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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

ALBERT EBO, Plaintiff and Appellant, v. THE TJX COMPANIES, INC., et al., Defendants and Respondents.	B214937 (Los Angeles County Super. Ct. No. BC380575)

APPEAL from an order of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Affirmed.

Van Vleck Turner & Zaller and Brian F. Van Vleck for Plaintiff and Appellant.

Littler Mendelson, Robert G. Hulteng, Joshua L. Cliffe and Shannon M. Gibson for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Albert Ebo appeals an order partially denying his motion for class certification. Ebo was an assistant store manager (ASM) at a retail store owned and operated by defendants and respondents The TJX Companies, Inc., Marshalls of California, LLC and TJ Maxx of California, LLC (TJX Defendants).[1] He contends, inter alia, that the TJX Defendants failed to provide him and the class he purports to represent timely meal and rest periods in violation of California law. The trial court denied Ebo's motion for class certification with respect to his meal and rest periods cause of action. It did so before the California Supreme Court published *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*). Ebo contends that the trial court abused its discretion in partially denying his motion by failing to apply correct legal analysis in compliance with *Brinker*. We affirm.

FACTUTAL AND PROCEDURAL BACKGROUND

The TJX Defendants own and operate several nationwide apparel retail store chains, including stores operated under the brand names of Marshalls, TJ Maxx and AJ Wright. The defendants contend that in California, there are 111 Marshalls stores, 76 TJ Maxx stores, and 9 AJ Wright stores.

Ebo began working as an ASM at an AJ Wright store in Michigan in November 2004. In February 2007, he transferred to the Marshalls store in Bakersfield, California, where he worked as an ASM. Ebo was terminated for poor work performance in October 2007.

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[1] Ebo's W-2 form indicates that his employer was Marshalls of California, LLC. In his first amended complaint (FAC), Ebo contends that the three TJX Defendants "operate as a single integrated enterprise for purposes of California employment law and the employment of Plaintiff and the Class." Although they denied this allegation in the trial court, for purposes of this appeal, the TJX Defendants do not dispute that each of them was Ebo's employer. Without deciding the issue, we too shall assume that Ebo was employed by all three TJX Defendants.

Ebo has never spoken to managers or ASMs at other California stores owned and operated by the TJX Defendants regarding meal and rest periods. He concedes that he has no personal knowledge of the practices regarding meal and rest periods in California stores other than the Bakersfield Marshalls.

In November 2007, about a month after he was fired, Ebo commenced this action by filing a complaint in the superior court. Shortly thereafter, Ebo filed the FAC, his operative pleading. The FAC set forth causes of action for (1) failure to provide meal and rest periods and (2) failure to provide accurate itemized wage statements. The FAC further stated that Ebo seeks to represent a class or classes of similarly situated employees of the TJX Defendants. The FAC alleged that there were several common questions of law and fact for all of the proposed class members, including whether the TJX Defendants "followed a consistent policy of scheduling shifts so that its employees are precluded from taking a 30-minute meal break" as mandated by California law.

In November 2008, Ebo filed a motion for class certification. The motion sought certification of two classes. The first related to his meal and rest period cause of action. Ebo sought to represent "[a]ll employees of [the TJX Defendants] who have worked in California as Assistant Store Managers between November 13, 2003 and the date of any final judgment in this action." The second proposed class was "[a]ll employees of [the TJX Defendants] who received itemized wage statements between November 13, 2004 and the date of any final judgment in this action that did not state the full name and address of the legal entity that is, or was, their employer."

