UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SHAON ROBINSON, et al.,

Plaintiffs,

v.

THE CHEFS' WAREHOUSE, et al.,

Defendants.

Case No. 15-cv-05421-RS

ORDER DENYING MOTION TO CERTIFY CLASS AND GRANTING MOTION FOR LEAVE TO AMEND

I. INTRODUCTION

In this putative class action named plaintiffs Shaon Robinson and Sean Clark seek to represent a class of delivery drivers employed by The Chefs' Warehouse West Coast, LLC[1] in asserting various wage and hour claims. For reasons set out below, plaintiffs' motion for class certification must be denied. Their motion to file a further amended complaint will be granted.

II. BACKGROUND

CW describes itself as a "premier distributor of specialty food products" catering to chefs in restaurants, hotels, culinary schools, bakeries, and other food establishments. CW has two

[1] Originally the only named defendant was Chefs' Warehouse, Inc., which apparently is the parent company. The corporation remains in the case, although plaintiffs' basis for asserting any liability against it is unclear. For purposes of this order, defendants will be referred to collectively in the singular as "CW."

California facilities, one in Northern CA, currently located in Union City, and one in Southern CA, located in City of Industry. CW employs delivery drivers operating from each facility. CW asserts that except during training, drivers typically drive by themselves with very little management oversight, and drivers generally spend no less than 90-95% of their work day on the road.

CW has a written meal and rest break policy that undisputedly is fully compliant with the law. The complaint in this action is premised on the theory that in actual practice, drivers are put under such time pressures to complete their deliveries within certain windows promised to customers that they are effectively precluded, or at least strongly discouraged, from taking meal and rest breaks. CW denies that its drivers cannot or do not take the requisite breaks. It explains that while it provides its drivers with meal and rest breaks in compliance with California law, "the timing of breaks varies from day-to-day and employee-to-employee depending on the delivery routes, daily activities (i.e. traffic, problems with the truck, etc.) and most of all, individual preferences." CW also asserts the practices in Southern California and Northern California for ensuring compliance with the meal and rest break policy differ in certain respects.

Plaintiff Robinson began employment with CW at its Northern California location in 2011. He initially was a driver and was promoted to driver trainer in 2013. In May of 2015, Robinson went on a medical leave of absence and has not worked since then. There is a dispute as to whether he remains a CW employee or not. Robinson never worked at the Southern California facility. Plaintiff Sean Clark was added as a plaintiff through a prior motion for leave to amend. Clark began working as a driver in 2012. He too has only worked from the Northern California facility. CW asserts Clark's credibility is subject to challenge as the result of a felony criminal record and his lack of candor regarding that record.

This action is not the first time CW has been sued for an alleged failure to provide meal and rest breaks. In 2012, an action filed in Los Angeles County Superior Court entitled *Gustavo Chicas v. The Chefs' Warehouse West Coast, LLC* ("the *Chicas* matter") advanced the same categories of wage and hour claims as alleged here, except for failure to reimburse business

expenses. Both Robinson and Clark were members of the *Chicas* class and signed declarations stating that they understood CW's policies regarding meal and rest breaks, accurate timekeeping, and reporting any violations of CW's policies. Moreover, they expressly admitted they were always provided with and took their meal and rest breaks, their supervisor insisted they take their meal breaks, their time sheets were always accurate, they were always paid for all hours worked, and they never worked off the clock. See Dkt. No.136, exhibits 2-D and 2-E.

III. DISCUSSION

A. Class certification

Federal Rule of Civil Procedure 23 allows for the certification of a class when: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Where these prerequisites are satisfied, a class action may be maintained if, "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3), or "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis," that the requirements of Rules 23(a) and (b) have been satisfied. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (citations and internal quotation marks omitted).

This case is unusual because the parties' dispute over class certification focuses primarily on whether these named plaintiffs and their counsel can adequately represent the class—questions which more often are not vigorously contested. The extensive record regarding the conduct of plaintiff's counsel Michael Hoffman in this litigation, and the findings of the assigned magistrate

judge regarding that conduct and its consequences will not be recounted here. At the hearing on class certification, plaintiffs eventually took an unequivocal and express position that Hoffman is *not* being proposed as counsel for the class, and that he would not serve as such, were certification to be granted. Were certification otherwise appropriate, plaintiffs would be held to that commitment, with the result that the questions as to Hoffman's adequacy are no longer relevant.

