SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/21/2014 TIME: 09:21:00 AM DEPT: C-71

JUDICIAL OFFICER PRESIDING: Ronald S. Prager
CLERK: Terry Ray
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT: L. Wilks

CASE NO: **37-2011-00102593-CU-OE-CTL** CASE INIT.DATE: 12/16/2011
CASE TITLE: **Felczer vs. Apple Inc [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Other employment

EVENT TYPE: Ex Parte

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 07/16/14 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

RULING AFTER ORAL ARGUMENT: The Court rules on plaintiffs Brandon Felczer (Felczer), Ryan Goldman (Goldman), Ramsey Hawkins (Hawkins), and Joseph Lane Carco's (Carco) (sometimes collectively Plaintiffs) motion for class certification as follows:

After taking the matter under submission, the Court confirms its tentative ruling.

As a preliminary matter, the Court notes that defendant Apple Inc. (Defendant) elected to file a Notice of Supplemental Authority despite the fact that this Court expressly stated that it did not want any further briefing on the derivative claim issue. Therefore, said Notice was not considered and shall be stricken from the record.

Plaintiffs' Request for Judicial Notice. With respect to the request for judicial notice made with their moving papers, it is denied as to the declarations but granted as to the court orders.

With respect to the request for judicial notice made with their reply, the request is denied as the Exhibits 57 and 58 but granted as to Exhibit 59.

Plaintiffs' Evidentiary Objections. The Court rules as follows:

Crandall Declaration. Objection Nos. 1-13, 15-22 are sustained on the ground that the statements are misleading. Objection No. 14 is sustained on the ground pursuant to Evidence Code section 1521.

Defendant's SCD, Exh. 1, Issues 2-4, 6-15, 18-19, Defendant's SCD, Exh. 2, Issues 1, 5-6, 8-14, 17-18, Davis Supp. Declaration, Easterwood Declaration, Fehr Declaration, Conmy Declaration, McGee Declaration, Ramirez Declaration, Valenzuela Declaration, and *Dunne Declaration.* The objections are overruled.

Defendant's Request for Judicial Notice. Defendant asks the Court to take judicial notice of two cases: (1) *Johnson v. California Pizza Kitchen,* Second Appellate District, Case No. B234542 and (2) *Cummings v. Starbucks Corp. et al.,* Central District of California. The request for judicial notice of these cases is granted as to their existence but not with respect to "the truth of hearsay statements in [the] decisions...including...statements of fact." (*People v. Harbolt* (1997) 61 Cal.App.4th 123, 127.)

Defendant's Evidentiary Objections. The Court rules as follows:

Fountain Declaration, Neidstedt Declaration, Haskett Declaration, Dodds Declaration, Kurtz Declaration, Chaidez Declaration. Mendoza Declaration, Stillings Declaration, Norman Declaration, Costa Declaration, Cash-Mitchell Declaration, Lee Declaration, Allrich Declaration, Shephard Declaration, Long Declaration, Gousha Declaration, Thiele Declaration, Petrini Declaration, Turner Declaration, Palmer Declaration, Sullivan Declaration, Kurtz Declaration, Stern Declaration, Solares Declaration, Smith Declaration, Danze Declaration, Hallman Declaration, Meyers Declaration, Reynolds Declaration, Dellava Declaration, Yniguez Declaration, Atkins Declaration, Bragalone Declaration, Fisch Declaration, Horn Declaration, Plante Declaration, Torres Declaration, Sosnowski Declaration, Pease Declaration, Donnelly Declaration, Collins Declaration, Blewett Declaration, Clark Declaration, McMurray Declaration, Dimick Declaration, Page Declaration, Ure Declaration, Rusten Declaration, Carlese Declaration, and *Sessions Declaration.* The objections are overruled.

Cooper Declaration. The objection is sustained on the ground that it is incomplete.

Ben-Kedem Declaration. The objection is sustained on the ground that it lacks a valid signature.

Rustan Declaration. The objection is sustained on the ground that it is incomplete.

Belong Declaration. The objection is sustained on the ground of improper opinion.

Hansen Declaration. Objection Nos. 1-6 are overruled. Objection No. 7 is sustained on the ground of lack of foundation as to other employees.

Cooper Declaration. Objection Nos. 1, 3 are overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Boyd Declaration. Objection Nos. 1, 3-8 are overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Deaner Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-6 are overruled.

