Tr. 30-31, 36,  
 20 77-83, 85-89, 92-102, 109-113, 126-132; Ex 11 at Tr. 185:12-188:15, 191:8-193:6, 193:13-194:4;  
 Ex 12 at Tr. 96-108, 140-150; Ex 15 at Tr. 99:11-16, 102:17-103:5, 111:12-113:15, 122:11-126:9;  
 21 Ex 21 at Tr. 33, 46-55, 89-94, 139-146, 148-151; Ex 22 at Tr.157, 162, 167-168; Ex 23 at Tr.134:20-  
 139:13; Ex 26 at Tr.110:25-114:2, 118:17-126:18; Ex 27 at Tr.190:4-14; Ex 30 at Tr.119-129.

22 <sup>17</sup> *E.g., id.*, Ex 3 at Tr. 72:4-77:22; Ex 5 at Tr. 119:17-133:22; Ex 6 at Tr. 76-77, 90-91, 116-120,  
 122-126; Ex 11 at Tr. 131:20-133:20, 161:3-13; Ex 12 at Tr. 136-139; Ex 18 at Tr. 202:12-209:16;  
 23 Ex 22 at Tr. 68, 183-184; Ex 23 at Tr. 139:19-143:23; Ex 26 at Tr. 54:9-22, 95:7-105:19, 104:18-25;  
 Ex 27 at 101:6-106:6, 110:23-119:12; Ex 30 at Tr. 45-47, 74-80, 101-102.

24 <sup>18</sup> *E.g., id.*, Ex 1 at Tr. 76:10-80:2; Ex 3 at Tr. 122:2-123:21; Ex 5 at Tr. 204:18-25; Ex 6 at Tr. 32-  
 34, 84-85, 140; Ex 11 at Tr. 57:5-17; Ex 27 at Tr. 10:3-8.

25 <sup>19</sup> Moreover, the existence of a common defense further supports certification here. *See, e.g., Brooks*  
 26 *v. Williams Tank Lines*, 2011 U.S. Dist. LEXIS 51982, \*9 (N.D. Cal. 2011) (employer's defense also  
 "presents a common question to all proposed class members").

27 <sup>20</sup> *See also McGhee v. Bank of America*, 60 Cal.App.3d 442, 449-50 (1976) (holding that it would be  
 28 error to deny certification based on purported individualized interpretations of adhesive contracts;  
 court should grant certification and resolve any ambiguities against the drafter).

1 Indian salary deductions and tax refund recoupment. Tata’s reliance on *Broussard v. Meineke Disc.*  
2 *Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998), is misplaced. There, substantive differences  
3 between contracts raised interpretive issues regarding liability that are not implicated by the  
4 standardized DTAs here. *Broussard* emphasized that “the cornerstone of plaintiffs’ contract case  
5 was language that appeared only in some versions of” multiple agreements. *Id.* at 336, 340 (half  
6 authorized the defendant to use a pooled account to purchase advertising, a quarter indicated another  
7 source, and others “rais[ed] a wholly distinct set of interpretive issues.”).

8 By contrast, Tata used a single form DTA with uniform contract language for all Class  
9 members. Unlike the contracts in *Broussard*, no DTAs contain *any* language authorizing the  
10 wrongful deductions. As noted above, a classwide determination on the Gross Compensation and  
11 In-Addition-To Provisions will not depend on the only variation that exists among any of the  
12 DTAs—the specific amount of the salary term. The salary terms for Beri (“\$50,000”) and  
13 Vedachalam (“\_\_\_\_\_”) do not affect the interpretation of what it means to pay Indian salary “in  
14 addition to” U.S. salary or to pay “gross compensation.” Instead, these terms relate solely to the  
15 amount of damages resulting from a breach of the contract. *Newberg on Class Actions*, § 3:16 (4th  
16 ed. 2002) (courts reject argument that differences in damages make plaintiff’s claim atypical); *see*  
17 *also Lopez*, 2010 U.S. Dist. LEXIS 95636, \*18-19 (Plaintiffs’ claims typical even though each  
18 plaintiff received a refund in differing amounts).<sup>21</sup>

19 Even if the Court concluded that the presence or absence of a particular salary amount were  
20 germane to typicality, then Beri and Vedachalam would be typical of Class members both with and  
21 without a specific salary term in their otherwise standard, uniform DTA. If the Court wishes to do

22 \_\_\_\_\_  
23 <sup>21</sup> *Bower v. Bunker Hill Co.*, 114 F.R.D. 587, 593 (E.D. Wa. 1986), rejected the argument made here  
24 by Tata -- that typicality was defeated by the existence of seven different contracts -- because each of  
25 the seven agreements contained *identical language* regarding the insurance benefits at issue even if  
26 the duration of benefits was ambiguous. Here, the existence of otherwise-identical DTAs with and  
27 without specific salary terms is analogous to the *Bower* contracts containing identical benefit  
28 language with variations in the benefit duration term. *Id.* at 593; *see also Gutierrez v. Wells Fargo*  
*Bank, N.A.*, 730 F. Supp. 2d 1080, 1134 (N.D. Cal. 2010) (“class-wide misrepresentation claims . . .  
and the exact documents they pertain to” need not “be surgically and precisely limited to those  
asserted by the class representative”); *Greenwood v. Compucredit Corp.*, 2010 U.S. Dist. LEXIS  
3839, at \*12 (N.D. Cal. 2010); *Siemer v. Assocs. First Capital Corp.*, 2000 U.S. Dist. LEXIS 21244,  
\*22-23 (D. Ariz. 2000) (breach of contract claims typical, though not all class members read form  
contract, and numerous contract versions existed).

