VENABLE LLP
Dan Chammas (SBN 204825)
dchammas@venable.com
Noah Steinsapir (SBN 252715)
nsteinsapir@venable.com
2049 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 229-9900
Facsimile: (310) 229-9901

Attorneys for Defendants
CONSUMER PROGRAMS
INCORPORATED, CPI IMAGES, L.L.C.,
and CPI CORP.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHANNON PAIGE, MONICA NUCKOLS, SHAMSHAD RENEER, as individuals, on behalf of themselves and all others similarly situated,

Plaintiff,

v.

CONSUMER PROGRAMS, INC., CPI IMAGES LLC, CPI CORPORATION and DOES 1 through 50, inclusive,

Defendant.

CASE NO. CV 07-2498-MWF (RCx)

Hon. Michael W. Fitzgerald
Courtroom 1600

NOTICE OF NEW AUTHORITY IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

Defendants hereby provide notice to this Court of new authority from the Central District of California, Ugas v. H&R Block Enterprises, LLC, CV 09-6510 (July 9, 2012), where the court granted defendant's motion for decertification of a meal break class, holding that "Brinker requires only that employers give their employees an 'opportunity' to take a meal break," and that "determining why a given employee did or did not take a meal break is inherently an individualized inquiry." The court also held that "the relevant question for purposes of certification [is] when an employee worked through a meal period, was it because defendants failed to provide that employee with an opportunity to do so, or was it because the employee voluntarily chose to work through the meal period for any number of reasons."

A true and correct copy of the new authority is attached hereto as Exhibit 1 for the Court's reference.

DATED: July 11, 2012

VENABLE LLP

By: /s/ Dan Chammas
Dan Chammas
Attornevs for Defendants

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-6510 CAS (SHx)	Date	July 9, 2012
Title	DELANA L. UGAS v. H&R BLOCK ENTERPRISES, LLC; ET AL.		

Present: The Honorable	CHRISTINA A. SNYDER	
ISABEL MARTINEZ	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants	
N/A	N/A	

Proceedings: **DEFENDANTS' MOTION FOR DECERTIFICATION OF MEAL BREAK SUBCLASS** (filed 5/29/2012)

I. INTRODUCTION

On July 13, 2009, plaintiff Delana L. Ugas filed the instant class action in Los Angeles County Superior Court against defendants H&R Block Enterprises LLC, H&R Tax Group, Inc., and H&R Block Tax Services, Inc., alleging four claims for relief: (1) failure to pay overtime compensation in violation of Industrial Wage Order No. 5-89 and Cal. Labor Code §§ 510, 1194, and 1198; (2) failure to provide itemized statements in violation of Cal. Labor Code § 226; (3) failure to provide meal and rest breaks in violation of Cal. Labor Code §§ 226.7 and 512; and (4) unfair competition in violation of Cal. Bus. & Prof. Code §§ 17200 et seq. On September 8, 2009, defendants timely removed the action to this Court on the basis of diversity jurisdiction under the Class Action Fairness Act of 2005.

On August 2, 2011, the Court granted plaintiff's motion for class certification. See Dkt. No. 139. At issue for the present motion for decertification is the meal break subclass, which certified the following:

> All current and former employees of the H&R BLOCK DEFENDANTS who were employed in California as hourly paid "Tax Professionals" during the Class Period, and who did not receive meal periods and were not paid meal break premiums.

Id. at 17.

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As part of its ruling, the Court concluded that it "need not reach the question of whether defendants were required to ensure that employees took their meal breaks or whether defendants were required only to make them available," because plaintiffs presented "sufficient evidence that defendants, as a policy, do not pay the legally required meal break premium pursuant to Cal. Labor Code § 226.7." Id. at 12.

Following the California Supreme Court's decisions in Brinker Rest. Corp. v. Sup. Ct., 53 Cal.4th 1004 (2012), and Kirby v. Immoos Fire Prot., Inc., 53 Cal.4th 1244 (2012), defendants filed the instant motion for decertification of the meal break subclass. Plaintiff filed an opposition to the motion on June 15, 2012, and defendants filed their reply on June 25, 2012.[1] Defendants' motion is presently before the Court.

