B248748
BC419340

In the Court of Appeal of the State of California
Second Appellate District, Division 1

VALERIE ALBERTS, ET AL.
Plaintiffs/Appellants

v.

AURORA BEHAVIORAL HEALTH CARE, ET AL.
Defendants/Respondents

Appeal from the Superior Court of California County of Los Angeles
Hon. Elizabeth A. White • BC419340

APPELLANTS' OPENING BRIEF

SCHONBRUN DeSIMONE SEPLOW HARRIS & HOFFMAN LLP
Michael D. Seplow (SBN 150183)
mseplow@gmail.com
Erin M. Pulaski (SBN 270998)
pulaski.sdshhh@gmail.com
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731
Attorneys for Plaintiffs/Appellants Valerie Alberts, et al.

B248748
BC419340

In the Court of Appeal of the State of California
Second Appellate District, Division 1

VALERIE ALBERTS, ET AL.
Plaintiffs/Appellants

v.

AURORA BEHAVIORAL HEALTH CARE, ET AL.
Defendants/Respondents

Appeal from the Superior Court of California County of Los Angeles
Hon. Elizabeth A. White • BC419340

APPELLANTS' OPENING BRIEF

SCHONBRUN DeSIMONE SEPLOW HARRIS & HOFFMAN LLP
Michael D. Seplow (SBN 150183)
mseplow@gmail.com
Erin M. Pulaski (SBN 270998)
pulaski.sdshhh@gmail.com
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731
Attorneys for Plaintiffs/Appellants Valerie Alberts, et al.

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Second APPELLATE DISTRICT, DIVISION 1	Court of Appeal Case Number: B248748
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Michael D. Seplow (SBN 150183) Erin M. Pulaski (SBN 270998) SCHONBRUN DESIMONE SEPLOW HARRIS & HOFFMAN LLP 723 Ocean Front Walk, Venice, California 90291 TELEPHONE NO.: (310) 396-0731 FAX NO. (Optional): (310) 399-7040 E-MAIL ADDRESS (Optional): mseplow@gmail.com; pulaski.sdshhh@gmail.com ATTORNEY FOR (Name): Plaintiffs-Appellants Valerie Alberts, et al.	Superior Court Case Number: BC419340 FOR COURT USE ONLY
APPELLANT/PETITIONER: Valerie Alberts, et al. RESPONDENT/REAL PARTY IN INTEREST: Aurora Behavioral Health Care, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Plaintiffs-Appellants Valerie Alberts, et al.

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 16, 2013

Erin M. Pulaski
(TYPE OR PRINT NAME)

▶ 9.22
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Page(s)

TABLES OF AUTHORITIES

Page(s)

STATE CASES

TABLES OF AUTHORITIES

Page(s)

STATE CASES

FEDERAL CASES

TABLES OF AUTHORITIES

Page(s)

STATUTES & REGULATIONS

I. INTRODUCTION

The trial court's ruling denying Plaintiffs-Appellants' ("Plaintiffs") Motion for Class Certification should be reversed. Plaintiffs presented a plethora of evidence demonstrating that, as a result of policies and practices common to all class members, nursing staff at Defendants-Respondents' ("Defendants") psychiatric hospitals, Aurora Las Encinas ("LEH") and Aurora Charter Oak ("COH"), were routinely denied meal and rest breaks, and were required to work overtime without compensation.

Instead of focusing on Plaintiffs' theory of the case, as required by *Brinker Restaurant Corporation v. Superior Court*, 53 Cal.4th 1004 (2012), the trial judge – the Honorable Elizabeth A. White – engaged in a plainly improper merits-based and damages-based analysis, concluding incorrectly that class certification was precluded by individual issues involving damages. Judge White failed to conduct the requisite comparative analysis, declining not only to weigh the issues subject to common versus individual proof, but also to even *acknowledge* the common policies and procedures alleged by Plaintiffs. Specifically, Plaintiffs submitted ample evidence showing that Defendants' class-wide policies required nursing staff to remain on their units and monitoring patients unless relieved. Nonetheless, the evidence shows that relief was routinely not provided, resulting in class members being denied lawful rest and meal breaks without compensation. Likewise, despite requiring employees to complete all assigned tasks before leaving at the end of the shift, Defendants actively discouraged requests for overtime compensation and instructed employees to finish outstanding assignments off-the-clock. The trial court utterly failed to address these common theories of liability.

The trial court's ruling also reveals fundamental misconceptions regarding the standard for class certification, including a flawed notion that certification is improper unless an employer has denied breaks to employees as a "*universal* practice," and the position that employees can "voluntarily" forego breaks that were never provided. California authorities clearly dictate that these failings alone require reversal of the trial court's decision. Indeed, if one were to credit Judge White's ill-conceived rationale that class certification cannot be granted except upon a showing that rest and meal breaks are "universal[ly]" denied to class members, no rest or meal break class would ever be certified.

But the errors do not end there. The trial court further misconstrued the evidence submitted by Plaintiffs, erroneously disregarding it as too "anecdotal" while expressly failing to even consider the (undeniably non-anecdotal) documentary and statistical evidence submitted in support of certification. For example, the trial court declined to examine Plaintiffs' compelling statistical evidence showing, *inter alia*, that over 80% of recorded meal breaks were less than 30 minutes in length and/or started more than six hours after the start of the work period. The trial court also ignored evidence that LEH's hospital-wide staffing coordinators adjusted employee time records to the detriment of putative class members. Likewise, evidence showing that both Hospitals systemically deprived employees of compensation for missed breaks and overtime through class-wide policies and a pattern of coercion, was also overlooked.

Finally, the trial court relied upon depublished California authorities that contain reasoning specifically rejected in *Brinker*. In sum, the trial court's ruling is erroneous in nearly every respect.

When one applies the correct criteria and engages in a proper analysis of Plaintiffs' certification request, it is clear that Plaintiffs' claims should be certified as they are based on class-wide policies and procedures applicable to all class members. Accordingly, consistent with California's strong policy favoring class certification of wage and hour claims, this Court should reverse the ruling below and remand the case with instructions to certify the classes and sub-classes proposed by Plaintiffs.

