

I.

FACTUAL BACKGROUND

As it must on this motion for summary judgment, the Court sets forth the material facts and views all reasonable inferences to be drawn from them in the light most favorable to Plaintiffs Chris Sirko and Daniel Cervantes, the non-moving parties. The following facts are uncontroverted unless otherwise noted.¹

A. Daniel Cervantes

In May 2009, Cervantes, a former Kaiser employee, became an IBM employee as part of an outsourcing agreement between Kaiser and IBM. (Defendant’s Reply in Further Support of Statement of Uncontroverted Facts and Response to Plaintiffs’ Separate Statement of Facts (“D’s Reply”) ¶¶ 1, 81 [Doc. # 96]; see Declaration of Wendy C. Butler (“WCB Decl.”), Exh. A (Cervantes Depo. at 25:15-26:1) [Doc. # 96-3].) Cervantes was a Recovery Manager. (D’s Reply ¶ 3; see WCB Decl., Exh. B (Exhibit 19 of Cervantes’ Deposition).) In that role, he earned \$8,265 per month, or \$99,174 per year. (D’s Reply ¶ 1; see WCB Decl., Exh. A (Cervantes Depo. at 135:3-18).)

Cervantes’ function as a Recovery Manager was to “drive immediate recovery” of systems in crisis situations. (D’s Reply ¶ 4; see WCB Decl., Exh. A (Cervantes Depo. at 48:7-10).) Cervantes maintains that even if that was his role when he was a Kaiser

¹ Parties object on several evidentiary grounds, including relevance, to each other’s “undisputed” facts. To the extent that the Court relies on IBM’s facts, it overrules Plaintiffs’ blanket objections. The same is true for Plaintiffs’ proffered facts. The Court addresses the parties’ other evidentiary objections only to the extent the Court relies on the corresponding evidence.

The parties argue that some of the “undisputed” facts included herein are disputed without identifying any material facts that raise a genuine issue. The Court has reviewed all such blanket objections and finds them without merit. A party must establish a genuine dispute of material fact with more than a conclusory objection or denial. “Rule 56(e) . . . requires the nonmoving party to . . . designate specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (internal quotation marks omitted).

1 employee, his work became dominated by “‘scribing’ the events on a bridge per
2 established IBM procedures” when he became an IBM employee. (Declaration of Daniel
3 Cervantes (“DC Decl.”) ¶ 3, Fact No. 4²; *see* Declaration of J. Jason Hill (“JJH Decl.”),
4 Exh. 14 (Cervantes Depo. at 16:18-23, 55:15-23).) In fact, 80 to 90 percent of his work
5 time, he asserts, was “to simply document the response and the times in which certain
6 events happened.” (DC Decl. ¶ 3, Fact No. 4.)

7 Typically, Cervantes would receive a “trouble ticket” after a Kaiser help desk
8 analyst had taken the call reporting the problem and escalated it to another Kaiser
9 employee called the “lead.” (D’s Reply ¶ 6; *see* WCB Decl., Exh. A (Cervantes Depo. at
10 53:19-54:5).) The lead would conduct a preliminary assessment of the symptoms and the
11 personnel needed to address the problem. (*Id.*) The lead would also designate the
12 problem “high, medium or critical.” (*See* WCB Decl., Exh. A (Cervantes Depo. at 51:5-
13 8).) Kaiser would use a Recovery Manager only on “high” and “critical” incidents
14 because they had “more urgency” and “need[ed] more coordination.” (D’s Reply ¶ 60;
15 *see* WCB Decl., Exh. A (Cervantes Depo. at 132:7-18).)

16 The parties dispute the level of decisionmaking authority and leadership
17 Cervantes’ job required throughout any given crisis. According to IBM, once a trouble
18 ticket had been routed to him, Cervantes’ job was to “glean as much information” as
19 possible about the issue, determine if the lead’s preliminary assessments “ma[d]e sense,”
20 and if they did not, “challenge the person on it.” (D’s Reply ¶ 7; *see* WCB Decl., Exh. A
21 (Cervantes Depo. at 51:1-53:16).) To do so, Cervantes probed whether the symptoms
22

23 ² Defendant IBM objects to the Declaration of Daniel Cervantes on the grounds that it is a
24 “sham” declaration. (Defendant’s Reply in Support of Motion for Summary Judgment 2-4 [Doc. # 96].)
25 *See Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012). In order to exclude the declaration based on
26 the sham affidavit rule, the Court must make a factual determination that the declaration is a sham, *i.e.*,
27 the “inconsistency between a party’s deposition testimony and subsequent affidavit must be clear and
28 unambiguous to justify striking the affidavit.” *Id.* (citation omitted). Unlike in *Yeager*, where the
declarant recalled facts that he could not remember during his deposition, here Cervantes is not recalling
a new fact that he did not testify to during his deposition nor is he directly contradicting his deposition
testimony. Thus, in this instance, the fact asserted in Cervantes’ declaration is admissible.

