SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - September 25, 2013

EVENT DATE: 09/26/2013 EVENT TIME: 02:00:00 PM DEPT.: C-67

JUDICIAL OFFICER: William S. Dato

CASE NO.: GIC834348

CASE TITLE: HOHNBAUM VS BRINKER RESTAURANT CORPORATION

CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Motion Hearing to Certify/Decertify Class Action

CAUSAL DOCUMENT/DATE FILED: Motion to Certify Class, 07/22/2013

Plaintiffs' motion to certify a meal period subclass is granted. Defendants' motion to decertify the rest period subclass is denied. The law firms of Hurst & Hurst and Cadena Churchill, LLP are added as additional class counsel.

Preliminary Matters

Defendants' evidentiary objections are overruled.

Plaintiffs' evidentiary objections to the declaration of Dr. Daniel Slottje are overruled with the exception of legal conclusions and argumentative statements as follows: ¶ 5, second sentence; ¶ 8; ¶ 12, second sentence; ¶ 18; ¶ 23, second, fourth and fifth sentences; ¶ 51, third sentence; ¶ 57, third sentence; ¶ 63, second sentence.

The Krosnick survey was not considered.

Factual and Procedural Background

With respect to class certification issues in this wage-and-hour case, to say this Court does not write on a clean slate would be an understatement. This matter is on remand following the Supreme Court's decision in *Brinker v. Superior Court* (2012) 53 Cal.4th 1004. This Court (per Judge Patricia Cowett) previously entered an order granting class certification, incorporating numerous subclasses of restaurant employees. Defendant Brinker entities (collectively "Brinker") sought writ review as to three of the subclasses. After the Court of Appeal reversed, the Supreme Court granted review and ultimately issued its decision in which it affirmed the Court of Appeal as to one subclass (off-the-clock work), reversed as to another (rest breaks), and remanded with instructions to conduct further proceedings as to the third (meal periods).

The alleged factual bases for plaintiffs' claims as well as the procedural history of the case were described in the Supreme Court opinion and need not be repeated here. (See 53 Cal.4th at pp. 1017-1021.) The current motions focus on two of the three subclasses considered by the Supreme Court. Plaintiffs' renewed motion for class certification addresses the meal period subclass as to which the Supreme Court remanded for reconsideration in light of its opinion. (*Id.* at pp. 1050-1051.) Brinker's motion to decertify the rest period subclass seeks to undo the subclass that the Supreme Court concluded had been properly certified. (*Id.* at p. 1033.)

A. Motion to Certify a Meal Period Subclass

The prior trial court proceedings regarding the meal period subclass were somewhat unusual in that they raised certain foundational controversies regarding the substantive employment law that would govern resolution of the merits of plaintiffs' claims. Consistent with Labor Code section 512 and Wage Order No. 5, there was no dispute that employees who work more than five hours are generally entitled to a meal period, or that those who work more than ten hours are entitled to a second meal period. The parties disagreed, however, as to (1) whether the employer was obligated to ensure that a meal period was taken by the employee, and (2) whether the statute and Wage Order imposed additional timing requirements with regard to when the meal period must be afforded. As to the first of these two disagreements, Judge Cowett concluded that even if Brinker were correct, common questions would still predominate, making class certification appropriate. (*Brinker, supra,* 53 Cal.4th at p. 1023.) As to the second, pursuant to a stipulation of the parties Judge Cowett addressed the additional timing issue before hearing the motion for class certification and generally agreed with plaintiffs. (*Id.* at p. 1019.)

The Supreme Court ultimately addressed both foundational issues. With respect to the nature of the requirement to "provide" employees with meal periods, the court held that an employer "satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." (*Id.* at p. 1040.) With respect to timing, the court rejected plaintiffs' argument that Wage Order No. 5 imposes additional timing requirements beyond those mandated by Labor Code section 512. Under the statute, the employer's obligation is merely "to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work." (*Id.* at p. 1049.) With those issues now resolved, the question is whether plaintiffs' claims are susceptible of class treatment.

