UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAYSON HUNTSMAN,

Plaintiff,

v.

SOUTHWEST AIRLINES CO.,

Defendant.

Case No. 19-cv-00083-PJH

ORDER GRANTING MOTION FOR CLASS CERTIFICATION AND DENYING MOTION TO FILE UNDER SEAL

Re: Dkt. No. 78, 84

Plaintiff Jayson Huntsman's ("plaintiff") motion for class certification came on for hearing before this court on January 28, 2021. Plaintiff appeared through his counsel, Michael Scimone. Defendant Southwest Airlines Co. ("Southwest" or "defendant") appeared through its counsel, Brian Berry. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motion, for the following reasons.

BACKGROUND

On January 7, 2019, plaintiff filed a putative class action complaint ("Compl.") alleging a single cause of action against Southwest for a violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301 et seq. Dkt. 1. In particular, plaintiff alleges that defendant violated title 38 U.S.C. § 4316(b), by failing to pay its employees when they take short-term military leave, while paying workers when they take comparable forms of leave, such as for jury duty leave, bereavement leave, and sick leave. Compl. ¶¶ 3–4.

Plaintiff is a pilot for Southwest who served in the Air Force Reserves from 2012 to

2020 and during that period he took short-term military leave from Southwest to fulfill his military duty obligations. Id. ¶ 9. Huntsman seeks to represent a national class defined as:

> current or former employees of Southwest Airlines Co. who, during their employment with Southwest at any time from October 10, 2004 through the date of judgment in this action, have taken short-term military leave from their employment with Southwest (i.e., military leave that lasted 14 days or fewer) and were subject to a [collective bargaining agreement ("CBA")], except for employees subject to the agreement between Southwest and Transport Workers Union Local 550 covering meteorologists.

Mtn. at 2 (footnote omitted).

Southwest organizes its employees in six separate work groups that are represented by eleven different unions and have different CBAs governing the terms of employment. The approximate composition and union representation of each work group is as follows:

Work Group	**Job Titles**	**Number of employees**	**Unions**
Flight Ops	Pilots	9,100	SWAPA
	Flight Instructors	95	SAPIA, TWU Local 557
	Flight Simulator Technicians	45	IBT Local 19
In Flight	Flight Attendants	15,775	TWU Local 556
Customer Support & Services	Customer Representatives	2,860	IAM District 142
	Source of Support Representatives		
Ground Ops	Customer Service Agents	4,000	
	Ramp Agents	18,000	TWU Local 555
	Operations Agents		
	Provisioning Agents		
	Freight Agents		
Tech Ops	Appearance Technicians	200	AMFA

	Facilities Maintenance Technicians	40	
	Mechanics & related Employees	2,400	
	Material Specialists (f/k/a Stock Clerks)	300	IBT Local 19
Network Operations Center	Dispatchers	390	SAEA, TWU Local 550
	Meteorologists	*10*	*TWU Local 550*
Non-Contract		*10,000*	*N/A (policy handbook)*

Declaration of Michael J. Scimone ("Scimone Decl."), Dkt. 79, ¶ 12. Southwest employs approximately 63,215 workers, of which 53,205 are subject to a CBA. Id. ¶ 14. The 10,010 non-contract employees and the meteorologists are not members of the proposed class. Separately, over 8,000 of Southwest's employees have served or are actively serving in the U.S. military. Compl. ¶ 12; Dkt. 28 ("Answer") ¶ 12.

Plaintiff alleges (and defendant admits) that it does not provide a paid leave benefit for employees who take short-term military leave to perform military service. Compl. ¶¶ 2, 26, 32–33, 36, 49; Answer ¶¶ 2, 26, 32–33, 36, 49. This policy applies to all Southwest employees, regardless of work group, job title, or union representation. Mtn. at 4 n.9. Plaintiff now moves for certification of the proposed class.

DISCUSSION

A. Legal Standard

To maintain a class action, a proposed class must satisfy Rule 23(a)'s numerosity, commonality, typicality, and adequacy of representation requirements. Fed. R. Civ. P. 23(a). If all four prerequisites of Rule 23(a) are satisfied, the court then determines whether to certify the class under one of the three subsections of Rule 23(b), which requires plaintiff to show: (1) a risk of substantial prejudice from separate actions, (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate, or (3) that common questions of law or fact common to the class predominate and that a class action is superior to other methods available for adjudicating the controversy at issue. Fed. R. Civ. P. 23(b)(1)–(3).

The party seeking class certification bears the burden of proof in demonstrating that he has satisfied all four Rule 23(a) requirements and that his action falls within one of the three types of actions permitted under Rule 23(b). Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001). "Before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." Mazza v. Am. Honda Motor Co. Inc., 666 F.3d 581, 588 (9th Cir. 2012). To the extent there are "any factual disputes necessary to determine" a Rule 23 criterion, a district court is required to resolve them. Ellis v. Costco Wholesale, 657 F.3d 970, 983 (9th Cir. 2011) ("[T]he district court was required to resolve any factual disputes necessary to determine whether there was a common pattern and practice that could affect the class as a whole. If there is no evidence that the entire class was subject to the same allegedly discriminatory practice, there is no question common to the class.").

B. Analysis

1. Rule 23(a)

a. Numerosity

Rule 23(a)(1) requires that a proposed class be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). While there is no fixed number that satisfies the numerosity requirement, courts often find that a group greater than 40 members meets such requirement. Californians for Disability Rights, Inc. v. Cal. Dep't of Transp., 249 F.R.D. 334, 346 (N.D. Cal. 2008); Hernandez v. Cnty. of Monterey, 305 F.R.D. 132, 152–53 (N.D. Cal. 2015) ("A class or subclass with more than 40 members 'raises a presumption of impracticability based on numbers alone.'" (citation omitted)). A court may make "common-sense assumptions and reasonable inferences" when analyzing numerosity. West v. Cal. Servs. Bureau, Inc., 323 F.R.D. 295, 303 (N.D. Cal. 2017) (citing The Civil Rights Educ. & Enforcement Ctr. v. RLJ Lodging Trust, 2016 WL 314400, at *6 (N.D. Cal. Jan. 25, 2016)).

Here, plaintiff asserts that there are over 6,700 members in the class. Mtn. at 8.

