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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JAVIER ROSAS et al., Plaintiffs and Appellants, v. CAPITAL GRILLE HOLDINGS, INC., et al., Defendants and Respondents.	B268959 (Los Angeles County Super. Ct. No. BC507869)

APPEAL from an order of the Superior Court of Los Angeles County, Jane L. Johnson, Judge. Affirmed.

Mexican American Legal Defense and Educational Fund and Victor Viramontes for Plaintiffs and Appellants.

Littler Mendelson, Richard H. Rahm, Julie A. Dunne and Khatereh S. Fahimi for Defendants and Respondents.

Plaintiffs Javier Rosas, Sergio Vasquez, Edwin Alfonso Cruz, and Antonio Morales (Plaintiffs) appeal from the trial court's order denying their motion to certify a class of former employees of The Capital Grille restaurant in Los Angeles (Capital Grille L.A.) who allegedly did not receive rest breaks or compensation for missed rest breaks. Plaintiffs claim that the defendants implemented a rest break policy at the restaurant for over a year that did not comply with California law.[1] It was undisputed that the Capital Grille L.A. adopted a *compliant* policy in 2010 when it opened. Plaintiffs' theory focused on descriptions of an allegedly noncompliant rest break policy that appeared in materials that Darden prepared in 2011. However, substantial evidence showed that those materials were never provided to the Capital Grille L.A., and managers testified that the 2010 compliant policy remained in effect. On that evidence, the trial court found that Plaintiffs failed to show that common issues would predominate.

We conclude that the trial court acted within its discretion in denying certification. While in some circumstances the issue whether an allegedly unlawful employment policy existed and was consistently applied to class members can itself be resolved through evidence common to the class, here the trial court found that there was insufficient evidence that the challenged policy was ever implemented in the restaurant where the class members worked. The court therefore acted within its discretion

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[1] Capital Grille L.A. was owned by defendant Capital Grille Holdings, Inc., and its corporate parents, defendants GMRI, Inc., and Darden Restaurants, Inc. This opinion refers to all these entities collectively as "Defendants" and refers to the corporate parents as "Darden."

in concluding that individual issues were likely to predominate over issues that were common to the class.

BACKGROUND

Capital Grille L.A. opened in July 2010. It was one of a number of Capital Grille locations in various cities owned by Darden, which also owns the Red Lobster and Olive Garden chains. The Capital Grille is a "fine dining" restaurant that stakes its reputation on high quality food and service.

Labor regulations in California require that nonexempt employees in the "public housekeeping industry," which includes restaurants, be given rest periods based on the total hours worked daily. (See Industrial Welfare Commission wage order No. 5-2001 (Cal. Code Regs., tit. 8, § 11050), hereafter Wage Order No. 5.) Subdivision 12(A) of Wage Order No. 5 requires 10-minute rest periods for every four hours worked "or major fraction thereof," except for employees who work for less than three and one-half hours, who need be given no break. In *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*), our Supreme Court interpreted "major fraction" to mean any time over two hours. (*Id.* at pp. 1028–1029.) Thus, the regulations require 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.) Employers who violate this requirement must pay a premium wage equivalent to one hour's pay. (Lab. Code, § 226.7, subd. (c); Wage Order No. 5, subd. 12(B).)

Plaintiffs allege that prior to April 25, 2012, Capital Grille L.A. did not comply with the rest break requirements summarized above. Plaintiffs sought to certify two classes: An

"illegal policy subclass" and an "illegal practices subclass." Plaintiffs have appealed the trial court's ruling only with respect to the illegal policy subclass.

Plaintiffs defined the illegal policy subclass to include Capital Grille L.A.'s nonexempt employees "who have not been compensated for Defendants' failure to provide a second rest period after working more than six hours of their shift, and/or for Defendants' failure to provide a third rest period after working more than ten hours of their shift, under Defendant's rest period policies during the period of June 2010 to April 25, 2012." Thus, for purposes of this appeal the key facts concern the rest break policy that Capital Grille L.A. applied during the alleged class period.

