1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WACKENHUT WAGE AND HOUR CASES

Coordinated actions:

LUBIN v. WACKENHUT CORP.
Los Angeles County Superior Court
Case No. BC326 996

MARESCA v. WACKENHUT SERVICES, INC.
Los Angeles County Superior Court
Case No. BC373415

DENTON v. THE WACKENHUT CORP.
Orange County Superior Court
Case No. 00180014

RODRIGUEZ v. G4S SECURE SOLUTIONS USA
San Francisco Superior Court Case
Case No. CGC11 511748

JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4545

ORDER GRANTING THE WACKENHUT CORPORATION'S MOTION TO DECERTIFY CLASS

INTRODUCTION

Defendant The Wackenhut Corporation ("Wackenhut") moves to decertify the class previously certified in this action. Wackenhut argues that class certification is not appropriate in light of post-certification developments, including the U.S. Supreme Court's landmark decision in *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. ___ [131 S.Ct. 2541] (*Wal-Mart*). Plaintiffs oppose the motion and seek certification of five subclasses. The matter was initially heard on December 21, 2011 and January 10, 2012. After the California Supreme Court issued its decision in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*), the parties submitted additional briefing on the impact of *Brinker*, and the Court held another hearing on June 12, 2012. Having considered oral argument and all of the papers filed by the parties, and based on a rigorous analysis of the extensive record compiled by the parties at class certification and in connection with Wackenhut's motion to decertify, the Court exercises its discretion as authorized by *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 ("*Sav-On*") in supervising this class action to now determine that decertification is prudent and proper.

BACKGROUND

Wackenhut provides an array of security-related services to numerous clients throughout the United States. In California, thousands of Wackenhut security officers are stationed at hundreds of different clients in a wide range of industries. Wackenhut clients include, among others, banks, power companies, public transit systems, business parks, grocery stores, homeowners associations, federal immigration enforcement agencies, jails, distribution centers, construction sites, shopping centers, gated communities, and post offices. A large number of class members work in one-guard situations, but a substantial number work in multi-guard locations, such as jails, oil refineries and museums.

On March 3, 2010, the Court granted Plaintiffs' motion for class certification. The class as certified consists of "all non-exempt Security Officers employed by Wackenhut in California during the Class Period of January 7, 2001 to the present," and covers Plaintiffs' claims "that Wackenhut violated the Labor Code by failing to provide off-duty meal periods, by failing to authorize and permit off-duty rest breaks, and by providing inadequate wage statements." (Class Cert. Order [Mar.

3, 2010] at pp. 1, 10.) The Court, however, declined to certify any of Plaintiffs' five proposed subclasses, finding them to be unascertainable. (*Id.* at p. 9.)

LEGAL STANDARD

Rule 3.764(a)(4) of the California Rules of Court provides that any party may file a motion to decertify a class. "The 'proper legal criterion' for deciding whether to . . . decertify a class is simply whether the class meets the requirements for class certification." (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1451 (*Walsh*).)

Code of Civil Procedure section 382 authorizes class actions "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, one or more may sue or defend for the benefit of all." (Code Civ. Proc., § 382.) "Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods." (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089 (*Fireside Bank*).) "In turn, the 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Ibid.*, quoting *Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 470.)

"[I]n determining whether the criteria of Code of Civil Procedure section 382 are met," a court may consider "how various claims and defenses relate and may affect the course of the litigation" even if such considerations "overlap [with] the case's merits." (*Fireside Bank*, *supra*, at pp. 1091–1092.) A court must engage in a "rigorous analysis" that "'[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.'" (*Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1458 (*Marler*), quoting *Wal-Mart*, *supra*, 131 S.Ct. at p. 2551.) "When evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them." (*Brinker*, *supra*, 53 Cal.4th at pp. 1023–1024, citing *Wal-Mart*, *supra*, 131 S.Ct. at pp. 2551–2552 & fn. 6.) "To the extent the propriety of

///

certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them." (*Id.* at p. 1025.)

Trial court decisions regarding certification questions are committed to the trial court's discretion. As noted by the Supreme Court in *Sav-On*:

> We review the trial court's ruling for abuse of discretion. "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, **they are afforded great discretion in granting or denying certification. … [Accordingly,] a trial court ruling supported by substantial evidence generally will not be disturbed** 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' [citation] . … 'Any valid pertinent reason stated will be sufficient to uphold the order.' " (*Linder*, *supra*, 23 Cal.4th at pp. 435–436; see also *Lockheed*, *supra*, 29 Cal.4th at p. 1106.)(emphasis added.)

Sav-On, supra, 34 Cal.4th at 326-27. *Sav-On* sets forth the relevant test to apply to a decertification motion coming after a prior grant of class certification:

> It may be, of course, that the trial court will determine in subsequent proceedings that some of the matters bearing on the right to recovery require separate proof by each class member. If this should occur, **the applicable rule … is that the maintenance of the suit as a class action is not precluded so long as the issues which may be jointly tried, when compared to those requiring separate adjudication, justify the maintenance of the suit as a class action**." (*Vasquez*, *supra*, 4 Cal.3d at p. 815; see *Lockheed*, *supra*, 29 Cal.4th at p. 1105.) And **if unanticipated or unmanageable individual issues do arise, the trial court retains the option of decertification**. (*Lazar v. Hertz Corp.* (1983) 143 Cal. App. 3d 128, 144; see, e.g., *O'Connor v. Boeing North American, Inc.* (C.D.Cal. 2000) 197 F.R.D. 404.)(emphasis added.)

Sav-On, supra, 34 Cal.4th at 335. There are two concurring reasons to de-certify at this time: (1) the Court finds that individualized, rather than common, issues now predominate, and (2) the Court finds that there is no way to conduct a manageable trial of Plaintiffs' claims. The class previously certified comprises over 13,000 members, and it is now clear that it is not possible to provide a jury trial to resolve the number of separate factual issues that would be presented. The individual factual issues now predominate over the common questions of fact which do continue to exist. Therefore, the Court exercises its available discretion to address these circumstances by granting Wackenhut's motion in full to decertify the class with prejudice.

///

///

1 **DISCUSSION**

2 **A. Wackenhut's Motion To Decertify Is Supported By Changed Circumstances**

3 Plaintiffs contend that a "'class should be decertified only where it is clear [that] there exists
4 changed circumstances [or new evidence] making continued class action treatment improper.'"
5 (Opp. Br. at p. 2, quoting *Weinstat v. Dentsply Int'l, Inc.* (2010) 180 Cal.App.4th 1213, 1226
6 (*Weinstat*).) Although the California Supreme Court has suggested in dicta that a court should
7 decertify a class only when there are "changed circumstances" (*Green v. Obledo* (1981) 29 Cal.3d
8 126, 148 & fn. 17), it is well-established that "[a]n order certifying a class is subject to modification
9 at any time" (*Shelley v. City of L.A.* (1995) 36 Cal.App.4th 692, 696), and the standard for deciding
10 whether to "decertify a class is simply whether the class meets the requirements for class
11 certification" (*Walsh*, *supra*, 148 Cal.App.4th at p. 1451). In any event, the Court finds that
12 Wackenhut has satisfied the "changed circumstances" standard because significant new case law—
13 the U.S. Supreme Court's decision in *Wal-Mart*—exists. (*Weinstat*, 180 Cal.App.4th at p. 1226 [new
14 law constitutes changed circumstances].)

