UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Tea Station Investment, Inc., et al., Debtor(s)	Lead Case No.: 2:20-bk-14175-NB Jointly Administered With: Case No. 20-18039; Case No. 20-18041; Case No. 20-18042; Case No. 20-18043; Case No. 20-18044; Case No. 20-18046; Case No. 20-18047 Affects all Debtors Chapter 11

MEMORANDUM DECISION SUSTAINING OBJECTION TO CLASS CLAIM OF MS. BAODI ZHOU

Prior Hearings:
Date: May 4, June 15, and Aug. 3, 2021
Time: 1:00 p.m.

Current Hearing:
Date: October 26, 2021
Time: 1:00 p.m.
Place: Courtroom 1545
255 E. Temple Street
Los Angeles, CA 90012
Or via Zoomgov

1. OVERVIEW

Debtors object ("Claim Obj.," dkt. 184) to the proofs of claim filed by former employee Baodi Zhou ("Ms. Zhou") against each Debtor in these jointly administered cases. Ms. Zhou asserts wage and hour claims of over $7 million on behalf of herself and other employees of each Debtor.

Debtors describe themselves as operators of stores "much like a Starbucks, but for tea," each store "primarily serv[ing] tea but also hav[ing] a small food menu," and with employees doing different jobs, "such as cooks, cashiers or servers." Claim Obj. (dkt. 184), pp. 9:18-10:18. Ms. Zhou was a cook at the store operated by lead Debtor Tea Station Investment, Inc. ("Debtor TSI").

In prior rulings, this Court has limited the parties' litigation, for now, to Debtor TSI. But, if Ms. Zhou can establish class claims against Debtor TSI, all rights are reserved for her to seek to expand these proceedings to address claims against other Debtors, and conversely for Debtors to assert that no such expansion is warranted. *See, e.g.,* Claim Obj. (dkt. 184), pp. 9:18-11:1.

For the reasons set forth below, this Court concludes that Ms. Zhou lacks the mandatory requirements to assert a class claim against Debtor TSI and, therefore, against any other Debtors. She can assert only her own claim. Because she has not presented sufficient argument and evidence to allow and estimate her own claim, this Court makes no ruling allowing or disallowing that claim at present.

2. BACKGROUND

Ms. Zhou initiated her action against Debtors in State Court in September of 2017. Zhou Supp. (dkt. 245), p. 8:15. But after the inception of the COVID-19 pandemic Debtors closed all their stores and, shortly before the deadline for Ms. Zhou to file her motion for class certification in State Court, lead Debtor TSI filed its bankruptcy petition, followed by the remaining Debtors. *Id.,* p. 8:16-24.

Ms. Zhou alleges that Debtors: (1) failed to provide compliant meal breaks and pay missed meal break premiums, (2) failed to provide compliant rest breaks and pay

missed rest break period premiums, (3) failed to pay for all hours worked or for overtime, due to time rounding and time shaving, and (4) failed to provide complete and accurate itemized wage statements. Zhou Supp. (dkt. 245), pp. 7:12-16, 10:1–19:2, 21:6–26:13. Debtors do not specifically dispute the following summaries of the key aspects of California law provided by Ms. Zhou, which this Court accepts for purposes of this discussion:

> **Meal periods.** In California, "[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes .... [Also, an] employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes .... [Employers who fail to provide such meal periods must pay] one additional hour of pay at the employee's regular rate of compensation for each work day that the meal … is not provided." [Zhou Supp. (dkt. 245), pp. 22:26-23:8 (emphasis added) (citing Cal. Lab. Code, §§ 226.7, 512; Cal. Code Reg. tit. 8, § 11050 Subd. 11(A)&(B)).]
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> **Rest breaks.** According to Ms. Zhou, Debtor TSI must "authorize and permit [Ms.] Zhou and the other TSI employees to take a net ten-minute rest period for each scheduled work shift of four hours or major fraction thereof." [Zhou Supp. (dkt. 245), p. 16:17-20 (emphasis added) (citing Cal. Lab. Code § 226.7, Wage Order No. 5-2001; Cal. Code of Reg., tit. 8, § 11050.]
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> **Presumption.** An employer may not pressure employees to perform their duties in ways that omit breaks. "[I]f the employer's records do not show that a legally-complaint meal period was taken on a particular day, then a rebuttable presumption arises that a compliant meal period was not taken that day" and, in that event, the burden is on Debtor TSI to rebut that presumption. [Zhou Supp. (dkt. 245), pp. 23:20-24:9 (citations omitted, emphasis added).]
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> **Overtime.** "Any work in excess of eight hours in one workday and 40 hours in any one workweek and their first eight hours worked on the seventh day

of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." [Zhou Supp. (dkt. 245), p. 22:15-18 (emphasis added) (citing Cal. Lab. Code § 510(a)).]

Proposed class. This Court previously ruled that Ms. Zhou could not represent any former employees in asserting any claims entitled to priority under the Bankruptcy Code (*see* 11 U.S.C. § 507(a)(4) & (5)), because of the inherent conflicts of interest between priority and nonpriority claims. *See* Order (dkt. 225) *and* Order (dkt. 226), p. 2:13-15. As noted above, this Court also limited Ms. Zhou's claims (at least for now) to those against Debtor TSI. *Id.,* pp. 2:21-3:2 & Ex. A at PDF p. 10 of 11, *and* Order (dkt. 227). Based on these constraints, Ms. Zhou proposes a class consisting of "all persons who are or were employed in hourly non-exempt positions … by debtor TSI in the State of California from September 13, 2013 (four years prior to the filing of the initial complaint) to November 6, 2019 (immediately preceding the start of the priority period) [the 'Proposed Class'] …." Zhou Supp. (dkt. 245), p. 9:17-21.

