**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF SANTA CLARA**

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| GUANG TIAN, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>MA LABORATORIES, INC., et al.,<br><br>Defendants. | Case No. 1-11-CV-15373<br><br>ORDER RE: (1) MOTION FOR CLASS CERTIFICATION; (2) DEFENDANTS' MOTION TO DISQUALIFY CLASS COUNSEL; (3) DEFENDANTS' MOTION TO STRIKE DECLARATIONS FILED IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; (4) PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' EXHIBIT 100; and (5) PLAINTIFFS' MOTION TO STRIKE CLASS MEMBER DECLARATIONS. |

The above-captioned motions came on for hearing before the Honorable Peter H. Kirwan on August 22, 2014 at 9:00 a.m. in Department 1. The matter having been submitted, the Court orders as follows:

This is a putative wage and hour class action brought by plaintiffs Tian, Nie, J. Wu, Yin, T. Ma, Tie, Chang, Y. Wu, Bao Jie Zhang, Chao Hui Liu, and Christopher Cavaliere (collectively "Plaintiffs") on behalf of all present and former employees of defendant Ma Labs, Inc. ("Ma Labs"), a computer component distributor doing business in California. The operative Second Amended Complaint ("SAC"), filed July 9, 2013, names as defendants Ma Labs, its founder and Chairman Abraham C. Ma, and its Chief Executive Officer Christine Rao

(collectively "Defendants"). The SAC asserts twelve causes of action, including both class and individual causes of action: (1) unlawful failure to pay required overtime; (2) unlawful failure to pay minimum wage; (3) unlawful failure to provide off-duty meal periods and meal period compensation; (4) unlawful failure to provide off-duty rest periods; (5) unlawful failure to timely pay wages upon separation from employment; (6) unlawful failure to furnish and keep accurate wage statements; (7) wrongful termination in violation of public policy, retaliation; (8) unfair competition – unlawful acts; (9) unfair competition – unfair acts; (10) unfair competition – fraudulent acts; (11) unfair competition – for preliminary and permanent injunction; and (12) violation of Private Attorney General Act.

On August 21, 2014, the Court issued a tentative ruling on the above-captioned motions except for the motion for class certification.[1] After considering the arguments at the August 22, 2014 hearing, the tentative ruling is hereby adopted as the final Order of the Court. Accordingly, Defendants' motion to disqualify Class Counsel is **DENIED**; Defendants' motion to strike declarations filed in support of Plaintiffs' motion for class certification is **GRANTED IN PART** as to the declarations of Bao Jie Zhang, Sheng Yang, and Guang Tian, but is otherwise **DENIED**; Plaintiffs' motion to strike Defendants' Exhibit 100 is **DENIED**; and Plaintiffs' motion to strike Defendants' class member declarations is **DENIED**.

Judicial Notice

In support of their reply to Plaintiffs' opposition to the motion to disqualify, Defendants request judicial notice of portions of pleadings filed by the plaintiffs in *Stiller v. Costco*, U.S. District Court for the Southern District of California, Case No. 09-cv-02473 and *Lou v. Ma Laboratories*, U.S. District Court for the Northern District of California, Case No. 12:cv-05409. The request is **DENIED** as to the *Stiller* pleadings on the grounds of relevance. The request is **GRANTED** as to the existence of the *Lou* pleadings. (See Cal. Evid. Code, § 452, subd. (d) [judicial notice of court records].)

In support of their motion for class certification, Plaintiffs request judicial notice of (1) excerpts from the Industrial Wage Commission ("IWC") Wage Order 7-2001, ¶ 12; and (2)

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[1] A copy of the August 21, 2014 tentative ruling is attached.

Department of Labor Standards Enforcement ("DLSE") Opinion Letter, 2002.2.22. Defendants oppose the request as to the DLSE Opinion Letter on the grounds that it is not binding or persuasive. The DLSE "is the state agency empowered to enforce California's labor laws" (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561-562), and it issues advice letters in response to inquiries by employers regarding California's labor laws. Thus, the Court may take judicial notice of the existence of the DLSE opinion letter as an "official act" of the state executive branch. (See Evid. Code, § 452, subd. (c).) While not controlling, DLSE Opinion Letters "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029, fn. 11, internal citations and quotation marks omitted; see also, *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 584.)