Butz Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other

employees. Objection Nos. 2-7 are overruled.

Endres Declaration. Objection Nos. 1, 3-6 are overruled. Objection Nos. 2, 7 are sustained on the ground of lack of foundation as to other employees.

Hernandez Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-4 are overruled.

Zimmer Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-7 are overruled.

Hong Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-6 are overruled.

Hill Declaration. Objection Nos. 1, 3 are overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Nye Declaration. Objection Nos. 1, 3-7 are overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Buenviaue Declaration. Objection Nos. 1, 3-6 are overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Solano Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-6 are overruled.

Burton Declaration. Objection Nos. 1-2 are sustained on the ground of lack of foundation as to other employees. Objection Nos. 3-4 are overruled.

McKinley Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-3 are overruled.

Freese Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-7 are overruled.

Munz Declaration. Objection Nos. 1, 7 are sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-6, 8 are overruled.

Decter Declaration. Objection No. 1 is overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Fieldhouse Declaration. Objection Nos. 1, 3-5 are overruled. Objection Nos. 2, 6 is sustained on the ground of lack of foundation as to other employees.

Brisby Declaration. Objection Nos. 1, 3-5 are overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Neal Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-7 are overruled.

Halili Declaration. Objection Nos. 1, 3-6 are overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Schrenko Declaration. Objection Nos. 1, 3-6 are overruled. Objection Nos. 2, 7 are sustained on the ground of lack of foundation as to other employees.

Sowell Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-6 are overruled.

Johnson Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-5 are overruled.

Rabe Declaration. Objection Nos. 1, 3-5 are overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Boyce Declaration. Objection Nos. 1, 3-7 are overruled. Objection Nos. 2, 8 is sustained on the ground of lack of foundation as to other employees.

Newsome Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-5 are overruled.

Granados Declaration. Objection No. 1 is overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Stern Declaration. Objection No.1 is overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Ben-Kedem Declaration. Objection Nos. 1-2 are sustained on the ground of lack of foundation as to other employees. Objection Nos. 3-6 are sustained.

Lyson-Nakama Declaration. Objection Nos. 1-2 are sustained on the ground of lack of foundation as to other employees. Objection Nos. 3-4 are overruled.

Fillport Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-5 are overruled.

Gonzalez Declaration. Objection No. 1, 3-7 are overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Alford Declaration. Objection Nos. 1, 3-8 are overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Jafry Declaration. Objection No. 1 is sustained on the ground of speculation. Objection Nos. 2, 4-7 are overruled. Objection No. 3 is sustained on the ground of lack of foundation as to other employees.

Cilurzo Declaration. Objection Nos. 1, 3-7 are overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Van Slyke Declaration. Objection Nos. 1, 12-13 are sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-11, 14 are overruled.

Roberts Declaration. Objection Nos. 1, 3-9 are overruled. Objection Nos. 2, 10 are sustained on the ground of lack of foundation as to other employees.

Spire Declaration. Objection No. 1 is overruled. Objection Nos. 2-3 are sustained on the ground of lack of foundation as to other employees.

The motion is granted for the reasons stated below.

The proposed sub-class definitions are as follows:

Unlawful Meal Period Policy Subclass (Non-Exempt Non-Managerial Retail Employees): All of Defendant's non-exempt non-managerial retail employees who were not relieved of all duties for a first meal period by the end of the fifth hour of work and/or a second meal period by the end of the tenth hour of work, and who were not compensated with one hour of pay for all such instances between December 16, 2007 to August 1, 2012.

Unlawful Meal Period Policy Subclass (Non-Exempt Corporate Employees): All of Defendant's non-exempt corporate employees who were not relieved of all duties for a first meal period by the end of the fifth hour of work and/or a second meal period by the end of the tenth hour of work, and who were not compensated with one hour of pay for all such instances between December 16, 2007 to August 1, 2012.

Unlawful Rest Period Policy Subclass (All Non-Exempt Retail Employees): All of Defendant's non-exempt retail employees who did not receive a *first,* paid 10 minute rest period during shifts of greater than 3.5 but less than 6 hours, a *second* rest period during shifts greater than 6 hours but less than 8 hours, or a *third* rest period during shifts greater than 10 hours but less than 12 hours, any time between December 16, 2007 to August 1, 2012.