II. PROCEDURAL HISTORY

On August 6, 2009, Plaintiffs filed a Class Action Complaint in Los Angeles County Superior Court alleging various wage and hour violations against Defendants. [Plaintiffs' Appendix, Vol. 1, 1-27 ("Appx.1.1-27")]. Plaintiffs and members of the putative class are current and former non-exempt employees of LEH and COH from August 6, 2005, to the present, who provided patient care, and held the following job titles: Registered Nurse ("RN"), Licensed Vocational Nurse (also known as Licensed Psychiatric Technician), and Mental Health Worker (also known as Behavior Health Specialist or Psychiatric Assistant) (collectively, "nursing staff" or "nursing employees"). [Appx.1.5-7, Appx.1.37, Appx.1.47-48]. There are approximately 1053 class members. [Appx.1.60 ¶4].

Plaintiffs filed a Motion for Class Certification ("Motion") on May 25, 2012. [Appx.1.29-55]. Plaintiffs proposed that there be two overall sub-classes: one for individuals employed by LEH and one for individuals employed by COH. [Appx.1.47]. Plaintiffs further proposed six additional subclasses, five of which are the subject of the current appeal: (1) a rest break subclass, (2) a meal break

subclass, (3) an overtime subclass, (4) a waiting time subclass and (5) an itemized statement subclass. [Appx.1.47-48].[1]

Judge White heard Plaintiffs' Motion on April 10, 2013. In a tentative ruling which the trial court adopted as final, it denied the Motion due to "lack of commonality." [Appx.13.3434-3439 (Order)]. The trial court held improperly that individualized issues predominated with respect to Plaintiffs' meal and rest break claims because the evidence purportedly failed to show that Defendants *universally* deprived putative class members of *all* meal and rest breaks. [Appx.13.3436-3438]. Similarly, Judge White held that the evidence showed variations in the extent to which employees were denied overtime or forced to work off-the-clock past the end of their shifts, and accordingly that the commonality requirement was not met with respect to Plaintiffs' overtime claims. [Appx.13.3438].[2]

Plaintiffs timely filed their Notice of Appeal on May 10, 2013. [Appx.13.3448-3449].

III. STATEMENT OF APPEALABILITY

"A decision by a trial court denying certification to an entire class is an appealable order." *Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462, 470 (1981). Accordingly, because Judge White's ruling denied certification as to an entire class, the order is appealable. *See id.*[3]

---

[1] Appellants are not pursuing on appeal a sixth subclass based upon unreimbursed business expenses.

[2] The parties filed various objections to the evidence submitted by the opposing party. [Appx.8.1852-2121; Appx.9.2122-2178; Appx.9.2179-2237; Appx.10.2563-2590; Appx.11.2686-2939; Appx.11.2946-2949; Appx.11.2950-2960]. The trial court declined to rule on the evidentiary objections. [Appx.13.3439].

[3] The trial court has ordered a complete stay of trial court proceedings pending the outcome of this appeal. [Appx.13.3464-3465].

IV. STANDARD OF REVIEW

A trial court's ruling denying class certification must be reversed when it is unsupported by substantial evidence, rests on improper criteria, or rests on erroneous legal assumptions. *Faulkinbury v. Boyd & Associates, Inc.*, 216 Cal.App.4th 220, 231 (2013) ("*Faulkinbury II*"); *see also Jaimez v. DAIOHS USA, Inc.*, 181 Cal.App.4th 1286, 1297-98 (2010). In such a case, appellate review is *de novo*. *Marler v. E.M. Johansing, LLC*, 199 Cal.App.4th 1450, 1459 (2011). The court does "not apply [a] deferential standard of review if the trial court has evaluated class certification using improper criteria or an incorrect legal analysis." *Jaimez*, 181 Cal.App.4th at 1297. Noticeably less deference is given to an order denying class certification than to an order granting class certification. *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010). "When reviewing an order denying class certification, appellate courts 'consider only the reasons cited by the trial court for the denial, and ignore other reasons that might support denial.'" *Jaimez*, 181 Cal.App.4th at 1297-98 (citation omitted). If the trial court applied improper criteria or incorrect legal analysis, the "appellate court is required to reverse…even though there may be substantial evidence to support the court's order." *Id.* at 1297 (internal quotations and citations omitted).

V. PLAINTIFFS HAVE EASILY MET THE LEGAL STANDARD FOR CLASS CERTIFICATION.

Class certification is appropriate when the party seeking certification demonstrates (1) the existence of an ascertainable class, and (2) a well-defined community of interest among the class members. *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 435 (2000). The community of interest requirement, in turn, 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. *Id*.

In *Brinker*, the California Supreme Court set forth this standard for determining whether common issues predominate:

> 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. The answer hinges on whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment…. 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.

53 Cal.4th at 1021-22 (internal quotations and citations omitted). In examining the propriety of certification, a trial court is required to engage in a comparative analysis, examining the costs and benefits of adjudicating plaintiff's claims on a class basis against the cost and benefits of proceeding by numerous separate actions. *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 334, 339 n. 10 (2004).

The Supreme Court has definitively and repeatedly held that class certification cannot be denied based on the trial court's assessment of the merits of a plaintiff's claims. *Sav-On*, 34 Cal.4th at 327; *Brinker*, 53 Cal.4th at 1023 ("A class certification motion is not a license for a free-floating inquiry into the validity of the complaint's allegations; rather, resolution of disputes over the merits of a case generally must be postponed until after class certification has been denied."). Finally, a court may not deny certification on the ground that class members must individually prove their damages. *Id*. at 1022; *see also Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 513-14 (9th Cir. 2013).

Here, Plaintiffs' theory of recovery is based upon class-wide policies and practices that are subject to common proof. Accordingly, common questions clearly predominate over individual issues, and class certification is proper.

VI. PLAINTIFFS HAVE PRESENTED COMPELLING EVIDENCE OF CLASS-WIDE POLICIES AND PRACTICES THAT VIOLATE CALIFORNIA LAW REGARDING REST BREAKS, MEAL BREAKS AND OVERTIME.

A. Common Policies Requiring Nursing Staff To Remain on Their Units Absent Relief Resulted In The Class-Wide Denial of Meal and Rest Breaks.