With respect to the first proposed class, Ebo mainly relied on his own declaration. Ebo stated that the TJX Defendants had a policy of requiring a "manager on duty" (MOD) on the store premises at all times. The MOD was the store manager, one of the ASMs, or a non-manager who was trained and authorized as a "key carrier."[2] Ebo stated: "When an ASM is the 'opening manager' who begins his shift at 7:00 a.m. he cannot

[2] The TJX Defendants apparently do not dispute that they have a policy requiring a MOD, consisting of a store manager, ASM or key carrier, to be one duty at all times.

leave the store until the relieving manager arrives ***at least six hours later*** at 1:00 p.m. In fact, because there are various functions that have to be performed prior to turning the store over to the relieving MOD, the opening ASM must wait until well after 1:00 p.m. before actually being relieved of duty. In short, [the TJX Defendants'] scheduling practices effectively preclude ASMs such as me from taking a meal break within the five-hour deadline required by California law."

Ebo further stated in his declaration that his store manager, Stephen Sharp, instructed him to deliberately "not clock out, or back in," for his late lunch, so that Sharp could later modify the time records to show that Ebo had taken his lunch earlier than he actually had. Additionally, Ebo stated that the TJX Defendants had a policy of requiring ASMs to remain at the store and work through rest periods.

In support of their opposition to Ebo's motion for class certification, the TJX Defendants filed, inter alia, 38 declarations by store managers, ASMs and key carriers in stores throughout California, including declarations by Sharp and other individuals who served as the MOD in the Bakersfield Marshalls store. Sharp denied Ebo's allegations about scheduling practices and falsifying records. He also summarized store records, which he claimed showed that there was virtually always a MOD available for Ebo to take meal and rest breaks. An ASM and two key carriers at the Bakersfield Marshalls store stated in their declarations that they were not precluded from taking timely meal or rest breaks due to scheduling and lack of "coverage" by another person who could serve as a MOD.

Likewise, the remaining declarations indicated that in dozens of other stores throughout California, the TJX Defendants scheduled the work shifts of managers, ASMs and key carriers in a way that always, or virtually always, allowed ASMs to take timely meal and rest periods. The declarations also indicated that shift hours and the number of employees who could serve as the MOD varied significantly from store to store, and that the number of employees and store hours increased during the holiday season.

The TJX Defendants' declarations further indicated that it was the "store" or "company" policy and practice to permit ASMs to take a meal period prior to the

completion of their fifth hour of work. According to many declarations, this policy was explained to ASMs and other employees during their initial training.

Additionally, the declarations stated that it was store or company policy and practice to allow employees, including ASMs, to take uninterrupted meal and rest periods. Declarants indicated that either they always took meal and rest periods without an interruption or that they very rarely were interrupted. Some declarants indicated that they always took their lunch and rest periods, while others stated that they voluntarily chose not to take some or all meal or rest periods, but knew they had the option of taking such breaks. Most of the declarants stated that their store followed a two-hour rule of thumb, which permitted employees to take a rest period within the first two hours of their shift, and either a meal period or rest period every two hours thereafter.

On January 20, 2009, the trial court entered an order granting in part and denying part Ebo's motion for class certification. The court denied class certification of Ebo's first cause of action for meal and rest periods on the grounds that Ebo failed to show commonality and superiority. It also denied class certification for Ebo's second cause of action for inaccurate wage statements against TJ Maxx of California LLC, but granted certification for this cause of action against Marshalls of California, LLC and The TJX Companies, Inc. upon a modification of the class definition to state that it only included California employees. We shall discuss this order in more detail *post*.

Ebo timely appealed the portion of the January 20, 2009, order denying class certification of his first cause of action.[3] He did not appeal the remainder of the order and the TJX Defendants did not file a cross-appeal.

ISSUE

The issue in this case is whether the trial court abused its discretion in partially denying Ebo's motion for class certification.

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[3] The order is appealable. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

DISCUSSION

1. *Standard of Review*

" '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' " (*Fireside Bank v. Superior* Court (2007) 40 Cal.4th 1069, 1089 (*Fireside*).) We thus generally review a trial court's order denying a plaintiff's motion for class certification for abuse of discretion. (*Ibid.*; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).)

