S166350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.,
Petitioners,

v.

THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,
Respondent,

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER, and SANTANA ALVARADO,
Real Parties in Interest.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE NO. D049331, GRANTING A WRIT OF MANDATE TO THE SUPERIOR COURT FOR THE COUNTY OF SAN DIEGO, CASE NO. GIC834348, HONORABLE PATRICIA A.Y. COWETT, JUDGE

BRINKER'S ANSWER TO AMICUS CURIAE BRIEF OF ROGELIO HERNANDEZ

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INTRODUCTION

Amicus Rogelio Hernandez's brief rests on the mistaken assumption that Brinker has institutionalized practices of denying or discouraging meal periods, requiring "early lunches," mistiming rest periods and denying them altogether, and requiring off-the-clock work during meal periods. The problem with Amicus' position is that, after extensive discovery, Plaintiffs never produced *any* evidence that a company-wide practice of depriving employees of their meal or rest period rights exists. In fact, the only evidence common to the class is Brinker's written, lawful policies providing for meal and rest periods and prohibiting off-the-clock work. The remainder of the evidence is individualized and shows only what happened to particular employees at particular restaurants working particular shifts under particular managers. That evidence reveals that most employees took full, uninterrupted meal and rest periods, while others did not. As to those employees who did not, many chose to skip them. Plaintiffs' "proof," in sum, fails to demonstrate a widespread practice of denying breaks.

Absent evidence of a company-wide policy or practice of prohibiting meal or rest periods, courts have uniformly refused to certify a class. Amicus' theory that a company-wide practice can be "inferred" from time records paired with the declarations of a few dozen employees testifying to

their highly individualized experiences has been squarely rejected time and again.

Equally misguided is the notion that surveys and statistics can substitute for company-wide evidence of liability. While courts admit representative evidence on damages after liability has been established, no court has held that such evidence can establish company-wide liability in the first instance without other class-wide proof.

Finally, the Court of Appeal never required "break-by-break" proof, but rather an "employee-by-employee" analysis of whether, when, and why breaks were missed. Contrary to what Amicus insists, its decision did not set an impossible hurdle for employees bringing individual claims.

This case, in short, does not fit the class action mold because there is no evidence of a common unlawful policy or practice binding the highly individualized claims presented. "Representative" evidence – whether in the form of sample testimony, surveys or statistics – cannot support certification where, as here, Plaintiffs have failed to prove that it actually would be "representative" of any widespread practice. The Court of Appeal thus correctly held that certification should be denied.

ARGUMENT

I. PLAINTIFFS' CLAIMS CAN BE ESTABLISHED ONLY BY INDIVIDUAL PROOF.

A. There Is No Evidence Of A Company-Wide Practice Of Denying Meal Or Rest Periods, Mistiming Meal Periods, Or Mistiming Rest Periods – Foreclosing Certification Of Those Claims.

While Amicus contends that a class can be built on the testimony of individual employees that Brinker's policies were not followed at particular restaurants, on particular shifts, by particular managers, California courts have consistently refused to certify a class where, as here, there is no "common evidence" to support their theory of liability. (*Lockheed Martin v. Superior Court* (2001) 29 Cal.4th 1096, 1111; *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 [class can be certified only "if the defendant's liability can be determined by facts common to all members of the class"]; *Wren v. RGIS Inventory Specialists* (N.D.Cal. 2009) 256 F.R.D. 180, 204 ["[W]here there is no common policy or practice on the part of the employer, class certification is unavailable."].) This case is no exception.

1. Individualized exceptions to lawful meal and rest period policies cannot be extrapolated from one employee to another.

a) Meal period compliance

Only one piece of evidence is common to Plaintiffs' "meal period class," and that is Brinker's lawful policy of providing 30-minute meal

periods to employees working shifts over five hours. Amicus nevertheless insists certification is warranted because Brinker allegedly had a "general practice" of not following its own policy. (Hernandez Amicus Brief ("AB"), p. 13.) But there is *no* evidence of any such "general practice."

Amicus – while admitting that Brinker's time records alone cannot "show 'why' any particular break was missed," whether because of a manager's coercion or by the employee's own choice (AB, p. 25, fn. 13) – nevertheless claims those time records "*coupled with credible witness testimony*" somehow prove Brinker's allegedly class-wide "practice of not allowing full timely meal periods when the restaurants were busy or understaffed."[1] (*Id.*, p. 14, emphasis added.) Amicus is mistaken.

The "witness testimony" on which Amicus relies consists of individual employees describing their experiences at their own restaurants, on their own shifts, during the time they were employed by Brinker. None of them professes knowledge of anything that happened to other employees on other shifts at other restaurants – and Amicus does not claim otherwise. Because this highly individualized testimony cannot "reasonably be extrapolated to others" (*Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th

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[1] According to Amicus, time records may be sufficient in a case like *Hernandez v. Chipotle Mexican Grill, Inc.* (2010) 118 Cal.Rptr.3d 110, review granted Jan 26, 2011, S188755. The *Hernandez* case involved a "tap-on-the-shoulder" policy, not present here. Even Amicus concedes that time records alone are insufficient to establish violations in this case. (AB, p. 25, fn. 13.)

1422, 1432), it does not establish a "general practice" throughout Brinker's 137 California restaurants over more than four years.

In fact, Plaintiffs' evidence directly undermines Amicus' notion that Brinker consistently "pressured" its employees not to take meal periods. By Plaintiffs' own estimate, meal periods generally were taken more than 75 percent of the time. (1PE54.)[2] Thus, even some of Plaintiffs' declarants admitted they regularly took meal periods. (19PE5206-5207, 5283-5284, 5371; 20PE5436, 5477, 5507.)

Of the meals not taken, many indisputably were skipped by the employee's own choice. (3PE721-722, 780, 812, 823, 828, 834, 843-844, 861, 871, 873-874; 4PE906-907.) Even named Plaintiffs Romeo Osorio and June Rader testified that they at times decided not to take their meal periods because they wanted to finish a shift early or for other personal reasons. (20PE5487-5490, 5508.)

Managers testified that Brinker gave them the discretion to handle meal period compliance locally, and that they developed compliance systems to suit their own particular restaurant – establishing that Brinker had no across-the-board practice. (3PE718; 3PE779 ["I have always

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[2] Moreover, Plaintiffs' estimate is based on the mistaken assumption that meal breaks must be provided for every five *consecutive* hours of work – not for every five hours of work, as the Labor Code explicitly states – which substantially increases the number of meal periods not taken. (Lab. Code, § 512, subd. (a).)

viewed it as my responsibility as a manager, or managing partner, to determine the particular break systems that will work best for my stores, and then implement and manage them."].)

Some managers, for example, allowed employees to take meal periods as a group (3PE706, 790, 835, 875; 4PE880, 894, 942), while others had a "rolling" practice whereby employees took serial breaks (3PE730, 768, 781, 811, 856, 860, 876; 4PE882, 894, 932). Some managers used a "buddy system" pairing employees to ensure that each received a break (3PE697, 739, 745, 800-801; 4PE942), while others had designated "breakers" to relieve employees one at a time (3PE739, 761, 810-811, 828; 4PE907).[3] Named Plaintiff Osorio testified that there were designated "breakers" at the restaurant where he worked (20PE5478, 5487-5490) – belying his claim that restaurants were uniformly too busy or understaffed to permit meal periods.

By its nature, Amicus' position that Brinker restaurants were "understaffed" (AB, pp. 13, 14) raises quintessentially individual questions.

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[3] Not only do meal period compliance methods vary from restaurant to restaurant, but often there are variations within a single restaurant. For example, some restaurants have one method for servers and bartenders ("front of the house" employees) and another for dishwashers and cooks ("back of the house" employees). (E.g., 3PE687, 730, 761, 835, 875.) Some use one breaker system for lunch, and another for dinner (e.g., 3PE687-688, 743-744, 767-768, 789, 875-876), and some vary their methods depending on the day of the week (e.g., 3PE720-721, 730, 744, 768, 780-781, 789, 875-876).

Whether any particular restaurant is understaffed depends on customer volume at any given time, as well as staffing levels for various positions (server, busser, host, bartender, cook, dishwasher). The record cited above shows that individual managers modified their staffing and meal period compliance methods depending on facts specific to a particular restaurant, shift and position.

For example, one manager testified that at his restaurant he implemented "a rotating shift schedule for servers so that servers will take meals at different times," but on "weekends and holidays, when the restaurant is busiest," a breaker is designated to relieve servers. (3PE801-802; see also, e.g., 3PE720 [manager accommodated "the increase in the volume on specific high volume days" by employing two "breakers instead of one"]; 3PE735 [manager modified a "'rotating break system' depending on the sales volumes of the stores [she has] managed"].) A determination whether any one of the various compliance methods employed by individual managers resulted in the understaffing of a certain position at a certain restaurant on a certain shift necessarily requires highly individualized inquiries. As the Court of Appeal correctly held:

> [T]he evidence does not show that Brinker had a class-wide policy that prohibited meal breaks. The evidence in this case indicated that some employees took meal breaks and others did not. For those who did not, the reasons they declined to take a meal period require individualized adjudication.

(July 22, 2008 Slip Opinion ("Slip Op."), p. 49.)

b) Meal period timing

Should this Court reverse the Court of Appeal's decision that employers must offer a first meal period only to employees working more than five hours per day and a second meal period only to employees working more than 10 hours per day (Slip Op., pp. 36-37), meal period timing violations *still* could not be proved on a class-wide basis. Amicus assumes Brinker's time records will establish "each violation" by showing "when an employee's initial meal period was taken" and "when that employee worked for more than five additional hours after taking an initial meal period" (AB, pp. 18-19), but that assumption is wrong. If an employee *skipped* the initial meal period – as even named Plaintiffs sometimes did (20PE5487-5490, 5508) – there would be no record indicating whether or when the initial meal period was made available. As a result, it would be impossible to tell from Brinker's records whether an employee worked "more than five additional hours" (AB, p. 19) after the initial meal was offered.

Thus, the trier of fact could identify violations only on an individual basis, after hearing live testimony from the employee, his or her manager, and co-workers about whether and when the initial meal period was actually provided. Given that "very particularized individual liability determinations would be necessary," and "findings as to one [employee]

could not reasonably be extrapolated to others" (*Dunbar*, *supra*, 141 Cal.App.4th at pp. 1431-1432), a meal period timing class cannot be certified.

c) Rest period timing

Amicus contends certification is appropriate as to Plaintiffs' claims that Brinker has a "policy and practice of refusing to permit any rest breaks until after four hours of work" and "of not permitting its employees to take any rest break at all until after their first meal period." (AB, pp. 20-21.)[4] Amicus misstates Brinker's policy on both issues.