In support of their reply to Defendants' opposition to the motion for class certification, Plaintiffs request judicial notice of a Minute Order dated July 21, 2014 from *Felczer v. Apple, Inc.*, Superior Court of California, County of San Diego, Case 37-2011-00102593-CU-OE-CTL. Defendants object to and move to strike the request on the grounds that a trial court's minute order decision is not citable authority and the *Felczer* case is not relevant to this case. "[A] written trial court ruling has no precedential value." (*Santa Ana Hospital Medical Center v. Belshé* (1997) 56 Cal.App.4th 819, 831.) It appears that Plaintiff seeks to use this request for judicial notice in order to cite to an unpublished trial court order as persuasive authority. Because this would not be allowed for unpublished appellate opinions (see Cal. Rules of Court, rule 8.1115; *People v. Webster* (1991) 54 Cal.3d 411, 428, fn. 4), it cannot be allowed for the *Felczer* trial court order. The request for judicial notice is **DENIED**.

Motion for Class Certification

California Code of Civil Procedure section 382 authorizes class actions "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 party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citations.] 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. [Citation.] [¶] The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' [Citation.] A trial court ruling on a certification motion determines 'whether ... 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.' [Citations.]" (*Sav-On, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

"The 'ultimate question' the element of predominance presents is whether '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.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' [Citations.]" (*Brinker*, *supra*, 53 Cal.4th at pp. 1021-1022.)

Here, the proposed Class is defined as Ma Labs' hourly workers in California from March 1, 2007 through final judgment. Plaintiffs also propose six subclasses:

1. Time-Shaving Subclass: All of Ma Labs' hourly employees employed in California between March 1, 2007 and date of final judgment.
2. Auto-Deduct Lunch Policy Subclass: All of Ma Labs' (a) hourly workers in the Shipping, Inventory, Warehouse, Will-Call, and Data Entry departments who worked in

San Jose from March 1, 2007 to February 15, 2010; and (b) California Drivers from March 1, 2007 through the date of final judgment.

3. Second Meal Period Policy Subclass: All of Ma Labs' hourly workers in California who worked at least one shift (a) of ten hours or more and/or (b) of six hours or more which began after 1:00 P.M., between March 1, 2007 and the date of final judgment.
4. Rest Period Policy Subclass: All of Ma Labs' hourly employees in California between March 1, 2007 and the dates, if any, that written rest break schedules were first implemented in their respective departments; and all of Ma Labs' hourly employees in California who worked at least one shift of ten hours or more between March 1, 2007 and the date of final judgment.
5. Derivative Wage Statement Subclass: All members of the first two subclasses who received biweekly wage statements that did not reflect actual clock-in and clock-out times or who were subject to the auto-deduction of lunch time.
6. Derivative Waiting Time Penalty Subclass: All of Ma Labs' hourly employees in California who left the Company between March 1, 2007 and the date of final judgment. Includes all members of the first four subclasses who are former employees.

Numerosity, Ascertainability

The class list contains 553 employees, of whom 433 worked at the San Jose headquarters, and 120 worked at the Los Angeles facility. There is no dispute that the putative class is sufficiently numerous to make joinder impracticeable. (See *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) Nor is there any dispute that the putative class definitions are sufficiently precise and objective for purposes of ascertainability (see *Global Minerals & Metal Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 858) or that the putative class members' identities are ascertainable from Ma Labs' records.

Time-Shaving Subclass

The theory of liability here is based on Defendants' failure to pay for all "hours worked."

" 'Hours worked' means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (8 Cal. Code Regs., § 11070(2)(G).)

According to Plaintiffs, Ma Labs requires employees to clock in and out of its time-keeping system when they start and end work. "This is the official time record for employee compensation." (Pltfs' Exh. 3 at MA Labs004318.) Ma Labs kept time records showing both the times that counted for compensation purposes under the employee's pre-set schedule (labeled "Timein"/"Timeout" or "Start"/"End") and the times when employees actually clocked in and out (labeled "ATimein"/"ATimeout" or "AStart"/"AEnd"). If work time beyond the preset schedule is approved for payment, a payroll assistant overrides the preset time so that the "Start" or "End" times reflect the approval. (Zhou Depo. at 29:16-21, Pltfs' Exh. 59.)

