

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

Present: The Honorable James V. Selna

Karla J. Tunis
Deputy Clerk

Sharon Seffens
Court Reporter

Attorneys Present for Plaintiffs:

Kenneth Yoon / Peter Hart / Linda Whitehead

Attorneys Present for Defendants:

David Sterns / Krista Enns

Proceedings: Plaintiff's Motion for Class Certification (fld 2-28-11)

Cause called and counsel make their appearances. The Court's tentative ruling is issued. Counsel make their arguments. The Court DENIES the plaintiff's motion and rules in accordance with the tentative ruling as follows:

Plaintiffs Juan Moreyra ("Moreyra") and Stacy Haddakin ("Haddakin") (collectively, "Plaintiffs") seek class certification pursuant to Federal Rule of Civil Procedure 23. Defendants Fresenius Medical Care Holdings, Inc., et al. oppose the motion. For the following reasons, the motion is DENIED.

I. Background

Plaintiffs sue on behalf of themselves and a putative class of current and former employees of Defendants. Plaintiffs allege that Defendants have engaged in several "systemic illegal employment practices." (Third Amended Complaint ("TAC") ¶ 2.) For example, prior to June 2007, Defendants automatically deducted thirty-minute meal period from employees' hours when the employee did not clock-in and clock-out for their meal periods. Plaintiffs assert that this practice deprived them of meal period premiums and wages in violation of California law. Additionally, Defendants rounded to the nearest quarter-hour the employees' clock-in and clock-out times. Thus, if an employee clocked in at any time between 7:53 a.m. and 8:07 a.m., his workday start time was deemed to be 8:00 a.m. Similarly, if he clocked out at any time between 4:53 and 5:07 p.m., his workday end time was deemed to be 5:00 p.m. The rounding rule applied to meal breaks as well. Thus, when an employee clocked back in from her meal break twenty-three to twenty-nine minutes after clocking out, she was deemed to have taken a full thirty minute meal break. Plaintiffs assert that Defendants' rounding practices also deprived them of

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

meal period premiums and wages in violation of California law.

Plaintiffs seek certification of a class action as to all causes of action asserted in the TAC. (Notice of Motion, ¶ 1.) In the TAC, Plaintiffs assert causes of action for (1) failure to provide meal breaks in violation of Cal. Labor Code § 226.7 and Industrial Welfare Commission (“IWC”) Wage Order 4, (2) failure to pay vested vacation wages in violation of Cal. Labor Code § 227.3, (3) failure to maintain accurate records in violation of Cal. Labor Code § 226, (4) failure to pay wages in violation of Labor Code § 218, (5) failure to pay overtime wages in violation of Labor Code § 1194 and IWC Wage Order 4, and (6) unfair business practices in violation of California Bus. & Profs. Code § 17200, et seq. All causes of action are asserted by both Plaintiffs, except the second cause of action for failure to pay vested vacation wages, which is asserted only by Moreyra.

Plaintiffs seek certification of four classes. (Notice of Motion, ¶ 2.) The classes are defined as follows:

Class 1: All persons who worked for FMCNA in California, who were classified as non-exempt from overtime and who were paid on an hourly basis at any time from November 19, 2005 to the present and who worked in a Fresenius dialysis clinic (the “FMCNA Class”);

Class 2: All past and present persons who were paid on an hourly basis and classified as non-exempt from overtime who worked in a Fresenius dialysis clinic from November 19, 2005 to the present (the “Fresenius Dialysis Clinic Class”);

Class 3: All past and present persons who were paid on an hourly basis and classified as non-exempt from overtime who worked for FNCMA and whose paystubs reflect Bio-Medical Applications of California, Inc. as the payor, from November 19, 2005 to the present (the “Bio-Medical Applications of California Class”);

Class 4: All past and present persons who were paid on an hourly basis and classified as non-exempt from overtime who worked for FNCMA and whose paystubs reflect Bio-Medical Applications of Mission Hills, Inc. as the payor, from November 19, 2005 to the present (the “Bio-Medical Applications of Mission Hills Class”).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZX) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

(Id.)¹ Within each of these classes, Plaintiffs seek to certify the following four subclasses:

Subclass (a): Employees “whose clock in time to begin a shift and clock out time to end a shift was [sic] rounded to the nearest quarter hour” (the “Rounding Subclass”);

Subclass (b): Employees that “worked in excess of eight (8) hours in a workday” and, for Classes 2-4, “whose clock in time to begin a shift and clock out time to end a shift was rounded to the nearest quarter hour” (the “Overtime Rounding Subclass”);

Subclass (c): Employees that “worked a shift in excess of six (6) hours in a workday without a recorded clock out and in for a minimum 30 actual minutes meal break (including no meal break at all)” (the “Meal Break Subclass”);

Subclass (d): Employees “whose time records reflect an automatic deduction of time” (the “Automatic Deduction Subclass”).

(Id.) Plaintiffs seek to be appointed as class representatives. (Id., ¶ 3.) Moreyra is a member of Classes 1, 2, and 4. (Mot. Br. 4.) Haddakin is a member of Classes 1, 2, and 3. (Mot. Br. 5.)

II. Legal Standard

A motion for class certification involves a two-part analysis. First, Plaintiffs must demonstrate that the proposed class satisfies the requirements of Rule 23(a): (1) the members of the proposed class must be so numerous that joinder of all claims would be impracticable; (2) there must be questions of law and fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of absent class members; and (4) the representative parties must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

¹ Plaintiffs seek certification of “Classes 2-4 as fallbacks to the main Class 1, which is inclusive of Classes 2-4.” (Mot. Br. 2.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

Second, Plaintiffs must meet the requirements of at least one of the subsections of Rule 23(b). Here, Plaintiffs contend that the class qualifies under Rule 23(b)(3), for which a class may be maintained where “questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

Plaintiffs bear the burden of demonstrating that they have met each of the requirements of Rule 23(a) as well as the predominance and superiority requirements of Rule 23(b). See Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001), amended by 273 F.3d 1266 (9th Cir. 2001). The Court must conduct a rigorous analysis to determine whether the prerequisites of Rule 23 have been met. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982). While the Court’s analysis must be rigorous, Rule 23 confers “broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court.” Armstrong v. Davis, 275 F.3d 849, 872, n.28 (9th Cir. 2001).

In Falcon, the Supreme Court reiterated the well-recognized precept that “the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” Falcon, 457 U.S. at 160 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)). Nevertheless, there is “nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

III. Discussion

A. Rule 23(a)

Defendants do not contest that Plaintiffs have met the numerosity and commonality requirements of Rule 23(a). (Opp’n Br. 11, n.4.) Rather, Defendants argue that Plaintiffs have not met the prerequisites for class certification under Rule 23(a) because their claims are not typical of the class and they are not adequate class representatives. (Opp’n Br. 11-15.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

Under Rule 23(a)'s "permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). There must be a demonstration that the "named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. . . ." Falcon, 457 U.S. at 157.

Class representatives also "must fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "This requirement is grounded in constitutional due process concerns: 'absent class members must be afforded adequate representation before entry of a judgment which binds them.'" Evans v. IAC/Interactive Corp., 244 F.R.D. 568, 578 (C.D. Cal. 2007) (quoting Hanlon, 150 F.3d at 1020). Representation is adequate if (1) the named plaintiffs and their counsel are able to prosecute the action vigorously and (2) the named plaintiffs do not have conflicting interests with the unnamed class members. Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978). The named plaintiffs and their counsel must have "the zeal and competence" necessary to prosecute the action. Fendler v. Westgate-California Corp., 527 F.2d 1168, 1170 (9th Cir. 1975).

1. Moreyra Is Not an Adequate Class Representative

The Court finds that Moreyra is not qualified to represent the proposed class in this action because he has serious credibility issues that would likely prejudice the interests of the class. Notably, Moreyra has been convicted of filing a false police report. (Moreyra Depo. 224:9-225:10, 234:22-235:7.) Moreyra also possessed a driver's license with his photograph, but someone else's name on it. (Moreyra Depo. 182:4-5, 183:12-14, 184:10-18.) He invoked his Fifth Amendment right when asked about the drivers license and about a Social Security card with the same third-party name on it. (Moreyra Depo. 241:11-246:15.) These facts raise serious concerns about Moreyra's credibility and ability to represent the class in this action without detrimentally affecting the class's interests.