3. JURISDICTION, AUTHORITY, AND VENUE

This Bankruptcy Court has jurisdiction, and venue is proper, under 28 U.S.C. §§ 1334 and 1408. This Bankruptcy Court has the authority to enter a final judgment or order under 28 U.S.C. § 157(b)(2)(A) (administration), (B) (claim allowance) and/or (O) (other proceedings affecting adjustment of debtor-creditor relationship). *See generally Stern v. Marshall*, 131 S. Ct. 2594 (2011); *In re Deitz*, 469 B.R. 11 (9th Cir. BAP 2012) (discussing *Stern*); *In re AWTR Liquidation, Inc.*, 547 B.R. 831 (Bankr. C.D. Cal. 2016) (same).

Alternatively, even if this were a non-core proceeding (which it is not), the parties have implicitly consented to this Bankruptcy Court's entry of a final judgment or order. *See Wellness Intern. Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015); *and see In re Pringle*, 495 B.R. 447 (9th Cir. BAP 2013). *See also* LBR 9013-1(c)(5) & (f)(3). Alternatively, this Bankruptcy Court can issue final rulings on pretrial matters that do not

require findings on disputed factual issues, including claim-dispositive motions. *See* *AWTR Liquidation*, 547 B.R. 831, 839 (citing authorities).

4. LEGAL STANDARDS

a. Streamlined Procedures Are Necessary And Appropriate Under § 502(c)

A claim objection is a "contested matter" that does not require a summons and complaint and the associated, more formal procedural requirements (with inapplicable exceptions). *See* Rules 3007(b), 7001. In addition, as this Court previously determined (Order, dkt. 226), Ms. Zhou's claims are unliquidated and fully litigating Ms. Zhou's class action wage and hour claims would unduly delay the administration of this case, so claim estimation is required:

> There shall be estimated for purposes of allowance … (1) any … unliquidated claim, the … liquidation of which …would unduly delay the administration of the case. [§ 502(c), emphasis added.]

"A claim is unliquidated when it is not subject to ready determination and precision in computation of the amount due." *In re Castellino Villas, A.K.F. LLC*, 836 F.3d 1028, 1033 (9th Cir. 2016) (citation and internal quotation marks omitted). Ms. Zhou's claims are unliquidated because they rely upon several types of uncertain data, some of which can only be estimated. Those data include the number of days worked by each employee, the number, length, and frequency of breaks taken by each employee (which may be very difficult to determine with accuracy), and the hourly pay rate for each employee. *See* Order (dkt. 226), Ex. A, part "(1)(c)(iv)" (at PDF p. 9). Therefore, her claims and the potential claims of other former employees are "not subject to ready determination and precision." *Castellino Villas*, 836 F.3d 1028, 1033.

The method used to estimate the value of an unliquidated claim is subject to this Court's discretion. *See, e.g., In re Corey,* 892 F.2d 829, 834 (9th Cir. 1989); *In re Brints Cotton Mktg., Inc.,* 737 F.2d 1338, 1341 (5th Cir. 1984) ("whatever method is best suited to the circumstances"). This Court is not required to apply the same exactitude that would be applied outside of bankruptcy – that would defeat the purpose of estimation. Rather, this Court has a duty to "reasonably estimate the probable value of the claim."

Pac. Gas & Elec. Co., 295 B.R. 635, 642 (Bankr. N.D. Cal. 2003) (citation and internal quotation marks omitted, emphasis added).

In addition, this Court has discretion to limit discovery and other aspects of this litigation, both under § 502(c) and under this Court's more general powers. *See, e.g.,* Rule 9014(c) (discretion in applying usual rules of civil procedure); *In re The Bible Speaks,* 65 B.R. 415, 427 (Bankr. D. Mass. 1986) (reviewing various discretionary aspects of claims estimation proceedings, including "limited discovery") (citations omitted). In addition, Debtor cites authority for limiting discovery in the labor and wage context. *See* Claim Obj. (dkt. 203), *passim*.

Streamlined procedures are particularly appropriate in this matter because otherwise the costs of litigation would consume a large portion, if not all, of any assets that are available to pay creditors. That would prejudice not only third party creditors but also Ms. Zhou herself, and members of her Proposed Class, and endanger Debtors' ability to reorganize in chapter 11 at all.

This Court previously directed the parties to address whether discovery in the prepetition State Court proceedings "has already covered the limited scope of initial discovery outlined [by this Court] (limited to Ms. Zhou's own claims, and to the one Debtor that directly managed the location at which Ms. Zhou worked)." Order (dkt. 226) Ex. A, part "(1)(d)" (at PDF p. 10). The parties informed this Court, at the hearing on May 4, 2021, that substantial discovery had already taken place in the State Court proceedings.

In addition, based on this Court's review of which factual issues are and are not disputed, and application of the law to the largely uncontested facts as set forth below, this Court is not aware of any reasons why testimony would materially advance the claims estimation process. For all of the foregoing reasons, this Court previously has limited discovery (*see* Order, dkt. 227) and now exercises its discretion to resolve this matter "on affidavits" and existing "depositions" without the necessity for additional discovery or oral testimony in court, pursuant to Rule 43(c) (incorporated by Rule 9017).

In sum, claims estimation using streamlined procedures is appropriate under § 502(c). *See generally In re Nicholson,* 435 B.R. 622, 635-37 (9th Cir. BAP 2010) (discussing when evidentiary hearing is required), *abrogated on other grounds, as stated in In re Elliott*, 523 B.R. 188 (9th Cir. BAP 2014).

b. Alternatively, Streamlined Procedures Are Necessary And Appropriate Under The Standards Applicable To Class Claims In Bankruptcy

As further described below, this Court has discretion whether to apply Rule 23 to the claims administration process, and one of the factors that this Court must consider is whether class certification would "adversely affect the administration of this bankruptcy case." *In re Musicland Holding Corp.,* 362 B.R. 644, 654 (Bankr. S.D.N.Y. 2007) (citations omitted). Absent streamlined procedures, including limitations on discovery, the resulting costs and delays in liquidating Ms. Zhou's claims would have a very adverse impact on the administration of this case. As noted above, the costs and delays of litigation could effectively undermine any prospect of Debtors' financial reorganization and ability to pay creditors, including Ms. Zhou and the Proposed Class. This is an alternative reason why streamlined procedures are appropriate.

c. Alternatively, Most Of The Issues Presented Can Be Resolved By Applying Summary Judgment Standards

On most issues, Debtors' claim objection effectively asserts that no genuine and disputed issues of material fact remain, and, when viewing the evidence and inferences therefrom in the light most favorable to the non-moving party (Ms. Zhou), Debtors are entitled to prevail as a matter of law. In other words, on most issues Debtors essentially seek summary judgment under Rule 7056 (made applicable by Rule 9014(c)).