15 Plaintiffs argue that *Wal-Mart* has little application because it is a Title VII case and a federal
16 case interpreting Federal Rule of Civil Procedure 23, rather than the requirements for class
17 certification under California law. (Opp. Br. at pp. 4–5.) The requirements of Rule 23, however, are
18 "analogous to the requirements for class certification under Code of Civil Procedure section 382."
19 (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 318 (*Tobacco II*).). Moreover, it is well-established
20 that California courts should look to federal law for "guidance on issues of class action procedure."
21 (*Ibid.*; see also *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 453 (*City of San Jose*)
22 [directing courts to Rule 23 "in determining whether to allow the maintenance of a particular class
23 suit"]; *In re BCBG Overtime Cases* (2008) 163 Cal.App.4th 1293, 1298 [explaining that the "law
24 governing California class actions is comprised of a mixture of federal and state law"].) Indeed, the
25 "requirements for the certification of a class" under California law were developed by "[d]rawing on .
26 . . federal precedent." (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) Furthermore, both the California
27 Supreme Court and the California Court of Appeal have cited and followed *Wal-Mart*'s guidance on
28 issues of class certification. (See *id.* at pp. 1023–1024; *Marler*, *supra*, 199 Cal.App.4th at p. 1458;

1 *City of San Diego v. Haas* (June 29, 2012, No. D058225) ___ Cal.App.4th ___ [2012 WL 2476876,
2 at *18], quoting *Wal-Mart*, *supra*, 131 S.Ct. at p. 2551 ["[A] common question predominates when
3 'determination of its truth or falsity will resolve an issue that is central to the validity of each one of
4 the claims in one stroke.'"].)

5 Despite *Brinker*'s adoption of *Wal-Mart*'s holding regarding inquiry into the merits at class
6 certification, Plaintiffs contend that *Brinker* "has emphatically confirmed that the more restrictive
7 federal class action standards, as evidenced by *Wal-Mart*, do not dictate a change in" California law
8 and that "California's class action standards remain intact." (Pls.' Opening Supp. Br. at p. 4.)
9 Specifically, Plaintiffs argue that the California Supreme Court rejected *Wal-Mart*'s holdings on
10 commonality and "Trial by Formula" because it (1) did not discuss them, and (2) stated the traditional
11 requirements for class certification under California law. (See *ibid.*) The Court disagrees. *Brinker*'s
12 silence on the other aspects of *Wal-Mart* does not constitute a rejection of these holdings (see *DCM*
13 *Partners v. Smith* (1991) 228 Cal.App.3d 729, 739 ["[A] case does not stand for a proposition neither
14 discussed nor analyzed"]), and the mere recital of the class certification requirements under
15 California law is not inconsistent with *Wal-Mart*'s guidance as to how courts should *apply* such
16 requirements. Moreover, *Brinker* cited with approval Professor Nagareda's article *Class*
17 *Certification in the Age of Aggregate Proof* (2009) 84 N.Y.U. L. Rev. 97 (hereafter Nagareda), which
18 played an important role in the *Wal-Mart* decision. (Compare *Brinker*, *supra*, 53 Cal.4th at p. 1022,
19 fn. 5, quoting Nagareda at p. 131 with *Wal-Mart*, *supra*, 131 S.Ct. at p. 2551, quoting Nagareda at pp.
20 131–132.)

21 Plaintiffs also contend that federal class certification law is relevant only in the absence of
22 controlling California law (Opp. Br. at pp. 4–5), but the Court finds that there is no California
23 authority specifically addressing what types of common questions satisfy the commonality
24 requirement, or discussing the propriety of using statistical sampling to prove liability through a
25 classwide "Trial by Formula" that alters substantive law and deprives defendants of their right to
26 raise individual defenses. Plaintiffs argue that the California Supreme Court's endorsement of
27 "innovative procedural tools" in *Sav-On* is controlling over *Wal-Mart*, but *Sav-On* itself recognized
28 that any such tools must permit defendants to defend themselves, including by raising affirmative

defenses, and therefore it did not sanction the type of "Trial by Formula" unanimously disapproved of by the U.S. Supreme Court in *Wal-Mart*. (See *Sav-On*, *supra*, 34 Cal.4th at pp. 339–340.) Moreover, the serious constitutional questions raised by statistical sampling counsel strongly against a contrary interpretation. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353 (*Philip Morris*); *Lindsey v. Normet* (1972) 405 U.S. 56, 66 (*Lindsey*); *City of San Jose*, *supra*, 12 Cal.3d at p. 458 [noting that "class actions may create injustice" if they "preclude a defendant from defending each individual claim to its fullest" or "deprive a litigant of a constitutional right"].)

Plaintiffs also attempt to distinguish *Wal-Mart* because it involved a much larger nationwide class and different substantive law, and was certified under Rule 23(b)(2) rather than Rule 23(b)(3). (Opp. Br. at pp. 2–4.) *Wal-Mart*, however, is important not just for its "narrow holdings," but also for the "reasoning, analysis, and legal rules applied in reaching its result." (*Rodriguez v. Nat'l City Bank* (E.D. Pa., Sept. 8, 2011, No. 08-2059) 2011 U.S. Dist. LEXIS 101367, at pp. *18–19.) Moreover, *Wal-Mart* addressed the commonality requirement, which is a requirement for certification under Rule 23(b)(2) and (b)(3), as well as Code of Civil Procedure section 382. And the U.S. Supreme Court in *Wal-Mart* considered class certification generally, and did not limit its holdings to Title VII claims. (See *Wal-Mart*, *supra*, 131 S.Ct. at p. 2552, fn. 6.) Indeed, federal and state courts in a variety of contexts have reconsidered class certification decisions in light of *Wal-Mart*. (See, e.g., *Cruz v. Dollar Trees Stores, Inc.* (N.D. Cal., July 7, 2011, Nos. 07-2050 SC, 07-4012 SC) 2011 U.S. Dist. LEXIS 73938 (*Cruz*) [wage and hour misclassification claims under California law]; *Price v. Martin* (La. 2011) 79 So.3d 960 [environmental contamination].) For example, the court in *Cruz* cited *Wal-Mart* as the basis to decertify a California wage and hour class action certified under Rule 23(b)(3) that involved only 184 employees all within California. (See *Cruz*, *supra*, 2011 U.S. Dist. LEXIS 73938, at pp. *7, fn. 3, 18–27.)

