UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 12-06345-MWF (FFMx)** Date: **March 24, 2014**

Title: Nicole Cummings -*v*- Starbucks Corp., et al.

PRESENT: HONORABLE MICHAEL W. FITZGERALD, U.S. DISTRICT JUDGE

Rita Sanchez Courtroom Deputy	None Present Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
None Present	None Present

PROCEEDINGS (IN CHAMBERS): ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [61]

This matter is before the Court on Plaintiff's Motion for Class Certification (the "Motion") (Docket No. 61). The Court has read and considered the papers filed on the Motion, and held a hearing on **August 26, 2013**. The parties then requested that the Court delay ruling on the Motion in order to allow the parties to reach a settlement. (Docket Nos. 78, 80). Having been informed that those attempts were unsuccessful, the Court now **DENIES** the Motion for the reasons stated below.

I. BACKGROUND

On December 22, 2011, Plaintiff Nicole Cummings filed a Complaint in California Superior Court, initiating this action. (Docket No. 1, Ex. A). On January 9, 2012, Cummings filed a First Amended Complaint in Superior Court. (Docket No. 1, Ex. B). On January 26, 2012, Starbucks removed this action to federal court. (Docket No. 1). On August 3, 2012, this case was transferred to this Court. (Docket No. 20). On January 9, 2013, Cummings filed a Second Amended Complaint ("SAC") (Docket No. 43), which is the operative complaint.

The SAC alleges the following claims for relief: (1) violations of the California Labor Code; and (2) violations of California's Unfair Competition Law

("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq*. Each of these "claims" contains a number of claims therein, including, but not limited to, violations of California Labor Code §§ 204, 510, 512, 1194, and 1198. (SAC ¶ 42). Cummings's UCL claims are derivative of the Labor Code claims. (SAC ¶ 45 ("Defendant's acts and practices . . . are unlawful and unfair, in that they violate the Labor Code . . . .")).

On April 11, 2013, Cummings and Starbucks filed a Joint Stipulation Dismissing Cummings's claims for (1) failure to provide second meal breaks on shifts longer than 10 hours, in violation of California Labor Code § 512(a) and California Code of Regulations, title 8, § 11050(11)(A), and (2) injunctive relief. (Docket No. 48). On April 15, 2013, the Court dismissed those two claims without prejudice. (Docket No. 49).

On April 15, 2013, Starbucks filed a Motion for Partial Summary Judgment on Cummings's (1) "truncating" claim, and (2) miscalculation of "regular rate" for overtime pay claim. (Docket No. 50). On May 14, 2013, the Court granted summary judgment on those two claims for relief. (Docket No. 59).

Cummings's remaining claims for relief in this action are that (1) Starbucks's rest break policy violated Industrial Welfare Commission Wage Order No. 5-2001, Cal. Code Regs., tit. 8, § 11050(12)(a) [hereinafter IWC Wage Order No. 5] (SAC ¶ 29); (2) Starbucks's rest break scheduling practice failed to provide required rest breaks and to pay employees for missed rest periods, in violation of IWC Wage Order No. 5 (SAC ¶¶ 31, 32); (3) Starbucks's policy and practice failed to provide meal periods to employees who work longer than five hours, and Starbucks failed to pay for missed meal breaks, in violation California Labor Code §§ 226.7, 512 (SAC ¶¶ 30, 32); and (4) Starbucks violated the UCL by committing the previously described violations of the California Labor Code (SAC ¶¶ 38-49).

On May 23, 2013, Cummings filed this Motion proposing to certify four proposed classes: (1) the rest period policy class, (2) the rest period scheduling practice class, (3) the meal period policy and practices class, and (4) the UCL class. (Docket No. 61). On July 2, 2013, Starbucks filed an Opposition to Plaintiff's Motion for Class Certification (the "Opposition"). (Docket No. 63). On

July 17, 2013, Cummings filed a Reply in Support of Plaintiff's Motion for Class Certification (the "Reply"). (Docket No. 65).

On August 26, 2013, the Court held a hearing and took the Motion under submission. (Docket No. 74). On October 15, 2013, the parties filed a stipulation seeking to stay a decision on the Motion, while the parties attended mediation. (Docket No. 78). The Court granted the stipulation. (Docket No. 79). On January 18, 2014, the parties filed another stipulation indicating that mediation was unsuccessful, and requesting the opportunity to file supplemental briefing. (Docket No. 84). The Court granted the stipulation. (Docket No. 85).

On January 31, 2014, Cummings filed a Supplemental Briefing in Support of Plaintiff's Motion for Class Certification ("Cummings's Supplemental Brief"). (Docket No. 86). On February 14, 2014, Starbucks filed a Supplemental Brief in Opposition to Plaintiff's Motion for Class Certification ("Starbucks's Supplemental Brief"). (Docket No. 87). On March 17, 2014, Cummings also filed a Notice of Supplemental Authority. (Docket No. 90).

II. REQUEST FOR JUDICIAL NOTICE

Cummings filed a Request for Judicial Notice in Support of Plaintiff's Reply to Opposition to Class Certification (the "Request"). (Docket No. 65-13). The Request asks the Court to take judicial notice of an order issued by another court in this District: the September 12, 2012 Order Denying Plaintiff York's Motion for Reconsideration in *York v. Starbucks Corp.*, Case No. 08-cv-07919-GAF-PJW (C.D. Cal. Sept. 12, 2012) (the "*York* Reconsideration Order"). (Request at 1).

"The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). It is appropriate for the Court to "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

The Court thus has the authority to take judicial notice of the *York* Reconsideration Order and it does so now. However, taking judicial notice of the *York* Reconsideration Order does not have the effect of adopting the reasoning in that order. "[W]hen a court takes judicial notice of another court's opinion, it may do so 'not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.'" *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (citation omitted).

Accordingly, the Request is **GRANTED**, and the Court takes judicial notice of the existence of the *York* Reconsideration Order.

In light of both parties' repeated references to *York*, the Court has reviewed the underlying decision that was the subject of the *York* Reconsideration Order. *See York v. Starbucks Corp.*, No. 08-cv-07919-GAF-PJW, 2011 WL 8199987 (C.D. Cal. Nov. 23, 2011). In *York*, the district court denied class certification to a former Starbucks employee with regard to alleged violations, including late and missed meal periods, failure to pay meal break premiums, and denied rest periods. *Id.* at *9-10.

While there are some similarities between the claims in this case and in *York*, there are also notable differences between the two cases. One distinction is that *York* was decided before the California Supreme Court clarified – to a degree – the legal standards for wage and meal claims in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 139 Cal. Rptr. 3d 315 (2012). This distinction, however, may be minor because the district court on reconsideration stated that it nonetheless applied the legal standard articulated in *Brinker* in its original order. *See York* Reconsideration Order, at *6-7.

The more significant difference is that, in *York*, the district court found that Starbucks's policies "mandate[d] full compliance with labor laws regarding wage and hours requirements," and thus, the district court was limited to determining whether the plaintiff had presented sufficient evidence of a "'common pattern and practice that could affect the class as whole.'" 2011 WL 8199987, at *23.

The reasoning in *York* is therefore not applicable to Cummings's class claims based on facially defective policies. But the Court gives *York* its due weight with regard to Cummings's class claims based on unlawful practices, while noting that *York* is not a binding decision. *See Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001) (finding that the first district judge to decide an issue within a district or within a circuit does not bind all similarly situated district judges).