The class in this case has previously been defined to include "[a]ll present and former employees of [Brinker] who worked at a Brinker-owned restaurant in California, holding a non-exempt position, from and after August 16, 2000." (See *id.* at p. 1019.) Plaintiffs now seek certification of a meal period subclass consisting of "Class Members who were not provided with a first thirty (30) minute meal period during which the Class Member was relieved of all duties by no later than the end of the fifth hour of work, and/or a second thirty (30) minute meal period during which the Class Member was relieved of all duties by the end of the tenth hour of work, and who were not compensated with one hour of pay when not provided with lawful meal periods from or after October 1, 2000." (SAC ¶ 22.)

Although Brinker captions its arguments under headings that include commonality, typicality, and manageability, the crucial question now - as it has always been - is whether plaintiffs' claim that employees were denied mandated meal periods (or premium pay in lieu of the required meal period) is subject to common proof, or whether any trial would necessarily devolve into a series of separate inquiries into the particular circumstances of individual employees. The focus in on the *plaintiffs' theory* of liability and proof, not on alternative approaches a defendant might prefer were being pursued. (*Brinker, supra,* 53 Cal.4th at p. 1025.) The court must examine the plaintiffs' theory (or theories), "assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate." (*Ibid.*) "'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.'" (*Id.* at p. 1022, quoting *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.)

Here, plaintiffs proffer two theories they believe are susceptible of classwide proof. The first involves the contention that Brinker's corporate meal period policies - and particularly its written policies after 2002 - violate California law. The second concerns the employer's obligation to relieve employees "of all duty" and not to "impede or discourage" them from taking their mandated meal periods. (*Brinker, supra,* 53 Cal.4th at p. 1040.)

1. Brinker's Corporate Meal Period Policy

Prior to 2002 Brinker had no corporate-wide written meal period policy. (Hukill Decl. ¶ 13.) The parties have stipulated that Brinker maintained a corporate-wide written policy since 2002, and that the policy was modified once in May 2012 in response to the *Brinker* decision. (Ridley Decl. (JCR) Exs. 18 at p. 74, 29, 58.) Between 2002 and 2012, the policy advised employees they were "entitled to a 30-minute meal period when I work a shift that is over five hours." (JCR Ex. 17.) After the modification, employees were required to acknowledge they were "entitled to an unpaid, uninterrupted 30-minute meal period when I work a shift that is over five hours. If I work for more than 10 hours per day, I am entitled to a second, unpaid uninterrupted 30-minute meal period." (JCR Ex. 28.)

Plaintiffs argue that Brinker's failure to adopt and promulgate a company-wide meal period policy prior to 2002 is itself unlawful. They contend the pre-May 2012 written policy is unlawful for three reasons: "(1) it does not inform Class Members of their entitlement to a first 30-minute, duty-free meal period by the end of their 5th hour of work or their entitlement to a second 30-minute, duty-free meal period by the end of their 10th hour of work; (2) it only permits Class Members to take their first 30-minute, duty-free meal after 5 hours of work or their second 30-minute, duty-free meal period after 10 hours of work; and (3) it does not inform Class Members of their entitlement to a second meal period at all." (Mot. at p. 12.) Finally, they maintain that the modified post-May 2012 policy is similarly unlawful for the same reasons except number (3).

As to the pre-2002 time frame, whether Brinker's failure to adopt *any* corporate meal period policy violates California law is an issue common to all class members who worked for Brinker during that period. The fact that in 2002, in response to an investigation by the Department of Labor Standards Enforcement (DLSE), Brinker adopted a written corporate policy is itself evidence that it believed such an obligation existed.

As to the post-2002 period, Brinker asserts that in order to obtain class certification, plaintiffs must demonstrate "that class members suffered a common injury as a result of a facially invalid policy that applied to all putative class members." (Opp. at p. 17.) This assertion, however, mischaracterizes the applicable law. Here there is no dispute that Brinker's written meal period policy applied to all putative class members. The "common injury" is the lack of premium pay if class members were not provided with a required meal period.