As to the "after four hours" argument, there is no evidence that Brinker has a "policy and practice of refusing to permit any rest breaks until *after* four hours of work" (AB, p. 19, emphasis added) – and Amicus points to none.[5] Brinker's policy is that a rest period must be authorized *before* – not after – the end of every four-hour work period. (21PE5913-5915.) Because nothing in the record supports the claim that Brinker has an institutionalized practice of not allowing "any rest breaks until *after* the completion of four hours of work," liability cannot (as Amicus claims) be determined by simply tallying the number of shifts that were "longer than

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[4] Amicus does not appear to adopt Plaintiffs' expansive theory that rest periods are "triggered" at the second, sixth, and tenth hours of a shift. (Plaintiffs' Opening Brief on the Merits ("OB"), pp. 104, 106.)

[5] Amicus cites to declarations in which witnesses testified that they were denied 10-minute rest breaks *completely* – not that they received a rest break only after working four hours. (AB, pp. 19-20.)

3½ hours." (AB, p. 20, emphasis added.) Instead, because rest periods are not recorded and because it is Brinker's policy to authorize rest periods before the end of each four-hour work period, a fact-finder would have to determine on an employee-by-employee basis whether Brinker's lawful policy was not followed.

As to the "rest-break-before-first-meal-period" argument, there are many holes in Amicus' position. First, the notion that a rest break must always be taken before the first meal finds no support in the Wage Order, which states that rest periods "insofar as practicable shall be in the middle of each work period." (Cal. Code Regs., tit. 8, § 11050, subd. (12)(A); see generally Brinker's Answer Brief on the Merits ("ABM"), pp. 95-98.)

Second, there is no evidentiary support for the claim that Brinker "has a policy of not *permitting* its employees to take any rest break at all until after their first meal period has been taken – thus effectively pushing that first rest break *to the end of the employee's shift.*" (AB, p. 20, emphasis added.) The evidence, rather, indicates that employees who are scheduled for an "early lunch" (defined by Amicus as a meal period "within the first two hours" of a shift (*ibid.*)), are not *required* to take their first rest break before that early lunch (21PE5913-5915).[6]

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[6] This timing practice makes perfect sense. If an employee's meal period is scheduled one hour into the shift and a rest break is scheduled two hours later, the spacing of breaks would eliminate long work periods without a break. On the other hand, if a meal is scheduled one hour into the

Amicus' idea that the first rest break, if not offered before the first meal, is automatically pushed "to the end of the employee's shift" – "as long as 6½ hours after the shift began" (AB, pp. 20-21) – is pulled out of thin air. The evidence that Amicus cites clearly states that an employee working a shift "from 10:00 until 7:00" *must* receive a rest break "[b]y 2 o'clock," which is before the end of the first four-hour work period. (21PE5913-5915, cited in AB, p. 20.)

Even if this Court holds that employers *are* required to authorize a first rest break before the first meal, individual issues would still predominate. Because rest periods are not recorded and pre-meal rest periods are not prohibited, only a case-by-case consideration could determine whether a particular employee at a particular restaurant under a particular manager received a pre-meal rest period.

For example, one Chili's manager testified that the managers at his restaurant "grant rest breaks whenever they are requested no matter what the employee's shift is or how long he or she has worked so far." (3PE769;

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shift and the first rest break is scheduled before the meal, as Amicus proposes, the breaks would be condensed, resulting in a longer work period without any break. While Amicus, like Plaintiffs, suggests the solution is to avoid "early lunches" altogether (AB, p. 19), that proposal ignores the realities of the restaurant industry. If an employee begins an eight-hour shift at 3 p.m., it is in the interests of both the employer and the employee to schedule a meal period early in the shift. The employer will have greater coverage during the busy dinner rush, and the employee will be working – not taking an unpaid meal period – when customer volume is high and tips are abundant. (See ABM, pp. 86-87.)

see also 3PE792 ["[O]ur managers virtually always honor [rest period] requests at the time they are made."].) He added that employees at his restaurant "sometimes take what are, in effect, rest periods, without management authorization," and "[a]s long as the employees are getting their jobs done," managers generally have "no problem with these types of rest breaks." (3PE769.) The inherently fact-specific question of when individual employees were offered rest periods defies class treatment.

2. Courts in California have uniformly refused to certify meal or rest period classes absent direct evidence of a company-wide policy or practice of prohibiting timely breaks.

a) Classes have been certified only where there was evidence of a company-wide policy or practice of preventing proper meal or rest periods.

Amicus relies on three recent decisions that only prove Brinker's point. In *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, *Dilts v. Penske Logistics, LLC* (S.D.Cal. 2010) 267 F.R.D. 625 and *Wang v. Chinese Daily News, Inc.* (9th Cir. 2010) 623 F.3d 743 (discussed in AB, pp. 14-17), there *was* evidence of a company-wide practice affecting all putative class members – evidence that indisputably does not exist here.

In *Jaimez*, the employer had a policy of either automatically deducting 30 minutes per shift for each meal break, or requiring employees "to sign a manifest indicating that they took a meal break, regardless of whether they actually took the break." (181 Cal.App.4th at pp. 1294-1295.)

There also was evidence that the employer itself "created routes and delivery schedules which it pressured [employees] to complete in 8 hours." (*Id.* at p. 1300.) As a result, "Plaintiff's theory of recovery, focused on *uniform policies and practices* applicable to [employees] within the relevant time period, as compared to individual claims, was and is more amenable to class treatment than individual disposition." (*Ibid.*, emphasis added.)[7] Here, by contrast, the vague understaffing allegations before this Court are specific to individual restaurants, shifts, managers and employees and cannot be resolved on a class basis.

Similarly, in *Dilts*, there was undisputed evidence that the employer "deducted thirty minutes per day regardless of whether a break was taken." (267 F.R.D. at p. 635.) No such policy exists here. The *Dilts* employer maintained other "company-wide practices" that "actively discouraged or prevented" driver-employees from taking statutorily authorized breaks, for example, regularly emphasizing "that breaks were not to be taken until all installations were completed," failing to allow employees to acknowledge, record or document when and if meal periods were actually taken, and requiring employees to remain "in constant communication with dispatch,

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[7] *Jaimez* is in any event questionable because the court reached certification without first determining whether the Labor Code obligates employers to "provide" meal periods or "ensure" that the provided meals are taken (181 Cal.App.4th at p. 1303), as it was required to do. (Slip Op., pp. 21-22, quoting *Hicks*, *supra*, 89 Cal.App.4th at p. 916 and *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 926-927.)

management and customers" – thus prohibiting them from taking uninterrupted breaks. (*Id.* at p. 636.)

Likewise in *Wang*, there was evidence that the employer required its reporter-employees "to carry pagers all the time and be on call from morning until night without ever getting a sustained off-duty period." (623 F.3d at p. 758.) The employer also "never told reporters that meal breaks were available and never told them to keep track of meal breaks on a time card." (*Ibid.*)

In sum, the employees in *Jaimez*, *Dilts* and *Wang* "were all ultimately controlled by the same set of central policies." (*Dilts*, *supra*, 267 F.R.D. at p. 639.)[8] Class treatment was granted because evidence of a uniform, systematically applied policy or practice allowed the trier of fact to infer that the experiences of testifying employees mirrored those of non-testifying employees. Here, by contrast, there *is* no evidence of a centralized, institutionalized policy or practice of prohibiting timely meal or rest periods. The Court of Appeal correctly held that a class-wide policy cannot be *inferred* from testimony and time cards showing "that some employees took meal breaks and others did not." (Slip Op., p. 49). As

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[8] The facts in these cases are comparable to those in *Cicairos v. Summit Logistics* (2005) 133 Cal.App.4th 949. (See ABM, pp. 53-55). Although *Cicairos* was not a class action, the employer there discouraged meals on a company-wide basis by maintaining an on-board computer system that regulated its drivers' minute-by-minute activities but did not "include an activity code" for meal periods. (133 Cal.App.4th at p. 962.)

discussed next, its decision is consistent with the decisions of every federal court to address the issue.

b) Eight federal courts have now held that where, as here, the evidence shows that some employees took meal and rest periods and others did not, a "common practice" cannot be inferred justifying certification.

When Brinker filed its Answer Brief on the Merits, six federal courts had held that "[i]n the absence of any explicit policy" to which missed meal and rest breaks can be attributed and "in light of the individualized inquiries necessary" to determine who missed breaks and why, meal and rest break claims are not amenable to class treatment.[9] (*Wren, supra*, 256 F.R.D. at p. 208; *Kimoto v. McDonald's Corps.* (C.D.Cal., Aug. 19, 2008, No. CV-06-3032) 2008 WL 4690536, *6; *Gabriella v. Wells Fargo Financial, Inc.* (N.D.Cal., Aug. 4, 2008, No. C06-4347) 2008 WL 3200190, *3; *Salazar v.*

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[9] When Brinker filed its Answer Brief on the Merits, nine federal courts had adopted a "provide" standard. (ABM, pp. 55-58.) Since then, two additional federal courts have agreed that employers need only provide meal periods, not guarantee that the provided meals are taken. (*Richards v. Ernst & Young LLP* (N.D.Cal., Feb. 24, 2010, No. C08-4988) 2010 WL 682314, *5 [Fogel, J.]; *Hostetter v. Barnes & Noble Booksellers, Inc.* (C.D.Cal., Jan. 25, 2010, No. CV-09-1572) Court Order Denying Plaintiff's Motion for Class Certification ["Order Denying Certification"], p. 6 [Fairbank, J.]; see attached.) In addition, two district court judges reaffirmed their prior decisions that the "provide" standard is correct. (*Washington v. Joe's Crab Shack* (N.D.Cal., Dec. 23, 2010, No. C08-5551) 2010 WL 5396041, *12 [Hamilton, J.]; *Lopez v. G.A.T. Airline Ground Support, Inc.* (S.D.Cal., Sept. 13, 2010, No. 09cv2268) 2010 WL 3633177, *10-11 [Gonzalez, C.J.].) Not a single federal court has held that employers must ensure that their employees take all provided meals. (ABM, p. 57, fn. 20 [discussing a single court's dicta about an "ensure" standard].)