Unlawful Rest Period Policy Subclass (Non-Exempt Corporate Employees): All of Defendant's non-exempt corporate employees who did not receive a *first,* paid 10 minute rest period during shifts of greater than 3.5 but less than 6 hours, a *second* rest period during shifts greater than 6 hours but less than 8 hours, or a *third* rest period during shifts greater than 10 hours but less than 12 hours, any time between December 16, 2007 to August I, 2012.

Derivative and Direct Waiting Time Penalty Subclass (Former Non–Exempt Employees): All of Defendant's former non-exempt employees who were not provided timely payments as required by law of all final wages upon separation of employment during any time between December 16, 2008 and the date of judgment.

Derivative Unlawful Wage Statement Subclass (Non-Exempt Employees): All of Defendant's non-exempt employees who were not provided timely and accurate wage statements in violation of California Labor Code section 226 during any time between December 16, 2007 and the date of judgment.

In order for a class to be certified, Code of Civil Procedure section 382 requires that there be (1) an ascertainable class and (2) a well-defined community of interest. (*Richmond v. Dart Industries, Inc.*

(1981) 29 Cal.3d 462, 470 (hereafter "*Richmond*").)

Ascertainability
Whether a class is "ascertainable" within the meaning of Code of Civil Procedure section 382 "is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying the class members." (*Reyes v. San Diego County Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.) "The class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description." (*Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 977 (internal quotes omitted).)

Based on the definitions cited above, the proposed subclasses are readily identifiable.

Community of Interest
The "community of interest" requirement embodies three separate factors: (1) predominant common questions of law or fact; (2) class representatives whose claims or defenses are typical of the class; and (3) class representatives who can adequately represent the class. (*Richmond, supra,* 29 Cal.3d at p. 470; *Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 326 (hereafter *Sav-On*).)

In this motion, Defendant contends that certification of the proposed sub-class is improper due to existence of individualized inquiries, the fact that the named Plaintiff is not typical, and the unmanageability of the proposed sub-class.

Commonality. Predominant common question means that "each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment; and "the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants." (*Washington Mutual Bank, FA v. Super. Ct.* (2001) 24 Cal.4th 906, 913–914 (brackets in original; internal quotes omitted); *Basurco v. 21st Century Insurance Co.* (2003) 108 Cal.App.4th 110, 117 (hereafter *Basurco*).)

"As a general rule if the defendant's liability can be determined by facts common to all members, a class will be certified even if the members must individually prove their damages." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (hereafter *Hicks*).) But a class action cannot be maintained where the existence of damage, the cause of damage, and the extent of damage have to be determined on a case-by-case basis, even if there are some common questions. (*Basurco, supra*, 108 Cal.App.4th at p. 119.)

Additionally, as part of this requirement, courts also consider the manageability of the common issues and taking into account the available management tools, weigh the common issues against the individual issues to determine which of them predominate. (*Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1432–1433 (hereafter "*Dunbar*").)

Plaintiffs seek to certify two "unlawful meal break policy" subclasses-(1) non-exempt corporate and (2) non-exempt, non-managerial retail employees. Plaintiffs offer two certification theories: (1) Defendant's meal break policies from December 2007 to August 2012 (meal break policies) are facially unlawful because they, "never inform[ed] the non-manager employees that they are permitted to take their meal period within the first five hours of every shift" and (2) Defendant schedules meal breaks close to the end of the fifth hour of work, making timely meal breaks difficult.

As to the former theory, an employer's duty to provide lawful meal periods means that the employer must: (1) authorize and permit a first meal period by no later than the end of the employee's fifth hour of work (and a second meal period by no later than the end of the employee's tenth hour of work); (2) actually relieve the employees of all duties: (3) relinquish control over the employees and permit them a reasonable opportunity to take an uninterrupted 30-minute meal period; and (4) not impede or discourage employees from taking their meal periods. (*Brinker, supra,* 53 Cal.4th at pp. 1040-1042, 1049, 1053; see *Bradley, supra,* 211 Cal.App.4th at p. 1151.)

Here, Defendant's argument primarily focused on the duty not to impede or discourage employees from taking their meals but ignored the duty to authorize and permit the breaks at the times required by law.