The abuse of discretion standard varies according to the aspect of the trial court's ruling under review. (*Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (*Cellphone*).) We review the trial court's legal conclusions de novo and its application of the law to the facts is reversible only if arbitrary, capricious or patently absurd. (*Ibid.*; *Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 748.)

We apply the substantial evidence test to the trial court's factual findings. (*Cellphone*, *supra*, 180 Cal.App.4th at p. 1118; *Brinker*, *supra*, 53 Cal.4th at p. 1022.) In determining whether there is substantial evidence, we presume the existence of every fact the trial court could reasonably deduce from the record (*Brinker*, at p. 1022), draw all inferences from the evidence in favor of the trial court's order (*Sav-On*, *supra*, 34 Cal.4th at p. 328), and imply any findings necessary to support the order, so long as any such implied findings are themselves supported by substantial evidence. (*Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1287-1288.)

Unlike ordinary appellate review, when we review an order denying a motion for class certification, we may "only consider the reasons stated by the trial court and must ignore any unexpressed reason that might support the ruling." (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 939.) "We may not reverse, however, simply because *some* of the court's reasoning was faulty, so long as *any* of the stated reasons are sufficient to justify the order." (*Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 844.)

In sum, "[a] certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions." (*Fireside*, *supra*, 40 Cal.4th at p. 1089.)

2. *Requirements of Class Certification*

Class actions are authorized by statute "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." (Code Civ. Proc., § 382.) There are two broad requirements for class certification. "The first is existence of an ascertainable class, and the second is a well-defined community of interest in the questions of law and fact involved." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 809 (*Vasquez*).)

" 'The community of interest requirement [for class certification] embodies 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.' " (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104.) It is the plaintiff's burden to establish the requisite community of interest. (*Ibid.*) In order to meet that burden, the plaintiff must show that questions of law or fact common to the class predominate over the questions affecting the individual members. (*Ibid.*)

"Questions of fact and law are 'predominant' if the factual and legal issues 'common to the class as a whole [are] sufficient in importance so that their adjudication on a class basis will benefit both the litigants and the court.' " (*Bomersheim v. Los Angeles Gay and Lesbian Center* (2010) 184 Cal.App.4th 1471, 1481, citing *Vasquez, supra*, 4 Cal.3d at p. 811.) " 'Class actions will not be permitted . . . where there are diverse factual issues to be resolved, even though there may be many common questions of law.' [Citation.] '[A] class action cannot be maintained where each member's right to recover depends on facts peculiar to his case . . . .' " (*Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 118.)

"The 'ultimate question' the element of predominance presents 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.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amendable to class treatment.' [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' " (*Brinker*, *supra*, 53 Cal.4th at pp. 1021-2022, fn. omitted.)

"A class action also must be the superior means of resolving the litigation, for both the parties and the court." (*Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1101.) The court determines this question by considering, among other things, whether the class size is sufficiently numerous. (*Ibid.*)

3. *Substantive Law Regarding Meal and Rest Periods*

As a general rule, the trial court should not resolve the merits in a putative class action case before deciding whether to grant class certification. (*Fireside*, *supra*, 40 Cal.4th at p. 1083; *Brinker*, *supra*, 53 Cal.4th at p. 1023.) The California Supreme Court has recognized, however, that issues affecting the merits of a case may be " 'enmeshed' " with class action requirements. (*Brinker*, at p. 1023.) "In particular, whether common or individual questions predominate will often depend upon resolution of issues closely tied to the merits. [Citations.] To assess predominance, a court 'must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.' " (*Id.* at p. 1024.) "To the extent the propriety of certification depends upon disputed legal or factual questions, a court may, and indeed must, resolve them." (*Id.* at p. 1025; accord *Dailey v. Sears, Roebuck and Co.* (2013) 214 Cal.App.4th 974, 991 (*Dailey*) ["if the parties' evidence is conflicting on the issue of whether common or

individual questions predominate . . . the trial court is permitted to credit one party's evidence over the other's in determining whether the requirements for class certification have been met—and doing so is not . . . an improper evaluation of the merits of the case"].)

