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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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KARL E. RISINGER, Plaintiff, v. SOC LLC, et al., Defendants.	Case No. 2:12-cv-00063-MMD-PAL ORDER (Defs.' Motion for Summary Judgment – dkt. no. 102; Pl.'s Motion for Partial Summary Judgment – dkt. no. 107; Pl.'s Motion for Class Certification – dkt. 104)

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I. SUMMARY

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This case involves a dispute over the terms of employment for armed guards hired to work in Iraq. Before the Court are Defendants' Motion for Summary Judgment (dkt. no. 102), Plaintiff's Motion for Partial Summary Judgment (dkt. no. 106), and Plaintiff's Motion for Class Certification (Mot. Class Cert., dkt. no. 104). The Court has reviewed these documents as well as the parties' respective responses and replies. (Dkt. nos. 116, 117, 119, 121, 123, 127.) The Court also heard oral argument on September 15, 2015. (Dkt. no. 153.) For the reasons discussed below, Defendant's Motion for Summary Judgment is granted in part and denied granted in part, Plaintiff's Motion for Partial Summary Judgment is denied, and Plaintiff's Motion for Class Certification is granted.

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II. BACKGROUND

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In 2009 Defendants SOC[1] won a contract with the Department of Defense to provide support services for United States military operations in Iraq ("DOD Contract"). (Dkt. no. 102-19.) The DOD Contract made SOC responsible for recruiting "a qualified

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[1]Consistent with its previous order, the Court will refer to Defendants collectively as "SOC."

work force to successfully perform" various tasks, including armed guards. (*Id.* at 50.) The Contract specified a number of requirements for guards, such as English proficiency, weapons qualifications, and minimum age. (*Id.* at 51.) It further stated that guards "shall be limited to a work week of not more than 72 hours." (*Id.*)

SOC's recruiters, including Paul Bogart, began recruiting for armed guards at one of sixteen sites in Iraq. (Dkt. no. 104-10 at 4.) Recruiters reached out to potential recruits about the details of the job over email and telephone calls. (*Id.* at 7.) The recruiters used a call script, which outlined the nature of the job and answers to common questions. (*Id.* at 11; dkt. no. 104-20.) The call scripts included information about SOC's vacation policies, compensation, and specifically detailed a workweek consisting of 6 days with 12-hour shift each day. (Dkt. no. 104-20.) The recruiters would then send a tentative agreement to interested recruits to sign. (Dkt. no. 104-14 at 3–4.) Interested recruits would then attend orientation in either Reno or Chicago. (*Id.)* At the training, the recruits were asked to sign an employment agreement and were given instructions for accessing SOC's employment policies online. The employment agreements for guards were essentially identical. (Dkt. no. 151-11 at 22–23.)

Plaintiff Karl E. Risinger, a United States Army veteran, was one such recruit. In 2010, Paul Bogart recruited Risinger to work for SOC as an armed guard in Iraq. (Dkt. no. 107-19.) Mr. Bogart communicated with Risinger through emails and phone calls about the terms of his prospective employment with SOC. (*Id.)* On February 22, 2010, SOC sent Risinger a written employment offer ("Offer Letter"). (Dkt. no. 102-11.) Risinger eventually attended a three-day training session in Reno in March of 2010. (Dkt. no. 107-19.) On March 10, 2010, at the close of the training session, Risinger signed an Employment Agreement. (Dkt. no. 102-13.) The Employment Agreement made reference to "the Company's usual [vacation] policy" and "the policies of the Company" as well as "duties and responsibilities that are customary for Employee's position." (*Id.* ¶¶ 2, 4.) On the same day, Risinger signed a form that contained instructions for

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accessing SOC's policy guide ("Policy Guide") online and a promise that he would review those policies within ten days. (Dkt. no. 102-14.)

Risinger then travelled to Iraq where he worked for approximately one year. Risinger claims, and SOC does not dispute, that he was required to work 7 days a week for at least 12 hours a day for months at a time. (Dkt. no. 107-19.) The parties do not dispute that Risinger did not receive additional compensation when he worked beyond 12 hours per day or beyond 6 days per week. (*Id.*) The parties also do not dispute that Risinger could earn, but not actually take, 42 vacation days in the first year, and that his compensation was cut for the duration of any vacation time used. (*Id.*) On March 7, 2011, Risinger resigned and returned to the United States. (Dkt. no. 102-17.)

Risinger then initiated this action, alleging that SOC misrepresented the terms of employment to recruits before they went to Iraq and then violated the terms of their Employment Agreement after they arrived. The parties dispute the nature of the representations made to Risinger and other recruits and the meaning of the terms in the Employment Agreement.

Risinger claims that recruiters told him that guards would work a 6-day workweek consisting of 12-hour days, could use 42 paid vacation days per year, and were paid a base salary of $65,000. (Dkt. no. 107-19.) He claims that once he arrived in Iraq, he found out that, in reality, he would be working 7 days a week, he would only be able to use 28 vacation days in the first year, his salary would be reduced if he utilized any vacation time, and he would be compensated at a lower rate for taking vacation outside of Iraq. (*Id.*) Risinger believes that the difference between what SOC promised and the reality of working for SOC amounts to promissory fraud. Risinger further argues that his Employment Agreement should be understood to include a work schedule of 12-hour days and a 6-day workweek, as well as a guarantee of 42 days of fully paid vacation.

SOC responds that Risinger was either never promised those terms by recruiters or he misunderstood them. SOC argues that Risinger signed an Employment Agreement which set out vacation and benefits policies, and that he was treated consistently with

those policies. SOC further argues that Risinger was an at-will employee, and so SOC was entitled to change the terms of his employment at any time.