1 “[were] really the symptoms,” “ask[ed] questions[,] listen[ed] to the responses, and
2 ma[d]e a decision about who should be engaged.” (D’s Reply ¶ 7; *see* WCB Decl., Exh.
3 A (Cervantes Depo. at 54:15-24, 56:6-9).)

4 Cervantes argues, however, that to the extent he thought the Kaiser lead had not
5 engaged the right people initially, he would suggest other people to be engaged based on
6 a “collaborative” discussion about what they thought the symptoms were. (D’s Reply ¶
7 90; *see* WCB Decl., Exh. A (Cervantes Depo. at 54:9-14).) Moreover, rather than
8 deciding whom to engage, Cervantes would merely consult the established support
9 personnel for the impacted systems or applications and get them on the line. (D’s Reply
10 ¶¶ 90, 91; *see* WCB Decl., Exh. A (Cervantes Depo. at 53:3-11, 56:17-57:4).)

11 After notifying assigned IT personnel of the problems, Cervantes would then spend
12 most of his time documenting the recovery process: marking the time the IT personnel
13 entered the bridge, documenting the alternative causes and solutions the IT personnel
14 explored, and contacting IT personnel assigned to other systems if the initial IT personnel
15 reported other systems as the possible cause of the outage. (D’s Reply ¶¶ 14, 15, 17, 90;
16 *see* JJH Decl., Exh. 14 (Cervantes Depo. at 56:17-24, 116:25-118:19).)

17 During the call, Cervantes would also release, retain, or engage additional
18 technical resources as the situation evolved; probe alternatives when the team proposed
19 bringing down the crippled system; and decide which incident to prioritize when multiple
20 incidents unfolded simultaneously. (D’s Reply ¶¶ 16, 18, 19; *see* WCB Decl., Exh. A
21 (Cervantes Depo. at 67:13-21, 83:15-22, 85:10-12, 97:23-98:5, 105:15-20).) While
22 Cervantes does not dispute that he performed these functions, he claims that IBM’s and
23 Kaiser’s established procedures governed how he performed these tasks. (D’s Reply ¶¶
24 16, 18, 19; *see* JJH Decl., Exh. 14 (Cervantes Depo. at 93:7-94:18).)

25 Finally, Cervantes would conclude a bridge once the problem was fixed and
26 verified as fixed. (*See* WCB Decl., Exh. A (Cervantes Depo. at 72:6-8).) The root cause
27 analysis would then fall to the IT personnel whose system required troubleshooting. (D’s
28 Reply ¶ 21; *see* WCB Decl., Exh. A (Cervantes Depo. at 72:18-24).) If the IT personnel

1 “pushed back” on performing that analysis, Cervantes would engage management to
2 make the final decision as to who would be responsible for the root cause analysis. (D’s
3 Reply ¶ 21; *see* WCB Decl., Exh. A (Cervantes Depo. at 74:5-75:1).)

4 **B. Chris Sirko**

5 IBM hired Chris Sirko as a Systems Programmer in May 2009 as a result of an
6 outsourcing agreement between Kaiser and IBM. (D’s Reply ¶ 2; *see* WCB Decl., Exh.
7 D (Sirko Depo. at 9:4-8).) Prior to becoming an IBM employee, Sirko was a Kaiser
8 employee. (*See* WCB Decl., Exh. D (Sirko Depo. at 9:1-2).) As a Systems Programmer,
9 Sirko has earned no less than \$7,836 per month, or \$88,632 per year. (D’s Reply ¶ 2; *see*
10 WCB Decl., Exh. D (Sirko Depo. at 254:22-25).)

11 Sirko’s job is to maintain and monitor databases and tools that run on Kaiser’s
12 mainframe. (D’s Reply ¶ 25; *see* WCB Decl., Exh. D (Sirko Depo. at 10:25-11:4; 87:23-
13 88:2).) Sirko supports multiple products (D’s Reply ¶ 29; *see* WCB Decl., Exh. D (Sirko
14 Depo. at 22:22-23:2, 58:1-6), but spends most of his time supporting CODE-1 and
15 FINALIST, two related databases that Kaiser uses “to cross-reference their member zip
16 codes for addresses,” which are then utilized to send bills, appointment notices, and other
17 mail. (D’s Reply ¶ 29; *see* WCB Decl., Exh. D (Sirko Depo. at 16:18-17:17, 19:19-21,
18 21:13-22:13).) Missed upgrades and updates can cause outages, which impacts Kaiser’s
19 ability to send mailings to its members. (D’s Reply ¶ 30; *see* WCB Decl., Exh. D (Sirko
20 Depo. at 17:13-17, 19:10-21).)