Furthermore, plaintiffs have made an adequate showing that attorney Stephen Ilg, with the association of attorney Leonard Emma and/or such other counsel as Ilg may see fit to utilize (but excluding any active participation by Hoffman in representation of the class), is qualified and competent to serve as class counsel. Representations previously made to the effect that Emma was not qualified to appear at depositions in this matter do not undermine the conclusion that he is competent to serve on a team of attorneys representing the class. Prior claims that Ilg could not handle depositions appear to have related more to his availability, given his role in the litigation at that point in time, rather than to his general qualifications and experience. Ilg has now shown that he can and would devote appropriate time to representing the class, and that he is sufficiently qualified to do so, were certification granted and he were appointed as counsel for the class.

CW's challenge to the adequacy of Robinson and Clark to serve as class representatives, however, is insurmountable. Both Robinson and Clark submitted sworn statements that at least as of early 2013 they were *not* subject to the conduct they allege gave rise to the wage and hour violations advanced in this action. Plaintiffs argue those declarations are not dispositive because this actions seeks recovery for conduct allegedly taking place in 2014 and thereafter. While it certainly is theoretically possible that CW began applying pressure on drivers that vitiated its otherwise lawful policies only after Robinson and Clark signed the declarations in *Chicas*, they have pointed to no facts even hinting of some change in CW's practices at that time or at any other time.

Thus, even assuming CW has been violating wage and hour laws since 2014 (or even that it was doing so prior to 2013, notwithstanding Robinson and Clark's declarations that they were not personally affected), Robinson and Clark are not similarly-situated to putative class members

who did not sign similar declarations in *Chicas.* The declarations Robinson and Clark signed plainly could be used to undermine their credibility when advancing claims that CW's actual practices nullify the effectiveness of its official policies. At trial they could be subjected to cross-examination and impeachment that a fact-finder very well might find fatal to their case—thereby also dooming the claims of the rest of the class.[2] Accordingly, the motion for class certification must be denied.

B. Leave to amend

Under the liberal standards applicable to amending pleadings pursuant to Rule 15 of the Federal Rules of Civil Procedure, plaintiffs have made an adequate showing that their motion for leave to file a "third" amended complaint should be granted.[3] There is not sufficient undue prejudice nor such clear futility as to warrant denying leave to amend. CW, naturally, retains the right to challenge the adequacy of the pleading, should there be appropriate grounds for doing so.

IV. CONCLUSION

The motion for class certification, Dkt. No. 123, is denied. The motion for leave to amend, Dkt. No. 127, is granted. The sealing motion (Dkt. No. 122) was addressed to certain materials submitted by plaintiffs that CW had produced under a designation as "confidential." CW filed no declaration establishing that these materials may appropriately be filed under seal, and they do not appear to include information rising to that level. See Civil Local Rule 79-5(e). Accordingly the

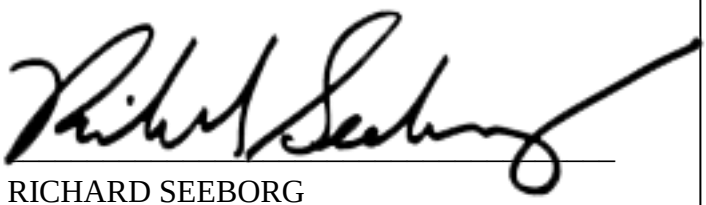
[2] In light of this conclusion, it is neither necessary nor appropriate to make a definitive finding as to whether it might otherwise be appropriate for the claims made in this action to be litigated on a class-wide basis. The decision in *Ludosky McCowen v. Trimac Transportation Services (Western), Inc.*, 14-cv-02694, however, strongly suggests class certification could be warranted for these claims, although the Southern California and Northern California facilities might require separate treatment.

[3] The pleading labeled as the first amended complaint was not allowed. The presently operative complaint, while labeled as the second amended, is therefore technically only the first amended complaint. With the granting of this motion, plaintiffs may file their proposed complaint, retaining its label of "third amended."

sealing motion is denied.

IT IS SO ORDERED.

Dated: February 8, 2018



RICHARD SEEBORG
United States District Judge

United States District Court
Northern District of California