SOC moved for summary judgment on all of Risinger's claims. (Dkt. no. 102.) Risinger moved for partial summary judgment and for class certification. (Dkt. nos. 104, 107.) The Court will address the summary judgment motions first.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Legal Standard

"The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for the nonmoving party and a dispute is "material" if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). Where reasonable minds could differ on the material facts at issue, however, summary judgment is not appropriate. See *id*. at 250–51. "The amount of evidence necessary to raise a genuine issue of material fact is enough 'to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968)). In evaluating a summary judgment motion, a court views all facts and draws all inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

The moving party bears the burden of showing that there are no genuine issues of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). "In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that

1 the nonmoving party does not have enough evidence of an essential element to carry its
2 ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210
3 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56's requirements,
4 the burden shifts to the party resisting the motion to "set forth specific facts showing that
5 there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The nonmoving party "may
6 not rely on denials in the pleadings but must produce specific evidence, through
7 affidavits or admissible discovery material, to show that the dispute exists*," Bhan v. NME*
8 *Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and "must do more than simply show
9 that there is some metaphysical doubt as to the material facts." *Orr v. Bank of Am.*, 285
10 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
11 475 U.S. 574, 586 (1986)). "The mere existence of a scintilla of evidence in support of
12 the plaintiff's position will be insufficient." *Anderson*, 477 U.S. at 252.

13 Further, "when parties submit cross-motions for summary judgment, '[e]ach
14 motion must be considered on its own merits.'" *Fair Hous. Council of Riverside Cty., Inc.*
15 *v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (alteration in original) (quoting
16 William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*,
17 139 F.R.D. 441, 499 (Feb. 1992)). "In fulfilling its duty to review each cross-motion
18 separately, the court must review the evidence submitted in support of each cross-
19 motion." *Id.*

20 **B. Discussion**

21 **1. Breach of Contract**

22 Risinger alleges that SOC violated the terms of his Employment Agreement by
23 not paying him $65,000 of guaranteed salary, failing to provide 42 days of paid vacation,
24 and failing to limit work hours to 12 hours per day and 72 hours per workweek. (Dkt. no.
25 19 ¶¶ 113-15.) SOC argues that they are entitled to summary judgment for two reasons.
26 First, Risinger was an at-will employee, and as such, SOC had the right to alter the
27 terms of his employment at any time. Second, SOC complied with its contractual
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1 obligations even if Risinger did have enforceable contract rights under the Employment
2 Agreement.

3 "A plaintiff in a breach of contract action must 'show (1) the existence of a valid
4 contract, (2) a breach by the defendant, and (3) damage as a result of the breach.'"
5 *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1240 (D. Nev. 2008) (quoting
6 *Saini v. Int'l Game Tech*., 434 F. Supp. 2d 913, 920–21 (D. Nev. 2006)). Interpretation of
7 a contract is a question of law. *See Shelton v. Shelton*, 78 P.3d 507, 510 (Nev. 2003). "A
8 basic rule of contract interpretation is that '[e]very word must be given effect if at all
9 possible.'" *Musser v. Bank of Am*., 964 P.2d 51, 54 (Nev. 1998) (alteration in original)
10 (quoting *Royal Indem. Co. v. Special Serv. Supply Co.*, 413 P.2d 500, 502 (Nev. 1966)).
11 Additionally, when construing a contract, a court should consider the contract as a whole
12 and "should not interpret a contract so as to make meaningless its provisions." *Phillips v.
13 Mercer*, 579 P.2d 174, 176 (Nev. 1978). Under contract law generally, when a term is
14 unambiguous, a court must construe it from the language contained within it.
15 *Chwialkowski v. Sachs*, 834 P.2d 405, 406 (Nev. 1992). A contract is unambiguous if it is
16 not susceptible to more than one interpretation. *See Margrave v. Dermody Props.*, 878
17 P.2d 291, 293 (Nev. 1994). A court's goal is to effectuate the parties' intent, but when
18 their intent is not clearly expressed in the contract language, it may also consider the
19 circumstances surrounding the agreement. *Sheehan & Sheehan v. Nelson Malley & Co*.,
20 117 P.3d 219, 223–24 (Nev. 2005). "The usual rule of interpretation of contracts is to
21 read provisions so that they harmonize with each other, not contradict each other. That
22 task of construction is for the court." *Peterson v. Minidoka Cty. Sch. Dist. No. 331*, 118
23 F.3d 1351, 1359 (9th Cir.), *amended by* 132 F.3d 1258 (9th Cir. 1997).

24 "Multiple writings signed at the same time, addressing the same subject, and
25 cross-referencing one another may be taken to comprise a single agreement." *Coast to
26 Coast Demolition & Crushing, Inc. v. Real Equity Pursuit, LLC*, 226 P.3d 605, 608 (Nev.
27 2010). "The general rule regarding incorporation by reference can be stated as follows:
28 '(W)ritings which are made a part of the contract by annexation or reference will be so

construed; but where the reference to another writing is made for a particular and specified purpose, such other writing becomes a part for such specified purpose only.'" *Lincoln Welding Works, Inc. v. Ramirez*, 647 P.2d 381, 383 (Nev. 1982) (alteration in original) (quoting *Orleans Hornsilver Mining Co. v. Le Champ d'Or French Gold Mining Co.*, 284 P. 307, 309 (Nev. 1930)).

As an initial matter, the Court need not resolve whether Risinger's employment was at-will in this context because, even assuming he was at-will, the Employment Agreement may not be modified at any time, as SOC suggests. This is because the Employment Agreement's amendment provision specifically requires a written instrument signed by both parties in order to change a term. (Dkt. no. 102-13 ¶ 9.) For this reason, SOC's reliance on *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96 (Nev. 2008), and its progeny for the proposition that an employer may modify the terms of employment where the employment was at-will is misplaced.[2] SOC does not argue that the actions that constituted Risinger's claimed breach of contract were carried out pursuant to a written change to the Employment Agreement signed by both parties. Nor do they offer any reason why the Court should disregard the Employment Agreement's amendment provision. Therefore, SOC's threshold argument fails, and the Court must evaluate whether SOC breached the terms of the Employment Agreement with respect to Risinger's salary, vacation, and work schedule.

a. $65,000 Base Salary

Risinger alleges that SOC failed to compensate him at his base salary of $65,000 because SOC reduced his compensation when he was in training or vacationing outside of Iraq. SOC argues that the written terms of the Employment Agreement clearly indicate that vacation time outside of the country would be paid at a lesser rate, and the formula

[2]In *Baldonado*, the employer had a procedure by which changes to any employment policies were to be made. 194 P.3d at 98. The employer ignored that procedure. However, the employer's policies also allowed the employer to change or eliminate any policies at any time. *Id.* at 99. Risinger's Employment Agreement specifically required a written document with Risinger's signature before any terms could be modified.

for accruing vacation days limited an employee to less than 42 vacation days in the first year. Essentially, SOC argues that the actions Risinger identifies as breaches were, in fact, perfectly consistent with the Employment Agreement.