Furthermore, Moreyra has made false statements under oath in the course of this litigation. At his May 4, 2010 deposition, Moreyra testified that he had resigned from his prior employment at Pacifica Hospital of the Valley. However, at his May 18, 2010 deposition, he testified that he had not resigned from Pacifica Hospital of the Valley.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

(Moreyra Depo. 205:2-7.) Instead, he testified that his employment had been terminated because he was accused of abusing a patient. (Moreyra Depo. 205:2-206:1, 207:2-5.) He also testified that he knew that his statement that he had resigned was not true when he made that statement at his May 4, 2010 deposition. (Moreyra Depo. 206:7-21.) Thus, Defendants have proffered evidence that Moreyra knowingly lied under oath in the course of this litigation. Additionally, when asked on May 4, 2010 if he had ever had his deposition taken before, Moreyra testified that he had not. (Moreyra Depo. 7:18-19.) However, Moreyra later testified that this was not true and that he had had his deposition taken in a previous case. (Moreyra Depo. 202:11-15.) Mr. Yoon, his counsel in this action, defended Moreyra's deposition in that action, just as Mr. Yoon has defended Moreyra's depositions in this case. (Moreyra Depo. 203:15-205:1.) Although Moreyra testified that he misunderstood the question, (Moreyra 202:16-203:5), the testimonial inconsistencies and other evidence suggesting dishonesty raise credibility concerns so significant that Moreyra is not an adequate class representative.

Plaintiffs argue that Defendants' attacks on Moreyra's history and credibility are insufficient to render him an inadequate class representative because his history and testimonial inconsistencies are unrelated to this action. The Court disagrees. Significant testimonial discrepancies "might well cause a fact finder to 'focus on [Plaintiff's] credibility to the detriment of the absent class members' claims.'" Evans, 244 F.R.D. at 578 (quoting Wang v. Chinese Daily News, Inc., 231 F.R.D. 602, 609-10 (C.D. Cal. 2005), abrogated on other grounds by Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935 (9th Cir. 2009)). Even the authority Plaintiffs cite acknowledges that a named plaintiff may be inadequate where his testimonial inconsistencies will "burden the class by diverting attention away from the substance of the claims" and "raise a serious question about [Plaintiff's] credibility . . ." (Reply Br. 21, quoting Michaels v. Ambassador Grp. Inc., 110 F.R.D. 84, 91 (E.D.N.Y. 1986).) Defendants have raised serious questions about Moreyra's credibility. These questions are certain to resurface at trial, particularly because a central issue in this case is whether Moreyra actually missed some or all of his meal breaks, which inevitably will require him to testify. In light of the severity of the testimonial inconsistencies and other evidence of dishonesty, the Court is persuaded that the issues surrounding Moreyra's credibility would divert attention away from the substance of the claims and burden the class. Thus, the Court finds that Moreyra is not an adequate class representative.

2. Haddakin Is Not an Adequate Class Representative

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

The Court also finds that Haddakin is not an adequate class representative. In her February 24, 2011 declaration, Haddakin testified that “[t]hroughout her employment with FMCNA, [her] wages were rounded pursuant to Defendants’ rounding policy.” (Haddakin Decl. ¶ 4.) However, Haddakin later testified that she was not aware that “there was a rounding rule” until March 15, 2011, after she signed her declaration. (Haddakin Depo. 72:24-73:4.) Plaintiffs argue that other deposition testimony demonstrates that she was indeed familiar with the rounding rule. (Reply Br. 22.) Specifically, Haddakin testified that she knew about the “seven-minute grace period,” for example because she was told to clock-in for her shift no sooner than seven minutes before her shift was to start. (Haddakin Depo. 330:8-20, 337:3-338:7.) However, her testimony about the grace period does not suggest that she knew anything about the rounding of her wages. At a minimum, there is a question about whether she had “personal knowledge,” as she testified in her declaration, that her wages were rounded at the time she signed her declaration. (Haddakin Decl. ¶ 2.) Thus, Haddakin’s declaration testimony raises credibility issues because it appears to be inconsistent with her deposition testimony that she was unaware of a rounding rule at the time she signed her declaration.