1 so, it has discretion to create subclasses for employees with and without a specific DTA salary  
 2 amount, which Beri and Vedachalam, respectively, can represent. *See* Fed. R. Civ. P. 23(c)(5);  
 3 *Siemer*, 2000 U.S. Dist. LEXIS 21244, at \*38, n.17 (breach of contract claims were typical, but if the  
 4 Court later determined that the representative’s claims are not typical of all class members, the Court  
 5 may divide class into sub-classes and appoint an appropriate representative).<sup>22</sup>

6 **b. Defenses Against Beri Do Not Defeat Typicality, And Evidence**  
 7 **Shows That Tata’s Mutual Mistake Defense Is Not Viable**

8 Defenses asserted against a class representative generally do not make her claims atypical.  
 9 *Burdick v. Union Sec. Ins. Co.*, 2008 U.S. Dist. LEXIS 108616, at 10-11 (C.D. Cal. 2008); *Newberg*,  
 10 § 3:16. Defenses to the class representative’s claims will defeat certification only if “there is a  
 11 danger that absent class members will suffer if their representative is preoccupied with defenses  
 12 unique to it . . . .” *Hanon v. Dataproducts Corp.*, 976 F. 2d 497, 508-509 (9th Cir. 1992).<sup>23</sup> There is  
 13 no basis for such a finding here. Beri does not possess a “unique background and factual situation”  
 14 as in *Hanon*; like all Class Members, Beri received a standard DTA and was subjected to Tata’s  
 15 uniform practices of Indian salary deduction and tax refund recoupment. *Cf. Hanon*, 976 F. 2d at  
 16 508. Further, Tata admits that it will assert against other Class members the same mutual mistake  
 17 defense it asserts against Beri, making potential defenses against her typical of those against other  
 18 Class members. *See* Defs.’ Opp. Brief at 21, 26. To the extent Tata asserts that its defense will  
 19 require individualized inquiries, it relies on misleading deposition excerpts which are contradicted  
 20 when put in the context of complete testimony.<sup>24</sup>

21 <sup>22</sup> The Court likewise has discretion to limit the Class to persons for whom Tata still has copies of  
 22 their DTAs, although such a limitation is both unnecessary and unfair to these Class members  
 23 because the evidence indicates (1) that Tata’s practice was to require all deputies to sign DTAs  
 24 during the Class Period (*see* Shaver Decl., Ex. 37 at Tr. 143:8-144:12, 153:16-156:18; Hearing Tr. at  
 25 4); and (2) Tata itself is responsible for the lost DTAs, as demonstrated by its failure to maintain or  
 locate over 75% of the 2,700 DTAs that it admittedly reviewed as part of the audit it performed for  
 this case. Dkt. 255, ¶34, Ex. T. Class Members should not be deprived of a claim simply because  
 Tata lost or destroyed their DTAs—especially because such loss or destruction may have occurred  
 after the filing of this lawsuit, as is the case with 75% of the DTAs included in the 2006 Audit. *See*,  
 e.g., *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (spoliation is “willful” if party has  
 notice that documents were potentially relevant before they were destroyed.).

26 <sup>23</sup> *See also In re Juniper Networks Secs. Litig.*, 264 F.R.D. 584 (N.D. Cal. 2009) (evidence  
 27 insufficient to show plaintiffs would be preoccupied with defense and did not defeat typicality).

28 <sup>24</sup> *See* Defs.’ Opp. at 21 (some declarants “admit that [\$50,000] is not their intended compensation”).  
 However, as shown in ¶45 of the Shaver Decl., declarants whose testimony Tata relies upon: (a) only

1           **B.     The National Class Satisfies Rule 23(b)(3)**

2           The common questions that establish commonality under Rule 23(a) also establish  
3 predominance under 23(b)(3)—namely, the questions of the proper interpretation of the In-Addition-  
4 To and Gross Compensation Provisions which will govern whether (a) deputees’ Indian salary may  
5 be deducted and (b) any over-withheld taxes belong to the deputees rather than Tata. In addition,  
6 through the contract interpretation, the Court can determine a uniform formula for determining the  
7 amount of damages suffered by Class members for any breach of contract.

8           **1.     Tata’s Form Contracts Make Common Issues Likely To Predominate**

9           Tata does not contest the line of cases holding that common issues are likely to predominate  
10 if the Court finds that a form contract exists. *See* Pls.’ Class Cert. Motion at 9-11, 13, & n.12-13.  
11 Instead, Tata argues that no form contract exists because the specific compensation amount in the  
12 DTA varies (though there are, at most, only four such variations). Defs’ Opp. Brief at 9. Tata fails  
13 to acknowledge, however, that *all* of the other contract language dealing with compensation—  
14 including the critical In-Addition-To and Gross Compensation Provisions—is identical. As such, the  
15 Court can interpret for all Class Members the identical compensation language without any need for  
16 individualized inquiries into specific compensation amounts.

17           Plaintiffs propose that the Class trial<sup>25</sup> regarding the contract claim proceed as follows: in an  
18 initial trial phase (Phase I), the Court decides two key contract interpretation questions. First, does  
19 the In-Addition-To Provision mean that Class Members should be paid two separate amounts—their  
20 U.S. compensation and their Indian salary? Second, under the Gross Compensation Provision, are  
21 Class Members entitled to a *net* salary on top of which Tata pays taxes (as Tata has asserted

---

22  
23 learned they would receive an amount other than the DTA salary term after coming to the U.S.;  
24 and/or (b) only heard this from friends or colleagues, not Tata supervisors. *See, e.g.*, Shaver Decl.,  
25 Ex 8 at Tr. 145:4-146:7 (refuting Tata’s false assertion that deponent knew would receive a net  
26 month allowance) (“[Y]ou understood when you arrived in the U.S., you were receiving a net  
27 allowance on a monthly basis, correct? A. I understood that I am going to get a salary, but salary as  
28 mentioned in my visa petitions, but when I saw the actual numbers that were there on the pay stub,  
that was inconsistent. So is that, does that answer your question? Q. No. You understood when you  
arrived in the U.S. that you were to receive \$2750 into your bank account, correct? A. No, I do not  
know that I have to get 2,750. That was not mentioned anywhere.”)

<sup>25</sup> *See* Plaintiffs’ Proposed Trial Plan (Dkt. 259), submitted herewith.

1 throughout this litigation), or are they instead entitled to *gross* compensation such that over-withheld  
 2 taxes should be returned to them? Because the Gross Compensation and In-Addition-To Provisions  
 3 are identical in all DTAs, the Court can interpret this language once and for all Class Members.