LEH and COH are psychiatric hospitals owned and operated by Defendant Aurora Behavioral Health Care. [Appx.1.76-79]. According to hospital policy, nursing staff at both LEH and COH were prohibited from leaving their units without designated relief. [Appx.3.644 ¶4 ("[T]he Hospital's number one policy was that we could not leave our patients without being relieved")].[4] This uniform policy is confirmed by documentary evidence as well as by the testimony of Directors of Nursing ("DONs") at both Hospitals. [Appx.9.2335:22-2336:12 (LEH DON Brenda Nocon testified that nursing staff members could not leave the unit for breaks unless relieved); Appx.9.2305:20-2306:1 (according to COH DON Sheila Cordova, nursing staff could face discipline for leaving the unit without relief)].[5]

[4] *See also* Appx.3.659 ¶9; Appx.3.667-668 ¶4; Appx.3.609 ¶¶7-8; Appx.3.542 ¶¶12-13; Appx.3.548 ¶9 (putative class member stating that the policy requiring nursing staff to remain on units absent relief was "Las Encinas' most important policy"); Appx.3.621 ¶8; Appx.3.581 ¶8; Appx.3.697 ¶15; Appx.3.715-716 ¶¶8-9; Appx.3.681 ¶9; Appx.3.555 ¶8; Appx.3.689 ¶¶11-12; Appx.3.638 ¶13; Appx.4.792 ¶20; Appx.3.615-616 ¶10.

[5] *See also* Appx.1.244; Appx.1.140:6-8,18-24; Appx.1.142:10-143:12; Appx.1.168:6-169:7; Appx.1.186:1-14; Appx.1.187:1-188:5; Appx.9.2302:6-20; Appx.9.2350:8-24.

State regulations applicable to LEH and COH (registered as "acute psychiatric hospitals") require that there be sufficient RNs on duty to provide for patient needs and staff supervision, *see* 22 C.C.R. §71225(c), and that there be sufficient additional staff to preserve patient safety, *see* 22 C.C.R. §71215(c). [Appx.1.105:22-106:11].[6] In conformity with these regulations, Defendants' staffing policies required that there be at least one RN, and at least two nursing employees total, on each unit at all times.[7] Moreover, there must be at least one licensed staff member (RN, LVN or LPT) on the unit for every six patients.[8] A RN could be relieved only by another RN, and a LVN could be relieved only by another LVN or RN.[9]

The policy requiring that employees remain on their units absent relief directly conflicted with Defendants' obligations to provide employees with meal and rest breaks. At LEH, there was *no* designated break relief for rest breaks. [Appx.1.122:8-12 (DON Cook testified that the scheduled break relievers were not responsible for providing relief for rest breaks); Appx.1.189:6-25 (staffing coordinator Evaldo Casas stated that scheduled break relief was for meal breaks,

---

[6] Additionally, as a condition of participation in Medicare, COH and LEH must "have adequate numbers of licensed registered nurses, licensed practical (vocational) nurses, and other personnel to provide nursing care to all patients as needed." Further, "[t]here must be supervisory and staff personnel for each department or nursing unit to ensure, when needed, the immediate availability of a registered nurse for bedside care of any patient." 42 C.F.R §482.23(b).

[7] Appx.1.99:12-100:7, Appx.1.120:18-24, Appx.4.929 ¶4 (Cook testimony); Appx.4.917 ¶4 (Cordova testimony); Appx.3.689 ¶¶11-12; Appx.3.608 ¶4; Appx.3.667-668 ¶4; Appx.3.555 ¶8; Appx.3.569 ¶6; Appx.3.637-638 ¶¶9,13; Appx.3.659 ¶9; Appx.3.564 ¶9; Appx.3.608-609 ¶¶4,9.

[8] Appx.1.100:4-7, Appx.4.929 ¶7 (Cook testimony); Appx.3.568-569 ¶5; Appx.263-264 (LEH policy setting forth minimum number of staff on units); Appx.3.696 ¶11; Appx.3.581 ¶7.

[9] *See also* Appx.1.121:3-11 (Cook Deposition); Appx.3.547 ¶5; Appx.3.564 ¶10; Appx.3.569 ¶6; Appx.3.542 ¶12; Appx.3.603 ¶9; Appx.9.2302:6-20 (Cordova Deposition).

not rest breaks); Appx.3.700 ¶27 (acting staffing coordinator Lisa Ramirez never scheduled relief for the provision of rest breaks)].[10]

There was only sporadic relief for meal breaks at LEH. [Appx.1.81 (random sampling of daily schedules at LEH from August 2005 through August 2009 demonstrated that there was no scheduled break relief on a large percentage of shifts); Appx.1.65 ¶13; Appx.1.83-91 (sample of LEH Daily Schedules on which no break relief is listed); Appx.3.697-698 ¶¶16-17 (even when break relief was scheduled, staffing coordinator Ramirez "often had to assign the break relievers to tasks that would prevent them from doing any break relief").[11] Prior to November 2005, there was *no* designated meal break relief whatsoever. [Appx.1.65 ¶13; Appx.1.190:19-191:14; Appx.3.588 ¶14].

Similarly, at COH, relief for rest breaks was rarely or never available. [Appx.3.581 ¶8 ("To the best of my recollection, no one ever relieved me so that I could take a rest break"); Appx.3.610 ¶12 ("the Hospital's general policy was not to schedule a staff member to come to the units to provide rest break relief"); Appx.3.690-691 ¶19 (similar)].[12] At both Hospitals, it was the employee's responsibility to arrange to take a rest break, as opposed to management's responsibility to make such arrangements. [Appx.1.145:3-21, Appx.1.146:8-11 (Cook Deposition); *see also* Appx.9.2303:9-11, 2307:3-5 (Cordova Deposition)].

---

[10] *See also* Appx.3.640 ¶21; Appx.3.624 ¶19 ("There was no designated relief for 10-minute rest breaks."); Appx.3.670-671 ¶11; Appx.3.646 ¶17; Appx.3.550 ¶20; Appx.3.543 ¶17; Appx.3.557 ¶¶16-17; Appx.4.790,792 ¶¶14,20.

[11] *See also* Appx.1.184:18-21, 201:8-15, (Casas Deposition); Appx.3.639 ¶¶15-16; Appx.3.660 ¶¶12-14 ("When there was no 'break reliever' scheduled, there was no mechanism for staff to receive relief for meal breaks…."); Appx.3.715-716 ¶9; Appx.3.652 ¶12; Appx.3.555-556 ¶¶9-10; Appx.4.790-791 ¶¶14-15; Appx.2.429 ¶17; Appx.2.431-442.

[12] *See also* Appx.3.707-708 ¶¶9,11; Appx.3.722-723 ¶9; Appx.3.564 ¶9; Appx.3.615-616 ¶10; Appx.3.603 ¶9; Appx.3.690-691 ¶¶19-20.