1. The Evidence Concerning Capital Grille L.A.'s Rest Break Policy

a. *2010 management and training materials*

When Capital Grille L.A. opened in July 2010, managers used Darden's "California Managers' Guide" dated April 2010 (2010 CMG). The purpose of the 2010 CMG was to advise California managers about California-specific policies to comply with California labor laws.

The 2010 CMG contained a section on rest breaks and meal periods. Consistent with the language of Wage Order No. 5, that section stated that "[a]ll non-exempt employees must receive a net 10 minute paid rest break for every 4 hours of consecutive work (or major fraction thereof)." A copy of a poster embedded in the April 2010 CMG further explained that "[y]our rest break should be taken as close as possible to the mid-point of each 4 hours worked when possible (i.e. after 2 hours)," and "[i]f you are working a shift of longer than 6 hours, you are entitled to a

second rest break."[2] Plaintiffs do not dispute that the rest break policy described in the 2010 CMG and the embedded poster complies with California law.[3]

Each Capital Grille L.A. management employee who submitted evidence in connection with the class certification motion testified that the rest break policy described in the 2010 CMG was the only rest break policy ever applied in Capital Grille L.A. Specifically, they understood that the policy required employees to receive a second rest break after six hours of work and a third rest break after 10 hours. Each of the management employees that Plaintiffs deposed also testified that Capital Grille L.A. always applied a rest break policy that complied with California law.

When Capital Grille L.A. management employees were trained, they were instructed in the rest break policy described in

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[2] Plaintiffs asserted below that Defendants never produced a stand-alone copy of the rest and meal break policy poster from April 2010, and on that basis argued that there was no evidence that a poster accurately describing California law was ever displayed for employees. However, Capital Grille L.A. management employees recalled that the rest break policy was posted when the restaurant opened and testified that the policy was as described in the 2010 CMG. Moreover, the first description of Capital Grille L.A.'s rest break policy that Plaintiffs challenge as unlawful was dated January 2011, six months after the restaurant opened. The trial court could therefore reasonably infer that the rest break policy posted in the restaurant in July 2010 was the same as the policy described in the 2010 CMG and embedded poster.

[3] In addition to the rest and meal break poster, a copy of Wage Order No. 5 was also displayed in the restaurant.

the 2010 CMG, including the requirement that employees who worked longer than six hours should receive a second rest break and those who worked longer than 10 hours should receive a third rest break. When Capital Grille L.A. managers trained new employees, part of the instruction included information about the rest break policy. The policy that they described included the requirement of a second rest break after six hours. That requirement was included in a PowerPoint presentation that was used to train new restaurant employees.

b. ***2011 descriptions of Darden's rest break policy***

Plaintiffs claim that various policy materials that Darden produced in 2011 contain inaccurate descriptions of the California rest break requirements (the 2011 Materials). The documents fall into two categories: (1) various posters and explanatory materials that Capital Grille L.A. management employees reviewed in connection with their continuing training and (2) several 2011 versions of the Darden California Managers' Guide.

i. ***Training materials***

Management-level employees at Capital Grille L.A. were required to complete an annual "recommitment" process. This was a training procedure in which managers were requested to review policies and commit to following them.

As part of the 2011 recommitment training, Capital Grille L.A. managers were provided with two documents describing the California rest break policy. One was a copy of a poster dated January 2011 entitled, "California Rest Break and Meal Period Requirements" (January 2011 Poster). The poster described the rest break policy as requiring a "first rest break between 3 1/2 and four hours worked," and, for a shift of longer than four hours,

"you are entitled to additional rest breaks every 4 hours." The poster also stated that "your rest break should be taken as close as possible to the mid-point of each 4 hours worked when possible (i.e. after 2 hours)."

The second document included with the 2011 recommitment training was entitled, "Rest Break and Meal Period," and contained a footer reading, "February 2011 California Managers' Guide."[4] This document contained an embedded copy of the January 2011 Poster, and included the additional instruction that "[a]ll hourly non-exempt employees must receive a net 10-minute paid rest break for every 4 hours of consecutive work (or major fraction thereof)."