Avis Budget Group, Inc. (S.D.Cal. 2008) 251 F.R.D. 529, 534; *Kenny* v. *Supercuts, Inc.* (N.D.Cal. 2008) 252 F.R.D. 641, 646; *Brown v. Fed. Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 587; see generally ABM, pp. 111-113.)[10] Since then, two more courts have held that absent evidence of an institutionalized practice of denying or discouraging meal breaks, class treatment is inappropriate. (*Washington v. Joe's Crab Shack*, *supra*, 2010 WL 5396041, *11; *Hostetter v. Barnes & Noble Booksellers*, *supra*, Order Denying Certification, p. 9.) Chief Judge Gonzalez also reaffirmed her decision in *Salazar*, *supra*, that certification is unavailable under such circumstances. (*Lopez v. G.A.T. Airline*, *supra*, 2010 WL 3633177, *10.)[11]

As here, the plaintiffs in those cases claimed that their employer "in practice" "ignore[d]" its official, properly disseminated and legal policy of providing meal periods.[12] And, as here, class member declarations showed

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[10] The three additional courts that adopted a "provide" standard did so outside of the class certification context.

[11] The other "provide" case issued after the Answer Brief was filed, *Richards v. Ernst & Young*, *supra*, was decided on a motion for summary judgment.

[12] (*Washington*, *supra*, 2010 WL 5396041, *2; see also, e.g., *Lopez*, *supra*, 2010 WL 3633177, *11 [claiming that although the employee handbook "provided for a one hour meal period, the company-wide policy and practice applied to ramp agents was to deny them an uninterrupted meal period"]; *Salazar*, *supra*, 251 F.R.D. at p. 534 [claiming that although company policy provided for a full 30-minute meal break, employees were often prevented from taking the allotted time]; *Kenny*, *supra*, 252 F.R.D. at p. 642 [claiming that although the employer's meal period policy was proper "on paper," it had an "on going practice of not providing meal breaks"].)

that some employees missed some meal periods, sometimes by their own choice and sometimes due to a manager's direction, and others never missed meals.[13] As here, the plaintiffs in those cases offered time records showing that meals were not taken some – but not most – of the time.[14]

Moreover, employees in those cases, like Brinker's employees, worked at different locations with different customer volume and staffing levels, under the supervision of different managers "who were not obligated to schedule meal periods under any uniform practice."[15] There, as here, the

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[13] (E.g., *Gabriella*, *supra*, 2008 WL 3200190, *3 ["[T]he class member declarations, as in *Brinker*, describe a variety of circumstances under which class members missed meal and rest periods."]; *id.* at *1 [plaintiffs' evidence showed that some declarants "were 'required' to work through meal breaks," while others would "skip lunch altogether"]; *Kenny*, *supra*, 252 F.R.D. at pp. 642-643 [class declarations indicated that some employees always took breaks, some never took breaks, and some took breaks some of the time].)

[14] (*Wren*, *supra*, 256 F.R.D. at p. 208 [plaintiffs' expert found meals were not taken up to 26.1% of the time]; *Kimoto*, *supra*, 2008 WL 4690536, *6 [time records showed "[s]ome of the employees clocked out for their full 30 minute meal periods . . . most of the time, and some appear to have clocked out only part of the time"]; *Kenny*, *supra*, 252 F.R.D. at p. 643 [time records demonstrated "on average the declarants did not clock out for a full 30-minute meal break approximately 40 percent of the time defendants were required to provide them with a meal break"].)

[15] (*Lopez*, *supra*, 2010 WL 3633177, *11; see also, e.g., *Washington*, *supra*, 2010 WL 5396041, *12 [recognizing that "analyses into why the breaks were not taken would require the parties to delve into each employee's personal preference, whether a breaker was available, how busy the restaurant was . . . ."]; *Hostetter*, *supra*, Order Denying Certification, p. 9 [noting that the evidence showed "wide variations in staffing levels between Defendant's California stores"]; *Kimoto*, *supra*, 2008 WL 4690536, *6 ["Defendant has submitted evidence showing that authorizations to take rest periods and meal breaks vary from manager to

employee declarants had "no knowledge of meal and rest break practices at any other restaurant other than the one[s] [they were] employed at . . . ." (*Washington*, *supra*, 2010 WL 5396041, *3.)

Every one of these courts, like the Court of Appeal, held that such evidence was insufficient to support adjudication of plaintiffs' claims on a class basis. In *Kenny*, for example, the court held that plaintiff's theory "that stores were too busy to give employees a meaningful opportunity to take breaks" "requires an individual inquiry into each store, each shift, each employee." (252 F.R.D. at p. 646.) Presented, as this Court is, with time records and witness testimony showing that some employees took breaks "nearly all the time, some none of the time, and some part of the time," Judge Breyer *refused to draw "an inference of a company-wide practice* that interfered with the employees' right to a meal break." (*Ibid.*, emphasis added.) He explained:

> The time records actually demonstrate the individual nature of the inquiry. Some of these employees clocked out for their full 30-minute meal break nearly all the time, some none of the time, and some part of the time. This disparity suggests that "the availability" of meal breaks varied employee to employee, or at least store to store or manager to manager. Even plaintiff herself admits that she took her full 30-minute meal break 60 percent of the time.

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manager, and also vary from store to store."]; *Brown*, *supra*, 249 F.R.D. at p. 587 [noting that "the variation in facilities introduces the additional complexity of understanding the management policies unique to each facility and how they impact drivers' schedules"].)

(*Ibid.*) As the *Washington* court recently put it: "[T]he only way of showing the 'practice' that plaintiff claims existed at the California restaurants" would be "through individualized analyses of why, in each instance, a particular employee did or did not take breaks . . . ." (2010 WL 5396041, *11.)

Where, as here, there is no basis for deciding that certain employees' experience is "representative" of others' – and the evidence actually shows the opposite is true – courts uniformly agree that a class cannot be certified.

B. Plaintiffs' Off-The-Clock And Rest Period Claims Cannot Be Proved Through Representative, Survey Or Statistical Evidence.

Amicus' arguments that the off-the-clock and rest period claims should be certified collapse under the same legal analysis. Without evidence of an unlawful company-wide practice, there is nothing that can be "represented" by aggregate proof.

1. Plaintiffs' off-the-clock claims

a) There is no evidence of a company-wide policy supporting adjudication of Plaintiffs' off-the-clock claims on a class basis.

In their Opening Brief, Plaintiffs contended that "Brinker pervasively requires 'off-the-clock' work during meal periods because workers are pervasively interrupted while on break." (OB, p. 12; see also *id.*, p. 132.) As the Court of Appeal recognized, Plaintiffs offered no evidence of a "class-wide policy forcing employees" to work off-the-clock;

in fact, they conceded that the only class-wide proof is Brinker's "written corporate policy prohibiting off-the-clock work." (Slip Op., pp. 51-52.)

Amicus, however, argues for the first time that Plaintiffs' off-the-clock claims should be certified because Brinker as a general matter "did not permit employees to clock back in from meal periods until 30 minutes had passed from the start of their meal periods, even when they were called back to work early." (AB, p. 22.) His newly-minted theory fails for several reasons.

First, Plaintiffs never raised any argument about Brinker's purported "policy" of not allowing employees whose meals were interrupted to clock back in. Amicus cannot raise issues that were not presented by the parties themselves. (See, e.g., *Berg v. Traylor* (2007) 148 Cal.App.4th 809, 823, fn. 5; *California Assn. for Safety Educ. v. Brown* (1994) 30 Cal.App.4th 1264, 1275.)

Second, there is no evidence that Brinker, by policy or systemic practice, called employees back to work before the end of a meal break. Nor is there any evidence that if an employee, based on individual circumstances, was called back to work before the meal period ended, that Brinker's policy required him or her to remain clocked out for the remainder of the 30-minute period. Amicus' attempts to establish such a practice by pointing to Brinker's lawful policy of mandating 30-minute meal periods and further requiring that employees clock out during those

periods, miss the mark. There is no evidence that Brinker's meal period policy, as written or as applied, required employees to remain clocked out even after they returned to work from a meal break. In fact, an additional Brinker policy establishes the opposite. Brinker's "Hourly Employee Handbook" prohibits off-the-clock work and explicitly advises each employee: "[I]f you believe your time records are not recorded accurately, you must notify a Manager immediately, so the time can be accurately recorded for payroll purposes." (19PE5181-5182.)

Amicus cites some declarants who said they were "required" to work off the clock during meal periods (e.g., 1PE166); he cites others who simply stated they "performed job duties while clocked out for meal breaks" – without indicating whether or not their managers required it (1PE130).[16] Still others said they were "regularly denied a 30-minute uninterrupted off-duty break" – without any indication whether they performed off-the-clock work at all. (1PE126; 1PE153.) *None* of the declarants indicated that any requests to adjust their time records to reflect

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[16] Amicus is thus wrong that Plaintiffs "limited their off-the-clock claims to instances in which a manager *required* a worker to return early from a break." (AB, p. 23, fn. 12, emphasis added.) Likewise, Amicus' assumption that there is no "rational reason a worker would return early from a meal period" (*ibid.*) is contradicted by evidence that servers complained about having to take unpaid 30-minute meal periods and "forego tips for half an hour." (3PE780, 814.) As mentioned above, named Plaintiffs sometimes elected not to take *any* part of a meal period. (20PE5487-5490, 5508.)

the work they performed during meal periods were denied. Presented with this evidence, the Court of Appeal correctly concluded that the "resolution of these claims would require individual inquiries in to whether any employee actually worked off the clock, whether managers had actual or constructive knowledge of such work and whether managers coerced or encouraged such work." (Slip Op., p. 52.)[17]

Amicus' contention that Brinker automatically deducts 30 minutes from its employees' time cards "even when they [are] called back to work early" (AB, p. 22) is also squarely defeated by evidence in the record proving that Brinker has no policy of automatic 30-minute deductions. Plaintiffs' own estimate of their "damages based on a sampling of the Brinker time records" – a document they filed with their motion for class certification – has an entire category of "meal period violations *where [the] meal period was less than 30 minutes*," demonstrating that 30 minutes is not automatically deducted. (2PE551-585, emphasis added.) There also is

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[17] Several managers testified that they took affirmative steps to ensure that meals in their restaurants were not interrupted. (See, e.g., 3PE745 ["We have a dedicated break area set up specifically to ensure that employees have a place to take their breaks where they will not be interrupted."]; 3PE813-814 ["Chili's Cypress has a separate 'break room' for employees to use for meal or rest breaks. . . . I have not seen any problem with employees on meal periods or rest breaks getting interrupted with any requests for work. No employee has ever complained to me that his or her meal periods were interrupted."]; 3PE783 ["To make sure employees are not interrupted on the break and have space to relax, our store has a designated break table in the rear of the restaurant where employees often sit during rest breaks or meal periods."].)

testimony in the record – featured prominently in Plaintiffs' Opening Brief (p. 16) – that Brinker can run a "Meal Period Compliance Report" showing all "employee shifts that lasted over five hours *with breaks that were less than 30 minutes*." (1PE226, 244, emphasis added.)