4 If Plaintiffs' contract interpretation is found to be correct, the class trial will proceed to  
 5 determine if Tata's Indian salary deduction and forced tax refund recoupment constitute breaches of  
 6 the DTA. Because of the uniformity of both the DTA language and the company-wide practices,  
 7 breach can be determined on a classwide basis without regard to the specific compensation amounts.  
 8 In *Berrien*, 2011 WL 3607197, \*5-6, this Court considered a claim of intentional interference with  
 9 contractual relations that included breach of contract as an element. Like Tata, the *Berrien*  
 10 defendant asserted the need for "individualized inquiry" into whether each class member discussed a  
 11 special assessment with the defendant's representative. *Id.* The Court found that the agreements did  
 12 not contain any language regarding special assessments and therefore found "an individualized  
 13 inquiry involving extrinsic evidence, such as sales representatives' statements, is not necessary." *Id.*  
 14 Similarly, because nothing in the DTAs' terms allows Tata to deduct deputees' Indian salaries or  
 15 recoup their tax refunds, there is no need to conduct an individualized inquiry regarding the parties'  
 16 intent in order to determine whether a breach occurred. The promised compensation amount—relied  
 17 upon by Tata to assert that individual issues predominate—relates only to the *amount* of damages  
 18 suffered from any such alleged breaches. The amount of such damages suffered by Class members  
 19 (if any) can be determined in the second phase of the trial (Phase II), as described below.<sup>26</sup>

20 Tata identifies four variations in DTA compensation amounts: (1) \$50,000, (2) \$\_\_\_\_\_  
 21 (\$50,000), (3) \$45,000 (\$50,000), and (4) \$\_\_\_\_\_.<sup>27</sup> Dkt. 243 at 9. After trial Phase I determines  
 22 the interpretation of the DTAs' uniform provisions, Phase II will determine how to interpret these  
 23 four variations. For example, Tata promised Class members in the first three categories a specific

24 <sup>26</sup> Plaintiffs here propose Phase II of the trial as a workable means of calculating the damages for any  
 25 contract breach; if, however, the Court concluded that it needed to determine the compensation  
 26 amounts of the DTAs in order to decide *whether* a contract breach occurred, the Court could do so  
 27 efficiently using the same process described below for Phase II.

28 <sup>27</sup> Tata's suggestion that these variations negate the existence of a form contract is based on  
 inapposite cases like *Sacred Heart, infra*, where, unlike here, there were dozens of contractual  
 variations and no overarching questions of contract interpretation that could be decided at a class  
 proceeding for all Class members. *See* Defs.' Opp. at 22.

1 dollar amount. The first and second categories list a \$50,000 amount and identify no other amount.  
 2 As to the third category, Plaintiffs will stipulate that the contemporaneous, written-in amount is the  
 3 agreed-upon salary. Because there is no ambiguity with regard to the amount promised in these  
 4 three categories, the Court can interpret the agreement without the need to admit any extrinsic  
 5 evidence.<sup>28</sup> Cal. Civ. Code § 1638 (“The language of a contract is to govern its interpretation”);  
 6 Dkt. 185 at 13-14 & n.17 (citing cases); *Northrop Grumman*, 563 F.3d at 783.<sup>29</sup>

7 Although the compensation amount for the minority of deutees in the fourth category (*e.g.*,  
 8 those with blanks in the compensation amount) is ambiguous, these amounts, and the compensation  
 9 amounts for Class members no longer having a DTA, can also be determined in a classwide  
 10 proceeding. Tata admitted that it provides U.S. salary information on a visa questionnaire “because  
 11 we want employees to know what salary you get.” Shaver Decl., Ex 37 at Tr. 181:12-21. The visa  
 12 petition identifies a U.S. salary to the U.S. government under penalty of perjury. Predominance is  
 13 satisfied in contract cases where, as here, extrinsic evidence can be considered on a classwide basis.  
 14 *See, e.g., Menagerie Prods. v. Citisearch*, 2009 U.S. Dist. LEXIS 108768, at \*37 (C.D. Cal. 2009).  
 15 Plaintiffs can present this evidence during Phase II as well as expert testimony based on a statistical  
 16 sample of DTAs regarding the percentage of the lost or destroyed DTAs that likely contained each  
 17 type of U.S. salary amount. In response, Tata may present extrinsic evidence or expert testimony to  
 18 support its position that deutees are instead entitled to the “net monthly allowance in the U.S. based  
 19 on where they were being deputed.” Dkt. 243 at 9.<sup>30</sup>

20 \_\_\_\_\_  
 21 <sup>28</sup> For all DTAs with specific salary amounts of \$50,000 or some other specific amount, the plain  
 22 terms of the contract govern. Tata concedes that such persons have a “reliable, intended, and agreed  
 23 compensation amount.” Dkt. 243 at 17; *see also* Shaver Decl. Ex. 39 at Tr. 103:3-9 (Bernard Siskin  
 24 deposition). Tata also concedes that the majority of Class members fall into these three categories.  
 25 Mukherjee Decl. (Dkt. 245), ¶9, Ex. A (concluding that majority of DTAs list a salary amount);  
 26 Siskin Supplemental Report (Dkt. 252), Chart 2 (same).

27 <sup>29</sup> Tata erroneously relies on *Fireman’s Fund Ins. Co. v. Nat’l Bank for Coops*, 849 F. Supp. 1347,  
 28 1364 (N.D. Cal. 1994), which actually supports Plaintiffs’ position. Although the court found  
 conflicting provisions in the contract that created ambiguities, it held that such ambiguities should be  
*construed against the drafter. Id.* at 1364, 1365. *Fremont Indem. Co. v. Fremont Gen. Corp.*, 148  
 Cal.App.4th 97 2007, is distinguishable because it addresses how to interpret contracts which are  
 reasonably susceptible to more than one interpretation. Only the fourth category here is ambiguous  
 in this way. Such ambiguity can be resolved as described below in Section II.E.

<sup>30</sup> For Class Members in this fourth category who signed an Authorization for Payroll Deduction  
 (“APD”), Tata may also produce the APD as alternative evidence of what they should have been

1 Accordingly, the first two phases of the trial will determine the interpretation of the DTAs'  
 2 terms, whether Tata has breached the DTAs through its company-wide policies, and the specific  
 3 amounts Tata owes Class members under the DTAs. During Phase II, damages resulting from any  
 4 breach may also be determined. If Plaintiffs' interpretation of the DTA provisions is deemed  
 5 correct, damages may be calculated as the gross amount paid to Class Members *minus* the amounts  
 6 (improperly) deducted for Indian salary and *minus* the amounts (improperly) collected by Tata in tax  
 7 refunds. The difference between this amount (the amount paid) and the amount owed under the  
 8 DTA is the amount of the damages. If the amount paid was *more* than the amount owed under the  
 9 DTA, there are no damages owed to that Class member.