Plaintiffs contend that their claims under California law are unaffected by *Wal-Mart* because, unlike Title VII claims or wage and hour misclassification cases, they do not present "inherent impediments to a finding of commonality." (Opp. Br. at p. 4.) But as this case demonstrates, these types of claims may present individualized issues that bar certification in certain cases. Indeed, a federal court recently applied *Wal-Mart* to assess whether a California meal period claim should be

1 certified as a class action. (See *Hughes v. WinCo Foods* (C.D. Cal., Jan. 4, 2012, No. 11-cv-00644)
2 2012 WL 34483 (*WinCo*).) In *WinCo*, the court refused to certify a Rule 23(b)(3) class of between
3 3,071 and 4,701 employees at 30 grocery stores across California, finding that the meal period claim
4 at issue did not present a common question under *Wal-Mart* because of differences "from store to
5 store, and from department-to-department within the same store" in terms of the provision of meal
6 and rest periods. (*Id.* at p. *5.) The Court finds *WinCo*'s conclusion that *Wal-Mart* is applicable to
7 California meal and rest period claims persuasive.

8 In sum, the *Wal-Mart* decision warrants reassessment of class certification here. California
9 courts regularly turn to the U.S. Supreme Court's guidance on issues of class certification. At a
10 minimum, *Wal-Mart* is highly relevant persuasive authority that the Court can and should consider in
11 determining whether to exercise its discretion to certify a class under California law. Moreover, the
12 requirements for class certification under Rule 23 are designed to ensure that class actions comport
13 with due process (see *Taylor v. Sturgell* (2008) 553 U.S. 880, 901), and therefore, to the extent that it
14 is grounded in federal due process principles, *Wal-Mart* is controlling.

15 The Court further finds that revisiting class certification at this stage is appropriate because
16 the practical difficulties of trying this class action involving over 13,000 employees holding very
17 diverse positions have become more apparent since certification. (See *Sav-On*, *supra*, 34 Cal.4th at
18 p. 335 ["[I]f unanticipated or unmanageable individual issues do arise, the trial court retains the
19 option of decertification."].) As this case approached trial, the scales fell from the Court's eyes and
20 the unmanageable individual issues present here became apparent. Notably, Plaintiffs had not
21 proposed to use statistical sampling to prove their claims at class certification, but it is now clear that
22 the only way to try their claims on a classwide basis would be through such impermissible shortcuts.

23
24
B. Plaintiffs Have Failed To Demonstrate That Common Questions Predominate And That Class Adjudication Would Be Manageable

25 *Wal-Mart* teaches that "'[w]hat matters to class certification . . . is not the raising of common
26 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common
27 *answers* apt to drive the resolution of the litigation.'" (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2551,
28 quoting Nagareda at p. 132; see also *Brinker*, *supra*, 53 Cal.4th at p. 1022, fn. 5, quoting Nagareda at

p. 131 [“As one commentator has put it, ‘what really matters to class certification’ is ‘not similarity at some unspecified level of generality but, rather, dissimilarity that has the capacity to undercut the prospects for joint resolution of class members’ claims through a unified proceeding.’”].) Class certification requires plaintiffs to identify a “common contention” for which a “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2551.) Without some “glue” binding together the claims of the entire class, class certification is not warranted. (*Id.* at p. 2552.) *Wal-Mart* also holds that the use of statistical sampling as a shortcut to create commonality where none exists is improper because it robs a defendant of the opportunity to defend against each individual claim and therefore impermissibly alters substantive law. (*Id.* at p. 2561.)

Plaintiffs’ claims do not involve the kinds of common questions that can support class certification under *Wal-Mart*. Rather, these claims present unmanageable individualized issues that preclude classwide adjudication in this case. Any common issues would be overwhelmed by the myriad individualized issues necessary to resolve Plaintiffs’ claims, and the amount of effort to adjudicate Wackenhut’s defenses and determine liability on a plaintiff-by-plaintiff basis, as would be required in this case, would render trial unmanageable. And the potential for this case to settle before trial does not make it manageable. While a court need not consider manageability when certifying a class for settlement purposes (because in that situation there would be no trial), the parties here have not reached a settlement and the Court must proceed under the assumption that this case will go to trial. (See *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 620 (*Amchem*).) Moreover, because of the serious problems presented by the use of statistical sampling to establish liability, the Court declines to authorize the use of that shortcut here to manage individualized issues.

1. Meal Period Claim

Plaintiffs contend that Wackenhut provided only on-duty meal periods to class members, allegedly in violation of the Labor Code and its implementing regulations. (See Lab. Code, § 226.7(a); Cal. Code Regs., tit. 8, § 11040, subd.(11)(A).) On-duty meal periods are not *per se* illegal, but instead are authorized under what is commonly known as the nature of the work exception. (See Cal. Code Regs., tit. 8, § 11040, subd.(11)(A).) In response, Wackenhut argues that

not all meal periods were on-duty, and with regard to those that were, it asserts the nature of the work exception as an affirmative defense.

With respect to Plaintiffs' meal period claims, the Court previously found that common questions predominated because of a "uniform practice on behalf of the Wackenhut Corporation, affecting all employees equally, of allowing clients to determine whether meal periods will be on-duty or off-duty, as opposed to Wackenhut performing an analysis of whether the 'nature of the work' at each site prevents an employee from being relieved of their duties for 30-minute meal periods." (Class Cert. Order [Mar. 3, 2010] at p. 4.) Wackenhut argues—and Plaintiffs agree (Opp. Br. at p. 6.)—that this question is not sufficient under *Wal-Mart* because how Wackenhut decided which type of meal periods to provide is irrelevant to whether on-duty meal periods were permissible due to the nature of the work exception. (Mot. Br. at pp. 8–10.)

The Court agrees that how Wackenhut determined whether to provide an on-duty rather than an off-duty meal period is not a "common contention" that when answered will "resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke." (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2551.) What matters is not whether Wackenhut had a policy of delegating the determination of whether to take advantage of the nature of the work exception, but rather whether Wackenhut provided on-duty meal periods, and, if so, whether such meal periods were permissible under the nature of the work exception. (See *Walsh*, *supra*, 148 Cal.App.4th at pp. 1461–1462.) The Court finds that these critical questions cannot be resolved on a classwide basis, and instead present numerous individual issues that cannot be adequately managed.

a. Whether Wackenhut Provided On-Duty Meal Periods

The threshold question under Plaintiffs' theory of liability is whether Wackenhut provided class members with on-duty, rather than off-duty, meal periods. Plaintiffs contend they can prove that Wackenhut provided class members with on-duty meal periods through the testimony of Wackenhut managers, and the records Wackenhut produced during discovery, irrespective of the facts and circumstances in practice at each Wackenhut worksite with respect to meal periods.