Thus, this is not a case in which the employer has a company-wide policy of automatically deducting 30 minutes from its employees' time cards "regardless of whether they actually took the break." (*Jaimez*, *supra*, 181 Cal.App.4th at pp. 1294-1295; *Dilts*, *supra*, 267 F.R.D. at p. 635.) To the contrary, the evidence shows that Brinker *did* record meal periods under 30 minutes, and that it specifically instructed employees to notify their managers if their time records did not accurately reflect the amount of time they worked.[18] A class action is not warranted.

b) Representative evidence cannot overcome the trial management obstacles posed by the lack of class-wide proof.

Amicus nevertheless would have this Court believe that even where there is no company-wide evidence of wrongdoing, off-the-clock liability

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[18] Because there is no evidence of an automatic 30-minute deduction, Amicus' related contention that Brinker "violated its legal duty to maintain accurate meal period records" – and that Plaintiffs thus "should be permitted to prove [their off-the-clock claims] through reasonable inference" (AB, p. 23, fn. 12) – is groundless. The cases on which Amicus relies – standing for the proposition that "the consequence of the employer's failure to keep [] accurate records must fall on the employer" (*id.*, p. 10 & fn. 7, citing cases) – have no relevance here.

can be established by "representative" evidence. Amicus cites no case for his position; in fact, all authority is to the contrary.

Reed v. County of Orange (C.D.Cal. 2010) 266 F.R.D. 446, is illustrative. There, the court decertified plaintiff's off-the-clock claims under the Fair Labor Standards Act, finding that because "[t]here was no single, uniform policy not to pay overtime," if the plaintiffs "were denied or discouraged from reporting overtime pay, it occurred in many different ways, by many different managers, at different times." (*Id.* at p. 458.)

As here, the *Reed* plaintiffs insisted that "representative testimony" could resolve any trial management problems. (266 F.R.D. at p. 462.) The court disagreed, holding that where individual class members' claims are characterized by materially divergent facts, representative testimony cannot capture those differences, and would result in overpayment for some class members and underpayment for others. (*Id.* at pp. 462-463.) It explained:

> In a collective action in which all members are similarly situated, plaintiffs may be permitted to establish their case using representative testimony. Decertifying a collective action is appropriate, however, when a jury trial would consist of a large number of separate mini-trials and would consume significant judicial time and resources. . . . *Representative testimony will not accurately capture each Plaintiff's diverse factual circumstances. This will result in some Plaintiffs being prejudiced by underpayment on their claims as well as prejudice to Defendant, which will overpay some Plaintiffs on their claims. . . . It is oxymoronic to use such a device in a case*

where proof regarding each individual plaintiff is required to show liability.

(*Ibid.*, internal quotations and citations omitted, emphasis added; see also *Smith v. T-Mobile USA, Inc.* (C.D.Cal., Aug. 15, 2007, No. CV-05-5274) 2007 WL 2385131, *6 [reconsidering certification of off-the-clock claims after "discovery . . . failed to yield evidence of any nationwide policy or practice," and "the proffered evidence indicate[d] only "sporadic violations [of defendants' compliant off-the-clock policy] arising out of individual circumstances, rather than violations stemming from a common impetus"].)

By contrast, off-the-clock classes *have* been certified – and representative proof allowed – where evidence of a company-wide practice exists. In *Adoma v. Univ. of Phoenix* (E.D.Cal. 2010) 270 F.R.D. 543 (cited in AB, p. 31, fn. 15), for example, the court certified an off-the-clock class where plaintiffs claimed that the employer's company-wide system for tracking employees' availability demonstrated that employees had worked overtime hours not recorded by the company's separate system for tracking overtime. (*Id.* at pp. 546, 548-551.) Likewise, in *Lopez*, *supra*, an off-the-clock class was certified because liability turned on the employer's class-wide practice of requiring employees to park in designated lots far from the work area and take a shuttle bus to the site – without compensating them for that travel time. (2010 WL 3633177, *10.)

Here, there *is* "no evidence of any company-wide or class-wide policy of requiring 'off-the-clock' work, and the individualized assessment necessary to ascertain whether there were in fact any employees who were told to work 'off-the-clock' would not be susceptible to common proof." (*Washington*, *supra*, 2010 WL 5396041, *13.) The Court of Appeal correctly held an off-the-clock claim could not be certified.

2. Plaintiffs' rest period claims

a) The trial court did not make any finding about the use of representative proof to resolve Plaintiffs' rest period claims, and even if it had, it would be entitled to no deference.

Amicus' rest period argument starts with the mistaken assumption that the "Court of Appeal rejected the trial court's conclusion that plaintiffs could establish Brinker's liability through expert surveys, statistical analysis, and other classwide proof." (AB, p. 25.) Although he acknowledges that Plaintiffs never "submitted their statistical experts' reports and detailed proposed methodologies to the trial court," Amicus nevertheless insists the trial court was somehow "fully aware of the parties' positions." (*Id.*, p. 24.) Amicus cannot seriously contend that Plaintiffs – without ever presenting any representative evidence – satisfied their burden of establishing how such evidence could "effectively manage the issues" at trial. (*Dunbar*, *supra*, 141 Cal.App.4th at p. 1432.)

In any event, the trial court *made* no finding that representative evidence could "effectively manage" Plaintiffs' rest period claims. In its short, conclusory order, the court simply stated that what Brinker "must do to comply with the Labor Code" is a "common legal issue," and that "common alleged issues of meal and rest period violations predominate." (1PE1-2.)

Moreover, had the trial court actually made a finding about representative evidence, it would not be entitled to deference, as Amicus argues. (AB, p. 3.) The trial court certified a class on the "'incorrect assumption'" that it was not required to "'examine the issues framed by the pleadings and the law applicable to the causes of action alleged.'" (Slip Op., pp. 20-22, quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436 and *Hicks*, *supra*, 89 Cal.App.4th at p. 916.) Reviewing courts do not defer to certification orders based on the wrong legal premise, even if supported by substantial evidence. (*Linder*, *supra*, 23 Cal.4th at p. 436.)

b) Had the trial court properly defined the elements of Plaintiffs' rest period claims, it would have decided – as every other court has – that absent evidence of an institutionalized practice of denying rest breaks, class-wide liability cannot be established by representative proof.

Amicus next contends that because "there can only be two answers" to the question "why" a rest break was missed, representative evidence is

adequate to resolve Plaintiffs' claims. (AB, p. 26.) Amicus oversimplifies the evidence and mischaracterizes the law.

(1) Plaintiffs' rest period claims involve inherently individualized inquiries.

Whether a particular manager at a particular restaurant "authorized" a rest break is a fact-specific question that can be established only by individualized inquiry.[19]

The evidence demonstrates, for example, that several managers encouraged their employees to take their rest breaks during "non-peak" times, when customer volume was lower. (E.g., 3PE721-722.) One manager testified that he "[o]ccasionally" had "to defer the break for several minutes, for business reasons" (3PE783), while another testified that "even when the store is very busy, if an employee really needs to take the break at that time, and cannot wait several minutes," he "will figure out how to" provide a rest break (3PE745). Because the Wage Order requires that rest periods be authorized in the middle of each work period "insofar as practicable" (Cal. Code Regs., tit. 8, § 11050, subd. (12)(A)), the trier of fact will have to determine based on the unique factual circumstances

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[19] Amicus' statement that the Court of Appeal suggested there are "16 million possible separate answers to the 'why' question" (AB, p. 26) is hyperbole. The Court of Appeal stated only that Plaintiffs' rest break claims must be decided on an employee-by-employee basis, which would result in "thousands of mini-trials" (Slip Op., p. 32) – not 16 million different answers.

whether it was "practicable" to allow a rest break at the requested time, or whether a manager in deferring the break actually discouraged it.

Individualized inquiries are also necessary because different restaurants had different compliance methods. At some restaurants, employees "must get permission from a manager before taking a rest break" (3PE745), while at others employees "take what are, in effect, rest periods, without management authorization" (3PE769-770). In addition, many servers "resist taking rest periods because they . . . do not want to lose out on tips they would otherwise receive if they were working." (3PE721.)

Evidence of significant variations among individual restaurants, managers and employees confirms that this question cannot be resolved class-wide "by the testimony of a handful of similarly situated workers describing comparable practices in a range of Brinker restaurants" (AB, p. 28, fn. 14). Instead, a fact-finder will have to hear testimony from each employee claiming to have been denied a rest break, his manager and his co-workers to decide whether a full rest period was actually prohibited or discouraged. As the court explained in *Kimoto*, *supra*, the evidence might "show that in a particular case the store manager instructed an employee to help a customer rather than take the ten-minute break. Such an instruction could be viewed as the employer not 'providing'" a break; however "it is an individual question that cannot be resolved class wide." (2008 WL 4690536, *7.)

Because "[t]he issue of whether rest periods are prohibited or voluntarily declined is by its nature an individual inquiry" (Slip Op., p. 31), courts in California have routinely declined to certify such claims. (E.g., *Washington*, *supra*, 2010 WL 54396041, *13; *Hostetter*, *supra*, Order Denying Certification, p. 11.) This case is no different.

(2) Representative evidence, standing alone, cannot supply the class-wide proof necessary for certification.

Amicus' claim that the existence of an institutionalized practice about rest breaks can be established with representative evidence (AB, pp. 28-34) is wrong. In the analogous misclassification context, the Ninth Circuit held that absent "common proof," the requisite "fact intensive inquiries" cannot be avoided by the use of "'innovative procedural tools' such as questionnaires, statistical or sampling evidence, representative testimony, separate judicial or administrative mini-proceedings, expert testimony, etc." (*Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 947; see also *In re Wells Fargo Home Mortgage Overtime Pay Litig.* (N.D.Cal. 2010) 268 F.R.D. 604, 612.)

