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KYLE FRENCHER, on behalf of herself
and others similarly situated.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGLES – CENTRAL CIVIL WEST

KYLE FRENCHER, on behalf of herself and others similarly situated.

PLAINTIFF,

vs.

PACIFICA OF THE VALLEY CORPORATION dba PACIFICA HOSPITAL OF THE VALLEY; and DOES 1 to 100, Inclusive.

DEFENDANTS.

Case No.: BC559056

Assigned for all Purposes to the Hon. Elihu M. Berle, Dept. 323

CLASS ACTION

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO THE MOTION FOR CLASS CERTIFICATION

Date: January 13, 2016
Time: 9:00 a.m.
Dept.: 323

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I. INTRODUCTION

Since it is impossible for Defendant to deny the facts asserted by Plaintiff in her motion, Defendant attempts to escape liability by trying to hide behind alleged collective bargaining agreements. First, Defendant has not set forth any evidence of such phantom "entrenched, aggressive unions." Second, Defendant ignores established law that unions cannot waive employees' statutory rights. This is why Defendant has not cited to a single case in support of its position that the existence of unions could excuse it from complying with California law.

As to meal and rest breaks: Defendant's claim employees could take meal and rest breaks any time and for as long as they wanted is ridiculous because Defendant admitted in deposition that the employees **cannot** take as many breaks as they wish because legal requirements mandate certain number of RNs, LVNS, and CNAs per patient. (Second Lavi Decl. Ex. 51[1] 68:16-18; 69:8-11; Cal. Code Regs., tit. 22, §§ 70217 [hospital must staff nurses based on defined "nurse-to-patient" ratios, *e.g.*, 1:2 licensed nurse to critical care patient; 42 C.F.R. § 482.23 [adequate staffing required by Medicare].) In fact, Defendant admitted its policies require supervisors to schedule meal and rest breaks and employees can only take breaks if it does **not** interfere with patient care. (Ex. 51 69:23-72:6.) This is further corroborated by declarations produced by Defendant stating nurses could not take breaks if others were on break or patient care was necessary. (See Acharya Decl. Ex. 4-34.)

Defendant's claim that charge nurses knew "how everyone's meal and rest breaks are done" (Opp. 4:22-25) is contrary to its own admission that it never trained supervisors or charge nurses on meal and rest breaks. (Ex. 51 32:8-33:2.) This allegation in no way means the charge nurses knew what was required by law because even if they knew about the policies outlined in the CBA and followed them, the CBA never informed employees of their right to 2nd meal breaks or 3rd rest breaks if they worked more than 10 hours! (*Id.* 47:9-11, 48:12-19, 94:12-95:2, 94:12-23, 45:22-46:22, 48:12-19, 49:1-50:16, 51:6-19.) **Defendant has not provided a single declaration from its charge nurses, supervisors or witnesses claiming they scheduled 2nd meal breaks or 3rd rest breaks**.

Defendant spends the majority of its opposition claiming there have never been grievances filed with the union regarding lack of 2nd meal breaks or 3rd rest breaks. However, Defendant fails to state that Defendant admits 2nd meal breaks have never been discussed at the union meetings. (*Id.* 105:1-106:1.) In addition, Defendant fails to note that if the employees were never informed of their rights and the union agreement and its own policies are silent as to 2nd meal breaks and 3rd rest

[1] Hereinafter, Exhibits are to the Second Declaration of Joseph Lavi unless otherwise indicated.

breaks, how could the employees complain to the union? How could the employees allege 2nd meal break violations or 3rd rest break violations or file a grievance, when Defendant admits that the union agreements did not reference 2nd meal breaks and 3rd rest breaks as well as admitting that the supervisors and charge nurses have never been trained on meal or rest breaks. As Defendant admits, if the employees do not know that they are entitled to 2nd meal breaks or 3rd rest breaks, they would never ask for premium wages for missed meal or rest breaks. (*Id.* 101:6-102:11.) Furthermore, filing a grievance is not a condition precedent to filing an action against Defendant for failure to pay minimum wages and/or providing meal and rest breaks.

In addition and most importantly, as required by law, Defendant **had to obtain written** meal break waivers from the employees that wanted to waive their 2nd meal breaks. In fact, Defendant admits that the employees are provided with meal break waivers at the beginning of their employment. (Ex. 51 53:6-17.) Yet only 180 class members signed a written 2nd meal break waiver (although as set forth in the motion, they are invalid), and 820 class members **never agreed to waive their 2nd meal breaks**. Yet, Defendant never provided them with 2nd meal breaks and never paid any premium wages for missed 2nd meal breaks.

Defendant's declarations support all of Plaintiff's claims in this case: It tells a lot when 28 out of the 30 declarations submitted by the Defendant **were not willing to declare** that:

1) they knew they were supposed to get a full uninterrupted 30 minute meal break;
2) their 1st meal breaks were never interrupted;
3) they always received a full 30 minute uninterrupted 1st meal break;
4) they *knew* they were entitled to a 2nd 30 minute meal break when they worked more than 10 hours;
5) they were *informed* that they were able to take a 2nd 30 minute uninterrupted meal break when they worked more than 10 hours;
6) that they were *provided* with the opportunity to take a 2nd 30 minute uninterrupted meal break when they worked over 10 hours;
7) that they *k:n-ew* that they were entitled to a 3rd rest break when they worked more than 10 hours;
8) that they were *informed* that they were able to take a 3rd break when they worked more than 10 hours; or
9) that they were *provided* with the opportunity to take a 3rd rest break when they worked over 10 hours.