Plaintiff derived this number by dividing the 8,000 Southwest employees who have served or are actively serving in the military by the total number of Southwest employees, 63,215, to determine that approximately 12.66 percent of all Southwest employees have served or are serving in the military. Scimone Decl. ¶ 15. Plaintiff then multiplied the 12.66 percent by the total number of individuals subject to a covered CBA, 53,205, which results in an estimated 6,733 individuals. Id.

Significantly, defendant does not contest plaintiff's numerosity contention and, in approving a settlement agreement between this same plaintiff and defendant resolving similar USERRA claims, Judge Donato noted that the settlement class numbered some 1,999 class members and potential class members. Huntsman v. Southwest Airlines Co. ("Huntsman I"), No. 17-cv-3972-JD, Dkt. 57 at 4 (N.D. Cal. Oct. 4, 2019). That class included only pilots who took short-term military leave so the class in this case, comprising not just pilots but other work groups, is necessarily greater.[1]

The court finds that plaintiff meets the numerosity requirement.

b. Commonality

Rule 23(a)(2) requires questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). Under this requirement, plaintiff must "demonstrate that the class members have suffered the same injury," not merely violations of "the same provision of law." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011). Given that, plaintiff's claims "must depend upon a common contention" such that "determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. "What matters to class certification . . . is not the raising of common questions—even in droves—but rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Id. (citation

[1] It is not clear that the actual number of class members will reach 6,733 individuals because the 8,000 employees who have served or are actively serving in the military likely includes veterans, i.e., those who have served, and did not take military leave. Nonetheless, the court is satisfied the actual number of class members easily surpasses the 40-member threshold.

omitted); see also Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) ("'An individual question is one where members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" (alteration in original) (citation omitted)).

To that end, the Ninth Circuit has explained that, under the commonality requirement, "plaintiffs need not show that every question in the case, or even a preponderance of questions, is capable of classwide resolution. So long as there is even a single common question, a would-be class can satisfy the commonality requirements of Rule 23(a)(2)." Wang v. Chinese Daily News, Inc., 737 F.3d 538, 544 (9th Cir. 2013). "Whether a question will drive the resolution of the litigation necessarily depends on the nature of the underlying legal claims that the class members have raised." Jimenez v. Allstate Ins. Co., 765 F.3d 1161, 1165 (9th Cir. 2014) (citation omitted).

Starting with the underlying legal claims, plaintiff's claim arises under 38 U.S.C. § 4316(b)(1), which provides:

> [A] person who is absent from a position of employment by reason of service in the uniformed services shall be— . . . entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

38 U.S.C. § 4316(b)(1). The U.S. Department of Labor's ("DOL") has promulgated regulations implementing USERRA that explain that employees on military leave must be given "the most favorable treatment accorded to any comparable form of leave." 20 C.F.R. § 1002.150(b). The regulation also provides three non-exclusive factors to consider whether two forms of leave are comparable:

> In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral

> leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

Id. (emphasis added).

Turning to plaintiff's commonality arguments, he advances five common questions of law or fact. The first question is whether paid leave is a "right and benefit" that must be provided equally under USERRA § 4316(b). Mtn. at 8. In response, defendant argues that this question has no bearing on the commonality analysis because it is a pure question of law that affects all employers equally and has already been answered by the court. Opp. at 10.

Rule 23(a)(2)'s commonality requirement applies to both questions of law and questions of fact. Defendant has not cited any authority for the proposition that a pure question of law that affects all employers subject to USERRA somehow precludes the question from being common to all class members. In considering a class certification motion in a case with similar factual and legal allegations, the district court in Clarkson v. Alaska Airlines, Inc., 2020 WL 4495278, at *4 (E.D. Wash. Aug. 4, 2020), found the same legal issue, i.e., "whether paid leave is one of the 'rights and benefits' that must be provided equally to employee on military leave under USERRA" was common to all class members and that finding alone satisfied Rule 23(a)(2). Nor is the court persuaded that a finding made before final judgment in the case removes it from consideration at the class certification stage. Other courts have indicated that an issue that has been "conceded or otherwise resolved does not mean that it ceases to be an 'issue' for the purposes of the predominance analysis." In re Nassau Cnty. Strip Search Cases, 461 F.3d 219, 228 (2d Cir. 2006) (citing Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 299 (1st Cir. 2000)). That a resolved issue can still impact the predominance analysis implies that it also can be a common issue.

Plaintiff's second common question is whether short-term military leave is comparable to jury duty, bereavement leave, or sick leave. Mtn. at 8–9. Plaintiff points to

two facts that demonstrate a uniform employment practice. Southwest offers the same paid jury, bereavement, and sick leave benefits to all class members regardless of work group or job title and it does not provide paid military leave to any class member. In opposition, defendant advances three arguments against plaintiff's second common question.

i. Whether Plaintiff's Definition of "Short-Term" Military Leave is Common

First, defendant argues that plaintiff's definition of "short-term" military leave is not common across the class, its work groups, or throughout the proposed class period. Opp. at 5. For example, by its agreement with the pilot union, Southwest published a military handbook in November 2014, Declaration of Brian D. Berry ("Berry Decl."), Ex. 3 to Ex. E, Dkt. 85-5, at 76,[2] that defined short term military leave as service in the uniformed service for less than thirty-one days, id., Ex. E, Dkt. 85-5, at 53:7–54:7; id., Ex. 4 to Ex. E, Dkt. 85-5, at 82 (Flight Operations Military Handbook). Southwest did not begin coding short-term as fourteen days for pilots until November 2016. Id., Ex. E, Dkt. 85-5, at 53:7–56:4. Additionally, the customer sales & support representative work group only uses a single code for military leave of any duration with no distinction between short-term and long-term military leave. Id., Ex. G, Dkt. 85-5, at 29:21–30:22. The same is true for flight instructors. Id., Ex. J, Dkt. 86, at pp. 56–57, 46:14–47:25. Dispatchers code military leave over 30 days as extended military leave without distinguishing short-term as 14 or fewer days. Id., Ex. L, Dkt. 86, at pp. 99–100, 38:20–39:2. Because "short-term military leave" lacks a common definition across work groups and over time, defendant argues there is no commonality of class members' claims. Opp. at 6.