Moreover, Haddakin testified in her declaration that “[w]henver [she] took a meal break, [she] clocked out and clocked back in.” (Haddakin Decl. ¶ 7.) However, Plaintiffs’ expert testified that “[o]f the 127 meal periods earned by Ms. Haddakin prior to June 1, 2007, there are no meal swipes for any of them.” (Foster Decl. ¶ 46.) The Court is troubled by this discrepancy. If the testimony of both Haddakin and Ms. Foster is true, then Haddakin must not have taken any meal breaks prior to June 1, 2007 because she never swiped out for meal breaks during that time. Accordingly, her claims would not be typical of the class, as many potential class members have testified that they consistently took their meal periods. (See, e.g., Follis Decl. ¶ 14; Ing Decl. ¶¶ 18-19; Parra Decl. ¶ 19, 21.)² More likely, Haddakin did take meal breaks, as Plaintiffs seem to assume, (Reply Br. 23), and Haddakin indicates elsewhere in her declaration, (see Haddakin Decl. ¶ 6). If she did indeed take meal breaks, then according to Ms. Foster’s testimony, Haddakin

² Plaintiffs argue that her claims are nonetheless typical because, like many other potential class members, she took “a third on the clock break of 30 minutes (i.e., 3 combined 10 minute rest breaks),” but do not explain how this makes Haddakin’s claims typical of the rest of the class. (Reply Br. 23.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

never swiped out or in for the breaks prior to June 1, 2007, which would make her deposition testimony that she clocked out and in whenever she took meal breaks inaccurate. This discrepancy implicates credibility concerns and is likely to be raised at trial because employees' practices for clocking in and out and for taking meal periods are factual issues central to Defendants' liability, as explained in greater detail below. Thus, her inconsistent testimony is likely to burden absent class members' claims.

Additionally, the Court notes that Haddakin testified that she signed a written document waiving meal periods for shifts shorter than six hours. (Haddakin Depo. 101:12-103:2.) Thus, in addition to being an inadequate class representative, her meal period claims appear to be atypical of the claims of many potential class members.

This is not a case where a lay plaintiff simply lacks the detailed knowledge of the claims which an attorney would have. Rather, there are inconsistencies and credibility concerns which have the potential of adversely affecting a fair assessment of the claims on their merits – to the detriment of the putative class.³ Accordingly, the Court finds that Haddakin is not an adequate class representative.

The Court believes that Plaintiffs likely would be able to satisfy the remaining factors under Rule 23(a), including establishing the competence of counsel and the presence of common issues of law and fact.

However, because the Court finds that Plaintiffs are not adequate class representatives, Plaintiffs have not met their burden of demonstrating that the proposed class satisfies the requirements of Rule 23(a). Accordingly, the Court declines to certify any of the proposed classes or subclasses. The Court nonetheless addresses whether Plaintiffs have met the requirements of 23(b)(3).

B. Plaintiffs Have Not Demonstrated Predominance or Superiority for Meal Period Claims under Rule 23(b)(3)

“Subdivision (b)(3) encompasses those cases in which a class action would

³ At oral argument, Plaintiffs argued that Haddakin is still a viable plaintiff for the lost wages claims. The Court believes that the problems with her testimony affect her viability generally.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” Kamm v. Cal. City Dev. Co., 509 F.2d 205, 211 (9th Cir. 1975) (quoting Committee notes). A class may be certified under this subdivision where common questions of law and fact predominate over questions affecting individual members, and where a class action is superior to other means to adjudicate the controversy.

1. Predominance

“The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997) (citation omitted). The Court must rest its examination on the legal or factual questions of the individual class members. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998). “To determine whether common issues predominate, this Court must first examine the substantive issues raised by Plaintiffs and second inquire into the proof relevant to each issue.” Jimenez v. Domino’s Pizza, Inc., 238 F.R.D. 241, 251 (C.D. Cal. 2006) (citation omitted).