It contended that Plaintiffs were provided timely meal breaks and that the evidence supports their position. However, Plaintiffs provided evidence that the meal period policy that was in force from December 16, 2007 through July 31, 2012 did not inform the non-exempt, non-manager employees that they were permitted to take their meal period within the first five hours of every shift. (PNOL, Exhs. O, M.) It instead stated the following: All non-exempt employees who work more than 5 hours at any time during a work shift must take at least a 30-minute meal period; All non-exempt employees who work more than 10 hours at any time during a work shift must take at least a 30-minute meal period; and Meal periods cannot be taken at the end of an employee's shift in order for the employee to leave work early. (*Ibid.*) Thus, as stated, it can be argued that Defendant's meal break policy never authorized, permitted, or made its non-exempt employees aware that they had the right to take a meal period *within* the first five hours prior to August 1, 2012. (PNOL, Exh. 0 (Defendant's pre-August 1, 2012 Meal Period Policy).) Said policy was supplemented by a separate document entitled "Scheduling" which consisted of a chart that informed the retail non-exempt employees that they are to be scheduled for a 30- minute meal period between a five to eight hour work shift, and a 60-minute meal period for a scheduled work shift of eight or more hours. (PNOL, Exhs. K, Q.) The chart re-states the meal period policy.

Defendant contends that it is only obligated under Labor Code section 512 to provide meal breaks and that there is no requirement that it authorize and permit them. However, the court in *Bradley* at page 1149 stated that "'[a]n employer is required to authorize and permit the amount of [rest and meal] break time[s] called for under the wage order for its industry. If it does not...it has violated the wage order and is liable.'"

Plaintiffs' theory of the case is premised on the illegality of the uniform policies that were in place during the class period. This type of theory has routinely been certified post-*Brinker.* (*Brinker v. Super. Ct.* (2012) 53 Cal.4th 1004, 1033 (hereafter *Brinker*); *see also Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1149 (hereafter *Bradley)*; *see also Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1299-1305 (hereafter *Jaimez)*; *Ghazaryan v. Diva Limousine* (2008) 169 Cal.App.4th 1524, 1533-1538; *Bufil v. Dollar Financial Group* (2008) 162 Cal.App.4th 1193, 1205-1208.) Since *Brinker,* this State's courts have held that the lawfulness of an employer's policy can be determined on a class-wide basis if the employer intends that policy to be applicable to all employees within the proposed class(es), and that evidence of application of the policy to specific employees would, at most, establish individual issues *of damages, which would not preclude certification.* (See e.g., *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 705, 717-730 (hereafter *Benton*); *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 237; *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864, 870-873.)

Finally, the court in *Sav-on Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 330 fn. 4 stated that

sudden uniform changes to an employer's policy provides common proof of liability.

Here, Plaintiffs presented evidence that Defendant changed its meal and rest period policy on August 1, 2012, which was approximately eight months *after* this lawsuit was filed. (PNOL, Exh. M, 73:13-73:18; PNOL Exh. K, 46:5-46:20; 107:24-108:10; PNOL, Exhs. S and T.)

As to the latter theory, an employer may also fail to provide meal periods if the employer "undermines a formal policy of providing meal breaks by pressuring the employees to perform their duties in ways that omit breaks" *(Brinker, supra,* 53 Ca1.4th at p. 1040.)

Defendant contends that its scheduling practices did not cause late meal breaks and that no uniform policy or practice of scheduling late meal breaks exists. However, Plaintiffs provided evidence indicating that Defendant had a uniform scheduling policy that prior to August 1, 2012, made taking meal and rest breaks extremely difficult. (PNOL, Exh. Q (Defendant's Scheduling Policy and Rules).) For example, non-exempt employees would have to wait until they were done helping each particular customer before they could go on a break. (*Id.,* at Exhs. W, gg.) This, in turn, had a domino effect on the next non-exempt employee's scheduled breaks. *(Ibid.)* In addition, Plaintiffs presented evidence that Defendant often scheduled its non-exempt employees for meal periods starting well after the fifth hour of work. (*Id.,* at Exh. ll; Dodds Dec., ¶¶6, 9.)

Rest Breaks. Plaintiffs seek to certify rest break subclasses of all non-exempt corporate and retail employees. Plaintiffs advance two theories for certification: (1) Defendant's rest break policies from December 2007 through August 12, 2012 (rest break policies) were facially unlawful because they "did not give full effect to the major fraction" language by stating "employees who work more than 6 but less than 8" hours were entitled to a second break; and (2) Defendant scheduled rest breaks late.