III. OBJECTIONS TO STARBUCKS'S SUPPLEMENTAL BRIEF

On February 17, 2014, Cummings also filed an Objection to "New Evidence" within Defendant's Supplemental Briefing Regarding Class Certification (the "Objection"). (Docket No. 88). On February 20, 2014, Starbucks then filed a Response to Plaintiff's Objection to Defendant's Supplemental Briefing Regarding Class-Certification. (Docket No. 89).

Cummings objects to Starbucks's Supplemental Brief on three grounds:

First, Cummings objects on the ground that Starbucks presents new evidence and argument that Cummings lacks standing to prosecute her meal period claim. (Objection at 1, 2-4). The Court does not find that Starbucks has introduced new evidence. Starbucks simply referred to a training document that had been filed earlier in support of its Opposition. (Starbucks's Supplemental Brief at 4 (citing to Docket No. 63-3)). However, it does appear that Starbucks raises for the first time the argument that Cummings lacks standing to pursue her meal break claim. Because this argument was not included in the Opposition, the Court will not consider this argument now.

Second, Cummings objects on the ground that Starbucks's Supplemental Brief relies overwhelmingly on case law that pre-dates the parties' oral argument on the Motion. (Objection at 1, 4-5). However, the Court did not understand the parties' stipulation and the Order permitting supplemental briefing to restrict Starbucks to case law issued after the hearing on August 26, 2013. (*See* Docket Nos. 84, 85). The parties' stipulation indicated that it was Cummings's position that case law published after the hearing was relevant to the Court's ruling on the

Motion. (Docket No. 84 at ¶ 2). If the Court permitted Cummings to file a supplemental brief, Starbucks simply sought the opportunity to file a brief in response. (*Id.*). Nothing in the stipulation confined Starbucks's response to case law prior to August 26, 2013. Moreover, Cummings's Supplemental Brief itself cites to at least two cases that pre-date the hearing. (Cummings's Supplemental Brief at 3, 5-6 (citing to *Leyva v. Medline Industries Inc.*, 716 F.3d 510 (9th Cir. 2013) and *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864, 157 Cal. Rptr. 3d 212 (2013)). Accordingly, the Court will consider the pre-August 26, 2013 case law cited in Starbucks's Supplemental Brief.

Third, Cummings objects on the ground that Starbucks misrepresented the argument set forth by Cummings's Supplemental Brief. (Objection at 1, 5). The Court does not see how this is a valid evidentiary objection, as opposed to a legal argument masquerading as an objection. To the extent that Starbucks misrepresents Cummings's arguments, the Court will find such misrepresentations unpersuasive.

IV. MOTION FOR CLASS CERTIFICATION

The party seeking class certification bears the burden of showing that each of the four requirements of Federal Rule of Civil Procedure 23(a) and at least one of the requirements of Federal Rule of Civil Procedure 23(b) are met. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001) (affirming the denial of class certification, where the plaintiff failed to meet the predominance requirement under Rule 23(b)(3) because the laws of multiple jurisdictions applied to the class).

Rule 23(a) sets forth prerequisites for class certification, commonly referred to as numerosity, commonality, typicality, and adequacy of representation. *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

"In determining the propriety of a class action, the question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417

U.S. 156, 178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) (internal quotation marks and citations omitted). Therefore, the Court considers the merits of the underlying claims to the extent that the merits overlap with the Rule 23(a) analysis, but does not conduct a "mini-trial" or determine at this stage whether Cummings actually could prevail. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981, 983 n.8 (9th Cir. 2011).

Cummings moves for certification pursuant to Rule 23(b)(3). Under Rule 23(b)(3), a plaintiff seeking to certify a class must also show that questions of law or fact common to the members of the class "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

A. Proposed Classes

Cummings seeks to certify four different classes: (1) the rest period policy class, (2) the rest period scheduling class, (3) the meal period policy and practice class, and (4) the UCL claims class. (Mot. at 2-3).

Each proposed class is overinclusive in that it is not limited to employees who were denied a rest or meal break, in violation of California labor law. While the Court can modify the proposed classes, *see Mazur v. eBay Inc.*, 257 F.R.D. 563, 568 (N.D. Cal. 2009) (recognizing the court's inherent power to modify proposed class definitions), there is no need to do so because none of the proposed classes will be certified.

1. *Rest Period Policy Class*

The rest period policy class is defined as: "All current and former hourly employees of [Starbucks] who were designated by [Starbucks] as nonexempt, and worked in excess of 6 hours, at any time in the state of California from December 21, 2008 through the date of trial." (Mot. at 12).

The theory of liability underlying the rest period policy class is that Starbucks's rest break policy was facially defective because it failed to include the "or major fraction thereof" language, required by California law. (Mot. at 2, 3-4; SAC ¶¶ 12.c., 29).

Subdivision 12(a) of IWC Wage Order No. 5 requires that employers permit rest breaks "at the rate of (10) minutes net rest time per four (4) hours *or major fraction thereof*," with the exception that rest periods are not required for daily work time less than three and one-half hours. IWC Wage order No. 5-2001 at 12(a), Cal. Code Regs., tit. 8, § 11050(12)(a) (emphasis added). The significance of the "or major fraction thereof" language is that rather than requiring 10 minutes of rest for every four hours of work, it instead, requires "10 minutes of rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours," and so on. *Brinker*, 53 Cal. 4th at 1029.

Starbucks's rest period policy was amended in 2011 to include the "or major fraction thereof" language. (*See* Starbucks Partner Guide, U.S. Store Edition, Aug. 2011) (Docket No. 63-6 at 14). Although there is some dispute as to when the revised policy became operative, Cummings does not oppose stipulating to allow Starbucks to verify the operative date, and then, amending the "end date" of the rest period policy class. (*See* Mot. at 23-24). This stipulation and amendment would be appropriate, if this class were certified.

It is unclear that the rest period policy class exists independently from the rest period scheduling class described below. Cummings presents essentially the same evidence for both her rest period policy claim and her rest period scheduling claim, which is that she and other employees were deprived of a second rest period when they were *scheduled* to work six hours or less, but actually worked more than six hours. (*See* Mot. at 6-8; Declaration of Nicole Cummings, ¶¶ 4-7, Ex. B (the "First Cummings Declaration") (Docket No. 61-5); Declaration of Clint S. Engleson, ¶¶ 4-12, Exs. J-Q (the "Engleson Declaration") (Docket No. 61-4)). Under a theory of liability premised solely on a facially defective policy, employees would have been deprived of a second rest break when they worked

between six and eight hours, regardless of what their scheduled shift was. However, the Court is required to determine this Motion on the basis of the plaintiff's legal theory. *See United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 808 (9th Cir. 2010) (finding that the district court erred by treating the "plaintiffs' actual legal theory as all but beside the point"). Accordingly, the Court examines the rest period policy class and rest period scheduling class as separate classes.

2. *Rest Period Scheduling Class*

The proposed rest period scheduling class is defined as:

> All current and former hourly employees of [Starbucks] who were designated by [Starbucks] as nonexempt, were scheduled to work a shift of less than 6 hours and 45 minutes [including a 30-minute lunch break], and worked in excess of 6 hours, at any time in the state of California from December 21, 2008 through the date of trial.

(Mot. at 12-13).

The theory of liability underlying the rest period scheduling class is that, as a result of Starbucks's uniform scheduling system, nonexempt employees were deprived of a second 10-minute rest break when they were scheduled to work six hours or less, but actually worked more than six hours. Moreover, Starbucks failed to pay rest period penalties to these employees who were denied a second rest break. (SAC ¶ 32; Mot. at 9-10; Cummings's Supplemental Brief at 7).