## 10 **2. Tata's Standard (and Admitted) Tax Refund Recoupment Policy**

11 Tata's argument that individual issues predominate because "there is not a uniform policy or  
 12 practice regarding tax refunds" (Defs.' Opp. at 24) is contrary to the evidence. Tata's 30(b)(6)  
 13 witness confirmed that its tax refund recoupment policy was the company's standard practice.  
 14 Shaver Decl., Ex 38 at Tr. 153:15-18 ("[O]nce the refund checks are received by the company, we  
 15 would send it out to the employees with a cover note requesting them to endorse the checks and send  
 16 it back."). Moreover, since this litigation began in 2006, Tata has consistently taken the position that  
 17 this practice was lawful because Tata paid the taxes for its deputees.<sup>31</sup>

18 Tata now attempts to disown its admitted policy on the grounds that some employees did not  
 19 comply with it. This fails for two reasons. First, most of Tata's examples of non-compliance are  
 20 misleading or inaccurate.<sup>32</sup> Second, even if some Class members retained their tax refunds for  
 21 certain years, isolated incidents of non-compliance with a standard policy do not defeat

---

22 paid. APDs, however, are extrinsic evidence that would *not* be considered in determining the first  
 23 three categories of compensation amounts for the reasons described below in Section II.B.4.

24 <sup>31</sup> See, e.g., Footnote 3, *supra*; Defs' Mot. to Dismiss at 15 (Dkt. 117) (arguing that Plaintiffs agreed  
 to return tax refunds to Tata because a company manual explained that Tata pays the taxes).

25 <sup>32</sup> For example, Tata recites Vivekanand Vemunoori's testimony that he deposited his 2003 refund  
 26 check into his own account. Defs.' Opp. 14. The full transcript shows, however, that he had stopped  
 27 working for Tata by the time he received this check at his home in India, and during his deputation  
 he always endorsed his refund checks to Tata. Shaver Dec., Ex. 34 at Tr. 128:10-18. He also  
 28 testified that his Tata manager in the U.S. told him, "this is [the] company's money, so you have to  
 sign it." *Id.* at 130:12-131:4. The other examples of supposed non-compliance with this policy are  
 similarly inaccurate or misleading, as set forth in the Shaver Decl., ¶45.

1 predominance; at most, such circumstances relate to variations in damages. As Judge Patel has  
 2 noted, “courts’ discomfort with individualized liability issues is assuaged in large part where the  
 3 plaintiff points to a specific company-wide policy or practice that allegedly gives rise to consistent  
 4 liability.” *Kurihara*, 2007 U.S. Dist. LEXIS 64224 at \*28. The court rejected the defendant’s  
 5 attempt to defeat predominance by showing instances of non-compliance with a uniform policy:

6 [D]efendants’ assertions regarding the failure of its employees to properly  
 7 implement the company’s standard policies do not convince the court that  
 8 substantial variations exist. Where a plaintiff challenges a well-established  
 company policy, a defendant cannot cite poor management to defend against class  
 certification.

9 *Id.* at \*30.<sup>33</sup> The same holds true here.<sup>34</sup>

### 10 **3. Tata’s Standard Indian Salary Deductions**

11 As set forth in section II.A.1., *supra*, the parties do not dispute that the DTA uniformly  
 12 promises U.S. compensation “[i]n addition to” Indian compensation. *See* Defs’ Reply In Support of  
 13 Summary Judgment (Dkt.179) at 4 (quoting paragraph 4(B)-(D) and stating “there is no dispute that  
 14 the contracts state that a deputed employees total gross pay would include both the Indian and U.S.  
 15 compensation.”). Moreover, Tata has presented *no evidence* disputing that Indian salary was  
 16 deducted from Class members’ U.S. paychecks. A Class trial will resolve for all Class members the  
 17 proper interpretation of this language and the effect of these deductions on Class members.

### 18 **4. Common Issues Of Uniform Contract Interpretation Predominate** 19 **Over Any Defenses To Certain Class Members’ Claims**

20 In contesting predominance, Tata argues that individual issues predominate because it may

21 <sup>33</sup> *See also Gutierrez*, 2004 U.S. Dist. LEXIS 29476 at \*28 (predominance despite need for  
 22 individualized damage determinations); *Lopez*, 2010 U.S. Dist. LEXIS 95636 at \*24-25 (same).

23 <sup>34</sup> Tata’s cited authority is inapposite. In *Helms v. Alderwoods Grp., Inc.*, 2009 U.S. Dist. LEXIS  
 24 123527 (N.D. Cal. 2009), the plaintiffs were unable to set forth common proof of the alleged  
 25 uniform employment policies. Instead, the certification briefing devolved into a battle of  
 26 declarations as to whether the policies existed or not. *Id.* at \*7-22, 36. By contrast, Tata’s tax refund  
 27 policy is not in dispute—Tata argues only that some deputees on occasion did not comply with it.  
 28 *Babineau v. Federal Express Corp.*, 576 F.3d 1183 (11th Cir. 2009), is also distinguishable because  
 plaintiffs there did not challenge defendant’s uniform policy of only paying employees for published  
 shift times. Instead, plaintiffs asserted commonality based on the lack of enforcement of that policy.  
*Id.* at 1191. The court found it could not determine on a classwide basis whether employees actually  
 worked before or after shift times. *Id.* This Court will not need to make any such individualized  
 inquiries here. The question of the policy’s legality predominates over individual damages issues  
 caused by isolated instances of non-compliance with it.

1 raise affirmative defenses against certain Class members. Courts, however, are reluctant to deny  
2 certification simply because affirmative defenses may be available against certain class members and  
3 will usually certify 23(b)(3) classes where common issues otherwise predominate.<sup>35</sup> In that vein,  
4 this Court recently held that affirmative defenses based on some Class members' signed releases did  
5 *not* raise issues that predominated over the common issue of defendants' liability to the class.  
6 *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 681 (N.D. Cal. 2011) (Henderson, J.). Judge  
7 Henderson also found that he could create a subclass if the defendant determined how many class  
8 members were subject to a possible bona fide error defense. *Id.*

9 The Eleventh Circuit decision Tata cites (*Sacred Heart Health Sys. v. Humana Military*  
10 *Healthcare Servs.*, 601 F.3d 1159, 1183 (11th Cir. 2010)) is distinguishable because it involved at  
11 least 33 different contracts with liability provisions that were "anything but uniform," and that would  
12 require evaluation of "significant quantities of individualized extrinsic evidence associated with  
13 [ratification and waiver affirmative defenses]." *Id.* at 1171, 1183. Further, the plaintiffs provided no  
14 analysis of the "considerable variation in the [six] state law[s] under which any extrinsic evidence  
15 would have to be scrutinized" relative to affirmative defenses. *Id.* at 1180. Notably, the court  
16 suggested that "to create subclasses corresponding to different variants of the payment clauses"  
17 could ensure predominance, were it not for the impossibility of conforming those subclasses to the  
18 division of states' laws. *Id.* at 1183.