21 The majority of Sirko’s time is spent on maintenance, which primarily involves
22 upgrading or updating Kaiser’s databases. (D’s Reply ¶ 27; *see* WCB Decl., Exh. D
23 (Sirko Depo. at 90:23-91:7, 92:21-22).) The parties dispute the accuracy of describing
24 one of Sirko’s tasks in upgrading or updating a database as “planning.” To perform an
25 update, for example, Sirko relies on existing documentation, either from the employee
26 previously charged with supporting the product or from the vendor of the product. (D’s
27 Reply ¶ 31; *see* WCB Decl., Exh. D (Sirko Depo. at 106:20-25, 129:4-9).) Sirko does not
28 create the documentation for each update, but rather “follow[s] the same thing over and

1 over [] again.” (*See* WCB Decl., Exh. D (Sirko Depo. at 105:16-20).) To the extent that
2 Sirko has to modify the documentation, which is written in a computer language called
3 JCL, Sirko’s modifications consist of changing the date parameter to the current date in
4 the jobs that his predecessor built and plugging in Kaiser’s naming protocols. (D’s Reply
5 ¶ 31; *see* WCB Decl., Exh. D (Sirko Depo. at 127:25-128:4, 130:3-17).)

6 Prior to implementation, Sirko also meets with the client to discuss his suggestions
7 for and the timing of the implementation. (D’s Reply ¶ 32; *see* WCB Decl., Exh. D
8 (Sirko Depo. at 40:8-14, 48:1-5, 74:16-23, 145:19-22).) For example, he once
9 recommended creating a “parallel environment,” in which he would create a second data
10 set and not delete the old data set until the second data set had been tested—essentially,
11 he suggested backing up the data. (D’s Reply ¶ 33; *see* WCB Decl., Exh. D (Sirko Depo.
12 at 37:5-38:7).) Further, an upgrade could require Sirko to gather information from both
13 Kaiser and the vendor to estimate the time needed to complete the upgrade. (*See* WCB
14 Decl., Exh. D (Sirko Depo. at 158:1-24).) In those cases, Sirko would need to find out
15 how the business users on Kaiser’s end would be using the product – for example, if they
16 would be running a specific report – and then to learn from the vendor which additional
17 steps he would need to perform to obtain that function. (*Id.*)

18 Sirko also creates a change record (“CRQ”) for Kaiser, in which he provides
19 Kaiser a summary of the steps he will take to implement the update, the potential impact
20 on its systems (which consists of responses to a series of eight “yes” or “no” questions),
21 and the steps he needs to take if the change fails. (D’s Reply ¶ 32; *see* WCB Decl., Exh.
22 D (Sirko Depo. at 103:6-105:5).)

23 As a last step before implementation, Sirko tests the database. (D’s Reply ¶ 33;
24 *see* WCB Decl., Exh. D (Sirko Depo. at 20:9-15, 28:2-4).) During testing, Sirko
25 “weed[s] out any problems” and corrects it by contacting the vendor for a patch or fixing
26 a syntax error in the code. (D’s Reply ¶ 39; *see* WCB Decl., Exh. D (Sirko Depo. at
27 144:9-15, 149:14-17, 150:5-15).) After Sirko completes testing, Kaiser performs its own
28 testing and signs off on the change. (D’s Reply ¶ 40; *see* WCB Decl., Exh. D (Sirko

1 Depo. at 20:9-15).) Sirko then implements the update based on the plan. (D’s Reply ¶
2 41; *see* WCB Decl., Exh. D (Sirko Depo. at 105:12-15).) The implementation takes place
3 during certain hours of the day, set forth by Kaiser, when the change would have the least
4 impact on users. (D’s Reply ¶ 36; *see* WCB Decl., Exh. D (Sirko Depo. at 135:17-
5 136:13).)

6 According to Sirko, there are different “tools” one can use to perform a change,
7 and some approaches are more efficient than others. (D’s Reply ¶ 42; *see* WCB Decl.,
8 Exh. D (Sirko Depo. at 58:16-59:20, 137:20-138:6).) Furthermore, since Sirko’s
9 supervisor and the team leads are not experts on CODE-1 and FINALIST, they do not
10 generally give Sirko guidance on how to update or upgrade these products. (*See* WCB
11 Decl., Exh. D (Sirko Dep. 199:15-200:14).) Instead, if he has a question, he contacts the
12 vendor and obtains any user guides to the product. (D’s Reply ¶ 47; *see* WCB Decl.,
13 Exh. D (Sirko Depo. at 200:17-23).)

14 The rest of Sirko’s time is spent monitoring the systems to spot and investigate
15 outages before they are reported. (D’s Reply ¶ 44; *see* WCB Decl., Exh. D (Sirko Depo.
16 at 88:18-89:21, 90:2-10, 91:8-92:13, 185:7-13).) A portion of his time is also spent on
17 call, resolving problems as they arise. (*See* WCB Decl., Exh. D (Sirko Depo. at 93:3-9).)