This theory of liability is based on the following evidence. Starbucks's automated scheduling system, the "ALS system," can only perform scheduling in 15-minute increments. (*See* Deposition of Jana Rutt at 109:13-15 (the "Rutt Deposition") (Docket No. 61-8, Ex. A); Declaration of Jana Rutt, ¶ 8 (the "Rutt Declaration") (Docket No. 63-2)). The ALS system schedules one 10-minute break for shifts of six hours or less, and schedules two 10-minute breaks for shifts

of six hours and fifteen minutes or more, not including a 30-minute lunch break. (Rutt Decl. ¶ 8). Starbucks's managers usually provide rest breaks according to the ALS system. (Rutt Depo. at 97:12-15). Therefore, Cummings asserts that Starbucks failed to schedule a second rest break for shifts lasting between six hours and six hours and fifteen minutes. (Mot. at 6; Reply at 11; Cummings's Supplemental Brief at 7). Although Starbucks did not appear to schedule shifts lasting between six hours and six hours and fifteen minutes, nonexempt employees who were scheduled to work six hours or less sometimes worked longer than six hours.

Additionally, with regard to Starbucks's failure to pay rest period penalties, Cummings argues that Starbucks lacked a policy that specifically provided for rest period penalties, lacked documents allowing employees or the payroll department to record a missed rest period, and lacked proof of paying employees for rest period violations. (Mot. at 8-10).

3. *Meal Period Policy and Practice Class*

The proposed meal period policy and practice class is defined as:

> All current and former hourly employees of [Starbucks] who were designated by [Starbucks] as nonexempt, and worked more than 5 hours in a single day, and were not provided a Meal Period "no later than the end of the 5th hour of work," at any time in the state of California from December 21, 2008 through the date of trial.

(Mot. at 13).

California Labor Code § 512 provides that:

> [a]n employer may not employ 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, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

Cal. Lab. Code § 512.

With regard to the timing of the meal break, the California Supreme Court clarified that "absent wavier, [California Labor Code §] 512 requires a first meal period no later than the end of an employee's fifth hour of work." *Brinker*, 53 Cal. 4th at 1041.

Cummings's theory of liability is that Starbucks's policy and practice failed to provide for meal break penalties where a nonexempt employee worked slightly more than five hours without being expressly directed to do so. (Mot. at 11-12; Cummings's Supplemental Brief at 6-7). Cummings argues that this policy and practice violated California law, which requires an employer to pay a penalty to an employee who works more than five hours and does not receive a duty-free meal period. (Mot. at 10-12, 17).

This theory of liability is supported by the following evidence. Starbucks's meal period policy largely appears to comply with California law in that it provides nonexempt employees "scheduled to work a shift of longer than five (5) hours" with a meal break "uninterrupted [for] 30 minutes," which "will be scheduled to begin before the end of the fifth hours worked." (Starbucks's Partner Resources Practices, Jan. 2009 ("Jan. 2009 Practices") (Docket No. 61-8, at Ex. I, 50)). Starbucks's policy, however, further states that it will not pay a meal break penalty when

> [t]he partner is scheduled to work a shift of five (5) hours or less, is not scheduled for a meal break, and is not directed by a manager to work more than five hours, but the actual hours worked are slightly more than five (5) hours because of punching in slightly early or punching out slightly late.

(*Id.* at 51). According to Cummings, Starbucks has treated "slightly more" as up to five hours and six minutes. (Reply at 14).

Cummings appears to assert a second distinct theory of liability for the meal period class. In the Motion, Cummings argues that a second common question of

law with regard to the meal period class is whether Starbucks's practice of failing to provide timely meal periods or meal period penalty payments violates California law. (Mot. at 17). This theory of liability is not discussed elsewhere in the Motion or in Cummings's Supplemental Brief. The only evidence provided in support of this theory is that on two occasions Cummings worked longer than five hours, was given a late meal break, and not paid a meal break penalty. (Mot. at 17 (citing to the First Cummings Decl. ¶¶ 9, 10, Exs. B-C (Docket No. 61-5)). Nonetheless, Cummings refers to this class as addressing the meal period policy and practice issue (Mot. at 2), and as containing two common questions of law (Mot.at 17). Therefore, the Court understands Cummings to be asserting two theories of liability for the meal period class.

4. *UCL Class*

Cummings finally seeks to certify a UCL claim class, defined as: "All current and former hourly employees of [Starbucks] who were designated by [Starbucks] as nonexempt, and worked for [Starbucks] at any time in the state of California from December 21, 2007 through the date of trial." (Mot. at 13).

The theory of liability for this proposed class is that any of above-described violations of the California Labor Code also constitute violations of the UCL. (*See* SAC ¶ 45 ("Defendant's acts and practices . . . are unlawful and unfair, in that they violate the Labor Code . . . ."); Mot. at 18 (stating that the common questions of law under the UCL are the same as those for the other claims)). Because the survival of the UCL class depends on certification of at least one other proposed class, the Court finds that the UCL class should not exist as an independent class. In fact, it would be difficult to define a UCL class without reference to one of the other classes. Therefore, the Court strikes the UCL class and adds a derivative UCL claim to the rest period policy class, the rest period scheduling class, and the meal period policy and practice class.

B. Rule 23(a) Requirements

As stated above, Rule 23(a) requires that a proposed class meet the requirements of numerosity, commonality, typicality, and adequacy of representation. *Hanon*, 976 F.2d at 508.

1. *Numerosity*

According to the Motion, Starbucks has verified that the putative class includes over 100,000 individuals. (Mot. at 14 (citing Letter from Jonathan Slowik, Counsel for Starbucks, to Clint S. Engleson, Counsel for Cummings (May 15, 2013) (Docket 61-8, at Ex. E, 44))). Additionally, based on a sampling of Starbucks's records, Cummings's expert, Robert Fountain, concluded that: (1) at least 97,000 individuals fall within the rest period policy class (Mot. at 14); (2) at least 89,000 individuals fall within the rest period scheduling class (Mot. at 16); and (3) at least 86,000 individuals fall within the meal period class (Mot. at 17).

If the rest period policy class were amended so that the "end date" tracks the revision of Starbucks's policy, the amended rest period policy class would likely contain less than the 89,000 individuals. However, extrapolating from the existing data, which sets the "end date" as the date of trial, the rest period class is still likely to number in at least the thousands, making joinder impracticable. Additionally, Starbucks has not raised any challenges to numerosity.

Based on this evidence, the Court finds that the putative class "is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

2. *Commonality*

"Commonality requires the plaintiff to demonstrate that class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 546 U.S. __, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) (citation omitted). The class members' "claims must depend upon a common contention." *Id.* The common contention "must be of such a nature that it is capable of classwide resolution, which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*.

Cummings argues that a recent Ninth Circuit case *Abdullah v. U.S. Security Associates, Inc.*, 731 F.3d 952 (9th Cir. 2013) is relevant to determining commonality because it adopted two elements of California law: (1) that the plaintiff's theory of liability controls on class certification, and (2) where a defendant stands on the legality of its uniform policies and/or practices, it necessarily concedes that the legality of those policies must be dealt with on a class-wide basis. (Cummings's Supplemental Brief at 2).

