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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE
COMPLEX DIVISION

Amanda Quiles, Heather Turman, and
Kimberly Dang, individually, on behalf of
all others similarly situated, and on behalf
of the general public,

Plaintiffs,

vs.

Koji's Japan Incorporated dba Koji's
Shabu Shabu and Koji's Sushi & Shabu
Shabu, Arthur J. Parent, Jr., and DOES 1
through 50 inclusive,

Defendants.

CASE NO.:

30-2010-00425532-CU-OE-CXC

Hon. Nancy Wieben Stock *in part*
ORDER GRANTING/AMENDED MOTION
FOR CLASS CERTIFICATION, FOR
APPOINTMENT OF CLASS
REPRESENTATIVES AND CLASS
COUNSEL, ~~AND FOR PROVISION OF AN
UPDATED CLASS LIST IN EXCEL
FORMAT TO PLAINTIFFS' COUNSEL
WITHIN 10 DAYS OF THE DATE THIS
MOTION IS GRANTED~~

Date/Time: February 22, 2013

Dept. CX105

Plaintiffs' Amended Motion for Class Certification came on for hearing February 22, 2012 before the Honorable Nancy Wieben Stock. All parties were represented by counsel. After taking the matter under submission to resolve a demurrer brought by Arthur J. Parent, Jr., in his capacity as an alleged joint employer (his prior demurrer as to his alleged status as an alter ego of Koji's was previously overruled), the Court made the following orders.

MOTION FOR CLASS CERTIFICATION

The standard for class certification is found at C.C.P. Section 382, which provides, in essence, that the class action may be brought when the question is one of a common or general interest of many persons or when the parties are numerous and it is impracticable to bring them all before the Court. Under 382 of the Code of Civil Procedure, there are two prerequisites to a

1 proper class action: one, there must be an ascertainable class; two, there must be a well-defined
2 community of interest in the questions of law and fact involved affecting the parties to be
3 represented. *Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 988;
4 *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021. The two requirements
5 are substantially intertwined. The existence of an ascertainable class depends in turn upon a
6 demonstrated community of interest among the purported class members and common questions
7 of law or fact. In order to establish a class action, it is not necessary to have a common recovery
8 nor does the fact that separate transactions are involved preclude such an action. *Id.* The
9 certification question is essentially a procedural one that does not ask whether an action is legally
10 or factually meritorious. *Linder v. Thrifty Oil* (2000) 23 Cal.4th 429, 439; *Sav-On Drug Stores,*
11 *Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326. The class certification motion is not a license
12 to engage in a “free floating inquiry” into the validity of the allegations. *Brinker*, 53 Cal.4th at
13 1023.

14 The burden is on the party seeking class certification to establish both; 1) an ascertainable
15 class; and 2) a well-defined community of interest among the class members. *Brinker*, 53 Cal.4th
16 at 1021; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104. The trial court
17 is afforded great discretion in evaluating the efficiencies and practicalities of permitting group
18 action and the decision is reviewed for abuse of discretion. *Sav-On*, 34 Cal.4th at 326.
19 Accordingly, a trial court ruling supported by substantial evidence generally will not be disturbed
20 unless: 1) improper criteria are used; or 2) erroneous legal assumptions are made. Any valid
21 pertinent reasons stated and supported by substantial legal assumptions are made. Any valid
22 pertinent reasons stated and supported by substantial evidence will be sufficient to uphold the
23 order. *Linder*, 23 Cal.4th at 439; *see also Lockheed*, 29 Cal.4th at 1104; *Sav-On*, 34 Cal.4th at
24 326. The question then is whether or not there is an ascertainable class, and the Court
25 determines: 1) what is the class definition; 2) the size of the class; and 3) the means available for
26 identifying the class members. *Reyes v. San Diego County Board of Supervisors* (1987) 196
27 Cal.App.3d 1263, 1271. The class definition must be precise, objective and presently
28 ascertainable to allow proper notice to the class members. *Global Minerals & Metals Corp. v.*

1 *Superior Court* (2003) 113 Cal.App.4th 836, 858. The goal is to use terminology that will
2 convey sufficient meaning to enable persons hearing it to determine whether they are members
3 of the class plaintiffs wish to represent. Weil & Brown, *Civil Procedure Before Trial*, Section
4 14:23, 14, 16, 17; *see also Global Minerals & Metals Corp.*, 113 Cal.App.4th at 858. The
5 definition need not include the claims asserted. The relationship between the class and the legal
6 claims may be explained in the certification order and notice to the class. *Hicks v. Kaufman &*
7 *Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915.