The rest period policy on HRWeb stated the following, in pertinent part: Defendant provides a 10-minute paid rest period for every 4 hours worked by all non-exempt employees; and that employees are expected to schedule rest periods at their discretion, unless instructed otherwise by a supervisor. (PNOL, Exhs. O, M, Q.)

Notably, Defendant has no record of paying any class member compensation for a missed meal or rest period prior to November 3, 2012. (PNOL, Exhs. Z, bb, K-M, U-V.) Furthermore, the rest period policy in *Brinker* is identical to the one here. (*Id.,* at Exhs. O, Q.)

In addition, a plain reading of Defendant's rest period policy that applied to the corporate nonexempt employees as well as the scheduling chart that applied to the retail nonexempt employees reveal that the only time a non-exempt employee is entitled to two rest breaks is if that nonexempt employee works 8 hours or more. (PNOL, Exh. K, 99:7-25.) But, in fact, a lawful policy must authorize a second rest period for employees working shifts longer than 6 hours and less than 8 hours. (*Brinker, supra,* 53 Cal.4th at p. 1033.) Here, the evidence shows that Defendant failed to authorize a second rest period under these circumstances.

Finally, contrary to Defendant's argument, Plaintiffs' scheduling theory is complementary with their unlawful policy theory because its meal/rest period policy stated the law incorrectly. Thus, at the time that Defendant's rest break policy failed to authorize and permit compliant rest breaks, its scheduling policy/practice also affirmatively impeded or discouraged compliant rest breaks. Both theories are suitable for class treatment under *Brinker* at pages 1040-1042, 1049.

Final Pay. Plaintiffs ask to certify a stand-alone final wage claim, asserting Defendant had a policy and practice to pay all final wages late.

California employers must immediately provide final wages to terminated employees at the place of employment or by direct deposit. (Lab. Code, §§201, 208, 213.) Employers must provide final wages for employees who resign with 72 hours' notice at the place of employment or by direct deposit on the last workday. (Lab. Code, §202.) Employers must provide final wages to employees who resign without at least 72 hours' notice at the place of employment or by mail within 72 hours. Wages not calculable at separation i.e., commissions or bonuses, are due when calculable. (*Labriola v. Bank of Am. Nat. Assn.* (N.D.Cal. May 10, 2012) 2012 U.S.Dist. LEXIS 65853.) No waiting time penalties are owed if employees avoid payment or there is a good faith dispute about owed wages. (Cal. Code Regs., tit. 8, §13520; *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7-8.)

Plaintiffs offer two certification theories: (1) Defendant's termination policies are facially unlawful and (2) Defendant's final wage practices made timely payment difficult.

With respect to the first theory, Defendant contends that it had compliant policies. However, Plaintiffs presented evidence that Defendant has a uniform unlawful job abandonment policy and voluntary termination policy.

The job abandonment policy provided for payment within 3 business days. (PNOL, Exh. yy.) However, the law requires that a final paycheck be provided no later than 72 hours after the voluntary end of employment. (Lab. Code, §202.) Defendant pointed out that none of the named plaintiffs ended their employment in this manner. However, this should not bar Plaintiffs from pursuing this claim provided that they are able to find a suitable representative. (See *Jaimez, supra,* 181 Cal.App.4th at pp. 1307-1308.)

The voluntary termination policy provided for payment on the last day of employment for employees who gave at least 72 hours notice and within 72 hours if notice was not given. (See e.g., PNOL, Exh. xx (APPLE 000418.) However, Plaintiffs theory is that from May 2011 to present, Defendants had no policy in place. (Id., at Exh. xx (APPLE 000420.) In Bradley at page 1150, the court stated that if the theory of recovery is based on the lack of a policy, such matters are subject to common proof. It further stated that even the defense that it had an unwritten policy is also a matter of common proof. (*Ibid*.)

With respect to the second theory, Defendant contends that its practices complied with the law and that it would voluntarily pay waiting time penalties if it delivered final wages late. (Conmy Dec., 36; Fehr Dec., ¶38; CD, Exh. 14 (Gillebaard Dec.), ¶27; DNOL, Exh. 5 (Sheeler Dec.), ¶39; SCD, Exh. 24 (Gutilla Depo.), 101:9-102:3.) However, Plaintiffs presented evidence that it had a uniform practice of issuing its final paychecks late as a result of its Payroll Procedures Policy. (Belong Dec., ¶¶12-13; PNOL, Exhs. xx-yy, and vv; *see also* PNOL, Exh. mm - 42:1-2; 78:22; 51:1-11; 56:20-57:5; 54:18- 55:3; 106:22-107:14.)