It is undisputed that Capital Grille L.A.'s managers reviewed and agreed to comply with these 2011 rest break policy descriptions as part of the recommitment process. However, the Capital Grille L.A. managers who offered evidence about the recommitment training testified that they believed that the training they received concerning rest break requirements was consistent with their original understanding of the rest break policy as described in the 2010 CMG.

ii. *2011 editions of the California Managers' Guide*

A version of the Darden California Managers' Guide dated November 2011 (2011 CMG) contained a copy of an embedded poster and an explanatory page on "scheduling and taking rest breaks." The embedded poster was dated September 2011 and

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[4] The parties dispute whether there actually was a February 2011 edition of the California Managers' Guide. In view of the lack of any evidence that such a document was ever provided to Capital Grille L.A., the dispute is not material.

contained a description of the rest break policy that was identical in substance to the January 2011 Poster discussed above (September 11 Poster). The explanatory page stated that "[e]mployees are entitled and required to receive 10-minute paid rest breaks for every four hours of consecutive work or major fraction thereof." However, the 2011 CMG defined "major fraction" as 3.5 hours. One of the examples explained that "[a]n employee who works 7 $^{1}/_{2}$ hours is entitled to and must receive one 10 minute paid rest break."

Another version of the 2011 CMG indicated that it was revised in December 2011. That version also contained an embedded version of the September 2011 Poster and an identical explanatory page on "scheduling and taking rest breaks."

Capital Grille L.A. management employees submitted declarations denying that they ever received the 2011 CMG. Defendants also provided a declaration from Darden's manager of employee relations, Barbara Shivarig, who testified about her investigation of the versions of the California Managers' Guide that were used at Capital Grille L.A. (Shivarig declaration).[5] Ms. Shivarig reported that she "found nothing to indicate that either the November 2011 California Managers' Guide or the Revised December 2011 California Managers' Guide with the embedded September 2011 poster was distributed to the [Capital Grille L.A.] or made accessible to the [Capital Grille L.A.] via DiSH [the Darden intranet]."

A December 15, 2011 e-mail from Darden's vice president of human resources distributed the 2011 CMG and the September

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[5] Ms. Shivarig was also deposed as Darden's "person most knowledgeable" concerning "policies regarding rest breaks applicable to the [Capital Grille L.A.] during the relevant period."

2011 Poster to the directors of operation of Darden's Olive Garden and Red Lobster restaurant chains. Employees of the Capital Grille L.A. were not included in the e-mail.

c. *2012 materials*

On April 25, 2012, after our Supreme Court issued its opinion in *Brinker*, Darden sent an e-mail to its restaurants in California, including Capital Grille L.A. The e-mail stated, "[W]e believe our current practices align with the court's clarifications." However, the e-mail also stated that "the clarification that will require a change in behavior is around the timing of rest break(s) for employees. If employees work for a period of 3.5 hours or more in a day, they must receive a net 10-minute rest period during each four-hour work period (or major fraction thereof, i.e. two hours)." The e-mail stated that a revised rest break and meal period poster would be sent that "must replace the current goldenrod-color poster (dated September 2011) immediately." Plaintiffs concede that this new break poster complied with California law.

d. *Employee testimony*

The only direct evidence that an allegedly incorrect description of the California rest break requirements was posted in the Capital Grille L.A. was the testimony of plaintiff Javier Rosas. However, Rosas testified that he saw a white poster, and there was evidence that the September 2011 Poster was goldenrod in color. The parties argued extensively about the significance of Rosas's testimony at the class certification hearing.

Plaintiffs submitted other declarations in which employees testified that they were unable to take breaks; requested and were denied breaks; had no one to cover for them to permit them

to take a break; felt pressured by the workload and by supervisors' expectations not to take breaks; and had no adequate location in which to take a break. Defendants submitted their own declarations from employees who testified that they were aware of the break requirements and were able to take their breaks. Defendants also pointed out that six of the nine declarations that Plaintiffs offered were from employees who did not work in the restaurant during the time covered by the allegedly noncompliant break policy.