Defendant has not and cannot cite a single declaration in which the declarant testified to any of the above. Not a single one. **Basically, declarations submitted by Defendant support all of Plaintiff's claims and allegations!** It also should be noted that the declaration of Plaintiff's supervisor Amina Mohammed (Archanya Decl. Ex. 4) **never** declares that: (1) Plaintiff's 1st meal break were never interrupted; 2) Plaintiff always received a full 30 minute 1st meal break; (3) Plaintiff was scheduled for 2nd meal breaks when she worked more than 10 hours; (4) Plaintiff was

informed she was able to take a 2nd meal break when working more than 10 hours; (5) Plaintiff was provided with the opportunity to take a 2nd meal break when working over 10 hours; (6) Plaintiff was scheduled for 3rd rest breaks when she worked more than 10 hours; (7) Plaintiff was informed she was able to take a 3rd break when she worked more than 10 hours; (8) Plaintiff was provided with the opportunity to take a 3rd rest break when she worked over 10 hours. **Plaintiff's supervisor basically admits that Plaintiff's allegations are true and undisputed**!

As to Defendant's alleged individualized department argument: Defendant tries really hard to muddy the water to claim there are different departments and that each department is handled differently. This is contrary to Defendant's **admission** that regardless of the employees' position, department or title, all of the employees are subject to the same policies and procedures. (Ex. 52 18:23-19:11; see Ex. 51 25:3-17.) All of the non-exempt employees have received the same employee handbook during the class period and they are expected to follow all policies and procedures set forth in the employee handbook. (Ex. 51 19:19-20:6, 40:2-14, 84:24-85:13; Ex. 52 44:13-23, 19:13-21; 21:3-10; 25:22-25.) Defendant has not and cannot set forth any evidence wherein its rounding, auto-deduct, or meal or rest break policies are different for each department. All employees are subject to the same rounding, auto-deduct, and meal and rest break policies. Defendant provides no evidence how the alleged "separate policies that specifically pertain to that department" vary between departments. (Opp. 5:21-23). Why not? Because there is no difference!

II. ARGUMENT

As set forth in Plaintiff's motion, class certification is appropriate where the party moving for class certification shows: the proposed class is numerous yet ascertainable; common issues of law and fact predominate; claims of the proposed class representatives are typical of the class; the class representatives will adequately represent the class; and, the class action is the superior means to resolve the litigation. In its Opposition, Defendant only addresses three issues: (1) predominance of common issues of law and fact; (2) ascertainability; and (3) whether Plaintiff can present a workable trial plan. Accordingly, Plaintiff does **not** address issues of numerosity, typicality, adequacy, or that the class action is a superior means to resolve the litigation because these issues have been conceded. Plaintiff addresses the issues of predominance of common issues of law and fact; ascertainability; and whether Plaintiff can present a workable trial plan below.

A. There Is No Merit To Defendant's Claim The Existence of Unions Or CBAs Undermine Commonality Because California Law Requires Employers To Comply With Wage And Hour Laws And That Burden Cannot Be Shifted To A Union

Defendant accuses Plaintiff of hiding "the fact that the class of employees she seeks to certify is represented by two entrenched, aggressive unions with two collective bargaining

agreements governing employment terms, including terms Plaintiff challenges herein," (Opp. p. 1:15-17) but Plaintiff has not hidden any relevant evidence. First, Plaintiff filed an action alleging Labor Code violations which require *Defendant, the employer, not a union,* to enact policies to protect guaranteed, unwaivable statutory rights to proper pay, meal breaks, and rest breaks. Defendant cannot shift the responsibility of complying with the Labor Code to a union and/or the employees because California law relating to the claims at issue—minimum wage, meal breaks and rest breaks, wage statements, and final wages—requires the employer to provide employees with proper wages, breaks, and wage statements. (See Lab Code §§ 1194, 1197, 226.7, 512, 226, 201, 202; Wage Order 5.) As such, the existence of the unions is absolutely irrelevant.

Second—and in addition to the fact Defendant cannot shift the burden to comply with the Labor Code to unions—Defendant claims that the CBAs protect the employees but yet *fails to provide any copies of the CBAs or cite to the relevant language in the CBAs*[2]. Although Defendant accuses Plaintiff of omitting significant facts about the CBA agreements, Defendant intentionally omits that the CBAs, *just like Defendant's written policies and/or employee handbook,* do not have any terms addressing the claims alleged in this lawsuit, never mention rounding, auto-deduction, 2nd meal breaks, or 3rd rest breaks. Defendant also fails to mention the fact that Defendant did not have a CBA in place for registered nurses since June 2013." The CBA covering registered nurses from June 1, 2010 to June 1, 2013 states the following regarding meal and rest breaks:

> A workday shall consist of eight and one-half (8 ½ consecutive hours of work, which includes a one-half (1/2) hour unpaid meal period.
> …
> Each Nurse shall receive a fifteen (15) minute rest period for each four (4) hours worked. Nurses shall receive a one-half (1/2) hour meal period for eight (8) hours worked.
> …
> [For twelve hours shift employees, a] workday shall be twelve and one-half (12 1/2) consecutive hours of work, which includes a one-half (1/2) hour unpaid meal period.