Plaintiffs submit that actual start and end times are not used to calculate pay unless overtime is approved and the preset times are overridden. However, the time-shaving is one-way because actual start and end times are used to dock pay. (Pltfs' Exh. 5 at MA/Tian 000015: "There will be a wage deduction for hourly employees for time actually missed; Depo. Yee at 717:8-21, Pltfs' Exh. 58.) Approval for overtime rarely if ever occurred for pre-shift time, and post-shift time was generally not approved if it was under 10 minutes. (Pltfs' Summary ¶ 7, Pltfs' Exh. 1.)

Ma Labs has produced time clock records for the entire proposed class up to September 2013. (Decl. Valerian ¶¶ 12-20.) Ma Labs' records show precisely which extra time was approved for payment and which was not. These records constitute common proof of the extent of unpaid pre-shift and post-shift time.

Defendants argue Plaintiffs cannot establish a common policy that employees requested but were denied compensation because the work was not pre-approved, and there will be many individual inquiries on whether the employee actually worked off the clock; whether Ma Labs knew any particular employee was incorrectly reporting his or her time, such as by failing to report overtime or failing to submit a time card adjustment, and the reasons for doing so; whether overtime was refused and if so, why it was denied; and whether uncompensated time was de

minimis. However, it appears that Plaintiffs' time-shaving theory merely involves comparing the swipe times versus the preset times. If employees requested pre-approved overtime and it was approved, it would be reflected in the "preset" portion of the timekeeping records. If employees swiped before the preset Start time or after the preset End time, it would be reflected in the AStart/AEnd times portion of the time-keeping records. The Court does not need to address the merits of this theory to know that it is based simply on a review of the time records.

Defendants argue that swipe time did not equate to work time. (Yee Decl. ¶ 18, Defs' Exh. 201.)[2] Defendants submit that many employees would perform personal tasks or eat breakfast after swiping in. However, Plaintiffs' declarations state that employees are expected to be working when they clock in. (See Pltfs' Summary ¶ 2.) Furthermore, as discussed above, Ma Labs' policy is that clocking in and out of the time-keeping system "is the official time record for employee compensation." Ma Labs admits that some class members were reprimanded for failing to start working upon clocking in, and Ma Labs' evidence that some employees occasionally engaged in personal activities after clocking in does not defeat certification because the record does not suggest that such instances would predominate over common ones. Furthermore, under Plaintiffs' theory, these employees are still "subject to the control" of Ma Labs and were "suffered or permitted to work" upon clocking in. Again, the merits of this theory are not adjudicated at the certification stage. Many of Defendants' declarations support the idea that upon clocking in, employees almost immediately start working. Some of the warehouse employees state that there is nothing to do in the mornings, so they are often just smoking cigarettes and waiting for instructions. However, even those who are waiting for instructions in the morning are clocked in and subject to Ma Labs' control/suffered or permitted to work, whether or not required to do so. Under Plaintiffs' theory, this still constitutes "hours worked" for purposes of compensation, and the necessary findings can be made from the time-keeping records alone.

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[2] Defendants' reliance on *Alonzo v. Maximus, Inc.* (C.D. Cal. 2011) 832 F.Supp.2d 1122 is unavailing because that decision addresses the merits of an off-the-clock/rounding claim on summary judgment. Furthermore, the court in *Alonzo* actually granted certification of the off-the-clock/rounding claim. (See *Alonzo*, *supra*, 832 F.Supp.2d at p. 1125.)

Accordingly, the motion for class certification of the Time-Shaving Subclass is **GRANTED**.

Auto-Deduct Lunch Policy Subclass

California Labor Code section 226.7, subdivision (b) prohibits an employer from requiring an employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission. "Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked." (IWC Wage Order 7-2001, Cal. Code Regs., tit. 8, § 11070(11)(c).) "If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission..., the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided." (Cal. Lab. Code, § 226.7, subd. (c).)

"An employer's duty with respect to meal breaks...is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." (*Brinker*, *supra*, 53 Cal.4th at p. 1040.)