The Court disagrees that this testimony is sufficient to prove that Wackenhut, in every case, provided class members only with on-duty meal periods. At most, this testimony supports the

proposition that Wackenhut managers intended as a general matter to provide on-duty meal periods at many, although not all, worksites.[1] But evidence in the record suggests that, in practice, the meal periods Wackenhut authorized were not necessarily "on-duty" in all cases, even at worksites that were typically limited to on-duty meal periods. (See, e.g., Wackenhut Compendium of Declarations [Dec. 1, 2009], Call Decl. ¶ 12 [security officer allowed to "take lunch at a restaurant" during an "on-duty" meal period]; *id.*, Dorama Decl. ¶ 15 ["[D]uring my 30-minute on-duty meal period[,] I am often permitted to leave the Border Patrol Station to pick-up food at a local restaurant."]; *id.*, Chowdhury Decl. ¶ 14 ["I am permitted to leave the premise[s] . . . during my 30-minute on-duty meal period."]; *id.*, Kotov Decl. ¶ 11 [security officer allowed to take an "on-duty meal period . . . at nearby restaurants"].) Indeed, Plaintiff Nivida Lubin testified at her deposition that she was allowed to leave the worksite to buy food during her meal periods. (Lubin Dep. at pp. 54:23–56:3.)

At the June 12, 2012 hearing, Plaintiffs contended that the instances on which Wackenhut relies to support its defense are facially insufficient to satisfy an employer's obligations regarding providing legally sufficient off-duty meal periods as stated in *Brinker*, and therefore no individualized examination of Wackenhut's meal periods is necessary. (Hr'g Tr. [Jun. 12, 2012] at pp. 11–13; see also Pls.' Opening Supp. Br. at pp. 11–12.) The Court disagrees. In *Brinker*, the California Supreme Court clarified that an "employer is not obligated to police meal breaks and ensure no work thereafter is performed," and that instead an "employer satisfies [its] obligation [to provide a meal period to its employees] if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impeded or discourage them from doing so." (*Brinker*, *supra*, 53 Cal.4th at p. 1040.) Significantly, however, the Court further explained that "[w]hat will suffice may vary from industry to industry" and that it could not "delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Ibid.*) Here, determining whether the meal periods that

[1] In fact, the class as certified includes several worksites whose employees that undisputedly were provided with off-duty meal periods. (See, e.g., Chang Dep. at p. 24:5-9 [San Francisco Conservatory of Music]; Fisher Dep. at p. 53:9-17 [Cricket Communications]; Dodough Dep. at 102:7-11 [testifying that approximately 200 out of 800 employees who signed on-duty meal period agreements were assigned to worksites that did not have on-duty meal periods].)

Wackenhut authorized in practice were "sufficient to satisfy the law" will require an individualized assessment of the nature of the meal periods Wackenhut actually provided to each class member, and a consideration of the unique factors of the industry (factors that may vary significantly from worksite to worksite depending on the type of security services Wackenhut provided and the underlying business of each Wackenhut client).

In sum, the Court finds that determining the nature of the meal periods that Wackenhut in practice permitted its employees to take at the hundreds of worksites and over the course of millions of shifts, and evaluating whether these meal periods were legally sufficient to satisfy Wackenhut's obligation to provide employees with off-duty meal periods, cannot be achieved on a classwide basis and instead will require numerous, unmanageable individualized inquiries. The Court further finds that these individualized inquiries are necessary because, pursuant to *Wal-Mart*, Wackenhut has a right to defend itself by proving that, in practice, even at worksites that typically had on-duty meal periods, some class members were actually authorized to take off-duty meal periods, as evidence in the record suggests.

b. Whether the Nature of the Work Exception Applies

Whether common issues predominate as to the meal period claim also depends on whether Wackenhut's affirmative defense—the nature of the work exception—can be adjudicated on a classwide basis. (*Walsh*, *supra*, 148 Cal.App.4th at p. 1450 ["[A] defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues."].) The nature of the work exception has two elements. First, the parties must have entered into a written agreement regarding on-duty meal periods. (Cal. Code Regs., tit. 8, § 11040, subd.(11)(A).) Second, the nature of the work performed by an employee must prevent the employee from being relieved of all duty during a meal period. (*Ibid.*) The Court finds that neither of these elements can be adjudicated on a classwide basis, even if the class is divided into Plaintiffs' proposed subclasses, because common issues do not predominate.

///

///

(i) On-Duty Meal Period Agreement

While it is undisputed that the overwhelming majority of Wackenhut security officers agreed in writing to on-duty meal periods, Plaintiffs allege that some portion of the agreements are invalid because they lacked language informing employees that they had the right to revoke the agreements in writing at any time. Plaintiffs contend that any agreement without this revocation language renders the nature of the work exception unavailable, and accordingly makes on-duty meal periods *per se* impermissible, regardless of the nature of the work performed. Whether Plaintiffs' interpretation of this requirement is correct—that an agreement is invalid if it lacks revocation language, regardless of an employee's actual understanding regarding his right to revoke the agreement—is a common question of law. The Court finds, however, that this single common question is overwhelmed by individualized issues related to the on-duty meal period agreements.

1) Use of Statistical Sampling

Determining whether class members signed agreements with revocation language requires an individualized analysis of each agreement because Wackenhut did not use a standard form throughout the class period, and many class members signed two substantively different versions of the agreement over the course of their employment, either with or without revocation language. Plaintiffs, however, obtained in discovery only a portion of the on-duty meal period agreements and plan to use statistical sampling to establish what proportion of the class signed agreements lacking revocation language. Specifically, Plaintiffs intend to examine the sample obtained in discovery to determine the percentage of agreements that lack revocation language and, using statistical methods, extrapolate the results across the entire class.

The Court agrees with Wackenhut that Plaintiffs' plan is essentially indistinguishable from the method of proof unanimously rejected by the U.S. Supreme Court in *Wal-Mart*. The plaintiffs in *Wal-Mart* sought to replace individualized proceedings with a "novel project" whereby a "sample set of class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined" and then the "percentage of claims determined to be valid would then be applied to the entire remaining class." (*Wal-Mart*, *supra*, at p. 2561.) *Wal-Mart*

///

"disapprove[d]" of this "Trial by Formula," holding that "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." (*Ibid.*)

Likewise, here, the Court finds that Plaintiffs' use of statistical sampling to establish liability under their invalid agreement theory is not an appropriate procedural tool to achieve manageability and protect Wackenhut's due process rights in this case. As explained in *Wal-Mart*, Plaintiffs' approach will deprive Wackenhut of its defenses to individual claims. Wackenhut will have no opportunity to present the affirmative defense—to which it is entitled under California law—that specific class members signed valid on-duty meal period agreements. Instead, Wackenhut would be limited to challenging Plaintiffs' statistical methods. This would violate Wackenhut's due process right to "present every available defense" (*Lindsey*, *supra*, 405 U.S. at p. 66, quoting *Am. Surety Co. v. Baldwin* (1932) 287 U.S. 156, 168), and would impermissibly alter the substantive law (*City of San Jose*, *supra*, 12 Cal.3d at p. 462 ["Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going."]).