In reply, plaintiff argues that Southwest's argument regarding a common definition of "short-term" is actually a merits issue that speaks to how he framed his USERRA claim, that is, whether he can challenge only Southwest's failure to pay for short-term

[2] Pin citations to the declarations filed in support of the parties' briefs refer to the electronically stamped ECF page numbers.

military leave as opposed to all military leave. Reply at 2.

The court begins with the observation that, if plaintiff had placed no limitation on his class definition of military leave, then comparing duration of leave would be a relatively straightforward exercise. In a case cited by defendant, a district court compared the average length for military leave, on the one hand, and sick leave and jury duty leave, on the other and determined for purposes of summary judgment that the leave duration was not comparable. See Hoefert v. Am. Airlines, Inc., 438 F. Supp. 3d 724, 739–41 (N.D. Tex. 2020). This illustrates that plaintiff could present common evidence by compiling the total average military leave duration of any length and comparing it with the total average sick, jury duty, and bereavement leave of any duration.

The parties dispute whether there is sufficient evidence available such that plaintiff can further narrow his definition of military leave to short-term military leave and in this respect, the answer is not particularly clear. For example, plaintiff cites evidence that the pilots, flight attendants, and ground ops and tech ops work groups all code short-term military leave as 14 or fewer days. Dkt. 79-4 at 54:25–55:2–6 (pilots); Dkt. 79-5 at 75:6–8 (flight attendants); 79-2 at 74:3–18 (ground ops and tech ops). Added together, these work groups comprise 49,815 employees out of a total 53,205 employees who are covered by a CBA or approximately 94 percent of potential class members. At the hearing, however, counsel for defendant pointed out that this seemingly high percentage is deceptive because the definition was not in place for the entire class period. As stated in the opposition, Southwest did not begin coding "short-term" military leave as 14 days or fewer for pilots until 2016. Opp. at 5.

It is not clear at this stage whether the evidentiary issues raised by defendant with regard to how Southwest codes its military leave for each work group will undermine plaintiff's ability to generate common answers apt to drive resolution of the litigation. Assuming that Southwest did not code short-term military leave for pilots as 14 or fewer days until 2016 and no other data regarding short-term leave is available from 2004 to

2016, then that lack of evidence may complicate plaintiff's claim on the merits because he will not be able to compare short-term military leave to other similar types of leave. E.g., Reply at 4 & n.9 (proposing to compare short-term military leave with short-term sick leave). But, plaintiff will still be able to compare the average duration of military leave to the average duration of other types of leave and that comparison will drive resolution of whether or not the types of leaves are comparable.

ii. Whether Different CBA Rules Governing Employee Scheduling Defeats Commonality

Second, defendant explains that it treats an employee's absence from work as a "leave" only if the absence conflicts with the employee's work schedule. Opp. at 6. Because the various CBAs governing the work groups have different levels of control and flexibility over scheduling, defendant contends there is no common evidence concerning an employee's ability to take leave. Id. For example, pilots have a monthly bidding process based on seniority. Berry Decl., Ex. A, Dkt. 84-9, at 59:25–60:5. Once a monthly schedule is assigned, pilots can trade flights with other pilots, with some restrictions. Id., Ex. A, Dkt. 84-9 at 61:17–63:4; 71:7–11. Conversely, non-pilots have different CBAs and less flexible levels of control over work schedules. Opp. at 7. For example, dispatchers bid on work schedules annually and have a repeating cycle of days on and off. Berry Decl., Ex. L, Dkt. 86, at pp. 93–94, at 21:16–22:25; id., Ex. 3 to Ex. L, Dkt. 86, at 111–12, 116–22.

The regulation implementing USERRA provides that one factor to consider is "the ability of the employee to choose when to take the leave." 20 C.F.R. § 1002.150(b). The parties differ on whether the ability to choose refers to the event causing the leave itself, e.g., an employee usually chooses when to take vacation leave but does not choose when he or she gets sick, or to the ability of an employee to arrange and rearrange his or her work schedule around the event causing the leave such that the employer counts the absence as leave.

Defendant's argument regarding the voluntariness factor is without merit. In

Waltermyer v. Aluminum Co. of America, 804 F.2d 821, 825 (3d. Cir. 1986), the Third Circuit held that employees on military leave were entitled to holiday pay because the employees' union contract provided for holiday pay for employees performing jury duty, testifying in court, and taking sick leave. In discussing the ability of the employees' ability to choose, the court recognized that employees "whose absence during the holiday week is involuntary and through no fault of their own receive holiday pay. . . . In those instances the government compels the employees' attendance and the worker, presumably, does not choose when to comply with this obligation." Id. The court then compared those absences to military training, stating "[p]articlarly important is the fact that the guardsmen have no individual voice in selecting the weeks they will be on active duty. Military superiors set the time for training which is both compulsory and short." Id.

Waltermyer's discussion of voluntariness indicates that the appropriate measure of voluntariness is whether the employee has control over the absence. Indeed, in the final rule promulgating 20 C.F.R. § 1002.150(b), DOL summarized Waltermyer as follows: "the court found that because military leave was similarly involuntary, it was comparable to other types of involuntary absences from work and should be afforded the holiday pay." Uniformed Services Employment and Reemployment Rights Act of 1994, As Amended, 70 Fed. Reg. 75,246, 75,264 (Dec. 19, 2005). Thus, in comparing the ability of the employee to choose when to take the leave, the appropriate focus is whether the absence is voluntary or involuntary, not the level of control an employee has selecting his or her work schedule.

Defendant also argues an employee's ability to choose when to take leave impacts the duration factor. Opp. at 6. For example, a pilot and a mechanic who both serve in the military for seven days likely will take military leave of different durations because the pilot has much more flexibility in choosing his or her work schedule compared to the mechanic.

USERRA requires employers to provide "such other rights and benefits not determined by seniority as are generally provided by the employer of the person to

employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan . . . ." 38 U.S.C. § 4316(b)(1)(B) (emphasis added); see also 20 C.F.R. § 1002.150(a) ("The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace." (emphasis added)). As plaintiff's counsel admitted at the hearing, USERRA requires pilots to be compared against other pilots, flight attendants would be compared against flight attendants, and so on.