II. BACKGROUND

Two of H&R Block's corporate policies are pertinent to its rules regarding meal breaks. First, H&R Block's corporate policy number 602, entitled "Breaks—Field Seasonal Associate," states:

> Meal breaks consist of an unpaid 30-minute or longer period free from all work. Associates are required to clock out for meal breaks. If you are unable to take your meal break, or if your meal break is interrupted by work demands, you must immediately notify your supervisor so that you will be paid properly. If you perform any substantive work during your meal break, you will be paid for the entire meal period.

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[1]On June 28, 2012, defendants filed a notice of errata regarding their reply brief to notify the Court that they "inadvertently neglected to provide the specific references to this Court's docket to assist the Court in locating the previously-filed evidence on which [d]efendants[] rely." Notice of Errata at 1. Plaintiff objects to the exhibits attached therewith, asserting that defendants were required to attach any supporting evidence to their motion to decertify. However, because all of the evidence offered by defendants has already been docketed in connection with their opposition to plaintiff's motion for class certification, the Court OVERRULES plaintiff's objections as moot. See Dkt. Nos. 115–116 (listing exhibits filed on April 22, 2011).

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> Associates must follow all state and local requirements for taking meal and rest breaks. If you have any questions about these requirements, contact your supervisor or Human Resource representative.
>
> Failure to properly clock out for a meal period may result in disciplinary action, up to and including termination of employment.
>
> Meal and rest breaks will be designated by the supervisor based on the daily schedule. Any associate taking breaks too frequently or improperly extending a break period without his or her supervisors [sic] approval may be subject to disciplinary action, up to and including termination of employment.
>
> Concerns regarding breaks and meal periods should be reported to the associates [sic] supervisor, next-level supervisor, Human Resource representative, or the H&R Block People Center at 1-877-2CALLHR (1-877-222-5547).

See Declaration of Aileen Wilkins ("Wilkins Decl.") ¶ 13, Exh. E.

Second, H&R Block's corporate policy number 510, entitled "The Entry Exception: Working Through Meal Breaks" states, in relevant part:

- During the tax season peak, if the office is busy, associates may be asked to work through the meal break. If requested to work:
- The associate must remain clocked in
- Associates will be paid for time worked
- If state law differs, H&R Block must follow the state or federal regulation most beneficial to associates.

Opp'n at 3, Exh. A.

Additional relevant facts are known to the parties and are detailed in the Court's order granting plaintiff's motion for class certification. See Dkt. No. 139.

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III. LEGAL STANDARD

"Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits, and (2) to protect rights of persons who might not be able to present claims on an individual basis." Haley v. Medtronic, Inc., 169 F.R.D. 643, 647 (C.D. Cal. 1996) (citing Crown, Cork & Seal Co. v. Parking, 462 U.S. 345 (1983)). Federal Rule of Civil Procedure 23 governs class actions. A class action "may be certified if the trial court is satisfied after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982).

To certify a class action, plaintiffs must set forth facts that provide prima facie support for the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ---, ---, 131 S.Ct. 2541, 2548 (2011); Dunleavy v. Nadler (In re Mego Fir. Corp. Sec. Litig.), 213 F.3d 454, 462 (9th Cir. 2000). These requirements effectively "limit the class claims to those fairly encompassed by the named plaintiff's claims." Falcon, 457 U.S. at 155 (quoting Califano v. Yamasaki, 442, U.S. 682, 701 (1979)). If the Court finds that the action meets the prerequisites of Rule 23(a), the Court must then consider whether the class is maintainable under Rule 23(b). Dukes, 131 S.Ct. at 2548.

The Court has a continuing duty to ensure compliance with class action requirements pursuant to Rule 23, and therefore may decertify a class at any time. Falcon, 457 U.S. at 160 ("Even after a certification order is entered, the judge remains free to modify it in light of subsequent developments in the litigation."). It is within the Court's discretion to decertify a class. Marlo v. United Parcel Serv., Inc., 639 F.3d 942, 944 (9th Cir. 2011).

IV. DISCUSSION

Defendants move to decertify the meal break subclass on the ground that the California Supreme Court's decisions in Brinker and Kirby require a finding that plaintiff's theory of liability is no longer subject to common proof. Mot. at 1–2. "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury . . . [and] [t]heir claims must depend upon a common contention . . . of such nature that it is capable of classwide resolution—which means that determination of

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its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 131 S. Ct. at 2551 (internal quotation marks and citations omitted). "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Id.