2. The Trial Court's Ruling

The trial court provided oral findings at the conclusion of the class certification hearing. With respect to Plaintiffs' alleged policy subclass, the court concluded that there was "insufficient evidence that an allegedly illegal uniform policy was consistently applied during the period June 2010 through April 25th, 2012." The court also found that "[t]here is inconsistent evidence amongst plaintiffs' own witnesses as to whether they were afforded timely rest breaks," and observed that, other than Rosas, "no other plaintiffs' witness testified that they read or relied on any allegedly illegal policy." In addition, "[t]here is no evidence that the allegedly noncompliant posters were actually posted at the Los Angeles Capital Grille."

The trial court signed the proposed order submitted by Defendants, which was consistent with the court's oral findings. The order stated that "Plaintiffs have failed to present sufficient evidence that . . . Defendants perpetuated a uniform policy that was consistently applied to the putative class" that failed to provide rest breaks in compliance with California law or that failed to provide the statutory compensation for employees who missed breaks.

DISCUSSION

1. Class Action Requirements and Standard of Review

A party seeking certification of a class must "demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) The "community of interest" requirement in turn includes three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Ibid.*) The " 'ultimate question' " in assessing predominance is "whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' " (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28.)

Presented with a class certification motion, "a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate." (*Brinker, supra*, 53 Cal.4th at p. 1025.) While a court "may, and indeed must" resolve disputed threshold legal or factual questions "[t]o the extent the propriety of certification depends upon [them]" (*id.* at p. 1025), "[s]uch inquiries are closely circumscribed" (*id.* at p. 1024). "[R]esolution of disputes over the merits of a case generally must be postponed until after class certification has been decided." (*Id.* at p. 1023.)

An appellate court's review of a class certification order is "narrowly circumscribed." (*Brinker, supra,* 53 Cal.4th at p. 1022.) " 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.' " (*Ibid.*, quoting *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.) A trial court's ruling supported by substantial evidence will not generally be disturbed on appeal unless it was based upon " 'improper criteria' " or " 'erroneous legal assumptions.' " (*Brinker*, at p. 1022.)

Therefore, on appeal the court must examine the reasons given by the trial court for denying class certification. (*Fairbanks v. Farmers New World Life Insurance Co.* (2011) 197 Cal.App.4th 544, 561.) " 'Any valid pertinent reason stated will be sufficient to uphold the order.' " (*Lindy v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436, quoting *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 656.)

2. The Trial Court's Findings Are Supported By Substantial Evidence

a. *The trial court did not improperly decide a merits question in finding insufficient evidence that the Capital Grille L.A. applied the challenged rest break policy*

Plaintiffs' primary argument on appeal is that the trial court erred by deciding the "merits" of their argument that Defendants applied an unlawful rest break policy to the Capital Grille L.A. during 2011 and the first few months of 2012. Plaintiffs argue that the question whether Defendants applied an allegedly unlawful uniform policy in the Capital Grille L.A. is itself common to the class. Plaintiffs claim that "[o]nce the trial

court identified this common question, the trial court was compelled to certify the class and should have ended its inquiry." Plaintiffs contend that they sufficiently demonstrated this common question by providing "substantial evidence" that Defendants applied an illegal rest break policy.

Plaintiffs thus contend that the trial court's role was limited to determining whether Plaintiffs presented substantial evidence of an unlawful rest break policy. If so, the trial court was required to certify the class, and this court is required to reverse the trial court's decision denying certification. Quoting the court's description of the substantial evidence standard of review in *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 329 (*Sav-On*), Plaintiffs characterize the evidence they presented as not " ' "qualified, tentative, and conclusionary," but, rather, "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." ' "

Plaintiffs' argument does not provide grounds for reversal because it is inconsistent with the substantial discretion given to the trial court in ruling on a class certification motion. As discussed above, our review of the trial court's decision is deferential. So long as the court did not base its ruling on improper criteria or erroneous legal assumptions, we will not reverse if there is substantial evidence supporting the trial court's decision *denying* certification. The standard that Plaintiffs urge would require us to take the opposite approach and reverse if there is substantial evidence *supporting* certification. That approach would be proper only if Plaintiffs had prevailed below.[6]