However, Cummings overstates the nature and strength of these two propositions. In *Abdullah*, the plaintiff asserted that the employer's requirement that all security guards sign agreements to take on-duty meal periods violated California labor laws. 731 F.3d at 955. In concluding that the plaintiff's claims met the commonality requirement, the Ninth Circuit relied on a recent California Court of Appeal case, *Faulkinbury v. Boyd & Associates, Inc.*, 216 Cal. App. 4th 220, 156 Cal. Rptr. 3d 632 (2013), which had interpreted and applied *Brinker* to "strikingly similar facts." *Abdullah*, 731 F.3d at 961. The Ninth Circuit found that *Faulkinbury*'s interpretation of *Brinker*'s holding was "directly on point for [its] analysis," *id.* at 962, but it did not explicitly adopt any elements of California law, as Cummings argues.

Moreover, with regard to Cummings's first proposition, Starbucks noted that *Abdullah* did not adopt a new legal principle, but that prior to *Abdullah*, federal courts had already focused their inquiry on the plaintiff's theory of liability. (Starbucks's Supplemental Brief at 1 (citing *United Steel*, 593 F.3d at 808)). Therefore, *Abdullah* simply applied preexisting Rule 23 standards.

Additionally, with regard to Cummings's second proposition, the Ninth Circuit summarized the reasoning in *Faulkinbury* as follows:

> The court of appeal explicitly rejected the defendant's argument that the "nature of the work" exception applied, concluding that, "by requiring blanket off-duty meal break waivers in advance from *all* security guard employees, regardless of the working conditions at a particular station," the

> defendant itself "treated the off-duty meal break issues on a classwide basis."

Abdullah, 731 F.3d at 962 (9th Cir. 2013) (quoting *Faulkinbury*, 156 Cal. Rptr. 3d at 234). While the reasoning in *Faulkinbury* and *Abdullah* are relevant to this action, the Court does not read *Abdullah* as establishing a general principle that an employer's creation of a uniform policy or practice necessarily concedes that the policy or practice must be addressed on a class-wide basis.

In light of the above principles, the Court addresses each proposed class.

a. Rest Period Policy Class

As noted above, Cummings's theory of liability is that Starbucks's rest break policy is facially defective in that it lacked the "or major fraction thereof" language.

In *Brinker*, the California Supreme Court found that an employer's corporate rest break policy, which violates Wage Order No. 5 by omitting the "or major fraction thereof" language, satisfied the commonality requirement under Rule 23(a). 53 Cal. 4th at 1033. In this case, Starbucks's rest break policy was facially defective in precisely the same way as in *Brinker*. To the extent that Cummings asks whether Starbucks has a "uniform policy, and that that policy, measured against wage order requirements allegedly violates the law," that question "is by its nature a common question eminently suited for class treatment." *Brinker*, 53 Cal. 4th at 1033.

Starbucks appears to dispute neither the text nor the facial illegality of the rest break policy. (Opp. at 12). Instead, Starbucks argued in its Opposition and at the hearing held on this Motion that, in spite of its defective rest period policy, its company-wide scheduling practice, the ALS system, "has always scheduled a rest break for work periods lasting a 'major fraction' of four hours." (Opp. at 2) In particular, Starbucks argues that "for shifts longer than six hours, the Company's automated system schedules *two* rest breaks." (Opp. at 2). To the extent that

Starbucks can show its uniform scheduling practice provided for rest breaks for work periods lasting a major fraction of four hours, despite its facially defective policy, that defense appears amenable to class-wide proof. *See, e.g., Bradley v. Networkers Int'l, LLC*, 211 Cal. App. 4th 1129, 1150, 150 Cal. Rptr. 3d 268 (2012), *as modified on denial of reh'g* (Jan. 8, 2013), *review denied* (Mar. 20, 2013) ("Although an employer could potentially defend" against claims that it lacked a uniform meal or rest break policy "by arguing that it did have an informal or unwritten meal or rest break policy, this defense is also a matter of common proof.").

Therefore, the rest period policy class meets the commonality requirement.

b. Rest Period Scheduling Class

As discussed above, Cummings's theory of liability is that as a result of its uniform scheduling system, Starbucks failed to provide a second rest break to nonexempt workers who were scheduled to work six hours or less, but actually worked more than six hours.

Because this theory is not based on a uniform policy, but on company-wide practice, the Court must "resolve any factual disputes necessary to determine whether" the scheduling system "was a common pattern and practice that could affect the class *as a whole*." *Ellis* 657 F.3d at 983 (emphasis in original). The parties do not appear to dispute that Starbucks used the ALS system as its company-wide scheduling system. (*See* Mot. at 3; Opp. at 2; Reply at 11). To establish that the ALS system comprises a uniform company practice, Starbucks relies on a declaration by Starbucks partner resources vice president, Jana Rutt. (*See* Rutt Decl. ¶ 7) ("Starbucks utilizes the Automated Scheduling System, or 'ALS,' to create schedules for store employees. . . ."). Cummings similarly points to a deposition of Jana Rutt to establish that the ALS system is a uniform practice. (*See* Mot. at 6 (citing Rutt Depo. at 36:2-13)).

The parties have thus established that the ALS system is Starbucks's uniform scheduling system, and there is no real dispute about this fact. Therefore,

to the extent that Cummings asks whether Starbucks's uniform scheduling practice failed to provide a second rest break, that question is common to the entire class.

c. Meal Break Policy and Practice Class

As noted above, Cummings presents two theories of liability for the meal break class. Her first theory is that Starbucks's meal period penalty policy violates California law. (Mot. at 17). Starbucks does not dispute the text of the policy, but rather, argues that its policy is "lawful," and moreover, that "[t]he Company's policy expressly authorizes payments for employees 'who miss or take a meal break late.'" (Opp. at 5-6). Applying *Brinker*, Cummings's claim that this uniform meal break penalty policy "measured against wage order requirements allegedly violates the law . . . is by its nature a common question eminently suited for class treatment." *Brinker*, 53 Cal. 4th at 1033.

Starbucks further argues that the analysis conducted by Cummings's expert witness demonstrates that late meal breaks are exceedingly rare and that premiums are generally paid when an uninterrupted work period runs slightly longer than five hours. (Opp. at 5-6). Presumably, Starbucks is arguing that not only is its policy lawful, but it has a practice of providing meal periods and meal period penalties, in compliance with the law. However, it appears from Starbucks's argument that it can demonstrate this defense through class-wide proof, namely expert analysis of its time records and payroll records.

Although Starbucks argues that the time records provide no information about whether an employee chose to forego a break, the California Supreme Court has indicated that issues regarding waiver do not defeat commonality, where the plaintiff alleges that a meal break was never authorized in the first place. *See Brinker*, 53 Cal. 4th at 1033-34 ("No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized an employee has no opportunity to decline to take it.").

Therefore, Cummings's first theory of liability—that Starbucks's meal period policy is facially defective—presents a common question of law.

Cummings's second theory of liability for the meal break class is that Starbucks's practice of failing to provide a timely meal break or meal break penalty violates California law. (Mot. at 17). This theory of liability does not appear to be premised on a defective Starbucks policy. The defective meal break penalty policy, discussed above, would not result in a practice of scheduling *late* meal breaks for employees working more than five hours, but rather, would result in the complete *absence* of a meal break for employees in this situation. Cummings has not pointed to any other defective meal break policy. Moreover, Cummings indicated in her deposition that her late meal breaks were not due to a defective policy, but because of circumstantial reasons such as "business of the store or lack of coverage [or] both." (Deposition of Nicole Cummings at 4:17-20 (the "Cummings Deposition") (Docket No. 63-10, Ex. A)).