The relief for meal breaks at COH was also sporadic at best. [Appx.3.564 ¶10 ("Frequently, the Hospital did not provide relief for us to get our meal breaks"); Appx.3.616 ¶11; Appx.3.689 ¶¶13-14 ("When I worked at Charter Oak, there was no RN assigned to relieve the other RNs to allow them to take a break. As a result, employees could not leave the unit, and remained fully responsible for their patients, throughout their entire shifts.")].[13] Even when break relief for meals was provided, there was no policy at either LEH or COH requiring that such relief be provided within the first five hours of an employee's shift. [Appx.3.698 ¶19 ("As far as I was aware based on my work as a MHW and the acting staffing coordinator, the Hospital had no policy requiring that employees be relieved for meal breaks within the first five hours of their shifts"); Appx.3.639 ¶17 ("[I]n my capacity as a charge nurse or nursing supervisor, I was not informed by anyone about any Hospital policy requiring that employees be relieved in the first five hours of their shift"); Appx.3.582 ¶9 ("On those rare occasions when relief for a [meal] break was provided, it was never within the first five hours").[14] Moreover, even when relief was provided, nursing staff were frequently not relieved for a full 30 minutes. Appx.3.576 ¶15 (when assigned as relief staff "I was not told to and did not try to relieve someone for a full 30-minute meal period")].[15] Staff were prohibited or discouraged from leaving the premises of the hospital during meal breaks. [Appx.1.231:8-16 (Nocon Deposition)].[16]

---

[13] *See also* Appx.3.581-582 ¶9; Appx.3.708 ¶¶12-13, Appx.3.574 ¶6; Appx.3.603 ¶10; Appx.3.676 ¶12; Appx.3.723 ¶11.

[14] *See also* Appx.1.238 (LEH employee handbook provision regarding meal breaks); Appx.3.548 ¶11; Appx.3.564 ¶10; Appx.3.609 ¶9; Appx.3.645 ¶11; Appx.3.661 ¶16; Appx.3.689-690 ¶15; Appx.1.129:14-22, 132:18-133:9 (Cook Deposition); Appx.1.202:2-25 (Casas Deposition).

[15] *See also* Appx.3.630 ¶10; Appx.3.645 ¶10; Appx.3.689-690 ¶15; Appx.3.708 ¶12; Appx.3.716 ¶ 10; Appx.3.548 ¶10; Appx.3.556 ¶11.

[16] *See also* Appx.3.690 ¶16; Appx.3.631 ¶14; Appx.3.556 ¶ 11.

B. Chronic Understaffing Pervades Both Hospitals.

The policy requiring nursing staff to remain at their units absent relief was of paramount importance to patient and staff safety. LEH and COH provide treatment to patients suffering from various psychiatric disorders, and there is an ever-present risk that patients will act out or become violent. Indeed, there have been several high profile incidents at the Hospitals such as patient deaths, suicides, reported rapes and numerous assaults by patients on staff or other patients. [Appx.3.540-541 ¶¶4, 6 (assaults, deaths); Appx.3.559-560 ¶¶24-25 (assaults, self-mutilation); Appx.3.588 ¶12 (deaths, rape); Appx.3.621 ¶7 (injuries to patients and staff, rape); Appx.3.615 ¶9 (attacks on staff members); Appx.3.688 ¶10 (patient escape); Appx.3.697 ¶14 (staff injury)] Accordingly – as Hospital management continually instructed its employees – patient safety was the first priority and it was absolutely critical that nursing staff engage in constant monitoring of the patients on their units. [Appx.1.246 ([P]atient safety is our #1 priority"); Appx.2.306 (Memorandum from DON Diane Hobbs stating: "I want to reinforce how important it is to the safety of our patients and to the facility that no one lets their guard down for even one second"); Appx.3.707 ¶9 ("Hospital policy was that we could not leave our patients unattended and patient care was the most important priority"); Appx.3.542 ¶13 ("[S]taff in a private psychiatric hospital *cannot* simply leave mentally ill and physically sick, or violent, people alone to go have a meal period")].[17]

Both LEH and COH have been subject to chronic and intentional understaffing throughout the class period, resulting in tremendous pressure on staff to miss rest and meal breaks so that already strained unit coverage is not further diminished. [Appx.3.667 ¶3 (nursing supervisor stated "because the

[17] *See also* Appx.1.154:19-155:4 (Cook Deposition); Appx.3.659 ¶9; Appx.3.542-543 ¶14; Appx.3.564 ¶9; Appx.3.659 ¶9 ("the Hospital required staff to prioritize patient safety over all else…"); Appx.3.676 ¶12.

hospital was understaffed, there was tremendous pressure on employees not to leave their units, even if they needed to take a break").][18] Indeed, as the result of a site inspection in September 2008, the Department of Health and Human Services, Centers for Medicare & Medicaid Services ("CMS"), found LEH deficient in its obligations to keep patients safe. In particular, CMS determined that LEH "failed to implement staff-to-patient ratios required by regulation to ensure all patients were provided with a safe and secure environment," and failed to provide break relief in a manner consistent with patient care duties. [Appx.1.267-268, Appx.1.274-276]. As Plaintiffs' nursing expert Denise Rounds concluded, Defendants were engaged in understaffing as an intentional business practice, thereby preventing staff from being able to take meal and rest breaks, and endangering patients and staff. [Appx.2.453-460 ¶¶31-59].

C. Defendants Concealed Their Wage and Hour Violations By Instructing Nursing Staff To Clock Out For Meal "Breaks" and Immediately Return to Work, And By Altering Timekeeping Records.