(Ex. 53 p. 32, 79-80, Ex. 51 45:8-18.) Guebara testified there was no other CBAs in place for registered nurses from June 1, 2013 to June 2016. (Ex. 51 45:8-21, 47:9-25.) Accordingly, the CBA for RNs was only in place from 2010 to 2013 and: expressly provides that in a "workday" RNs are entitled to **only one meal break and two 15 minute rest breaks**, RNs only get a second meal period if the employee works **16 hours**, expressly limits RNs working a twelve hour shift to one meal period. In addition, the CBA does not provide a third rest period to employees working 10 to 12 hours in violation of California law. (*Brinker Rest. Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1029 (*Brinker*).) The CBA makes no mention of rounding or auto-deduction. (Ex. 53.)

[2] The only reason Plaintiff refers to the CBAs is due to arguments raised by Defendant. To be clear,

Defendant produced two other CBAs which cover hospital personnel other than RNs for June 1, 2010 to June 1, 2013, and June 1, 2013 to June 1, 2016, respectively. These CBAs make no mention of rounding or auto-deduction and state only the following regarding meal and rest breaks:

> All employees covered by this Agreement who are connected with the Dietary Department shall be entitled to free meals during their regular break and meal periods.
> …
> Each employee shall be granted a rest period of fifteen (15) minutes during each four (4) hour shift.

(Ex. 54 p. Pacifica 2743, 2745; Ex. 55 p. 2811, 2812.) Accordingly, the CBAs for employees other than RNs have no relevance to any claims in this lawsuit since they do not address rounding, auto-deduction, meal periods, or rest periods for persons other than those scheduled for a four hour shift.

B. Presence of A Union Or The CBAs Are Irrelevant Since The Union Could Not Waive Employees' Statutory Rights To Minimum Wage OR Meal and Rest Breaks

It should be noted that the Labor Code and Wage Order only exempts union employees from overtime wages. It does not exempt such employees from minimum wages, meal or rest break requirements. This is precisely why Plaintiff does not have an overtime cause of action against the Defendant and her claims are limited to minimum wage, meal breaks, and rest breaks.

As required by California law and the Supreme Court: "An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes… the second meal period may be waived by mutual consent of the employer and the employee …" (*Brinker*, 53 Cal.4th at 1042.) Furthermore, in the pending action any meal waiver must be in writing. (Wage Order 5, subd. 11.)

The right to meal and rest breaks is a *statutory* right which **cannot** be bargained away in a union agreement. (*Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 212 ["§ 301 [of the LMRA (29 U.S.C. § 185)] does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law."].) Furthermore, the 9th Circuit has "held that § 301 does not permit parties to waive, in a collective bargaining agreement, nonnegotiable state rights" conferred on individual employees. [Citation.] . . . Where, however, under state law waiver of state rights may be permissible, "**the CBA must include 'clear and unmistakable' language waiving the covered employee's state right 'for a court even to consider whether it could be given effect**.'" [Citations.] (*Valles v. Ivy Hill Corp.* (9th Cir. 2005) 410 F.3d 1071, 1076) [bold added].) The Court further held that "[e]ven assuming *arguendo* that the right to meal periods could be bargained away by a union, we could not determine that the employees had waived their rights without 'clear and unmistakable language' so indicating in the collective bargaining agreement

~~Plaintiff's claims arise out of violations of California law and do **not** arise out of the CBAs.~~

[citations] [and in] this case, Ivy Hill cites no 'clear and unmistakable language' waiving the right to non-working meal periods or penalties." (*Id.* at 1082, fn. 12.) Here, Defendant admits that the CBA meal policy mentions nothing about 2nd meal breaks! (Ex. 51 47:9-11, 48:12-19) and admits the CBAs are "vague and lack specific detail" (Opposition 4:7-9). Thus, the rights to meal and rest breaks at issue in this case are *statutory* rights which **could not** be bargained away in a union agreement and regardless, assuming *arguendo* that they could have been, the CBA does not contain any clear and unmistakable language attempting to (illegally) waive the statutory rights.