The parties have not specifically structured their arguments as seeking or opposing summary judgment, but nor have they argued for any other standards in this claim estimation context, and this Court is not aware of any reason why summary judgment standards could not be applied. *See Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23

(1986). Under those standards, a mere "scintilla" of evidence in opposition to summary judgment is insufficient. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986). This Court applies the other, well established interpretations of each element of the foregoing standard.

"Genuine": If one party's "version of events is so utterly discredited by the record that no reasonable jury could have believed him" summary judgment is appropriate. *Scott v. Harris,* 550 US 372, 380 (2007). But the Ninth Circuit has observed that "cases where intent is a primary issue generally are inappropriate for summary judgment[.]" *Provenz v. Miller,* 102 F.3d 1478, 1489 (9th Cir. 1996).

"Material": Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, could affect the outcome of the case. The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). At the summary judgment stage, the court does not weigh the evidence and determine the truth of the matter, but determines whether there is a genuine issue for trial. *Id.* at 249.

Shifting burdens: The moving party bears the initial burden of showing that there is no genuine issue of material fact. If the moving party meets its initial burden, the burden then shifts to the non-moving party to set out, by affidavits or admissible discovery material, specific facts showing a genuine issue for trial. *Celotex*, 477 U.S. at 324. The party opposing summary judgment must produce affirmative evidence that is sufficiently probative on the issue that a jury reasonably could rely on that evidence to decide the issue in his or her favor at trial. *Matsushita Elec. Indust. Co., Inc. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Without such evidence, there is no reason for a trial. *Celotex*, 477 U.S. at 323.

Evidence: The evidence presented by the parties must be admissible, or at least it must be capable of later being presented in admissible form if the

litigation were to proceed to trial. *JL Beverage Co., LLC v. Jim Beam Brands Co.,* 828 F.3d 1098, 1110 (9th Cir. 2016).

This Court has applied summary judgment standards as an *alternative* ground for granting the relief set forth below.

d. Class Claim Standards

For Ms. Zhou to assert a claim on behalf of other employees, she must establish either (i) that she is their representative (*e.g.,* that she holds their power of attorney), which she has not established, or (ii) that she can assert a class claim under Rule 23, which is the focus of the parties' arguments. The latter issue requires a two step inquiry.

(i) The *Musicland* Factors For Applying Rule 23

First, under Rules 9014(c) and 7023, this Court has discretion whether to apply Rule 23 to the claims administration process. If so, this Court must determine whether the requirements of Rule 23 have been satisfied.

In applying the first step, courts have developed a three factor framework, known as the "*Musicland* factors," to guide the exercise of their discretion:

(1) whether the class was certified prepetition – which it was not;

(2) whether the members of the putative class received notice of the bar date – which is discussed further below; and

(3) whether class certification will adversely affect the administration of the estate – which is also discussed below. *See Musicland,* 362 B.R. 644, 654; *In re Chaparral Energy, Inc.,* 571 B.R. 642, 646 (Bankr. D. Del. 2017).

"No one factor is dispositive; a factor may take on more or less importance in any given case." *Chaparral Energy,* 571 B.R. 642, 646. The key question is "whether the benefits of applying Rule 7023 (and Civil Rule 23) are superior to the benefits of the standard bankruptcy claims procedures." *Gentry v. Siegel,* 668 F.3d 83, 93 (4th Cir. 2012).

(ii) Rule 23 Elements

Turning to the second step, after the *Musicland* analysis, Rule 23 provides, in relevant part:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all only if
> (1) the class is so *numerous* that joinder is impracticable [the "*Numerosity*" requirement],
> (2) there are questions of law or fact *common* to the class [the "*Commonality*" requirement],
> (3) the claims or defenses of the representative parties are *typical* of the claims or defenses of the class [the "*Typicality*" requirement], and
> (4) the representative parties will *fairly and adequately* protect the interests of the class [the "*Adequacy*" requirement].
> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
> (1) prosecuting *separate actions* by or against individual class members would create a risk of
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
> * * * or
> (3) 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. The matters pertinent to the findings include:
> (A) the class members' interests in *individually controlling* the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy *already commenced* by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular *forum*; and
> (D) the likely difficulties in *managing* a class action. [Rule 23 (Fed. R. Civ. P.) (emphasis added).]

If Rule 23 applies at all (step one of the *Musicland* test), the burden will be on Ms. Zhou to meet the prerequisites of Rule 23(a) and meet at least one of the requirements of Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541, 2550-51 (2011); *Ellis v. Costco Wholesale Corp.,* 657 F.3d 970, 979-80 (9th Cir. 2011).

Class certification is, ultimately, within the discretion of this Court (*Califano v. Yamasaki,* 442 U.S. 682, 703 (1979)), after a "rigorous analysis" of Rule 23's elements. *Wal-Mart,* 131 S.Ct. 2541, 2551 (citation omitted). Frequently that analysis will entail "some overlap with the merits" of the underlying claims. *Wal-Mart,* 131 S.Ct. 2541, 2551-52 (citations omitted).

5. ANALYSIS

a. Under *Musicland*, Rule 23 Should Apply

On the one hand, Ms. Zhou's Proposed Class was not certified prepetition, so the first *Musicland* factor weighs against applying Rule 23 to the claims administration process. In addition, Debtors assert (without any contrary argument by Ms. Zhou) that the vast majority of any potential claims by individual employees of Debtors are now barred by a three year statute of limitations under California law applicable to wage and hour violations, so certifying a class at this time "would allow [Ms.] Zhou to revive claims that have long since expired." Claim Obj. (dkt. 184), pp. 17:25-18:4.