It is true that class members' entitlement to those damages depends on plaintiffs ultimately establishing the facial invalidity of Brinker's written meal period policy. But the validity of the policy is *not* an issue to be determined at the class certification stage. It is, rather, the merits of plaintiffs' lawsuit. As the Supreme Court has repeatedly explained and *Brinker* only reaffirmed, "[t]he certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.'" (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–440; *Brinker, supra,* 53 Cal.4th at p. 1023.) "[R]esolution of disputes over the merits of a case generally must be postponed until after class certification has been decided [citation], with the court assuming for purposes of the certification motion that any claims have merit." (*Ibid.*)

Brinker involved a dispute between the parties in defining the elements of the plaintiffs' claims. "[W]hether an element may be established collectively or only individually, plaintiff by plaintiff, can turn on the precise nature of the element and require resolution of disputed legal or factual issues affecting the merits." (*Brinker, supra,* 53 Cal.4th at p. 1024.) The Supreme Court emphasized, however, that any inquiry into the merits at the class certification stage is narrowly circumscribed. Indeed, "any 'peek' a court takes into the merits at the certification stage must 'be limited to those aspects of the merits that affect the decisions essential' to class certification." (*Ibid,* quoting *Schleicher v. Wendt* (7th Cir. 2010) 618 F.3d 679, 685.)

Here, the parties' dispute over the facial validity of Brinker's written meal period policy does not involve

defining an element of plaintiffs' claim. Determining the validity of the policy is not in any sense necessary to decide whether its invalidity is subject to common proof. Indeed, that plaintiffs will ultimately be able to prove that the policy is invalid is what the Court must "assum[e] for purposes of the certification motion." (*Id.* at p. 1023.) As the *Brinker* court explained, "[c]laims *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.* at p. 1033, emphasis added; see also, e.g., *In re AutoZone, Inc., Wage and Hour Employment Practices Litigation* (N.D. Cal. 2012) 289 F.R.D. 526, 534; *Cervantez v. Celestica Corp.* (C.D. Cal. 2008) 253 F.R.D. 562, 576.) Indeed, the "facial" validity of a uniform written policy is a prototypical instance where proof as to one will provide proof for all. (See generally *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808; *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 453.)

Brinker argues that its written meal period policy at the outset of the class period, which dated from 2002, was approved by the Department of Labor Standards Enforcement (DLSE) and that the 2012 modification fully tracks the *Brinker* decision. (Opp. at pp. 5-8, 10-11.) In effect, Brinker disputes plaintiffs' contention that the written policies are facially invalid. It may turn out Brinker is right, in which case plaintiffs will lose and Brinker will have the benefit of a judgment that binds the entire class. (See *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1538.)

Brinker also asserts that notwithstanding whether there was a corporate policy (pre-2002) or whether the applicable corporate written meal period policy was facially valid (post-2002), there was wide variation in how meal period policies were implemented and applied in individual restaurants or restaurant groups such that some employees may have been treated properly while others may not have been. (Opp. at pp. 8-10, 11-16.) But whether the lack of a company-wide policy violates California law is itself a classwide issue subject to common proof. (*Bradley v. Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1150.) And as the Court of Appeal explained in *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, an employer's liability can also arise "by adopting a uniform policy that violates the wage and hour laws. Whether or not the employee was able to take the required break goes to damages, and '[t]he fact that individual [employees] may have different *damages* does not require denial of the class certification motion.'" (*Id.* at p. 235, quoting *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1301, emphasis in original; see also *In re Taco Bell Wage and Hour Actions* (E.D. Cal., Nov. 27, 2012, 1:07CV1314 LJO DLB) 2012 WL 5932833, at *6 [expressly rejecting a virtually identical defense argument that "the existence of an allegedly violative corporate policy is not sufficient to establish liability and that an individual inquiry as to how each manager, at each store, *implemented* the policy is necessary"] (emphasis in original).)

Plaintiffs and their counsel are entitled to choose their theory of recovery, and as previously noted it is *that* theory that guides the analysis for purposes of class certification. (See *Sav-on Drug Stores, Inc. v. Superior Court, supra,* 34 Cal.4th at p. 327 [trial court must determine "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment"].) The fact that individual employees might be able to establish a violation of the law regarding meal periods by using evidence unique to their particular circumstances - e.g., the practices of an individual restaurant - does not mean that a class action cannot be tried based only on common proof. Obviously in deciding whether to opt out or participate, putative class members will have to consider whether they wish to forego the possibility of proving their claim by relying on individual evidence. Similarly, the fact that Brinker might be able to minimize damages by pointing to individual restaurants that failed to follow a facially invalid policy does not defeat the efficacy of a class action. (See *Kurihara v. Best Buy Co., Inc.* (N.D. Cal., Aug. 30, 2007, C 06-01884 MHP) 2007 WL 2501698, at *10.) For common issues to predominate, it need only be shown that "the issues which may be jointly tried, when compared to those requiring separate adjudication, justify the maintenance of the suit as a class action." (*Vasquez v. Superior Court, supra,* 4 Cal.3d at p. 815; accord *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104-1105.) The critical issue for certification purposes is whether plaintiffs have a theory of liability that can be proved on a common basis. The evidence here indicates they do.

