UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-5029 RGK (SHx)	Date	November 12, 2015
Title	***Brandon Campbell et al. v. Vitran Express Inc.***		

Present: The Honorable	R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS)** Order re: Plaintiffs' Motion for Class Certification (DE 77)

I. INTRODUCTION

On May 7, 2010, Brandon Campbell ("Campbell") and Ralph Maldonado ("Maldonado") (collectively, "Plaintiffs") filed the present class action Complaint in Superior Court for the County of Los Angeles against Vitran Express, Inc. ("Defendant"). Plaintiffs, acting under the Private Attorney General Act ("PAGA"), allege violations of the California Labor Code premised on Defendant's purported failure to provide legally mandated meal and rest breaks.

On June 14, 2010, Defendant removed the case to this Court under the Class Action Fairness Act ("CAFA"). This Court remanded the case on August 25, 2011, a decision that was reversed by the Ninth Circuit Court of Appeals on March 30, 2012.

On June 8, 2012, this Court granted summary judgment in favor of Defendant, holding that Plaintiffs' claims were preempted by the Federal Aviation Administration Authorization Act ("FAAAA"). On July 9, 2014, the Ninth Circuit reversed this Court's decision and remanded the case, holding that Plaintiffs' claims were not preempted by the FAAAA.

Presently before the Court is Plaintiffs' Motion for Class Certification. For the following reasons, the Court **GRANTS** Plaintiffs' motion.

II. FACTUAL BACKGROUND

Defendant operates an interstate trucking company, which, during the relevant time period, maintained five terminals throughout California. These terminals employ two different types of drivers: road drivers and local/city drivers. Road drivers transport trailers between terminals and engage in interstate driving beyond one hundred miles from the point of origin. Local/city drivers are only responsible for pick-up and delivery to and from clients situated around the terminals, typically retail

stores. The instant case only concerns local/city drivers.

Plaintiffs and putative class members are former local/city drivers who worked for Defendant at one of these five terminals. Plaintiffs seek to certify the following class against their former employer:

> All current and former [drivers] and employees in similar job titles, who worked for Vitran Express, Inc. within the state of California that were not paid premium wages for working through rest and meal breaks at any time during the period of four years before the filing of this Complaint to final judgment.

(Pl.s' Mot. For Class Certification 1, ECF No. 77.)

Plaintiffs' allegations are premised on two theories of liability. First, Plaintiffs claim that Defendant implemented an unofficial policy of discouraging and denying its drivers their meal and rest breaks. Second, Plaintiffs allege that Defendant's meal and rest break policies are facially unlawful.

Additionally, Plaintiffs allege several derivative claims that flow from the core meal and rest break violations. For instance, the Complaint claims that Defendant failed to pay its employees premium pay, which refers to the amount an employer must pay any employee who is not provided with meal or rest breaks. Cal. Lab. Code § 226.7(c). Similarly, the Complaint alleges that Defendant failed to pay its employees all wages upon termination or resignation. Cal. Lab. Code §§ 201, 202. Finally, Plaintiffs claim that Defendant failed to issue properly itemized wage statements or maintain adequate payroll records. Cal. Lab. Code §§ 226(a), 1174(d). Every single one of these ancillary claims necessarily relies on the alleged meal and rest break violations; therefore, Plaintiffs' Motion for Class Certification will rise or fall solely on the meal and rest break allegations.

III. EVIDENTIARY OBJECTIONS

In support of their argument that Defendant maintained an unofficial policy of discouraging and denying meal and rest breaks, Plaintiffs proffer two types of evidence: (1) Defendant's supposed admission of liability in its Motion for Judgment on the Pleadings and (2) Declarations from thirteen drivers and one dispatcher who testify that their supervisors prohibited them from taking meal and rest breaks. Defendant objects to both types of evidence.

A. Defendant's Supposed Admission

"Statements of fact contained in a brief may be considered admissions of the party in the discretion of the district court." *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988). Plaintiff contends that Defendant admitted its failure to provide meal and rest breaks in its Motion for Judgment on the Pleadings. The Court disagrees.