Amicus nevertheless insists that "as a mechanism for *determining a defendant's aggregate liability*," "properly conducted surveys and statistically valid analyses of those survey results can yield even more accurate results than would occur by class member-by-class member trial testimony." (AB, pp. 32-33, emphasis added.) But every case Amicus

cites for this proposition discusses the propriety of representative evidence in the context of determining a defendant's aggregate *damages*, not liability. (*Id.*, citing *Pharmaceutical Industry Average Wholesale Price Litig.* (1st Cir. 2009) 582 F.3d 156, 197-98 [involving challenge to district court's award of "aggregate damages 'without *any* individualized determination of damages as to a single class member . . . .'"], original emphasis, citation omitted; *Braun v. Wal-Mart, Inc.* (D.Minn., June 30, 2008, No. 19-CO-01-9790) 2008 WL 2596918, Concl. of Law No. 22 ["The Court is entitled to make an aggregate damages award to the Class based on representative testimony and statistical analyses."]; *Long v. Trans World Airlines, Inc.* (N.D.Ill. 1991) 761 F.Supp. 1320, 1322 [addressing, after granting summary judgment for plaintiffs "as to liability," "how litigation of the damages issues shall proceed"]; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 721, 751 [approving "the use of statistical sampling and extrapolation . . . in the determination of damages" given that plaintiffs already had "prevailed on liability issues"].) None of these cases allowed representative proof to establish liability.

Amicus twice cites Newberg's class action treatise to support his claim that liability can be established by representative proof (AB, p. 31, fn. 15 & *id.*, pp. 32-33, fn. 17), but the section he cites addresses only the "[p]ropriety of aggregate *damages*" (3 Newberg on Class Actions (4th ed. 2002) § 10:5, emphasis added), and explicitly states: "*If the liability to the*

class is proved, then class recovery entitlement is measured by individual or aggregate proofs of loss or of the defendant's unjust enrichment." (*Ibid.*, emphasis added.) Where, as here, liability has *not* been proved and there is no company-wide evidence on which class-wide liability can be based, there is no authority to suggest that representative evidence can establish liability on a class-wide basis.

Such use of representative evidence is not only unprecedented, but also would jeopardize Brinker's federal and state constitutional due process rights. (See, e.g., *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462 [where nuisance liability would be predicated on the "impact of certain activities on a particular piece of land" and specific characteristics of the parcel would factor into the analysis, any attempt to determine liability on a class basis would require "superficial adjudications" that "could deprive either the defendant or the members of the class – or both – of a fair trial"]; *Jimenez v. Domino's Pizza, Inc.* (C.D.Cal. 2006) 238 F.R.D. 241, 251 [denying certification on plaintiffs' overtime claims "because of the individualized inquiries required" and because the employer "has a right to cross-examine each [employee] to determine whether there is liability as to that specific person"]; see generally Consolidated Answer to Amicus Curiae Briefs, pp. 37-40.)

The same due process concerns, in fact, would surface if *any* of Plaintiffs' claims were to be litigated on a class basis. Without evidence of

an unlawful practice generally applicable to Brinker employees, due process requires the court to determine which employees missed full, uninterrupted breaks and why on an employee-by-employee basis.

II. THE COURT OF APPEAL'S DECISION IS SOUND.

A. A Class Trial In This Case Would Be Unmanageable And Counterproductive.

Although everyone agrees that "meal and rest periods have long been viewed as part of the remedial worker protection framework" (*Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1105), no court has indicated that a class action is the only – or always the best – means to achieve compliance with California's wage and hour laws. If that were true, courts would automatically certify every labor claim without regard to whether class action requirements were satisfied. This Court, however, has been mindful "of the *dangers of injustice*" inherent in class actions and of the "*limited scope within which [class action] suits serve beneficial purposes*. Indeed, it has consistently admonished trial courts . . . to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts." (*City of San Jose*, *supra*, 12 Cal.3d at p. 459, emphasis added.)

With these principles in mind, courts have repeatedly and consistently denied certification of meal and rest period classes absent evidence of a company-wide practice forbidding or discouraging employee

breaks, recognizing the "difficulties in managing . . . a wide-ranging factual inquiry" that encompasses scores of different work locations and individual managers. (*Brown v. Federal Express Corp.*, *supra*, 249 F.R.D. at p. 587.) *Brown*, for example, explains that because plaintiffs "propose no method of common proof that would establish FedEx's policies prevent drivers from taking required breaks," a class action would mire the Court in "over 5000 mini-trials regarding individual job duties and expectations." (*Ibid.*)

Amicus' stated concern – that if Plaintiffs' meal and rest period claims are relegated to individual actions, "few if any individual workers will have the resources," "or the prospect of a sizeable enough potential recovery," "to pursue these types of claims at all" (AB, pp. 33-34) – was rejected by the *Brown* court, which concluded that a class action without common proof would create exactly the same problems (249 F.R.D. at pp. 587-588). The court explained that because class treatment would still "require individual class members to establish the reason for their missed breaks, *class members would face many of the same difficulties in motivation and expenditure of resources that they would encounter in separate actions*." (*Ibid.*, emphasis added.) "In addition to this, they would face the inevitable delay imposed by waiting for the resolution of thousands of individual factual claims in the class action." (*Id.* at p. 588.)

Reed v. County of Orange, *supra*, echoes these concerns. There, the court decertified off-the-clock claims because permitting them "to proceed

as a collective action would be neither efficient nor fair to Defendants or Plaintiffs." (266 F.R.D. at p. 462.) *Reed* explains that "[g]iven Plaintiffs' varying factual and employment settings and the lack of substantial evidence that Plaintiffs were subjected to a uniform decision, policy or practice . . . the jury will have to make individualized determinations." (*Ibid.*) There, as here, each plaintiff "may have had several supervisors who will be required to testify at trial, and any claims and defenses must be made, explored, and tested on an individualized basis. *Proceeding collectively . . . would, in short, be unmanageable, chaotic and counterproductive.*" (*Ibid.*, emphasis added; see also *In re Wells Fargo, supra*, 268 F.R.D. at p. 614 ["Any trial would be consumed by individualized inquiries into how each class member spent his or her day, making a class action no better than numerous individual actions."].)

B. The Court Of Appeal's Decision In No Way Eviscerates Employees' Ability To Pursue Individual Actions.

Amicus' contention that the Court of Appeal's decision will result in "few if any workers [being] able to prosecute [meal and rest period] claims . . . on an individual basis" (AB, p. 35) is also unfounded.

Contrary to what Amicus claims, the Court of Appeal *never* said that "to pursue individual litigation," "each individual Brinker employee" must "affirmatively document the circumstances surrounding" the hundreds of breaks he or she took – or did not take – while employed by Brinker. (AB,

p. 36.) In fact, the Court of Appeal's opinion nowhere mentions Amicus' idea of "break-by-break proof" (*ibid.*), referring only to the necessity of an analysis "as to each employee." (Slip Op., pp. 32. 45.)

Moreover, the Court of Appeal's opinion nowhere suggests that an employee must have "affirmatively document[ed]" each allegedly prohibited break to establish liability (AB, p. 36) – but states instead that the trier of fact will have to make an "individual inquiry as to all Brinker employees to determine if [they missed breaks] because Brinker failed to make them available, or employees chose not to take them" (Slip Op., p. 48).[20] That "individual inquiry" could take the form of testimony, for example, from a server who worked evening shifts, that on Friday and Saturday nights his breaks were effectively prohibited by the high customer volume and low staffing levels at his particular restaurant. Brinker, in turn, could present testimony from the restaurant's manager that extra breakers were employed on weekends so that servers could take breaks. It might also present testimony from the server's co-workers about the claimant's

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[20] Again, Amicus' suggestion that Brinker's records are somehow "falsified" or inaccurate (AB, pp. 5, 37, citing *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727 and *Anderson v. Mt. Clements Pottery Co.* (1946) 328 U.S. 680, 687) finds no support in the record – and Amicus cites none. The *Mt. Clements* line of cases cited by Amicus allows the use of representative evidence to establish hours worked once liability is shown – and only where the employer failed to maintain legally required records. Even if there was evidence that Brinker's records were inaccurate (there is not), those cases do not stand for the proposition that *liability* can be proved by representative evidence – which is the issue before this Court.

preference to work through breaks to earn additional tips. "It is the trial court's role to assess the credibility of the various witnesses, to weigh the evidence to resolve the conflicts in the evidence." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52.)

The Court of Appeal's opinion thus creates no impediment to individual actions, which remain as robust and viable as ever, and would be the more "efficient" and "fair" solution where, as here, there is no company-wide proof allowing Brinker's liability to be manageably resolved on a class basis. (*Reed*, *supra*, 266 F.R.D. at p. 462.)

C. The Court Of Appeal's Decision Allows Employees To Pursue Class Actions Where There Is Company-Wide Evidence Of Wrongdoing.

Finally, Amicus' suggestion that if the Court of Appeal's decision is affirmed, class actions will "no longer be available to remedy meal and rest break violations allegedly caused by supervisor pressure or coercion" (AB, p. 35) is misguided. Indeed, as discussed above, *supra*, pp. 12-14, 25, where courts found there was a company-wide practice class certification has been granted, as in *Jaimez*, *Dilts*, *Wang* and *Adoma*.

The Court of Appeal's opinion that certification is improper here, where there is no such class-wide evidence of wrongdoing, does not sound the death knell for all class actions in break cases. In fact, the Court of Appeal itself emphasized that its conclusion "does not dictate" that meal and rest period claims "can never be certified as a matter of law. Rather,

we are only concluding that under the facts presented to the trial court in this case, and the manner in which plaintiffs' claims are defined, the claims in this case are not suitable for class treatment." (Slip Op., p. 33.) Its limited decision is sound.

CONCLUSION

For all of the reasons set forth above and in Brinker's Answer Brief on the Merits and Consolidated Answer to Amicus Curiae Briefs, Brinker respectfully requests that this Court affirm the judgment of the Court of Appeal in its entirety.

Respectfully submitted,

Dated: March 28, 2011

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CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, rule 8.504(d)]

This brief consists of 9,229 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: March 28, 2011

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 09-1572-VBF(SSx)** Dated: **January 25, 2010**

Title: Chas Hostetter -v- Barnes & Noble Booksellers, Inc., et al.

PRESENT: HONORABLE VALERIE BAKER FAIRBANK, U.S. DISTRICT JUDGE

Rita Sanchez Courtroom Deputy	None Present Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None Present	None Present

PROCEEDINGS (IN CHAMBERS): **COURT ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [DOC. # 23]**

I. Ruling

The Court has received, read, and considered Plaintiff's Motion for Class Certification, and supporting papers (docs. # 23, 24); Defendant's Opposition, and supporting papers (docs. # 25, 26); and Plaintiff's Reply, and supporting papers (doc. # 27). On January 21, 2010, the Court issued a Minute Order (doc. # 32) tentatively denying Plaintiff's Motion. On January 22, 2010, the Court held a hearing on Plaintiff's Motion and took the matter under submission.