Defendants assert that "the fact that meal period premiums were not paid cannot drive the resolution of this case on a class-wide basis," and that as a result, "there is no other commonality that would allow the Court to determine liability in a single stroke." Mot. at 2. According to defendants, individuals' testimony demonstrates that H&R Block consistently gave its Tax Professionals the opportunity to take meal breaks, and that inquiring why any particular employee skipped a meal period is inherently individualized. Id. at 4, 8–9.

Plaintiff, in opposition, asserts three overarching reasons why the Court should maintain certification of the meal break class. First, plaintiff reads Brinker as standing for the proposition that defendants' alleged uniform policy on meal breaks, i.e. the "failure to pay Section 226.7 premium[s]," is "by its nature a common question eminently suit[able] for class treatment." Opp'n at 11 (emphasis omitted). Second, plaintiff maintains that defendants' Time Entry Audit Reports "demonstrate, in color coding no less, when a Tax Professional employee has been deprived of their meal period." Id. at 14. Finally, plaintiff cites defendants' policy that "[i]f the employee remains subject to the employer's control, the employees [sic] meal period must be paid" and argue it must therefore be the case that "when a Tax Professional was paid for working through a meal break, the employee remained subject to H&R Block's control." Id. at 11 (internal quotation marks and alterations omitted).

In Brinker, the California Supreme Court concluded that California Labor Code § 512 "requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." Brinker, 53 Cal.4th at 1041. The court further concluded that an employer need not ensure an employee does no work during off-duty meal period; an employer's obligation is only to "provide a meal period to its employees" by offering them a "reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." Id. at 1040. If an employer "knew or reasonably should have known" that an employee skipped a 30-minute meal break, the employee is

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owed one hour of "premium" pay. Id. at 1040 n.19. However, "[a]n employer's failure to provide an additional hour of pay does not form part of a section 226.7 violation, and an employer's provision of an additional hour of pay does not excuse a section 226.7 violation. The failure to provide required meal and rest breaks is what triggers a violation of section 226.7." Kirby v. Immoos Fire Protection, Inc., 53 Cal.4th 1244, 1256–57 (2012). See also id. at 1256 ("Nonpayment of wages is not the gravamen of a section 226.7 violation. Instead, subdivision (a) of section 226.7 defines a legal violation solely by reference to an employer's obligation to provide meal and rest breaks.").

Here, plaintiff's theory for classwide proof of his meal break claims is based on H&R Block's Time Entry Audit Reports which show when an employee missed a meal break. The Court, in previously certifying the class, concluded that it "need not reach the question of whether defendants were required to ensure that employees took their meal breaks or whether defendants were required only to make them available," because plaintiffs presented "sufficient evidence [based on the Time Entry Audit Reports] that defendants, as a policy, do not pay the legally required meal break premium pursuant to Cal. Labor Code § 226.7." Dkt. No. 139 at 12. The California Supreme Court, however, unequivocally held that "[a]n employer's failure to provide an additional hour of pay does not form part of a section 226.7 violation, and an employer's provision of an additional hour of pay does not excuse a section 226.7 violation. The failure to provide required meal and rest breaks is what triggers a violation of section 226.7." Kirby, 53 Cal.4th at 1256–57.

Accordingly, the Court's prior justification for concluding that plaintiff satisfied the commonality requirement has been undercut by new developments in the law. Plaintiff's argument to the contrary—that H&R Block "never provided actual off duty meal breaks to the Tax Professionals" based on the Time Entry Audit Reports that show when a meal break was missed—does not consider the possibility that employees skipped a meal break to, for example, finish what they were working on, or because they were not hungry, or because they simply forgot what time it was. Because Brinker requires only that employers give their employees an "opportunity" to take a meal break, plaintiff must demonstrate that defendants' policy provided no such opportunity to each and every class member. Individual employee's testimony, however, reflects the individual nature of this inquiry in this case. See, e.g., Barbara Guerra Depo. at 127:16–21 ("Q. Did anybody every tell you that you were not allowed to take a 30-minute meal break? A. No. Q. Did anybody ever tell you that you had to work through a lunch break? A. No."); Delana