8 **PROPOSED CLASS**

Kojis Japan, Inc
(hereinafter "Kojis")
NK

9 In this case, the proposed class is as follows:

10 All persons who were employed by Defendant¹ as servers,
11 hosts/hostesses, floor managers, sushi chefs, assistant general
12 managers, bussers, dishwashers, bartenders, kitchen helpers, and
"barbacks," at any time from November 16, 2006, to the date of the
final disposition of this case.

13 The size of the class must be numerous, but manageable for the purpose of notice
14 requirements, distribution of recovery, et cetera. *Blue Chip Stamps v. Superior Court*, (1976) 18
15 Cal.3d 381, 386. Class certification is particularly appropriate when numerous parties suffer
16 injuries in relatively small numbers because bringing individual suits would not be economical
17 and the wrongdoer might escape liability. *Daar v. Yellow Cab*, (1967) 67 Cal.2d 695, 715; *see*
18 *also Weil & Brown, Civil Procedure Before Trial*, Section 14:22, 14-15.

19 **PROPOSED CLAIMS**

Kojis

20 The Court certifies the following class claims as to both Defendants ^{asserted to be joint}
21 ~~employers, and as to the alleged alter egos (Mr. Parent and A.J. Parent Company, Inc. dba~~
22 ~~AmericasPrinter.com, AMERICAS PRINTER.COM, and americasprinter.com).~~

- 23 (1) Violations of Labor Code §§512 and 226.7 and Industrial Welfare Commission
Wage Order 5 (fourth cause of action) (noncompliant meal and rest periods);
- 24 (2) Violations of Labor Code §221, 223, 510, 1194, 1198, and Industrial Welfare
25 Commission Wage Order 5 ((first and fifth causes of action) (failure to pay for all
26 time worked and overtime as a result of uncompensated meal periods during which
they remained under the employer's control);
- 27 (3) Restitution for the meal and rest period, unpaid wages, and overtime violations
28 under Business and Professions Code §17200 (ninth cause of action)

- 1 (4) Violations of Labor Code §§201-203 (second cause of action) (waiting time
penalties);
- 2 (5) Violations of Labor Code §226 (third cause of action) (itemized wage statements);
3 and
- 4 (6) Penalties under the Private Attorney Generals Act, Labor Code §2699 (twelfth
5 cause of action).

6 The Court believes it appropriate to certify the class sought by Plaintiffs as to all causes of action
7 stemming from the alleged, denied meal and rest periods.

8 The Court further believes it is appropriate to certify one sub-class as follows, specific to
9 the tip-pooling claim (*i.e.*, restitution for improper tip pooling under Business and Professions
10 Code §17200 (sixth cause of action) (pooling with agents and those outside the chain of service,
11 in violation of Labor Code §351)):

12 All persons who were employed by Defendants ^{Kojis} as servers, hosts/hostesses,
13 bussers, bartenders, and “barbacks,” at any time from November 16, 2006,
14 through the date of the final disposition of this action

15 ANALYSIS

16 1. Class Ascertainable And Numerous

17 The class is definable and the numbers make the class large enough to make proceeding
18 by class action appropriate, particularly since the class is not so large as to be unmanageable. The
19 Court notes two locations over a multi-year period with estimates ranging from 100-200 class
20 members. Membership is easily ascertainable from company records, since the class is limited to
21 particular position titles and a particular timeframe. In this case, it does not seem to the Court
22 that there is going to be a difficulty in notifying the class members or in identifying them in
either instance.