Without a defective policy, the Court must "resolve any factual disputes necessary to determine whether there was a common pattern and practice that could affect the class *as a whole*." *Ellis* 657 F.3d at 983 (emphasis in original). Cummings's primary evidence of this violation is that she, herself, was provided a late meal break on two occasions when she worked more than five hours, and that she was not paid a late meal penalty on those occasions. (*See* First Cummings Decl. ¶¶ 9, 10). The only other evidence supporting the meal class claims are time records showing examples of other employees who worked more than five hours without receiving either a meal period or a penalty payment. (*See* Engleson Decl. ¶¶ 13-24, Exs. R-BB). These latter examples, however, support only the first theory of liability regarding the defective meal period penalty policy. Without additional evidence, Cummings has not met her burden of demonstrating that Starbucks's practice of failing to provide timely meal breaks and penalties affected the class as a whole. *See, e.g.*, *Ordonez v. Radio Shack*, No. CV-10-7060-CAS (JCGx), 2013 WL 210223, at *7 (C.D. Cal. Jan. 17, 2013) (denying class certification on a meal break subclass because the employer's written policy complied with California law, and declarations "show[ing] that some employees may have been deprived of the opportunity to take an uninterrupted meal break, directly or indirectly, does not amount to a 'policy and practice' capable of determining [the employer's] liability on a classwide basis").

In the absence of a uniform policy or practice, there is no common answer as to why employees took a late meal break, and individualized inquiries into each late meal break would be required. The predominance of individualized questions is demonstrated by: (1) declarations from other Starbucks employees stating that they have always received timely meal breaks (Opp. at 15) (citing to declarations by Starbucks employees); (2) declarations from Starbucks employees stating that when they did not receive a timely meal break, it was due to "idiosyncratic" circumstances, rather than a common practice or policy (*id.*); and (3) Cummings's own testimony that her late meal breaks were due to circumstantial reasons (Cummings Depo. at 4:17-20).

Therefore, Cummings's second theory of liability—that Starbucks had a practice of failing to provide timely meal breaks—does not present a common question of law.

3. *Typicality*

"[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). To make this assessment, the Court looks to "'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Hanon*, 976 F.2d at 508 (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 288 (C.D. Cal. 1985)).

Starbucks does not raise any challenges to Cummings's typicality with regard to the rest period classes. The Court agrees with the parties that Cummings's claims are typical of the rest period class because she alleges that she was denied a second rest break and penalty payment, when she was scheduled to work six hours or less, but actually worked more than six hours. (Mot. at 15).

In contrast, with regard to meal break claim, Cummings does not meet the typicality requirement. Only Cummings's first theory of liability for the meal

period claim meets the commonality requirement. That claim is based on the theory that employees working slightly longer than five hours were deprived of a meal break altogether, as a result of Starbucks's policy. (Mot. at 17). Cummings offers evidence showing only that she received a late meal break without being paid a penalty, on two occasions when she worked more than five hours. (*Id.*). Moreover, she testified that these meal breaks were late not because of a defective policy, but because of unique circumstances in the store. (Cummings Depo. at 4:17-20). Therefore, there is no evidence that Cummings was injured by the "same course of conduct" or under the same legal theory as the class members injured by the meal break penalty policy. *See, e.g.*, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156, 102 S. Ct. 2364, 2370, 72 L.Ed. 2d 740 (1982) (finding that a Mexican-American plaintiff who had been denied a *promotion* for discriminatory reasons was not typical of class members who were injured by discriminatory *hiring* practices). Cummings therefore is not typical of class members under the meal break policy theory.

Therefore, the Motion is **DENIED** as to the meal period class.

4. *Adequacy*

a. Plaintiff Cummings

"To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: '(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?'" *Ellis*, 657 F.3d at 985 (citing *Hanlon*, 150 F.3d at 1020). "Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." *Id.*

In the Motion, Cummings argues that she has no conflicts of interest with the proposed class members, and seeks the same remedies that they do. (Mot. at

18). Cummings also argues that the time and effort that she and her counsel have invested in this litigation—for example, by participating in depositions, discovery responses, and meetings with counsel—demonstrate their commitment to pursuing this action vigorously. (Mot. at 18-19).

Starbucks does not challenge Cummings's lack of conflict of interest or willingness to vigorously represent the class. Instead, Starbucks argues that Cummings is not an adequate class representative because she has provided inconsistent testimony directly related to her rest period claims, and such untrustworthiness renders her an inadequate class representative. (Opp. at 21-23). Although the class representative's "credibility may be a relevant consideration with respect to the adequacy analysis, . . . '[c]redibility problems do not automatically render a proposed class representative inadequate.'" *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010) (citation omitted). "'Only when attacks on the credibility of the representative party are so sharp as to jeopardize the interests of absent class members should such attacks render a putative class representative inadequate.'" *Id.*

The Court has reviewed the following testimony by Cummings: (1) excerpts from her February 13, 2013 deposition (*See generally* Cummings Depo.); (2) the March 26, 2013 errata sheet correcting her deposition (the "Errata") (Docket No. 66-5); (3) the First Cummings Declaration (Docket No. 61-5); and (4) her July 17, 2013 declaration (the "Second Cummings Declaration") (Docket No. 65-3).

The Court finds that Cummings, for the most part, consistently asserted a general recollection that she was not given a second rest break on occasions when she was scheduled to work six hours or less, but actually worked more than six hours. (*See, e.g.*, Cummings Depo. at 5:9-14 (stating that she does not remember working any shifts where she took two rest breaks); Errata ("There were times when I worked longer than 6 hrs. and did not get a second rest break."); First Cummings Decl. ¶ 4 (stating that on shifts when she worked longer than the scheduled six hours, she "was never given a second rest break") (emphasis in

original); Second Cummings Decl. ¶ 4 ("I would generally receive 1 rest break for shifts of less than 7 hours in length.")).

Starbucks specifically asserts that credibility issues are raised by the First Cummings Declaration, in which Cummings testified that she did not receive a second break on three specific occasions. (Opp. at 21-23). Cummings identified those occasions by date, the precise clock-in and clock-out times, and the exact duration worked. (First Cummings Decl. at ¶¶ 5-7). However, it appears that the date, clock-in and clock-out times, and duration worked were most likely taken from Cummings's time records, and not her own recollection. Nowhere else in any of her other testimony does she claim to recall the specific dates when she did not receive a second break as due.

In fact, in her other declaration, Cummings appears to revert back to her original position that she could probably remember the specific dates on which she did not receive a second break, only after reviewing her time sheets. (Second Cummings Decl. ¶ 4). She then stated, "[f]or example, if my time records show that I had worked 6 hours and 6 minutes, I could easily conclude that I was scheduled to work a 6 hours shift on that day and, therefore, would have received only 1 rest break." (*Id.*) However, an ability to "conclude" when she received only one break is distinct from a recollection.

Therefore, Paragraphs 5-7 of the First Cummings Declaration would have been more accurate if more detailed – *i.e.*, if Cummings would have described her review of the records that led counsel to draft her Declaration in this fashion. At most, this attack on Cummings' credibility is therefore very mild. Cummings has otherwise consistently testified that she did not receive a second break when she worked beyond her scheduled six-hour shifts. Cummings is thus an adequate representative for the rest period class.

b. Plaintiff's Counsel

The adequacy of representation also turns on the competency of class counsel and the absence of conflicts of interest. *Gen. Tel. Co. of Sw.*, 457 U.S. at 157. As indicated above, no conflicts of interest have been identified.