In this appeal, the only cause of action at issue is Ebo's first cause of action for failure to provide meal and rest periods in violation of California law. We shall thus provide a brief summary of the applicable substantive law before analyzing whether the trial court abused its discretion in partially denying Ebo's motion for class certification.

Under state law, an employer must provide non-exempt employees with meal and rest periods during the workday. (Lab. Code, § 512; *Brinker*, *supra*, 53 Cal.4th at p. 1018.) Absent waiver, the employer must provide the first meal period of not less than 30 minutes no later than the end of an employee's fifth hour of work. (*Brinker*, at p. 1041.) The employer must also provide rest periods of 10 minutes per four hours work and, insofar as practicable, in the middle of each work period. (*Id.* at p. 1031; Cal. Code Regs., tit. 8, § 11070(12)(A).)[4] Both meal and rest periods must be uninterrupted. (Lab. Code, § 226.7, subd. (a).) "If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." (Lab. Code, § 226.7, subd. (b).)

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[4] The Industrial Welfare Commission (IWC) issues wage orders regarding various provisions of the Labor Code, including meal and rest periods, on an industry-by-industry basis. (*Brinker*, *supra*, 53 Cal.4th at p. 1018, fn. 1; *Id.* at p. 1027; see generally Cal. Code Regs., title 8, §§ 11010-11170.) In *Brinker*, the court applied IWC wage order No. 5-2001. (*Brinker*, at p. 1018.) In this case, we apply IWC wage order No. 7-2001. (Cal. Code Regs., tit. 8, § 11070(1) ["This order shall apply to all persons employed in the mercantile industry"].) The relevant provisions in both wage orders regarding meal and rest periods are in all material respects the same. (Compare Cal. Code Regs., tit. 8, § 11050(11)(12) with § 11070(11)(12).)

In *Brinker*, our Supreme Court resolved a number of substantive issues that are relevant here. The first is whether employers are required to ensure that workers actually take their meal and rest periods, or are only obligated to provide employees an opportunity to do so. In his motion for class certification, filed prior to *Brinker*, Ebo argued that employers must ensure that breaks are taken. In *Brinker*, however, the court concluded that "an employer's obligation is to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done." (*Brinker*, *supra*, 53 Cal.4th at p. 1017.)

The *Brinker* court elaborated that an employer satisfies its obligation to provide a meal period "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. What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law. [¶] On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay under [the applicable wage order] and Labor Code section 226.7, subdivision (b)." (*Brinker*, *supra* 53 Cal.4th at pp. 1040-1041.)

Brinker also addressed the issue of the timing of meal periods. In the trial court, Ebo argued that the meal period must commence *prior to* the end of the fifth hour of work. *Brinker* held, however, that the first meal period must commence "no later than the end of the employee's fifth hour of work," i.e. "no later than the start of an employee's sixth hour of work." (*Brinker*, *supra*, 53 Cal.4th at p. 1041.)

4. *The Trial Court Did Not Abuse Its Discretion in Partially Denying Ebo's Motion for Class Certification*

In its order partially denying Ebo's motion for class certification, the trial court recognized that there were common questions of fact and law, including whether the TSF Defendants provided ASMs meal periods within the first five hours of their shift and the rest periods required under California law. The court, however, found that these common questions did not "predominate."

In its discussion regarding predominance, the court reviewed *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 (*Cicairos*), *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080 (*White*), *Brown v. Federal Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580 (*Brown*), and *Brinkley v. Public Storage, Inc.* (2008) 167 Cal.App.4th 1278 (*Brinkley*).[5] The court determined that "[t]he law appears under *Cicairos*, *White*, *Brown* and *Brinkley* that an employer must ensure that employees are provided with such meal and rest breaks and that the employer does not do anything, constructively (impede) or overtly (demand), to prevent a meal from being taken. Yet, the employer is not required to ensure that its employees actually take their meal break."