As to the issue of manageability, Defendant contended that the proposed sub-classes would be unmanageable because of the individualized issues that exist. However, Plaintiffs that this his case can be resolved by relying exclusively upon Defendant's unlawful corporate policies and corporate records. (PNOL, Exhs. D, E, G, I, O, Q, R, ll-pp, rr-tt, vv; Fountain Dec., ¶¶3-12; Nienstedt Dec., ¶¶4-10.) And, the rest period violation damages can be addressed through a survey. (Nienstedt Dec., ¶¶4-10.)

Derivative Claims. In addition to the direct cause of action for late final paychecks, the waiting time class

is also derivative in nature as a result of any or all of the direct meal period or rest period violations described above, given that not all meal and rest period penalties were issued to employees within the time frames required by the Labor Code. Likewise, the claim for inaccurate wage statements is derivative of the unlawful meal and rest period claims because, wherever meal and rest period penalties should have been paid but were not, the corresponding wage statement is inaccurate.

Defendant contends that Plaintiffs cannot recover waiting time penalties under Labor Code section 203 for an alleged failure to provide meal and rest breaks under Labor Code section 226.7. However, Plaintiffs correctly pointed out that the law is unsettled as to this issue, citing *Murphy v. Cole* (2007) 40 Cal.4th 1097, 1103. Thus, the Court is not inclined to preclude Plaintiffs' claim based on the current state of the law.

Since the Court has found that Plaintiffs have met their burden of establishing that their meal break, rest break, and final pay claims should proceed, their derivative claims should proceed as well.

Typicality. Generally the test for typicality is whether other members have the same or similar injury, whether the action is based on conduct that is not unique to a single class member, and whether other class members have been injured by the same conduct. (*See Weinberger v. Thornton* (S.D. Cal. 1986) 114 F.R.D. 599, 603.) It is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 45.) Thus, it is not necessary that the class representative have personally incurred all of the damages suffered by each of the other class members. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 228.)

As to Felczer, his claims are typical of the proposed class that he intends to represent because (1) he was subject to the same break and scheduling policies as all of the retail nonexempt employees and he is still owed two days of final wages. Although Defendant presented evidence indicating that he may have been fully compensated, Plaintiff disputes the accuracy of the information Defendant relied upon to make this assertion and insists that he is still owed money. In addition, courts have stated that "[e]ven if the named plaintiff receives all the benefits that he seeks in the complaint, such success does not divest him of the duty to continue the action for the benefit of others similarly situated." (*Ticconi v. Blue Shield of Cal.* (2008) 160 Cal.App.4th 528, 548, *La Sala v. American Sav. & Loan* (1971) 5 Cal.3d 864, 872; *see also Deposit Guarantee Nat. Bank v. Roper* (1980) 445 U.S. 326.)

As to Goldman, his claims are typical of the proposed classes he represents because he was also subject to the same break and scheduling policies, and was paid late.

As to Carco, his claims are typical because he was subject to the same break policies that applied uniformly to all the corporate nonexempt employees. In addition, he was injured in that he (a) received meal periods after the first 5 hours of his work shift, and (b) missed second rest breaks when he worked shifts more than 6 hours of work, but less than 8 hours.

With respect to Defendant's contention that Carco's claims are based on his own subjective interpretation of its policies, Defendant's argument ignores *Brinker.* In addition, *Green* is a federal district court decision and is factually distinguishable since there was no meal/rest break policy. Finally, Plaintiffs stated that Carco is basing his claims on the express language of the policy itself.

As to Hawkins, his claims are typical of the proposed classes because he was subject to Defendant's scheduling policy that made taking breaks difficult, as well as the rest break policy that did not permit

and authorize a rest break for work periods of over 6 hours, but less than 8 hours.

Adequacy. The Plaintiff must show that she can adequately represent the class. (*Lockheed Martin Corp. v. Super. Ct.* (2003) 29 Cal.4th 1096, 1104.) As such, the class representative, through qualified counsel, must be capable of "vigorously and tenaciously" protecting the interests of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.) Adequate representation requires that (1) the interests of the representative plaintiff coincide with those of the class; (2) the representative plaintiff vigorously prosecute the claims on behalf of the class; and (3) counsel for the representative plaintiff be qualified, experienced and generally able to conduct the litigation. (*See Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 159.)