On the other hand, as noted above, no single factor is dispositive, and courts sometimes have exercised their discretion to apply Rule 23 in such circumstances. *See In re Verity Health System of Cal., Inc.,* 2019 WL 2461688 at *8 (Bankr. C.D. Cal.) (citing cases). In addition, this Court believes that the time-bar issue is best analyzed under the Rule 23 standards, rather than under the first *Musicland* factor, because Rule 23 can distinguish between any potential members of the Proposed Class whose claims might be timely and those whose claims are time-barred, whereas if this Court were to decline to apply Rule 23 at all then even timely claims would be barred because the claims bar date in these bankruptcy cases has already passed.

In addition, the second *Musicland* factor – whether the members of the putative class received notice of the bar date – weighs in favor of applying Rule 23 because, although Debtors provided actual notice of the claims bar date to employees who were terminated just prior to the Petition Date, they did not provide such notice to former employees (except for those persons employed within 180 days prepetition, pursuant to

this Court's order directing Debtor to provide notice to the holders of such potential priority claims). *See* Order (dkt. 225); 11 U.S.C. § 507(a)(4) & (5). *See Verity Health,* 2019 WL 2461688 at *8-9.

True, it might have been unrealistic for Debtors to have provided more notice to such former employees than it asserts was already provided by reporting in Chinese language newspapers near Debtors' stores about their closing. Debtors have presented evidence that former employees are difficult to locate because turnover is high and many former employees have returned to mainland China or Taiwan. Kao Decl. (dkt. 279), p. 2:13-16.

But the fact remains that an unknown number of former employees likely have not received notice of Debtors' bankruptcies and the bar date. If Ms. Zhou is able to obtain class certification and allowance of class claims, there will be funds available, which may provide an incentive for former employees to identify themselves. Therefore, in this Court's view, the second *Musicland* factor cuts in favor of class certification.

In addition, the third *Musicland* factor – whether class certification will adversely affect the administration of the estate – also weighs somewhat in favor of applying Rule 23. As explained in *Verity Health*:

> In applying the third factor, courts consider whether class certification would delay or interfere with the debtor's ability to make distributions under a plan. For example, in *Musicland,* the court found that the third factor weighed against invoking Civil Rule 23 where the class certification motion was filed after the court had begun the confirmation hearing. *Musicland,* 362 B.R. at 656. The court reasoned that the late introduction of a significant claim would delay the debtor's ability to confirm a plan by creating unforeseen issues as to plan feasibility. *Id.* Applying the same logic, the court in *Chapparal Energy* held that certification would not interfere with the plan, because the debtors intended to proceed with confirmation and consummation of the plan notwithstanding an outstanding objection to the class proof of claim. *Chapparal Energy,* 571 B.R. at 648–49. [*Verity Health,* 2019 WL 2461688 at *9.]

In this case, Debtors are not at the stage of confirming any plan(s) of reorganization. True, there is some delay in reaching that stage due to the existence of Ms. Zhou's Proposed Class claim. But that is no different from any resolution of

disputed claims that have a significant impact on a debtor's proposed financial restructuring.

As in *Verity Health,* "Of particularly significance to [this] Court is that absent application of … Rule 23, former employees of the Debtors who lacked actual notice of the bar date would be prejudiced." *Verity Health,* 2019 WL 2461688 at *9. Taking all of the foregoing into consideration, this Court concludes in the exercise of its discretion that Rule 23 should apply.

b. Under Rule 23(a), Ms. Zhou Has Not Carried Her Burden To Satisfy The Typicality, Commonality, Numerosity, And Adequacy Of Representation Requirements

As noted above, the analysis under Rule 23 starts with whether Ms. Zhou has met her burden to prove the Typicality, Commonality, Numerosity, and Adequacy Tests of Rule 23(a). This Court must make a "rigorous analysis" of each requirement, although in practice the separate requirements tend to merge. *See, e.g., Wal-Mart,* 131 S.Ct. 2541, 2551 n. 5 ("[t]he commonality and typicality requirements of Rule 23(a) tend to merge. … Those requirements … also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.") (citation and internal quotation marks omitted).

Ms. Zhou asserts that she has met her burden to meet the elements of Rule 23 with respect to a putative class of "all persons employed by [Debtor TSI] at any time from September 13, 2013 to November 6, 2019" and that the class claim as against Debtor TSI should be estimated, at a minimum, at $1,825,327.88. Zhou Supp. (dkt. 245), p. 7:1-8. This Court disagrees.

(i) Typicality – meal breaks, rest breaks, overtime, and alleged time shaving

Ms. Zhou alleges that "the time and wage records produced, at least from the time prior to [her] filing of her initial complaint, do not include a single meal or rest period

premium, which confirms [her] theory that [Debtor] TSI's policy and practice was to never pay premiums." Zhou Supp. (dkt. 245), p. 25:16-18. Debtors do not dispute that failure to provide breaks, pay premiums, or pay overtime *can* support claims, and that time rounding *can be* an unlawful evasion of wage and hour requirements, if the rounding is in Debtors' favor. *Donohue v. AMN Servs., LLC*, 11 Cal. 5th 58 (2021); *See's Candy Shops, Inc. v. Superior Ct.*, 210 Cal. App. 4th 889, 907 (2012).

As Ms. Zhou argues, and this Court agrees, a complete lack of any premiums would require either perfection or, more likely, a "deep, system-wide error" in failing to pay such premiums; and such failures by employers can be the basis for class certification. *See* Zhou Supp. (dkt. 245), p. 25:16-18 (citing *inter alia Safeway, Inc. v. Superior Ct.,* 238 Cal. App. 4th 1138, 1153 (2015)). Accordingly, this Court assumes for purposes of the following discussion that, in at least some number of instances, Debtor did not provide adequate meal breaks or rest breaks or compensation for any missed breaks. This Court leaves open, for now, whether the number of instances can be reliably estimated, and whether Ms. Zhou's own experience has sufficient Typicality on this issue.

This Court notes that the standard for Typicality is not extremely high. For "representative claims" to be "typical" they need not be substantially identical" but they must be "reasonably co-extensive with those of absent class members. *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir. 1998).