In its Motion for Judgment on the Pleadings, Defendant states that its "drivers operating in California have schedules and routes that can vary on almost a daily basis." (Def.'s Mot. J. on the Pleadings 5:20-21, ECF No. 30.) Because of the constantly changing routes, Defendant asserts that it "would have to specifically schedule several, additional, daily stops in driver schedules to verify that the drivers take meal and rest breaks at the rigid times, and in the required numbers, as dictated by California law." (*Id.* at 6:2-5.) The Motion for Judgment on the Pleadings concludes by explaining, "Forcing [Defendant] to schedule several, additional, daily stops for drivers to take meal and rest breaks at the rigid times required by California law will also have a significant, prohibitive impact on [Defendant's] services." (*Id.* at 9:17-19.)

After reviewing Defendant's Motion for Judgment on the Pleadings, the Court is not convinced that the motion constitutes an admission of liability by the Defendant. The motion must be understood in context. In the motion, Defendant argued that the instant case is preempted by the FAAAA because California's meal and rest break laws relate to the rates, services, and routes offered by Defendant. To demonstrate how California's meal and rest breaks impact its rates, services, and routes, Defendant explained that complying with California's meal and rest break requirements would "have a significant, prohibitive" effect on its business. Nowhere did Defendant actually admit its failure to comply with California's meal and rest break requirements—such a conclusion is merely inferred by Plaintiffs. Instead, Defendant, in an effort to prevail on the preemption argument, was only explaining that California's meal and rest break mandates impose an onerous requirement that impacts business.

Accordingly, the Court does not agree that Defendant actually admitted class-wide liability.

B. Drivers' and Dispatcher's Declarations

Plaintiffs offer declarations from thirteen drivers (all putative class members) and one dispatcher, attesting to Defendant's alleged policy of discouraging and preventing meal and rest breaks. (Pl.s' Mot. For Class Certification App. of Evid., ECF No. 77.) Defendant moves to strike these declarations because Plaintiffs failed to timely disclose the identities of the declarants as part of their mandatory initial disclosures.

Federal Rule of Civil Procedure 26 requires the disclosure of "each individual likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(I). "Rule 26 does not require that Plaintiff disclose specifically which individuals he plans to use in support of his position, nor does it require that Plaintiff turn over declarations obtained from putative class members." *Campbell v. Best Buy Stores, L.P.*, No. CV-12-07794-JAK, 2013 WL 5302217, at *16 (C.D. Cal. Sept. 20, 2013).

Here, Plaintiffs identified "all putative class members" and "members of Vitran management" as witnesses in this action. Defendant, therefore, was on notice that all putative class members were likely to possess discoverable information. Furthermore, Defendant could have chosen to interview any of its own employees or supervisors. Therefore, the Court rejects Defendant's argument and will properly consider Plaintiffs' declarations in conducting the class certification analysis.

V. CLASS CERTIFICATION

For certification of a class action under Federal Rule of Civil Procedure 23, the plaintiff bears the burden of establishing each of the prerequisites set forth in Rule 23(a). *Hanon v. Dataproducts, Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Rule 23(a) requires that "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

In addition to finding that the requirements of Rule 23(a) have been satisfied, the Court must also find that at least one of the following three conditions of Rule 23(b) is satisfied: (1) the prosecution of separate actions would create risk of (a) inconsistent or varying adjudications, or (b) individual adjudications dispositive of the interests of other members not a party to those adjudications; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b).

A. California's Meal and Rest Break Requirements

When considering Rule 23 class certification, a district court may look beyond the pleadings, even to issues overlapping with the merits of the underlying claims, in order to ensure that Rule 23 requirements are actually met and not simply presumed from the pleadings. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011). Therefore, the Court provides a brief overview of the substantive law at issue.

"[California] law obligates employers to afford their nonexempt employees meal periods and rest periods during the workday." *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 521 (Cal. 2012) (citing Cal. Lab. Code §§ 226.7, 512). The meal period requirements are codified at § 512(a) of the California Labor Code, requiring employers to provide a 30-minute meal period for employees who work more than five hours and a second 30-minute meal period for employees who work more than ten hours. The rest period requirements are embodied in a Wage Order issued by the Industrial Welfare Commission.[1] IWC wage order No. 5–2001 (Cal. Code Regs., tit. 8, § 11050). The Wage Order requires employers to provide 10 minutes of rest time for every four hours worked or major fraction thereof unless the employee's entire workday consists of less than 3.5 hours. *Id.* In other words, "Employees 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." *Brinker*, 273 P.3d at 529.