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[6] That was the case in *Sav-On*, where the court upheld the trial court's decision certifying a class based on substantial

Some cases do state that a plaintiff's burden on class certification is limited to providing substantial evidence that common issues predominate over individual issues. This means, for example, that a plaintiff seeking certification of claims for an alleged unlawful employment practice need not "conclusively establish" that a defendant had an unlawful policy that universally affected the entire class. (See, e.g., *Lubin v. Wackenhut Corp.* (Nov. 21, 2016) 2016 Cal.App. LEXIS 1016.) However, this "substantial evidence" standard does not mean that a trial court has no discretion to weigh the proffered evidence or to consider the totality of the evidence in determining whether common issues predominate. Rather, the question whether a plaintiff has provided "substantial evidence" of the class requisites is "a discretionary determination to be made by the trial court," and "[n]othing in the law prevents the court from considering the totality of the evidence in making that determination." (*Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, 1447–1448 [rejecting the argument that the "trial court *must* grant the motion for class certification if there is substantial evidence that the requirements of certification were met and *must* disregard any conflicting evidence or inferences"]; see also *Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1422 [citing *Quacchia* for the principle that "the trial court is entitled to consider 'the totality of the evidence' " in determining whether a " 'plaintiff has presented substantial evidence of the class action requirements' "].)

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evidence supporting the court's ruling. (*Sav-On*, *supra*, 34 Cal.4th at pp. 329–330.)

Thus, despite the similar terminology, the requirement that a plaintiff provide substantial evidence to support its class certification motion is different from the substantial evidence standard that we apply on appeal. In contrast to an appellate court reviewing whether substantial evidence supports an order,[7] the trial court considering a class certification motion is permitted to evaluate and weigh the evidence that a plaintiff provides to the extent necessary to determine whether common issues will predominate.[8]

Applying the appropriate standard of review here, it is clear that the trial court did not improperly decide the ultimate "merits" question of whether an alleged unlawful policy applied to Capital Grille L.A. Rather, the trial court evaluated the evidence only to the extent necessary to determine whether common issues would predominate at trial. (See *Brinker*, *supra*, 53 Cal.4th at p. 1023 [trial courts considering class certification should only resolve legal or factual issues that are necessary to determining whether class certification is proper].) The trial court found that Plaintiffs had failed to provide "sufficient evidence" of a "uniform policy that was consistently applied to the

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[7] The substantial evidence standard of course requires an appellate court to affirm an order that is supported by sufficient evidence even if the appellate court might have evaluated the evidence differently. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874.)

[8] And in reviewing the trial court's exercise of its discretion in evaluating the evidence, we are required to presume in favor of the trial court's class certification order "the existence of every fact the trial court could reasonably deduce from the record." (*Sav-On, supra*, 34 Cal.4th at p. 329.)

putative class," and therefore had "failed to meet their burden of providing substantial evidence that Plaintiffs' Complaint is appropriate for class treatment." The court did not require Plaintiffs to prove conclusively their allegation that Defendants applied an unlawful policy, and it did not purport to rule on that merits issue.

Plaintiffs correctly point out that, in some cases, whether a company consistently applied a particular employment policy can itself be a common issue appropriate for class resolution, regardless of the ultimate outcome of that issue on the merits. (See, e.g., *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1150 (*Bradley*) [employer might defend against the plaintiffs' claim that it had no rest break policy by arguing that it did, but "this defense is also a matter of common proof"]; *Lubin*, *supra*, 2016 Cal.App. Lexis 1016 at p. *63 ["Wackenhut's defense that it had a policy or practice of authorizing rest breaks is susceptible to classwide resolution"].) Plaintiffs claim that the trial court improperly disregarded their theory that Darden applied a common unlawful employment practice, which they claim could ultimately be determined for or against them based upon common evidence. (See *Sav-On*, *supra*, 34 Cal.4th at p. 327 [trial court should consider "whether the theory of recovery advanced by the proponents of certification is . . . likely to prove amenable to class treatment"].)