The substantive issues can be grouped into two categories: meal period premiums and lost wages.⁴ With respect to meal period premiums, Plaintiffs allege that Defendants failed to pay proper meal period premiums due to auto-deductions and rounding of meal periods. With respect to lost wages, Plaintiffs allege that Defendants failed to pay proper wages due to auto-deductions and rounding of clock-in and clock-out times. Although some claims, particularly the third, fourth, and sixth claims, involve both meal period premiums and lost wages, the Court focuses on these issues separately for ease and clarity of analysis.

i. Meal Period Premiums

⁴ Plaintiffs do not address the propriety of class certification with respect to their cause of action for failure to pay vested vacation wages. Thus, the Court declines to address whether common legal and factual issues predominate with respect to that claim. However, the Court notes that because Moreyra is an inadequate class representative, the claim for unpaid vacation wages is not appropriate for class certification for the reasons set forth above.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

The California Labor Code provides, in pertinent part:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. 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, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

Cal. Lab. Code § 512(a). An employee is entitled to one hour of wages for each day that a meal period is not provided. Cal. Labor Code § 226.7(a).

The California Supreme Court has not specifically explained the contours of the requirement that the employer “provide” the employee with a meal period. In the absence of controlling California Supreme Court precedent⁵, the Court must apply the law as it believes the California Supreme Court would under the circumstances. Wylar Summit P’ship, 135 F.3d 658, 663 n.10. The California Supreme Court has described the employee’s statutory entitlement as “the right to be free of the employer’s control during the meal period.” Murphy v. Kenneth Cole Prods., Inc., 40 Cal. 4th 1094, 1104 (2007) (citation omitted). Based on this language and the statutory language of the Code, California district courts have held that the Labor Code mandates that employers authorize and permit employees to take thirty-minute, uninterrupted meal periods, but does not require employers to affirmatively ensure that employees take their meal periods. See Kenny v. Supercuts, Inc., 252 F.R.D. 641, 646 (N.D. Cal. 2008) (“[W]hatever ‘fails to provide’ in the Labor Code means, it does not require an employer to ensure that an employee take a meal break.”); Brown v. Federal Express Corp., 249

⁵ Two California Court of Appeals decisions are presently pending before the California Supreme Court: Brinker Rest. Corp. v. Superior Court, 196 P.3d 216 (Cal. Oct. 22, 2008), and Brinkley v. Pub. Storage, Inc., 198 P.3d 1087 (Cal. Jan. 14, 2009).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

F.R.D. 580, 584-86 (C.D. Cal. 2008) (rejecting Plaintiffs' position that employer was required to ensure Plaintiffs took meal breaks); White v. Starbucks Corp., 497 F. Supp. 2d 1080, 1088-89 (N.D. Cal. 2007) (concluding "that the California Supreme Court, if faced with this issue, would require only that an employer offer meal breaks, without forcing employers actively to ensure that workers are taking these breaks"). The Court agrees with the statutory and case law analysis of the Kenny, Brown, and White decisions, along with their conclusion that employers are not required to affirmatively ensure that employees take their meal breaks. See also Marlo v. United Parcel Serv., Inc., Case No. CV 03-04336 DDP (RZx), 2009 WL 1258491, at *9 (C.D. Cal. May 5, 2009) (collecting cases).

With this background the Court now turns to the question of whether common issues predominate among Plaintiffs' meal period claims. Common issues will predominate if Plaintiffs can show, by common methods of proof, that Defendants' conduct or policies "forced [them] to forego" their meal periods on a class wide basis. White, 497 F. Supp. 2d at 1089. Plaintiffs concede that "for the entirety of the relevant class period, Defendants have maintained a policy of mandatory meal breaks." (Mot. Br. 16.) Plaintiffs assert that Defendants nonetheless violated the California Labor Code by failing to pay one hour of wages where meal breaks were missed, cut short, or taken late. Plaintiffs argue that because meal breaks were mandatory and "failure to take meal breaks could result in discipline . . . , it follows that employees always took their meal breaks as required and that if they missed a meal break, took a short meal break, or took it late, it was because they had to – not because they had a choice." (Reply Br. 12, emphasis in original.)