"The employer satisfies [its meal and rest break] 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 536-37. An employer cannot contravene an official meal or rest break policy by imposing an informal practice that impedes or discourages its employees from taking compliant breaks. *Ricaldai v. U.S. Investigations Servs., LLC*, 878 F. Supp. 2d 1038, 1042 (C.D. Cal. 2012) (collecting cases holding that meal period violations were present in instances when an employer pressured employees to skip meal periods).

In the present case, both parties agree that Defendant maintains an official company policy concerning meal and rest breaks. Defendant's company policy provides, "All employees are entitled to a 30-minute lunch period when working 5 or more hours in a day" and "All Vitran Express West employees are entitled to a 15-minute break per 4 hours of work. A break is not required for employees whose total daily work time is less than 3 ½ hours." (Pl.s' Mot. For Class Certification App. Of Evid. Bickford Decl. Ex. C, ECF No. 77.)

Plaintiffs challenge this official company policy on two grounds. First, despite the written policy, Plaintiffs claim that Defendant implemented an unofficial policy of discouraging and denying its drivers their meal and rest breaks. Second, Plaintiffs allege that Defendant's written meal and rest break policies are facially unlawful.

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[1] The Industrial Welfare Commission's wage orders are considered legislative regulations with legally binding effect on employers in California. *See Brinker*, 273 P.3d at 527-28 ("The IWC's wage orders are to be accorded the same dignity as statutes. They are 'presumptively valid' legislative regulations of the employment relationship, regulations that must be given 'independent effect' separate and apart from any statutory enactments.") (citations omitted).

B. Rule 23(a)

1. *Numerosity*

Rule 23(a)(1) requires that the class be so "numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Generally, a class with over forty members satisfies the numerosity prerequisite. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). "The Ninth Circuit has not offered a precise numerical standard; other District Courts have, however, enacted presumptions that the numerosity requirement is satisfied by a showing of 25-30 members." *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000).

Here, numerosity is satisfied because Plaintiffs have identified 156 drivers that would fall within Plaintiffs' proposed class, and joinder of all of these members is impracticable. (Notice of Removal ¶ 20, ECF No. 1.)

Thus, Plaintiffs have met their burden of establishing the prerequisite of numerosity.

2. *Commonality*

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "To show commonality, Plaintiffs must demonstrate that there are questions of fact and law that are common to the class. The requirements of Rule 23(a)(2) have 'been construed permissively,' and '[a]ll questions of fact and law need not be common to satisfy the rule.'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (citations omitted). Commonality exists, and certification is proper, where the legality of a challenged policy poses a "significant question of law" that is "apt to drive the resolution of the litigation." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 963 (9th Cir. 2013) cert. denied, 135 S. Ct. 53, 190 L. Ed. 2d 30 (2014).

Here, Plaintiffs have demonstrated that there are common questions of law and fact arising from Defendant's alleged practice of violating California labor and unfair competition laws relating to meal and rest breaks. The common questions include (1) whether Defendant maintained an unofficial policy of impeding and discouraging legally mandated meal and rest breaks and (2) whether Defendant's official meal and rest break policy comports with California requirements. Plaintiffs have presented evidence showing that putative class members' claims stem from the same source in that they were all employed by Defendant as drivers during the relevant class period, and they were all subject to the same unofficial policy. Since all putative members' claims arise from the same source, the fact that they may require different amounts of damages due to their distinct job positions and wages does not defeat class certification.

The Court will further discuss these common questions when it analyzes whether those common questions predominate.