With that merits-focused consideration in mind, the duration of short-term military leave compared to other forms of paid leave is susceptible to common proof. As discussed above, plaintiff can compute and compare the average duration of leaves for similarly situated employees. While that may later dictate the need for subclasses, it does not defeat a finding of commonality.

iii. Whether CBA-Specific Terms for Sick Leave Accrual Defeats Commonality

Third, defendant asserts that paid sick leave is an accrual-based benefit with different accrual rates and caps on accrual determined by the different covered CBAs. Opp. at 9. Because of these differences in sick leave accrual, defendant contends that there cannot be a common answer to whether paid sick leave is comparable to military leave. Id. at 10. Plaintiff responds that all class members have received paid sick leave, regardless of work group, throughout the entire class period. Reply at 5. According to plaintiff, the comparability factors can be evaluated with common evidence such as payroll data, corporate documents, and testimony. Id.

Defendant's argument is not persuasive for a few reasons. First, as it details in the opposition, Southwest's sick leave policies are common to all employees within each work group, which would permit comparison across similarly situated employees. Second, by definition, all leave that is a "right and benefit" under USERRA is accrual

based. See 38 U.S.C. § 4303(2). Whether that leave accrues upon employment, in the case of military leave, or after working a certain period of time, in the case of sick leave, does not impact how Southwest accounts for leave that has already occurred. That is, Southwest has already recorded the instances of sick leave, which can be averaged and then compared to military leave. It may be the accrual rates and caps on sick leave mean that Southwest employees took less sick leave than if Southwest did not restrict sick leave, but that simply means the average sick leave is shorter in duration, a fact that may benefit defendant in the duration comparison.

Third, the fact that sick leave accrues after the period of work can also be viewed as a merits question speaking to the purpose of the leave. For example, in Hoefert, 438 F. Supp. 3d at 739, the court compared sick leave to military leave and noted that "the purposes are different because military absences are forward looking, whereas sick leave is backward looking." While military leave "is provided as the need arises," sick leave "is provided (accrues or is earned) based on past days worked." Id. Similarly, in Duffer v. United Continental Holdings, Inc., 173 F. Supp. 3d 689, 705 (N.D. Ill. 2016), the district court indicated that sick leave had a different purpose than military leave, the former was "compensation for past work."

iv. Commonality Conclusion

Plaintiffs remaining three questions do not meet the commonality requirement because they either parrot USERRA or address an affirmative defense that does not speak to whether the class members have suffered the same injury. See Dukes, 564 U.S. at 349–50 ("Any competently crafted class complaint literally raises common questions. . . . Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification." (quotation marks and citations omitted)).

Nonetheless, plaintiff has identified two common questions that are likely to drive resolution of the litigation. The first is a pure question of law. The second is a question of fact and Southwest has raised plausible concerns that the evidence used to answer

the duration question may not be common. Nonetheless, in Dukes, id. at 355, the Supreme Court has indicated that "a uniform employment practice" can "provide the commonality needed for a class action." In this case, Southwest maintains uniform practices for each work group because it provides paid leave for certain types of leave and denies paid leave for military leave.

Accordingly, plaintiff meets the commonality requirement of Rule 23(a)(2).

c. Typicality

Rule 23(a)(3) requires that the claims of the named plaintiff be typical of those of the proposed class. Fed. R. Civ. P. 23(a)(3). "The test for 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.'" Sandoval v. Cnty. of Sonoma, 912 F.3d 509, 518 (9th Cir. 2018) (quoting Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992)). "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." Hanon, 976 F.2d at 508 (citation omitted).

It is evident that the nature of Huntsman's claim is the same as any other class member because each class member has been denied payment for short-term military leave. Similar to class members, Huntsman alleges that he "has routinely taken short-term military leave," Compl. ¶ 9, and Southwest does not pay employees who have taken short-term military leave, id. ¶ 2.

Defendant argues that plaintiff's claim is barred by res judicata because he could have raised this same claim in Huntsman I but failed to do so. Opp. at 11–13. Defendant's argument is not to the contrary for two reasons. First, defendant has not established that res judicata, if successful, would even reach plaintiff's claims. Claim preclusion requires "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." Howard v. City of Coos Bay, 871 F.3d 1032, 1039 (9th Cir. 2017) (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322

F.3d 1064, 1077 (9th Cir. 2003)). "[T]he claim preclusion 'inquiry is modified in cases where the earlier action was dismissed in accordance with a release or other settlement agreement.'" Wojciechowski v. Kohlberg Ventures, LLC, 923 F.3d 685, 689 (9th Cir. 2019) (quoting U.S. ex rel. May v. Purdue Pharma L.P., 737 F.3d 908, 913 (4th Cir. 2013)). In such cases, "[a] settlement can limit the scope of the preclusive effect of a dismissal with prejudice by its terms." Id. (quoting U.S. ex rel. Barajas v. Northrop Corp., 147 F.3d 905, 911 (9th Cir. 1998)).

In the first case between Huntsman and Southwest, Huntsman I, No. 17-cv-3972-JD (N.D. Cal.), the parties entered into a settlement agreement and the terms of that settlement agreement determine whether plaintiff released his subsequent claim in this case. That settlement agreement only released claims that "(1) arise from or relate to the accrual of Sick Leave during periods of Short-Term Military Leave . . . , or (2) arise from or relate to employee or employer contributions to Class Members' 401(k) accounts." Supplemental Declaration of Michael Scimone ("Scimone Supp. Decl."), Dkt. 91-4, Ex. 3, § XIV. In contrast, plaintiff's claim here is that Southwest failed to pay employee wages and/or salaries during periods of short-term military leave. Compl. ¶ 33. It is plausible that there is no overlap between the settlement agreement and plaintiff's claims such that the present USERRA claim was not released in the prior action, though the court makes no finding on the merits of defendant's res judicata affirmative defense as it goes to the merits of plaintiff's claim.

Second, even if defendant's res judicata defense applies, that would not necessarily defeat certification. As stated by the Ninth Circuit, "[d]efenses unique to a class representative counsel against class certification only where they 'threaten to become the focus of the litigation.'" Rodriguez v. Hayes, 591 F.3d 1105, 1124 (9th Cir. 2010) (quoting Hanon, 976 F.2d at 508). It is not clear at this stage whether this defense is likely to become the focus of the litigation, but given the narrow scope of the settlement agreement, defendant has not demonstrated that the res judicata defense necessitates a finding that plaintiff is atypical. See Kihn v. Bill Graham Archives, LLC, 445 F. Supp. 3d

234, 247 (N.D. Cal. 2020) (determining that affirmative defenses required more factual and legal development before finding they threatened to become focus of litigation).