23 2. Common Issues Predominate

24 The Court finds the second prong, well-defined community of interest, to exist. It
25 includes three factors: predominant common questions of law or fact, class representatives with
26 claims or defenses typical of the class, and class representatives who can adequately represent
27 the class. *Brinker*, 53 Cal.4th at 1021. *Sav-On Drug Stores* addresses the issue regarding
28 common questions of law or fact and says that the focus in determining a certification dispute is

1 on the type of questions that are likely to arise, common or individual, not the merits of the case,
2 and the Court instructed there that in determining whether there is substantial evidence to support
3 a trial court certification order, the Court considers whether or not the theory of recovery
4 advanced by the proponents of certification is, as an analytical matter, likely to prove amenable
5 to class treatment. *Sav-On Drug Stores*, 34 Cal.4th at 327. As noted in *Sav-On Drug Stores*, a
6 class action is not inappropriate simply because each member of the class may at some point be
7 required to make an individual showing as to his or her eligibility for recovery or as to the
8 amount of damages. *Id.* at 332; *Employment Development Dept. v. Superior Court* (1981) 30
9 Cal.3d 255, 266.

10 As the Supreme Court said in *Sav-On Drug Stores*, “[p]redominance is a comparative
11 concept and the ‘necessity for class members to individually establish eligibility and damages
12 does not mean that individual fact questions predominate.’ Individual issues do not render class
13 certification inappropriate, so long as such issues may be effectively managed.” *Sav-On Drug*
14 *Stores*, 34 Cal.4th at 334 (citations omitted). In this instance, the Court believes that they may
15 and that a class proceeding is the appropriate way to accomplish that management.

16 Having reviewed all of the briefing and the arguments of counsel, the Court finds that the
17 allegations of the Complaint and the un-refuted Declarations of the Plaintiffs that Defendant had
18 no meal and rest break policy (at least for the majority of the class period) reveal a basis for class
19 certification under *Bradley v. Networkers International, LLC* (2012) 211 Cal.App.4th 1129,
20 review denied March 20, 2013. Added to that is the fact that Defendant had in place, again for
21 part of the class period, an auto-deduct system which systematically deducted wages for breaks
22 that ~~probably were not~~ ^{may not have been} taken. The Court also holds that Defendant's admission that it had an
23 informal policy that an employee was permitted to take a break on request violates the law on its
24 face. These policy challenges predominate over any individual issues.

25 Likewise, Defendant admits that it has such a tip-sharing policy and the question then is
26 whether it is legal or not. That is a predominant and common question.

27 Accordingly, among the common issues would be, as outlined in Plaintiffs' motion:
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- whether Defendants¹ lacked any implemented meal period policy (for all but a brief interval during the statutory period) to provide 30-minute, uninterrupted meal periods to non-exempt employees;
- whether Defendants¹ failed to authorize and permit 10-minute rest breaks when they did not implement any system to make them available to employees;
- whether Defendants¹ practices (preventing leaving the restaurant or immediate vicinity during meal periods and breaks, requiring employees to remain attentive to customers during supposed breaks, failing to provide break coverage, etc.), and each of them, failed to relinquish control adequately over the putative class members during meal periods, so they were not free to come and go at will, warranting §226.7 premiums;
- whether the restrictions on the class members' meal and rest periods were such that the time became "hours worked," under IWC Wage Order 5, warranting straight time pay, and, on occasion, overtime premiums;
- whether Defendants¹ limitations on putative class members' movements and activities converted their meal/rest periods into compensable "on-call time" by which Defendants suffered or permitted them to work in, among other ways, remaining attentive to customers' needs;
- whether requirements to receive supervisor permission before acting freely during meal and rest periods tended to discourage or impede unfettered usage of these breaks;²
- whether an admitted loss of income if putative class members took rest breaks was tantamount to Defendants¹ creating incentives to forego breaks;
- whether pooling tips with employees outside the chain of direct customer service (such as chefs, kitchen managers, etc.) was permissible under Cal. Lab. §§350 and 351;
- whether employees were adequately trained to know to take (or how to take) meal/rest periods compliant with §226.7;
- whether Defendants adequately instructed supervisory personnel to take steps to provide employees with the opportunity to take the required meal and rest breaks free from all duty;

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¹ See, e.g., *Pina*, 2012 WL 1278301, at *7 (supervisor permission required before break was common practice warranting certification of meal break claim because of potential for discouragement of break usage.)²

- 1 • whether the lack of accurate and comprehensive time and payroll records must be
2 construed against the employer;
- 3 • ~~whether all Defendants were indeed joint employers of the putative class;~~²
- 4 • whether Defendants⁵ have any valid waiver defense; and
- 5
- 6 • whether the failure to pay *any* premiums during years of the statutory period suggests,
7 *per se*, that violations of §226.7 occurred.