After further considering the papers filed, the evidence submitted, and the arguments of counsel, the Court DENIES Plaintiff's Motion on the ground that Plaintiff has not shown that at least one of the requirements set forth in Federal Rule of Civil Procedure 23(b) is met:

A. Rule 23(b)(2): Plaintiff has not shown that the action is primarily for injunctive or declaratory relief and thus certification under Rule 23(b)(2) is inappropriate.

B. Rule 23(b)(3): Plaintiff has not shown that common issues predominate over individual issues for any of Plaintiff's

claims. Plaintiff has also not shown that a class action is superior to other methods of adjudication.

The Court also declines to stay its ruling on Plaintiff's Motion for Class Certification until the California Supreme Court issues a decision in *Brinker Restaurant Corp. v. Superior Court*, 196 P.3d 216 (Cal. 2008). Good cause for a stay is not shown.

II. Background

On March 5, 2009, this class action was removed from state court pursuant to the Class Action Fairness Act ("CAFA"). The operative complaint is Plaintiff's First Amended Complaint ("FAC"), filed in state court on January 21, 2009.

Plaintiff worked as an assistant manager for Defendant between April 15, 2007 and June 28, 2008 at one of Defendant's California stores. Opp'n 9:2-3; Ashby Decl., Ex. 19. Plaintiff alleges, individually and on behalf of a putative class of similarly situated non-exempt employees, that Defendant regularly required Plaintiff and the class members: (i) to work over eight hours per day or forty hours per week without being paid overtime; (ii) to work over five hours per day without being provided a thirty-minute meal period, and without being compensated one hour of pay for each day a meal period was not provided; and (iii) to work without being provided a minimum ten minute rest period for every four hours worked, and without being compensated one hour of pay for each workday that a rest period was not provided. FAC ¶ 11.

The FAC alleges the following causes of action: (1) failure to pay wages and overtime, in violation of California Labor Code § 510; (2) failure to provide meal breaks, in violation of California Labor Code § 226.7; (3) failure to provide rest breaks, in violation of California Labor Code § 226.7; (4) waiting time penalties, pursuant to California Labor Code § 203; (5) violation of California's Unfair Competition Law, Business & Professions Code §§ 17200, *et seq.*; and (6) civil penalties, pursuant to California Labor Code § 2699.

Plaintiff moves to certify the action as a class action under Federal Rule of Civil Procedure 23. The proposed class is defined in Plaintiff's Motion papers as follows: "All persons who are employed or have been employed, and who have worked one or more shifts as hourly non-exempt 'assistant managers' at Barnes & Noble Booksellers, Inc. in the State of California since March 21, 2006." Pl.'s Mem. P. & A. 3:15-17.

III. Legal Standard

To obtain class certification under Rule 23, Plaintiff has the burden of demonstrating that the four requirements of Rule 23(a) are met, and that at least one of the three additional requirements set forth in Rule 23(b) is met. *United Steel v. ConocoPhillips Co.*, -- F.3d --, 2010 WL 22701, at *3-4 (9th Cir. 2010). "'In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met[,]' and 'nothing in either the language or history of Rule 23...gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at *5 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974)). A court has flexibility in managing a class action, including the ability to decertify. *Id.* at *6.

IV. Analysis

Plaintiff argues that the four prerequisites of Rule 23(a) are met, and that the proposed class action may be maintained pursuant to either Rule 23(b)(2) or Rule 23(b)(3). Defendant argues that Plaintiff's Motion should be denied for the following reasons: (1) Rule 23(b)(3)'s "predominance" requirement is not met; (2) Rule 23(b)(3)'s "superiority" requirement is not met; (3) Rule 23(a)(4)'s "adequacy" prerequisite is not met; and (4) this action should not be certified pursuant to Rule 23(b)(2). Defendant does not appear to argue that Plaintiff has failed to show the Rule 23(a) prerequisites of "numerosity," "commonality," and "typicality" with respect to the proposed class.

A. Rule 23(b)

As set forth below, Plaintiff has failed to show that any requirement under Rule 23(b) is met, and therefore Plaintiff's Motion is denied on that basis.

1. Rule 23(b)(3)

To maintain a class action under Rule 23(b)(3), Plaintiff must show that: (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

a. Predominance

The predominance inquiry concerns whether a plaintiff's "actual legal theory" is "one in which common issues of law or fact...predominate over individual questions." *United Steel*, -- F.3d --, 2010 WL 22701, at *5. "To determine whether common issues predominate, this Court must first examine the substantive issues raised by Plaintiffs and second inquire into the proof relevant to each issue." *Brown v. Fed. Express Corp.*, 249 F.R.D. 580, 584 (C.D. Cal. 2008) (citing *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 251 (C.D. Cal. 2006)). "[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." *Zinser v. Accuflix Research Inst.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (quoting 7A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 1778 at 535-39 (2d ed. 1986)). *See also Brown*, 249 F.R.D. at 583-84 ("When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis....") (citation omitted).

i. Meal Break Claim

Both parties focus primarily on Plaintiff's meal break claim. Plaintiff argues that: (i) Defendant has a policy of understaffing that prevents assistant managers from taking meal breaks; (ii) when no punches for a meal break appear on an assistant manager's time sheet, Defendant's managers manually add punches for a thirty-minute meal break based on the assumption that assistant managers were provided a meal break, thereby depriving assistant managers of earned wages; and (iii) Defendant uses this procedure to remove missed meal breaks from the payroll records. Defendant argues that it is required to make meal breaks available, not ensure that they were taken, and that determining whether meal breaks were provided will require substantial individualized inquiries.

A. Legal Issues

Since the class is limited to Defendant's California assistant managers, the legal standard that applies to the meal break claim is common to the class.

California Labor Code § 512 prohibits an employer from employing an employee for a work period of more than five hours per day "without providing the employee with a meal period of not less than 30 minutes...." Cal. Lab. Code § 512. California Labor Code § 226.7 prohibits employers from requiring any employee to work "during any meal or rest period mandated by an applicable order of the Industrial Welfare

Commission." Cal. Lab. Code § 226.7. Industrial Welfare Commission ("IWC") Order 4 prohibits an employer from employing an employee for a work period of more than five hours per day "without a meal period of not less than 30 minutes...."[1] IWC Order No. 4 further provides that: "Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked."

To date, the California Supreme Court has not determined whether employers are required under Labor Code § 226.7 and § 512 to merely offer meal and rest breaks, or to ensure that breaks are taken.[2] Recent district court cases have held that under these provisions, employers are required only to make meal breaks available to employees, and reject the argument that California law requires that employers ensure that meal breaks are actually taken.[3] *See, e.g., Brown*, 249 F.R.D. at 585 ("It is an employer's obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do any particular thing during that time.").

As a result, plaintiffs must show that the defendant "forced plaintiffs to forego missed meal periods." *Salazar v. Avis Budget Group, Inc.*, 251 F.R.D. 529, 534 (S.D. Cal. 2008). *See also Kenny v. Supercuts, Inc.*, 252 F.R.D. 641, 646 (N.D. Cal. 2008) ("[A]n employer is not liable for 'failing to provide a meal break' simply because the evidence demonstrates that the employee did not actually take a full 30-minute meal break.").

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[1]IWC Order 4 applies to "Professional, Technical, Clerical, Mechanical and Similar Occupations," which includes cashiers and salespersons. IWC Order 4 at 2(O).

[2]In a case currently before the California Supreme Court, an issue presented concerns whether the Labor Code requires that employers merely provide meal breaks, or requires that employers ensure that meal breaks are actually taken. *See Brinker Rest. Corp. v. Super. Ct.*, 196 P.3d 216 (Cal. 2008) (granting petition for review in *Brinker*, 80 Cal. Rptr. 3d 781 (Cal. App. 2008)). It is does not appear that a change in the law to require that employers ensure that meal breaks are taken would significantly affect the predominance analysis set forth herein. *See infra* Part V.

[3]"In the absence of controlling California Supreme Court precedent, the court is *Erie*-bound to apply the law as it believes that court would do under the circumstances." *White v. Starbucks Corp.*, 497 F. Supp. 2d 1080, 1088 (N.D. Cal. 2007).

In so holding, these cases distinguish *Cicairos v. Summit Logistics, Inc.*, in which the California Court of Appeal held that employers have "an affirmative obligation to ensure that workers are actually relieved of all duty" during meal periods. 133 Cal. App. 4th 949, 962-63 (2005). The rationale for construing the Labor Code as requiring that employers merely make meal (and rest) breaks available has been stated as follows:

> Under [plaintiff's] reading of *Cicairos*, an employer with no reason to suspect that employees were missing breaks would have to pay an additional hour of pay every time an employee voluntarily chose to forego a break. This suggests a situation in which a company punishes an employee who foregoes a break only to be punished itself by having to pay the employee. In effect, employees would be able to manipulate the process and manufacture claims by skipping breaks or taking breaks of fewer than 30 minutes, entitling them to compensation of one hour of pay for each violation.

White v. Starbucks Corp., 497 F. Supp. 2d 1080, 1089 (N.D. Cal. 2007)

The Court finds that the weight of authority supports a finding that Defendant is required to make meal (and rest) breaks available to assistant managers, not ensure that breaks are taken. This finding, however, is not determinative of the Court's ruling on the instant Motion. *See infra* Part V.

B. Factual Issues

Plaintiff argues that the following factual issues are common to the class and demonstrate that common issues predominate over individual issues:[4]

1. Defendant's official written policy:

- Defendant's employee handbook provides a meal break for employees who work over 5 hours, and a 15 minute rest break for every 4 hours worked. *See, e.g.*, Kingsley Decl., Ex. 7 at BN 000338; Ex. 10 at BN 000445; Ex. 24 at 41:1-20.
- Defendant's written meal and rest break policy, as set forth in its employee handbook, applies to employees, including assistant managers, at all California locations. Kingsley Decl., Ex. 24 at 41:21-42:7.

2. Scheduled break times:

[4]This section also includes facts relevant to the rest break claim.