The court finds that plaintiff's claim is typical of the proposed class's claims.

d. Adequacy

Rule 23(a)(4) requires that the representative party will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). The Ninth Circuit has set forth a two-part test for this requirement: "(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?" Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003).

Additionally, Rule 23(g) requires that a district court appoint class counsel for any class that is certified and further lists the following four factors relevant to such appointment: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions or other complex litigation and the type of claims in the litigation; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g). A court may also consider the proposed counsel's professional qualifications, skill, and experience, as well as such counsel's performance in the action itself. In re Emulex Corp., 210 F.R.D. 717, 720 (C.D. Cal. 2002) (citations omitted).

With respect to plaintiff's adequacy to serve as class representative, defendant argues that he is not adequate because he lacks knowledge of the terms of CBAs for the non-pilot work groups. Opp. at 14. According to defendant, plaintiff admitted that he has no knowledge about how schedules work for the other work groups, the terms of the other CBAs, whether other work groups distinguish between "short-term" and "long-term" military leave, or whether other work groups have similar handbooks as pilots. Id.

Defendant's argument that plaintiff lacks the requisite knowledge to represent other class members is not persuasive. The facts here are easily distinguishable from cases such as Koenig v. Benson, 117 F.R.D. 330, 337 (E.D.N.Y. 1987), where the

plaintiff demonstrated "an alarming unfamiliarity with the suit," or McPhail v. First Command Financial Planning, Inc., 247 F.R.D. 598, 612 (S.D. Cal. 2007), where one plaintiff "never recalled seeing the First Amended Complaint" and "did not recognize the names of her attorneys or their respective law firms," and the other plaintiff was deployed overseas and never sat for a deposition. Plaintiff testified that he is "comfortable representing any individual . . . who's taken short-term military leave for Southwest Airlines," because he is "familiar with USERRA." Scimone Supp. Decl., Ex. 2 at 106:11–21. Indeed, plaintiff Huntsman is familiar with the broad contours of a USERRA claim because he previously was class representative in a prior USERRA case against Southwest. See Huntsman I, No. 17-cv-3972-JD.

Defendant does not oppose the second prong of the Rule 23(a)(4) analysis, that is, whether plaintiff and his counsel will vigorously prosecute this action on behalf of the class. Nor does defendant oppose plaintiff's choice for co-lead class counsel. Co-lead class counsel, Outten & Golden LLP and Block & Leviton LLP, have experience in and knowledge regarding litigating employment class action cases. Scimone Decl. ¶¶ 4–10; Declaration of R. Joseph Barton, Dkt. 80; Declaration of Peter Romer-Friedman, Dkt. 81; Declaration of Thomas G. Jarrard, Dkt. 82; Declaration of Matthew Crotty, Dkt. 83. Their performance in this action to date has been sufficient, including successfully litigating a motion to transfer venue and a motion for judgment on the pleadings.

Thus, plaintiff meets the adequacy prong of Rule 23(a) and co-lead class counsel meet the Rule 23(g) requirements.

2. Rule 23(b)(3)

Once a plaintiff satisfies Rule 23(a), he or she may maintain a class action under Rule 23(b)(3) if the court finds that "the questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

a. Predominance

"The predominance inquiry under Rule 23(b)(3) tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." In re Hyundai & Kia Fuel Economy Litig., 926 F.3d 539, 557 (9th Cir. 2019) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997)). "It presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2), and focuses on whether the common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." Id. "[I]f so, there is clear justification for handling the dispute on a representative rather than on an individual basis." Id.

The predominance analysis is "far more demanding than Rule 23(a)'s commonality requirement." Amchem Prods., 521 U.S. at 623–24. But the rule "does not require a plaintiff seeking class certification to prove that each element of their claim is susceptible to classwide proof," so long as one or more common questions predominate. Castillo v. Bank of Am., NA, 980 F.3d 723, 730 (9th Cir. 2020) (quoting Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 469 (2013)).

"Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011) (quoting Fed. R. Civ. P. 23(b)(3)). In this case, plaintiff alleges a single cause of action for violation of title 38 U.S.C. § 4316(b)(1). Compl. ¶¶ 46–53. In alleging a section 4316(b)(1) violation, a plaintiff must show the following elements: (1) that he or she is absent from a position of employment; (2) that absence is by reason of service in the uniformed services; and (3) that he or she was denied other rights and benefits not determined by seniority and generally provided by the employer to other employees who are furloughed or on a leave of absence and who have similar seniority, status, and pay. The two common issues identified by plaintiff address two aspects of the third element: whether paid leave is a right and benefit; and whether short-term military leave is comparable to other forms of

paid leave.

The Ninth Circuit has held that "predominance in employment cases is rarely defeated on the grounds of differences among employees so long as liability arises from a common practice or policy of an employer." Senne v. Kansas City Royals Baseball Corp., 934 F.3d 918, 938 (9th Cir. 2019) (quoting 7 Newberg on Class Actions § 23:33 (5th ed. 2012)). "Although the existence of blanket corporate policies is not a guarantee that predominance will be satisfied, such policies 'often bear heavily on questions of predominance and superiority'." Id. (quoting In re Wells Fargo Home Mortg. Overtime Pay Litig., 571 F.3d 953, 958 (9th Cir. 2009)). The comparability analysis required by USERRA implicates Southwest's policies, which uniformly deny paid military leave to its various work groups and uniformly pay them for other types of leave.

Defendant advances three arguments against predominance. First, Southwest argues that it has a laches defense against plaintiff and class members that have slept on their rights. Opp. at 15. Second, individual inquiries into each employee's military service dates will predominate. Id. at 18. Third, plaintiff has failed to provide a damages model because he has testified that military leave records are flawed and inaccurate. Id. at 20–21. The court discusses each in turn.

i. Laches

According to defendant, laches involves an individualized inquiry into whether a plaintiff or putative class member had notice that his or her rights were purportedly violated, and those individualized inquiries defeat predominance. Opp. at 16. "'Laches is an equitable time limitation on a party's right to bring suit,' resting on the maxim that 'one who seeks the help of a court of equity must not sleep on his rights.'" Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835 (9th Cir. 2002) (citations omitted). To establish a laches defense, a defendant must prove "unreasonable delay by the plaintiff and prejudice to itself." Couveau v. Am. Airlines, Inc., 218 F.3d 1078, 1083 (9th Cir. 2000) (citation omitted).