Paragraph 1 of the Employment Agreement provides that "SOC will compensate Employee an annual base salary of $65000, which shall be subject to review as required by the Company." (Dkt. no. 102-13.) Paragraph 2 of the Employment Agreement states that "Employee shall receive vacation and reimbursement for travel expenses in accordance with the Company's usual policy." (*Id.*) SOC argues that "the Company's usual policy" incorporates by reference the vacation policy listed in the Policy Guide. (*See* dkt. no. 102-15.) Risinger was provided with instructions for accessing the Policy Guide online, and he signed a form acknowledging that he would read the Policy Guide within ten days of being hired.[3] (Dkt. no. 102-14.) The Policy Guide, in turn, provides that the Policy Guide is to be used "unless it conflicts with negotiated employment agreements or specific laws or statutes." (Dkt. no. 102-15 at 4.) The Policy Guide further states that "compensation for vacation days will be at 50% of the employee's normal overseas base pay rate." (*Id.* at 7.) Additionally, it makes clear that travel time is paid at 50% of the normal pay rate. (*Id.* at 8.)

When reading paragraph 1 in conjunction with the vacation policy, the Court must, if possible, read the terms to be harmonious. *See Peterson*, 118 F.3d at 1359. Therefore, the Court must read the $65,000 base salary to be a starting point rather than a guaranteed minimum salary. Risinger points the Court to the dictionary definition of salary: "[a]n agreed compensation for services — esp[ecially] professional or semiprofessional services-usu[ally] paid at regular intervals on a yearly basis." *Gilliam v. Nevada Power Co.*, 488 F.3d 1189, 1196 (9th Cir. 2007) (alteration in original) (quoting Black's Law Dictionary 1365 (8th ed. 1999)). The Court finds this definition to be

[3]Risinger seems to argue that because he was given instructions for accessing the policies online rather than receiving a physical copy of the policies, they should not be understood as part of the Employment Agreement. The Court disagrees.

consistent with unpaid or half-paid vacation time. Even if the terms were in tension, Risinger's proposed construction would ignore portions of the Employment Agreement that are clearly incorporated by reference. Such an interpretation requires too many contortions and is contrary to the principals of contract interpretation.

It is undisputed that Risinger received his base salary at all times except when he attended training in Nevada or vacationed outside of Iraq. SOC, therefore, was in compliance with the Employment Agreement as to Risinger's base salary. Accordingly, summary judgment in favor of SOC on Risinger's claim that SOC breached the Employment Agreement when they failed to pay him his full base salary is appropriate.

b. 42 Paid Vacation Days

SOC similarly argues that the Employment Agreement and the Policy Guide clearly indicate that an employee may accrue 42 vacation days per year, and that Risinger was in fact treated consistently with that policy. Risinger argues that the Offer Letter, which states that he was "entitled" to 42 vacation days per year, should be read as part of his Employment Agreement, and further contends that it should override the Policy Guide to the extent that they are inconsistent. Both of Risinger's arguments are tenuous.

The Employment Agreement does not incorporate the Offer Letter by reference. And even if it did, the Court would still need to read the terms to harmonize with one another. The Policy Guide lays out SOC's policy for accruing vacation days: 7 days after the first 3 months of work, 14 more days after the next 3 months, 7 more days after the next 3 months, and 14 more days after the next 3 months. (Dkt. no. 102-15 at 7.) As Risinger points out, this policy does not allow an employee to actually *use* 42 vacation days in his or her first year of employment. Rather, it allows them to *earn* 42 vacation days. However, the pertinent wording in the Employment Agreement is "Employee shall receive vacation . . . in accordance with the Company's usual policy." (Dkt. no. 102-13 at 2.) The Court finds the Employment Agreement's reference to the vacation policy to be consistent with the policy laid out in the Policy Guide.

It is undisputed that Risinger was allowed to accumulate vacation days in accordance with the Policy Guide. Therefore, no reasonable juror could find that SOC breached the Employment Agreement as to Risinger's vacation benefits. Summary judgment on this part of Risinger's breach of contract claim will be granted.

c. 72-Hour Workweek

Risinger contends he was routinely required to work in excess of 72 hours per workweek, and that he routinely worked 7 days a week and more than 12 hours a day in breach of the Employment Agreement. SOC does not dispute that Risinger was required to work this schedule, but SOC argues that the Employment Agreement contains no limitation on the hours Risinger would be required to work per week. Alternatively, they argue that if the Agreement is read to contain a work schedule, Risinger, as an at-will employee, consented to any changes in that schedule when he continued to work those hours.

A 72-hour workweek (consisting of 12 hours per day and 6 days per week) hovers around the Employment Agreement like a phantom. Such a schedule was required by SOC's agreement with the Department of Defense (dkt. no. 154-10) and was repeated by SOC's recruiters to recruits (dkt. no. 107-4 at 17; dkt. no. 107-5 at 9). It is also implicit in the calculation of Risinger's vacation pay.[4] Yet at first glance, the text of the Employment Agreement seems to be silent on the amount of hours Risinger would be required to work.