C. There Is No Merit To Defendant's Claim The "Decentralized" Hospital Affects This Case Because Plaintiff's Claims Are Based On Policies Or Lack of Policies Which Apply To All Employees Regardless Of Their Department

Defendant also spends several pages discussing the "decentralized" nature of the hospital. This is another red herring because the claims at issue in this lawsuit are based on policies, or lack of policies, which Defendant uniformly applied to all employees as discussed in further detail below. Defendant's method of "rounding" was a programmed payroll procedure which Defendant applied uniformly to all employees. (Ex. 52 39:3-12, 74:15-75:10, 96:7-16.) Defendant's method of auto-deduction of thirty minutes from employees' daily hours was another programmed payroll procedure which applied uniformly to all employees that did not clock in or out for a meal period. (*Id.* 26:20-27:13, 33:25-34:5, 62:17-63:17, 65:6-14, 68:22-69:1, 92:1-19, 63:23-64:7, 89:9-16; First Lavi Decl. Ex. 8 p. PACIFICA 85, Ex. 48 62:20-22; see declarations submitted by Defendant all acknowledging 30 minute auto-deduct policy: Acharya Decl. Ex. 4-5 ¶5, 6 ¶4, 7-12 ¶5, 13 ¶4, 14 ¶6, 15-18 ¶4, 19-21 ¶5, 22 ¶4, 23 ¶5, 24 ¶8, 25 ¶5, 26-34 ¶5.) Defendant's lack of a policy providing for second meal periods and third rest period was also uniform (see, *e.g.*, Opposition p. 7:21-22 ["Pacifica acknowledges it does not have written policies for when employees should take second meal periods or third rest periods. This is intentional."]) and whether or not employees received meal periods in different departments is an issue of damages which is not relevant to certification. (*Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 729-730 (*Benton*).) Accordingly, Defendant's attempts to focus on the "decentralized" hospital is irrelevant because Defendant's policies and lack of policies at issue in this lawsuit was common to all subclasses uniformly regardless of what department they were in or who their supervisor was.

D. There Is No Merit To Defendant's Claim Common Issues Do Not Predominate

1. Common Issues Predominate On The Minimum Wage Class For Rounding

In arguing common issues do not predominate on the rounding claim, Defendant focuses on merits issues which are not properly before the court for certification. (Opposition p. 14:3-28 [arguing whether deduction of time was permissible rounding].) "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."" (*Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1141–1142 (*Bradley*), quoting *Brinker,* 53 Cal.4th at 1025, 1021-1022 [italics added by *Bradley*]; accord *Hall v. Rite Aid Corp.* (2014) 226 CalApp.4th 278, 286-287.) On class certification "*a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate*." (*Hall*, 226 Cal.App.4th. at 288, quoting *Brinker*, 53 Cal.4th at 1025.)

Plaintiff's theory of liability is it was illegal for Defendant to use a payroll policy which automatically shaves time off of employees' compensable work time. Defendant admits it put in place a payroll policy which *uniformly deducted thirty minutes from all employees compensable work hours*. (Ex. 52 39:3-12, 74:15-75:10, 96:7-16.) Defendant admits it required *all employees* to clock in and out at the beginning and end of the workday. (*Id.* 19:13-21, 21:3-10, 25:22-25.) Defendant admits the recorded hours for *all employees* accurately reflect compensable work time. (*Id.* 32:12-22, 81:5-83:3 [supervisors reviewed time and changed if it did not reflect compensable time].) Because rounding was a common procedure programmed into its payroll system and applied evenly to the class members, it can be decided on a class basis.

Defendant will argue "rounding," which is an *affirmative defense*, was permissible pursuant to *See's Candy Shops, Inc. v. Superior Court* which allows an employer's to use such payroll process if the employer can prove it both of the following: the employer programmed the rounding to apply in a neutral manner and that it's use did "not result, over a period of time, in failure to compensate employees properly for all the time they have actually worked." (*See's Candy Shops, Inc. v. Sup. Ct.* (2012) 210 Cal.App.4th 889, 900-902, 907-908.) But whether Defendant's can prove the affirmative defense of "rounding" is a merits issue. The Supreme Court has repeatedly emphasized a trial court should not examine merits issues because class certification can often be determined regardless of which party is correct. (*Brinker*, 53 Cal.4th at 1023 ["resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided"].

2. Common Issues Predominate On The Auto Deduct Class And First Meal Break Class Because The Auto-Deduct Procedure Uniformly Applied To Employees Regardless Of Their Department Or Union Status

Defendant’s failure to keep track of its employees meal breaks and automatic deduction of 30 minutes per day from the employees daily worked hours for meal breaks leads to two (2) separate violations: (1) failure to pay minimum wages for the hours worked and unpaid due to the automatic deduction, and (2) failure to provide 1st meal breaks. In its opposition, Defendant does not

specifically address why it believes that the Auto Deduct Class, which seeks unpaid minimum wage for Defendant's automatic deduction of meal periods which were never taken or were shorter than 30 minutes, does not raise common issues of law and fact. Defendant only references the automatic deduction of meal periods in the context of Plaintiff's claim for *meal period premiums*. (Opposition, 15:19-16:16.) Plaintiff, however, will address both of these claims here.