Additionally, when considering whether to appoint class counsel, the Court must consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
>
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
>
> (iii) counsel's knowledge of the applicable law; and
>
> (iv) the resources that counsel will commit to representing the class . . . .

Fed. R. Civ. P. 23(g)(1)(A).

Cummings asserts that her counsel: (i) has expended several hundred hours investigating the claims in this case, among other work; (ii) has had approximately 17 years of experience in class action litigation; (iii) is currently lead counsel on approximately 20 employment wage and hour claims with class action allegations; and (iv) has incurred $18,000 in costs, to date, in this matter. (Mot. at 19-20).

Starbucks has not challenged the adequacy of Cummings's counsel on any of the above grounds. Therefore, Cummings has established that her counsel meets the prerequisites of both Rule 23(a) and Rule 23(g).

C. Ascertainability

As the parties acknowledge, in addition to the Rule 23(a) requirements, there is an implied requirement that the proposed classes be ascertainable for a court to

grant certification. *See, e.g.*, *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 593-94 (C.D. Cal. 2008) (determining that "the defined class is sufficiently ascertainable"). "An identifiable class exists if its members can be ascertained by reference to objective criteria." *Id.* at 593 (citing *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, Nos. C 06-2069 SBA & C 06-05411 SBA, 2008 WL 413749, at *5 (N.D. Cal. Feb. 13, 2008)) (internal quotation marks omitted). "The class definition must describe 'a set of common characteristics sufficient to allow' a prospective plaintiff to 'identify himself or herself as having a right to recover based on the description.'" *Parkinson*, 258 F.R.D. at 593 (citing *Moreno v. AutoZone, Inc.*, 251 F.R.D. 417, 421 (N.D. Cal. 2008)).

Starbucks does not challenge the ascertainability of the meal period class. Because that class fails due to a lack of typicality on its first theory and a lack of commonality on its second theory, the Court will not address the ascertainability of that class.

Starbucks, however, challenges whether the rest period policy class and the rest period scheduling class can be "ascertained through reasonable effort." (Opp. at 25). Here, Cummings proposes to identify the rest break class through Starbucks's verified "copies of schedules, time records, and payroll summaries," as was done by Clint S. Engleson for a sample of class members. (Engleson Decl. ¶ 3). Using these records, Engleson was able to identify examples of eight employees who were scheduled to work six-hour shifts and received one break, but who ended up working longer than six hours and received no rest break premium on that occasion. (Engleson Decl. ¶ 4).

The Court finds that the criteria defining both rest period classes—namely, an employee's exempt status, the shifts an employee was scheduled to work, the hours actually worked, the number of rest breaks scheduled, and when the employee was employed—are objective and can be ascertained by Starbucks's employment records. Starbucks does not challenge the objectivity of the criteria. In fact, Starbucks concedes that the employment records, required by Cummings to identify the class, exist. (Opp. at 25)

What Starbucks argues is that the scheduling records are retained only in "hard copy . . . either at the individual Starbucks stores or at a warehouse," and thus, ascertaining the class would require "'laborious' . . . review of individual personnel files." (Opp. at 25) The Court is not persuaded by Starbucks's argument, which inserts the requirement that a class be not only ascertainable, but also ascertainable through "reasonable effort." None of the cases cited by Starbucks support this heightened requirement, and the cases cited by Starbucks can be distinguished from the present case. *See, e.g.*, *In re Wal-Mart Stores*, 2008 WL 413749, at *8-9 (distinguishable on the ground that the class in that case was not ascertainable, in part, because there was potentially inaccurate information in "the electronic databases" as to the employees' termination dates and the dates employees made themselves available for tender; no such inaccuracy regarding Starbucks's records have been alleged in this case); *Dioquino v. Sempris, LLC*, No. CV11-05556 SJO, 2012 WL 6742528, at *6 (C.D. Cal. Apr. 9, 2012) (distinguishable on the ground that the plaintiff in that case was completely unable to show "an evidentiary source . . . that would permit class-wide discovery"); *Cortez v. Best Buy Stores, LP*, No. CV 11–05053 SJO (FFMx), 2012 WL 255345, at *4 (C.D. Cal. Jan. 25, 2012) (distinguishable on the ground that the plaintiff in that case did "not allege that [the employer] **categorically** refused to permit rest breaks," whereas that is the precise argument in this case) (emphasis in original).

The Court thus finds that the rest break class is ascertainable from Starbucks's employment records.

D. Rule 23(b)(3) Requirements

Rule 23(b)(3) requires that the Court find that "[1] the questions of law or fact common to class members predominate over any questions affecting only individual members, and that [2] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a). *Amchem Prods., Inc. v. Windsor*, 521

U.S. 591, 624 117 S. Ct. 2231, 2250, 138 L.Ed. 2d 689 (1997). The predominance inquiry "'trains on the legal or factual questions that qualify each class member's case as a genuine controversy.'" *Amchem Prods.*, 521 U.S. at 594 (citation omitted).

Cummings argues that common questions predominate because on a motion for class certification, the plaintiff's theory of liability controls. (Cummings's Supplemental Brief at 2). Cummings's theory is that Starbucks's facially defective rest break policy and uniform rest break scheduling practice failed to authorize a second rest break for non-exempt employees scheduled to work six hours or less, but who work more than six hours. (Cummings's Supplemental Brief at 6-7, 9).

In contrast, Starbucks argues that individualized inquiries predominate for two reasons. ***First***, the evidence shows that Starbucks has a practice of providing a second rest break to employees scheduled to work six hours or less, but who work more than six hours. (Opp. at 8). ***Second***, Starbucks argues that common questions do not predominate because "the crucial question is whether a break violation occurred in the first place," and the answer to that question cannot be determined based solely on whether Starbucks's policy is lawful. (Starbucks's Supplemental Brief at 3).

The Rule 23(b) predominance requirement presents the closest issue in this case. In determining whose position is correct, the Court looks at the seminal case on this issue, *Brinker*, as well as cases applying *Brinker*.

In *Brinker*, the California Supreme Court addressed whether the trial court abused its discretion in concluding that common questions predominate with regard to the plaintiff's rest break subclass. 53 Cal. 4th at 1032. "The issue for the trial court was whether any of the rest break theories of recovery advanced by [the plaintiff] were 'likely to prove amenable to class treatment.'" *Id.* One of the plaintiff's theory was that the defendant "adopted a uniform corporate rest break policy that violate[d] Wage Order No. 5 because it fail[ed] to give full effect to the 'major fraction' language of subdivision 12A." *Id.* The plaintiff presented

evidence and the defendant conceded that the policy was a uniform policy that was equally applicable to all employees. *Id.* at 1033.

In *Brinker*, the trial court granted certification, but the court of appeal reversed, concluding that because rest breaks can be waived, any showing on a class basis that plaintiffs or other members of the proposed class missed rest breaks or took shortened rest breaks would not necessarily establish, without further individualized proof, that the defendant violated the Labor Code and Wage Order No. 5. *Id.* The California Supreme Court held that this reasoning was error because "[n]o issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline or take it." *Id.*

Accordingly, the California Supreme Court held that "[c]lasswide liability could be established through common proof if [the plaintiff] were able to demonstrate that, for example, [the defendant] under this uniform policy refused to authorize and permit a second rest break for employees working shifts longer than six, but shorter than eight, hours." *Id.* at 1033. "Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." *Id.*

A line of California Court of Appeal cases have interpreted *Brinker* as holding that an employer's liability flows simply from having a facially defective policy, and that evidence that employees were actually able to take breaks or waived breaks only addresses the damages to which each employee is entitled.