Moreover, as Plaintiffs conceded at the hearing, statistical sampling would lead to imprecise individual recoveries that do not accurately reflect the actual damages incurred by each class member, resulting in a windfall for some class members and leaving other class members under-compensated. (See Hr'g Tr. [Jan. 10, 2012] at pp. 10, 23.) This inherently imprecise approach "raises serious due process concerns" because it would deprive Wackenhut of its "right to pay damages reflective" of its actual liability. (*McLaughlin v. Am. Tobacco Co*. (2d Cir. 2008) 522 F.3d 215, 231–232 (*McLaughlin*); see also *Broussard v. Meineke Discount Muffler Shops, Inc.* (4th Cir. 1998) 155 F.3d 331, 343.) These concerns also affect absent class members. Plaintiffs' approach would indiscriminately divide an aggregate recovery among the class members, without litigating each class member's individual entitlement to recover. For example, if sampling revealed that class members worked under an invalid meal period agreement 40% of the time, each class member would receive a recovery based on 40% of the length of their employment, even if they actually worked 100% of the time under an invalid agreement. In other words, class members with valid claims would be forced to share a portion of their rightful recovery with class members who were never injured. This not only creates a conflict within the class between injured and uninjured class

members (see *Amchem*, *supra*, 521 U.S. at pp. 610, 625, 626, fn. 20), but also violates the due process rights of absent class members with valid claims, who would be limited by res judicata to an imprecise, sampling-based recovery that leaves them under-compensated (see *Hansberry v. Lee* (1940) 311 U.S. 32, 44–45). Plaintiffs' statistical sampling approach therefore sacrifices the claims of the absent class members that they are duty-bound to represent in the name of class certification. The Court finds that these serious due process concerns counsel strongly against the use of statistical sampling here.

Plaintiffs argue that Wackenhut should be estopped from challenging, and has waived any challenge to, Plaintiffs' reliance on sampling because Wackenhut previously objected to the production of all the on-duty meal period agreements. The Court disagrees. Although Wackenhut did object to the production of the on-duty meal period agreements for the entire class as unduly burdensome, it did initially offer to provide Plaintiffs with "a reasonable opportunity to examine, audit, or inspect the documents . . . in accordance with Code of Civil Procedure section 2030.230." (Marsili Decl. [Nov. 21, 2011], Ex. B, at p. 7.) After a series of meet and confers, however, the parties instead reached an agreement that called for the production of only a representative sampling of the agreements. (See Marsili Decl. [Nov. 21, 2011] ¶¶ 5-6; Order and Stipulation re Defendant's Production of Class Members' Personnel Files for Plaintiffs' Sampling [May 4, 2011].) Plaintiffs could have moved to compel production of all of the on-duty meal period agreements, but they voluntarily declined to assert this right. In light of Wackenhut's initial offer to allow for an inspection of all of the agreements, and Plaintiffs' voluntary decision not to press for full discovery, the Court finds that Wackenhut is not estopped from challenging Plaintiffs' use of sampling.

Nor has Wackenhut waived its right to challenge Plaintiffs' use of sampling. When Wackenhut agreed to the sampling stipulation, it expressly reserved its rights to challenge Plaintiffs' use of sampling on any grounds other than certain aspects of the statistical methodology used to create the sampling. (See Order and Stipulation re Defendant's Production of Class Members' Personnel Files for Plaintiffs' Sampling [May 4, 2011] at pp. 2–3.) And nothing in the stipulation, or anywhere else, suggests that Wackenhut intended to waive future, unknown rights or arguments

///

based on new case law, such as *Wal-Mart*. The Court therefore finds that Wackenhut has not waived its right to challenge Plaintiffs' sampling as an impermissible "Trial by Formula" under *Wal-Mart*.

It is true that in *Sav-On*, the California Supreme Court urged courts to use "innovative procedural tools" to manage individual questions, and approved of the Court of Appeal's decision in *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715 (*Bell*) endorsing the use of statistical sampling. (See *Sav-On*, *supra*, 34 Cal.4th at pp. 333, 339–340.) But neither *Sav-On* nor *Bell* held that sampling could be used to resolve issues pertaining to *liability*, as Plaintiffs seek to do in this case. Plaintiffs contend that the question whether an individual class member signed an invalid on-duty meal period agreement pertains to damages, not liability. (Pls.' Opening Supp. Br. at p. 12.) This is incorrect. If the nature of the work exception is satisfied, Wackenhut does not just owe a lower amount of damages, but instead is not liable at all to those class members who received on-duty meal periods under the exception. Determining whether the exception applies necessarily involves the determination of whether the on-duty meal period agreements signed by class members were or were not invalid, and therefore this question is one of liability, not damages.

Moreover, *Sav-On* and *Bell* do not mandate the use of statistical sampling in class actions, but instead give the Court *discretion* to employ that tool if the Court deems it appropriate. (See *Sav-On*, *supra*, 34 Cal.4th at p. 336; *Bell*, *supra*, 115 Cal.App.4th at p. 751 ["In our view, it was within the discretion of the trial court to weigh the disadvantage of statistical inference . . . with the opportunity it afforded to vindicate an important statutory policy without unduly burdening the courts."].) The Court declines to exercise its discretion to do so here.