The Employment Agreement does not expressly identify Risinger's work schedule or the expected weekly work hours required to earn his annual salary. The Agreement, however, does impose some expectations. Paragraph 4 of the Employment Agreement states that the employee "shall perform duties and responsibilities that are customary for employee's position." (Dkt. no. 102-13 at 2.) The Agreement does not define the term

[4]In order to determine the pay rate for a vacation day, SOC needed to decide how Risinger's $65,000 annual salary would be split on a day-by-day basis. Risinger was paid $8.68 per hour for vacation time. (Dkt. no. 107-19 ¶ 9.) This is half of a rate that assumes a 12-hour workday and 6-day workweek.

"customary" and is unclear as to the type of work schedule or even minimum work hours customarily expected of employees in Risinger's position.

Whether a term is ambiguous is a question of law. *Galardi v. Naples Polaris, LLC*, 301 P.3d 364, 366 (Nev. 2013). When the parties' intent is unclear from the words of the agreement, the court may turn to the circumstances surrounding the agreement in order to make sense of the term. *Sheehan*, 117 P.3d at 223–24. Furthermore, "[i]n cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language." *Williams v. Waldman*, 836 P.2d 614, 619 (Nev. 1992) (alteration in original) (quoting *Jacobson v. Sassower*, 489 N.E.2d 1283, 1284 (N.Y. 1985)).

Applying these contract principles here, the Court finds that the term "customary" in Paragraph 4 is ambiguous. The recruiters' statements, vacation pay, and the DOD Contract all help clarify this ambiguous term. The call scripts that recruiters used specifically detailed a workweek consisting of 6 days with 12-hour shift each day. (Dkt. no. 104-20.) The DOD Contract requires that guards "shall be limited to a work week of not more than 72 hours."[5] (Dkt. no. 102-19.) Risinger has shown that genuine issues of material fact exist as to whether the Employment Agreement provided for a 72-hour workweek as "customary." "If there is an ambiguity requiring extrinsic evidence to discern the parties' intent, summary judgment is improper." *Dickenson v. Nev. Dep't of Wildlife*, 877 P.2d 1059, 1061 (Nev. 1994).

SOC argues that even if a 72-hour workweek was part of the Employment Agreement, summary judgment is still appropriate because SOC could change the terms of Risinger's at-will employment at any time. SOC's argument falls short for two reasons.

First, viewing the evidence in the light most favorable to Risinger as the non-moving party, SOC never intended to modify the Employment Agreement. During his

[5]The Court considers the DOD Contract as relevant to clarify the "duties and responsibilities that are customary for employee's position," rather than as an agreement that Risinger may enforce. (Dkt. no. 102-13 at 2.)

deposition, Michael McAreavy, one of SOC's Rule 30(b)(6) designees, testified that SOC's intention was always to adhere to a 72-hour workweek for guards like Risinger, but that they struggled with understaffing. (Dkt. no. 119-2 at 11-13.) Mr. McAreavy further testified that SOC recorded when guards were unable to take a day off so that they could later be reimbursed when staffing levels increased. (*Id.* at 6-7). This is not behavior consistent with a change in the terms of Risinger's employment. SOC cannot have it both ways. They cannot convince employees like Risinger to stick around and work because they are attempting to fix staffing problems so they can comply with a 72-hour workweek requirement, and then, in litigation, turn around and argue that they changed workweek requirements and that Risinger consented to those changes by continuing to work.

Second, as discussed above, Paragraph 9 of the Employment Agreement states: "[T]his agreement may be amended only by a written agreement signed by Employee and the Company." (Dkt. no. 102-13 ¶ 9.) The Court must give every word of a contract effect and must avoid making a provision meaningless. *Musser*, 964 P.2d at 54; *Phillips*, 579 P.2d at 176. This amendment provision means that even if Risinger was an at-will employee whose employment could be terminated at any time, SOC and Risinger specifically agreed to alter the corollary background rule that the terms of his employment (at least as set out in the Employment Agreement) could be changed at any time. SOC has neither provided an adequate explanation for why this provision should be ignored, nor proffered any evidence of a signed agreement modifying Risinger's work hours.

A reasonable jury could find that the Employment Agreement provided for Risinger to work a 72-hour workweek as "customary" for employees in his position, and that SOC breached this term when they required Risinger to routinely work in excess of the 72-hour workweek. Summary judgment is denied as to this part of Risinger's breach of contract claim.

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2. Breach of Implied Covenant of Good Faith and Fair Dealing

SOC argues that because Risinger was an at-will employee, he did not enjoy any enforceable contract rights related to changes in the terms of his employment and is precluded from bringing any claim for breach of an implied covenant of good faith and fair dealing. As support, SOC cites *Martin v. Sears, Roebuck & Co.*, 899 P.2d 551 (Nev. 1995), which held that claims for a breach of the implied covenant of good faith and fair dealing do not apply in the context of the termination of at-will employees.

Risinger's claim sounds in tort, not contract. As the Court previously determined, Risinger has adequately asserted a tortious breach of the implied covenant of good faith and fair dealing, rather than a contract-based claim. (Dkt. no. 59 at 11.) Liability in tort may occur where a special relationship exists between the parties and "the party in the superior or entrusted position' has engaged in 'grievous and perfidious misconduct." *Nev. Univ. & Cmty. Coll. Sys. v. Sutton*, 103 P.3d 8, 19 (Nev. 2004) (quoting *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 934 P.2d 257, 263 (Nev. 1997)); *A.C. Shaw Constr., Inc. v. Washoe County*, 784 P.2d 9, 10 (Nev. 1989). Thus, SOC's reliance on *Sears, Roebuck* is misplaced. SOC's request for summary judgment on this issue is denied.