3. *Typicality*

Rule 23(a)(3) requires that the claims of the representative plaintiff be typical of the claims of the class. Fed. R. Civ. P. 23(a)(3). "[R]epresentative claims are typical if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

Here, both Plaintiffs worked as drivers at Defendant's Fontana/LAX terminal during the relevant class period, and they both claim that they were denied meal and rest breaks as a result of Defendant's

unofficial policy. Plaintiffs' allegations mirror the claims of the putative class members who also worked as drivers at various terminals during the relevant class period and were similarly subject to Defendant's unofficial meal and rest break policy.

Defendant counters that Plaintiffs have not satisfied the typicality requirement because their claims only represent their own experience at a single terminal with a unique dispatcher. In support of its argument, Defendant invokes *Cummings v. Starbucks Corp.* where the plaintiff brought a similar claim alleging that her employer maintained a practice of denying meal and rest breaks. No. CV 12-06345-MWF FFMX, 2014 WL 1379119, at *13 (C.D. Cal. Mar. 24, 2014). The court held that plaintiff failed to satisfy the typicality requirement because the plaintiff "testified that these meal breaks were late not because of a defective policy, but because of unique circumstances in the store. Therefore, there is no evidence that [plaintiff] 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." *Id.*

Defendant's reliance on *Cummings* is misplaced because the evidence presented there varies from the evidence proffered in the present case. The plaintiff in *Cummings* acknowledged that her missed meal breaks resulted from the idiosyncracies of her specific shift and work location, thereby undermining any allegation of a uniform policy. In stark contrast, Plaintiffs and putative class members here offer near-identical testimony that Defendant maintained the same unofficial policy throughout its various terminals. (Pl.s' Mot. For Class Certification App. Of Evid. Class Members' Decls., ECF No. 77.) Therefore, Plaintiff's claims are reasonably coextensive with those of absent class members.

Thus, Plaintiff has met his burden of establishing the prerequisite of typicality.

4. *Adequacy*

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The prerequisite of adequacy is satisfied if (1) the named representative appears able to prosecute the action vigorously through qualified counsel, and (2) the named representative does not have antagonistic or conflicting interests with the unnamed members of the class. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

Here, adequacy is satisfied because (1) the Declaration of Plaintiffs' attorney, R. Rex Parris, demonstrates that experienced and qualified counsel will vigorously prosecute the action[2] (Pl.s' Mot. For Class Certification App. of Evid. Parris Decl., ECF No. 77.), and (2) the record does not reflect any conflicts of interest between Plaintiff and the putative members of the class.

C. Rule 23(b)(3)

To qualify for certification under Rule 23(b)(3), a plaintiff must show (1) common questions "predominate over any questions affecting only individual members," and (2) class resolution is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

1. *Predominance*

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[2] As demonstrated in his declaration, R. Rex Parris is an experienced litigator who has devoted his practice to the prosecution of class action wage and hour cases. (Parris Decl. ¶ 3-4.)

The "predominance" prong is satisfied "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at1022 (quoting Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1777 (2d ed. 1986)).

Plaintiffs argue that a common question predominates over any individualized issues, namely, whether Defendant complied with its meal and rest break requirements under California law. Plaintiffs contend that both Defendant's (1) unofficial policies and (2) facially defective policies uniformly applied to all drivers, thereby rendering the issue of liability amenable to class-wide proof.

a. *Unofficial Policies*

Plaintiffs' first theory of liability turns on whether Defendant implemented an unofficial policy of pressuring its drivers to forego lunch breaks. Both plaintiffs, thirteen of their fellow drivers, and one dispatcher all submitted declarations attesting to Defendant's unofficial policy of discouraging and denying meal and rest breaks.

"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." *Brinker,* 273 P.3d at 531. At the heart of Plaintiffs' claim is the so-called "policy-to-violate-the-policy," a theory of liability recognized by the Ninth Circuit. *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1166 (9th Cir. 2014) cert. denied, 135 S. Ct. 2835 (2015). In *Jimenez*, insurance adjusters sought to certify a class, alleging that their employer had implemented an unofficial policy of discouraging its employees from reporting overtime. *Id.* at 1164. "[T]he district court held that the common question of whether [the defendant] had an 'unofficial policy' of denying overtime payments while requiring overtime work predominated over any individualized issues regarding the specific amount of damages a particular class member may be able to prove." *Id.* The Ninth Circuit affirmed and explained, "Proving at trial whether such informal or unofficial policies existed will drive the resolution of [the overtime issue]." *Id.* at 1166.