Significantly, the federal cases that provided the jurisprudential underpinnings of both *Bell* and *Sav-On* are no longer valid. *Bell*'s endorsement of sampling followed directly from the Ninth Circuit's decision in *Hilao v. Estate of Marcos* (9th Cir. 1996) 103 F.3d 767 (*Hilao*), a decision which, as Plaintiffs acknowledge, was expressly rejected by the Supreme Court in *Wal-Mart*. (See Opp. Br. at pp. 7–8; *Wal-Mart*, *supra*, 131 S.Ct. at p. 2550; *Bell*, *supra*, 115 Cal.App.4th at p. 752.) *Bell* and *Sav-On* also relied on *In re Simon II Litigation* (E.D.N.Y. 2002) 211 F.R.D. 86, but the reasoning in *Simon II* was subsequently rejected by the Second Circuit because of the serious due process concerns raised by the sampling method it had endorsed, and it surely does not survive *Wal-*

1 *Mart*. (See *Sav-On*, *supra*, 34 Cal.4th at p. 333, fn. 6; *Bell*, *supra*, 115 Cal.App.4th at pp. 752–753;
2 *McLaughlin*, *supra*, 522 F.3d at pp. 231–232.) Plaintiffs also cite *Bell* to support their contention that
3 "it is not permissible for Wackenhut to object to any method of determining the individual amounts
4 owed to members of the Class" once "aggregate" liability has been determined. (Opp. Br. at p. 10.)
5 But this proposition comes directly from the *Hilao* case (see *Bell*, *supra*, 115 Cal.App.4th at p. 752,
6 citing *Hilao*, *supra*, 103 F.3d at p. 786), which was overruled in *Wal-Mart*. Moreover, *Bell* itself
7 recognizes that it is appropriate for a trial court to take into account these concerns regarding the
8 potential for uninjured class members to recover as a result of sampling in exercising its discretion
9 whether to certify a class. (*Ibid*.)
10 Despite *Wal-Mart*'s unanimous repudiation of *Hilao* and "Trial by Formula," Plaintiffs
11 nonetheless argue that the use of statistical sampling in class actions remains viable under California
12 law. (See Opp. Br. at p. 9; Pls.' Opening Supp. Br. at pp. 10–11.) To support this argument,
13 Plaintiffs rely on existing California case law and Justice Werdegar's concurrence in *Brinker*, which
14 cited *Bell* and *Sav-On* and noted that statistical sampling could be used "to render manageable
15 determinations of the extent of liability." (*Brinker*, *supra*, 53 Cal.4th at p. 1054 [Werdegar, J.,
16 concurring].) The concurrence, however, is not the law, and the *Brinker* majority opinion has no
17 discussion of sampling. Moreover, the fact that the concurrence attracted only two votes, unlike the
18 unanimous majority opinion, suggests that a majority of the Court did not agree with the concurrence,
19 otherwise there would have been no need for Justice Werdegar to write a concurrence to her own
20 majority opinion.
21 In any event, as the *Brinker* concurrence recognized (*Brinker*, *supra*, 53 Cal.4th at p. 1055
22 [Werdegar, J., concurring]), under existing law the Court has discretion to weigh the disadvantages of
23 statistical inference against its benefits, and the U.S. Supreme Court's reasoning in *Wal-Mart*
24 illustrates a significant disadvantage of this method: the elimination of a defendant's ability to raise
25 defenses to individual claims. (See *Wal-Mart*, *supra*, 131 S.Ct. at p. 2561; see also *Sav-On*, *supra*,
26 34 Cal.4th at pp. 339-40.) Moreover, statistical sampling would violate the rights of absent class
27 members with valid claims to obtain a full recovery. Thus, while sampling may still be viable in
28 some cases, the Court finds that—in light of *Wal-Mart*'s persuasive reasoning, and the serious due

process concerns presented by Plaintiffs' plan to estimate liability using an admittedly imprecise sampling methodology—the disadvantages of statistical sampling in this case far exceed its benefits. Therefore, the Court exercises its discretion not to allow this method of proof here.

2) Manageability Without Statistical Sampling

Even if Plaintiffs were to obtain every on-duty meal period agreement and attempt to prove liability without relying on statistical sampling, individual issues still would predominate and a classwide trial still would be unmanageable. Although examining each of the thousands of agreements at issue would be a highly individualized endeavor, it would not be much more than a very tedious and extensive audit that is not likely to result in many factual disputes. But simply proving that certain class members for some amount of time signed invalid on-duty meal period agreements does not establish liability. Instead, as explained above, Plaintiffs must also prove that those class members who signed invalid agreements were not provided with off-duty meal periods. *See supra* Part B.1.a. Plaintiffs contend they will do so using the testimony of Wackenhut's managers and Wackenhut documents that were produced in discovery. Conversely, Wackenhut is entitled to prove that those class members were provided with off-duty meal periods. And proving (or disproving) this element of Plaintiffs' claims would require a highly individualized analysis of what happened on the ground for each of the millions of shifts involved in this case, thus rendering trial unmanageable.

The Court also finds that Plaintiffs' proposed "invalid meal period agreement subclass" is not readily ascertainable. Plaintiffs have defined this subclass as "[a]ll non-exempt Security Officers employed by Wackenhut in California from January 7, 2001 through on or about May 23, 2008 who did not sign a valid on-duty meal period agreement and worked at a post with an on-duty meal period." (Opp. Br. at p. 23.)[2] Because Plaintiffs have failed to "define the class in objective terms . . . without regard to the merits of the claim" (*Bomersheim v. L.A. Gay & Lesbian Ctr.* (2010) 184 Cal.App.4th 1471, 1483). Instead, the proposed subclass definition includes elements necessary to establish liability, and thus determining who is in the subclass would require an evaluation of the

---

[2] In their post-*Brinker* supplemental briefing, Plaintiffs advanced a revised, yet substantively identical subclass definition. (See Pls.' Opening Supp. Br. at p. 15.)

merits (i.e., whether an agreement was invalid and whether meal periods were on-duty), which would in turn require answering numerous individualized questions, as discussed above.

(ii) The Nature of the Work Performed

The Court also finds that, because the duties and work environments differ dramatically amongst the class, the nature of the work performed by Wackenhut security officers cannot be resolved on a classwide basis. In the absence of case law delineating the contours of the nature of the work analysis, the Court finds the guidance of the Division of Labor Standards Enforcement ("DLSE") persuasive. (See *Brinker*, *supra*, 53 Cal.4th at p. 1029, fn. 11; *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 815 [DLSE interpretations of wage orders entitled to "great weight"].)

The DLSE has outlined a "multi-factor objective test" for determining whether an on-duty meal period is permissible due to the nature of the work. Relevant factors include "(1) the type of work, (2) the availability of other employees to provide relief to an employee during a meal period, (3) the potential consequences to the employer if the employee is relieved of all duty, (4) the ability of the employer to anticipate and mitigate these consequences such as by scheduling the work in a manner that would allow the employee to take an off-duty meal period, and (5) whether the work product or process will be destroyed or damaged by relieving the employee of all duty." (June 9, 2009 DLSE Opinion Letter at p. 7.) While informal DLSE pronouncements made outside the procedures of the Administrative Procedure Act are not entitled to much weight in and of themselves (*Tidewater Marine Western v. Bradshaw* (1997) 14 Cal.4th 557), they are useful when they correctly interpret the law, as here. These factors, however, "are not an exhaustive list" and "the critical determination . . . whether an on-duty meal period may be lawfully provided by an employer is whether the employer can establish that the facts and circumstances in the matter point to the conclusion that the nature of the work prevents the employee from being relieved of all duty." (*Ibid.*)