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Ugas Depo. at 56:8–11, 21–23 ("I would forget to take my lunch . . . so [my brother] would write it in for me . . . I have worked [for H&R Block] for 12 years. They've always indicated you've had to take your lunch."); Lucila Cabrera Depo. (H&R Block manager) at 96–97 (testifying that she always made meal breaks available to her employees and that employees might choose to skip a meal to serve clients because "the more clients they see . . . the more money they can make"). Because determining why a given employee did or did not take a meal break is inherently an individualized inquiry, commonality is not satisfied. See Brinker, 53 Cal.4th at 1040 ("Proof an employer had knowledge of employees working through meal periods will not alone subject the employer to liability for premium pay; employees cannot manipulate the flexibility granted them by employers to use their breaks as they see fit to generate such liability."); Reed v. Cty of Orange, 266 F.R.D. 446, 450 (C.D. Cal. 2010) ("[T]he disparity between Plaintiffs' factual and employment settings as to their pre-shift and post-shift activities, work taken home, and their meal breaks results in highly individualized questions of fact that make proceeding as a collective action impractical and prejudicial to the parties."); Gonzalez v. Millard Mall Servs., Inc., --- F.R.D. ---, 2012 WL 684590, at *8 (S.D. Cal. March 2, 2012) ("The conflicting evidence reveals that Millard did not have a uniform practice of denying employees their meal breaks and/or rest breaks.").

Aside from his reliance on the Time Audit Reports, plaintiff now asserts that certain of defendants' corporate policies are proof that employees were denied the opportunity to take meal breaks. For example, plaintiff cites corporate policy 510 that states, in part: "During the tax season peak, if the office is busy, associates may be asked to work through the meal break. . . . If state law differs, H&R Block must follow the state or federal regulation most beneficial to associates." Opp'n at 3, Exh. A. Plaintiff also cites corporate policy number 602, which states: "If the associate continues to work during the assigned meal period (i.e., eats at the desk while answering the phone) the associate must be paid and must remain on the clock." Opp'n at 6, Exh. G. Corporate policies numbers 511 and 514 state, respectively, that "[t]o ensure an accurate timesheet and resulting paycheck, designated editors are to review timesheets daily" and "[a]ssociates who need to change recorded time should complete an electronic exception in STAR." Opp'n at 5–6, Exhs. J and H. Finally, plaintiff points to a compliance document of H&R Block's entitled "Wage & Hour Compliance Under State of California Wage and Hour Laws" that states "[i]f an employee remains subject to the employer's control, the employees [sic] meal period must be paid." Opp'n at 7, Exh. K. According to plaintiff, these corporate policies and guidelines constitute "proof" that defendants

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violated labor laws by depriving employees of the opportunity to take a meal break. E.g., Opp'n at 7 ("[T]he corporate policies of H&R Block dictate[] that Tax Professionals did not, and could not, voluntarily work through a meal period."). Contrary to plaintiff's assertion, however, none of these policies answers the relevant question for purposes of certification: when an employee worked through a meal period, was it because defendants failed to provide that employee with an opportunity to do so, or was it because the employee voluntarily chose to work through the meal period for any number of reasons? Because resolving such questions requires an individualized inquiry, commonality has not been satisfied and the meal break subclass must be decertified.[2] See Brinker, 53 Cal. 4th at 1040–41; Morales v. Stevco, Inc., 2012 WL 1790371, at *10 (E.D. Cal. May 16, 2012) ("Notably, given the recent ruling of the California Supreme Court in [Brinker], class certification for Plaintiffs' claims regarding missed meal breaks would be more difficult.").

V. CONCLUSION

In accordance with the foregoing, defendants' motion to decertify the meal break subclass is GRANTED.

IT IS SO ORDERED.

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[2]At oral argument, plaintiff's counsel reiterated the contention that defendants' policies force Tax Professionals to "occasionally" work through meal periods. There are two problems with this assertion: first, H&R Block's policy 510 states that associates "may be asked" to work through meal periods, and that "[i]f state law differs, H&R Block must follow the state or federal regulation most beneficial to associates." Nothing in this policy facially violates California law. Second, plaintiff's counsel still has not demonstrated a classwide method to differentiate between forced missed lunch breaks and voluntary missed lunch breaks. As stated above, the yellow coding in the Time Audit Reports does not answer the question of "why" an employee worked through a given meal period.