2. Impeding or Discouraging Meal Breaks

Apart from a uniform written corporate meal period policy or lack thereof, plaintiffs point to three other Brinker policies that allegedly have the effect of interfering with the taking of meal breaks: (1) a tip forfeiture policy applicable to order-taking employees that requires an employee taking a meal break to transfer all open tickets to other servers and forfeit all tips on those tickets (JCR Exs. J and K); (2) a policy that requires employees to obtain permission before taking a meal break rather than scheduling such breaks in advance (JCR Ex. I); and (3) a policy that makes employees responsible for their cash drawer even during meal breaks (JCR Ex. Q), meaning that these employees are not "relieve[d] ... of all duty" within the meaning of *Brinker*. (See 53 Cal.4th at p. 1040.)

Brinker does not seriously dispute the existence of the policies that plaintiffs claim discourage the taking of meal breaks. Rather it argues that these policies do not amount to a "systemic practice of 'discouraging' meal periods." (Opp. at p. 18.) Again, however, this argument goes to the merits of plaintiffs' claim, not its suitability for class treatment.

Brinker points out that certain of these policies ((1) and (3) in particular) only apply to certain categories of employees within the defined subclass. While this is certainly true, further formal sub-subclassing is not required at this point in time. The Court will address the implications of these limitations if and when it becomes necessary.

3. Other Issues

Brinker contends that certain defenses it wishes to assert as to certain class members will have the effect of causing individual issues to predominate. Although affirmative defenses may be considered in assessing the predominance of common questions, the issues they raise must be substantial before they will affect the inquiry. (See, e.g., *Weinstat v. Dentsply Intern., Inc.* (2010) 180 Cal.App.4th 1213, 1235.) Here they are not.

Brinker first contends it had an "open door" complaint procedure if employees believed they were improperly denied meal breaks, but that it received few if any complaints. It suggests it can assert the "doctrine of avoidable consequences" to preclude an award of damages if it "took reasonable steps to prevent and correct" harms to employees in the workplace. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1044.) The *State Dept. of Health Services* case involved an employee's claim under the Fair Employment and Housing Act (FEHA) based on sexual harassment by a supervisor. Brinker cites no authority to suggest it has any application to a wage-and-hour claim based on an employer's mandatory duty to properly compensate employees.

Brinker also claims that some putative class members signed arbitration agreements that would require submission of these claims to arbitration. As plaintiffs point out in response, however, earlier in this case Brinker filed a motion to compel arbitration as to one of the named plaintiffs. It later withdrew the motion with prejudice pursuant to an agreement with plaintiffs' counsel. The terms of the withdrawal provided that it "should be understood only as Defendants' intent to not arbitrate Plaintiff's claims *or the claims of the putative class* with respect to this particular litigation." (Reply RJN Ex. 9, p. 2, emphasis added.) As a result, Brinker can successfully assert no right to arbitrate any claim in this case.

B. Motion to Decertify a Rest Period Subclass

Subdivision 12(A) of Wage Order No. 5 provides in relevant part that "[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours." Plaintiffs contend Brinker failed to provide legally required rest breaks to members of the rest period subclass. That subclass, certified by this Court prior to Supreme Court review, included "Class

Members who worked one or more work periods in excess of three and a half (3.5) hours without receiving a paid 10 minute break during which the Class Member was relieved of all duties, from and after October 1, 2000." (53 Cal.4th at p. 1032.)

As with the meal period subclass, the Supreme Court began its discussion of the rest period subclass by defining the scope of the employer's duty - in this case, the duty to provide rest breaks to its employees. (*Brinker, supra,* 53 Cal.4th at pp. 1028-1032.) The Court of Appeal had addressed two threshold issues - "the amount of rest time that must be authorized, and the timing of any rest periods;" the Supreme Court considered the same two questions. (*Id.* at p. 1028.) As to the first issue, the court found the plain language of Wage Order No. 5 dispositive. Interpreting that language, *Brinker* holds that "[e]mployees are entitled to 10 minutes 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, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." (*Id.* at p. 1029.) As to the second, the Supreme Court rejected plaintiffs' contention that employers were legally required to provide a rest period before any meal period. (*Id.* at pp. 1031-1032.)