As a general matter, courts must consider affirmative defenses in undertaking the

predominance analysis. 2 Newberg, § 4:55. There are two competing considerations. On the one hand, the mere existence of affirmative defenses "does not compel a finding that individual issues predominate over common ones." Williams v. Sinclair, 529 F.2d 1383, 1388 (9th Cir. 1975); see also Senne, 934 F.3d at 938 ("A proposed (b)(3) class may be certified as long as 'one or more of the central issues in the action are common to the class and can be said to predominate . . . even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" (alteration in original) (quoting Tyson Foods, 136 S. Ct. at 1045)). On the other hand, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." Dukes, 564 U.S. at 367.

Synthesizing these two requirements together, as long as a defendant is able to assert individualized defenses at a later stage, the mere existence of such a defense does not defeat certification. See 2 Newberg, § 4:55; see also Kivett v. Flagstar Bank, 333 F.R.D. 500, 506 (N.D. Cal. 2019) ("[C]ourts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members." (alteration in original) (quoting Rodman v. Safeway Inc., 2015 WL 2265972, at *3 (N.D. Cal. May 14, 2015)); Nitsch v. Dreamworks Animation SKG Inc., 315 F.R.D. 270, 313 (N.D. Cal. 2016); Herrera v. LCS Fin. Servs. Corp., 274 F.R.D. 666, 681 (N.D. Cal. 2011).

The circumstances in which an affirmative defense defeats certification are limited to situations in which the affirmative defenses are unusually important or are coupled with other individual issues. 2 Newberg, § 4:55. This latter consideration was present in the two cases Southwest cites in support of its laches theory where the defendants pleaded several affirmative defenses that could not be adjudicated through common facts or evidence. See Valenzuela v. Union Pac. R.R. Co., 2017 WL 679095, at *14 (D. Ariz. Feb. 21, 2017), In re SFPP Right-of-Way Claims, 2017 WL 2378363, at *17–18 (C.D. Cal. May 23, 2017).

This case does not have the same considerations as Valenzuela or In re SFPP because defendant only identifies one potential affirmative defense for the predominance inquiry. Even if defendant had that information available, the district court in Kelly v. City and County of San Francisco, 2005 WL 3113065, at *3 (N.D. Cal. Nov. 21, 2005), recognized that there is "no authority for defendants' claim that each element of the laches analysis will require a fully individualized inquiry." Rather, "common evidence will . . . almost certainly be involved in the laches analysis." Id.

In sum, there are sufficient safeguards at later stages of this litigation to permit defendant to assert a laches defense against individual class members and/or plaintiff. See Jimenez, 765 F.3d at 1168 (affirming class certification where "the district court was careful to preserve [the defendant's] opportunity to raise any individualized defense it might have at the damages phase of the proceeding").

ii. Individual Inquiries into Military Service Dates

Defendant states that plaintiff routinely took military leave from Southwest on dates that were not reflected in his military service records. Opp. at 18. In written discovery responses and at his deposition, plaintiff stated that he performed military service on days that were included in Southwest's leave records but were not reflected in the Air Force's service records. Id. According to defendant, plaintiff also testified that Southwest's leave records were "flawed" and "inaccurate." Id. at 19. Based on these factual issues, defendant argues that individual inquiries into military service dates will predominate. Id. at 18.

Southwest's arguments implicate two separate elements of plaintiff's USERRA claim. Whether plaintiff actually performed military service on the days he claims speaks to whether plaintiff was "absent from a position of employment by reason of service in the uniformed services." 38 U.S.C. § 4316(b)(1) (emphasis added). Whether Southwest's own payroll records are inaccurate or flawed goes to the comparability analysis required by section 4316(b)(1).

With regard to the first argument, Southwest has identified 14 days in 2017 and

2018 during which plaintiff took military leave from Southwest and for which the military has no record of plaintiff performing military service. Opp. at 18. According to defendant, this apparent discrepancy undermines plaintiff's claim that he should be paid for those days he was performing military service. Id. Plaintiff disputes that contention and has proffered various explanations why the military records do not accurately reflect these days. See, e.g., Berry Decl., Ex. C. He also argues that there is no requirement that plaintiffs with USERRA claims must independently verify the accuracy of an employer's payroll and leave records. Reply at 12.

Defendant's argument is not persuasive because USERRA does not require persons who serve less than 31 days to submit documentation to their employer upon return from a leave of absence. See 38 U.S.C. §§ 4312(e), (f), 4316(e)(2); see also 20 C.F.R. § 1002.121 ("Is the employee required to submit documentation to the employer in connection with the application for reemployment? Yes, if the period of service exceeded 30 days and if requested by the employer to do so."). Similarly, the military is generally required to verify an employee's absence, regardless of duration, due to uniformed service to civilian employers, but only upon the employer's request. See Dep't of Def. Instruction 1205.12, at 9, https://www.esgr.mil/Portals/0/Volunteer%20Resources/ombudsman%20services/5%20year%20exemption%20USERRA%20policy%20memos/Department%20of%20Defense%20Instruction%20120512p.pdf?ver=2019-04-19-102455-327 (Feb. 24, 2016). As stated by defendant's counsel at the hearing, Southwest does not routinely request verification of its employee's period of military service and only verified in this case because plaintiff sued the company.

Moreover, defendant has not persuasively demonstrated that plaintiff would need to present evidence that varies from class member to member. Assuming plaintiff had no justification[3] for taking military leave from Southwest for the 14 days defendant identified

[3] It may be the case that plaintiff had a valid reason why each of the 14 days was not reported by the Air Force such that he was justified in taking military leave from

in 2017 and 2018, plaintiff's military service records confirm that he did serve on 47 out of a total 61 days on which he took military leave from Southwest.[4] Declaration of John Freed ("Freed Decl."), Dkt. 84-5, ¶ 2 (explaining that Exhibit 1 includes a chart "that identifies Jayson Huntsman's military leaves Southwest in 2017 and 2018"); see Dkt. 84-5; Ex. 1 at 4. In other words, the discrepancies identified by defendant amount to twenty-three percent (14 divided by 61) of all military leave days in 2017 and 2018. While not insignificant, a 23 percent error rate—inferred from one data point, i.e., one employee—does not support a conclusion that class members will need to present individualized evidence to support their military service.