But the record does not show that the trial court *ignored* Plaintiffs' theory; rather, it shows that the court found that Plaintiffs had not provided sufficient evidence to support the theory. The trial court acted within the scope of its discretion in concluding that Plaintiffs could not proceed on class claims

without an adequate showing that Plaintiffs' class theory was viable.

The court in *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974 considered a similar issue. In that case, the court affirmed the trial court's denial of class certification on the ground that alleged policies and procedures governing a particular automobile servicing job were not implemented uniformly in all of Sears's service centers. The court rejected the plaintiff's argument that, at the class certification stage, the plaintiff needed to show only that uniform policies and practices *existed* that would classify the job in question as nonexempt, not whether those policies were actually uniformly applied. (*Id.* at p. 990.) The court concluded that the plaintiff "was required to present substantial evidence that proving *both* the existence of Sears's uniform policies and practices *and* the alleged illegal effects of Sears's conduct could be accomplished efficiently and manageably within a class setting." (*Id.* at p. 989.) In making that determination, the trial court was "permitted to credit one party's evidence over the other's," and doing so was not "an improper evaluation of the merits of the case." (*Id.* at p. 991.) Similarly, here, the trial court was permitted to weigh the evidence to determine whether Plaintiffs had sufficient support for their claim that an alleged uniform employment practice was actually implemented in the place where class members worked.

None of the cases that Plaintiffs cite holds that a trial court must certify a class based on the mere theory or allegation that a common employment policy existed in the absence of substantial evidence to support that theory. (See *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1300, 1304–1305 [plaintiffs submitted evidence of defendant's common practice of designing

routes and delivery schedules that pressured delivery personnel not to take rest breaks]; *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 407–408 (*Alberts*) [plaintiffs provided evidence of defendant's practices and policies, including schedules and internal correspondence as well as survey results, supporting their claim that nursing staff was not able to take breaks]; *Hall v. Rite Aid Corp.* (2014) 226 Cal.App.4th 278, 292 [defendant Rite Aid did not dispute that it "had a uniform policy of the type envisioned by *Brinker*"]; *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 380–381 [restaurant chain was governed by "the same policies and procedures" reflected in employee handbooks and training manuals that could permit common means of determining whether positions were exempt or nonexempt]; *Bradley, supra*, 211 Cal.App.4th at p. 1149 [defendant did not dispute that it had no policy permitting or authorizing rest breaks]; see also *In re AutoZone, Inc. Wage & Hour Employment Practices Litig.* (N.D. Cal. 2012) 289 F.R.D. 526, 534 [noting that "there is no dispute that there is a uniform policy," and citing with approval the principle that a " 'mere allegation of a company-wide policy does not compel class certification' "], quoting *Kurihara v. Best Buy Co., Inc.* (N.D. Cal. Aug. 30, 2007) 2007 U.S. Dist. LEXIS 64224.) Thus, the trial court here was not required simply to accept Plaintiffs' theory that Darden applied an allegedly unlawful rest break policy to Capital Grille L.A., but could properly evaluate the evidence supporting that theory. (See *Cruz v. Sun World Internat., LLC* (2015) 243 Cal.App.4th 367, 388 [under *Brinker*, "evidence of a uniform policy or practice, not just an allegation, is necessary in order to certify the class"].)

b. *The record supports the trial court's ruling*

The trial court's evaluation of the evidence finds sufficient support in the record. It was undisputed that Capital Grille L.A.'s written rest break policy described in the 2010 CMG and its embedded poster complied with California law. Plaintiffs also agreed that the description of Darden's rest break policy that it circulated in April 2012 following our Supreme Court's decision in *Brinker* was compliant. Thus, the only period at issue for purposes of class certification was 2011 and the first few months of 2012.

Plaintiffs claim that the 2011 Materials did not comply with California rest break requirements. However, the trial court could reasonably conclude from the evidence that Capital Grille L.A. did not change its rest break policy as a result of those materials.