18 II.

19 LEGAL STANDARD

20 Summary judgment should be granted “if the movant shows that there is no
21 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
22 of law.” Fed. R. Civ. P. 56(a); *accord* *Wash. Mut. Inc. v. United States*, 636 F.3d 1207,
23 1216 (9th Cir. 2011). Material facts are those that may affect the outcome of the case.
24 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202
25 (1986). A dispute is genuine “if the evidence is such that a reasonable jury could return a
26 verdict for the nonmoving party.” *Id.* The moving party bears the initial burden of
27 establishing the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at
28 323. Once the moving party has met its initial burden, Rule 56(c) requires the

1 nonmoving party to “go beyond the pleadings and by her own affidavits, or by the
 2 ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts
 3 showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(c),
 4 (e) (1986)); *see also Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010) (*en*
 5 *banc*) (“Rule 56 requires the parties to set out facts they will be able to prove at trial.”).
 6 “[T]he inferences to be drawn from the underlying facts . . . must be viewed in the light
 7 most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith*
 8 *Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

9 III.

10 DISCUSSION

11 IBM moves for summary judgment on all of Plaintiffs’ claims for (1) failure to
 12 pay overtime wages under California Labor Code §§ 204, 515, 1194, 1198; (2) failure to
 13 provide accurate itemized wage statements under California Labor Code § 226; (3)
 14 failure to timely pay all wages due at termination under California Labor Code § 203; (4)
 15 unfair business practices under California Business and Professions Code §§ 17200-
 16 17208; and (5) violations of the Private Attorney General Act (“PAGA”) under California
 17 Labor Code § 2698 *et seq.* IBM moves for summary judgment on all of these claims on
 18 the ground that Sirko and Cervantes are administratively exempt employees. (Mot. at 1.)

19 A. **IBM is Not Entitled to Summary Judgment Because There is a Material** 20 **Dispute As to Whether Plaintiffs Are Subject to an Exemption**

21 California Labor Code § 510 requires overtime pay for any work over eight hours
 22 in one workday, over 40 hours in one workweek, or on the seventh day of work in one
 23 workweek subject to certain exceptions. Cal. Lab. Code § 510. The Industrial Welfare
 24 Commission (“IWC”) is statutorily authorized to establish exemptions from such
 25 statutory overtime requirements for “executive, administrative, and professional
 26 employees.” *Soderstedt v. CBIZ S. California, LLC*, 197 Cal. App. 4th 133, 144, 127
 27
 28

1 Cal. Rptr. 3d 394 (2011); *see* Cal. Lab. Code § 515(a).³ Pursuant to its authority, the
2 IWC issued Wage Order No. 4-2001,⁴ which is codified in California Code of
3 Regulations, title 8, section 11040(1)(A)(2), and applicable to professional, technical,
4 clerical, and similar occupations. Cal. Code Regs. tit. 8, § 11040; *see Soderstedt*, 197
5 Cal. App. 4th at 145.

6 At issue here is whether Plaintiffs fall within the “administrative exemption,” set
7 forth in Wage Order No. 4-2001. The administrative exemption applies to any employee:

8 (a) Whose duties and responsibilities involve . . . :

9 (i) The performance of office or non-manual work directly related to
10 management policies or general business operations of his
11 employer or his/her employer’s customers

12 . . . and . . .

13 (b) Who customarily and regularly exercises discretion and independent
14 judgment; and

15 (c) Who regularly and directly assists a proprietor, or an employee employed
16 in a bona fine executive or administrative capacity . . . ; or

17
18
19 ³California Labor Code § 515(a) provides in relevant part:

20 The Industrial Welfare Commission may establish exemptions from the requirement that
21 an overtime rate of compensation be paid pursuant to Sections 510 and 511 for executive,
22 administrative, and professional employees, if the employee is primarily engaged in the
23 duties that meet the test of the exemption, customarily and regularly exercises discretion
and independent judgment in performing those duties, and earns a monthly salary
equivalent to no less than two times the state minimum wage for full-time employment.

24 ⁴ Plaintiffs ask the Court to take judicial notice pursuant to Federal Rule of Evidence 201 of the
25 State of California Department of Industrial Relations, Industrial Welfare Commission’s Wage Order 4-
26 2001, *available at* <<http://www.dir.ca.gov/IWC/IWCArticle4.pdf>> (hereinafter “Wage Order No. 4-
27 2001”). [Doc. # 84-1.] IBM does not oppose the request. As the facts within this document are “not
28 subject to reasonable dispute” because they “can be accurately and readily determined from sources
whose accuracy cannot reasonably be questioned,” Fed. R. Evid. 201(b), the Court takes judicial notice
of the document.

- 1 (d) Who performs under only general supervision work along specialized or
 2 technical lines requiring special training, experience, or knowledge; or
 3 (e) Who executes under only general supervision special assignments and
 4 tasks; and
 5 (f) Who is primarily engaged in duties that meet the test of the exemption.