19 Here, this Court's resolution of the predominant, common questions—the proper  
20 interpretation of the In-Addition-To and Gross Compensation Provisions and whether Tata's  
21 standard practices breached these provisions—will drive the resolution of Tata's liability to the  
22 Class. To the extent Tata needs to rely on extrinsic evidence for their defenses as to "certain [Class]

23 <sup>35</sup> *Smilow v. Southwestern Bell Mobile Sys.*, 323 F.3d 32, 39-40 (1st Cir. 2003); *Rodriguez v. ACL*  
24 *Farms, Inc.*, 2010 U.S. Dist. LEXIS 125580, 6-7 (E.D. Wash. 2010) ("the fact that affirmative  
25 defenses may be available against certain . . . class members does not defeat class certification"); *see*  
26 *also In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 138-40 (2d Cir. 2001) (overruled  
27 on other grounds); *Cameron v. E. M. Adams & Co.*, 547 F.2d 473, 478 (9th Cir. 1976)  
28 (decertification order reversed in part because individual statute of limitations defenses did not  
defeat predominance). If evidence later shows that an affirmative defense is likely to bar claims  
against some class members, then a court "has available adequate procedural mechanisms,"  
including creating separate subclasses. *Smilow*, 323 F.3d at 39-40; *Winkler v. DTE, Inc.*, 205 F.R.D.  
235, 242 (D. Ariz. 2001) ("consideration of counterclaims against individual class members may be  
more appropriately handled after liability has been determined").

1 Members,” such evidence will be far more limited and manageable than in *Sacred Heart*, where 33  
2 different liability provisions and six states’ laws were at issue. *See id.* at 1171, 1183.

3 Moreover, as indicated above, the Court can efficiently deal with the small “variants of the  
4 payment clauses” in the otherwise-uniform DTAs. *See Sacred Heart*, 601 F. 3d at 1183. There are,  
5 in essence, only two variations in the DTA salary terms: (1) blank salary term; and (2) term with  
6 stated salary amount. The Court need only address these differences *after* Phase I of the Class trial,  
7 when it has interpreted the uniform compensation provisions that apply to all Class members. As  
8 noted above, at Phase II, for the subset of Class members with a blank salary term, the Court can  
9 consider Class members’ visa petitions (which all Class members have) as well as extrinsic evidence  
10 Tata wishes to present on this issue, and determine for this subset of Class Members the amount of  
11 salary they were owed under the DTA.

12 As described above in Section II.A.1.a., Tata’s reliance on the opinions of Dr. Siskin or the  
13 2006 audit is misplaced for several reasons. Both types of evidence are unreliable and should not be  
14 considered here. In addition, Tata’s argument that it must search for APDs to support its defense  
15 that a depute “acknowledged that he or she would receive ‘Net Take Home Pay’” is unpersuasive.  
16 As Plaintiffs note above, the APDs are largely irrelevant because the DTA and Deputation  
17 Agreement—not APDs—“govern and apply to the Deputation.” Dkt. 243 at 26; Hutchinson Decl.,  
18 Exs. 1-6, at 1. The only possible exception might be where there is a blank salary term, but even  
19 then it is unlikely that APDs will assist Tata, as the number of Class members who signed APDs is  
20 likely very small. Out of the 43 declarants, Tata produced only two APDs that were signed during  
21 the Class Period. *See* Dkt. 246, Exs. AJ, BW.

## 22 **5. Individual Damages Calculations Do Not Defeat Predominance**

23 Tata’s argument that the possibility of individualized damage calculations defeats  
24 predominance is unavailing. It is well-settled that “[t]he amount of damages is invariably an  
25 individual question and does not defeat class action treatment.” *Yokoyama v. Midland Nat’l Life Ins.*  
26 *Co.*, 594 F. 3d 1087, 1094 (9th Cir. 2010) (internal citations omitted). *Yokoyama* held that class  
27 issues predominated despite the complexity of individualized damages calculations. *Id.* at 1094  
28 (citing *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)); *see also Stearns v. Ticketmaster*

1 *Corp.*, 2011 U.S. App. LEXIS 17454, \*29 (9th Cir. 2011).<sup>36</sup>

2 The damages calculations here are more straightforward than in *Yokoyama*. As noted in  
3 Section II.B., the formula for calculating damages is identical for all Class members: the difference  
4 between the amount Tata should have paid them under the DTA and the amount Tata actually paid  
5 them after deducting their Indian salaries and recouping their tax refunds. *See Ward v. Dixie Nat'l*  
6 *Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (affirming class certification and holding damages  
7 calculation “was, at least in one important respect, not individualized,” where formula was identical  
8 for all class members). Tata does not contest this common damages formula. Instead, Tata asserts  
9 only that an individual damages calculation is needed for Class Members with a blank salary term  
10 (or if their DTA is missing), or if evidence of the amount of their tax refund forfeiture is missing.  
11 Defs.’ Opp. at 27. Damages calculations for such Class Members can be conducted efficiently, as  
12 described above, and in any event do not defeat class treatment. *See Yokoyama*, 594 F. 3d at 1094.<sup>37</sup>

13 **C. The California Class Satisfies Rule 23(a)**

14 For the California Class, Tata’s only Rule 23(a) arguments relate to commonality (regarding  
15 the Labor Code §§ 221 and 226 claims only) and typicality (regarding § 221 claim only). As shown  
16 below, however, commonality is satisfied, and Plaintiffs are typical of the Class.

17 **1. Plaintiffs Raise Questions Capable Of Generating Common Answers**

18 Plaintiffs’ evidence establishes an overarching common question regarding the California  
19 Class that is capable of classwide resolution: whether Tata violated Labor Code §§ 221, 226, and  
20 203 through its policies of Indian salary deductions and tax refund recoupment. As noted in

21 <sup>36</sup> This Court similarly rejected this argument in an employee breach of contract class action. *Otsuka*  
22 *v. Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 448 (N.D. Cal. 2008) (individual damages based on  
time each class member waited for bag inspections did not defeat predominance); *see also Wilson v.*  
23 *Kiewit Pac. Co.*, 2010 U.S. Dist. LEXIS 133304, \*44-45 (N.D. Cal. 2010) (Illston, J.).