Plaintiffs' theory here is that prior to February 10, 2010, Ma Labs did not have a policy providing for *uninterrupted*, *duty-free* meal periods of 30 minutes, and there was no *bona fide* policy, practice or procedure for employees to report missed or interrupted breaks. As for Drivers, Plaintiffs' theory is that Ma Labs did not provide them with off-duty lunches due to company-mandated delivery schedules and the nature of delivery jobs. Plaintiffs contend that Drivers were never relieved of duty when they were on the road and were constantly monitored.

Plaintiffs' declarants state that (1) managers had the power to tell employees to perform work during lunch (e.g., calling employees over the loudspeaker); (2) when work arose during lunch, employees could not refuse the work duties because they understood that the company expected them to prioritize work over lunch; (3) Ma Labs did not inform hourly employees that

they were entitled to take an uninterrupted 30-minute lunch break; (4) employees did not complain for fear of losing their jobs, and Ma Labs did not inform employees to report missed meal breaks or that there was a procedure by which they could claim missed meal breaks; and (5) on a regular basis, Ma Labs required drivers to sign a large amount of mandatory paperwork certifying that they received all meal and rest beaks, even though it was not true. (Pltfs' Summary ¶¶ 10-14).

Defendants argue that Ma Labs had a clear meal and rest period policy, but Defendants mostly refer to policies implemented in February 2010. Except for Drivers, the Auto-Deduct Lunch Policy Subclass period ends in February 2010, so evidence after February 2010 is irrelevant. Defendants claim that Ma Labs' February 15, 2010 Time Clock and Meal and Rest Break Memorandum (Defs' Exh. 103) simply "reaffirm[ed]" a prior policy change in February 2008 that extended the length of time for meal and rest periods from 30 to 45 minutes. (See Decl. Guan ¶ 16, Defs' Exh. 200.) However, there is no evidence that under the February 2008 policy, Ma Labs informed its employees of their right to *uninterrupted* meal periods. Plaintiffs contend the February 2010 memorandum did not merely reaffirm Ma Labs' prior policy but made sweeping changes that now specified meal breaks were to be uninterrupted.

Defendants submit that employees were informed of Ma Labs' meal break policy during the new hire orientation process. However, the supporting declaration of Helen Guan, Human Resources Manager, does not clearly refer to the hiring process before February 2010. For instance, Ms. Guan mentions that during the new hire process, employees are given a copy of the February 15, 2010 memorandum (Decl. Guan ¶ 7), which suggests that her other comments relate to post-February 2010 new hire procedures.

Defendants also submit copies of an Overtime Certification used by Ma Labs until 2006 (Exh. 104A and B) to support the position that Ma Labs had a clear meal break policy that was communicated to employees before February 2010. However, Exhibit 104A only says "I…hereby certify…that I have one-half hour (30 minutes) for lunch." Exhibit 104B states, "Employees have one-half hour (30 minutes) for lunch. The employee's lunch break normally should be taken at a time, or range of times, approved by the Operations Managers. Employees

may take lunch at their desks should they desire." Neither exhibit specifies a policy that meals were to be uninterrupted.

Defendants also submit declarations in which employees state that they received lunch breaks during which they were relieved of all duties. However, many of Defendants' declarations are problematic because the declarants either were not employed with Ma Labs before February of 2010 or do not clearly indicate their time of employment with Ma Labs to support the inference that their statements refer to the relevant time period for the Auto-Deduct Lunch Policy Subclass. (See Decls. Jie He [Exh. 215]; Min Chin [Exh. 218]; Fei Long [Exh. 221]; Wei Li [Exh. 222]; Michael Ma [Exh. 228]; Leopoldo Marquez [Exh. 230]; Xioa Xiao Mi [Exh. 231]; Chong Guang Pan [Exh. 234]; Yu Shu Tay [Exh. 244]; William Wang [Exh. 247]; Cheng I Yang [Exh. 253]; Zhi Quan Zhang [Exh. 257].) Defendants' other declarants who were employed during the relevant period state that they saw labor law posters around Ma Labs' premises (e.g., Exh. 101A), that they were told by their managers what the lunch break policies and procedures were, that they could use Ma Labs' Time Clock Adjustment Request Form ("TCARF") to adjust their working hour history, and they were never interrupted during their lunches. However, these declarations are outnumbered by Plaintiffs' declarations, which establish that before February 2010, the declarants did not clock out for lunch, they were pressured to eat lunch quickly and get back to work, and they could not refuse a manager's request to ask them to work during lunch. (Pltfs' Summary ¶¶ 10-12.) Furthermore, although Defendants' declarants state that managers explained the meal period policy to them, they do not state that managers specifically informed them of the duty-free nature of the meal periods.