6 *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011) (quoting Cal. Code
 7 Regs. tit. 8, § 11090(1)(A)(2)(a)-(f)) (alterations in original).

8 For the exemption to apply, an employee must also “earn a monthly salary
 9 equivalent to no less than two (2) times the state minimum wage for full-time
 10 employment.” Cal. Code Regs. tit. 8, § 11090(1)(A)(2)(g). Under California law, the
 11 employer bears the burden of establishing its affirmative defense that the employee is
 12 administratively exempt. *Combs v. Skyriver Comms., Inc.*, 159 Cal. App. 4th 1242, 1254,
 13 72 Cal. Rptr. 3d 171 (2008); *Marlo*, 639 F.3d at 947 (citing *Nordquist v. McGraw-Hill*
 14 *Broad, Co.*, 32 Cal. App. 4th 555, 38 Cal. Rptr. 2d 221, 225-26 (1995)).

15 California’s administrative exemption expressly incorporates certain regulations
 16 under the Fair Labor Standards Act (“FLSA”) effective on the date of the order, January
 17 1, 2001. *Combs*, 159 Cal. App. 4th at 1254-55; *see* Cal. Code Regs. tit. 8, §
 18 11040(1)(A)(2)(f).

19 Here, IBM contends that it is entitled to summary judgment on all of Plaintiffs’
 20 claims because Sirko and Cervantes satisfy all elements of California’s administrative
 21 exemption. (Mot. at 1.) Because triable issues of material fact exist with respect to
 22 whether Plaintiffs customarily exercised discretion and independent judgment on matters
 23 of significance and whether Plaintiffs primarily engaged in exempt duties, the Court must
 24 deny summary judgment.

25 **1. Salary Test**

26 For the exemption to apply, an employee must “earn a monthly salary equivalent to
 27 no less than two (2) times the state minimum wage for full-time employment.” Cal. Code
 28 Regs. tit. 8, § 11090(1)(A)(2)(g). California’s current minimum wage is \$9.00 per hour.

1 Thus, the required minimum annual salary is \$37,440. It is undisputed that Cervantes
2 earned \$8,265 per month, or \$99,174 per year, and that Sirko earned no less than \$7,836
3 per month, or \$88,632 per year. Thus, IBM has met the salary basis test of the
4 administrative exemption.

5 **2. Duties Test**

6 **a. Discretion and Independent Judgment on Matters of Significance**

7 To determine whether Plaintiffs “customarily and regularly exercise[d] discretion
8 and independent judgment,” the Court looks to 29 C.F.R. § 541.207, which is expressly
9 incorporated in Wage Order No. 4-2001. Section 541.207 provides that “[i]n general, the
10 exercise of discretion and independent judgment involves the comparison and the
11 evaluation of possible courses of conduct and acting or making a decision after the
12 various possibilities have been considered.” 29 C.F.R. § 541.207(a). In addition, the
13 term “implies that the person has the authority or power to make an independent choice,
14 free from immediate direction or supervision and with respect to matters of significance.”
15 *Id.* The term is applied in light of all the facts of the employment situation. *Id.* §
16 541.207(b).

17 Section 541.207 provides specific guidance with respect to systems analysts and
18 computer programmers. *See id.* § 541.207(c)(7). Specifically, a systems analyst
19 exercises discretion and independent judgment when he (1) “develops methods to process
20 . . . accounting, inventory, sales, and other business information by using electronic
21 computers”; and (2) “determines the exact nature of the data processing problem, and
22 structures the problem in a logical manner so that a system to solve the problem and
23 obtain the desired results can be developed.” *Id.* A computer programmer exercises
24 discretion and independent judgment when he (1) carefully analyzes a computer
25 processing problem “so that exact and logical steps for its solution can be worked out”;
26 and (2) “determines exactly what information must be used to prepare the necessary
27 documents and by ascertaining the exact form in which the information is to be
28 presented.” *Id.* In contrast, “highly technical and mechanical operations such as the

1 preparation of a flow chart or diagram showing the order in which the computer must
2 perform each operation, the preparation of instructions to the console operator who runs
3 the computer or the actual running of the computer by the programmer, . . . and the
4 debugging of a program” do not require the contemplated level of discretion and
5 independent judgment. *Id.*

6 The “discretion and independent judgment exercised must be real and substantial,
7 that is, they must be exercised with respect to matters of consequence.” *Id.* §
8 541.207(d)(1). The employee’s judgments may be subject to review and occasionally
9 revised or reversed. *Id.* § 541.207(e). The employee’s discretion and independent
10 judgment must be exercised with greater frequency than occasionally, but may be less
11 than constant. *Id.* § 541.207(g).

