

Oct 9, 2014 3:00 PM

David H. Yamasaki
Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
Case #1-11-CV-195373 Filing #G-66845
By R. Walker, Deputy

1
2
3
4
5
6
7
8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**
10

11
12 GUANG TIAN, et al.,

13
14 Plaintiffs,

15 vs.

16 MA LABORATORIES, INC., et al.,

17
18 Defendants.
19

Case No. 1-11-CV-15373

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.

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

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

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

10 On August 21, 2014, the Court issued a tentative ruling on the above-captioned motions
11 except for the motion for class certification.¹ After considering the arguments at the August 22,
12 2014 hearing, the tentative ruling is hereby adopted as the final Order of the Court. Accordingly,
13 Defendants’ motion to disqualify Class Counsel is **DENIED**; Defendants’ motion to strike
14 declarations filed in support of Plaintiffs’ motion for class certification is **GRANTED IN PART**
15 as to the declarations of Bao Jie Zhang, Sheng Yang, and Guang Tian, but is otherwise
16 **DENIED**; Plaintiffs’ motion to strike Defendants’ Exhibit 100 is **DENIED**; and Plaintiffs’
17 motion to strike Defendants’ class member declarations is **DENIED**.

18 Judicial Notice

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

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

28 _____
¹ A copy of the August 21, 2014 tentative ruling is attached.

1 Department of Labor Standards Enforcement (“DLSE”) Opinion Letter, 2002.2.22. Defendants
2 oppose the request as to the DLSE Opinion Letter on the grounds that it is not binding or
3 persuasive. The DLSE “is the state agency empowered to enforce California’s labor laws”
4 (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561-562), and it issues
5 advice letters in response to inquiries by employers regarding California’s labor laws. Thus, the
6 Court may take judicial notice of the existence of the DLSE opinion letter as an “official act” of
7 the state executive branch. (See Evid. Code, § 452, subd. (c).) While not controlling, DLSE
8 Opinion Letters “do constitute a body of experience and informed judgment to which courts and
9 litigants may properly resort for guidance.” (*Brinker Restaurant Corp. v. Superior Court* (2012)
10 53 Cal.4th 1004, 1029, fn. 11, internal citations and quotation marks omitted; see also, *Morillion*
11 *v. Royal Packing Co.* (2000) 22 Cal.4th 575, 584.)

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

23 Motion for Class Certification

24 California Code of Civil Procedure section 382 authorizes class actions “when the
25 question is one of a common or general interest, of many persons, or when the parties are
26 numerous, and it is impracticable to bring them all before the court, one or more may sue or
27 defend for the benefit of all.”

1 “The party seeking certification has the burden to establish the existence of both an
2 ascertainable class and a well-defined community of interest among class members. [Citations.]
3 The ‘community of interest’ requirement embodies three factors: (1) predominant common
4 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
5 (3) class representatives who can adequately represent the class. [Citation.] [¶] The
6 certification question is ‘essentially a procedural one that does not ask whether an action is
7 legally or factually meritorious.’ [Citation.] A trial court ruling on a certification motion
8 determines ‘whether ... the issues which may be jointly tried, when compared with those
9 requiring separate adjudication, are so numerous or substantial that the maintenance of a class
10 action would be advantageous to the judicial process and to the litigants.’ [Citations.]” (*Sav-On,*
11 *Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

12 “The ‘ultimate question’ the element of predominance presents is whether ‘the issues
13 which may be jointly tried, when compared with those requiring separate adjudication, are so
14 numerous or substantial that the maintenance of a class action would be advantageous to the
15 judicial process and to the litigants.’ [Citations.] The answer hinges on ‘whether the theory of
16 recovery advanced by the proponents of certification is, as an analytical matter, likely to prove
17 amenable to class treatment.’ [Citation.] A court must examine the allegations of the complaint
18 and supporting declarations [citation] and consider whether the legal and factual issues they
19 present are such that their resolution in a single class proceeding would be both desirable and
20 feasible. ‘As a general rule if the defendant’s liability can be determined by facts common to all
21 members of the class, a class will be certified even if the members must individually prove their
22 damages.’ [Citations.]” (*Brinker, supra*, 53 Cal.4th at pp. 1021-1022.)