Hospital management was well aware that Defendants' policies denied employees lawful breaks. However, instead of compensating employees for missed breaks as the law requires, Defendants acted to cover-up these violations. First, despite Defendants' awareness that they did not routinely provide lawfully compliant breaks, LEH and COH had strict policies requiring employees to clock for a 30-minute meal "break" each day, regardless of whether a break was actually taken. [Appx.9.2372:2-2372:8 (putative class member told by staffing coordinator Casas that she would be subject to discipline if she failed to clock out for meal breaks even when there was no relief); Appx.3.549 ¶16 (same); Appx.3.709 ¶16 ("Supervisors insisted that the employees' time records show there were meal and

[18] *See also* Appx.3.568-571 ¶¶5,8; Appx.3.558-559 ¶¶23-24; Appx.3.688 ¶10; Appx.3.644 ¶5; Appx.3.651 ¶9; Appx.3.637-638 ¶¶9, 12; Appx.3.541 ¶6; Appx.3.565 ¶13.

rest breaks taken even when it was virtually impossible to take such breaks")].[19] Nursing staff members were directed and pressured to clock out for meal breaks and immediately resume their patient care work on the unit.[20] Defendants were aware of and directly implemented this practice.[21] Indeed, numerous employees have been *personally instructed by hospital management* that nursing staff must clock out for meal breaks regardless of whether such breaks are taken. [*See* Appx.3.699-700 ¶¶20, 25 (staffing coordinator Ramirez was told by DON Cook that employees were required to clock out for meal breaks regardless of whether breaks were actually received); Appx.3.669 ¶¶7-9 (nursing supervisor Robin Motola was instructed by DON Nocon that "I and my staff should simply clock out for breaks and then go back to the unit and continue to work so that it would appear that we had not missed our break")].[22]

---

[19] *See also* Appx.3.723-724 ¶12; Appx.3.565 ¶13; Appx.3.645 ¶9; Appx.3.542-543 ¶¶13-15; Appx.3.575-576 ¶¶8,11-14; Appx.3.640 ¶20; Appx.3.661 ¶¶17-18; Appx.3.543 ¶15; Appx.3.549-550 ¶18; Appx.3.623 ¶15; Appx.3.676 ¶11.

[20] *See* citations in Footnote 19.

[21] Appx.3.699 ¶22 ("Hospital management was aware that employees frequently clocked out and went back to work during meal 'breaks.'"); Appx.3.670 ¶10; Appx.3.690 ¶17; Appx.3.631 ¶16; Appx.4.791-792 ¶18; Appx.3.582 ¶11; Appx.3.569-571 ¶¶7, 9; Appx.3.565 ¶13.

[22] *See also* Appx.3.549 ¶16 (putative class member told by staffing coordinator Casas that he had failed to clock out for meal periods and would be suspended if the practice continued; "I believe that I told [Casas] that I didn't punch out because I didn't take my break. Mr. Casas' response was simply that I *had* to clock out and back in to show a meal period"); Appx.3.556-557 ¶14 ("[W]hen I told my supervisor Rowena Paja that I had no relief to take a meal break, she would simply instruct me to clock out, continue working and clock back in after thirty minutes had lapsed"); Appx.3.631 ¶¶15-16 ("Evaldo Casas…told staff, including me, on numerous occasions that we had to clock out for our meal breaks, even if we didn't take our meal breaks"); Appx.3.700 ¶25; Appx.3.575-576 ¶13; Appx.3.564-565 ¶11; Appx.3.604 ¶11; Appx.3.645 ¶9; Appx.3.716-717 ¶14; Appx.3.690 ¶18; Appx.3.623 ¶15; Appx.9.2371:2-2372:8.

When an employee did not clock out for a meal break, the staffing coordinator would simply adjust his or her time worked to correct this. [Appx.10.2428-2429 ¶8 (statistical analysis of a representative sampling of Defendants' scheduling and payroll records demonstrated that "nearly *one out of every five* recorded meal breaks was either added or edited by a supervisor") (emphasis added); Appx.3.564-565 ¶11 ("Even if we forgot to clock in and out [for meal breaks that were not taken], it didn't matter because the Hospital would simply alter the hours on our payslips so that we were not paid for the extra time"); Appx.3.645 ¶9 ("the staffing coordinator[] told me that he would manually add my meal breaks by hand to my time cards even if I did not take them"); Appx.3.702-703 ¶34 (acting scheduling coordinator Ramirez was instructed to alter time records when time clocks showed that employees did not receive a full 30-minute lunch)].[23]

Thus, Defendants were not only well aware that their common policies routinely deprived employees of lawful breaks, but actively attempted to cover-up and avoid compensating employees for their unlawful practices.

D. Defendants Routinely Deprived Putative Class Members of Compensation for Missed Meal and Rest Periods.

Neither LEH nor COH had any mechanism through which employees could seek compensation for missed rest breaks. [Appx.1.146:8-11 (DON Cook

[23] *See also* Appx.3.549 ¶17 ("Mr. Casas even went so far as to alter my time card records and add punches for meal breaks…. Mr. Casas did not even ask me whether I had taken the lunches that he was inputting to my time records. Had he asked, I would have told him that I did not get the meal breaks for which he was docking my time"); Appx.3.645 ¶9 ("Evaldo Casas…told me that he would manually add my meal breaks by hand to my time cards even if I did not take them"); Appx.1.71 ¶45; Appx.2.309-311 (showing adjustments made to time card by Casas to add "punches" for meal breaks); Appx.1.193:22-194:7, 197:11-22, 208:11-23, 209:17-212 (Casas was authorized to and did make adjustments to employee's time cards).

confirmed that LEH does not keep track of whether 10-minute breaks are taken); Appx.1.192:6-8 (Casas Deposition); Appx.3.701 ¶29 ("the Hospital did not have any method for staff to report missed rest breaks and be paid for them"); Appx.9.2304:13-24 (DON Cordova has never seen a request for a missed rest break premium)].[24] The Timekeeping Adjustment Form ("TAF") utilized by each Hospital (through which employees could request compensation for, *e.g.*, missed meals or overtime) did not permit an employee to request compensation for a missed rest break. [Appx.9.2267 (TAF for LEH); Appx.9.2269 (same); Appx.9.2271 (TAF for COH).][25] Indeed, Defendants have not produced evidence of a *single* instance in which a putative class member was paid a premium for a missed rest break. [Appx.9.2264 ¶4].

Hospital policy put the onus on employees to justify, and obtain authorization for, missed meal compensation[26] while management would, at the same time, actively discourage employees from requesting such compensation,[27]

---

[24] *See also* Appx.3.691 ¶21; Appx.3.717 ¶17; Appx.3.663 ¶25; Appx.3.670-671 ¶11; Appx.3.646-647 ¶18; Appx.3.624 ¶21; Appx.3.543 ¶17; Appx.3.557-558 ¶18; Appx.3.590 ¶21; Appx.3.611 ¶15.

[25] Several years after the initiation of the present lawsuit, LEH purportedly modified its TAF to allow employees to request missed break compensation. [Appx.9.2263-2264 ¶¶2-3].