3. Unjust Enrichment & Quantum Meruit

In the Court's earlier Order, it explained that Risinger's quantum meruit claim was proper as an alternative to his breach of contract theory and as a remedy in conjunction with his unjust enrichment claim. (Dkt. no. 59 at 13.) SOC argues that both claims fail as a matter of law because Risinger was an at-will employee with an express Employment Agreement. In support of its position, SOC points to cases in which contracting parties either issued a written memorandum changing a term of an employment agreement, *see, e.g.*, *Hester v. Vision Airlines, Inc.*, No. 2:09-cv-00117-RLH, 2010 WL 3724182, at *1 (D. Nev. Sept. 15, 2010); or were working pursuant to an agreement that expressly governed work done beyond the terms of the agreement. *See, e.g.*, *Mobius Connections Grp., Inc. v. TechSkills, LLC*, No. 2:10-cv-01678-GMN, 2012 WL 194434, at *8 (D. Nev. Jan. 23, 2012). Neither of these situations applies in this case.

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As discussed above, SOC has not provided any evidence that they actually altered the terms of Risinger's employment. Risinger, on the other hand, has offered evidence that the Employment Agreement was not altered. Furthermore, the existence of a 72-hour workweek is a genuine issue of material fact for a trier of fact to resolve. The Court therefore denies summary judgment on Risinger's claims for quantum meruit and unjust enrichment.

4. Promissory Fraud

In order to recover on a promissory fraud claim, a plaintiff must allege five essential elements: (1) the defendant made a false representation, (2) the defendant knew or believed that the representation was false, (3) the defendant intended to induce the plaintiff to act or to refrain from acting in reliance on the misrepresentation, (4) the plaintiff justifiably relied on the misrepresentation, and (5) the plaintiff suffered damages from the reliance. *Bulbman, Inc. v. Nev. Bell*, 825 P.2d 588, 592 (Nev. 1992).

SOC argues that Risinger has not provided evidence that SOC made any affirmative promises to him during his recruitment; that even if SOC made promises to Risinger, his reliance on them was unreasonable as a matter of law; and that Risinger did not suffer any damages as a result of his reliance. The Court will address each argument in turn.

a. False Representations Made by Defendants

Risinger has produced sufficient evidence to create a genuine issue of material fact as to the false representation element. First, Risinger's declaration states that representatives from SOC told him that guards in Iraq work a 72-hour workweek. (Dkt. no. 107-19 ¶ 3.) This testimony is supported by the deposition testimony of Paul Bogart, a recruiter for SOC. Mr. Bogart testified that recruits were told that their usual work schedule was usually 6 days a week, 12 hours a day. (Dkt. no. 107-4 at 17.) Similarly, Lisa Verrecchia Santin, who was SOC's director of human resources for government services, testified that SOC recruiters told guards that the normal schedule was a 72-hour workweek consisting of six 12-hour days. (Dkt. no. 107-5 at 9.) These testimonies

are further supported by call scripts, which recruiters used to inform potential guards about what their jobs would entail. (Dkt. nos. 104-19, 104-20.) These scripts indicated that the "work schedule is usually 6 days a week, 12 hours a day." (Dkt. no. 104-19 at 3.) SOC argues that the scripts also note that "[o]perations are 24/7" and "shift rotations will be determined by Operations in country." (*Id.)* However, the term "shift rotation" is not synonymous with work hours; nor does a "24/7" operation mean that prospective recruits should expect to work more than the specifically referenced 72-hour schedule. SOC suggests that Risinger's claim should be disregarded because he does not recall the specifics of when the representation as to the work schedule was communicated to him. (Dkt. no. 102 at 15–16.) SOC acknowledged that the Court is not permitted to consider the weight of the evidence, but SOC cites to *Anderson*, 477 U.S. at 254, to ask the Court to consider the evidence "through the prism of the substantive evidentiary burden." (*See* dkt. no. 102 at 15–16.) The Court has done so here. Viewing this evidence in the light most favorable to Risinger and drawing all reasonable inferences in his favor, a reasonable jury could find that SOC made false representations that the workweek was 72 hours.

b. Justifiable reliance

SOC argues that because Risinger signed an employment agreement, any reliance on earlier representations was unreasonable as a matter of law. However, the Court has already found that a fact-finder could find that a 72-hour workweek was included in the Employment Agreement. That term, therefore, may be consistent with earlier representations. In any event, Risinger has provided evidence that SOC continued to represent that they intended to adhere to a 72-hour workweek even after he signed the Employment Agreement. (Dkt. no. 119-2 at 5-6, 10-12.)

SOC further advances the incredible argument that because Risinger was an eleven-year veteran of the Army, he should have known that he could not rely on a representation that guards would be given one day off per week, and therefore his reliance was unjustified as a matter of law. SOC maintains that because Risinger was

entering a territory "subject to frequent acts of war and terrorism," his experience should have informed him that his schedule would be uncertain. (Dkt. no. 102 at 19-20.) This argument might have merit if Risinger's claim were grounded in being forced to work extra hours due to an attack or due to unforeseen tactical developments in U.S. operations in Iraq. However, Risinger asserts — and SOC's Rule 30(b)(6) designees have offered deposition testimony to support — that Risinger and other guards were required to work seven days a week for months on end due to intentional and preventable understaffing as a matter of practice, not because of the unpredictability of battle. A reasonable jury could find that even an Army veteran would reasonably expect to be given time off during the workweek consistent with the representations made to him, even if he was going to work in a war zone.

c. Damages

SOC argues that Risinger cannot establish damages because he was unemployed when he accepted SOC's job offer. This too is an incredible argument. Lost wages from a previous job are not the only type of damages one may incur due to promissory fraud. Moreover, Risinger left his family, travelled to another continent, and subjected himself to the harsh conditions in Iraq (including working without a day off for months on end). (Dkt. no. 119-9 ¶ 4.) A reasonable fact-finder could find that these damages, which are distinct from lost earnings from a previous job, are attributable to Risinger's justifiable reliance on SOC's representations. *Cf. Lazar v. Superior Court*, 909 P.2d 981, 985 (Cal. 1996) (damages properly alleged where plaintiff "sever[ed] his connections with the New York employment market, uproot[ed] his family, purchas[ed] a California home and mov[ed] here").