Here, Plaintiffs are adequate representatives because their interests in recovering unpaid wages coincides with the interests of the class. Furthermore, Plaintiffs sought out experienced counsel to represent her which demonstrates their willingness to vigorously represent the claims on behalf of the class. Finally, Plaintiff's counsel are experienced practitioners in the wage and hour class action field.

Superiority. Many courts hold that class treatment of wage and hour claims is clearly "superior to other available methods for the fair and efficient adjudication of the controversy." *(Dean Witter Reynolds, Inc. v. Super. Ct.* (1989) 211 Cal.App.3d 758, 772-773.) This is so because "[P]ublic policy has long favored the 'full and prompt payment of wages due an employee.' *(Pressler v. Donald L. Bren Co.* (1982) 32 Ca1.3d 831, 837; *Sav-On, supra,* 34 Cal4th at p. 340.) Courts regularly certify class action wage and hour claims. *(Ibid.; see e.g. Earley v. Super. Ct.* (2000) 79 Cal.App.4th 1420, 1423.)

Here, the cost of effectively litigating individual suits is high when compared to the relatively small amount of potential recovery per individual; thus, a class action is the only feasible method to fairly and efficiently adjudicate these claims. Moreover, the relative stakes of each party and the outcome are greatly imbalanced. An individual class member cannot economically afford to litigate a case that has such little economic upside for him or her but such great economic downside for Defendant. Moreover, class certification provides substantial benefits to the litigants and the Courts. Rather than having over 20,995 separate lawsuits or Labor Commissioner hearings regarding the same claims alleged in this action, a class action allows all individual actions to be resolved once on behalf of all claimants. *(Blue Chip Stamps v. Super. Ct.* (1976) 18 Ca1.3d 381, 385.) Finally, the fact that this action concerns the enforcement of important matters of public policy also favors certification so that the putative class members can afford to have their important labor rights vindicated without fear of retaliation. *(Gentry v. Super. Ct.* (2007) 42 Cal.4th 455-456, 460; see also *Sav-On, supra,* 34 Cal.4th at p. 340

IT IS SO ORDERED.

The Court rules on defendant Apple Inc.'s (Defendant) motion to deny class certification as follows:

After taking the matter under submission, the Court confirms its tentative ruling.

As a preliminary matter, the Court notes that Defendant elected to file a Notice of Supplemental Authority despite the fact that this Court expressly stated that it did not want any further briefing on the derivative claim issue. Therefore, said Notice was not considered and shall be stricken from the record.

Defendant's Request for Judicial Notice. The request for judicial notice is granted.

Defendant's Evidentiary Objections: The Court rules as follows: As a preliminary matter, the Court

notes that its rulings with respect to evidentiary objections re: declarations that were made in the concurrent motion are incorporated into this motion but will not be set forth below.

Arneson Declaration, Dixon Declaration, Clements Declaration, and *Allrich Declaration.* The objections are overruled.

Richardson Declaration. Objection Nos. 1, 4-11, 13 Objection Nos. 2-3, 12 are sustained on the ground of lack of foundation as to other employees.

Baumgartner Declaration. Objection No. 1 is overruled. Objection Nos. 2-3 are sustained on the ground of lack of foundation as to other employees.

Spencer Declaration. Objection Nos. 1, 3-6 are overruled. Objection No. 2 is sustained on the ground of lack of foundation as to other employees.

Moen Declaration. Objection Nos. 1-2, 5, 7-8 are overruled. Objection Nos. 3-4, 6 is sustained on the ground of lack of foundation as to other employees.

Solares Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-6 are overruled.

Marroquin Declaration. Objection Nos. 1, 5-13, 15-21 are overruled. Objection Nos. 2-3, 14 are sustained on the ground of lack of foundation as to other employees. Objection No. 4 is sustained on the ground of lack of foundation.

Saldinger Declaration. Objection Nos. 1, 4-12 are overruled. Objection Nos. 2-3 are sustained on the ground of lack of foundation as to other employees.

Morgan Declaration. Objection Nos. 1, 5-7 are overruled. Objection Nos. 2-4 are sustained on the ground of lack of foundation as to other employees.