The Court finds that this test, which requires consideration of the facts and circumstance under which Wackenhut class members worked, cannot be applied on a classwide basis. Wackenhut has presented substantial evidence illustrating the profound differences among the various worksites and the nature of the work performed by its security officers. (See Tsjui Decl., Exs. 1–5; Wackenhut

Compendium of Declarations [Dec. 1, 2009]; Mot. Br. at pp. 2–4.) Plaintiffs contend that the differences amongst the class are overstated because all security officers "observe, patrol, protect, assist, and report." (Opp. Br. at p. 11.) But even if all class members share some of the same basic duties, this does not mean that they all perform the same work under the same circumstances, or that the consequences of allowing an off-duty meal period are identical at each worksite. The nature of the work of a security officer tasked with monitoring sensors and alarms at a nuclear facility simply is not the same as an officer stationed outside of a local bank, or an officer who is in charge of registering inmates at a local jail. Yet class members performing all of these different types of "work" are within the class.[3]

Unlike in *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, where the class consisted solely of clerks at check cashing and consumer lending retail stores and the work performed by each class member was essentially the same and conducted under similar circumstances, there is no single type of "work" the nature of which can be evaluated on a classwide basis. Rather, the class members here, like those in *Wal-Mart*, hold many different positions, at numerous different worksites, and under vastly difference circumstances. (See *Wal-Mart*, *supra*, 131 S.Ct. at pp. 2552, 2557.) As a result, commonality is lacking, and, *a fortiori*, Plaintiffs cannot satisfy the "far more demanding" predominance requirement. (*Amchem*, *supra*, 521 U.S. at p. 624.)

Plaintiffs argue that differences in the duties performed by class members' assignments do not prevent Wackenhut from taking steps at almost all worksites to allow for class members to have off-duty meal periods.[4] (Opp. Br. at pp. 12–16.) This argument, however, is based on the incorrect premise that if an employer can theoretically remake its business operations to provide an off-duty meal period, it should be required to do so and precluded from taking advantage of the nature of the

---

[3] Plaintiffs' recognition that roving relief officers would need to be cross-trained proves this point. (See Opp. Br. at p. 15.) If the work performed by all Wackenhut security officers truly were the same, there would be no need for cross-training.

[4] Plaintiffs cite *Delagarza v. Tesoro Refining & Marketing Co.* (N.D. Cal., Sept. 8, 2011, No. C-09-5803 EMC) 2011 WL 4017967 (*Delagarza*) to support their argument that "variations between class members' post assignments" are irrelevant. (Opp. Br. at p. 12.) *Delagarza*, however, did not involve the nature of the work exception, and therefore it provides no support for Plaintiffs' arguments regarding the nature of the work analysis.

work exception. The DLSE has rejected such a narrow interpretation of the nature of the work exception, concluding that the "express language of the wage order contains no requirement that, in order to have an on-duty meal period, the employer must establish that the nature of the work makes it 'virtually impossible' for the employer to provide the employee with an off-duty meal period." (June 9, 2009 DLSE Opinion Letter at p. 7.) Plaintiffs' view of the nature of the work exception would effectively render it a nullity. It is hard to imagine any job that could not be modified to allow for off-duty meal periods, especially if expense and economic reasonableness were irrelevant. But even if Plaintiffs' view were correct, an analysis of what steps an employer could take to provide an off-duty meal period would still require numerous individualized inquiries. Indeed, Plaintiffs' analysis in their opposition brief of the various steps it claims Wackenhut could have taken to provide off-duty meal periods (see Opp. Br. at pp. 12–16), which is focused on a small handful of worksites and positions, would have to be repeated numerous times with respect to each individual worksite and security officer position and is therefore incompatible with classwide adjudication. (See *Wal-Mart*, *supra*, 131 S.Ct. at pp. 2552, 2557.)

In an attempt to overcome the difficulties of resolving the nature of the work element on a classwide basis, Plaintiffs propose two subclasses—a single-officer subclass and a multi-officer subclass. (Opp. Br. at p. 23.) The Court finds, however, that these subclasses cannot eliminate the need for numerous individualized inquiries to determine whether the nature of the work performed by class members allowed for on-duty meal periods. Breaking up the class according to the number of officers at a particular site does nothing to make an analysis of the actual type of work performed by security officers at various worksites any more manageable. In short, Plaintiffs' proposed meal period subclasses control for a variable that is not a "common contention . . . central to the validity" of each class members' claim. (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2551.)

2. Rest Period Claim

Plaintiffs allege that, prior to May 23, 2008, Wackenhut failed to have a policy which authorized and permitted off-duty rest periods, in violation of Labor Code section 226.7. The Court previously found that common issues predominated with respect to the rest period claim because some Wackenhut managers had testified in depositions that Wackenhut had a policy not to provide

1 off-duty rest periods, and there is no nature of the work exception for off-duty rest periods. (Class
2 Cert. Order [Mar. 3, 2010] at pp. 6–7.) Wackenhut disputes that this deposition testimony shows that
3 it had such a policy. (Mot. Br. at pp. 21–22.) The Court agrees with Wackenhut and finds that the
4 deposition testimony of Wackenhut managers does not conclusively establish that Wackenhut had a
5 policy of providing on-duty rest periods at every worksite, but instead shows only that Wackenhut
6 intended to place certain restrictions on rest periods at some worksites, and these restrictions may or
7 may not have rendered such rest periods on-duty.

8 The Court finds that resolving the rest period claim will entail numerous individualized
9 inquiries, and therefore common issues do not predominate. Evidence in the record shows that class
10 members at many Wackenhut worksites were provided with rest periods that lacked any restrictions
11 and appear to be fully off-duty. (See, e.g., Wackenhut Compendium of Declarations [Dec. 1, 2009],
12 Brunot Decl. ¶¶ 18–20; *id.*, Castro Decl. ¶¶ 19–20.) In fact, Plaintiffs' counsel conceded at the
13 hearing that Plaintiff Nivida Lubin "on occasion was relieved for rest breaks." (Hr'g Tr. [Jun. 12,
14 2012] at p. 28.) Wackenhut has a due process right to prove on an individualized basis that it
15 provided off-duty rest periods to class members (*Philip Morris*, *supra*, 549 U.S. at p. 353; *Lindsey*,
16 *supra*, 405 U.S. at p. 66; cf. *Wal-Mart*, *supra*, 131 S.Ct. at p. 2561), and analyzing whether any
17 restrictions placed on rest periods made them on-duty would require unmanageable individualized
18 inquiries into the nature of the rest periods for each distinct worksite, shift, and security officer
19 position.

20 Since the Court in the exercise of its discretion does not believe that a meal period class is
21 appropriate, it separately exercises its discretion to determine that it would be unwise to allow this
22 case to proceed forward on a rest-period only theory, which has its own individualized factual
23 inquiries which are separate and apart from those which bog down the meal period theory in a
24 quagmire of individualized determinations.