Evidence proffered by Defendants contradicts this assumption. Some of Defendants' employees have testified that they took their meal breaks late so that they could pick up their children from school, (Hernandez Decl. ¶ 21), or because they lost track of time, (Goodin Decl. ¶ 4). Moreover, some employees, including Haddakin, waived their meal breaks. (Haddakin Depo. 101:12-103:2; see also Garza Decl. ¶¶ 6-7, 14, 22.) California law allows employees to waive meal periods. See Cal. Labor Code § 512(a) (permitting waiver of first or second meal period); Wage Order 4 § 11(D) (requiring waiver to be in writing for employees in the health care industry who work shifts in excess of eight hours in a workday). Accordingly, determining whether certain employees are entitled to meal period premiums would require the Court to determine whether the employee waived her meal period orally, or in writing if the shift was in

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

excess of eight hours. Although Plaintiffs argue that Defendants' auto-deduct system ignored waivers, (Reply Br. 5-6), individual inquiries would still be necessary for the alleged auto-deduction violations because the Court would have to determine whether the employee took a proper meal period despite not clocking out and, if the employee did not take a proper meal period, the reason for the missed, shortened, or late meal period. See White, 497 F. Supp. 2d at 1089 ("In short, the employee must show that he was forced to forego his meal breaks as opposed to merely showing that he did not take them regardless of the reason.").

Thus, the Court does not agree with Plaintiffs' argument that because "Defendants' policy is that [meal breaks] are mandatory, . . . by looking at Defendants' records Plaintiffs can establish liability on a class-wide basis where meal breaks were not taken and premiums were not paid." (Reply Br. 24.) Simply reviewing the records will not reveal why meal periods were missed, cut short, or taken late. As explained above, employers are required to provide meal periods, but are not required to affirmatively ensure that employees take their meal periods. Thus, the reason that an employee's meal period was missed, cut short, or taken late is not only relevant but central to Defendants' liability.

Plaintiffs attempt to frame Defendants' argument that individual questions predominate as raising damages issues, not liability issues, because "damage calculations alone cannot defeat certification." (Reply Br. 6, n. 8, quoting Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010).) The Court disagrees with Plaintiffs' framing the question as a damages issue. For example, if an employee waived her meal periods, (see, e.g., Garza Decl. ¶ 7, Ex. 17), Defendants would not be liable to that employee for failing to pay her meal period premiums, even if the period was auto-deducted. Or if an employee's records show that she missed meal periods but the employee testifies that, even when she did not clock in or out, she took all of her thirty-minute meal periods, (see, e.g., Teves Decl. ¶ 24), Defendants would not be liable to that employee, even if the period was auto-deducted. Or if an employee regularly clocked back in from her meal periods early, and therefore had her meal periods rounded up to thirty minutes, but continued taking her full thirty-minute break after clocking in early, (see, e.g., Jose Decl. ¶ 20), or simply chose to end her meal period early, Defendants would not be liable to that employee. In a way, these are damages issues because in these situations, the employee did not sustain damages. However, these are also liability issues because in these situations, Defendants did not violate the Labor Code by failing to pay

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

premium wages. Furthermore, these examples demonstrate that claims based on both auto-deductions of and rounding of meal periods will involve significant individualized inquiries.

The Court reaches its conclusion that individual issues predominate despite Dilts v. Penske Logistics, in which the court found that common issues predominated with respect to auto-deductions for missed meal periods. 267 F.R.D. 625, 637 (S.D. Cal. 2010). In Dilts, the court found “that California meal break law requires an employer to affirmatively act to make a meal period available where the employee are [sic] relieved of all duty.” Id. at 638. In that case, the plaintiffs’ “claims center[ed] around defendant’s policies in terms of whether meal and rest breaks were available.” Id. at 639. Here, Defendants have presented substantial evidence that meal breaks were available. In this case, the central question will be whether employees voluntarily missed, shortened, or delayed their meal breaks or, instead, were forced to forego meal breaks. Notably, Dilts did not address the significant factual inquiries required to determine whether employees actually took their breaks and, if not, the reason they missed their breaks. Other courts have found that even where an employer utilizes an auto-deduction system, common issues do not predominate where Defendants provided a mechanism for overriding the auto-deduction. See Saleen v. Waste Mgmt., Inc., Case No. 08-4959, 2009 WL 1664451, at *4 (D. Minn. June 15, 2009); Frye v. Baptist Memorial Hosp., Case No. CIV 07-2708, 2010 WL 3862591, 2010 WL 3862591, at **1,5 (W.D. Tenn. Sept. 27, 2010) (decertifying class where employer automatically deducted meal periods but employee could note interrupted or missed meal breaks in an “exception log” and noting that defendant’s “mere adoption of a system that, by default, deducts meal breaks from its employees’ compensation does not constitute a unified policy of [Fair Labor Standard Act] violations capable of binding the Plaintiffs together”); cf. Dilts, 267 F.R.D. at 630 (noting that defendant “provided no means for the employee to override the auto-deduction for any day that a meal period was not provided”) (quotation marks omitted). Defendants in this case allowed their employees to contact superiors to override the auto-deduction (see, e.g., Neithold Decl. ¶ 25), which will prompt additional factual inquiries about whether particular employees overrode their auto-deductions. After reviewing these cases and for the reasons explained above, the Court finds that determining liability, even based on auto-deductions, will involve individual issues that predominate over common issues.