Under Plaintiffs' theory, Ma Labs did not satisfy its obligation to "provide" a "duty-free" meal period to its employees (e.g., relieving employees of all duties and relinquishing control over their activities) because Ma Labs never informed employees of their right to an uninterrupted meal period and, at the same time, Ma Labs allowed managers to request work from employees during their lunch breaks. Without getting to the merits of this theory of liability, it relies mostly on facts and evidence that are common to the subclass about Ma Labs' general conduct and policies prior to February 2010. On balance, the record does not suggest

that predominantly individualized inquiries would be required to test whether Ma Labs adequately informed employees of their right to uninterrupted meals before February 2010, and whether the failure to do so meant that Ma Labs' pre-February 2010 meal period policy violated the law.

Defendants argue that nothing in the law requires employers to use the word "uninterrupted" in a meal break policy. However, whether a particular meal period practice complies with the law is a merits question. Moreover, Plaintiffs' theory seems to be based not simply on the failure to use particular wording in the stated meal break policy, but on Ma Labs' failure in the period before February 2010 to inform employees of the uninterrupted nature of their meal breaks, coupled with the practice of allowing managers to request work from employees.

Plaintiffs also dispute whether Ma Labs had a bona fide procedure for employees to report missed or interrupted meal breaks and receive premium pay. Ostensibly, a trial on this theory would not seem to involve predominantly individualized inquiries, particularly if there were no premium payments made in the pre-February 2010 period for missed meal periods. In opposition, Defendants refer to the testimony of Payroll Manager Christy Yee regarding three instances "in the past calendar year" when employees received premium pay, as well as Exhibit 142G, which is an earnings statement showing premium pay in 2013. However, evidence of post-February 2010 practices is not relevant to the time period for the Auto-Deduct Lunch Policy Subclass. Defendants also submit copies of blank TCARF forms from before and after December 2008 that allowed employees to record hours for missed meal periods (Exhibits 102A and B). However, to the extent the existence of the TCARF forms goes to defending Plaintiffs' claim of a lack of a bona fide procedure, that is a merits issue.

The Court feels that Plaintiffs' theory for pre-February 2010 meal periods is based on a sufficiently common set of facts and circumstances regarding the subclass to make class treatment appropriate.

As for the Drivers subclass, under *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1304–1305, which was cited with approval by the California Supreme Court in *Brinker*,

proof of a common scheduling policy that makes taking meal or rest breaks extremely difficult may support certification. However, Plaintiffs do not submit sufficient evidence to support the inference that any common Ma Labs policy for drivers made taking meal breaks extremely difficult. Plaintiffs submit two declarations in support (Cavaliere, Exh. 23 and Wen Yan Xu, Exh. 42) vaguely referring to Ma Labs' pressure on drivers to not stop for lunch or other breaks. Notably however, Mr. Cavaliere, a class representative, testified that he regularly took uninterrupted meal breaks. (Depo. Cavaliere at 86:21-22, Defs' Exh. 123S.) Defendants also submit that GPS data suggests Mr. Cavaliere took excessive meal breaks. (Defs' Exh. 123L.) Thus, the Drivers subclass suffers from both the potential for predominantly individualized inquiries about why the drivers missed meal breaks on a given occasion, as well as the lack of an adequate representative. (See *Jaimez*, *supra*, 181 Cal.App.4th at pp. 1307-1308 [plaintiff was not adequate class representative "because he has credibility issues."].)

For these reasons, the motion for class certification of the Auto-Deduct Lunch Policy Subclass is **GRANTED** in part as to subdivision (a), but **DENIED** as to the Driver subclass in subdivision (b).[3]

Second Meal Period Policy Subclass

For employees that work more than 10 hours per day, the employer must provide a second 30-minute meal period, "except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived." (Cal. Lab. Code, § 512, subd. (a).)