Class certification is not proper in every instance where a plaintiff alleges an unofficial policy to violate wage-and-hour laws. *See Flores v. Supervalu, Inc.*, 509 F. Appx. 593 (9th Cir. 2013). For example, in *Flores*, the plaintiff sought to certify a class, claiming that "although her employer's written meal and rest break policies were facially lawful, the demeanor of some supervisors implicitly compelled employees to forego or interrupt breaks to help customers." *Id.* at 594. The claim in *Flores* mirrored the claim in *Jimenez* insofar as both allegations centered on an employer's unofficial policy to violate the labor code. Despite the similarity between the claims, however, the two cases diverge on the predominance question. In *Flores*, "[t]he district court correctly found that [the "unofficial policy"] claim required examination of 'a number of human factors and individual idiosyncrasies' having 'little to do with an overarching policy,' and thus failed to satisfy Rule 23(b)(3)." *Id.*

The distinguishing factor between *Flores* and *Jimenez* appears to be the amount of evidence presented to support the existence of an unofficial policy. In other words, common issues predominate in those cases where the plaintiff proffers sufficient evidence to demonstrate that an unofficial policy exists and applies uniformly to all class members. Indeed such a rule comports entirely with the requirement under Rule 23(b)(3) because if there is no evidence of a uniform company policy, then the case largely rests on the individual circumstances of each employee's missed meal breaks. Lower courts addressing this issue have consistently hewed the same line and looked to whether the plaintiff has adduced sufficient evidence demonstrating a uniform or over-arching policy. Determining whether a plaintiff has offered "sufficient evidence" is, of course, not an exact science, but the lower court decisions on this issue provide a landscape within which to locate the instant case.

Courts generally hold that sufficient evidence of an unofficial policy exists where the plaintiff offers multiple declarations from employees attesting to the uniform application of the policy. *Harp v. Starline Tours of Hollywood, Inc.*, No. 2-14-CV07704-CAS-EX, 2015 WL 4589736, at *6 (C.D. Cal. July 27, 2015) (finding that common issues predominate where plaintiffs offered three declarations from employees testifying that they "were often prevented from taking lunch breaks, but that such breaks were nonetheless automatically deducted from their reported hours"); *Antemate v. Estenson Logistics, LLC*, No. CV 14-5255-DSF RZX, 2015 WL 3822267, at *5 (C.D. Cal. June 15, 2015) (finding that common issues predominate where plaintiffs offered evidence that "proposed class members . . . all appear equally subject to . . . alleged policies and practices, regardless of the particular facility where they work"); *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 638 (S.D. Cal. 2010) (finding that common issues predominate where "[t]he majority of Plaintiff's evidence [was] anecdotal, consisting of the declarations of [employees]" and one supervisor stating that "dispatchers did not schedule lunches").

To the contrary, courts have found insufficient evidence of a uniform policy where employees provide testimony indicating that their experiences varied based on supervisor or work location. *Braun v. Safeco Ins. Co. of Am.*, No. CV 13-00607 BRO PLAX, 2014 WL 9883831, at *14 (C.D. Cal. Nov. 7, 2014) ("Unlike the case in *Jimenez*, Plaintiffs have not produced substantial evidence of a company-wide 'policy to violate the policy.' Plaintiffs rely on the declarations of various Automobile Examiners, some of whom testified that they believed Defendants discouraged overtime. But others testified that they did not feel discouraged from seeking overtime."); *Campbell v. Best Buy Stores, L.P.*, No. LA CV12-07794-JAK, 2013 WL 5302217, at *13 (C.D. Cal. Sept. 20, 2013) ("This evidence demonstrates that, even if some Techs experienced pressure from their supervisors to miss breaks or not to report or request overtime, some Techs did not. As a result, resolving the questions whether Techs missed breaks and worked unreported overtime, as well as the reasons why any particular Tech did so, will necessarily involve individualized inquiries."); *Kilbourne v. Coca-Cola Co.*, No. 14-CV-0984-MMA BGS, 2015 WL 5117080, at *11 (S.D. Cal. July 29, 2015) (finding that individualized issues predominate where the evidence failed to point to a uniform, company-wide policy).