The trial court concluded: "Although the merits are not determined at this stage – so whether meals are taken timely and rest breaks are taken is not adjudicated here – the presented evidence establishes that individual inquiry will predominate. To determine Defendants' liability here, each putative class member will need to testify on (i) whether [he or she] missed a meal break, why (was it voluntary . . . to forgo or forced to forgo) and if forced (and/or voluntary) was he/she paid the one hour additional premium wage, (ii) whether a meal break was taken after the 5th hour of work, and if so why and was he/she paid the one hour additional premium wage; and (iii) whether [he or she] missed a rest break, why (was it voluntary or forced) and if forced to forgo rest break was he/she compensated one additional hour of wage. Although the time records may be able to

[5] At the time, *Brinkley* was citable. Subsequently, we vacated the *Brinkley* opinion and issued another, unpublished opinion incorporating the analysis of *Brinker*.

determine if a class member missed a meal break or took a late meal break, it cannot [tell] us why. As the case law above indicates before Defendants can be determined liable for not providing timely meal and rest breaks, it must be established why a class member missed or took a late lunch and missed a rest break. Such defeats commonality."

Predominance is a fact question we review under the substantial evidence test. (*Brinker*, *supra*, 53 Cal.4th at p. 1022.) In this case, there was substantial evidence supporting trial court's finding. This evidence consisted mainly of the 38 declarations filed by the TJX Defendants. These declarations showed that various stores in California scheduled shifts for ASMs in many different ways and had different numbers of employees who could serve as the MOD. Further, the declarations indicated that, contrary to Ebo's statements about scheduling in the Bakersfield Marshalls store, managers at other locations prepared schedules which allowed ASMs who worked in a morning shift to take their meal period no later than after working for five hours. The declarations also showed that ASMs sometimes voluntarily did not take meal and rest periods for a variety of reasons, but not because they did not have adequate coverage from other employees who could serve as the MOD. In light of this evidence, a reasonable judge could have determined that it would be more desirable and feasible to resolve each claim individually rather than by designating a single class. The trial court thus did not abuse its discretion in denying Ebo's motion to certify a class for his meal and rest period cause of action.

a. *The Trial Court Did Not Apply Incorrect Legal Analysis*

In its analysis of whether individual or common issues predominate, the trial court stated that "*before* [the TJX] Defendants can be determined liable for not providing timely meal and rest breaks, it must be established why a class member missed or took a late lunch and missed a rest break." (Italics added.) Ebo contends that this analysis contradicted *Brinker*. He argues that under *Brinker*, "[i]f, and only if" an employer discharges its "affirmative obligation" to provide a meal or rest period, "may it become necessary to ask 'why' an employee may have remained on-duty instead of taking an off-duty break."

Although Ebo's argument is difficult to follow, he appears to contend that the trial court failed to recognize that the issue of why class members missed meal and rest periods relates to an affirmative defense of the TJX Defendants. Ebo contends that the trial court's incorrect analysis of the "substantive elements" of his cause of action caused the trial court to erroneously analyze the requirements for class certification.

Ebo bases this argument mainly on the concurring opinion of Justice Werdegar in *Brinker*, which is not binding precedent. (*In re Marriage of Dade* (1991) 230 Cal.App.3d 621, 629.) Justice Werdegar stated that the majority opinion "does not edorse Brinker's argument, accepted by the Court of Appeal, that the question why a meal period was missed renders meal period claims *categorically* uncertifiable." (*Brinker*, *supra*, 53 Cal.4th at p. 1052.) She further opined: "If an employer's records show no meal period for a given shift over five hour, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided. . . . An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, as the Court of Appeal properly recognized, the assertion is an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it." (*Id.* at p. 1053.)