The theory here is that Ma Labs did not have an official policy at all regarding second meal periods, not even in the February 2010 memorandum. (Pltfs' Summary ¶¶ 15-17; Pltfs' Exh. 3 at MaLabs004319; Pltfs' Exh. 4 at MA/Tian004333; Pltfs' Exh. 5 at MA/Tian000015.) Plaintiffs submit there is no evidence that employees received a full 30-minute second meal period or that premium payments were made.

[3] Any putative Driver subclass member who was employed with Ma Labs on or before February 15, 2010 is still included in the certified Auto-Deduct Lunch Policy Subclass.

Ma Labs argues that waiver is an affirmative defense to Labor Code section 512, and this will raise individualized issues. However, Ma Labs does not submit evidence supporting the predominance of individualized inquiries regarding waiver. "[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, emphasis added.) Here, Ma Labs has merely posited that waiver may raise individualized issues, but Ma Labs's declarants do not discuss waiving second meal periods. Many of Ma Labs' declarants state that they rarely worked over 10 hours a day.

In *Brinker*, the Supreme Court held that "[n]o issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it." (*Brinker, supra,* 53 Cal.4th at p. 1033.) The same can be said here. If second meal periods were simply not an official policy of Ma Labs, then there can be no waiver.

While many of Defendants' declarants state that during the monthly inventory count, the company would buy them a "dinner box" when they worked overtime and gave them the opportunity to eat at least one-half hour, Plaintiffs' declarants clarify that this dinner box practice occurred only during the monthly inventory check, and even then, they were given no fixed time to eat a second meal, and most people only took ten to twenty minutes to eat. (See Pltfs' Summary ¶¶ 15-17.) Plaintiffs' declarants otherwise state that when they worked over ten hours a day, they were not given a second meal break. Thus, the absence of a legally compliant second meal break policy, either on monthly inventory days or otherwise, is a predominantly common question to the entire Second Meal Period Subclass.

The motion for class certification of the Second Meal Period Policy Subclass is **GRANTED**.

Rest Period Policy Subclass

"Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time

shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages." (8 Cal. Code Regs., § 11070(12)(A).)

Plaintiffs argue that Ma Labs' rest break policy is facially deficient because it fails to provide for a duty-free rest break for an employee who works less than 8 hours, fails to allow for breaks to fall in the middle of four-hour periods, and fails to provide for a third break after 10 hours. Plaintiffs contend that Ma Labs' practice on rest breaks was to treat anything other than active labor (e.g., downtime, going to the bathroom) as a break, and that breaks did not need to be 10 consecutive minutes and could be added together. Plaintiffs submit there was no procedure for reporting or claiming missed or interrupted breaks. In 2010, Ma Labs had a system of daily "Certification" on a touch screen time clock requiring employees to "Confirm" receipt of all meal and rest breaks in order to clock out (Pltfs' Exh 22) but there was no "deny" button. Plaintiffs argue that Defendants' post-litigation attempts to comply with the law on rest breaks is still deficient because drivers and guards are not given off-duty rest breaks, and Ma Labs does not authorize a third rest break for employees who work more than ten hours.

Defendants argue that in 2006, the rest break policy was provided to employees and acknowledged by employees upon hire. (Decl. Guan ¶ 18, Defs' Exh. 104.) Ma Labs posted applicable labor law posters in its facilities by 2007. (Decl. M. Musto ¶¶ 3-4.) In 2010, Ma Labs implemented the daily certification process confirming breaks (Defs' Exh. 105). In February of 2010, Ma Labs issued a memorandum clarifying meal and rest break policies. Defendants argue that under *Brinker*, an employer is only required to make rest breaks available, and in a 2009 investigation, the DLSE found no violation of meal and rest break violations. Defendants submit declarations in which employees state they were authorized to take breaks at their discretion.

Based on the record, the Court sees fit to certify a narrower subset of the Rest Period Policy Subclass. Because Ma Labs' rest break policy before February of 2010 did not specify that employees were entitled to a 10-minute break for every four hours of work "or major

fraction thereof," the theory of liability as to employees who worked six hours or ten hours or more is sufficiently based on a common uniform policy allegedly violates the law because it does not authorize breaks for the "major fraction(s) thereof." The February 15, 2010 memorandum provides for rest periods for every four hours worked or "major fraction thereof," and Defendants' declarants state that they were informed of the February 2010 policies. As for a broader Rest Period Policy Subclass that extends after February 2010, the issue of whether Ma Labs sufficiently provided a full 10-minute, duty-free rest break seems to involve predominantly individualized inquiries, as demonstrated by the parties' conflicting declarations.