Defendant, although unclear, appears to argue individual questions predominate because (1) many employees *may* have taken a meal break when their time auto deducted (Opposition 15:19-21, 15:27-16:1); (2) many employees manually clock out for meal periods and do not have their meal periods auto-deducted (*id.* 15:25-27); and (3) some employees submitted a punch variance form and may have been paid for that time (*id.* 16:1-6).

a. Whether employees received a meal period when auto-deducted is a damages issue which does not render the case uncertifiable

Defendant's assertion some employees may have taken a meal break when their time was auto- deducted is a damages question. Plaintiff does not claim that all employees did not receive breaks following the auto-deduction, nor must he do so to warrant certification. (*Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 409.) Aa court must examine the question of predominance of common questions by *viewing the claim through the prism of Plaintiff's theory of liability*. (*Brinker,* 53 Cal.4th at 1021-1022.) If the employer adopts a uniform policy that violates the law, it is liable. The fact that individual employees may have different damages or must individually prove their damages does not require denial of a class certification. (*Id.*)

Plaintiff's theory for the Auto Deduct and 1st Meal Classes is that Defendant had an illegal uniform policy programmed into its payroll system, which automatically deducted 30 minutes from any employees' hours if they did not clock out for meal breaks. As set forth above, it is *undisputed* that Defendant automatically deducts 30 minutes from any employees' shift time if they don't clock in and out for a meal periods or clocked out for less than a thirty minute meal period without verifying whether the employee took a full thirty minute meal period. This common procedure is automatically applied to all employees regardless of what department they were in and regardless of whether they were union employees or not. Plaintiff alleges this common practice resulted in unpaid minimum wage or a meal period violation if the employee did not receive a 30 minute meal period or received less than a 30 minute meal period. Such claims alleging a uniform policy consistently applied to a group of employees are proper for certification. (*Brinker,* 53 Cal.4th at 1033.)

Moreover, this practice is especially illegal in light of the fact California law requires Defendant to record meal breaks (Wage Order 5, subd. 7(A)(3)) and a rebuttable presumption arises

that employees did not receive a meal period if they are not recorded (*Safeway, Inc. v. Sup. Ct.* (2015) 238 Cal.App.4th 1138, 1159-1160 ("*Safeway*"); *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 230-231 (*Faulkinbury*); *Bradley,* 211 Cal.App.4th at 1144-1145 [same].) As noted in Plaintiff's motion, this practice is directly analogous to the certificable automatic practice in *Faulkinbury.* In *Faulkinbury, in advance to assignment and regardless of the working conditions at a particular station*, the employer automatically and uniformly required all security guards to sign the on-duty meal period agreement and take on-duty meal breaks. (*Faulkinbury* 216 Cal.App.4th at 232.) The employer argued that California allows on-duty meal break agreements if the nature of the work prevents an employee from being relieved from duty and that whether each class member's nature of the work allowed for an on-duty meal break would require an individualized inquiry and that some employees ultimately were justifiably required to take on-duty meal periods. (*Id.* at 234-235.) The court found the automatic and common practice certifiable and, just like Defendant's argument in this case that auto-deduction is not certifiable because Plaintiff would have to prove employees did not receive a meal period, the *Faulkinbury* court noted that following *Brinker*, the employer is liable for meal break violations if its adoption of the uniform on-duty meal break policy was held to be unlawful and whether employees ultimately failed to receive meal breaks was a damages issue not an issue for certification. (*Id.* at 235)

Similarly, in *Hall,* the Court of Appeal reversed the denial of class certification stating that with regard to case law since *Brinker* "[t]hose courts have ... agreed that, where the theory of liability asserts the employer's uniform policy violates California's labor laws, factual distinctions concerning whether or how employees were or were not adversely impacted by the allegedly illegal policy do not preclude certification." (*Hall,* 226 CalApp.4th at 289.) And in *Bradley,* the court of appeal reversed the trial court's denial of class certification due to variations among putative class members, explaining that *Brinker* has "expressly rejected ... [the idea] that evidence showing some employees took rest breaks and other employees were offered rest breaks but declined to take them made ... certification inappropriate." (*Bradley,* 211 Cal.App.4th at 1143.)

3. Common Issues Predominate For The Second Meal Class And Third Rest Class

First and foremost, Defendant admits that it intentionally did not inform the employees that they were entitle to 2nd meal breaks and 3rd rest breaks! (Opp. 7:21-22). Defendant also admits that the employees that were provided with written 2nd meal break waivers, did not sign the waivers. (Opp. 8:12-13). This supports Plaintiff's claim that the employees wished to take a 2nd meal break, however, they were not provided with the opportunity to do so. In addition, Defendant's meal break

waivers were intentionally vague since they do not inform the employees that they are entitled to 2nd meal breaks if they worked more than 10 hours. Since Defendant intentionally created vague waivers, it can only be concluded that Defendant wanted the class members to believe that they would be entitled to 2nd meal breaks after working more than 16 hours as stated in the CBA.

Defendant also misleads the court by claiming that the deposition transcript says something when in fact it does not. Defendant claims that the employees were provided with "paid-off-duty second meal period" and cites to Standley's Depo., 31:7-9. (Opp. 7:1-5; see Ex. 52 31:7-9.) However, the cited deposition portion mentions nothing about 2nd meal breaks, let alone, paid-off-duty 2nd meal breaks. To the contrary, Defendant has admitted that Defendant has never paid for an off duty meal break. (Ex. 52 28:5-13.) Defendant has not presented any evidence that any employee ever received 2nd meal breaks or that any employee ever received paid 2nd meal breaks!