25 Plaintiffs argue that individualized issues can be managed through certification of a subclass
26 that is linked to the type of meal periods class members were provided because, they contend,
27 employees who received on-duty meal periods must also have received on-duty rest breaks. (Opp.
28 Br. at pp. 18–19, 23.) To that end, Plaintiffs propose certifying a subclass of "[a]ll non-exempt

Security Officers employed by Wackenhut in California during the Class Period who were required to remain at their post during their on-duty meal period." (*Id.* at p. 23.) But Plaintiffs' assumption is not necessarily true, as it is entirely possible for an employer to provide an off-duty rest period, even if it chooses to provide an on-duty meal period. Therefore, Plaintiffs' proposed shortcut does not eliminate the need for an individualized analysis of the actual rest periods provided to class members. In any event, the Court finds that this proposed subclass is not ascertainable, because determining which class members fall within the subclass would involve resolving the same individualized issues that precludes class certification of the meal period claim.

In their post-*Brinker* supplemental briefing, Plaintiffs asked the Court to reconsider certification of the rest break claim in light of *Brinker* because Wackenhut's national written rest period policy, which was based on the federal Fair Labor Standards Act ("FLSA"), did not specify all the requirements for rest periods under California law. (See Pls.' Opening Supp. Br. at pp. 6–7; Pls.' Reply Supp. Br. at p. 6.) The rest period claim in *Brinker*, however, is nothing like the one in this case. Unlike Wackenhut, Brinker had "conceded at the class certification hearing the existence of, a common, uniform rest break policy" that was "equally applicable to all Brinker employees." (*Brinker*, *supra*, 53 Cal.4th at p. 1033.) Because of this concession, evaluating the legal sufficiency of the written policy was akin to assessing the actual rest periods that were provided in practice, as there was no dispute that the policy and the practice were one and the same. By contrast, Wackenhut denies that the written documents Plaintiffs focus on represent the full extent of the rest periods that it provided to class members.

The Court finds that evidence in the record supports Wackenhut's position. It is clear on the face of the documents that they only provided guidance regarding the requirements of the FLSA, and that each region would supplement this guidance with local requirements. (See Rosen Decl. [Nov. 21, 2011], Ex. I at p. 1 ["Supervisors are additionally responsible for compliance with any other regulations of the State(s) or Commonwealth(s) in which they operate. . . . In those states and/or localities where there are statutes and/or ordinances which afford greater benefits and protection to the employee, such statutes and/or ordinances shall prevail over the Fair Labor Standards Act."]; *id.*, Ex. J at pp. 1–2 ["The Wackenhut Corporation is committed to complying with . . . all applicable

state and local laws that establish wage and other labor-related requirements that exceed the provisions of the FLSA. . . . It is important to note that in addition to the FLSA, many state and local laws have provisions that exceed the requirements of the FLSA. Examples of these types of provisions include . . . meal and rest period requirements . . . ."].) As Wackenhut Human Resources Vice President Michael Goodboe testified, these documents contained only "a basic policy" that was "not exhaustive in the sense that it's a policy for everybody everywhere." (Goodboe Dep. at p. 52:21–25.) Rather, Wackenhut "offices would be expected to add to it" because "there are state and local . . . enhancements to the legislation." (*Id.* at pp. 52:24–53:2.) And contrary to Plaintiffs' contention (see Pls.' Reply Supp. Br. at p. 6), Mr. Goodboe did not testify that there were no enhancements for California, but only that he was personally unaware of the California enhancements. (See Goodboe Dep. at pp. 53:11–54:22, 65:10–65:24.) Therefore, because Plaintiffs have failed to prove, and Wackenhut has not conceded, that its written guidance concerning the FLSA represented the full extent of the rest periods that it authorized in California, this policy is insufficient to obviate the need for individualized inquiries into the actual rest periods provided to each class member.

3. Wage Statement Claim

Plaintiffs claim that Wackenhut failed to provide accurate itemized employee wage statements because the statements allegedly lacked all three items required by Labor Code section 226(a): the beginning date of each payroll period, the regular rate of pay, and the overtime rate of pay. The Court found at class certification that because this claim was derivative of the meal and rest period claims, it was also suitable for class treatment. (Class Cert. Order [Mar. 3, 2010] at p. 7.) The Court, however, has now found that individual issues predominate with regard to the meal and rest period claims. Therefore, to the extent that Plaintiffs' wage statement claim is derivative of the meal and rest period claims, the Court finds that it is no longer suitable for class treatment.

The Court also finds that common questions do not predominate as to Plaintiffs' claim that Wackenhut's wage statements had defects unrelated to the meal and rest period claims. Although determining whether Wackenhut's wage statements contained the required elements under Labor Code section 226(a) is a common question, proving that a required element was missing does not

automatically establish liability. Instead, Plaintiffs must also prove that class members suffered injury as a result of the defect. (See Lab. Code § 226(e); *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1142–1143.) Plaintiffs conceded at the hearing that they had no direct evidence of a class representative losing money as a result of the allegedly defective wage statements (see Hr'g Tr. [Jan. 10, 2012] at pp. 72-73), and instead argued that class members must have suffered a "mathematical injury" because omissions in the wage statements made it necessary for class members to perform calculations to determine if they were paid correctly. But whether class members actually performed such calculations is an inherently individualized inquiry. Plaintiffs have identified no way in which the injury element can be proven on a classwide basis, other than by making the unwarranted assumption that a mathematical injury necessarily results whenever a wage statement is deficient (which, if accepted, would render Labor Code section 226(e)'s injury requirement meaningless).[5] Furthermore, the Court finds that *Jaimez v. DAIHOS USA, Inc.* (2010) 181 Cal. App. 4th 1286, is distinguishable because *Jaimez* involved a class of only 247 members, and the individual inquiry into each class member's injury required in this case after *Wal-Mart* would not be manageable.

CONCLUSION

For the foregoing reasons, the Court exercises its discretion in the onward supervision of this case based on further information learned and case law changes since the original class certification motion was granted. For this reason, the Court now grants Wackenhut's motion to decertify class in full and decertifies the class with prejudice. The Court stays this action pending resolution of Plaintiffs' anticipated appeal of this Order.

Dated: August 1, 2012

Hon. William F. Highberger
JUDGE OF THE SUPERIOR COURT

[5] Plaintiffs suggest that the Court follow *McKenzie v. Federal Express Corp.* (C.D. Cal. 2011), 275 F.R.D. 290, 299-300 (*McKenzie*), a case in which a federal district court certified a wage statement class involving an alleged mathematical injury. The Court does not find the reasoning in *McKenzie* persuasive. Moreover, in *McKenzie* there was evidence that class members had suffered a common mathematical injury. (*Id.* at p. 300.) There is no such evidence here.