Defendant's second argument is that plaintiff has testified that Southwest's own military leave records are "flawed" and "inaccurate." Southwest has not demonstrated that plaintiff's statements, selectively pulled from his deposition testimony, discredits its own payroll records to such an extent that the records are unreliable as common evidence. For example, plaintiff testified that he "performed military duty on days off showing on my SWA records that are not annotated accordingly" and responded in the affirmative to the question: "And so in that regard Southwest's records are inaccurate? " Berry Decl., Ex. A, Dkt.84-9, at 257:19–25. These quotes give no indication of how pervasive the potential flaws might be.[5] Nor is it clear how pervasive those flaws might

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Southwest. This goes to the merits of plaintiff's individual claim and the court makes no finding on this issue.

[4] It is not clear whether the number of unverified days is in fact 14 days. Of the 14 days Southwest identifies in its opposition, Opp. at 18 n.12, three are not marked on its own records as days on which plaintiff took military leave, which instead yields only 11 days. Compare Freed Decl., Ex. 1, Dkt. 84-6 at 4 with Berry Decl., Ex. C, Dkt. 84-11. Whether the true number is 14 days or 11 days does not substantively alter the quantitative element of the analysis.

[5] Defendant cites Exhibit C to the Berry Declaration where plaintiff has identified instances where his military service record displayed dates that were not recorded on Southwest's leave record. Defendant has made no attempt to quantify the extent of the supposed inaccuracies and from a brief review of Exhibit C there are a handful of days from June 2012 to May 2020 for which the Air Force has records, but Southwest does not. Berry Decl., Ex. B at 7–13 (Air Force records), Ex. C (plaintiff's excel chart of discrepancies). There is one exception where a 21-day period of service is missing from Southwest's payroll data, which might support defendant's argument, but it has not put forward a quantitative analysis of the errors in its own payroll data.

be when applied to the class as a whole because defendant only focuses on plaintiff's records.

Southwest records when its employees take leave and those records specify whether that leave is sick, jury duty, bereavement, or military leave. Those records are reliable enough to permit a comparison of the different types of leave on a class-wide basis and the individual issues identified by defendant do not overcome the common issues. If, however, plaintiff were to rely on records other than Southwest's to prove leave days taken, the court would likely be forced to reconsider this determination.

iii. Damages Model

Citing plaintiff's testimony that Southwest and the military's records are "inaccurate" and "flawed," defendant argues that plaintiff cannot also claim those records are reliable for calculating damages. Opp. at 21. Defendant also argues this case is similar to others that have denied certification because the plaintiffs in those cases failed to show that the damages stemmed from the defendant's actions that created the legal liability. Id. In response, plaintiff states that he has described a common methodology to calculate damages based on periods of leave reported in Southwest's payroll records during the class period. Reply at 13. Plaintiff points out that defendant does not argue that the damages approach is flawed, only that defendant questions the reliability of the records based on the apparent errors in plaintiff's military service records. Id.

Levya v. Medline Industries Inc., 716 F.3d 510 (9th Cir. 2013), guides the damages model analysis in employment cases. There, the Ninth Circuit reversed a denial of class certification where the district court had determined that the damages inquiry would be highly individualized. Id. at 513. On appeal, the Circuit noted that damages determinations are individualized in nearly all wage-and-hour class actions and that "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." Id. at 513–14. The Levya court acknowledged the principle from the Supreme Court's decision in Comcast Corp. v. Behrend that the plaintiff must show that his or her damages "stemmed from the defendant's actions that created the legal

liability." Id. at 514 (citing Comcast Corp. v. Behrend, 569 U.S. 27, 38 (2013)). The Ninth Circuit approved a damages model (and distinguished Comcast) where the defendant's computerized payroll and time-keeping database would enable the court to accurately calculate damages and related penalties for each claim. Id.

Here, plaintiff has alleged only one claim for violation of USERRA and if plaintiff is able to prove liability, then such a finding would mean that Southwest was liable for any unpaid military leave. Indeed, plaintiff's requested relief would include requiring Southwest to pay the compensation that plaintiff and class members should have received for periods of short-term military leave. Compl., Prayer for Relief. Defendant's computerized payroll information records military leave and serves as a reasonable measure of damages for unpaid military leave. Additionally, defendant's attempt to undermine the reliability of its own records with plaintiff's testimony that it solicited, and it injected into this case is unpersuasive.

In sum, the common issues identified by plaintiff, whether paid leave is a "right and benefit" under 38 U.S.C. § 4316(b) and whether short-term military leave is comparable to other forms of paid leave, can be resolved on a classwide basis. Because plaintiff's USERRA claim turns on Southwest's generally applicable policies, predominance is met. See Senne, 934 F.3d at 938.

b. Superiority

The superiority prong of Rule 23(b)(3) requires a court to determine "whether the objectives of the particular class action procedure will be achieved in the particular case." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1023 (9th Cir. 1998), overruled on other grounds by Dukes, 564 U.S. at 338. Rule 23(b)(3) provides four factors to evaluate superiority: (1) the class members' interests in controlling litigation, (2) the nature and extent of other litigation concerning the same controversy, (3) the desirability of concentrating the litigation of the claims in this forum, and (4) the difficulties of managing the case as a class action. Fed. R. Civ. P. 23(b)(3).

Significantly, defendant does not contest any of plaintiff's superiority contentions.

As to the first factor, "[w]here recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1175 (9th Cir. 2010) (citations omitted). This factor is similar to the commonality test; underlying both tests "is a concern for judicial economy." Id. Plaintiff meets that standard here since the cost of litigating to recover the brief periods of time for which an employee takes short-term military leave (i.e., less than 2 weeks) are substantial relative to the individual relief. Neither party has identified other litigation against Southwest on the same issue and this court has already denied defendant's motion to transfer venue. Finally, neither party has identified any manageability concerns.

The court finds plaintiff satisfies the superiority element and further finds that plaintiff meets all the requirements to certify a class.