For example, in *Bradley*, 211 Cal. App. 4th 1129, the plaintiff's theory of recovery was that the employer lacked a uniform rest and meal break policy, and that it uniformly failed to authorize such breaks. *Id.* at 1150. The court found that "[t]he lack of a meal/rest break policy and the uniform failure to authorize such breaks are matters of common proof." *Id.* *Bradley* initially appears distinguishable in that the employer provided no evidence that some employees

took authorized rest or meal breaks. *Id.* at 1151. However, the court indicated that even if such evidence had been present, it would not have defeated class certification. *Id.* The court viewed *Brinker* as having "expressly rejected" the reasoning "that evidence showing some employees took rest breaks and other employees were offered rest breaks but declined to take them made class certification inappropriate." *Id.* at 1143. The court thus stated that "the fact that an employee *may* have actually taken a break or was able to eat food during the work day does not show that the individual issues will predominate," and that such issues would only be relevant to determining individual damages. *Id.* at 1153.

Similarly, in *Faulkinbury*, 216 Cal. App. 4th 220, the plaintiffs asserted that the employer did not have a policy regarding rest breaks, and had an express policy of requiring security guards to remain at their posts at all times, thereby failing to authorize or permit rest breaks. *Id.* at 236. The court of appeal found that the lawfulness of the defendant's lack of a rest break policy and requirement that all employees remain at their posts could be determined on a class-wide basis. *Id.* at 237. In so holding, the court adopted the reasoning in *Bradley* and stated that the defendant's "liability, if any, would arise upon a finding that its uniform rest break policy, or lack of policy, was unlawful." *Id.* Although the defendant submitted declarations of employees indicating that some were relieved of duties in order to take rest breaks or were otherwise able to take rest breaks, the court found that "this evidence at most establishes individual issues of damages." *Id.*

Likewise, in *Benton v. Telecom Network Specialists, Inc.*, 220 Cal. App. 4th 701, 163 Cal. Rptr. 3d 415 (2013), the plaintiffs argued that their employer failed to adopt a policy authorizing and permitting meal and rest breaks. *Id.* at 707. The parties' declarations indicated that while some class members were able to take rest breaks, others were not. *Id.* at 725. The court of appeal also read *Brinker* as expressly rejecting the proposition that an employer would become "liable only upon a showing that [an employee] had missed breaks as a result of [the employer's] policies." *Id.* at 726. Instead, the court of appeal adopted the reading in *Faulkinbury* that "the employer's liability arises by adopting a uniform policy that violates the wage and hour laws." *Id.* Under this logic, the court found that

the trial court erred in denying class certification. *Id.* at 725-26. "Rather than focusing on whether plaintiffs' theory of liability—that [the defendant] violated wage and hour requirements by failing to adopt a meal and rest period policy—was susceptible to common proof," the court of appeal found that the trial "court improperly focused on whether individualized inquiry would be required to determine which technicians had missed their meal and rest periods." *Id.* at 725.

In contrast to the above line of cases, there are post-*Brinker* district court cases that find that liability springs not simply from a facially defective policy, but from proof that a rest break was unlawfully denied.

For example, in *Ordonez v. Radio Shack, Inc.*, 2013 WL 210223 (C.D. Cal. Jan. 17, 2013), the district court denied certification on a rest break subclass. The court applied *Brinker* to find that an employer's rest break policy, which was facially deficient because it lacked the "or major fraction thereof language," presented a common question of law under Rule 23(a). *Ordonez*, 2013 WL 210223, at *6. However, the defendant also offered "testimony that despite its written policy, putative class members were granted rest breaks in accordance with California law-or at a minimum, in accordance with no uniform policy at all." *Id.* at *11. The district court found this evidence significant, stating that "[u]nlike other cases where a defendant had a purportedly illegal rest or meal break policy and courts found that common issues predominated, there is substantial evidence in this case that defendant's actual practice was to provide rest breaks in accordance with California law." *Id.* Therefore, the "plaintiff's evidence that defendant *may* have an illegal, written rest break policy [wa]s insufficient for [the district court] to find that common issues predominate" under Rule 23(b)(3). *Id.* (emphasis in original). In other words, unlike the California Court of Appeal cases, *Ordonez* did not treat evidence of whether employees were actually able to take breaks as a matter of damages, but as a matter of liability.

Cummings argues that *Ordonez* can be distinguished from this case in that the employer's national policy in *Ordonez* contained the following language, making it compliant with state law: "[s]tate laws specifying additional break and

meal provisions may also apply." (Reply at 11 (citing *Ordonez*, 2013 WL 210223, at *10)). However, this additional language in the employer's policy was not central to the district court's denial of certification in *Ordonez* because the court still found the employer's policy to be facially non-compliant with California law. *See Ordonez*, 2013 WL 210223, at *11.

Cummings also argues that *Ordonez* can be distinguished because the plaintiff in *Ordonez* "'appear[ed] unable to offer any classwide method for proving when class members were or were not authorized and permitted to take a rest break.'" (Reply at 11 (citing *Ordonez*, 2013 WL 210223, at *11)). The Court disagrees with Cummings. In *Ordonez*, the plaintiff had access to the time and pay records for class members, which were analyzed by the plaintiff's expert with regard to meal breaks. *Ordonez*, 2013 WL 210223 at *2. However, "[u]nlike a meal break class, rest breaks were not recorded in defendant's timekeeping system," and thus, the "plaintiff ha[d] not demonstrated how, on a classwide basis, he [could] demonstrate that defendant failed to authorize the minimum amount of rest periods." *Id.* at *12.

Ordonez was not the only case to apply this reasoning post-*Brinker*. In *In re Taco Bell Wage & Hour Actions*, the plaintiffs asserted that the defendant's rest period policy was facially invalid because it only provided one ten-minute rest break for employees working between six and seven hours. No. 1:07CV1314 LJO DLB, 2012 WL 5932833 at *10 (E.D. Cal. Nov. 27, 2012) *report and recommendation adopted sub nom.*, No. CV F 07-1314 LJO DLB, 2013 WL 28074 (E.D. Cal. Jan. 2, 2013), *leave to appeal denied* (Apr. 24, 2013), *reconsideration denied*, CV F 07-1314 LJO DLB, 2013 WL 204661 (E.D. Cal. Jan. 17, 2013). The district court found that the plaintiff lacked a form of class-wide proof because Defendants had no records of whether employees took rest breaks. *Id.* The court held that "[w]ithout reliable evidence in the time cards, an individual inquiry is the only way to determine whether a second break was or was not taken." *Id.* In other words, both *Ordonez* and *In re Taco Bell* found that an employer's liability does not arise solely from a facially defective policy, but from proof that an employee was actually denied a rest break.

The same evidentiary flaw that was noted in both *Ordonez* and *In re Taco Bell* is present in this action. Cummings argues that she can demonstrate rest break violations on a class-wide basis by comparing employees' scheduled shifts with those employees' time cards. (Reply at 20). However, as was the case in *Ordonez* and *In re Taco Bell*, Starbucks employees do not clock out when they take rest breaks, and thus, rest breaks are not documented on the employees' time sheets. (*See* Opp. at 3). Therefore, Cummings's proposed methodology can only demonstrate that an employee was not scheduled to receive a second rest break; it cannot demonstrate that an employee did not actually receive a second rest break.

The Court is thus presented with conflicting case law as to whether Starbucks's liability can result solely from its unlawful policy, as the California Court of Appeal cases suggest, or whether liability results from the actual failure to provide a rest break, as the district court cases suggest. Neither set of cases is binding. Therefore, the Court looks to a recent Ninth Circuit case, *Abdullah*, 731 F.3d 952.