The Court of Appeals for the Ninth Circuit has stated:

> The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct. … Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. [*Ellis v. Costco,* 657 F.3d 970, 984 (emphasis added).]

On the other hand, when a named plaintiff had a "unique background and factual situation" that "required him to prepare to meet defenses that were not typical of the defenses which may be raised against other members of the proposed class," that did

not satisfy Rule 23(a)'s Typicality requirement. *Ellis v. Costco,* 657 F.3d 970, 984 (citation and internal quotation marks omitted).

Debtors assert that Ms. Zhou's factual circumstances are unique, and that the nature of her claims is different from potential claims of other employees.

> [Ms.] Zhou's duties and hours as a **kitchen staff member** were completely different from the cashier staff and serving staff. Thus, [Ms.] Zhou's claims of not being allowed breaks or having to work overtime at her store because she was the sole cook in the kitchen were necessarily different from the experiences of the other employees, not only within her store, but from the other stores, as well. Thus, [Ms.] Zhou' Claims lack typicality. [Claim Obj. (dkt. 184), p. 22:1-7 (emphasis added).]

Debtors also assert:

> [Ms.] Zhou claimed that she had to work overtime and was not allowed breaks because she worked the night shift and was **often the only cook in the kitchen** during her employment. Thus, [Ms.] Zhou's claims of not being allowed breaks or having to work overtime [were] unique to her and necessarily different from the experiences of the other employees because she was the sole cook in the kitchen. [Debtors' Supp. (dkt. 234), pp. 3:23-4:5 (citations to evidence omitted, emphasis added).]

Debtors provide two forms of evidentiary support for these allegations. First, Debtors provide their own testimony that the duties and hours of kitchen staff members generally, and Ms. Zhou in particular, were not typical of other employees:

> The Tea Station stores primarily serve tea but also have a small food menu. Each store employs workers to perform services such as cooks, cashiers or servers. Each group worked different hours and shifts. [Huang Decl. (dkt. 186), p. 2:22-24 (emphasis added).]
>
> According to [Debtor] TSI's records [before it switched to ADP as its payroll processor], of the 130 employees, only 18 were employed by TSI as kitchen staff [and] 5 of those 18 employees signed settlement agreements. … Of the 18 kitchen staff employees, 10 of them worked for [Debtor] TSI less than a year (9 worked for less than 6 months). Of the remaining 8 who worked for more than a year, only 5 were full time, along with Ms. Zhou. Only 4 of those 5 worked the night shift. [Hung Supp. Decl. (dkt. 235), pp. 2:24-3:3]
>
> Based on [Debtor] TSI's records, Ms. Zhou was employed only as a cook in TSI's store from 2008 to 2015, and **primarily worked the night shift**, although she did occasionally work the morning or day shift. … **Most morning and daytime shifts did not work overtime as there was usually another shift coming in after to replace the prior shift**. Only the night-time shift might *sometimes* but very rarely, work more than 8 hours due to post-closing duties. … Most of the kitchen staff did not work alone. **Ms. Zhou was the only kitchen staff member who worked alone** during some night shifts towards the end of her employment because she had been a long-time

> employee. [Huang Supp. Decl. (dkt. 235), p. 2:12-14, p. 2:26-28, *and* p. 3:4-6 (underlining and boldface added; italics in original).]

Second, Debtors cite to Ms. Zhou's deposition in which (a) she testified that she lacks knowledge about other people's work situation – *i.e.,* she has to rely on some evidence other than her personal knowledge to establish Typicality and the other requirements to apply Rule 23 – and (b) she acknowledged that "[o]ther people took breaks":

> Q … Do you know if there were any employees outside of the kitchen who didn't take a meal break?
> A I have absolutely no idea about people working outside. [Pham Decl. (dkt. 185), ¶ 5 & Ex. B, Tr. (12/10/19), p. 79:23-80:2 (at PDF pp. 75-76).]
> Q … [H]ow many times a week did you not take a break to eat[?]
> A Previously, when I work alone on night shift, almost none. [Pham Decl. (dkt. 236), Ex. D, Tr. (12/10/19), pp. 67:23-68:1 (at PDF pp. 8-9).]
> Q … Did you ever ask anyone that you needed a break to eat?
> A When there were two of us working, then I would ask the other individual. [*Id.,* p. 68:19-22 (at PDF p. 9).]
> Q Did you ever talk to any of the other employees about how many rest breaks you're entitled to take?
> A We talked. **Other people took breaks**, but we did not take breaks. [*Id.,* p. 70:7-11 (at PDF p. 11) (emphasis added).]
> Q Do you know whether any of the employees at the Tea Station where you worked took at least two breaks a day?
> A I don't know.
> Q What about other people outside the kitchen staff? Do you know if they took at least two breaks a day?
> A I don't know at all.
> Q What about meal breaks? … Do you know if [named workers] all took their meal breaks every day? …
> A I'm not certain about them.
> Q Okay. How about other people outside of the kitchen? Do you know if there were any employees outside the kitchen who didn't take a meal break?
> A I have absolutely no idea about people working outside [the kitchen]. [*Id.,* pp. 79:5-80:2 (at PDF pp. 16-17) (emphasis added).]

In opposition to the foregoing arguments and evidence, Ms. Zhou relies primarily on her attorneys' analysis based on an allegedly "random" sampling of pay records for eighteen employees. Decl. of David Grimes (dkt. 245) pp. 2:16–4:28, Ex. 2, Ex. 15. While statistical evidence may be supplied to help establish "an employer's centralized practices," such evidence must be accompanied by some factual evidence linking members of a class, to avoid the use of statistical sampling to "manufacture predominate common issues where the factual record indicates none exist." *Duran v.*

U.S. Bank National Assn., 59 Cal. 4th 1, 31 (2014) ("*Duran I*") (emphasis added; citation and internal quotation marks omitted) (applying California class certification standards, similar to Rule 23(a)). More broadly, statistical evidence used to establish potential classwide injury must be reliable and any sampling of putative class members used to prepare such evidence must be representative of the class. *See Tyson Foods, Inc., v. Bouaphakeo*, 136 S. Ct. 1036, 1046-49 (2016); *Ellis v. Costco,* 657 F.3d 970, 981-84; *Duran I,* 59 Cal. 4th 1, 38-49.