8 **3. Class Certification Is the Superior Method of Adjudication**

9 The Court believes that the Plaintiffs have adequately shown that common questions of
10 policy and practice with respect to class members arise and exist here, such that class treatment
11 is appropriate. Further, the Court finds that this case could be well-managed at trial. The Court
12 does not believe it would be superior to have numerous separate trials of the same legal and
13 factual issues presented here. ~~Before any certification of this matter, 11 opt-in plaintiffs under the~~
14 ~~Federal Labor Standards Act, 29 U.S.C. §216(b), have already suggested an inclination to pursue~~
15 ~~their claims.~~

16 **4. Class Representatives are Adequate and Claims are Typical**

17 With respect to the class representatives, plaintiff class representatives must show that
18 their claims are typical of the class. *Brinker*, 53 Cal.4th at 1021. They need not be identical. It is
19 sufficient if each class representative has the same interest and is similarly situated with the other
20 class members so that she is motivated to litigate on their behalf. In this case, it appears that the
21 proposed class representatives, Quiles, Dang, and Turman, meet these criteria with respect to
22 typicality of their claims, and their declarations demonstrate that they are ready and willing to
23 perform the duties as associated with their respective responsibilities here. It appears that their
24 duties with respect to their positions and the way they were treated were essentially the same as
25 the co-workers that they seek to represent. Therefore, the Court finds that the class
26 representatives' claims are sufficiently similar to those of the proposed class members, so as to
27 support typicality, and ORDERS they be appointed Class Representatives in this action.

28 **5. Adequacy of Representation Met**

1 In terms of counsel's experience, the Declaration of Mr. Schwartz supports the fact that
2 Bryan Schwartz Law is experienced in matters of this nature and that its services should be
3 sufficient to adequately represent the classes in question. Therefore the Court ORDERS the firm
4 be appointed Class Counsel in this action.

5 **6. Class Notice**

6 It is Plaintiffs' counsel's obligation to propose the notice in terms of its nature and
7 content and the mechanism for giving notice to the class members. The Court ORDERS that
8 Plaintiffs shall propose a class notice and that such proposed notice be filed with the Court and
9 served upon Defendants' counsel, to be received (via email, facsimile, and U.S. mail) within two
10 weeks (14 calendar days) of the date of this Order. Thereafter, Defendants shall have two weeks
11 (14 calendar days) to submit any responses to the Court, *i.e.*, 28 days from the date of this Order.
12 The Court will rule regarding the language of the Class Notice thereafter, and Plaintiffs or
13 whatever reputable claims administration firm they deem suitable will provide notice to the Class
14 within 30 days thereafter.

15 **7. Class List**


16 Because the Court does not wish to see any delay in these proceedings, which until now
17 have been contentiously litigated, the Court ORDERS that, within 10 days of the date of this
18 Order, the Defendants, or any of them, will provide an updated class list in Excel format to
19 Plaintiffs' counsel, to be received by Plaintiffs' counsel (by email is acceptable) by this 10-day
20 deadline. The list shall include all persons who were employed by Defendants as servers,
21 hosts/hostesses, floor managers, sushi chefs, assistant general managers, bussers, dishwashers,
22 bartenders, kitchen helpers, and "barbacks," at any time from November 16, 2006, to present,
23 including for each his/her name, address, telephone number, position title(s), dates of
24 employment in each position, location(s) of employment, employee number, and last four digits
25 of his/her social security number. The Court also ORDERS that Plaintiffs' counsel is only to use
26 this list in connection with the instant litigation, and for no other purpose, and to remain the data
27 confidential, to be shared only (if at all) with the reputable class action administration firm
28 referenced above.

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CONCLUSION

The Court grants class certification with the class and subclass as set forth above, appoints the proposed class representatives to represent the class, and appoints Bryan Schwartz Law as class counsel in this matter, ~~ordering Defendants to provide a class list forthwith to Bryan Schwartz Law.~~

Dated: 3/6/13



Honorable Nancy Wieben Stock
Judge, Orange County Superior Court