In the present case, Plaintiffs submitted their own declarations as well as declarations from thirteen drivers who had worked at four of Defendant's five terminals. (Pl.s' Mot. For Class Certification App. Of Evid. Class Members' Decls., ECF No. 77.) The declarations are identical and all allege that employees "were constantly intimidated and threatened to comply with [Defendant's] falsification of records and forced to work through [their] meal and rest breaks." (*Id.* at 121-147.) Moreover, Plaintiffs offered the declaration of one dispatcher who testified, "[Defendant] ignored its own written policy for meal and rest breaks. As a practice, I never provided any drivers with an opportunity for meal or rest breaks and I specifically prevented all drivers from taking a meal or rest break apart from time drivers had while waiting for cargo to be loaded or unloaded or were driving to another location." (Pl.s' Mot. For Class Certification App. of Evid. Rios Decl. ¶ 6, ECF No. 77.) Plaintiffs also present evidence that Defendant has issued premium pay for missed meal breaks on less than five occasions since 2009. (Mot. For Class Certification App. of Evid. Kuska Depo. 97:20-25, ECF No. 77.)

The Court finds that Plaintiffs have proffered sufficient evidence to support the existence of a uniform, unofficial policy to violate the labor laws. The present action differs from those cases where conflicting testimony among the employees suggested that each worker's unique circumstances varied. *See Flores*, 509 F. Appx. at 594; *Braun*, 2014 WL 9883831 at *14; *Campbell,* 2013 WL 5302217 at *13; *Kilbourne*, 2015 WL 5117080 at *11. Here, fifteen employees situated at four of five work sites declared in unison—and without exception—that Defendant implemented and uniformly applied an unofficial policy to deprive class members of their legally required meal and rest breaks. The instant action falls in line with those cases where courts have found sufficient evidence of an over-arching unofficial policy. *See Jimenez*, 765 F.3d at 1166; *Harp*, 2015 WL 4589736 at *6; *Antemate*, 2015 WL 3822267 at *5; *Dilts* 267 F.R.D. at 638. The Defendants have not submitted any conflicting evidence

from other employees testifying that the meal-and-rest-break practices varied among locations or supervisors. Every single employee declaration in the record attests to a uniform, common policy denying meal and rest breaks at their specific location. Therefore, the Court concludes that common issues predominate as to whether Defendant maintained an unofficial, company-wide policy to deprive class members of their meal and rest breaks.

Defendant rebuts with declarations from two of its supervisors who testify that drivers were always allowed to take their meal and rest breaks. (Def.'s Opp'n to Pl.s' Mot. For Class Certification Jones Decl. Ex. G-H, ECF No. 78.) According to Defendant, the supervisors' declarations introduce conflicting testimony, rendering each employee's experience an individualized issue not amenable to class-wide proof. The Ninth Circuit rejected an identical argument by the defendant in *Jimenez*. There, the defendant argued that common issues did not predominate because "the alleged informal 'policy-to-violate-the-policy' does not exist." *Jimenez*, 765 F.3d at 1166 n.5. The court disagreed and explained, "This argument is appropriately made at trial or at the summary judgment stage, as it goes to the merits of the plaintiffs' claim. Whether any of these common questions are ultimately resolved in favor of either side is immaterial at this class certification stage, where we determine whether any answer that the questions could produce will drive resolution of the class claims." *Id.* Here, much like in *Jimenez*, Defendant attacks Plaintiffs' allegation, which amounts to a merits argument properly made at a later stage. Accordingly, the Court rejects Defendant's argument.