In sum, determining whether each employee actually missed a meal period and

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

determining why particular employees did not take meal periods are determinations central to Defendants' liability. In this case, there is no common means of proof to determine why class members' meal periods were missed, cut short, or taken late. Accordingly, the Court finds that common questions do not predominate over individual questions with respect to Plaintiffs' meal period claims.

ii. Lost Wages

Plaintiffs also assert that Defendants failed to pay them accurate wages for time worked due to the auto-deduction and rounding practices.

Plaintiffs argue that Defendants' auto-deduction practice deprived Plaintiffs of wages for time worked because prior to June 2007, thirty minutes was automatically deducted from employees' hours whenever they worked through their meal period and did not reverse the auto-deduction. Plaintiffs argue that their claims for lost wages based on improper auto-deductions involve common issues of fact and law that predominate over individual issues. (Mot. Br. 21-22.) Unlike the meal period auto-deduction claims, the lost wages auto-deduction claims may not require a fact-intensive individualized inquiry into the reasons an employee's meal periods were missed, short, or late. Instead, the only individualized inquiries may be whether the employee worked during his or her meal period and, if so, whether the employee reversed the auto-deduction. Thus, Plaintiffs may be able to demonstrate that common issues predominate with respect to lost wages due to auto-deductions.

As for Defendants' practice of rounding employees' clock-in and clock-out times, the parties disagree about the proper test for determining whether the practice constituted a failure to pay employees proper wages. Defendants argue that rounding is lawful as long as, over a period of time, the rounding does not underpay the employee for time worked. (Opp'n Br. 3.) Defendants rely on the California Department of Labor Standards Enforcement ("DLSE") Policies and Interpretations Manual §§ 47.1, 47.2, which states that for enforcement purposes, the practice of rounding employees' hours to the nearest quarter hour "will be accepted by DLSE, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." (Opp'n Br. 3.) However, the California Supreme Court has declined to give deference to the DLSE's enforcement policies because they were not adopted in compliance with the Administrative Procedure Act. Martinez v.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

Combs, 29 Cal. 4th 35, 50 n. 15 (2010). Plaintiffs disagree with Defendants' view of the law and argue that "each and every instance of rounding in their disfavor is an unlawful failure to pay for time worked." (Reply Br. 7.) Although they do not cite case law directly on point, they argue that the issue of whether Defendants' practice is lawful is analogous to the issue of whether an employer violates California minimum wage laws when it averages all hours worked over the course of a work week. In Armenta v. Osmose, the California Court of Appeals concluded that although such an averaging practice was appropriate under federal guidelines, the practice violated the California Labor Code. 135 Cal. App. 4th 314, 324 (Ct. App. 2005). Therefore, although federal law allows for rounding as long as the practice does not result in net loss of wages over time, see 29 C.F.R. § 785.48(b), rounding that causes employees to be underpaid for hours worked in a single work day may violate California law. However, the Court does not express an opinion of the proper standard under California law because the parties have not briefed the issue thoroughly and, in any event, a merits assessment is not proper at this stage. Eisen, 417 U.S. at 177.