Except for Rosas's disputed testimony that he saw the September 2011 Poster displayed at the Capital Grille L.A. (which the trial court rejected), Plaintiffs did not offer any evidence that the allegedly unlawful 2011 Materials were actually provided to Capital Grille L.A. Plaintiffs cite Darden's April 25, 2012 post-*Brinker* communication directing that its California restaurants replace the September 2011 Poster with a new version as evidence that Capital Grille L.A. must have implemented the policy as described in the September 2011 Poster. However, the trial court could reasonably decline to draw such an inference from a mass e-mail sent to Darden's California restaurants in light of the express testimony from a number of Capital Grille L.A. managers denying that any of the challenged posters were received or displayed at Capital Grille L.A.

Plaintiffs also rely on the fact that at least some Capital Grille L.A. managers reviewed the allegedly noncompliant 2011 materials in their recommitment training and agreed to comply with them. But the managers who recalled those materials did not believe that they altered Capital Grille L.A.'s compliant 2010 policy, and all the Capital Grille L.A. managers testified that there was never any change to that policy.

Other evidence that Plaintiffs cite does not support their claim of a uniform unlawful policy. Testimony by former employees that they were denied breaks provides only individual evidence of noncompliance. The declarations that Plaintiffs submitted in support of their motion do not show any change in conduct that might indicate a policy change; indeed, most of the employee testimony that Plaintiffs provided did not even pertain to the time when Plaintiffs allege a noncompliant policy was in place.

Plaintiffs also cite evidence that the Capital Grille L.A.'s point of sale machines reflected a 99.6 percent record of break compliance, arguing that this figure was unrealistically high. However, even if one were to conclude that the recorded compliance numbers were suspect, that simply means that Defendants could not prove near-universal compliance. The absence of such proof does not provide evidence of a uniform policy of *noncompliance*.

Plaintiffs also point to evidence that Capital Grille L.A. did not implement some of Darden's procedures for ensuring that employees took breaks, including formal schedules of breaks and the use of designated "breakers" to relieve employees while they were on break. This evidence is similarly irrelevant to the issue whether Capital Grille L.A. applied an unlawful policy. Even if

the evidence could support an inference that Capital Grille L.A. did not do all it could to ensure *compliance* with a break policy, it has no bearing on what that policy was. In particular, it does not support any inference that Capital Grille L.A. implemented policy changes based upon the 2011 Materials that Plaintiffs alleged were unlawful.

Based on the evidence, the trial court reasonably concluded that Plaintiffs had failed to provide sufficient support for their claim that Capital Grille L.A. "perpetuated a uniform policy that was consistently applied to the putative class." Plaintiffs therefore failed to provide evidence that their rest break claims could be resolved based upon common evidence.

3. The Trial Court's Ruling Was Not Based On Improper Criteria or Erroneous Legal Assumptions

As discussed above, the trial court did not improperly decide a merits question by finding insufficient evidence that the Defendants applied an allegedly unlawful policy at the Capital Grille L.A. The trial court also did not apply an improper standard in making that finding. The court did not require proof that Defendants' alleged unlawful rest break policy universally affected every member of the class, or deny certification based upon anecdotal evidence that some class members were not damaged. (See *Alberts*, *supra*, 241 Cal.App.4th at p. 407 [trial court erred in requiring plaintiffs to demonstrate at the certification stage that the defendant had a " 'universal practice' " to deny class members the benefit of the defendant's written break policy].) Rather, the trial court concluded that, based on the record as a whole, Plaintiffs had failed to provide sufficient evidence that an allegedly unlawful policy applied *at all* to the

restaurant where class members worked.[9] That decision was within the court's discretion and not based on improper criteria or legal standards.