Defendant argues that individual issues will dominate because there was a decentralized management environment and different supervisors and individuals chose when they would schedule, allow, or take meal and rest breaks. (Opposition 15:1-16, 16:17-17:5.) Defendant fails to view the case through the prism of Plaintiff's theory of liability, an approach set forth by *Brinker* and consistently applied by cases since *Brinker*. (*Brinker,* 53 Cal.4th at 1025; *Faulkinbury,* 216 Cal.App.4th at 232; *Bradley,* 211 Cal.App.4th at 1141; *Benton,* 220 Cal.App.4th at 726.)

Plaintiff's theory of liability is that Defendant's *lack of a policy* providing for second meal periods and third rest breaks is illegal and fails to "provide" employees with second meal periods and third rest periods as required of the employer by California law. (See *Brinker,* 53 Cal.4th at 1029, 1039.) Courts have made clear that an employer's lack of a policy affirmatively authorizing meal and rest breaks is grounds for class certification. (*Benton,* 220 Cal.App.4th at 725-726; *Bradley,* 211 Cal.App.4th at 1150.) In *Brinker,* the Supreme Court explained that an employer cannot avoid liability by merely showing that it has not actively prohibited or prevented breaks. To the contrary, employers have a legal duty to ***affirmatively*** create and implement meal and rest break policies to satisfy its duty to provide meal and rest breaks.

In *Bradley,* plaintiffs filed a class action alleging defendant violated meal and rest break laws by its lack of an express policy providing technicians with meal and rest breaks. (*Bradley,* 211 Cal.App.4th at 1135.) The plaintiffs submitted evidence the employer did not have a rest or meal break policy in place, did not maintain records of rest or meal breaks, and did not know the extent or frequency that any breaks were taken. (*Id.* at 1140.) The employer argued that despite not having an express meal and rest break policy the technicians were not prevented from receiving breaks and it

was up to them when they took them. (*Id.* at 1150.) The trial court and court of appeal denied certification, ruling there were reasonable grounds to find that individual inquiry would predominate regarding which employees missed breaks and whether those missed breaks were the result of the employer's "lack of a break policy." (*Id.* at 1145, 1151.) **However, the case was stayed and remanded following *Brinker,* the court of appeal reversed its ruling finding that the lack of a policy to provide meal and rest breaks was subject to common proof**. (*Id.* at 1150.)

> [P]laintiffs' theory of recovery is based on Networkers's (uniform) lack of a rest and meal break policy and its (uniform) failure to authorize employees to take statutorily required rest and meal breaks. The lack of a meal/rest break policy and the uniform failure to authorize such breaks are matters of common proof. Although an employer could potentially defend these claims by arguing that it did have an informal or unwritten meal or rest break policy, this defense is also a matter of common proof."

(*Id*. [original parentheses] [italics removed].) The court further found that if the lack of a policy resulted in missed breaks, *Brinker* had held this was a damages issue that would not render the claim uncertifiable. [W]hen an employer has not authorized and not provided legally required meal and/or rest breaks, the employer has violated the law and the fact that an employee *may* have actually taken a break or was able to eat food during the workday does not show that individual issues will predominate in the litigation." (*Id.* at 1150-1151.)

Similarly, in *Benton v. Telecom Network Specialists,* security guard employees alleged they could establish class-wide liability based on their employer's lack of a legally compliant meal and rest period policy.

> [The] plaintiffs' "theory of legal liability" [] is that TNS violated wage and hour requirements by failing to adopt a policy authorizing and permitting its technicians to take meal or rest break periods. In plaintiffs' view, TNS was obligated to implement procedures ensuring that technicians received notice of their meal and rest period rights and were permitted to exercise those rights.

(*Benton,* 220 Cal.App.4th at 724-725.) Just like in the current case, the employer argued and presented 15 declarations which all stated that the class members "normally worked without supervision, [] were able to take breaks whenever they wanted[, t]he technicians stated that they took meal and break periods when they felt they were needed, and that TNS had never discouraged or prevented technicians from taking breaks" (*Id.* at 713 [citation omitted].) The trial court denied certification on the grounds that the employer was only required under *Brinker* to provide meal and rest periods and since "no one was around to tell them when to work or when to break--they were at liberty to do as they pleased. Whether there were break violations turns on specific details about what happened at each specific site. ..." (*Id.*at 715.)

The court of appeal reversed. After analyzing *Brinker*, *Bradley*, and *Faulkinbury*, the court held that the trial court had incorrectly found that the employer would only become liable for meal and rest break violations after showing employees had missed breaks. (*Id.* at 725-726.) **Instead, the court held liability existed if the *lack of a meal and break policy*, which was a certifiable issue subject to common proof, was found to be illegal and whether or not employees received meal and rest breaks was an issue of damages.** (*Id.* at 729-730.) Whether the law required an employer to adopt meal and rest policies and communicate them to employees to satisfy its duty to provide employees with breaks was a merits issue to be determined after certification. (*Id.* at 727.)