12 In *Combs*, the plaintiff testified that he spent 60 to 70 percent of his time on his
13 core responsibility of maintaining the well-being of the defendant’s network, and in so
14 troubleshooting, the plaintiff had authority to determine the course of action to correct a
15 problem. The defendant’s director of information technology testified that the plaintiff
16 was the defendant’s “quarterback” with respect to solving problems with the operation of
17 the network and that his responsibilities included identifying, selecting, and integrating
18 new equipment into the network. The court held that such facts supported a finding that
19 the plaintiff “customarily and regularly exercised discretion and independent judgment
20 with respect to matters of significance.” *Combs*, 159 Cal. App. 4th at 1266-67.

21 In a recent unpublished decision, the Ninth Circuit held that an IT worker
22 customarily and regularly exercised discretion and independent judgment regarding
23 matters of significance where he was responsible for keeping a personnel records
24 management database “up and running,” served as the “point man” for a common access
25 card system, “analyzed production problems,” “participated in ‘subsystem design’ and
26 ‘major system upgrades,’” and worked under minimal direction. *Heffelfinger v.*
27 *Electronic Data Sys. Corp.*, 492 F. App’x 710, 713 (9th Cir. 2012) (unpublished). The
28 *Heffelfinger* court affirmed that the employer was entitled to summary judgment on the

1 employee's California Labor Code section 510 claim because the administrative
2 exemption applied. *Id.*

3 Here, there is sufficient evidence in the record to raise a material dispute as to
4 whether Plaintiffs customarily exercised discretion and independent judgment on matters
5 of significance. While Cervantes does not directly dispute the significance of his work,
6 Cervantes argues that he did not exercise discretion and independent judgment to merit
7 exempt status. Indeed, a reasonable jury could find that, contrary to IBM's
8 characterization of Cervantes as the one "driving" the solution to a problem, he was
9 instead a mere "receptionist and note-taker." IBM argues that Cervantes had
10 decisionmaking power on a considerable number of issues, including whether to
11 challenge Kaiser's lead on initial assessments; which personnel to assign to the bridge;
12 whether to pursue parallel recovery courses; whether to bring down a crippled system;
13 which incident to prioritize when multiple situations unfolded simultaneously; when to
14 release personnel and conclude the bridge; and to whom to assign the root cause analysis.
15 Cervantes, on the other hand, contends that once a trouble ticket was routed to him, he
16 simply notified the IT personnel previously assigned to support the affected system;
17 documented the time they entered the bridge and the alternative causes and solutions they
18 explored; and contacted other IT personnel if necessary. Cervantes admits that based on
19 skill and experience, he could identify and redirect an ill-routed trouble ticket, but in most
20 cases he merely got the assigned personnel on the line and documented the details of the
21 recovery process.

22 Moreover, the evidence indicates that Cervantes' discretion and independent
23 judgment were limited by both Kaiser and IBM's practices and procedures, which
24 governed the steps he had to take to perform his job.⁵ So, in those instances when IBM
25

26 ⁵ IBM objects to Plaintiffs' reliance on a written policy, the "Standard Recovery Management
27 Process," because Cervantes did not recall ever seeing it and therefore could not have been constrained
28 by a document he never saw. (*See* WCB Decl., Exh. A (Cervantes Depo. at 128:23-129:14).) Nevertheless, based upon Cervantes' deposition testimony, the Court must draw the reasonable

1 contends he had opportunities to exercise his own discretion and judgment – *e.g.*, “probed
2 alternatives” when the team proposed bringing down a crippled system, concluded a
3 bridge, and assigned the root cause analysis – Cervantes argues that he performed these
4 actions only within parameters largely set by IBM and Kaiser policies. In other instances
5 where a decision had to be made – *e.g.*, if IT personnel pushed back on being assigned a
6 root cause analysis, or if two crisis situations were occurring simultaneously and one had
7 to be prioritized over the other – he would escalate the situation to his managers, who
8 would make the ultimate determination.

9 Similarly, Sirko does not directly dispute the significance of his work. He does
10 argue he was unaware of the business purposes for which the systems he maintained were
11 used, but as IBM points out, his knowledge of the systems’ business uses is not relevant
12 to analyzing the significance of his work.

13 As with Cervantes, however, a factfinder could reasonably find that Sirko has
14 limited discretion and opportunity to exercise independent judgment. IBM contends that
15 Sirko exercises discretion and independent judgment regarding the approach for
16 upgrades, the implementation and back-out plans for upgrades and updates, and the
17 modification of JCL code during the planning and testing phases based on a number of
18 factors, including familiarity with Kaiser’s mainframe environment, the interaction of the
19 different components of the operating system, Kaiser’s business use of the product, and
20 the timing of the implementation. Sirko’s admission that there is more than one way to
21 plan updates and some ways could be more efficient than others further underscores that
22 Sirko has some opportunity to exercise independent judgment. The fact that Sirko’s
23 supervisor and the team leads are not experts on CODE-1 and FINALIST and do not give
24
25
26

27 inference that Cervantes understood what the established practices and procedures were even if he did
28 not read the policy manual.