"The issue of whether a party has met the elements of intentional misrepresentation is generally a question of fact." *Blanchard v. Blanchard*, 839 P.2d 1320, 1322 (Nev. 1992). Risinger has pointed to disputed issues of material fact that prevent the Court from granting summary judgment on his promissory fraud claim.

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5. Negligent Misrepresentation

The Nevada Supreme Court has adopted the following definition of negligent misrepresentation from the Restatement (Second) of Torts § 552:

> One who, in the course of his business, profession or employment, or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Barmettler v. Reno Air, Inc., 956 P.2d 1382, 1387 (Nev. 1998). Reliance is required to prevail on a claim for negligent misrepresentation. *Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nev.*, 575 P.2d 938, 940 (Nev. 1978).

SOC argues that Risinger's negligent misrepresentation claim relies on promises of future performance. Risinger counters that SOC's representation about the work schedule of guards was a false statement of then-current fact. SOC was operating in Iraq when its recruiters were describing job conditions to Risinger and other recruits. A reasonable fact-finder could view the representations that recruiters made to Risinger as statements about existing conditions. Therefore, summary judgment will be denied.

C. Summary

SOC's Motion for Summary Judgment is granted only with respect to Risinger's breach of contract claim based on a guarantee of 42 vacation days and a $65,000 base salary. It is also granted on all other claims insofar as they relate to a promise of 42 vacation days and a $65,000 base salary. It is denied with respect to Risinger's breach of contract claim based on a 72-hour workweek, and with respect to his claims for breach of the covenant of good faith and fair dealing, unjust enrichment, quantum meruit, promissory fraud, and negligent misrepresentation.

IV. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Risinger seeks partial summary judgment on his claims for promissory fraud, negligent misrepresentation, breach of contract, quantum meruit and unjust enrichment. The Court finds that genuine issues of material fact exist to preclude summary judgment.

A. Promissory Fraud

A plaintiff must satisfy five essential elements to establish fraud: (1) the defendant made a false representation; (2) the defendant knew or believed that the representation was false; (3) the defendant intended to induce the plaintiff to act in reliance on the misrepresentation; (4) the plaintiff justifiably relied on the misrepresentation; and (5) the plaintiff suffered damages from the reliance. *Bulbman*, 825 P.2d at 592. Risinger asks the Court to grant summary judgment on elements 1, 3, 4, and 5 of his promissory fraud claim.

As an initial matter, SOC argues that Risinger's request is improper because it excludes element 2 — the defendant knew or believed that the representation was false. SOC believes that this omission collapses Risinger's partial summary judgment request on this claim into his contract and quasi-contract claims, even though those claims contain distinct elements. The Court need not address this argument because, in any event, factual disputes underlie the entirety of Risinger's promissory fraud claim. As the Court discussed above, and as Risinger himself recognized in his opposition to SOC's Motion for Summary Judgment, the existence of a 72-hour workweek, justifiable reliance, the falsity of SOC recruiter's representations, and damages are all material facts at issue. (Dkt. no. 119 at 4.) Risinger has failed to show an absence of disputed material facts to warrant granting summary judgment in his favor.

B. Negligent Misrepresentation

Negligent misrepresentation, like promissory fraud, contains falsity, justifiable reliance, and damages elements. *Barmettler*, 956 P.2d at 1387. For the same reasons summary judgment is denied with respect to promissory fraud, it is denied with respect to Risinger's negligent misrepresentation claim.

C. Breach of Contract

The Court grants summary judgment in favor of SOC on two aspects of Risinger's breach of contract claim relating to his salary and vacation benefits, which necessarily requires the Court to deny Risinger's request for summary judgment on the same issues.

1 As for the breach of contract claim relating to Risinger's work schedule, the Court finds
2 that a reasonable fact-finder could conclude that the Employment Agreement contains a
3 72-hour workweek. This ambiguity, however, is not suited for resolution on summary
4 judgment, especially when the Court views the facts in the light most favorable to SOC.
5 *See Dickenson* 877 P.2d at 1061. Risinger's request for summary judgment is denied

6 **D. Quantum Meruit and Unjust Enrichment**

7 Risinger's quantum meruit and unjust enrichment claims suffer from the same
8 disputed issue of material fact that his promissory fraud claim contains — how to
9 properly interpret the representations SOC made regarding a 72-hour workweek
10 schedule. Because Risinger has not shown an absence of factual disputes, summary
11 judgment on these claims is denied as well.

12 **V. CLASS CERTIFICATION**

13 **A. Background**

14 Risinger seeks to represent a class of armed guards who worked for SOC in Iraq
15 between 2006 and 2012. In his Amended Complaint, Risinger describes two potentially
16 overlapping groups: a Promissory Fraud Class and a Breach of Contract Class. (Dkt. no.
17 19 at 6-14.) Risinger contends that all of the class members in the two groups were
18 induced to work in Iraq by SOC's false representations and, once there, were harmed by
19 various breaches of their employment agreements. The Court does not find a meaningful
20 distinction between the two groups for purposes of evaluating Risinger's Motion for Class
21 Certification. The Court therefore proceeds with the analysis treating both groups as a
22 single class.

23 **B. Standard**

24 "The class action is 'an exception to the usual rule that litigation is conducted by
25 and on behalf of the individual named parties only.'" *Wal–Mart Stores, Inc. v. Dukes*, 131
26 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).
27 The party seeking class certification "must affirmatively demonstrate his compliance with
28 the rule." *Id.* at 2551. "[C]ertification is proper only if the 'trial court is satisfied, after a

1 rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Id.* (quoting
2 *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). The four Rule 23(a)
3 requirements are numerosity, commonality, typicality, and adequacy of representation.
4 *Id.* at 2550; Fed. R. Civ. P. 23(a).

5 "In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class
6 certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)."
7 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). "To qualify for certification
8 under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a)
9 prerequisites." *Id.* at 615. First, "common questions must 'predominate over any
10 questions affecting only individual members.'" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
11 1022 (9th Cir. 1998) (quoting Fed. R. Civ. P. 23(b)(3)). Second, "class resolution must be
12 'superior to other available methods for the fair and efficient adjudication of the
13 controversy.'" *Id.* (quoting Fed. R. Civ. P. 23(b)(3)).