Contrary to Ebo's assertion, we find nothing in the trial court's order that conflicts with either the majority or concurring opinion in *Brinker*. The trial court did not state whether the issue of "why" a class member missed a meal or rest period was part of the analysis of Ebo's case-in-chief or part of the analysis of an affirmative defense by the TJX Defendants. Instead, the court simply stated that "before [the TJX] Defendants *can be determined liable* for not providing timely meal and rest breaks, it must be established why a class member missed or took a late lunch and missed a rest break." (Italics added.) Further, earlier in its order, the trial court clearly stated that "an employer must ensure that employees are provided with such meal and rest breaks and that the employer does not do anything, constructively (impede) or overtly (demand), to prevent a meal from being taken." This is entirely consistent with *Brinker*.

It is also worth noting that Justice Werdegar recognized in her concurring opinion that individual issues arising from an affirmative defense can support a denial of certification, though they pose no per se bar. (*Brinker*, *supra*, 53 Cal.4th at p. 1053, citing *Sav-On*, *supra*, 34 Cal.4th at pp. 334-338.) She also stated that "whether in a given case affirmative defenses should lead a court to approve or reject certification will hinge on the manageability of any individual issues." (*Brinker*, at p. 1054, citing *Sav-On*, at p. 334.) Accordingly, assuming the issue of "why" a meal or rest period was not taken relates to the TJX Defendants' affirmative defense, the trial court's analysis was fully consistent with Justice Werdegar's concurring opinion.

b. *The TJX Defendants' Alleged Uniform Policy*

Ebo argues that the TJX Defendants had a "uniform written policy for employees" regarding meal and rest periods. He bases this argument on a document he received from the TJX Defendants in response to discovery requests. The document is entitled "New Hire Orientation For Non-Exempt Associates."[6] It appears to consist of slides used in a presentation software. Two of the slides are entitled "Store Standards," one labeled "Associate View" and the other "Manager View." In the "Associate View" slide it states: "You will receive breaks and meals as follows:

"— Up to 6 hours work – one 15 minute break

"— Over 6 hours of work – two 15 minute breaks and a 45-minute meal break."

In the "Manager's View" slide, it states:

"Explain that breaks and meals are provided as follows:

"— Over 6 hours work, you will receive a 45-minute meal break.

"— You will receive one 15 minute break for 4 – 6 hours scheduled." It further states: "***Provide Associate with specific amount of time allowed for a meal break consistent with state law. Also provide Associate with any other state-specific***

[6] "Associates" at the stores owned and operated by the TJX Defendants are non-exempt employees who are subordinate to ASMs.

requirements regarding breaks and meals (see Policy Book for state-specific information)."[7]

Ebo contends that these slides show that the TJX Defendants had a uniform policy which violated California law with respect to meal and rest periods. In the trial court, however, Ebo did not make an argument based on the language of these two slides and the trial court did not specifically address any such argument. Ebo thus forfeited this argument on appeal. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.)

Moreover, a reasonable judge could have declined to credit this evidence as establishing a uniform policy regarding ASMs in California. The slides appear to apply only to "Associates" and thus do not necessarily state a policy for ASMs like Ebo and the members of the class he sought to represent. The slides also indicate that store managers were required to consider "state-specific" requirements. Taking into account the numerous declarations filed by the TJX Defendants, the trial court could have reasonably determined that for purposes of Ebo's motion for class certification, Ebo did not establish that the TJX Defendants had a uniform policy for meal and rest periods for ASMs in California.

It is of no consequence that the trial court could have reasonably inferred a contrary conclusion. (*Dailey, supra*, 214 Cal.App.4th at p. 992.) In light of the TJX Defendants' substantial evidence disputing the application of the purported uniform policy stated in the slides, the trial court acted within its discretion in finding that Ebo's theory of liability was not susceptible of common proof at trial. (*Id.* at p. 997.)