1 Sirko guidance on how to update or upgrade these products also makes IBM's argument
2 that Sirko exercises discretion and independent judgment more plausible.⁶

3 Enough evidence exists in the record, however, to support a contrary finding. A
4 factfinder could reasonably conclude that, rather than creating installation plans based on
5 his own judgment of the steps needed to update a system, Sirko largely follows a script.
6 For the two database systems on which he spends most of his time, Sirko testified that he
7 relies on his predecessor's implementation plan; for other systems, he obtains preexisting
8 documentation from the vendor. To the extent that he modifies any code, it is largely
9 limited to changing the date parameter to the current date and plugging in Kaiser's
10 naming protocols. Once the documentation is in place, Sirko testified that he "follow[s]
11 the same thing over and over [] again."

12 At the summary judgment stage, the Court must draw all reasonable inferences in
13 favor of the *nonmoving* parties, Sirko and Cervantes. Here, when viewed in the light
14 most favorable to Plaintiffs, the evidence in the record could support findings that both
15 Cervantes and Sirko did not customarily exercise discretion and independent judgment.

16 **b. Primarily Engaged in Duties that Meet the Test of the Exemption**

17 To determine whether Plaintiffs were "primarily engaged" in exempt duties, the
18 Court looks to 29 C.F.R. § 541.205, which is expressly incorporated in Wage Order No.
19 4-2001. Under section 541.205, among the indicia of exempt duties is that an employee
20 performs office or non-manual work "directly related to management policies or general
21

22
23 ⁶ IBM contends that the fact that he had to work on a system installation for nine months
24 demonstrates that Sirko exercised considerable discretion and independent judgment. (Mot. at 16; *see*
25 WCB Decl., Exh. D (Sirko Depo. at 84:8-12). The Court does not find that argument to be dispositive
26 because there are insufficient facts provided as to what Sirko actually did during that nine-month period.
27 The record is unclear as to the nature of the work required for the installation and whether he worked on
28 that project continuously or for a large percentage of his time during the nine months. For example, it
would be less reasonable to infer that Sirko exercised discretion and independent judgment if he
installed a third party vendor's program with its pre-existing instructions or he spent just a few days out
of those nine months actively working on the installation and the rest of the time receiving directives
from other experts or waiting for management approval.

1 business operations of his employer or his/her employer's customers." He performs such
2 work when he engages in "activities relating to the administrative operations of a
3 business as distinguished from 'production' or, in a retail or service establishment, 'sales'
4 work." 29 C.F.R. § 541.205(a). Administrative operations include "advising the
5 management, planning, negotiating, representing the company, purchasing, promoting
6 sales, and business research and control." *Id.* § 541.205(b). Such work is "qualitatively"
7 administrative. *Harris v. Superior Court*, 53 Cal. 4th 170, 181, 135 Cal. Rptr. 3d 247
8 (2011).

9 Under California law, work must also be "quantitatively" administrative, that is,
10 "of substantial importance to the management or operation of the business of [the
11 employee's] employer or his employer's customers." *Id.* at 181-82; 29 C.F.R. §
12 541.205(a). Employees' work is of substantial importance if they "carry out major
13 assignments in conducting the operations of the business, or [their] work affects business
14 operations to a substantial degree, even though their assignments are tasks related to the
15 operation of a particular segment of the business." 29 C.F.R. § 541.205(c). "[R]outine
16 clerical duties" and "run-of-the-mine positions in any ordinary business" are not directly
17 related to management policies or general business operations. *Id.* § 541.205(c)(1) & (2).

18 Section 541.205 provides specific guidance with respect to employees in the data
19 processing field, such as systems analysts and computer programmers. *See id.* §
20 541.205(c)(7). If such an employee is "concerned with the planning, scheduling, and
21 coordination of activities which are required to develop systems for processing data to
22 obtain solutions to complex business, scientific, or engineering problems of his employer
23 or his employer's customers, he is clearly doing work directly related to management
24 policies or general business operations." *Id.*

25 The *Combs* court found that the plaintiff, employed first as the manager of capacity
26 planning and then as director of network operations for a high-speed, wireless, broadband
27 Internet service provider, was administratively exempt. The plaintiff's resume showed
28 his job functions included management of "overseas deployment of wireless data

1 network,” management of the integration and standardization of three networks into the
2 defendant’s architecture, and overseeing the day-to-day network operations, including
3 network upgrades, repairs, change controls, monitoring, and reporting. The plaintiff also
4 testified that his “core responsibility” was “maintaining the well-being of [the
5 defendant’s] network” and that he was occasionally responsible for lease negotiations,
6 capacity and expansion planning, and equipment sourcing and purchasing. On those
7 facts, the court found the plaintiff’s duties “directly related to the management or general
8 business operations” within the meaning of Wage Order No. 4-2001. *Combs*, 159 Cal.
9 App. 4th at 1264-65.

10 In *Heffelfinger*, the Ninth Circuit held that an employee performed work directly
11 related to management policies or general business operations where his “main role,
12 installing, maintaining, and managing a personnel records management database . . . ,
13 qualifie[d] as ‘servicing a business,’” and his duties included executing and carrying out
14 policy by “developing and enforcing data base standards and procedures, leading or
15 participating in logical and physical data base design, and reviewing system and
16 programing designs to ensure efficient use of data base resources.” *Heffelfinger*, 492 F.
17 App’x at 712 (internal quotation marks omitted). He also “affected policy” by
18 “monitoring data base performance statistics and recommending improvements, advising
19 systems engineers and updating management on data base concepts and techniques, and
20 researching new data base technologies.” *Id.* at 712-13 (internal quotation marks
21 omitted).

22 In contrast, in *Bothell v. Phase Metrics, Inc.*, the court held that because a fact-
23 finder could find that the plaintiff was a “highly skilled repairman,” whose primary duty
24 was to “install, troubleshoot, and maintain” production equipment, it was necessary to
25
26
27
28

1 remand the matter to the district court for trial.⁷ 299 F.3d 1120, 1128 (9th Cir. 2002).
2 Bothell presented evidence that as a field service engineer for a company that designed,
3 manufactured, and sold robotic test and inspection equipment for the data storage
4 industry, he was a “high-tech equivalent of a Xerox machine man” who met and
5 conferred with customers to identify the problem, diagnose the malfunction, formulate a
6 work plan, repair the equipment based on the manufacturer’s procedures, and fill out a
7 service report for his employer to bill for the work. *Id.* Thus, a jury could conclude that
8 Bothell “did not engage in running the business itself or determining its overall course or
9 policies.” *Id.* (internal quotation marks omitted).

10 Here, there is sufficient evidence in the record to raise a dispute of material fact as
11 to whether Plaintiffs were primarily engaged in office work directly related to Kaiser’s
12 general business operations. IBM argues that both Plaintiffs “serviced” Kaiser’s business
13 by maintaining its technical infrastructure. With respect to Cervantes, IBM contends that
14 Cervantes’ work was qualitatively administrative because his job was to “drive
15 immediate recovery” of Kaiser’s “production systems” when they were compromised by
16 major outages. To be sure, resolving crisis situations that compromise Kaiser’s
17 production systems is of substantial importance. Likewise, with respect to Sirko, IBM
18 argues that Sirko’s work of planning, coordinating, and leading upgrades and updates to
19 Kaiser’s databases is both qualitatively and quantitatively administrative. Moreover,
20 since these tasks occupied most of Plaintiffs’ time, they were “primarily engaged” in
21 administrative work.

22 While Plaintiffs agree that they were primarily engaged in these tasks, they dispute
23 the administrative nature of these tasks. Indeed, the evidence could support a reasonable
24
25

26
27 ⁷The Ninth Circuit analyzed the plaintiff’s claims under the FLSA and held that the same
28 reasoning applied to the plaintiff’s claim for overtime compensation under California Labor Code §
1194. *Id.* at 1129-30.

1 inference that Plaintiffs’ responsibilities were more similar to those of the employee in
2 *Bothell* than those of the employees in *Combs* or *Heffelfinger*.

3 Viewed in the light most favorable to Plaintiffs, Sirko’s tasks were the installation,
4 configuration, troubleshooting, and support of existing computer systems, while
5 Cervantes’ responsibilities were the notification and coordination of assigned personnel
6 to recover a downed system and the documentation of their efforts. Cervantes’ work of
7 notifying personnel assigned to an impacted system based on the Kaiser lead’s diagnosis
8 of the problem and documenting the recovery process could be viewed as even less
9 “administrative” than the work of the plaintiff in *Bothell*, who himself identified the
10 problem, diagnosed the malfunction, formulated a work plan, and repaired the equipment
11 based on the manufacturer’s procedures.

12 Although it is a closer question, when indulging Sirko’s version of the facts, a
13 factfinder could find that Sirko’s work of adapting a preexisting update implementation
14 plan to Kaiser’s needs, testing the update and repairing any bugs, and installing the
15 update is more similar to the work of the plaintiff in *Bothell*. While in *Heffelfinger*, the
16 plaintiff’s duties included the installation, maintenance, and management of a personnel
17 records database, they also extended to developing and enforcing database standards and
18 procedures, leading or participating in logical and physical database design, and
19 reviewing system and programming designs to ensure efficient use of database resources
20 – all tasks that are not within Sirko’s purview.

21 In sum, there is a genuine dispute of material fact as to whether Plaintiffs primarily
22 engaged in duties that were qualitatively and quantitatively administrative.

23 //

24 //

25 //

26 //

27 //

28 //


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

IV.
CONCLUSION

In light of the foregoing, Defendant's motion for summary judgment as to all claims is **DENIED**.

IT IS SO ORDERED.

DATED: August 22, 2014



DOLLY M. GEE
UNITED STATES DISTRICT JUDGE