Armendariz Declaration. Objection Nos. 1-2 are sustained on the ground of lack of foundation as to other employees. Objection Nos. 3-10 are overruled.

Pearce Declaration. Objection Nos. 1-2, 5-15, 17-20 are overruled. Objection Nos. 3-4, 16 is sustained on the ground of lack of foundation as to other employees.

Parvizad Declaration. Objection Nos. 1-2, 4 are sustained on the ground of lack of foundation as to other employees. Objection Nos. 3, 5-12 are overruled.

Heher Declaration. Objection No. 1 is sustained on the ground of lack of foundation as to other employees. Objection Nos. 2-7 are overruled.

Morales-Glenn Declaration. Objection Nos. 1, 4-13, 15-24 are overruled. Objection Nos. 2-3, 14 are sustained on the ground of lack of foundation as to other employees.

Casalou Declaration. Objection Nos. 1-2 are sustained on the ground of lack of foundation as to other employees. Objection Nos. 3-7 are overruled.

Mckinnie Declaration. Objection Nos. 1-2, 5-16, 18-27 are overruled. Objection Nos. 3-4, 17 are sustained on the ground of lack of foundation as to other employees.

Michelow Declaration. Objection Nos. 1, 4-10 are overruled. Objection Nos. 2-3, 11 are sustained on the ground of lack of foundation as to other employees.

U-Ahk Declaration. Objection Nos. 1, 4-15, 17-20 are overruled. Objection Nos. 2-3, 16 are sustained on the ground of lack of foundation as to other employees.

Harkenrider Declaration. Objection Nos. 1, 4-16, 18-32 are overruled. Objection Nos. 2-3, 17 are sustained on the ground of lack of foundation as to other employees.

Fung Declaration. Objection Nos. 1-2, 11 are sustained on the ground of lack of foundation as to other employees. Objection Nos. 3-10, 12-15 are overruled.

Rovin Declaration. Objection Nos. 1, 4-8 are overruled. Objection Nos. 2-3 are sustained on the ground of lack of foundation as to other employees.

Defendant's Request to Strike Plaintiffs Brandon Felczer et al.'s (collectively Plaintiffs) Summary of Witness Deposition Testimony or, In the Alternative, Defendant's Objections Thereto. Defendant request is denied.

Plaintiffs' Request for Judicial Notice. The request for judicial notice is denied.

Plaintiffs' Evidentiary Objections. The Court rules as follows:

Objections Filed With Opposition. The general objections that (1) declarations submitted in support of Defendant's motion should be rejected where the declarant was omitted from the class list, (2) Defendant should have produced certain documents rather than testimony from a declarant, and (3) the fact that 100 percent of Defendant's declarants are current employees are overruled.

Fehr Declaration. Objection Nos. 1-2, 4 are overruled. Objection No. 3 is sustained on the ground of speculation.

Conmy Declaration, Strauss Declaration, Brackett Declaration, Gonzalez Declaration, Hill Declaration, Lozano Declaration, Nguyen Declaration, Duran Declaration, Blair Declaration, Sanchez Declaration, Chan Declaration, Cleveland Declaration, Douglas Declaration, Eklund Declaration, Garcia Declaration, Gustafson Declaration, Jones Declaration, King Declaration, Lincoln Declaration, Midel Declaration, Nunez Declaration, Railton Declaration, Ramos Declaration, Salas Declaration, Specht Declaration, Tertadian Declaration, Walley Declaration, Davis Declaration, Yorkey Declaration. The objections are overruled.

Gilleabard Declaration. Objection Nos. 51-53, 58 are overruled. Objection Nos. 54, 56-57 are sustained on the ground of speculation. Objection No. 55 is sustained on the ground of hearsay.

LeFrancis Declaration. Objection Nos. 59-60, 63 are overruled. Objection Nos. 61-62 are sustained on the ground of speculation.

Other Objections. In addition to the objections filed with their opposition, Plaintiffs filed objections to

supplemental declarations from Crandall and Sheeler as well as deposition transcript excerpts filed with its reply. The objection is granted pursuant to *Neighbours v. Buzz Oates Enters.* (1990) 217 Cal.App.3d 325, 335 fn. 8.)

The motion is denied for the reasons set forth in Plaintiffs' concurrently filed motion for class certification.

IT IS SO ORDERED.

Ronald S. Prager

Judge Ronald S. Prager