Next, Defendant retorts by citing to its official policy and arguing that the policy comports with California law by explicitly authorizing 30-minute meal break and 10-minute rest breaks. (Def.'s Opp'n to Pl.s' Mot. For Class Certification Jones Decl. Ex. A, ECF No. 78.) A formal policy, however, will not save an employer in the face of allegations that a contrary and uniform company policy exists. *Brewer v. Gen. Nutrition Corp.*, No. 11-CV-3587 YGR, 2014 WL 5877695, at *7 (N.D. Cal. Nov. 12, 2014) ("[E]ven if an employer has a formal policy that is compliant with California law, proof of an informal but common scheduling policy that makes taking breaks extremely difficult, or other informal means of exerting pressure to discourage taking meal and rest breaks, would be sufficient to establish liability to a class."); *Boyd v. Bank of Am. Corp.*, No. SA CV 13-0056-DOC, 2015 WL 3650207, at *31 (C.D. Cal. May 6, 2015) ("[A] formal policy will not be controlling where it is otherwise shown that an employer pressured or coerced employees to skip breaks.").

Finally, Defendant claims that individualized issues predominate because each driver's route and schedule varied by day, meaning that drivers may have had time to take breaks during a lull in their schedule. Therefore, Defendant maintains, determining liability will require an individual inquiry into each driver's unique route on any given day. Defendant's argument here betrays a fundamental misunderstanding of California's meal and rest break requirements.

The California Supreme Court has held that an "employer satisfies [its meal and rest break] 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." *Brinker*, 273 P.3d at 536-37. Even if the Court were to accept Defendant's argument that some employees found time to take a break during the work day, the question of liability still remains, namely, did Defendant comply with its legal responsibility to "relieve its drivers of all duty" and "not impede or discourage" the rest and meal breaks? *Boyd v. Bank of Am. Corp.*, 300 F.R.D. 431, 441 (C.D. Cal. 2014) ("Here, even if the Court accepts [defendant's] assertions that [employees], who worked from home, had time to take breaks and [defendant] never prevented them from taking those breaks, the threshold common question remains: did [defendant] relieve its employees of all duty so that they could take their meal periods and rest breaks?"). Liability does not hinge on the individual conduct of the employees, but on the existence of a uniform policy to deny meal and rest periods. Thus, the Court finds this argument unavailing.

Accordingly, the Court finds that common questions predominate as to Plaintiff's claim that Defendant maintained an unofficial policy to deprive employees of their meal and rest breaks.

b. *Facially Defective Policies*

Plaintiffs also allege that Defendant's company policies are facially defective because they fail to fully and accurately state the meal and rest break requirements mandated by California law.

First, Plaintiffs allege that Defendant's meal break policy, as stated, is facially defective. California Labor Code § 512(a) requires a 30-minute meal period for employees who work a period longer than five hours. The Code also mandates a second 30-minute meal break if the employees work for a period longer than ten hours. Cal. Lab. Code § 512(a). Defendant's meal break policy provides, "All employees in California are entitled to a 30-minute lunch period when working 5 or more hours in a day." (Pl.s' Mot. For Class Certification App. Of Evid. Bickford Decl. Ex. C, ECF No. 77.) Plaintiffs challenge the policy because it does not state that employees are entitled to a second 30-minute meal break when working 10 or more hours in a day.

Next, Plaintiffs claim that Defendant's rest break policy is also facially defective. California Wage Order No. 5 provides, "Every 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." *Brinker*, 273 P.3d at 528. Defendant's rest break policy states, "All Vitran Express West employees are entitled to a 15-minute break per 4 hours of work. A break is not required for employees whose total daily work time is less than 3.5 hours." (Pl.s' Mot. For Class Certification App. Of Evid. Bickford Decl. Ex. C, ECF No. 77.) Plaintiffs attack the policy because it fails to inform drivers that rest breaks must be provided every "major fraction" of a four-hour period and that rest breaks should be taken in the middle of the work period "insofar as practicable."

Plaintiff argues that because the official company policies apply uniformly to all drivers, the issue of whether the policies are facially defective presents a common question that predominates over any individualized issues. Defendants do not dispute that their policies omit the material language identified above. The question before this Court, then, is whether an allegation of facially defective policies, without more, subjects an employer to liability. If so, then common questions predominate because liability springs solely from the facially defective policy. California courts and federal district courts diverge on this issue.