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

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

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

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

17 Numerosity, Ascertainability

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

25 Time-Shaving Subclass

26 The theory of liability here is based on Defendants' failure to pay for all "hours worked."
27
28

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

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

12 Plaintiffs submit that actual start and end times are not used to calculate pay unless
13 overtime is approved and the preset times are overridden. However, the time-shaving is one-way
14 because actual start and end times are used to dock pay. (Pltfs’ Exh. 5 at MA/Tian 000015:
15 “There will be a wage deduction for hourly employees for time actually missed; Depo. Yee at
16 717:8-21, Pltfs’ Exh. 58.) Approval for overtime rarely if ever occurred for pre-shift time, and
17 post-shift time was generally not approved if it was under 10 minutes. (Pltfs’ Summary ¶ 7,
18 Pltfs’ Exh. 1.)

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

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

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

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

26 _____
27 ² Defendants' reliance on *Alonzo v. Maximus, Inc.* (C.D. Cal. 2011) 832 F.Supp.2d 1122 is
28 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.)

1 Accordingly, the motion for class certification of the Time-Shaving Subclass is

2 **GRANTED.**

3 Auto-Deduct Lunch Policy Subclass

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

14 “An employer’s duty with respect to meal breaks...is an obligation to provide a meal
15 period to its employees. The employer satisfies this obligation if it relieves its employees of all
16 duty, relinquishes control over their activities and permits them a reasonable opportunity to take
17 an uninterrupted 30-minute break, and does not impede or discourage them from doing so.”

18 (*Brinker, supra*, 53 Cal.4th at p. 1040.)

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

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

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

7 Defendants argue that Ma Labs had a clear meal and rest period policy, but Defendants
8 mostly refer to policies implemented in February 2010. Except for Drivers, the Auto-Deduct
9 Lunch Policy Subclass period ends in February 2010, so evidence after February 2010 is
10 irrelevant. Defendants claim that Ma Labs' February 15, 2010 Time Clock and Meal and Rest
11 Break Memorandum (Defs' Exh. 103) simply "reaffirm[ed]" a prior policy change in February
12 2008 that extended the length of time for meal and rest periods from 30 to 45 minutes. (See
13 Decl. Guan ¶ 16, Defs' Exh. 200.) However, there is no evidence that under the February 2008
14 policy, Ma Labs informed its employees of their right to *uninterrupted* meal periods. Plaintiffs
15 contend the February 2010 memorandum did not merely reaffirm Ma Labs' prior policy but
16 made sweeping changes that now specified meal breaks were to be uninterrupted.

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

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

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

3 Defendants also submit declarations in which employees state that they received lunch
4 breaks during which they were relieved of all duties. However, many of Defendants’
5 declarations are problematic because the declarants either were not employed with Ma Labs
6 before February of 2010 or do not clearly indicate their time of employment with Ma Labs to
7 support the inference that their statements refer to the relevant time period for the Auto-Deduct
8 Lunch Policy Subclass. (See Decls. Jie He [Exh. 215]; Min Chin [Exh. 218]; Fei Long [Exh.
9 221]; Wei Li [Exh. 222]; Michael Ma [Exh. 228]; Leopoldo Marquez [Exh. 230]; Xioa Xiao Mi
10 [Exh. 231]; Chong Guang Pan [Exh. 234]; Yu Shu Tay [Exh. 244]; William Wang [Exh. 247];
11 Cheng I Yang [Exh. 253]; Zhi Quan Zhang [Exh. 257].) Defendants’ other declarants who were
12 employed during the relevant period state that they saw labor law posters around Ma Labs’
13 premises (e.g., Exh. 101A), that they were told by their managers what the lunch break policies
14 and procedures were, that they could use Ma Labs’ Time Clock Adjustment Request Form
15 (“TCARF”) to adjust their working hour history, and they were never interrupted during their
16 lunches. However, these declarations are outnumbered by Plaintiffs’ declarations, which
17 establish that before February 2010, the declarants did not clock out for lunch, they were
18 pressured to eat lunch quickly and get back to work, and they could not refuse a manager’s
19 request to ask them to work during lunch. (Pltfs’ Summary ¶¶ 10-12.) Furthermore, although
20 Defendants’ declarants state that managers explained the meal period policy to them, they do not
21 state that managers specifically informed them of the duty-free nature of the meal periods.