Thus, the motion for class certification of the Rest Period Policy Subclass is **GRANTED IN PART** as to all of Ma Labs' hourly employees in California between March 1, 2007 and February 15, 2010.

Derivative Subclasses (Wage Statements, Waiting Time Penalties)

California Labor Code section 226, subdivision (a) requires employers to provide employees with "an accurate itemized statement in writing" showing "total hours worked" and "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate." (Cal. Lab. Code, § 226, subd. (a).) "An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with [section 226, subdivision (a)] is entitled to" certain specified damages. (See Lab. Code, § 226, subd. (e).)

California Labor Code section 203 provides that if an employer willfully fails to pay any "wages" of an employee who is discharged or who quits, "the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days." (Cal. Lab. Code, § 203.)

Here, Plaintiffs' theories for wage statement violations and waiting time penalties are derivative of their time-shaving and auto-deduct claims. Because certification is granted as to the time-shaving and auto-deduct claims, as set forth above, and Defendants do not argue that any individualized issues will predominate among these derivative subclass claims alone, it is

appropriate to also certify subclasses for wage statement violations and waiting time penalties deriving from these certified claims.

The motion for class certification of the Derivative Subclasses is **GRANTED**.

Typicality

Defendants do not seriously challenge the typicality of the Plaintiffs' claims, other than to point out differences among Ma Labs' facilities. However, the typicality requirement does not require that a representative's claims be identical to other class members; it is simply meant to ensure that the class representative will have the motive to litigate on behalf of all class members. (See *Classen v. Weller* (1983) 145 Cal.App.3d 27, 45.) Here, Plaintiffs have the proper motive to litigate on behalf of the entire putative class.

Adequacy of Representation

Defendants raise some credibility issues as to Cavaliere and Yi Wu. Defendants also contend that Yan Nie, Roger Liu, Ming Fang Tie, and Tie Quan Ma are not adequate representatives because they were disciplined for excessive breaks in 2010.

Trivial attacks on credibility should not defeat a class representative's adequacy. (See *CE Design Ltd. v. King Architectural Metals, Inc.* (7th Cir. 2011) 637 F.3d 721, 728.) "For an assault on the class representative's credibility to succeed, the party mounting the assault must demonstrate that there exists admissible evidence so severely undermining plaintiff's credibility that a fact finder might reasonably focus on plaintiff's credibility, to the detriment of the absent class members' claims." (*Ibid.*)

As discussed above, Cavaliere's credibility is impugned by his prior inconsistent declarations and his testimony that he regularly takes meal breaks, since this goes to the heart of the meal period class claims and could become a distraction in this trial. Also, evidence of excessive breaks by other class representatives could also create a distraction. Nevertheless, where there is more than one named class representative, adequacy is satisfied so long as one is adequate. (See *Rodriguez v. Est. Pub. Corp.* (9th Cir. 2009) 563 F.3d 948, 961.) Since Defendants do not challenge the adequacy of all class representatives, these limited credibility issues should not, by themselves, defeat certification.

Other than the issues raised and disposed of in the motion to disqualify, there is no real dispute that Plaintiffs' counsel is qualified to conduct the proposed litigation. (See *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450-451 [adequacy of representation].)

Conclusion

For all of these reasons, the motion for class certification is **GRANTED IN PART** as to the Time-Shaving Subclass, the Auto-Deduct Lunch Policy Subclass from March 1, 2007 to February 15, 2010, the Second Meal Period Policy Subclass, the Rest Period Policy Subclass from March 1, 2007 to February 15, 2010, the Derivative Wage Statement Subclass, and the Derivative Waiting Time Penalty Subclass. The motion is **DENIED** as to a Drivers subclass within the Auto-Deduct Lunch Policy theory, as well as a broader Rest Period Policy Subclass after February 15, 2010.

IT IS SO ORDERED.

Dated: 10/9/14

Peter H. Kirwan

Honorable Peter H. Kirwan
Judge of the Superior Court