We also reject Plaintiffs' remaining arguments that the trial court erred in its approach to ruling on class certification. Plaintiffs assert that the trial court impermissibly ruled on the merits of their claim that the rest break policy described in the 2011 Materials was unlawful. During the class certification hearing, the trial court made comments indicating that it thought Darden's description of the rest break policy in its January 2011 Poster and September 2011 Poster, while "not artfully said," complied with California law. The court concluded that the combined effect of the various requirements described in those posters— i.e., a first rest break between three and a half and four hours worked; an additional rest break for every four hours worked; and the instruction that the break be taken "as close as possible to the midpoint of each four hours worked"— was to describe a compliant policy. Plaintiffs dispute that conclusion, arguing that the language on which the court relied is similar to language that other courts have rejected, and would not clearly require an additional break if an employee worked a "major

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[9] Plaintiffs claim that the trial court erred in finding that Plaintiffs' witnesses testified inconsistently as to whether they were given rest breaks. Plaintiffs argue that this finding was not based on substantial evidence and therefore cannot support the court's ruling. We need not consider this issue, as the trial court's ruling did not depend on parsing the evidence as to whether particular employees were denied rest breaks. Rather, the important aspect of the employee testimony is that it did not show that Defendants applied a *policy* at Capital Grille L.A. that wrongfully denied breaks.

fraction" of a four-hour period but not the entire period (e.g., an employee who worked only six hours).

We agree that a ruling denying class certification on the ground that Darden's challenged policy description was lawful would have contravened our Supreme Court's instruction in *Brinker* that "resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided." (*Brinker, supra*, 53 Cal.4th at p. 1023.) However, the record does not show that the trial court relied on its observations about the legality of Darden's challenged policy in its ruling denying class certification. Rather, the court's ruling was based on the lack of evidence that the challenged policy was *applied* in the Capital Grille L.A., not whether the policy was illegal.

The court's oral findings reflect this: At the hearing, the court was careful to state that there was insufficient evidence that "an *allegedly* illegal uniform policy was consistently applied" and referred to the challenged 2011 posters as the "*allegedly* noncompliant posters." (Italics added.) Moreover, the trial court did not make any findings concerning the legality of Darden's challenged 2011 policy either in its oral ruling or in its subsequent written decision.[10] The finding that the trial court

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[10] In its written decision, the court cited "the evidence that Defendants maintained a California compliant rest break policy throughout the class period." However, in the context of all the evidence, this does not appear to be a ruling on the legality of Darden's 2011 rest break policy in the challenged 2011 Materials. Rather, the conclusion that the Defendants "maintained" a California compliant policy at Capital Grille L.A. was supported by the uncontested legality of the policy described in the 2010

did articulate—that the Defendants did not perpetuate a "uniform" policy that was "consistently applied" to the putative class—is sufficient to support the trial court's ruling. (See *Hataishi v. First American Home Buyers Protection Corp.* (2014) 223 Cal.App.4th 1454, 1462 [appellate court may not reverse trial court's decision on class certification simply because some of the court's reasoning was faulty, " 'so long as *any* of the stated reasons are sufficient to justify the order' "].)

Plaintiffs also take issue with the trial court's conclusion that there was no evidence "that the allegedly noncompliant posters were actually posted at the Los Angeles Capital Grille." Plaintiffs argue that this conclusion reflects an erroneous legal assumption that such evidence was necessary to support Plaintiffs' claim. However, the trial court did not make this finding in the context of deciding the elements of Plaintiffs' claim; rather, the lack of evidence that the 2011 Materials were actually provided to or used in Capital Grille L.A. was an important part of the court's conclusion that the Plaintiffs did not show that the challenged policy was *applied* at that location. Plaintiffs' theory that Defendants applied a noncompliant rest break policy was based on the descriptions of that policy in the challenged 2011 posters and the editions of the California Managers' Guide in which the posters were embedded. The absence of evidence that those posters were ever observed or used in Capital Grille L.A. undermines that theory. The trial court did not commit any legal error in that analysis, and Plaintiffs' argument therefore provides no basis for reversal.

CMG and the testimony from the Capital Grille L.A. managers that the policy did not change in 2011.

DISPOSITION

The trial court's order denying Plaintiffs' motion for class certification is affirmed. Defendants are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.