Ms. Zhou has not explained the methodology for the statistical evidence provided beyond labeling the sample as "random." Supp. Reply (dkt. 256) p. 4:9–15. For example, she provides no information about whether each employee was assigned a number and then computer-generated random numbers used to select the employees (without re-running the computer to generate more numbers), or whether some other "random" process was used. Nor does she address the statistical "margin of error" given such considerations as (i) the sample size, (ii) the overall number of employees for whom data is available, and/or (iii) any other relevant considerations – *e.g.,* should an employee who worked 10,000 hours over 5 years be more likely to be sampled than one who worked 50 hours over 2 weeks, or should they be equally likely to be sampled? This Court does not know the answer: the point is only that Ms. Zhou does not address the issues that would be needed to support the reliability of her "random" sample, and to show that the results are representative of her Proposed Class. *See Duran v. U.S. Bank N.A.*, 19 Cal.App.5th 630, 640 (2018) ("*Duran II*") ("far larger sample sizes" would be required for reliability of statistical sampling, under similar California standards for class certification).

The absence of any such explanations of Ms. Zhou's methodology is particularly significant because the analysis was not prepared by a statistician or some other qualified expert. *See Ellis v. Costco,* 657 F.3d 970, 981-84. As noted above, the "random" sample was prepared by Ms. Zhou's own counsel, and although his analysis of the data he collected appears to reflect the thoughtful and skillful work of a lawyer

within the scope of what he did, he does not address the margin of error, or anything else that a trained statistician might address.

In addition, the fact that the time records selected by Ms. Zhou's counsel show some rounding of hours is not, by itself, enough to establish that Debtor TSI has done anything wrong. Debtors have cited authority that rounding hours is not impermissible so long as it has an overall neutral effect; and although Debtor TSI appears to have rounded down, not up, Debtor TSI also asserts that its employees had a practice of clocking in early and clocking out late (Kao Decl. (dkt. 279) p. 3:4-11), so it is not clear that the rounding had anything more than a neutral effect. *See, e.g., See's Candy,* 210 Cal. App. 4th 889; *Verity Health,* 2019 WL 2461688 at *12.

To be clear, this Court is not presuming that Debtor TSI's allegations about employees clocking in early or clocking out late are true. The point is, rather, that this Court cannot presume the contrary: this Court cannot assume, based on the limited data provided by Ms. Zhou, that there are in fact a wage and hour violations, and that any alleged violations as to Ms. Zhou are typical of any violations as to other employees.

True, as noted above, it is highly suspicious that Debtor TSI did not pay ***any*** premiums for additional hours worked, and that sort of "perfection" is doubtful on its face in human endeavors. But a lack of "perfection" cuts both ways.

An employee who commutes may show up early and clock in before the previous shift is done and before actually starting work; and during breaks or at the end of a shift it is easy to forget to clock in or out right away. In fact, Debtors present evidence that Employees regularly did not clock in or out precisely on time. *See* Kao Decl. (dkt. 279), pp. 2:16-22, 3:4-11 (asserting that, due to employees clocking in early or out late, Debtor TSI often *overpaid* employees); Huang 3d Supp. Decl. (dkt. 280) p. 2:6-17

(evidence that time not included in one pay period was included in the next, and that employees check time cards and paychecks "very carefully").[1]

Debtors also present evidence that Ms. Zhou herself forgot to clock back in on one occasion (which she had pointed to as an alleged error in Debtor TSI's records). Huang 3d Supp. Decl. (dkt. 280) p. 2:18-23. This Court makes no presumption one way or the other – perhaps Debtor is correct, and perhaps Mz. Zhou is correct – the only point is that these types of human errors exist, and that makes Ms. Zhou's statistical evidence all the less reliable, and her assertion of Typicality unsupported.

In addition, Ms. Zhou's factual circumstances do not appear likely to be similar to those for other employees. To illustrate, suppose that a server works some extra minutes even after their shift has finished, perhaps to finish up with one table of customers to get the table's tip, while another server starts on the rest of the tables. First, Debtors provide evidence that there was no room in the kitchen for that sort of overlap, in which one shift could start before the other finished (*see* Kao Decl. (dkt. 279), p. 2:26-28) and Ms. Zhou has not presented any contrary evidence. Second, in the above hypothetical situation, the server has an incentive to work voluntarily a few extra minutes (to get the table's tip), whereas Ms. Zhou has not presented any evidence that she, as a kitchen worker, had any such incentive.

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[1] Debtors present a former employee's declaration to the same effect. *See* Chao Decl. (dkt. 258, 259), p. 3:19-26. Ms. Zhou has objected that she has not had the opportunity to depose this employee (*e.g.,* dkt. 260, p. 2:10-16), so this Court places no reliance on this declaration for purposes of this Memorandum Decision.

Debtor has also presented the declarations of seventeen former employees affirming that "I have always been allowed to take all of my break periods and meal periods" and "I do not do any work while on my break and meal periods and I am not required to remain on the premises during my meal break." Employee Decls. (dkt. 237), at PDF p. 4, ¶ 5, and passim. But this Court has not relied on those declarations, for several reasons. For one thing, Ms. Zhou questions whether those seventeen employees were provided adequate information (*see generally* Zhou Supp. (dkt. 245), p. 30:4-10, questioning accuracy of translation), including whether they knew the breaks to which they were legally entitled. For another thing, while those employees were still employed they may have felt pressured to sign their declarations, notwithstanding statements in the declarations themselves that they did not. *See* Zhou Supp. (dkt. 245), pp. 31:12-32:12. *See also, e.g., Kirby v. Kindred Healthcare Operating, LLC,* 2020 WL 4639493 at *3 (Dist. Ct., C.D. Cal. 5/1/2020) ("the risk of coercion and abuse is higher in the context of an employer-employee relationship") (citation omitted); *Morden v. T-Moblie USA, Inc.,* 2006 WL 2620320 at *2 3 (Dist. Ct., W.D. Wash. 9/12/2006) (decided under different laws, "not subject to the numerosity, commonality, and typicality rules of a class action suit under Rule 23," but stating, "the Court will discount [99] declarations [from current employees] because of the risk of bias and coercion inherent in that testimony") (citations omitted).