14 In addition to the explicit requirements of Rule 23, an implied prerequisite to class
15 certification is that the class must be sufficiently definite. The party seeking certification
16 must demonstrate that an identifiable and ascertainable class exists. *See Berger v.*
17 *Home Depot USA, Inc.*, 741 F.3d 1061, 1071 n.3 (9th Cir. 2014). To satisfy the
18 ascertainability requirement, a class must be determinable from objective, rather than
19 subjective, criteria. *See Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1303
20 (D. Nev. 2014).

21 The moving party must affirmatively demonstrate that he or she meets the above
22 requirements. *Parsons v. Ryan*, 754 F.3d 657, 674 (9th Cir. 2014). However, a court
23 should not "'turn class certification into a mini-trial' on the merits." *Edwards v. First Am.*
24 *Corp.*, --- F.3d ----, No. 13-55542, 2015 WL 4999329, at *2 (9th Cir. Aug. 24, 2015)
25 (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011)).

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C. Discussion

a. Ascertainable

The parties disagree, initially, about Risinger's ability to establish a class of individuals. Risinger argues that a class consisting of armed guards who worked for SOC between 2006 and 2012 can be identified through SOC's employee and payroll files. SOC argues that because it would be necessary to determine who was actually induced by the alleged misrepresentations, it is not possible to ascertain a class. However, this argument goes to the commonality and typicality requirements of Rule 23(a) rather than the ascertainability of the proposed class. Risinger has identified easily available, objective criteria from which a class can be ascertained, and has therefore shown that the class is ascertainable.

b. Rule 23(a) Requirements

i. Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is impracticable. Fed. R. Civ. P. 23(a)(1). The exact size of the class need not be known so long as general knowledge and common sense indicate that the class is large. *See In re Cirrus Logic Sec.*, 155 F.R.D. 654, 654 (N.D. Cal. 1994); *see also Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991) ("'It is not necessary that the members of the class be so clearly identified that any member can be presently ascertained.' The court may draw a reasonable inference of the size of the class from the facts before it." (citation omitted) (quoting *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970))).

Risinger estimates the class will be greater than 4,220 individuals based on the number of guards employed by SOC and stationed in Iraq between 2006 and 2012, as explained in the deposition testimony of Michael McAreavy. (Dkt. no. 211-8.) Joinder of this many class members would clearly be impracticable. *See*, *e.g.*, *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 646 (W.D. Wash. 2007) (joinder of 3,000 class members impracticable). SOC's counterarguments focus on issues of commonality and

typicality. They are misplaced. The Court finds that Risinger has satisfied the numerosity requirement of Rule 23(a).

ii. Commonality

"[C]ommonality requires that the class members' claims 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke.'" *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (quoting *Dukes*, 131 S. Ct. at 2551). These common questions may center on "shared legal issues with divergent factual predicates [or] a common core of salient facts coupled with disparate legal remedies." *Hanlon*, 150 F.3d at 1019. "[A] class meets Rule 23(a)(2)'s commonality requirement when the common questions it has raised are 'apt to drive the resolution of the litigation,' no matter their number." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (quoting *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 962 (9th Cir. 2013)).

After the Court's decision on the parties' cross motions for summary judgment, the common questions driving this litigation include whether SOC promised recruits a 72-hour workweek in order to induce them to accept a job offer, whether SOC knew that guards would in fact be required to consistently work longer hours due to a preventable understaffing practice, and whether class members are entitled to damages for regularly working beyond 72 hours. The resolution of these questions will resolve the claims of the class members.

SOC argues that Risinger has not shown that all class members were subjected to the same misrepresentations, and therefore commonality is lacking. But Risinger has provided evidence indicating that class members received similar or identical messages. Recruiters told potential recruits that guards worked a shift of 6 days per week with 12-hour days. (Dkt. no. 104-11 at 3-4.) Recruiters used a script that included either the phrase "your work schedule is usually 6 days a week, 12 hours a day" or "Work Hours: 12 Hour Shift . . . Days: 6 days on 1 off." (Dkt. nos. 104-19, 104-20). Similarly, Risinger has produced deposition testimony from one of SOC's Rule 30(b)(6) designees

acknowledging that SOC suffered a labor shortage and received complaints from guards that they were working 7 days a week. (Dkt. no. 104-11 at 6–8.) Risinger has provided sufficient evidence to show a "common core of salient facts" and has therefore satisfied the commonality requirement. *Hanlon*, 150 F.3d at 1019.

iii. Typicality

The commonality and typicality requirements, though distinct, tend to merge in many cases. Both requirements aid the court in determining whether maintaining a class is feasible and "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 131 S. Ct. at 2551 n.5. The question a court must ask when evaluating typicality is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis*, 657 F.3d at 984 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Claims need not be absolutely identical; they need only be "reasonably co-extensive with those of absent class members." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1042 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at 1020).

SOC argues that Risinger has not presented any evidence of a typical injury, and that defenses unique to Risinger preclude a finding of typicality. Once again, both arguments are unconvincing.

Risinger and the purported class members received the same alleged misrepresentations. Risinger has offered evidence in the form of deposition testimony from recruiters and other SOC representatives, as well as call scripts. Like Risinger, the purported class members then worked for SOC in Iraq while SOC was experiencing staffing shortages. The same alleged recruiting and staffing practices underlie Risinger's claim as well as the purported class members' claims. SOC's argument mainly goes to

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the merits of Risinger's claim, rather than its relation to the claims of potential class members. Risinger has established the typicality requirement.

iv. Adequacy of Counsel

The adequacy of counsel is considered under Rule 23(a)(4) and Rule 23(g). *See Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122–23 (9th Cir. 2014) (noting that "named plaintiff's and class counsel's ability to fairly and adequately represent unnamed [plaintiffs]" are "critical requirements in federal class actions under Rules 23(a)(4) and (g)"). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020.