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

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

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

12 Plaintiffs also dispute whether Ma Labs had a bona fide procedure for employees to
13 report missed or interrupted meal breaks and receive premium pay. Ostensibly, a trial on this
14 theory would not seem to involve predominantly individualized inquiries, particularly if there
15 were no premium payments made in the pre-February 2010 period for missed meal periods. In
16 opposition, Defendants refer to the testimony of Payroll Manager Christy Yee regarding three
17 instances "in the past calendar year" when employees received premium pay, as well as Exhibit
18 142G, which is an earnings statement showing premium pay in 2013. However, evidence of
19 post-February 2010 practices is not relevant to the time period for the Auto-Deduct Lunch Policy
20 Subclass. Defendants also submit copies of blank TCARF forms from before and after
21 December 2008 that allowed employees to record hours for missed meal periods (Exhibits 102A
22 and B). However, to the extent the existence of the TCARF forms goes to defending Plaintiffs'
23 claim of a lack of a bona fide procedure, that is a merits issue.

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

27 As for the Drivers subclass, under *Jaimez v. Daihatsu USA, Inc.* (2010) 181 Cal.App.4th
28 1286, 1304–1305, which was cited with approval by the California Supreme Court in *Brinker,*

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

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

16 Second Meal Period Policy Subclass

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

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

26
27
28 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.

1 Ma Labs argues that waiver is an affirmative defense to Labor Code section 512, and this
2 will raise individualized issues. However, Ma Labs does not submit evidence supporting the
3 predominance of individualized inquiries regarding waiver. “[A] defendant may defeat class
4 certification by showing that an affirmative defense would raise issues specific to each potential
5 class member *and that the issues presented by that defense predominate over common issues.*
6 [Citations.]” (*Walsh v. Ikon Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450, emphasis
7 added.) Here, Ma Labs has merely posited that waiver may raise individualized issues, but Ma
8 Labs’s declarants do not discuss waiving second meal periods. Many of Ma Labs’ declarants
9 state that they rarely worked over 10 hours a day.

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

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

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

26 Rest Period Policy Subclass

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

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

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

18 Defendants argue that in 2006, the rest break policy was provided to employees and
19 acknowledged by employees upon hire. (Decl. Guan ¶ 18, Defs’ Exh. 104.) Ma Labs posted
20 applicable labor law posters in its facilities by 2007. (Decl. M. Musto ¶¶ 3-4.) In 2010, Ma Labs
21 implemented the daily certification process confirming breaks (Defs’ Exh. 105). In February of
22 2010, Ma Labs issued a memorandum clarifying meal and rest break policies. Defendants argue
23 that under *Brinker*, an employer is only required to make rest breaks available, and in a 2009
24 investigation, the DLSE found no violation of meal and rest break violations. Defendants submit
25 declarations in which employees state they were authorized to take breaks at their discretion.

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

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

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

12 Derivative Subclasses (Wage Statements, Waiting Time Penalties)

13 California Labor Code section 226, subdivision (a) requires employers to provide
14 employees with “an accurate itemized statement in writing” showing “total hours worked” and
15 “all applicable hourly rates in effect during the pay period and the corresponding number of
16 hours worked at each hourly rate.” (Cal. Lab. Code, § 226, subd. (a).) “An employee suffering
17 injury as a result of a knowing and intentional failure by an employer to comply with [section
18 226, subdivision (a)] is entitled to” certain specified damages. (See Lab. Code, § 226, subd. (e).)

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

24 Here, Plaintiffs’ theories for wage statement violations and waiting time penalties are
25 derivative of their time-shaving and auto-deduct claims. Because certification is granted as to
26 the time-shaving and auto-deduct claims, as set forth above, and Defendants do not argue that
27 any individualized issues will predominate among these derivative subclass claims alone, it is
28

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

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

4 Typicality

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

11 Adequacy of Representation

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

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

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

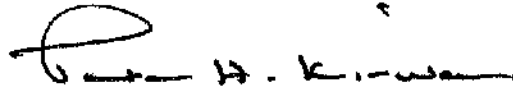
1 Other than the issues raised and disposed of in the motion to disqualify, there is no real
2 dispute that Plaintiffs' counsel is qualified to conduct the proposed litigation. (See *McGhee v.*
3 *Bank of America* (1976) 60 Cal.App.3d 442, 450-451 [adequacy of representation].)

4 Conclusion

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

12 IT IS SO ORDERED.

13
14
15 Dated: 10/9/14



Honorable Peter H. Kirwan
Judge of the Superior Court