In other words, not only has Ms. Zhou failed to meet her burden to show Typicality, but Debtors have presented substantial evidence to the contrary, in the form of evidence that Ms. Zhou's situation as a cook who often worked alone on the night shift is different from the situation of the vast majority of other employees, if not all of them. In practical terms, Debtors have shown that the evidence presented by both sides at any trial would be very different for Ms. Zhou than for most if not all other members of the Proposed Class.

Taking a different tack, Ms. Zhou asserts that Debtor TSI's written rest break policy is "facially deficient." Zhou Supp. (dkt. 245), p. 17:10-12. But, "[e]ven when the party proposing a class asserts 'the employer consistently imposed a uniform policy or *de facto* practice on class members, the party must still demonstrate that the illegal effects of this conduct can be proven efficiently and manageably within a class setting.'" *Duran II,* 19 Cal.App.5th 630, 647 (quoting *Duran I*, 59 Cal.4th 1, 29) (other citations omitted) (applying California law similar to Rule 23(a)). Thus, as stated in a different context, "a declaratory judgment that the policy was unlawful would resolve *nothing* …." *Duran II,* 19 Cal.App.5th 630, 646 (emphasis in original). In other words, Ms. Zhou cannot rely on Debtors' policy manuals to supply the Typicality that she has otherwise failed to show.

In sum, if Ms. Zhou's circumstances were more typical, it probably would not matter that individual employees' particular circumstances vary; but Ms. Zhou has not shown Typicality. Debtor has presented unrebutted evidence that Ms. Zhou's situation as a cook who generally worked alone on night shifts lacks Typicality with other members of the Proposed Class with respect to meal breaks, rest breaks, overtime, and alleged time shaving. For these reasons, class certification must be denied with respect to all those types of claims.

(ii) Commonality

The Commonality requirement "has been construed permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "The existence of shared legal

issues with divergent factual predicates is sufficient [for Commonality], as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.* (emphasis added). Indeed, a single common issue of law or fact can be sufficient for purposes of Rule 23(a)(2). *Wal-Mart,* 131 S.Ct. 2541, 2556; *California Rural Legal Assistance, Inc. v. Legal Servs. Corp.,* 917 F.2d 1171, 1175 (9th Cir. 1990).

But "the common issues must be of sufficient importance to the case that the Court is convinced that the most efficient method of determining the rights of the parties is through a class action." *Krzesniak v. Cendant Corp.,* 2007 WL 1795703 at *7 (Dist. Ct., N.D. Cal. 6/20/2007). In addition, the Supreme Court has cautioned that the Commonality requirement is "easy to misread" because:

> any competently crafted class complaint literally raises common "questions." For example: Do all of us plaintiffs indeed work for [the employer]? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can **productively be litigated at once**. Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of class-wide resolution – which means that 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.
>
> What matters to class certification ... is not the raising of common questions – even in droves – but, rather the capacity of a classwide proceeding to generate **common *answers* apt to drive the resolution of the litigation**. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.
>
> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. … Frequently [the required] "rigorous analysis" [to assure satisfaction of Rule 23(a)] will entail some overlap with the merits of the plaintiff's underlying claim.
>
> In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination. That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is the reason for a particular employment decision.

> Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question[,] *why was I disfavored[?]*
>
> * * *
>
> [To show that bias was the likely reason for being disfavored, and hence meet their burden to show **Commonality**, plaintiffs had to provide] significant proof that Wal-Mart "operated under a **general policy** of discrimination. [*Wal-Mart,* 131 S.Ct. 2541, 2550-54 (citations, internal quotation marks, and footnotes omitted, italics in original, underlining and boldface added).]

Similar to the multiple supervisors in *Wal-Mart*, Ms. Zhou has not met her burden to establish Commonality in Debtor TSI's treatment of multiple different types of employees: cooks, servers, cashiers, etc. Even within those categories, there is no showing of Commonality among sub-categories, such as cooks who work alone on the night shift as against other cooks, or servers and cashiers who work nights as against other shifts. *Compare, e.g., Krzesniak v. Cendant Corp.,* 2007 WL 1795703 at *8 ("Defendants argue that [Plaintiff] performed work which was different than the class members [but that argument is] *not* supported by the evidence.") (emphasis added).

In practical terms, Ms. Zhou has not shown common issues of fact or law that can "productively be litigated at once" and "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart,* 131 S.Ct. 2541, 2550-52 (underlining added). In any actual trial of the issues, it appears that a series of separate trials would be necessary to address the different circumstances of individual employees or groups of employees, so certification of the Proposed Class would be not be productive to the litigation.

This Court concludes that Ms. Zhou has not met her burden to show Commonality. This is an additional reason why class certification must be denied.

(iii) Numerosity

The Supreme Court has held that a class comprised of 15 members is too small to satisfy the Numerosity prerequisite (*i.e.,* whether "the class is so numerous that joinder is impracticable" under Rule 23(a)(1)). *Gen. Tel. Co. of Sw. v. Falcon,* 446 U.S. 318, 330 & n. 14 (1980), further proceedings, 457 U.S. 147 (1982). Although there is no

established minimum number of class members, courts have found the Numerosity element satisfied when the class comprises at least 40 members (*Krzesniak v. Cendant Corp.,* 2007 WL 1795703 at *7), and sometimes even twenty or so. *See Falcon,* 446 U.S. 318, 330 n. 14 (citing cases).

Ms. Zhou purports to represent a class of 130 employees employed by Debtor TSI. Supp. Opp. (dkt. 245) p. 9:17-20 *and* p. 20:1-2. But Numerosity largely depends on who is included within the proposed class, which in turn depends on Typicality and Commonality.