With the legal standard clarified, the *Brinker* court next addressed whether the trial court correctly certified the rest period subclass. It concluded that Judge Cowett properly determined common questions would predominate. (*Id.* at p. 1032.) As with the meal period subclass issues, the Supreme Court emphasized that the trial court's appropriate focus was "whether any of the rest break theories of recovery advanced by [plaintiffs] were 'likely to prove amenable to class treatment.'" *(Ibid,* quoting *Sav–On Drug Stores, Inc. v. Superior Court, supra,* 34 Cal.4th at p. 327.) In this regard the court found it only necessary to address one of plaintiffs' theories in order to conclude class certification was proper.

The rest period theory advanced by plaintiffs and discussed by the *Brinker* court was whether "Brinker adopted a uniform corporate rest break policy that violates Wage Order No. 5 because it fails to give full effect to the 'major fraction' language of subdivision 12(A)." (53 Cal.4th at p. 1032.) Justice Werdegar's opinion noted that Brinker had conceded "the existence of, a common, uniform rest break policy ... established at Brinker's corporate headquarters [and] equally applicable to all Brinker employees." (*Id.* at p. 1033.) The Supreme Court explained that if an employer adopts a uniform policy that does not "authorize and permit the amount of rest break time called for under the wage order for its industry, ... it has violated the wage order and is liable." (*Ibid.*) Thus, assessing the validity of the employer's corporate rest period policy is an issue common to all class members and "the trial court's certification of a rest break subclass should not have been disturbed." (*Ibid.*)

While it is true that a trial court always retains discretion to decertify a class or subclass that was previously certified, such a motion is proper only on a showing of changed circumstances. (Green v. Obledo (1981) 29 Cal.3d 126, 148.) The right to file a decertification motion is not merely an unrestricted opportunity to reargue the initial motion for class certification based on a belated flash of inspiration. It is nearly always based on some additional information obtained in discovery that followed the initial motion or additional insight developed by the trial court in the course of managing the litigation. (See, e.g., *National Solar Equipment Owners' Assn. v. Grumman Corp.* (1991) 235 Cal.App.3d 1273, 1286 [motion may be based on subsequent discovery]; *Sav-on Drug Stores, Inc. v. Superior Court, supra,* 34 Cal.4th at p. 335 [manageability].)

And beyond the threshold obligation to demonstrate changed circumstances, the particular procedural posture of this case indicates that Brinker faces an even greater hurdle in demonstrating that decertification is appropriate. The notion of "successive [trial court] motions concerning certification" referred to by the Supreme Court in *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 360, likely did not contemplate an intervening Supreme Court decision that confirmed rulings on legal issues. This case is on remand from the Supreme Court after a decision in which it affirmed this Court's certification of a rest period subclass. It goes without saying that the Supreme Court's decision in fully binding on this Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Nothing of significance has happened since the remittitur was issued; this is the first substantive post-remand trial court proceeding. A trial court would tread cautiously before undoing what the Supreme Court has approved based on similar evidence and repackaged arguments.

Brinker first argues that the subclass "should be decertified because [it] was not properly certified in the first place." (Mot. at p. 13.) It claims that plaintiffs' theory "has evolved" such that the theory adopted by the Supreme Court was never advanced by plaintiffs in this Court. In making this argument Brinker relies heavily on what it characterizes as "conditional" language in the *Brinker* opinion where the Supreme Court commented that "[c]lasswide liability *could be* established through common proof *if* [plaintiffs] were able to demonstrate that, for example, Brinker 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." (53 Cal.4th at p. 1033, emphasis added; see Mot. at pp. 2, 14.) Adding the carefully placed emphasis, Brinker suggests it is for this Court to now determine whether there was a uniform corporate rest break policy.