- Meal and rest breaks are scheduled in advance on the Daily Assignment Sheet. Kingsley Decl., Ex. 24 at 41:3-4.
- There is always at least one manager on duty, whose role includes ensuring that employees take rest breaks at appropriate times and clock out and in for meal breaks. *See* Kingsley Decl., Ex. 24 at 57:1-25.
- Employees do not clock in/out for rest breaks. *See, e.g.*, Ashby Decl., Ex. 1 at 5:13.
- If an assistant manager is the manager on duty, the assistant manager is responsible for scheduling and taking his or her own breaks. *See, e.g., id.*, Ex. 1 at 6:1-6.

3. Timekeeping program:

- Defendant uses a payroll system in which, if an employee misses a meal period, or a meal period commences after five hours into a shift, the payroll system automatically pays the employee one additional hour of pay for that day. Kingsley Decl., Ex. 17 at BN 000171.
- Managers can edit time sheets to add missing meal break punches. *Id.*, Ex. 11 at BN 000188; Ex. 22 at 34:3-5.
  - Plaintiff presents evidence that at least one manager, Marla Peter, added missing meal break punches based on an assumption that the employee did take a break. *Id.*, Ex. 22 at 34:10-20.
    - Defendant argues that this manager's regular practice was to ask assistant managers whether they took a meal break, and only on a few instances—*e.g.*, in order to timely close payroll—assumed that a meal break had been taken. *Id.*, Ex. 22 at 33:1-4, 34:8-35:4.
  - Plaintiff further relies on emails by Philip Alexander, the District Manager for District 135, commending that District's stores for having no missed meal breaks in its time records during a particular period. *See id.*, Ex. 23 at 125:24-130:15.
    - Defendant argues that these emails were aimed at encouraging compliance with Defendant's meal break policies requiring that employees are provided and take meal breaks.

4. Staffing levels:

- Plaintiff argues that Defendant had a policy of understaffing its stores, including regularly scheduling assistant managers as the only manager on duty for periods of five hours. *See* Pl.'s Mem. P. & A. 7:4-6; Kingsley Decl., Ex. 23 at 114:3-12.
  - Defendant submits declarations from assistant managers who state that they did not experience unpaid missed breaks or

overtime. *See* Opp'n Mem. P. & A. 18:23-19:5 & n.46; Ashby Decl., Ex. 2.

- As a result, Plaintiff argues, assistant managers were prevented from taking uninterrupted meal breaks, such as by, for example, leaving the store for meal breaks.[5] *See* Kingsley Decl., Ex. 25 ¶ 3.
  - Defendant argues that any issues with understaffing at particular stores were temporary, such as would result during a manager's temporary leave of absence, and that staffing levels vary greatly between stores. *See* Kingsley Decl., Ex. 23 at 88:3-22; Harrison Decl. ¶ 4.
  - Defendant also presents evidence that other assistant managers did not experience unpaid missed breaks or overtime. *See* Opp'n Mem. P. & A. 18:23-19:5 & n.46; Ashby Decl., Ex. 2.

5. Store labor budgets:

- Plaintiff argues that payments for missed meal breaks, such as where an employee is to be paid an additional hour of pay in the event of a missed or late-taken meal break, come out of an individual store's payroll budget, which creates incentives to adjust time sheets to remove missed meal breaks. *See* Pl.'s Mem. P. & A. 17:2-4.
  - Defendant points out that employees who repeatedly fail to take breaks in accordance with Defendant's policies are counseled and may even be terminated. *See* Opp'n 8:19-9:1; Kingsley Decl., Ex. 23 at 84:10-13; Harrison Decl. ¶ 5.
  - Defendant also notes, as set forth above, that there are significant differences among its California stores in terms of sales volume, staffing, etc. *See* Harrison Decl. ¶ 5.

C. Predominance Analysis

For reasons set forth in cases such as *Brown* and *Kenny*, Plaintiff's legal theory is one in which individual issues predominate over common issues. *See, e.g., Brown*, 249 F.R.D. at 586 ("Because FedEx was required only to make meal breaks and rest breaks available to Plaintiffs,

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[5]An independent analysis of Plaintiff's evidence somewhat belies Plaintiff's contention that where an assistant manager is the only manager on duty, that assistant manager is precluded from taking a full meal break. *Compare* Kingsley Decl., Ex. 18 at BN 000721 (indicating that on May 30, 2007, Plaintiff was the only manager on duty from 4:00 p.m. to 11:00 p.m.); *with* Kingsley Decl., Ex. 20 at BN 000215 (indicating that Plaintiff took a meal break from 4:28 p.m. to 4:59 p.m.). This highlights the individualized nature of the inquiry required under the circumstances of this case.

Plaintiffs may prevail only if they demonstrate that FedEx's policies deprived them of those breaks. Any such showing will require substantial individualized fact finding.").

Sole manager on duty. Plaintiff's theory that there were times when an assistant manager was the only manager on duty, which made it impossible to take breaks, "does not apply class wide; it applies only to those employees who did not take breaks" when they were the only manager on duty. *Kenny*, 252 F.R.D. at 646. For example, Defendant's evidence that some assistant managers did not experience unpaid missed breaks or overtime highlights the individualized inquiry necessary under the circumstances of this case.

Customer levels. Similarly, Plaintiff's theory that stores "were too busy to give employees a meaningful opportunity to take breaks[,] requires an individual inquiry into each store, each shift, each employee." *Id.* Even if there were evidence that "in a particular case the store manager instructed an employee to help a customer rather than take a lunch break," whether such an instruction amounts to the employer not "providing" a meal break "is an individual question that cannot be resolved class wide." *Id.* For example, in light of the evidence submitted that there are wide variations in staffing levels between Defendant's California stores, that Defendant's official written policy is for managers to ensure that assistant managers are provided and take meal breaks, and that some assistant managers have not experienced unpaid missed breaks or overtime, Plaintiff has not shown that common issues of fact predominate over individual issues.

Time sheets and schedules. The time sheets and schedules on which Plaintiff relies "actually demonstrate the individual nature of the inquiry." *Id.* As Defendant argues, Plaintiff has not shown that merely identifying time sheets on which manual meal break edits appear is sufficient to establish liability for purposes of Plaintiff's claims. For example, to determine whether meal breaks were not provided requires a determination of why a particular assistant manager did not punch out/in for a particular meal break and why time punches for that meal break were added later by a manager. Thus, the assertedly common issue that meal breaks may be manually added to an assistant manager's time sheet does not predominate over the more central individualized inquiry into the circumstances surrounding such edits.

Moreover, Defendant has submitted numerous declarations from assistant managers in which they state that they did not experience unpaid missed breaks or overtime. *See* Opp'n Mem. P. & A. 18:23-19:5 & n.46; Ashby Decl., Exs. 1, 2. "This disparity suggests that 'the

availability' of meal breaks varied employee to employee, or at least store to store or manager to manager." *Kenny*, 252 F.R.D. at 646.

Manager's assumption that break provided. Plaintiff makes a related argument that Defendant violated *Cicairos* when a manager merely "assumed" that a meal break was provided when no meal break punches appear on an assistant manager's time records. *See Cicairos*, 133 Cal. App. 4th at 962 ("[T]he defendant's obligation to provide the plaintiffs with an adequate meal period is not satisfied by assuming that the meal periods were taken...."). Plaintiff also argues that the edits managers make to time sheets is evidence that Defendant failed to keep accurate payroll records.

This theory, however, also raises predominately individual issues. For example, even if Defendant has a company-wide policy authorizing managers to add punches, determining whether punches were added when no meal break was actually provided (or taken)—a central issue with respect to liability—requires individualized proof as to the reasons why any particular punches were added, even where an assumption was made that a meal break was provided. Moreover, Plaintiff's evidence shows that the manager's regular practice was to ask assistant managers whether they took a meal break, and only on a few instances—*e.g.*, in order to timely close payroll—assumed that a meal break had been taken. Kingsley Decl., Ex. 22 at 33:1-4, 34:8-35:4.

Under such circumstances, a further inquiry must be made into whether a break was provided but merely not voluntarily taken, or whether a break was taken at all. For example, Plaintiff attempts to argue that in light of Defendant's alleged failure to keep accurate time records, hours worked may be established by the employee's testimony, and that the burden would then shift to the Defendant to show that the hours claimed by the employee were not worked. *See Hernandez v. Mendoza*, 199 Cal. App. 3d 721, 727 (1988). The need for individual testimony illustrates why Plaintiff has failed to show that for this claim common issues predominate over individual ones.

Representative evidence. Plaintiff's argument in the Reply that the issue of whether there were not enough assistant managers scheduled such that stores could operate while breaks were taken "can easily be proven at trial by representative testimony and survey data" is unsupported. Reply 8:2-5.

Summary. The Court finds that Plaintiff has not shown that with respect to the meal break claim, common issues predominate over individual questions. Here, "[l]iability cannot be established without

individual trials for each class member to determine why each class member did not clock out for a full 30-minute meal break on any particular day." *Kenny*, 252 F.R.D. at 646. *See also Brown*, 249 F.R.D. at 586; *Salazar*, 251 F.R.D. at 534 (finding that the California Labor Code's requirement that employers only make meal breaks available to employees "forecloses class-wide adjudication of claims in this case").

ii. Rest Period Claim

Plaintiff's showing with respect to his rest break claim is more spare, particularly under circumstances where assistant managers do not punch in and out when taking rest breaks. As Defendant persuasively argues, and as set forth above with respect to Plaintiff's meal break claim, since Defendant's written policy is to provide assistant managers with a 15 minute rest break every four hours worked, and to ensure that such breaks are taken, Plaintiff will have to show that circumstances on a particular day in a particular store prohibited assistant managers from taking otherwise scheduled rest breaks, on an individual-by-individual basis. As with Plaintiff's meal break claim, Plaintiff has not shown that common issues predominate over individual issues with respect to the rest break claim. At oral argument, Plaintiff's counsel conceded that class certification of the rest period claim was unavailable on the current record.

iii. Overtime and Other Claims

Plaintiff concedes in the Reply that the cause of action for "overtime/wages" is derivative of Plaintiff's break claims. Reply 9:2-3. Plaintiff's theory of failure to pay overtime is that Defendant failed to pay overtime where an assistant manager was scheduled for an eight-and-a-half hour shift, was not provided a thirty minute meal break, and was paid for only eight hours. For reasons set forth above, this claim is one in which common issues do not predominate over individual issues.

Similarly, Plaintiff's UCL claim borrows the Labor Code claims as the predicate "unlawful" act required to sustain a UCL claim. *See* Pl.'s Mem. P. & A. 20:25-21:6. Plaintiff's claims for penalties are also derivative of Plaintiff's meal and rest break claims.