A spate of California Court of Appeal decisions have ruled 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." *Cummings*, 2014 WL 1379119 at *18 (collecting cases). Holding to the contrary, a line of federal district court opinions adopts the view that "liability springs not simply from a facially defective policy, but from proof that a rest break was unlawfully denied." *Id.* at *19; *Ordonez v. Radio Shack, Inc.*, No. CV 10-7060-CAS JCGX, 2013 WL 210223, at *11 (C.D. Cal. Jan. 17, 2013) ("Because of the competing testimony before the Court, plaintiff's evidence that defendant may have an illegal, written rest break policy is insufficient for this Court to find that common issues predominate."); *Villa v. United Site Servs. of California, Inc.*, No. 5:12-CV-00318-LHK, 2012 WL 5503550, at *8 (N.D. Cal. Nov. 13, 2012) ("Indeed, Plaintiff's own evidence confirms that the written policy does not generate uniform practices."). Put differently, the California Court of Appeal decisions impose liability solely on the basis of a facially defective policy whereas federal district courts require a showing that the defendant not only maintained a facially defective policy but also implemented unlawful practices pursuant to the policy.

Caught between conflicting lines of precedent, the Court turns to a recent Ninth Circuit decision that clarifies the issue, *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952 (2013). In fact, the court in *Cummings*, presented with an identical question also resorted to *Abdullah* for guidance on the issue. 2014 WL 1379119 at *20 ("The Court is thus presented with conflicting case law as to whether [defendant'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*, plaintiffs alleged that their employer maintained a defective written policy because it required employees to work through their lunch breaks. *Abdullah*, 731 F.3d at 956. Defendant challenged the district court's order of class certification on the basis that liability does not solely arise from a facially invalid policy. *Id.* at 964-66. The Ninth Circuit held that while liability can stem purely from a defective written policy, "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. The appellate court then proceeded to look beyond the facially defective policy and consider all the evidence in the record, such as employee declarations, before concluding that common questions would predominate. *Id.* at 965. In sum, the Ninth Circuit acknowledged that liability may flow from a facially defective policy but admonished lower courts to consider the entire record before determining the predominance question. *Id.*; *Cummings*, 2014 WL 1379119 at *21 ("*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.").

Heeding the *Abdullah* opinion, the Court now considers all the evidence in the record before deciding the predominance question as to the allegations of facially defective policies. As previously discussed, Plaintiffs have submitted substantial evidence from putative class members and one supervisor, alleging that Defendant's policies strayed from the California meal and rest break requirements. (Pl.s' Mot. For Class Certification App. of Evid. Class Members' Decls., ECF No. 77.) In fact, the analysis of the "defective policy" claim dovetails nicely with the prior analysis of the "unofficial policy" claim insofar as both hinge on the evidentiary record. For both claims, the Court finds that Plaintiffs have proffered sufficient evidence to demonstrate a uniform policy that deviates from California's meal and rest break mandates.

Accordingly, the Court finds that common questions predominate as to Plaintiffs' claim of a facially defective policy, and, therefore, Plaintiffs have satisfied the predominance requirement of Rule 23(b)(3).

2. Superiority

The "superiority" prong requires a consideration of: (1) class members' interests in individually controlling the prosecution or defense of separate actions, (2) the extent and nature of any litigation concerning the controversy already begun by or against class members, (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and (4) likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(a)-(d).

The Court finds that class resolution is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Nothing in the record indicates that class members' have any individual interest in controlling the prosecution or defense of separate actions. Indeed, all class members' harm arises out of the same allegedly unlawful policy. There has not been any other litigation concerning this controversy initiated by or against class members. Finally, the class is not unmanageable as the common question of Defendant's unofficial policy will establish liability as to all 156 class members. *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 515 (9th Cir. 2013) ("The putative

class and proposed sub-classes contain approximately 538 people, and courts routinely certify larger and more complex classes."). To the extent that individual damages issues exist, a district court may not deny class certification based on the need to individually calculate damages. *Id.*

Accordingly, Plaintiffs have satisfied the superiority prong of Rule 23(b)(3).

V. CONCLUSION

In light of the foregoing, the Court **GRANTS** Plaintiffs' Motion for Class Certification.

IT IS SO ORDERED.

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Initials of Preparer ________________________