In *Abdullah*, the Ninth Circuit appeared to acknowledge and apply the reasoning in the California Court of Appeal cases. It noted that *Faulkinbury* clarified that "an employer may be held liable under state law 'upon a determination that [its] uniform on-duty meal break policy [is] unlawful,' with the 'nature of the work' defense being relevant only to damages." *Abdullah*, 731 F.3d at 963 (quoting *Faulkinbury*, 216 Cal. App. 4th at 235).

However, the Ninth Circuit also noted that "it is an abuse of discretion for the district court to rely on uniform policies 'to the near exclusion of other relevant factors touching on predominance.'" *Id.* at 964. In light of this principle, the Ninth Circuit found that the district court appropriately looked at all of the evidence in the record, including testimony about the defendant's "actual business practices, as well as the declarations of [the defendant's] employees," to support "a finding that common questions would predominate." *Id.* at 965.

In particular, the Ninth Circuit noted that a representative of the defendant-company testified that (1) 99.9% of the employees worked at single guard posts, (2) no single guard post allowed for a lunch break, and (3) on-duty meal periods were required as a matter of policy. *Id.* at 966. This testimony discredited the declarations provided by the defendant, demonstrating that guards at some locations were provided off-duty meal periods. *Id.* Moreover, none of the declarations established that off-duty meal breaks were categorically given to the declarant, and in the vast majority of cases, the defendant's policy was implemented to require on-duty meal breaks. *Id.* at 965-66.

Abdullah thus appears to recognize the logic of the California Court of Appeal cases, while leaving room for the possibility that the predominance requirement may not be met, despite the existence of a facially defective policy.

Unlike *Abdullah*, the evidence in the record here does not indicate that Starbucks's facially defective rest period policy was consistently applied to deprive class members of a second rest period. Instead, the evidence indicates that the ALS system scheduled rest breaks for every major fraction of a four-hour period. (*See* Rutt Decl., ¶¶ 7-8; Rutt Depo. 34:17-36:18). The only situation in dispute is when a nonexempt employee is scheduled to work six hours or less, and then works more than six hours. For this particular situation, it does not appear that common answers will drive the resolution of the question whether employees were provided a second rest break.

While the evidence indicates that Starbucks's managers usually schedule breaks in accordance with the ALS system (*see* Rutt Deposition, 97:12), it does not appear that managers are prevented from scheduling breaks outside the ALS system. For example, Rutt testified as follows in her deposition:

> Q: . . . But if, say, the ALS system or, say, the daily coverage report determines that [nonexempt employees are] not entitled to take a break, a break would not be scheduled for them, correct?

A: Correct.

Q: And as a result, the nonexempt employee would not be expected to take any form of break, correct?

A: ***If they're not otherwise entitled to it*** and it's not in the system, then they would not typically take a break.

Rutt Deposition, 36:9-18 (emphasis added).

Moreover, Starbucks has presented declarations by store managers and putative class members who testified that nonexempt employees were given a second rest break when they were scheduled to work six hours or less, but actually worked more than six hours.

Some declarants indicated that these breaks were given as a matter of uniform practice. (*See, e.g.*, Declaration of Joseph Bresler, ¶ 8 ("If a partner is scheduled for 6 hours or less but ends up working more than 6 hours, I make sure he or she is provided an additional, unscheduled rest break.") (Docket No. 63-28); Declaration of Samuel Nigro, ¶ 9 ("When a partner is scheduled to work 6 hours or less but ends up working more than 6 hours, I make sure that partner is provided an additional, unscheduled rest break.") (Docket No. 63-51); Declaration of Kayleigh Winn, ¶ 6 ("[E]ven if a partner works 5 or 10 minutes past 6 hours, I make sure they have a chance to take an additional rest break before clocking out for the day.") (Docket No. 63-70); Declaration of Maria Ayala, ¶ 7 ("Sometimes when I am scheduled for six hours or less, I stay later and work past the six hour mark. When this happens, I am provided an additional, unscheduled rest break.") (Docket No. 63-23); Declaration of Ina Prince, ¶ 8 (attesting that when she is scheduled for a shift of 6 hours or less, but works past the 6-hour mark, she is "provided an additional rest break, even though it is not scheduled on the DCR [Daily Coverage Report]") (Docket No. 63-55)).

Other declarants indicated that they were generally or usually given breaks when they were scheduled to work six hours or less, but worked more than six hours. (*See, e.g.*, Declaration of Raul Silva, ¶ 9 ("When a partner is scheduled for 6 hours or less but ends up working past the 6 hour mark, he or she generally takes an additional, unscheduled rest break.") (Docket No. 63-62); Declaration of Heidi Castillo, ¶ 11 ("Sometimes I work 6 hours shifts," which run long. "On these shifts, I am often given the opportunity to take an additional 10-minute break right before I clock out. . . .") (Docket No. 63-32).

In total, Starbucks presented ten declarations demonstrating that rest breaks were provided when this particular situation occurred.

In contrast, the only evidence showing that employees were denied rest breaks when they were scheduled to work six hours or less, but actually worked more, is Cummings's own testimony. (*See* Errata ("There were times when I worked longer than 6 hrs. and did not get a second rest break."); First Cummings Decl. at ¶ 4 (stating that on shifts when she worked longer than the scheduled six hours, she "was <u>never</u> given a second rest break") (emphasis in original); Second Cummings Decl. at ¶ 4 ("I would generally receive 1 rest break for shifts of less than 7 hours in length.")).

Even in *Brinker* itself, the California Supreme Court stated: "Claims alleging that a uniform policy ***consistently applied*** to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." 53 Cal. 4th at 1033 (emphasis added). In the present case, the evidence in the record establishes only that Starbucks's rest break policy was applied so as to deprive Cummings of a second rest break, when she was scheduled to work six hours or less, but then worked past six hours. Therefore, to find that common issues predominate, the Court would have to rely on the defective rest period policy to the exclusion of other evidence in the record, which would be an abuse of discretion under *Abdullah*, 731 F.3d at 964.

Similarly, individual questions predominate in regard to the rest break scheduling claim. The above evidence indicates that when employees are scheduled to work six hours or less, but work past six hours, Starbucks lacked a uniform scheduling practice for rest breaks. Some employees uniformly received a second rest break, others regularly received a second rest break, and Cummings never received a second rest break. Nor is there a common method of proof that can demonstrate when employees were denied a second rest break because rest breaks are not documented as was the case in *Ordonez* and *In re Taco Bell*. Accordingly, individual inquiry would predominate in determining whether an employee was denied a rest break under the rest break scheduling claim.

While Cummings also argues that Starbucks failed to pay rest break penalties (Mot. at 8-10), that claim depends on proving that the class was entitled to a rest break and did not receive one. Because Cummings cannot show, via a uniform policy or practice applied consistently to the class or a common method of proof, when an employee was denied a second rest break, she also cannot show, on a class-wide basis, when a rest break penalty was unlawfully denied.

Therefore, Cummings's rest break claim is not amenable to class certification because it does not satisfy the predominance requirement under Rule 23(b).

The Motion is **DENIED** as to the rest period class.

V. CONCLUSION

The Motion for Class Certification is **DENIED** as to the rest period policy class, the rest period scheduling class, and the meal period policy and practice class. Because the UCL claims were derivative of the California Labor Law claims, they are also not amenable to class certification.

IT IS SO ORDERED.