[26] Appx.1.213:16-214:1, Appx.9.2362:9-24, Appx.9.2363:2-2366:4 (Casas Deposition); Appx.1.123:5-23, Appx.1.139:8-16 (Cook Deposition); Appx.3.668-669 ¶6; Appx.3.623 ¶16; Appx.3.699-700 ¶¶23-24; Appx.3.565 ¶12; Appx.3.604 ¶11; Appx.3.610 ¶10; Appx.3.616 ¶12.

[27] Appx.3.556 ¶13("[M]any of the nursing supervisors, including Rowena Paja, were reluctant to sign off on missed meal forms because upper management, including [DON] Cook, would pressure them not to authorize overtime or missed meal compensation…. Rowena told me numerous times that she was fearful of authorizing missed meal compensation because she thought she would get in trouble with the [DON]"); Appx.3.662 ¶21 ("our supervisors…would pressure us not to ask for missed meal compensation, saying that employees could get written up if we asked too often"); Appx.3.699-700 ¶¶23-24; Appx.3.604 ¶12; Appx.3.543

and routinely deny such requests.[28] Furthermore, Defendants had a routine practice of not paying employees the required missed meal premium when breaks were not taken within the first five hours of the shift, breaks were less than thirty minutes or employees did not receive the second required meal break in shifts longer than ten hours.[29] These common policies and practices were implemented directly by Hospital management and applicable to all nursing staff on a class-wide basis. As a result of these practices, employees were systematically denied missed break premiums mandated by state law.

E. Statistical Evidence Further Demonstrates Defendants' Class-Wide Illegal Practices Regarding Meal Breaks.

In support of class certification, Plaintiffs submitted compelling statistical evidence – based upon an analysis of Defendants' timekeeping and payroll data by statistician Dr. Brian Kriegler – that clearly demonstrates Defendants' common illegal practices. Dr. Kriegler's analysis shows that even the meal breaks recorded in Defendants' timekeeping system (a large percentage of which were not actually taken) reflect class-wide practices and policies that violate California law. For example, the statistical analysis shows the following:

- A very small fraction of missed meal premiums were paid relative to the total number of missed meal breaks (*e.g.*, while records showed 67 late, short or completely missed meal breaks per 100 shifts, there

---

¶15; Appx.3.570 ¶8; Appx.3.640 ¶19; Appx.3.623-624 ¶17; Appx.3.682 ¶15; Appx.3.565 ¶12; Appx.3.575-576 ¶¶10-13; Appx.3.616 ¶12.

[28] Appx.3.700 ¶24; Appx.3.616 ¶12; Appx.3.699-700 ¶23; Appx.3.716-717 ¶14; Appx.3.631 ¶17; Appx.3.565 ¶12; Appx.3.549 ¶¶13-14; Appx.3.543 ¶15; Appx.3.556 ¶13; Appx.4.791 ¶16; Appx.3.661-662 ¶¶20-21.

[29] Appx.2.323 ¶24 (statistical analysis of Defendants' records reveals that nursing employees were rarely or never compensated under these circumstances); Appx.10.2428 ¶8; Appx.10.2446-2447 ¶¶41-43; Appx.10.2453 ¶56(d); Appx.10.2481.

were only 3.5 missed meal or rest premiums *paid* per 100 shifts) [Appx.10.2430-2431 ¶12(e)];

- Almost half (44.6%) of recorded meal breaks were less than 30 minutes [Appx.10.2463 ¶3; *see also* Appx.2.318-320 ¶¶15-17(b)];
- More than one-third (34.3%) of recorded meal breaks were taken more than six hours after the start of the shift [Appx.10.2463 ¶4; *see also* Appx.2.318-320 ¶¶15-17(c)];
- The vast majority (over 80%) of first recorded meal breaks were either less than 30 minutes or started more than six hours after the start of the shift [Appx.2.318-320 ¶¶15-16,17(e); Appx.10.2464];
- The vast majority (87.4%) of all work periods over 10 hours did not have a second meal break [Appx.2.318-321 ¶¶15-16,18(a); Appx.10.2465];
- Of those work periods over 10 hours that did have a second meal break recorded, 33.6% of these breaks were less than 30 minutes and 73.0% were taken more than eleven hours after the start of the shift. Less than 1% of second meal breaks examined were both a full 30 minutes and timely provided [Appx.10.2465; *see also* Appx.2.318-321 ¶¶15-16,18(b)-(c)];
- There was a widespread practice of management modifying timekeeping records: 24.5% of the first recorded meal and 46% of the second recorded meal breaks were "round punch meal breaks," meaning the breaks were added or edited by supervisors. [Appx.10.2463 ¶5; Appx.10.2465; Appx.2.321 ¶18(d) & n.10]. In addition, the vast majority (84%) of all sampled class members' time records showed "round punch work periods." [Appx.10.2466].

- On days where no break relief was reflected in Defendants' daily schedules the timekeeping records still reflected an average of 2.2 meal breaks per day, suggesting that the timekeeping data over-reports the number of meal breaks. [Appx.2.322 ¶22; Appx.2.324 ¶27(e); Appx.2.373].

Dr. Krieger's analysis constitutes persuasive common proof of Defendants' uniform policies and practices which resulted in the class-wide denial of lawfully compliant breaks to nursing staff. For instance, the fact that the vast majority of recorded first meal breaks were either less than 30 minutes or started more than six hours after the start of the shift, illustrates that the purported relief provided by Defendants for meal breaks was wholly insufficient. The evidence demonstrating a widespread practice of management modification of timekeeping records buttresses employee testimony that Defendants actively attempted to cover-up their wage and hour violations. The fact that very few missed meal premiums were paid relative to the total number of missed meal breaks, in combination with other evidence that management actively discouraged employees from seeking missed break compensation, shows that Defendants had a common practice of failing to compensate employees for missed meal and rest breaks. All of this evidence constitutes common proof of Defendants' liability.