Regardless of whether an employee can recover for each workday he or she loses wages due to rounding, Defendants concede that many employees not only lost pay for particular workdays, but also netted less pay over the course of their employment due to rounding. (See Opp'n Br. 23.) For these employees, it appears that Defendants' rounding policy resulted, over a period of time, in failure to compensate the employees properly for all the time they actually worked. Based on the records and data available, it appears to be relatively simple to determine whether a particular employee netted less pay due to rounding. Defendants' argument that certification would be improper because "[i]ndividual analysis of time records is required to determine whether an employee falls into the 60% [of employees who netted less pay as a result of rounding] or the 40% [of employees who netted more pay as a result of rounding]" is therefore unpersuasive. (Opp'n Br. 23.) Determining which employees netted less pay from the rounding practice would not require fact-intensive inquiries and a class could be defined to include only those employees who netted less pay. Thus, the Court would be inclined to find predominance of common issues based on wages lost due to rounding.⁶

⁶ Defendants argue that certification would still be inappropriate under the de minimis rule because "the net difference between the rounded time and actual time for those who netted less pay as a result of rounding was about 20 seconds per 4.5 hour shift." (Opp'n Br. 23, citing Lindow v. United States,

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

Plaintiffs' other claims, including their claim for violation of Cal. Labor Code § 226, are derivative of the meal period premium and lost wages claims. Accordingly, the Court would be inclined to find that common issues predominate insofar as the derivative claims are premised on lost wages, but that common issues do not predominate insofar as the derivative claims are premised on failure to pay meal period premiums.

2. Superiority

Finally, the Court considers whether a class action would be superior to individual suits. Amchem, 521 U.S. at 615. "A class action is the superior method for managing litigation if no realistic alternative exists." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234-35 (9th Cir. 1996). This superiority inquiry requires a comparative evaluation of alternative mechanisms of dispute resolution. Hanlon, 150 F.3d at 1023. Rule 23(b)(3) provides a non-exhaustive list of factors relevant to the superiority analysis that includes "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

Plaintiffs contend that class treatment for all claims "is both superior and manageable because Plaintiffs' claims are based on common, class-wide policies." (Reply Br. 24.) However, "[e]ven where there is a common nucleus of fact regarding a defendant's conduct, '[i]f each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.''" 249 F.R.D. at 587 (quoting Zinser, 253 F.3d at 1192). That is precisely the case for Plaintiffs' meal period claims.

Thus, for claims based on meal period premiums, a class action would be unmanageable given the predominance of the individual issues necessary to establish Defendants' liability under each of Plaintiffs' claims. For example, "the resources that would be expended on determining the reason for missed breaks would exceed those saved by classwide determination of the number of breaks missed." Brown, 249 F.R.D. at 587. Similarly, the resources expended on determining whether each employee actually

738 F.2d 1057, 1063 (9th Cir. 1984).) However, Defendants do not address the amount of compensable wages that those employees lost over the course of their employment. The Lindow decision noted that "[c]ourts have granted relief for claims that might have been minimal on a daily basis but, when aggregated, amounted to a substantial claim." Lindow, 738 F.2d at 1063 (citations omitted).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-517 JVS (RZx) Date May 23, 2011

Title Juan Moreyra v. Fresenius Medical Care Holdings, Inc., et al.

took her break or missed her break when her meal period was automatically deducted and the reasons for employees' missed breaks would exceed the resources saved by classwide determination of whether the Defendants' auto-deduction practice violated the California Labor Code. Because the adjudication of Plaintiffs' meal period premium claims on a class-wide basis would require fact-intensive determinations of whether Defendants are liable to each class member on an individual basis, the Court finds that the class action would be unmanageable with respect to those claims. However, with respect to the lost wages claims, Plaintiffs may be able to demonstrate the superiority of class adjudication.

IV. Conclusion

For the foregoing reasons, the Court denies Plaintiffs' motion for class certification.

The Court stays the action for 45 days to permit Plaintiffs' counsel to identify new class representatives and to make a motion to amend the Third Amended Complaint to add such individuals. For purposes of such a motion, the Court reduces the usual meet-and-confer requirement from ten days to five court days. (Local Rule 7-3.) At the time the Court hears the motion, the Court will review the present trial and pretrial schedule.

Initials of Preparer 0 : 20
 kjt