Thus, for reasons set forth above, Plaintiff has failed to show predominance with respect to any of Plaintiff's claims. Plaintiff's attempt at oral argument to re-define and narrow the proposed class to assistant managers who experienced manager time sheet edits is unpersuasive at this late stage, and more importantly, as Defendant

persuasively argues, does not adequately resolve the need for an individualized inquiry into the reasons for any such edits.

b. Superiority

Consideration of the four superiority factors stated in Rule 23(b)(3) "requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis." *Zinser*, 253 F.3d at 1190 (quoting WRIGHT, *supra*, § 1780 at 562).

Defendant does not appear to challenge Plaintiff's showing that the first three factors (each class member's interest in individually controlling a separate action, other litigation already commenced by the class, and the desirability of concentrating litigation in this forum) weigh in favor of a finding of superiority. *See* Pl.'s Mem. P. & A. 22:25-23:6.

Manageability. As to the fourth factor—manageability—the parties' arguments echo their arguments with regards to the predominance inquiry.

Defendant argues that where, as here, the Court would need to determine on an individual-by-individual basis "whether—and if so, why—proper breaks were not taken or unpaid overtime was incurred," the manageability factor weighs heavily against a finding that a class action is superior. Opp'n 23:3-14. *See Zinser*, 253 F.3d at 1192 ("If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'").

Plaintiff's argument that Defendant has not presented facts indicating the need for individualized determinations is belied by the record and by the preceding analysis. *See* Reply 10:23-24. Moreover, for reasons set forth above, Plaintiff has inadequately shown that individual issues can be adequately managed. Similarly, Plaintiff's assertion at oral argument that determining whether assistant managers merely forgot to clock out/in for meal breaks can be measured by survey evidence is unsupported and does not sufficiently resolve the underlying individualized determinations required to explain why specific time edits were made.

Even though the proposed class is limited to Defendant's California assistant managers, the apparent necessity of substantial individualized determinations as to liability and right to relief weigh heavily against

a finding that a class action is superior to alternate mechanisms for litigation. The Court finds that Plaintiff has not shown that a class action is superior to other methods of adjudication.

2. Rule 23(b)(2)

For reasons set forth in Defendant's Opposition, the Court denies Plaintiff's Motion to certify a class pursuant to Rule 23(b)(2). Opp'n 24:23-25:16. Defendant's argument that this action seeks primarily monetary relief, and therefore certification under Rule 23(b)(2) is inappropriate, is well taken, and Plaintiff does not appear to respond to Defendant's arguments in the Reply. Plaintiff is a former employee and will not benefit from the requested injunctive relief. Similarly, the proposed class would likely include a certain proportion of former employees. Thus, the predominant claims in this action are monetary, and certification under Rule 23(b)(2) is not appropriate. *See Jimenez*, 238 F.R.D. at 250. At oral argument, Plaintiff conceded that class certification under Rule 23(b)(2) would be inappropriate in this case.

B. Rule 23(a) Prerequisites

Plaintiff's failure to show that any Rule 23(b) requirement is met is dispositive, and the Court need not determine whether Plaintiff has met the Rule 23(a) prerequisites. However, as set forth below, Plaintiff has shown that the prerequisites of Rule 23(a) are met in this case.

1. Rule 23(a)(1)—Numerosity

Plaintiff has shown, and Defendant does not appear to dispute, that the class as defined in Plaintiff's Motion "is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The class is estimated to include 463 individuals employed by Defendant as assistant managers. Pl.'s Mem. P. & A. 10:1-4; Kinglsey Decl., Ex. 2 at 3:15-25.

2. Rule 23(a)(2)—Commonality

Plaintiff has shown, and Defendant does not appear to dispute, that there is at least "one significant issue common to the class" so as to support a finding that the commonality requirement is met.[6] *See Dukes v.*

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[6]The proposed class definition includes all assistant managers at Defendant's California stores. Pl.'s Mem. P. & A. 3:15-17. Although not expressly argued by Defendant, Defendant's declarations from assistant

Wal-Mart, Inc., 509 F.3d 1168, 1177 (9th Cir. 2007). For example, Plaintiff has shown that Defendant has a written policy under which assistant managers at Defendant's California stores who work over 5 hours in a day are to be provided with a duty free thirty minute meal period. *See, e.g.*, Kingsley Decl., Ex. 11, BN 000188. Plaintiff has also shown that managers are authorized to manually add timekeeping punches to an assistant manager's time records, if an employee forgets to punch in and out "at the specified times." *See, e.g.*, Kingsley Decl., Ex. 11, BN 000188-89.

3. Rule 23(a)(3)—Typicality

Plaintiff has shown, and Defendant does not appear to dispute, that Plaintiff's claims "are reasonably co-extensive with those of absent class members...." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Plaintiff was a former assistant manager at one of Defendant's California stores and seeks to represent a class of Defendant's California assistant managers. Plaintiff's claims regarding Defendant's alleged failure to provide meal and rest breaks, and failure to pay overtime, are sufficiently typical to meet the requirement of Rule 23(a)(3).

4. Rule 23(a)(4)—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*, 150 F.3d at 1020.

Conflict of interest. Plaintiff argues that in light of the similarity of the claims asserted and remedies sought by Plaintiff and the class members, there are no conflicts between Plaintiff and

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managers, who state that they did not experience unpaid missed breaks or overtime, appears to significantly undermine Plaintiff's showing that commonality is met with respect to the proposed class. *See* Opp'n Mem. P. & A. 18:23-19:5 & n.46; Ashby Decl., Ex. 2. To the extent that there are assistant managers who have not been denied meal or rest breaks, Plaintiff does not share a common question of law or fact with such assistant managers. In this sense, the proposed class may be overbroad, as the class definition does not "reflect the way in which the potential plaintiffs are alleged to be similarly situated and share common claims." *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 568-69 (C.D. Cal. 2008).

Plaintiff's counsel and other class members. *See* Pl.'s Mem. P. & A.12:21-27. Defendant has not identified any conflicts of interest.

Vigorous prosecution. Defendant argues that Plaintiff lacks sufficient familiarity with the relevant facts and claims of this litigation to show that Plaintiff "will discharge his fiduciary obligations by fairly and adequately protecting the interests of the class." *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144, 153-54 (N.D. Cal. 1991). Defendant points to Plaintiff's deposition testimony, in which he stated that: (i) he did not review the Complaint before it was filed; (ii) he has not heard of the statutes he was suing under; (iii) he had not met his attorneys prior to his deposition; (iv) he mistakenly thought that he was seeking to represent a nationwide class, rather than a California class; (v) he mistakenly thought managers are included in the proposed class, rather than just assistant managers; and (vi) he mistakenly thought he was only seeking to recover for missed meal breaks, rather than missed rest breaks, overtime, and penalties. *See* Opp'n 24:5-20; Ashby Decl., Ex. 3 at 8:7-18, 24:19-26:5, 34:21-35:9, 38:19-39:18, 40:11-21, 41:20-42:13, 55:20-56:13.

Plaintiff argues that he sufficiently understands: (i) the factual and legal issues in this case; (ii) that his claims against Defendant are for missed meal breaks, rest breaks, and overtime, and that the proposed class is limited to California employees; and (iii) that he has a fiduciary duty to the assistant managers he seeks to represent in this action. Reply 11:15-26; Kingsley Supp. Decl., Ex. 31 at 27:21-29:25, 32:4-13, 37:14-23, 39:19-40:10.

Plaintiff has shown that he understands the "basic elements" of his claims and his fiduciary obligations to the class. This is not a case where Plaintiff is "unaware of even the most material aspects" of the action, does not know why Defendant is being sued, and has "no conception of the class of people [he] purportedly represents." *Burkhalter*, 141 F.R.D. at 153-54. Moreover, Plaintiff argues, and Defendant does not appear to dispute, that Plaintiff's counsel is experienced in litigating wage and hour class actions. Pl.'s Mem. P. & A. 12:27-13:3; Kingsley Decl. ¶ 3. Based on the current record, Plaintiff has shown that the adequacy requirement of Rule 23(a)(4) is met.

Summary. For the foregoing reasons, the Court finds that Plaintiff has shown that the requirements of Rule 23(a) are met.

V. The California Supreme Court's Pending Decision in *Brinker*

Plaintiff states in the Reply that if the Court is inclined to deny Plaintiff's Motion, the Court should postpone ruling on Plaintiff's Motion until after the California Supreme Court decides *Brinker Restaurant Corp. v. Superior Court*, which has been fully briefed. 196 P.3d 216 (Cal. 2008) (granting petition for review in *Brinker*, 80 Cal. Rptr. 3d 781 (Cal. App. 2008)). *See* Reply 10:5-11. In *Brinker*, one of the issues presented concerns whether the California Labor Code requires that employers merely provide meal breaks, or whether employers must ensure that meal breaks are actually taken.[7]

Plaintiff has not show good cause for the requested stay, and Plaintiff's request is denied on that basis. The Court initially notes that Plaintiff appears to concede that the California Supreme Court's decision in *Brinker* would "have minimal bearing on the case at bar." Pl.'s Mem. P. & A. 16:19-20. It does not appear, under the circumstances of this case and the current record, that common issues would predominate even if the California Supreme Court determines that employers must ensure that employees take meal breaks. For example, it already appears that Defendant's official written policy is to ensure that meal breaks are taken. Thus, under an ensure standard, even if a manager adds meal break punches to an employee's time sheet, that would need a further determination of whether the employee actually took a meal break. Thus, the individualized inquiry into the reason for added meal punches would still be required under either standard. And, this individualized inquiry would still predominate over any common issues, such as Defendant's written policies and the authority granted to managers to add punches.

For the foregoing reasons, Plaintiff's Motion for Class Certification is denied.

IT IS SO ORDERED.

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[7]Another issue presented to the California Supreme Court in *Brinker* appears to be whether class action claims for missed meal and/or rest breaks can be proven by survey, statistical, or other representative evidence. For reasons set forth by Defendant at the Motion hearing, that this issue is before the *Brinker* court is not germane for purposes of either ruling on Plaintiff's Motion, or determining whether a stay is warranted.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, CA 90067. On March 28, 2011, I served the foregoing document described as: **BRINKER'S ANSWER TO AMICUS CURIAE BRIEF OF ROGELIO HERNANDEZ** on the interested parties below, using the following means:

SEE ATTACHED SERVICE LIST

☒ BY UNITED STATES MAIL I enclosed the document in a sealed envelope or package addressed to the respective addresses of the parties stated above and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at Los Angeles, California.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 28, 2011, at Los Angeles, California.

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