F. Defendants' Practices Forced Nursing Staff to Work Off-The-Clock to Complete All Required Tasks.

Defendants' policies required that overtime be approved in advance and provided that employees could be disciplined for unapproved overtime.[30] Moreover, Defendants actively discouraged nursing staff from requesting overtime

[30] Appx.1.148:4-13, 149:9-17 (Cook Deposition); Appx.1.213:16-214:1 (Casas Deposition); Appx.1.252 (LEH's written policy regarding overtime); Appx.3.710 ¶18; Appx.3.671-672 ¶12; Appx.3.647 ¶19; Appx.3.624-625 ¶22; Appx.3.663 ¶26; Appx.3.605 ¶14; Appx.3.710 ¶18; Appx.3.576 ¶21.

by threatening employees with discipline if they worked too much overtime, criticizing employees who requested overtime, and repeatedly denying overtime requests that were justified.[31] Meanwhile, employees – in particular RNs who had to complete mandatory paperwork for their shifts – were under tremendous pressure to make sure that all of their work was finished. [Appx.1.155:20-156:7 (DON Cook stated it was critical that nursing staff complete documentation on their patients)].[32] This routinely resulted in employees having to clock out at the end of their shifts yet continue to work to complete their assignments.[33] Defendants knew that employees were working off-the-clock past the end of their shifts, and condoned and encouraged this conduct. [Appx.3.671-672 ¶12 ("I was told by [DON] Nocon…that working off the clock was the normal practice at Las Encinas because the hospital did not want to pay overtime but expected that all work would be completed before the end of the shift")].[34] Likewise, the evidence

---

[31] Appx.3.624-625 ¶¶22-24 (when employees requested overtime, CEO Linda Parks would threaten to discipline or terminate them); Appx.3.671-672 ¶12 (nursing supervisor "was criticized for working or allowing overtime even though there was not enough time in my normal shifts for me and my staff to complete our duties"); Appx.3.616 ¶12; Appx.3.558 ¶20; Appx.3.570 ¶8; Appx.3.582 ¶11; Appx.3.605 ¶14; Appx.4.793 ¶¶25-26; Appx.3.710 ¶18; Appx.3.725 ¶18; Appx.3.576-577 ¶¶22-23; Appx.3.647 ¶19.

[32] *See also* Appx.1.246; Appx.3.577 ¶24; Appx.3.683 ¶20; Appx.3.717-718 ¶19; Appx.3.701 ¶31; Appx.3.663 ¶26; Appx.3.723 ¶11; Appx.3.565 ¶14; Appx.3.676-677 ¶13; Appx.3.605 ¶13; Appx.3.543-44 ¶¶18-19; Appx.3.558 ¶19.

[33] *See* citations in footnotes 30-32.

[34] *See also* Appx.3.671 ¶12 ("I explained to [DON Nocon] that my staff did not have enough time to complete their work and that they would have to clock out and finish the work off the clock. Ms. Nocon said that this was too bad but that the hospital did not have enough staff and needed to cut down on overtime."); Appx.3.701 ¶32 ("[W]hen I stayed past the end of my shift, the supervisors on the next shift would see me while doing their rounds. They would sometimes ask what I was doing and whether I was off-the-clock to ensure that I was not working on-the-clock."); Appx.3.663 ¶27 (similar); Appx.3.624-625 ¶¶22-24 (similar); Appx.3.717-718 ¶19 (similar); Appx.3.632 ¶21 (similar); Appx.3.569-571 ¶¶7-9;

shows that LEH adjusted employee time records in order to eliminate overtime. [Appx.3.702-703 ¶34 (acting scheduling coordinator was instructed to alter time records showing that employees worked overtime)]. Pursuant to these policies and practices, employees were routinely not compensated for overtime.

VII. DEFENDANTS HAVE AN OBLIGATION TO PROVIDE NURSING STAFF WITH UNINTERRUPTED MEAL AND REST BREAKS RELIEVED OF ALL DUTIES.

Brinker and its progeny hold that employers comply with their rest and meal period obligations only by "actually relieving an employee of all duty." 53 Cal.4th at 1040. "[A]n employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks," and may not "exert[] coercion against the taking of, creat[e] incentives to forego, or otherwise encourag[e] the skipping of legally protected breaks." *Id.* A written policy allowing breaks is not sufficient. *Id.* Instead, employers must afford workers "[b]ona fide relief from duty and the relinquishing of control" over the workers' activities. *Id.* at 1040-41. Here, despite their written break "policy," Defendants have implemented conflicting policies that deprive employees of lawfully-compliant rest and meal periods.

A. Rest Breaks.

"Employees are entitled to 10 minutes rest for shifts from three and one-half to six hours in length, 20 minutes for shifts 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 1029; *see also* Industrial Welfare Commission Wage Order 5-2001 ("Wage Order"), §12(A)-(B). Employers must compensate employees for missed rest

---

Appx.3.793 ¶24; Appx.3.632 ¶21; Appx.3.616 ¶12; Appx.3.709-710 ¶¶17-18; Appx.1.250.

breaks in the form of a premium payment equal to one hour's wage at the employee's regular rate of pay. Lab. Code §226.7(b); Wage Order, §12(B).

B. Meal Breaks.

"[A]n employer's obligation is to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work." *Brinker*, 53 Cal.4th at 1049. In order for a meal period to qualify as a lawful break under California law, the employee must be completely free of any employer responsibilities, free to leave the premises of the employer, and the break must last for an uninterrupted 30 minutes. *Id*. at 1040; Wage Order, §11(A). If an employer fails to provide an employee a meal period meeting the above criteria, the employer must pay the employee one hour of pay at the employee's regular rate of compensation. Wage Order, §11(B); Lab. Code §226.7(b).

VIII. THE TRIAL COURT'S RULING DENYING CERTIFICATION OF PLAINTIFFS' REST AND MEAL BREAK CLAIMS REQUIRES REVERSAL.

Engaging in an improper analysis that has been rejected by *Brinker* and numerous subsequent decisions, the trial court denied certification based solely upon its cursory and clearly erroneous conclusion that common questions did not predominate over individualized inquiries. Rather than analyzing whether Plaintiffs' theory of recovery was likely to prove amenable to class treatment – as she was required to do – Judge White engaged in a misguided merits-based and damages-based analysis, relying on improper criteria and concluding incorrectly that certification was precluded by individualized issues regarding damages. Further, Judge White's order denying certification was premised upon numerous fundamentally erroneous assumptions concerning the legal standard for certification, including her assumption that certification is appropriate only when class members *universally* miss breaks.