SOC suggests that Risinger's lack of a trial plan and decision to seek summary judgment are indications that his counsel, Early, Sullivan, Wright, Gizer & McRae LLP and Erik C. Alberts, are inadequate. However, Risinger had no reason to submit a trial plan to the Court. And Risinger's Motion for Partial Summary Judgment, brought in conjunction with his Motion for Class Certification, is neither atypical nor antagonistic to the interests of purported class members. SOC has not pointed to any other conflicts of interest with class members, and Risinger's counsel have submitted a declaration indicating that they have significant experience as counsel of record in class action lawsuits. (Dkt. no. 104-1 ¶ 21.) Therefore both the factors noted in *Hanlon* are satisfied. Risinger has shown that his counsel will adequately represent purported class members.

c. Rule 23(b) Requirements

i. Do Common Questions of Law Predominate?

The bulk of SOC's opposition concerns the predominance question. SOC argues that Risinger has failed to show that the employment agreements were the same among purported class members, that Risinger has taken a unique position in advocating how the Court should interpret his Employment Agreement, that questions of reliance are

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necessarily individualized, and that Risinger has not shown that reliance can be resolved on a class-wide basis.

Contrary to SOC's assertion, Risinger has provided evidence indicating that the employment agreements given to class members were standardized. (Dkt. no. 151-8 at 13–15.) SOC's argument that class members may each have unique theories of their own contracts is inapposite because the Court has already resolved the majority of interpretation issues based on the parties' cross motions for summary judgment. Because the class members' contract and quasi-contract claims are based on the same uniform representations and standardized employment agreements, common questions of law predominate their claims.

SOC correctly points out that many courts are reluctant to certify classes where materially different representations may lead to individualized questions about whether a potential plaintiff's reliance was justified. (Dkt. no. 116 at 20 (citing William B. Rubenstein et al., *Newberg on Class Actions* § 4:58 (5th ed.)).) However, "[c]lass treatment has been permitted in fraud cases where . . . a standardized sales pitch is employed." *In re First All. Mortg. Co.*, 471 F.3d 977, 991 (9th Cir. 2006). Additionally, there is no "talismanic rule" that a class cannot be certified where the alleged fraudulent statements are made orally and are nearly identical. *Id.*; *see also Phelps v. 3PD, Inc.*, 261 F.R.D. 548, 561 (D. Or. 2009) (common questions predominated in fraud claim based on alleged misrepresentations in uniformly used boilerplate form contracts drafted by defendant).

Risinger has offered testimony from SOC employees and copies of call scripts indicating that representations made to recruits were identical or nearly identical. As Risinger has pointed out, courts sometimes rely on circumstantial evidence and common sense when evaluating class-wide reliance in fraud cases. *See, e.g.*, *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 120 (2d Cir. 2013). The representation of a 72-hour workweek was a material term of employment that would be important to any employee, let alone an employee signing up to work in a war zone on another continent. Michael Janke, the founder and former CEO of SOC, noted in his deposition that armed

guards faced highly stressful, unpredictable circumstances in Iraq, and so regular rest was very important. (Dkt. no. 119-3 at 7-8.) Common sense would suggest that recruits considering whether to work as armed guards in a warzone would find the promise of an occasional day off relevant to their decision to accept employment. The inclusion of the work schedule in the call scripts designed to answer common questions further underscores the obvious importance of this issue to recruits that SOC targeted. For these reasons, SOC's argument that individualized issues of reliance would overwhelm the litigation is unconvincing.

Accordingly, because reliance in this case would be based on common misrepresentations concerning a key employment term, the Court finds that common questions will predominate over individual questions.

ii. Is a Class Action Superior to Other Methods?

In order to determine superiority, the Court looks to the factors in Rule 23(b)(c)(A) through (D). These factors are: (1) class members' interest in controlling separate actions; (2) the existence and extent of any current litigation; (3) the desirability of the forum; and (4) the difficulties in managing a class action.

Only the first factor gives the Court pause. This factor normally weighs in favor of granting class certification when the damages suffered by each class member are relatively small. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001), *amended on denial of reh'g by* 273 F.3d 1266 (9th Cir. 2001). Risinger believes a typical damages amount would be less than $50,000 while SOC argues that the appropriate number, based on Risinger's disclosures, is at least $54,992.36. Risinger cautions the Court to evaluate these amounts in conjunction with the cost of litigating them, and that many individual claims would be barred by the statutes of limitations. Risinger also argues that some class members may be entitled to less than $50,000, and that because class members could only bring claims in a limited number of forums, the burden of litigating cases individually is increased.

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Risinger's arguments about the cost and difficultly of pursuing individual claims lead the Court to conclude that a class action is a superior mode of litigation even though some class members' damages may be relatively large. The Court also notes that the absence of any current litigation can be understood to indicate that the costs of litigation for purported class members may be large enough to dissuade them from making claims. Risinger has demonstrated that the certification of a class is preferable to individual litigation in this instance.

In sum, Risinger's Motion for Class Certification is granted with respect to the claims remaining after adjudication of the parties' cross motions for summary judgment.

VI. CONCLUSION

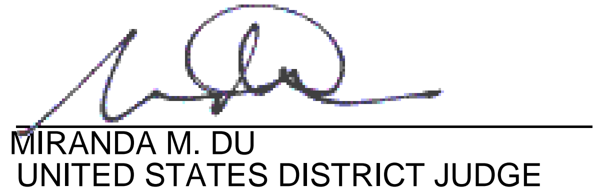
The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motions before the Court.

It is therefore ordered that SOC's Motion for Summary Judgment (dkt. no. 102) is granted in part and denied in part.

It is further ordered that Risinger's Motion for Partial Summary Judgment (dkt. no. 107) is denied.

It is further ordered that Risinger's Motion for Class Certification (Dkt. no. 104) is granted.

DATED THIS 30th day of September 2015.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE