SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

Crisostomo, Plaintiff vs. 15 Main LLC., et al., Defendant	)	Case No. RG16809772 Class Certification Order

Plaintiffs seek class certification in this case of a class (and subclasses) of restaurant workers denied meal and rest breaks and reimbursement of certain expenses. For the reasons described below, the court grants the motion in part and denies the motion in part.

Plaintiffs are former workers at defendant's Oakland restaurant Calavera. The named plaintiffs each worked in hourly positions in the "back of the house" i.e. the kitchen area. They allege that non-exempt employees who worked shifts of six hours or more were denied required meal and rest breaks, including those who worked in the "front of the house" i.e. waiters and bus persons. They seek to certify subclasses of employees who worked one or more shifts of at least 6 hours in length and a separate subclass of employees who worked one or more shifts of 10 hours or more. A separate subclass of all exempt and non-exempt employees who were required to purchase items of clothing and other equipment is also proposed.

Following extensive briefing, the court issued an order requesting the parties to address several questions and subsequently heard oral argument. The matter was then submitted.

This decision will first address general class action standards, and then apply these standards to each of the subclasses proposed (or modified).

Class Action Standards

The California Supreme Court has repeatedly enunciated the basic requirements for class certification. Expanding on the terse language of Code of Civil Procedure section 382 ("when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all"), the Court has explained that a party seeking class treatment must "demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceedings as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1021; *Duran v. U.S. Bank Nat. Assn.*(2014) 59 Cal. 4th 1, 28; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) The community-of-interest requirement embodies three factors: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Brinker*, *supra*, 53 Cal.4th at p. 1021, citations omitted.)

Thus, class certification here depends in large part on whether the Plaintiffs have established that common issues will predominate in this action. Predominance of common issues is established where "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Collins v. Rocha* (1972) 7 Cal. 3d 232, 238, quoted by *Brinker*, *supra*, 53 Cal.4th at p. 1021.) This determination is

"essentially a procedural one that does not ask whether an action is legally or factually meritorious." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 439–440.) While courts may have to consider the merits of legal issues that are enmeshed with class action requirements, a class certification motion "is not a license for a free-floating inquiry into the validity of the complaint's allegations...." (*Brinker*, *supra*, at p. 1023.)

The determination of whether common issues predominate calls for a comparative analysis. (*Sav-on*, *supra*, 34 Cal.4th at p. 334.) The fact that some issues in a case may require individualized class-member-by-class-member analysis does not automatically preclude class certification. "Individual issues do not render class certification inappropriate so long as such issues may be effectively managed." (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 473.) Thus, the need for individualized adjudication of class member entitlement to and amount of damages does not necessarily preclude class certification. (*Duran*, *supra*, 59 Cal.4th at p. 28; *Brinker*, *supra*, 53 Cal.4th at pp. 1021–1022.) But common issues may not predominate if every member of the class must litigate "numerous and substantial questions determining his individual right to recover following the 'class judgment' on common issues." (*Duran*, *supra*, at p. 389, quoting *City of San Jose v. Superior Ct.* (1974) 12 Cal.3d 447, 459.) Where there are individual issues, the court must consider whether class treatment is manageable. (*Duran*, *supra*, at p. 29 [court must "conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently"].) In managing class actions, courts are obliged to "consider the use of innovative procedural tools proposed by a party to certify a manageable class." (*Osborne v. Subaru of Am., Inc.* (1988) 198 Cal.App.3d 646, 653, quoted by *Sav-on*, *supra*, at p. 339.)

The starting point in determining whether common issues predominate is whether "the theory of recovery advanced by the proponents of class certification is, as an analytic matter, likely to prove amenable to class treatment." (*Sav-on*, *supra*, 34 Cal.4th at p. 327; see also *Brinker*, *supra*, 53 Cal.4th at p. 1025 ["a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate"]).[1]

California public policy "encourages the use of the class action device." (*Sav-on*, *supra*, 34 Cal.4th at p. 340, quoting *Richmond, supra*, 29 Cal. 3d at p. 473.) In a case based on asserted Labor Code Wage Order violations, there is likewise a clear public policy "directed at enforcement of California's wage and overtime laws for the benefit of workers." (*Sav-on*, *supra*, at p. 340, quoting *Earley v. Superior Court* (2000) 79 Cal. App. 4th 1420, 1429–1430.) Thus, at first blush, a claim that a defendant's uniform policy violates Wage Order requirements is "by its nature a common question eminently suited to class treatment." (*Brinker*, *supra*, 53 Cal.4th at p. 1033; see also *Martinez v. Joe's Crab Shack Holdings* (2014) 213 Cal.App.4th 362, 380 [paraphrasing *Brinker* and applying concept to managerial-employee classification case]). Nevertheless, while all class cases, must meet class certification standards. "class wide relief remains the preferred method of resolving wage and hour claims, even those in which the facts appear to present difficult issues of proof." (*Martinez*, *supra*, 231 Cal.App.4th at p. 384.)

Commonality Analysis

[1] It is also appropriate to consider defendant's affirmative defenses "because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues. [Citations.]." (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450; *Soderstedt v. CBIZ So. Cal., LLC* (2011) 197 Cal. App.4th 133, 144.)

The court first addresses commonality issues for each subclass. [2]

1. Meal Break Subclasses

Employees are generally entitled to a 30 minute meal period if they work for more than 5 hours per day, and a second meal period if they work for more than 10 hours per day. Labor Code §512. Plaintiff makes no claim for denial of meal breaks for employees who worked less than 6 hour shifts, in large part, it appears, because most employees signed a written waiver of a meal break for shifts of more than 5 but less than 6 hours. See Exh. Pastena Dec. ¶ 7 and Ex. C. thereto. Such a waiver is authorized by Labor Code §512(a). See *Brinker*, supra at 53 Cal. 4th at 1041. Even with such a waiver, employees working shifts of six hours or more are nevertheless entitled to a first meal period no later than the fifth hour of work, and, if they work shifts of 10 hours or more, a second meal period by the end of the tenth hour of work. Id. [3]

Plaintiffs concede that defendant's written policy is consistent with the Labor Code and applicable Wage Order. They nevertheless argue that defendant does not comply with the legal requirement as a matter of practice and that defendant's own electronic records establish this. In addition, plaintiffs offer plaintiff and class member declarations[4] and records to show that, consistent with the electronic records, there is a predominant common issue of whether

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[2] Defendant does not claim the class is not ascertainable inasmuch as its own records identify employees. There is also no question that the meal break class is sufficiently numerous. See Woolfson declaration discussed infra. Given the court's finding that that the break and expense reimbursement subclasses lack commonality, the court need not address whether such proposed subclasses are sufficiently numerous.

[3] Neither party claims that employees waived the second meal period, which under limited circumstances they are permitted to under section 512(a).

[4] Defendant objects to several class member declarations because the declarations state "Confidential-Subject to Mediation Privilege." Assuming objections to evidence at class certification are proper, the court overrules this objection because the mediation privilege does not preclude a party from using his or her own evidence, simply because he or she offered it in a mediation. See Evidence Code §§1120 and 1122(a)(2). Defendant also objects to the translations offered for some of the declarations, since they were prepared by a member of plaintiffs' counsel's staff. Defendant relies upon California Rule of Court 2.890, but that rule on its face applies to in-court interpreters. Moreover, even if it applies to out of court interpreters, the fact that an attorney's assistant does the translation does not automatically establish bias.

defendant complies with its duty to provide meal breaks to employees who work six hours or longer.

Central to plaintiffs' claim is the declaration of their expert, Aaron Woolfson, who examined defendant's payroll and time-keeping records. Woolfson has a background in designing and analyzing databases. He reviewed defendant's "breadcrumb" records it utilizes for payroll purposes.[5] Based on his analysis of the records he reached the following conclusions: There were 170 employees during the period analyzed, of whom 163[6] worked one of more shifts over 6 hours, and 64 worked at least one shift over 10 hours. Woofson Dec. ¶ ¶ 29(s) and (t). Based on the data, he found that 94.4% of the employees who worked at least one shift of over 6 hours did not receive a compliant meal break (meaning no meal in first 5 hours or at all or a meal of less than 30 minutes). *Id.* ¶ 29 (o) Examining all shifts of over 6 hours, he found that there was no meal or a non-compliant meal in 64.6% of the cases (3801 of the 5899 shifts). *Id.* ¶ 29(l). He further found that 98.4% of the recorded shifts (624) over 10 hours lacked compliant meals (no meal or only one meal). *Id.* ¶ 29 (p).

Defendant levels a barrage of challenges to Woolfson's analysis, but, inexplicably, does not offer its own expert. It first argues that time records were frequently corrected or adjusted, and suggests that Woolfson did not include these corrections in his analysis. Its corporate representative, however, testified that such corrections were made in the Breadcrumb system. Pastena dep. at 76-78, 83, Ex. 2 to Sutton Reply Dec. As plaintiffs put it, defendant's corrections *reduced* the number of non-compliant meals periods to the levels found by Woolfson. In its opposition, defendant offers a declaration that is arguably inconsistent with its corporate

[5] Defendant produced records for the August 3, 2015-March 31, 2016 period. Defendant does not claim these records are not representative for the broader period encompassed by the proposed class.
[6] Woolfson states this number in the cited paragraph but refers to 162 in subsections (m) and (o).

representative's deposition testimony, stating that corrections "did not always occur." Pastena dec. at 5:5. Even if the court were to consider this statement, it is unquantified, and does not indicate how such corrections would change the result or whether examination of these corrections would cause individual issues to predominate. The same is true of all but one of defendant's other challenges to Woolfson—it claims he included exempt employees, did not include data from other files, or failed to consider the timing of segments of the shift. These unquantified assertions may be fodder for cross-examination or may even disprove Woolfson's analysis, but they do not demonstrate that common questions do not predominate.

Defendant does offer quantifiable data for one of its challenges—that Woolfson failed to account for premium pay provided to an employee who missed a meal. The extent of such premium pay, however, is very limited—defendant's data shows that there were 281 meal and/or rest break premium payments. The data does not show what shifts the payments pertained to. Even assuming all the payments were for missed meals for shifts of over 6 hours, the premium payments at best would amount to 7.4% of the 3801 missed meal breaks. This hardly undercuts the common evidence of a pattern of missed meals.

At the hearing on this matter, the court asked if plaintiffs intended to rely on the electronic data, and if, accordingly, the class definition should be limited to those employees whose electronic records showed a non-compliant meal break for shifts of 6 hours or more. Plaintiffs agreed to this modification of the class definition. As so stated, the class is not only ascertainable, plaintiffs' theory of the case rests on common evidence and would not require separate, individualized testimony from each class member.

Defendant argues that the question of whether a meal break was not taken does not end the matter, for an employer is not required to force employees to take breaks. It claims it took

steps to enforce its meal policy, as evidenced by the many corrections it made to its payroll records (and perhaps by the unspecified corrections it failed to make in the electronic data) and its provision of premium pay. It also argues many employees did take meal breaks, and offers employee declarations. While this evidence may generate some individual issues, it is unlikely to swamp the predominant common evidence based on defendant's own records. Certainly if all plaintiffs offered were individual class member testimonies, the case could degenerate into a series of mini-trials. But here, the focus will be on defendant's own records, perhaps augmented by some individual testimony, which will show who received meal breaks and who did not.

Finally, defendant suggests that employee choice may explain missed meals, and evidence of this would generate substantial individualized issues. It offers no evidence, however, that any significant number of employees chose to skip meals. Indeed its employee declarations state the opposite. In any event, waiver is an affirmative defense, and where an employer's records show no meal break was taken, there is a rebuttable presumption that the employee was not relieved of duty and no meal period was accordingly provided. *Safeway, Inc. v. Superior Court* (2015) 238 Cal. App.4th 1138, 1160, citing Werdegar, J. concurrence in *Brinker*, 53 Cal. 4th at 1053. The record before the court does not demonstrate that a waiver defense will swamp the common issues and render individual issues predominant.

2. Rest Break Subclass

In contrast to the meal break subclass, plaintiffs concede that there is no electronic data that supports their rest break claims. Instead, aside from contested class member declarations, plaintiffs base their claim on defendant's employee Handbook, which they claim incorrectly states the legal rest break obligation because it does not provide that employees are entitled to a second rest break after six hours of work. See *Brinker* at 53 Cal.4th 1029. Plaintiffs selectively

quote the Handbook, which states "More than six(6) hour shift to ten (10) hour shift: you are entitled to one 10 minute rest break...." Ex, 7 to Mallison dec. in support of motion. The Handbook correctly cites California law that "Employees are entitled to one 10 minute rest break for every 3.5 hours worked...." This language, which precedes the language plaintiffs cite, indicates that the break for employees who work over six hours is in addition to the break for the first 3.5 hours. If this document stood alone, one might consider that the lack of the word "additional" before the latter sentence might be confusing (although plaintiffs offered no evidence that this language confused anyone). But defendant notes that its posted policy, as well as its posted time schedules expressly and correctly, as plaintiffs concede, state the legal break obligation. See Ex. A and B to Pastena Dec.

Plaintiffs rest break claim accordingly relies solely on individual testimony from class members. It does not rely on a "common policy nor a common method of proof." *Brinker* at 53 Cal.4th 1051. Trial of such a claim would become a battle of anecdotes from employees marshalled by each side. The court concludes that common issues do not predominate for this subclass.

3. Expense Reimbursement

Plaintiffs' final claim is that employees were not reimbursed for certain expenses. At the hearing on this matter, plaintiff conceded that the issues may differ for front and back of the house employees, and that two different types of expense reimbursement claims are made: 1) employees may have purchased aprons and shirts from defendant and 2) employees may have purchased required clothing and non-slip shoes from third parties. As for the first claim, plaintiff does not dispute that employees are given a free apron and shirt, but notes that a document states

that "Additional aprons and shirts may be purchased from the Company for $10 each." Plaintiffs offer no evidence, however, that in fact *any* employee purchased a shirt or apron, and further concedes they have no evidence from defendant's records evidencing such purchases.

As for the second claim, even assuming non-slip black shoes or black pants could be construed to be reimbursable items, plaintiffs offer no evidence that any employee purchased such items for this job, that they ever requested reimbursement, or that defendant knew that employees incurred such expenses. See *Stuart v. Radio Shack Corp.* (N.D. Cal. 2009) 641 F.Supp.2d 901, 905 (no employer obligation to reimburse employee unless it knew or should have known expenses incurred by employee).

In short, plaintiffs have not shown that their underdeveloped reimbursement claims can be litigated on a class basis where common issues predominate. To prove their case, plaintiffs and class members would have to testify one by one. This is not a sufficient basis to establish a predominant common issue of fact.

Typicality and Adequacy

Defendants raise a host of challenges to the named plaintiffs' typicality and adequacy. Since the court is only certifying a meal break class, its analysis is addresses the defendant's arguments in that context. . The fact that there are individual defenses to a class representative does not, by itself, establish either inadequacy or lack of typicality. Nor, at the class certification stage, should the court address and attempt to resolve the validity of these defenses. Rather, the class certification stage question is whether the plaintiff has claims or defenses typical of the class. A plaintiff may be untypical only where there are "unique defenses" to his or her claims that may "distract the class representative from common issues." *Fireside Bank v. Superior*

Court (2007) 40 Cal. 4th 1069, 1090-1091. Ultimately, "the relevant inquiry is whether, and to what extent, the proffered defenses are 'likely to become a major focus of the litigation.'" Id at 1091 (citations omitted).

Defendant first argues that plaintiffs signed arbitration agreements that waived the right to assert class actions. It has not, however, brought a motion to enforce this agreement either before or after answering the complaint[7], and, by extensive participation in this lawsuit, has undoubtedly waived the right to arbitrate. Code Civ. Proc. §1281.5; *Guess, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557-558. More to the point, the arbitration agreement does not waive the right to bring a class action. It only waives the right to assert a class claim in an arbitration. It does not waive or even address claims brought in court. Had it done so, such a waiver would be against public policy. See *Garrido v. Air Liquide Industrial US LP* (2015) 241 Cal.App.4th 833, 837-838.

Equally unavailing is defendant's citation of exit "acknowledgements" that two plaintiffs signed stating they received all payments due. These vague documents, likely required as a condition of receipt of final wages, are invalid if construed as a release. See Labor Code 206.5. They do not address meal breaks. The ultimate significance of any exit document is a matter for the merits phase of the case, if at all.

Defendant notes that the named plaintiffs are all "back of the house" employees who complained about a specific manager, and thus are not typical of front of the house employees. But the meal claim made does not factually rest on specific job positions or supervisors, and indeed the data plaintiffs offer includes all employees and their class member declarations are

[7] The Answer does not raise an arbitration claim by way of defense or otherwise.

not limited to back of the house employees. Nor does defendant offer any evidence that there are differing policies for front and back of the house employees. Plaintiffs' legal theory is the same for front and back employees.

Finally, defendant argues plaintiffs were terminated for time-keeping violations and were sloppy in their declarations. The court need not resolve the former argument, for at most it is a merits question of a defense raised by defendant. Since the defense raised overlaps the claims raised by plaintiff, and the claim raised by defendant is not likely to become a major focus of the litigation, it does not undermine adequacy. As for the declarations' sloppiness, the court notes the language barriers in this case and the unskilled nature of the job positions. The errors in the declarations do not go to the heart of the claims and do not render the plaintiffs inadequate representatives.

Superiority

Finally, defendant argues that class certification should be denied because it is not superior to individualized litigation. To a large extent, this argument replicates defendant's commonality arguments, except in one respect. It asserts that resort to the Labor Commissioner by plaintiffs is superior to class relief. This argument pre-supposes that only the plaintiffs have claims. Where common issues predominate, as here for the meal break claims, the individualized Labor Commissioner process is not a superior method of resolving the claims but would likely result in `random and fragmentary enforcement of the employer's legal obligation...." *Bell v. Farmers Exchange* (2004) 115 Cal.App.4th 715, 745.

Conclusion and Order

Accordingly, the court grants certification of a class of a) all current and former non-exempt 15 Main workers for whom defendant's electronic payroll data shows no meal break or a less than 30 minute meal break in a shift of six or more hours and b) all current and former non-exempt 15 Main workers for whom defendant's electronic payroll data shows no meal break or only one meal break or less than 30 minute meal breaks in a shift of ten or more hours. The court appoints named plaintiffs Crisotomo, Hernandez and Mendoza as class representatives[8] and Mallison & Martinez as class counsel.

The parties are directed to meet and confer as to a form and method of class notice and file a joint statement (indicating any disagreements) with the court within 30 days. The matter is set for further case management conference on October 31, 2017 at 3:00 pm.

Dated: September 22, 2017

BRAD SELIGMAN, JUDGE

CLERK'S CERTIFICATE OF SERVICE

I certify that I am not a party to this cause and that a true and correct copy of this Order was mailed to the addresses shown on at the bottom of this document.

Dated: September 25, 2017

Lynette Rushing
Courtroom Clerk, Dept. 30

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[8] A fourth plaintiff, Sergio Esquivel, is not offered as a class representative.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

Crisotomo, Plaintiff vs. 15 Main LLC, et al., Defendant	Case No. RG16809772 Order Modifying Class Definition and for Class Notice

This court certified a class in this case. Plaintiffs request a modification of this order to modify the class definition to make clear that the class includes for workers whose electronic payroll data shows a meal taken after the 5th hour of work in a shift of six hours or more. The court has reviewed the class certification order and the original motion and agrees that this term was inadvertently excluded by the court from the class definition. The issue had been argued and the data the court relied upon in making the order clearly included this item. The addition of this term would not expand the class beyond that originally sought and is consistent with the position of plaintiffs. Accordingly, the class definition shall include, in addition to the other terms, "all current and former non-exempt 15 Main workers for whom defendant's electronic payroll data shows...*a meal taken after the 5th hour of work*....in a shift of six or more hours...." (new language in italics) In all other respects the class certification order is unchanged.

The parties have submitted proposed versions of class notice. The court adopts plaintiffs' version with the following changes based on defendant's version: The word "alleged" is added to page 2. The reference to defendant's time keeping data on p. 3 is

deleted. The instruction on p. 4 to class members who wish to opt out regarding statutes of limitation is deleted. The notification to class members who opt out that they will not recover any money (p.5) is deleted.

The parties are directed to submit an order re class notice including the final versions of the notice and explaining the manner and timing of notice.

IT IS SO ORDERED

Dated: November 17, 2017

BRAD SELIGMAN, JUDGE

CLERK'S CERTIFICATE OF SERVICE

I certify that I am not a party to this cause and that a true and correct copy of this Order was mailed first class, postage prepaid, in a sealed envelope, addresses shown below, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Dated: November 17, 2017

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