As discussed above, Ms. Zhou's claims lack Typicality and Commonality with other employees of Debtor TSI, due to her role as a chef, often working alone on the night shift. Even if other Debtors were included, it is doubtful that there would be enough chefs who typically work alone on the night shift to comprise a sufficiently numerous class with Typicality and Commonality.

Certainly with respect to Debtor TSI, Ms. Zhou cannot meet the Numerosity requirement because of Debtors' evidence of how few former employees have similar circumstances. *See* Huang Supp. Decl. (dkt. 235), pp. 2:24-3:3 (of 130 employees, only 18 employed as kitchen staff, 5 of whom signed settlement agreements [leaving maximum of 13], only some of whom worked night shift). This is an additional reason why class certification must be denied.

(iv) Adequacy

"Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (citation omitted). "Although there are no fixed standards by which 'vigor' can be assayed, considerations include competency of counsel …." *Id.* at 1022.

Debtors have not challenged either the competency of Ms. Zhou's counsel or, more broadly, her or her counsel's vigor. But Ms. Zhou appears to have some conflicts

of interest because, for example, the seventeen declarations of Debtor TSI's other employees that they had all required meal and rest breaks, and were not subject to overtime violations, create an incentive for Ms. Zhou to point out that such evidence does not bear on her unique situation as the sole cook, working the night shift. In other words, she has an incentive with respect to all categories of employees who were not the sole cook on the night shift to "throw them under the bus" so as to distinguish and save her own claims. *See Hesse v. Sprint Corp.,* 598 F.3d 581, 589 (9th Cir. 2010) ("[A]s a result of not possessing the same type of claim as the Washington Plaintiffs, the *Benney* Class Plaintiff had an insurmountable conflict of interest with those members of the class. Conflicts of interest may arise when one group within a larger class possesses a claim that is neither typical of the rest of the class nor shared by the class representative.").

This Court concludes that Ms. Zhou has not met her burden to establish the Adequacy requirement under Rule 23(a). That is an additional reason why class certification must be denied.

(v) Other wage and hour violations asserted by Ms. Zhou

With one exception, Ms. Zhou appears to admit that her remaining claims are derivative of the other claims described above. *See generally* Zhou Supp. (dkt. 245), pp. 17:19-19:9; 10:8-18. In any event, she has not shown how those claims can be asserted as class claims if, as this Court has ruled above, her claims for meal breaks, rest breaks, overtime, and alleged time shaving fail to meet the Typicality, Commonality, Numerosity, and Adequacy requirements.

The one exception appears to be Ms. Zhou's assertion that wage statements did not list Debtors' names and addresses. But Debtors have presented evidence (Huang Supp. Decl. (dkt. 257), p. 3:23-28 & Ex. H) that their names and addresses appeared on a portion of the wage statements that was not included in Ms. Zhou's copies.

Ms. Zhou has not presented any rebuttal evidence, so there is no genuine issue of material fact on this issue. Accordingly, this Court grants partial summary judgment on this issue (without reaching the Rule 23 issues).

Alternatively, Debtors have presented evidence that any omission of their names and addresses from wage statements was not "knowing and intentional," as required by California law. *See, e.g., Garnett v. ADT LLC,* 139 F.Supp.3d 1121, 1131 (E.D. Cal. 2015). Alternatively, Ms. Zhou has not established any "resulting injury" to any employees from Debtor TSI's alleged failure to list its name and address on wage statements (*id.*), let alone established that her own experience with Debtor TSI with respect to any wage statements has enough overlap with other employees' experiences to satisfy the Typicality, Commonality, Numerosity, and Adequacy requirements of Rule 23(a).

(vi) Conclusion under Rule 23(a)

This Court concludes that Ms. Zhou has not met her burden to show that class certification is appropriate under Rule 23(a). She has not met her burden to show Typicality, Commonality, Numerosity, and Adequacy.

c. Under Rule 23(b), Ms. Zhou Also Has Not Carried Her Burden

One alternative under Rule 23(b) would be for Ms. Zhou to show that prosecuting separate actions would create risks of inconsistent or varying adjudications (Rule 23(b)(1)(A)), but that is inapplicable because all claims are either time barred or, if there were some exception to the time bar, would have to be brought in this single forum by filing proofs of claim, and this Bankruptcy Court can apply uniform and consistent standards. *See Gentry v. Siegel,* 668 F.3d 83. *See also In re Ephedra Prod. Liab. Litig.,* 329 B.R. 1, 9 (S.D.N.Y. 2005) (noting same issue under Rule 23(b)(3)). Therefore, there is no risk of inconsistent or varying adjudications.

Another alternative under Rule 23(b) would be for Ms. Zhou to show that prosecuting separate actions would result in adjudication that would, "as a practical matter," be "dispositive of the interests of the other members not parties to the individual

adjudications or would substantially impair or impede their ability to protect their interests." Rule 23(b)(1)(B). But, again, due to the time bar and the fact that any person wishing to assert a claim must proceed in this single forum, it does not appear that Ms. Zhou can satisfy this portion of Rule 23(b).

The final alternative that appears to be applicable under Rule 23(b) would be for Ms. Zhou to show that common questions of law or fact predominate and that a class action is a superior method of addressing claims. Rule 23(b)(3). But this Court's rulings with respect to Typicality and Commonality also establish that Ms. Zhou cannot meet these standards under Rule 23(b)(3). As observed by the Ninth Circuit, the standards for Typicality and Commonality under Rule 23(a)(2) and (3) are "less rigorous" and more "permissive" than the "companion requirements of" Rule 23(b). *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020. In addition, the fact that any claims would have to be brought in a single forum (this bankruptcy case before this Court) undermines the usual grounds for asserting that a class action is superior to the alternative. *Ephedra Prod. Liab. Litig.,* 329 B.R. 1, 9.

6. CONCLUSION

For all of the foregoing reasons, Ms. Zhou has not met her burden to show that her Proposed Class should be certified and her class claims allowed. This Court anticipates addressing with the parties any remaining issues before entering any written order implementing this Memorandum Decision.

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Date: October 26, 2021

Neil W. Bason
United States Bankruptcy Judge