3. Motion to File Under Seal

Concurrent with its opposition to the motion for class certification, defendant moves to file certain documents under seal. Dkt. 84. Defendant seeks to seal Exhibits A through C of the Berry Declaration, Dkts. 84-9 to 84-11; a portion of the Freed Declaration along with Exhibits 1 and 2 to that declaration, Dkts. 84-5 to 84-7; and those portions of its opposition brief that refer to material from the aforementioned Berry and Freed Declarations, Dkt. 84-3. Plaintiff designated these materials as "confidential" under the parties' protective order and has not filed any response or opposition to the motion.

Neither party has complied with Civil Local Rule 79-5. Specifically, an administrative motion to file under seal must be accompanied by a declaration establishing that the documents sought to be filed under seal, or portions thereof, are sealable. Civ. L.R. 79-5(d)(1)(A). Defendant did not file such a declaration. Defendant has also failed to indicate, by highlighting or other clear method, the portions of the unredacted opposition brief that have been omitted from the redacted version of the brief. Civ. L.R. 79-5(d)(1)(D). The redacted and unredacted versions of the opposition brief also fail to display the proper notation as required by Local Rule 79-5(d)(1)(C) and (D).

Additionally, where, as here, a submitting party (defendant) seeks to file under seal a document designated as confidential by a designating party (plaintiff) within four days of the filing of the motion to file under seal, the designating party must file a declaration establishing that all of the designated material is sealable. Civ. L.R. 79-5(e)(1). Plaintiff has failed to do so.

Turning to the merits of defendant's motion, there is a general presumption in favor of public access to federal court records. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978). "[T]he proponent of sealing bears the burden with respect to sealing. A failure to meet that burden means that the default posture of public access prevails." Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1182 (9th Cir. 2006).

When a request to seal documents is made in connection with a motion, the court must determine whether the parties are required to overcome that presumption with "compelling reasons" or with "good cause." A party seeking to seal materials submitted with a motion that is "more than tangentially related to the merits of the case"—regardless whether that motion is "technically dispositive"—must demonstrate that there are compelling reasons to keep the documents under seal. Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1101–02 (9th Cir. 2016). Conversely, if the motion is only tangentially related to the merits, "a 'particularized showing," under the 'good cause' standard of Rule 26(c) will 'suffice[] to warrant preserving the secrecy of sealed discovery material attached to non-dispositive motions." Kamakana, 447 F.3d at 1180 (alteration in original) (quoting Foltz v. State Farm. Mut. Auto. Ins. Co., 331 F.3d 1122, 1135, 1138 (9th Cir. 2003)). Generally, courts in the Ninth Circuit apply the compelling reasons standard to class certification motions. See A.B. v. Pac. Fertility Ctr., 441 F. Supp. 3d 902, 906 (N.D. Cal. 2020); Yan Mei Zheng v. Toyota Motor Corp., 2019 WL 6841324, at *1 (N.D. Cal. Dec. 16, 2019) (collecting cases); Racies v. Quincy Bioscience, LLC, 2017 WL 6405612, at *2 (N.D. Cal. Dec. 15, 2017).

Here, the information sought to be sealed includes plaintiff's personal information relating to his leaves of absence from Southwest, his military service records, tax and

financial information related to his military service, and other sensitive personal information. Dkt. 84 at 2. Defendant argues that plaintiff has designated these materials as confidential under the parties' protective order. Of course, such a designation, without more, is insufficient to demonstrate a compelling reason to seal that document. See Civ. L.R. 79-5(d)(1)(A) ("Reference to a stipulation or protective order that allows a party to designate certain documents as confidential is not sufficient to establish that a document, or portions thereof, are sealable.").

Defendant also argues that certain employment records can be sealable. Dkt. 84 at 1. The cases defendant cites, e.g., San Diego Trolley, Inc. v. Superior Ct., 87 Cal. App. 4th 1083, 1097 (Ct. App. 2001); Lee v. Pep Boys-Manny Moe & Jack of Cal., 2015 WL 9268118, at *4 (N.D. Cal. Dec. 21, 2015), deal with California's constitutional right to privacy of an employee's personnel records, which in turn is defined as those files that the employer maintains relating to the employee's performance or to grievances concerning the employee, Cal. Labor Code § 1198.5. None of the cases cited deal with dates of military service or anything similar. The only plausible material to be sealed relates to plaintiff's personal financial information, i.e., his IRS form W-2s. See Pension Plan for Pension Tr. Fund for Operating Eng'rs v. Giacalone Elec. Servs., Inc., 2015 WL 3956143, at *10 (N.D. Cal. June 29, 2015); In re Wachovia Corp. "Pick-a-Payment" Mortg. Mktg. & Sales Practices Litig., 2014 WL 2905056, at *4–5 (N.D. Cal. June 26, 2014).

A review of each document to be sealed confirms that, aside from the personal financial information, the material does not meet the compelling reasons standard or is not narrowly tailored. With regard to Exhibit C to the Berry Declaration, the Freed Declaration and Exhibits 1 and 2 to the Freed Declaration, neither defendant nor plaintiff have cited a case or proffered a compelling reason for the proposition that past dates of military service are sealable. With regard to Exhibit A to the Berry Declaration, defendant has made no attempt to narrowly tailor the material to be sealed. See Civ. L.R. 79-5(b). Exhibit B to the Berry Declaration meets the compelling reason standard with respect to

plaintiff's tax information but does not with regard to his dates of service. The photos taken by plaintiff when he was on an Air Force base may be sealable if they tend to reveal sensitive information, but defendant has not made any particular argument as to the photos.

In sum, both the submitting party and the designating party have procedural obligations under the Civil Local Rules with which they have failed to comply. The justification proffered by defendant generally does not meet the compelling reasons standard, except as articulated above. The court is cognizant of the fact that, even though defendant has filed the motion to file under seal, it is plaintiff who has designated this material as confidential. Accordingly, the court will deny the motion without prejudice so that the parties may refile the motion in accordance with the procedural and substantive issues identified above.

CONCLUSION

For the reasons stated, the court GRANTS plaintiff's motion for class certification. The court DENIES WITHOUT PREJUDICE defendant's motion to file under seal. Defendant may refile its motion to file under seal within fourteen days of the date on which this order is filed.

IT IS SO ORDERED.

Dated: February 3, 2021

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

United States District Court
Northern District of California