24 <sup>37</sup> The one case Tata cites to counter predominance, *Endres v. Wells Fargo Bank*, 2008 U.S. Dist.  
LEXIS 12159, \*23-24, 32-33 (N.D. Cal. 2008), required the far more complex determination of  
25 whether, absent the defendant bank’s nondisclosure, class members would have incurred bank  
overdrafts based on a “customer’s drafting patterns, the timing and extent of his or her overdrafts,  
26 and his or her credit card balances, interest rates, and payment practices.” This type of complex,  
speculative determination is not at issue here. If individualized calculations are necessary for Class  
27 Members with a blank salary term or missing DTA, the parties can calculate their damages by  
referencing the salary term in their visa petitions, or if unavailable, through sworn testimony or other  
28 proof of claims. *See Wilson*, 2010 U.S. Dist. LEXIS 133304 at \*44-45.

1 Section II.A., above, these policies were uniform. At a class trial, Plaintiffs will demonstrate that  
2 through these policies, Tata violated the Labor Code on a classwide basis.

3 **a. Commonality With Regard To The Labor Code § 221 Claim**

4 Tata's commonality arguments regarding § 221 miss the mark. Notably, Tata does *not* deny  
5 that the tax refund recoupment policy exists across the Class—nor can they do so, given the  
6 testimony of its corporate designee and its previous filings. Instead, Tata asserts that Plaintiffs  
7 “*misconstrue* TCS's policy” and argues that Plaintiffs cannot establish that the § 221 claim can be  
8 decided on a classwide basis because (1) the amount of compensation owed under the DTAs must be  
9 known to determine whether the tax refund recoupment was proper; (2) some Class members did not  
10 sign over *every one* of their tax refund checks; and (3) there is evidence of two California Class  
11 members who signed an APD authorizing certain deductions. All three arguments fail.

12 First, both the forced repayment of tax refund checks *and* the deduction of Indian salary<sup>38</sup>  
13 violate the explicit terms of § 221—regardless of the specific gross amount promised in the DTA.  
14 Cal. Lab. Code § 221; *Kerr's Catering Serv. v. Department of Indus. Relations*, 57 Cal.2d 319, 328  
15 (1962). Tata's manipulation of deputees' pay through the Indian pay deduction and tax refund  
16 recoupment are precisely the sort of conduct § 221 was enacted to prevent. *See Kerr*, 57 Cal.2d at  
17 328 (use of deductions “creates the danger that the employer, because of his superior position, may  
18 defraud or coerce the employee by deducting improper amounts”). This Court noted at the summary  
19 judgment hearing that each tax refund check “clearly was money that originally started out as . . .  
20 wages and . . . was deducted for taxes, but turned out not to be owed in taxes, and, thus, it would go  
21 back to the person whose wages they were in the first place.” Hearing Tr. at 33. Moreover,  
22 regardless of Tata's arguments regarding the specific salary amounts promised to Class members—  
23 which, as noted above in Section II.A., can be demonstrated efficiently at a Class trial, if  
24 necessary—the DTAs of all Class Members contained the uniform In-Addition-To and Gross

25 <sup>38</sup> Tata fails to respond to Plaintiffs' argument that the Indian salary deduction is a common issue  
26 underlying their § 221 claim. Tata notes only that the Court “dismissed” the § 221 claims based on  
27 the Indian salary deduction and granted Plaintiffs leave to amend. Plaintiffs amended on  
28 September 20, 2011. *See* Dkt. 249. Indeed, at the hearing on Tata's summary judgment motion, the  
Court wondered whether amendment was even necessary. Hearing Tr. at 56. (“It seems that they are  
making that 221 claim now and you know it. I don't think we necessarily need to go through a whole  
exercise of amending a complaint and all of that.”).

1 Compensation Provisions. If the Court agrees with Plaintiffs’ interpretation of these provisions, the  
2 Indian salaries were Class Members’ wages that should not have been deducted, and any amounts of  
3 over-withheld taxes should have been returned to Class members, not Tata. During Phase I of the  
4 Class trial, therefore, after the Court interprets the DTA’s provisions, the Court can determine on a  
5 classwide basis whether Tata’s Indian salary deduction and tax refund recoupment policies resulted  
6 in an unlawful recoupment of wages under Labor Code § 221.

7 Second, as described above, isolated incidences of non-compliance with the classwide tax  
8 refund policy do not defeat commonality or predominance. *See* Section II.B.2., above.

9 Third, the APDs relied upon by Tata (only two of which relate to California Class members)  
10 actually *support* Plaintiffs’ § 221 claim by confirming that Class members were paid *gross* salaries  
11 from which deductions are made. Smith Decl. (Dkt. 246), Exs. AJ, BH, BI, BT, BU, BV, BW, BX,  
12 BY. Nowhere in the APDs are Class Members asked to pay back to Tata the amount of over-  
13 withheld taxes, and six of the nine APDs submitted by Tata make clear that it is the *Class member*—  
14 not Tata—who is “responsible for paying the taxes in full.” *Id.*, Exs. AJ, BH, BI, BT, BU, BY. The  
15 APDs simply do not absolve Tata from these unlawful deductions even for the small minority of  
16 California Class Members who may have signed them.

17 **b. Commonality With Regard To The Labor Code § 226 Claim**

18 Plaintiffs have demonstrated common questions regarding their § 226 claim that are capable  
19 of generating common answers—specifically, whether Class members’ wage statements were  
20 inaccurate because the gross wages should have (1) reflected the amount of Class members’ salary to  
21 be paid “in addition to” Indian salary and (2) accounted for money that was initially paid to Class  
22 members that was later returned to Tata in the form of a tax refund check.

23 Tata’s reliance on *Price v. Starbucks Corp.*, 192 Cal.App.4th 1136 (2011), for the  
24 proposition that Plaintiffs have failed to demonstrate any injury due to inaccurate wage statements is  
25 misplaced. *Price* found that the plaintiff had not alleged an injury where he was only speculating  
26 about a possible underpayment of wages that was not evident from his wage statements. The *Price*  
27 court distinguished this situation from cases in which injury *had* been found, where plaintiffs were  
28 required to engage in mathematical computations to see if they had been correctly paid—for

1 example, where wage statements left the employees unable to determine if they were paid for all  
 2 hours worked.<sup>39</sup> The Indian salary deduction and forced repayment of tax refunds here reduced the  
 3 Class members' U.S. compensation and also left them unable to determine what their true gross  
 4 salary was. *See Jaimez*, 181 Cal.App.4th at 1305-06.

5 Tata argues that the wage statements "accurately" indicated the employees' net pay—that is,  
 6 the wage statements identified the amount of money in the paycheck. Tata's argument proves too  
 7 little. The relevant question is not whether the wage statement reflects the amount of the paycheck  
 8 but whether it *accurately* shows the gross wages earned, the deductions made, and the net wages  
 9 earned. *See* Cal. Lab. Code § 226(a). Here, the gross wages were inaccurate because they  
 10 incorrectly included the Indian salary and they showed improperly over-withheld taxes that would  
 11 later be returned to Tata in the form of a tax refund check. Moreover, substantial evidence  
 12 demonstrates Tata's practice of unilaterally changing the number of exemptions listed on Class  
 13 members' wage statements, which resulted in an incorrect amount of withheld income taxes.<sup>40</sup>

14 **c. Commonality With Regard To The Labor Code § 203 Claim**

15 Tata does not address commonality with regard to Plaintiffs' § 203 claim for failure to pay  
 16 all wages due at termination. Plaintiffs have satisfied commonality for this claim for the same  
 17 reasons they have satisfied it with regard to their breach of contract and § 221 claims.

18 **2. Plaintiffs' Claims Are Typical Of The California Class**

19 Tata does not appear to contest typicality for Plaintiffs' California claims beyond its  
 20 meritless challenges to the breach of contract claim, described above. Defs.' Opp. at 19-21.

21 **3. Predominance Is Satisfied As To The California Class**

22 For the same reasons described in Section II.B., above, common questions of law and fact  
 23 predominate over any individual issues raised in Plaintiffs' California claims. To the extent Tata

24 <sup>39</sup> *Id.* at 1143 (citing *Wang v. Chinese Daily News, Inc.*, 435 F. Supp. 2d 1042, 1050 (C.D.Cal. 2006)  
 25 (wage statements inaccurately listed hours worked and omitted hourly wage); *Jaimez v. DAI OHS*  
 26 *USA, Inc.*, 181 Cal.App.4th 1286, 1305-1306 (2010) (wage statement listed "total hours paid," which  
 left employees unable to determine if they were paid for all hours *worked*).

27 <sup>40</sup> Shaver Decl., Ex. 1 at Tr. 70:13 ("[e]xemptions were wrong many times"); Ex. 3 at Tr.122:2-  
 28 123:21 (noting Tata changed exemption status from "married" to "single"); Ex. 36 at Tr. 37:25-  
 38:25 (changing exemptions); Hutchinson Decl., D1 ¶8; D10 ¶8; D14 ¶7; D16 ¶10; D23 ¶10; D25  
 ¶11; D27 ¶8; D29 ¶6; D35 ¶8; D41 ¶6; P1 ¶11; P2 ¶11.

1 raises new arguments as to California claims, they are addressed below.

2 **a. Itemized Wage Statement Claim Under Labor Code § 226**

3 Tata asserts that the DTA's four categories of compensation amounts prevent Plaintiffs from  
4 establishing their § 226 claim by common proof. Tata is mistaken because this claim can be decided  
5 at a class trial based on the uniform In-Addition-To Provision in the DTA without regard to the  
6 specific compensation amounts. If the Court agrees with Plaintiffs' interpretation of the DTA, the  
7 Indian salary deduction resulted in an inaccurate wage statement under § 226 because the statements  
8 misstated deutees' U.S. pay. In addition, under *Jaimez*, 181 Cal.App.4th at 1305-06, Plaintiffs will  
9 be able to demonstrate that Tata's policy of tax refund recoupment constituted a violation of § 226  
10 without regard to the specific compensation amounts listed in the DTAs because the wage statements  
11 simply did not account for the tax refund payments that were returned to Tata. *Id.*

12 Tata asserts further that Plaintiffs cannot demonstrate this claim based on inaccurate tax  
13 exemptions because § 226 does not require tax exemptions to be listed accurately in wage  
14 statements. Dkt. 243 at 29:22-23. The plain language of the statute, however, suggests otherwise.  
15 *See* Cal. Lab. Code § 226(a) (requiring employers to provide employees with "an accurate itemized  
16 statement in writing showing . . . all deductions"). At a Class trial, Plaintiffs can demonstrate that  
17 Tata violated § 226 by inaccurately reporting tax exemptions, which in turn resulted in inaccurate  
18 deductions of Class members' salary for federal and state taxes.<sup>41</sup>

19 **b. Waiting Time Penalty Claim Under Labor Code § 203**

20 Tata asserts incorrectly that Plaintiffs' § 203 waiting time penalty claim cannot be  
21 determined by common proof. To the contrary, this claim is subject to the same common proof as  
22 the breach of contract and Labor Code § 221 claims. *See supra*, Section II.C.1.a-b.

23 Tata further argues that individual issues predominate because Tata has "potential  
24 counterclaims" against some Class Members who purportedly owe money to Tata because they  
25 "absconded" from Tata. Tata's argument fails for at least two reasons. First, Tata's argument is  
26 speculative because it presents no evidence of having filed *any* such counterclaims, which are likely

27 <sup>41</sup> *See, e.g., Perez v. Safety-Kleen Sys., Inc.*, 253 F.R.D. 508, 519-20 (N.D. Cal. 2008) (predominance  
28 met for § 226 claim where paystubs reflected inaccurate amount of wages owed); *Ulin v. Lovell's  
Antique Gallery*, 2010 WL 3768012, \*19 (N.D. Cal. 2010).

1 time-barred for the great majority of Class members.<sup>42</sup> Second, consideration of any such  
 2 counterclaims that Tata might file in the future is more appropriately handled after class-wide  
 3 liability has been determined. *Winkler v. DTE, Inc.*, 205 F.R.D. 235, 242 (D. Ariz. 2001); *see also*  
 4 *Newberg*, § 4:26 (existence of counterclaims no bar to a finding of predominance).

5 Tata's liability for violations of Labor Code §§ 203 and 226 can be determined in Phase III  
 6 of the Class trial. *See* Dkt. 259 at 5-6. Phase III will address whether, as a result of the deduction of  
 7 or failure to pay wages owed under Tata's policies, Class Members are thereby also entitled to  
 8 penalties under §§ 203 and 226. Plaintiffs will argue that if Tata failed to pay wages due or  
 9 unlawfully deducted wages, then Tata thereby violated § 203 by failing to pay all wages due at  
 10 termination and § 226 by failing to provide accurate wage statements. The parties will present  
 11 evidence concerning whether the California Class suffered an injury as a result of the itemized wage  
 12 statements and whether Tata had a good faith basis to fail to pay all wages due.<sup>43</sup>

13 **D. Plaintiffs' Damages Do Not Weigh Against Superiority.**

14 Tata's argument against superiority rests solely on the amount of Beri's and Vedachalam's  
 15 estimated damages. The size of Plaintiffs' claims, however, does not weigh against superiority.  
 16 This Court has held that a class action was superior where average damages awards of "\$25,000-\$  
 17 30,000 per year of work for each class member" were simply not "large enough to weigh against a  
 18 class action."<sup>44</sup> Tata relies upon *Zinser*, which stated that estimated damages were not persuasive of

19 <sup>42</sup> *See* Cal. Civ. Proc. Code § 337(1) (four year statute of limitations for breach of contract). The  
 20 statute of limitations has likely run for any depute who "absconded" before November 2007.

21 <sup>43</sup> If trial Phases I and II determine that Tata neither breached the DTAs nor unlawfully deducted  
 22 wages, then Plaintiffs will present additional evidence during Phase III that Tata violated § 226 by  
 23 unilaterally changing Class Members' tax exemptions. Tata may present evidence that any such  
 24 changes in exemptions were due to changes in employee status. After Phase III ends, the parties can  
 introduce evidence concerning Plaintiff Beri's individual overtime claim. The same jury can  
 determine liability and damages on this claim. Alternatively, the Court can choose to try Ms. Beri's  
 individual claims separately because few, if any, issues will overlap with the class trial.

25 <sup>44</sup> *Smith v. Cardinal Logistics Mgmt. Corp.*, 2008 U.S. Dist. LEXIS 117047, \*32-33 (N.D. Cal.  
 26 2008) (certifying class) (citing *Breeden v. Benchmark Lending Group*, 229 F.R.D. 623, 630 (N.D.  
 27 Cal. 2005) ("[e]ven those members of the putative class who could potentially submit the largest  
 28 dollar claims frequently at issue in Rule 23 class actions")); *see also Labrador v. Seattle Mortg.*  
*Co.*, 2010 U.S. Dist. LEXIS 105716, \*21-22 (N.D. Cal. 2010) (granting certification where  
 estimated per-class member damages of "\$20,000 plus penalties and interest" were "possibly too  
 small for class members to pursue individual actions"). Moreover, unlike *Zinser*, where the three

1 class certification based on the \$50,000 “*minimum* amount alleged to be in controversy for each  
 2 putative class member.” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1191 (9th Cir. 2001)  
 3 (emphasis in original). Here, Plaintiffs do not allege a minimum damages amount, and individual  
 4 damages may be as low as a few hundred dollars for Class members deputed for only a few months.  
 5 *See Chamberlan v. Ford Motor Co.*, 223 F.R.D. 524, 527 (N.D. Cal. 2004) (Wilken, J.) (superiority  
 6 present where relatively modest damages were at issue). Further, many Class members no longer  
 7 live in the U.S., and testimony indicates that many Class members fear retaliation if they assert their  
 8 rights,<sup>45</sup> thus diminishing Class members’ interest in individually controlling their own cases. *See*  
 9 *Bibo v. Federal Express, Inc.*, 2009 U.S. Dist. LEXIS 37597, \*26 (N.D. Cal. 2009).

10 **E. The Court May Rely On The Class Member Declarations**

11 Tata’s two objections to the Class member declarations – that the declarations contradict  
 12 deposition testimony, and that the declarants lack personal knowledge – are unsupported.  
 13 “‘Contradictory’ is not a valid objection under the Federal Rules of Evidence[.]. Purported  
 14 contradictions only go to the weight of evidence, not its admissibility.” *Canatella v. U.S.*, 2011 WL  
 15 2712967, \*17, n.3 (N.D. Cal. 2011) (Illston, J.) (denying motion to strike allegedly contradictory  
 16 declaration because objections went only to weight of evidence). Moreover, the alleged  
 17 contradictions are taken out of context and distort their meaning. Plaintiffs have rebutted each  
 18 allegation and demonstrated the deponents’ personal knowledge. *See Shaver Decl.*, ¶45.<sup>46</sup>

19 **III. CONCLUSION**

20 Plaintiffs respectfully request that the Court certify the National and California Classes.

21  
 22  
 23 other superiority factors also weighed against certification, Tata does not contest Plaintiffs’  
 24 arguments that these factors favor certification. *See* Defs.’ Opp. at 30-31.

25 <sup>45</sup> *See* Shaver Decl., Ex 2 at Tr. 170:18-24 (“That’s a very common thing . . . Even though they were  
 26 knowing that they can participate in this lawsuit, many of them . . . were scared like if they do all of  
 27 these things, they might lose their jobs.”); Ex. 36 at Tr. 34:14-17 (describing fears of retaliation);  
 28 Hutchinson Decl., D1 ¶10; D7 ¶10; D8 ¶14; D10 ¶13; D12 ¶9; D16 ¶13; D21 ¶13; D22 ¶11; D30  
 ¶15; D31 ¶15; D32 ¶13; D33 ¶12; D34 ¶10; D36 ¶11; D39 ¶10; D41 ¶12; D42 ¶11; P2 ¶13.

<sup>46</sup> Tata failed to depose eight witnesses; their declarations should not be stricken. Two had medical  
 exigencies. Tata failed to pursue depositions under the Hague Convention of the six outside the  
 U.S. even though Plaintiffs provided their information to Tata. Shaver Decl., ¶48.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: November 3, 2011  
  
RUKIN HYLAND DORIA & TINDALL LLP

By: /s/ Steven M. Tindall  
Steven. M. Tindall

Steven M. Tindall (State Bar No. 187862)  
Angela Perone (State Bar No. 245793)  
RUKIN HYLAND DORIA & TINDALL LLP  
100 Pine Street, Suite 2150  
San Francisco, CA 94111  
Telephone: (415) 421-1800  
Facsimile: (415) 421-1700

*Counsel for Plaintiffs and the Proposed Class*

Respectfully submitted,  
  
LIEFF CABRASER HEIMANN &  
BERNSTEIN, LLP  
  
By: /s/ Kelly M. Dermody  
Kelly M. Dermody  
  
Kelly M. Dermody (State Bar No. 171716)  
Daniel M. Hutchinson (State Bar No. 239458)  
Anne B. Shaver (State Bar No. 255928)  
Katherine M. Lehe (State Bar No. 273472)  
LIEFF CABRASER HEIMANN &  
BERNSTEIN, LLP  
275 Battery Street, 29th Floor  
San Francisco, CA 94111  
Telephone: (415) 956-1000  
Facsimile: (415) 956-1008

*Counsel for Plaintiffs and the Proposed Class*