Pursuant to *Benton* and *Bradley* and most recently affirmed in *Lubin v. The Wackenhut Corp.* (2016, No. B2244383), 2016 Cal.App.LEXIS 1016, *59-63 (*id.* [lack of a meal and rest break policy is certifiable], Plaintiff's claim that Defendant lacked policies to provide second meal breaks and third rest breaks policies is a certifiable claim. There is no merit Defendant's argument that Plaintiff' has to show a uniform policy denying breaks. (Opposition 16:17-17:20.)

> Plaintiffs do not claim they were universally denied all breaks, nor must they do so to warrant certification. *Brinker*, *supra*, 53 Cal.4th 1004 does not require class proponents to establish the universal application of an allegedly illegal policy; rather, a class proponent need only show a 'consistent[]' application of the policy. (*Id.* at p. 1033.) In *Brinker*'s wake, courts have repeatedly found that a defendant employer's evidence of an inconsistent application of an illegal policy to be insufficient on its own to defeat class certification.

(*Alberts*, 241 Cal.App.4th at 409.) Whether the employees ultimately received 2nd meal breaks or 3rd breaks is a damages question. As noted in the motion, substantial evidence demonstrates Defendant lacked a second meal period policy and third rest break policy for all of its employees. In fact, *Defendant admits it did not have a policy to provide employees with second meal breaks and third rest breaks after working 10 hours.* (Opposition p. 7:21-22].)

4. Common Issues Predominate For Wage Statement and Final Wage Classes

Defendant has not addressed these derivative claims for lack of predominant common issues of law and fact. For the foregoing reasons and reasons set forth in the motion, Plaintiff reasserts that these derivative claims raise common issues of fact and law which predominate.

E. The Proposed Subclasses Are Ascertainable

Defendant argues that some of the subclasses are not ascertainable but merely cites blackletter law, and lists only the Minimum Wage Class and Auto Deduct Class, and specifically addresses only the Auto Deduct Class definition in vague terms. (Opposition p. 18:26-19:20.) It appears that Defendant's concern with the definition of the Auto Deduct Class is it is overinclusive and includes those employees who had a 30 minute meal break auto-deducted but received their

meal period and includes employees who submitted "punch variance forms" and were either paid for that time or given a premium meal wage. To assuage Defendant's apparent concerns, Plaintiff can add the following underlined language and delete the language with strikethrough to each of these subclasses which Plaintiff believes Defendant is implying are overinclusive:

> **Minimum Wage Class**: All current and former hourly non-exempt employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class who were not compensated for all hours worked because of Defendant's payroll "rounding".
>
> **Auto Deduct Class**: All current and former hourly non-exempt employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class who worked any shift more than 6 hours,~~and~~ were automatically deducted 30 minutes for meal breaks during that shift, received less than a thirty minute meal break during that shift, and did not submit a punch variance form for that shift.
>
> **1st Meal Class**: All current and former hourly employees employed by Defendant at any time between September 29, 2010, through the date of a signed order certifying the class that worked any shift more than 5 hours, were automatically deducted 30 minutes for meal breaks during that shift,~~ and did not~~ received less than a thirty minute ~~first~~ meal break during that shift, and did not receive a meal period premium wage.
>
> **Wage Statement Class:** All current and former hourly employees employed by Defendant at any time between September 29, 2013, and the date the court signs an order certifying a class who received wage statements that were inaccurate or incomplete.

This should resolve Defendant's concerns about being overinclusive. Defendant also states the Auto Deduct Class and First Meal Class cannot be identified from Defendant's records because Defendant did not record who did not receive a meal break when they were auto-deducted a meal because they did not clock in and out. (Opposition p. 19:11-20.) There is no merit to the argument Plaintiff must establish a damages issue (e.g., employees did not receive meal or rest breaks) for the class to be ascertainable. As recent as September 14, 2016, in *Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, the Court of Appeal made clear that the ascertainability requirement was for the purpose of sending class notice to enable persons who receive the notice to determine whether they are members of the class to satisfy due process. The court held that even if it is determined later in litigation that persons who received notice are outside of the class "those [persons] can be eliminated from the class at that time." (*Id.* at 1214 [quoting *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 136]; see also *Sav-On Drug Stores, Inc. v. Sup. Ct.* (2004) 34 Cal.4th 319, 333 ["'a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery …'"]; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 743 [class of all employees in certain job categories ascertainable even though some employees may not have worked overtime and thus may not be entitled to any recovery].) In *Nicodemus* the court of appeal found defendant's

argument that some of the class members who receive notice may ultimately not be part of the class constituted "speculation that goes to the merits of each class member's recovery" and "was an inappropriate focus for the ascertainability inquiry." (*Nicodemus*, 3 Cal.App.5th at 1216.)