Brinker's argument founders on several different shoals. First of all, what is "conditional" in the Supreme Court's statement is classwide *liability*, not the ability to submit classwide *proof*. Plainly plaintiffs have yet to establish that Brinker is liable to anyone, but that is not the issue at the class certification stage. The question before this Court on the original motion, and the Supreme Court on review, was whether plaintiffs could *attempt* to establish Brinker's liability on a classwide basis. The Supreme Court held they *could* attempt to do so based on the evidence of Brinker's "common, uniform rest break policy." (53 Cal.4th at p. 1033.)

It is interesting but not particularly significant that Brinker now seeks to contest the uniformity of its corporate policy, a point the Supreme Court believed was conceded by the time it considered the case. (*Ibid.*) Brinker made similar arguments to Judge Cowett in opposing the original motion, noting "restaurant to restaurant" variations and asserting that the "individual practices at particular restaurants" meant there was no "'uniform policy' and set of practices ... at play here." (Pltfs.' RJN Ex. 6, pp. 6-8 and fn. 11.) At best, Brinker's point amounts to "newly packaged, but not newly discovered, evidence." (*Weinstat v. Dentsply Intern., Inc., supra,* 180 Cal.App.4th at p. 1225.)

Brinker's argument may be a matter of convenient semantic emphasis - to the extent our written corporate policy was valid, we had one; to the extent it was not, there was significant variation in how the policy was implemented from restaurant to restaurant. Or it may simply be Brinker's attempt to switch from a drowning horse in the middle of the stream. But whether or not the concession is treated as binding, the Supreme Court plainly concluded that Brinker's corporate rest period policy was sufficiently uniform for class certification purposes. This Court is not at liberty to conclude otherwise at this juncture.

Brinker's contention that decertification is warranted because plaintiffs' theory has "evolved" again ignores the significance of the intervening Supreme Court decision. Justice Werdegar's opinion did not remand for reconsideration of the trial court ruling certifying a rest period subclass, which it would have done had the court believed plaintiffs' theory had never been properly presented. Rather, it affirmed the subclass as originally certified by Judge Cowett. If Brinker believed there were relevant facts not yet considered by the trial court because of a modification in plaintiffs' theory, that should have been argued to the Supreme Court as a basis why Judge Cowett's order should not be affirmed as to the rest break subclass, but instead reversed and remanded for reconsideration.

Brinker's remaining arguments are either variations on similar themes or have already been considered and rejected in the discussion of the meal period subclass. It contends, for instance, that restaurant-by-restaurant variations in the implementation of the corporate rest period policy means that employees in certain locations suffered no damages. To a certain extent this is a definitional concern. The subclass is defined to include only those employees who were denied rest breaks. If, hypothetically, an individual restaurant deviated from a facially invalid corporate policy and provided rest breaks as required by law, those employees are not members of the subclass.

Moreover, as the Court of Appeal explained in *Faulkinbury v. Boyd & Associates, Inc., supra,* 216 Cal.App.4th 220, "the employer's liability arises by adopting a uniform policy that violates the wage and hour laws. Whether or not the employee was able to take the required break goes to damages ...." (*Id.*

at p. 235.) And the *Brinker* opinion itself reaffirms the rule that class certification is appropriate "'even if the members must individually prove their damages.'" (53 Cal.4th at p. 1022, quoting *Hicks v. Kaufman & Broad Home Corp., supra,* 89 Cal.App.4th at p. 916.)

Brinker posits that there will be insuperable manageability problems in identifying employees who were denied rest breaks because the law does not require the keeping of rest break records. Again, the factual basis for the argument - variation in the implementation of rest break policy at individual restaurants - was already considered by the Supreme Court and rejected as a basis to deny certification. In addition, the Court is guided by the Supreme Court's repeated admonition to be procedurally innovative in managing individual issues that may arise in the class action context. (See, e.g., *Sav-on Drug Stores, Inc. v. Superior Court, supra,* 34 Cal.4th at p. 339.) Of course, the Court retains discretion to re-address aspects of the certification question if it becomes convinced that issues involved in identification of class members or proof they have been damaged cannot be adequately managed.

Plaintiffs' request for a minor modification of the subclass definition is granted.

C. Class Notice

The parties are directed to meet and confer on the content and method of class notice. (See Cal. Rules of Court, rule 3.766.) A status conference is set for October 22, 2013 at 3:00 p.m. to discuss class notice issues.

Plaintiffs are directed to serve notice on all parties within 5 days of the date of this ruling.