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[7] It is unclear whether part or all of the "Policy Book" is in the record. A document in the record which appears to be a Marshalls' Human Resources "Policy" statement regarding "Meals/Breaks" provides: "*Non-Exempt Associates in CA, CO, NH, ND and WA who are scheduled or work more than five but six or less hours must be provided a thirty minute unpaid meal period as well as applicable paid breaks.*" The document further provides that "Non-Exempt Management (CA only) who work five or more hours are provided a thirty minute unpaid meal period and two fifteen minute paid breaks."

c. *Ebo's Proffered Statistical Analysis of Time Records*

In support of his motion for class certification, Ebo's counsel set forth a chart in his declaration allegedly summarizing the data on Ebo's weekly time cards. According to Ebo's attorney, this data shows that Ebo "worked more than five hours without a meal break on approximately 82% of opening shifts (18/22)." In the trial court, Ebo argued that "analysis of contemporaneous time punches and edits [of other ASMs in California] can plainly confirm whether [the TJX Defendants] engaged in a class-wide pattern and practice of denying compliant meal periods to its California ASMs."

On appeal, Ebo argues that he "proffered a statistical analysis of [the TJX Defendants'] time records demonstrating that when he was the opening 'manager on duty' [the TJX Defendants] failed to timely relieve him of duty for a meal break on 81.81% of shifts." This same analysis, Ebo claims, "could be performed for all class members (or a representative sample, thereof)." Ebo argues that in violation of the holding in *Brinker*, the trial court rejected the use of time records for ASMs in California on the ground that they "cannot tell us why" an individual did or did not take a meal or rest period. We disagree. As we explained *ante*, the trial court's statements about the issue of "why" an individual missed meal or rest periods did not contradict *Brinker*.

Ebo contends that *Brinker* "endorsed the use of statistical analysis as a tool of common proof." As authority for this claim Ebo cited Justice Werdegar's concurring opinion, which stated that "[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability." (*Brinker*, *supra*, 53 Cal.4th at p. 1054.) The majority opinion, however, did not state anything regarding the use of surveys or statistical analysis. Further, Justice Werdegar did not state in her concurring opinion that a trial court was required to use such methods or that it was an abuse of discretion not to do so. *Brinker* therefore is not binding authority regarding these matters.

Moreover, apart from his counsel's analysis of his own payroll records, Ebo did not offer any actual data or statistical analysis about missed meal or rest periods of proposed class members. Rather, he simply suggested that a random survey of time records might establish that class members missed a certain percentage of meal and rest periods.

In *Dailey*, the court addressed a similar proposal. There, the plaintiff alleged that the defendant violated California laws governing the payment of overtime. The plaintiff argued that the trial court erroneously denied his motion for class certification because his expert could have used random sampling methodology to prove liability on a classwide basis. (*Dailey*, *supra*, 214 Cal.App.4th at pp. 997-998.) The Court of Appeal, however, stated: "We have found no case, and [the plaintiff] has cited none, where a court has deemed a mere proposal for statistical sampling to be an adequate evidentiary *substitute* for demonstrating the requisite commonality, or suggested that statistical sampling may be used to manufacture predominate common issues where the factual record indicates none exist. If the commonality requirement could be satisfied merely on the basis of a sampling methodology proposal such as the one before us, it is hard to imagine that any proposed class action would *not* be certified." (*Id.* at p. 998.) The court concluded by stating, "[a] trial court does not err in rejecting a proposed statistical sampling procedure when the class action proponent fails to 'explain how the procedure will effectively manage the issues in question.' " (*Id.* at p.1000.)

We agree with the analysis in *Dailey*. Ebo's suggestion that he could use a random statistical analysis of employees' payroll records to determine how many meal and rest periods were missed was not a substitute for demonstrating the requirement that common issues predominated over individual issues. The trial court did not abuse its discretion in rejecting Ebo's argument.

DISPOSITION

The order dated January 20, 2009, is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.