Such circular logic, that the class cannot be identified until merits issues are decided, was similarly rejected in the case of *Hicks v. Kaufman Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915. In *Hicks*, plaintiffs sued on the grounds the use of Fibermesh in their concrete slabs caused manifest damage to the slab. (*Id.* at 912-913.) The plaintiff defined the class members as those persons whose concrete slab suffered "manifest damage" from the use of Fibermesh. (*Id.*) The trial court found ascertainability was lacking because class membership could not be determined until after examining each concrete slab to determine if manifest damage was caused. (*Id.* at 914.) The court of appeal reversed finding despite the inclusion of language in the class definition that class members must have suffered "manifest damage", this was a merits inquiry for trial and that the class was still ascertainable as those persons who had concrete slabs with Fibermesh in them without requiring the class to prove, for purposes of ascertainability, their slab suffered manifest damage. (*Id.* at 914-915.) The court of appeal stated the trial "court's reasoning is circular because it makes ascertainability depend on the outcome of the litigation on the merits." (*Id.*)

Based on *Hicks* and *Nicodemus*, the parties do not need to determine what are ultimately issues for trial (e.g., damages and merits issues) to show the classes are ascertainable. Defendant's records demonstrate which employees: had their time rounded (Minimum Wage Class and derivative classes), had thirty minutes auto-deducted (Auto Deduct Class, 1st Meal Class, and derivative classes), worked over 10 hours (2nd Meal Class, 3rd Rest Class, and derivative classes), or worked over 10 hours and signed a meal waiver form (2nd Meal Waiver Class).

F. Plaintiff Has Presented A Workable Trial Plan

Defendant attacks Plaintiff's trial plan by arguing that because employees do not clock out for meal or rest periods and are not reflected in the records, Plaintiff cannot set forth a trial plan. (Opposition p. 19:20-20:25.) This argument has no merit. First, the case can be bifurcated into liability and damages phases. As for the "rounding" claim, Defendant admits that it used payroll procedure to deduct time from employees' daily hours and admits that this time reflected compensable time. To support its affirmative defense of rounding, Defendant must show both of the following: Defendant rounded in a neutral manner; *and* that Defendant's rounding over time did not result in a failure to compensate employees for all hours worked. Defendant can rely on testimony of its payroll representatives and images of its payroll settings to demonstrate whether the "rounding"

was programmed in a neutral manner. Simple analysis of the amount of time deducted compared to the amount of time granted to the class members over the class period can be used to determine whether the rounding procedure resulted in the failure to pay wages to the employees for all hours worked. If rounding is not legal, the time cards will also show the amount of illegally deducted time.

As for the Auto Deduct Class and 1st Meal Class, Defendant's admissions and time cards will demonstrate Defendant's procedure of automatically deducting a half hour from employees' time. The merits and liability determination of whether this auto-deduct procedure without recording meal periods violated California law is based on the same common evidence. As to Defendant's concerns that the records do not reflect when the employees did not receive meal and rest periods, as noted by *Brinker* and the cases cited above, this is a damages question. Such damages can be shown by representative evidence either by survey, deposition sampling, or representative testimony at trial. (*Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 33 [reaffirming use of representative testimony, sampling, or other statistical methodology]; *Williams v. Super. Ct.* (2013) 221 Cal.App.4th 1353, 1369 ["California law permits statistical sampling to determine damages."]; *Bell*, 115 Cal.App.4th at 755 [same].)

As for the 2nd Meal Class and 3rd Rest Class, the common evidence listed above and in the motion (i.e., admissions, policies and lack of policies, PMK testimony, written waiver and lack of written waiver) will be used to establish that Defendant lacked express policies to provide second meal breaks and third rest breaks, and the employees that did not sign a written waiver as required by law are entitled to damages. Representative evidence either by survey, deposition sampling, or representative testimony at trial to be generalized to the non-testifying class members can be used as additional secondary evidence to support this claim.

The derivative claims for wage statements and final wages will be based on the aforementioned evidence as well as wage statements during the relevant time period.

III. CONCLUSION

For the reasons set forth above and in the motion, Plaintiff requests the Court grant class certification as to each of the classes, appoint Plaintiff as class representative, and appoint Joseph Lavi and Vincent Granberry as class counsel.

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Dated: December 14, 2016

Respectfully submitted,
LAVI & EBRAHIMIAN, LLP

By: _____
Joseph Lavi, Esq.
Vincent C. Granberry, Esq.
Attorneys for PLAINTIFF
KYLE FRENCHER
and Other Class Members

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am an employee in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 8889 W. Olympic Blvd., Beverly Hills, California 90211.

On December 14, 2016, I served the documents described as **"PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO THE MOTION FOR CLASS CERTIFICATION"** on all interested parties in this action as indicated below:

Counsel for Defendant: Christopher Ward, Esq. Archana R. Acharya, Esq. FOLEY & LARDNER LLP 555 South Flower Street, Suite 3500 Los Angeles, California 90071	

☐ **(BY MAIL)** As follows:

I placed such envelope, with postage thereon prepaid, in the United States mail at Los Angeles, California.

I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day, with postage thereon fully prepaid, at Los Angeles, California, in the ordinary course of business. I am aware that, on motion of the party served, service is presumed invalid if the postal cancellation or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

☒ **(BY ELECTRONIC SERVICE)** Pursuant to California Rules of Court Rule 2.251, Code of Civil Procedure section 1010.6, and the Court Order Authorizing Electronic Service, I sent such document via use of CASEANYWHERE.

☐ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the attorney at the offices listed above.

I declare under penalty of perjury under the laws of the State of California that the aforementioned service information is true and correct.

Dated: December 14, 2016

Jordan D. Bello