California authorities since *Brinker* have noted a "renewed direction that class-wide relief remains the preferred method of resolving wage and hour claims, even those in which the facts appear to present difficult issues of proof." *Martinez v. Joe's Crab Shack*, --- Cal.Rptr.3d ---, 2013 WL 5977417, *9 (Cal.Ct.App. Nov. 12, 2013). The key inquiry in determining class certification is whether liability for Defendants' wage and hour violations is subject to class-wide proof. *Brinker*, 53 Cal.4th at 1021-22. Here, Plaintiffs' theory of recovery is that Defendants' class-wide policies and procedures did not satisfy their obligations to provide timely meal and rest breaks relieved of all duties – including *inter alia* the policies and practices (1) requiring employees to remain on their units absent relief, (2) routinely failing to provide such relief for rest and meal breaks, (3) wholly failing to provide employees with a means to request compensation for missed rest breaks, (4) instructing employees to clock out and immediately return to their units during purported meal "breaks," (5) placing the burden on employees to justify compensation for missed meal breaks, and actively discouraging and denying such compensation, and (6) altering time records so that records reflected breaks that were not taken.

The existence of these policies is a factual question common to all nursing staff members and amenable to class treatment. These policies can be established by common evidence, including Defendants' own written policies, testimony from nursing employees and management, Defendants' schedules and other documents, and statistical analysis of Defendants' time records.

///

///

///

///

///

A. The Trial Court Applied Patently Improper Criteria..

1. The Trial Court Erroneously Denied Certification Based On Purported Individual Issues Regarding Damages.

The trial court failed to analyze Plaintiffs' theory of recovery – *i.e.* that the common policies evidenced by Plaintiffs denied employees lawful breaks and compensation for missed breaks. Instead, the trial court denied certification based on purported variations in the extent to which employees actually took breaks. In so holding, Judge White relied heavily upon putative class member declarations submitted by Defendants:

> Here, there appears to be too much variance between the declarations and deposition responses of putative class members to indicate a *universal* practice of denying employees their meal and rest breaks…. Declaration and deposition responses by putative class members vary widely as to whether these employees had an opportunity to take an entitled break.

[Appx.13.3436-3438 (emphasis added)]. Disregarding clear authority that class certification is proper even if class-wide policies affect class members in different ways, the trial court further concluded that variations in the reasons why putative class members missed breaks precluded certification. [Appx.13.3437] ("And even if employees missed a break, their reasons for missing their break also varied, ranging from understaffing and coercive hospital policy to simple choice").

Judge White's rationale has been expressly and uniformly rejected by California courts, which consistently hold that variations in the extent to which breaks are actually taken is not a proper basis for denying certification. For example, in *Benton v. Telecom Network Specialist*, 220 Cal.App.4th 701, 705 (2013), plaintiffs sought certification of a proposed class of approximately 750 technicians. The Court of Appeal concluded that the trial court committed reversible error in failing to evaluate the plaintiff's theory of recovery and instead focusing on purported variations in the putative class:

> As in *Bradley* [*v. Networkers Int'l*, 211 Cal.App.4th 1129, 1134 (2012)] and *Faulkinbury*[, 216 Cal.App.4th 220], the trial court employed improper criteria in assessing whether plaintiffs' meal and rest break claims were amenable to class treatment. Rather than focusing on whether plaintiffs' theory of liability—that [defendant] violated wage and hour requirements by failing to adopt a meal and rest period policy—was susceptible to common proof, the court improperly focused on whether individualized inquiry would be required to determine which technicians had missed their meal and rest periods…. As explained in *Bradley* and *Faulkinbury*, however, *Brinker* expressly rejected this mode of analysis.

Id. at 725-726 (internal quotations and citations omitted). The Court of Appeal explicitly rejected the trial court's rationale that individual issues predominated because of variations in the extent to which class members actually took meal and rest breaks. *Id*. at 730 ("The mere fact that some technicians may have taken breaks (or declined to take breaks)…does not show that individual issues will predominate in the litigation") (internal quotations and citations omitted).

The *Benton* decision is illustrative of the trial court's errors in the present case. As in *Benton*, the trial court here ignored Plaintiffs' theories of liability based upon class-wide policies and practices depriving putative class members of rest and meal breaks – indeed, the common policies and practices alleged by Plaintiffs are not acknowledged *once* in the trial court's decision. [*See* Appx.13.3436-3438]. Also as in *Benton*, the trial court focused improperly on purported variations in the extent to which putative class members actually received breaks, as well as purported variations in the reasons why breaks were missed. *Benton* establishes conclusively that this reasoning – which was the crux of Judge White's certification decision – is reversible error. *See* 220 Cal.App.4th at 725-730.

Numerous other cases have expressly rejected the rationale adopted by Judge White. In *Faulkinbury II*, 216 Cal.App.4th at 224, the Court of Appeal was directed by the California Supreme Court to re-examine its prior decision

affirming denial of certification of meal and rest break classes ("*Faulkinbury I*") in light of the *Brinker* decision. The reasoning employed by the court in *Faulkinbury I* was identical to that adopted by Judge White in the present case (in fact, Judge White affirmatively cited *Faulkinbury I* in her ruling though it was no longer good law at the time she issued her decision [*see* Appx.13.3436]). Specifically, *Faulkinbury I* affirmed the trial court's conclusion – based predominantly upon employee declarations submitted by defendant stating that putative class members received breaks – that defendant's liability could not be established without individualized inquiries. *Id*. at 237. However, the Court of Appeal swiftly rejected this reasoning in *Faulkinbury II*, explaining that its prior analysis was inconsistent with *Brinker*:

> In opposition to the motion for class certification, [defendant] submitted declarations from current employees. Some declarations stated the employee was relieved of duties in order to take off-duty rest breaks; other declarations stated breaks were taken during periods of inactivity…. While, in *Faulkinbury I*, we concluded this evidence established individual issues of liability, we are now convinced, in light of *Brinker*, this evidence at most establishes individual issues of damages, which would not preclude class certification.

Id. Like the trial court in *Faulkinbury I*, Judge White relied heavily upon Defendants' employee declarations in concluding that individual issues predominated. The *Faulkinbury II* decision shows definitively that this reasoning was in error and requires reversal. *See id*.

In a similar decision, the Court of Appeal in *Jaimez*, 181 Cal.App.4th at 1300-01 (cited affirmatively in *Brinker*) reversed the trial court's ruling that individual issues predominated with respect to plaintiffs' rest and meal break claims. In support of class certification, the plaintiff submitted nine class member declarations stating, *inter alia*, that the nature of the employer-assigned routes and delivery schedules made it difficult for employees to complete all work and to also

take rest and meal periods. *Id*. at 1294. In opposing the certification motion, the employer submitted declarations from 25 putative class members stating that employees were allowed, encouraged and able to take breaks. *Id*. at 1295. Again relying upon reasoning almost identical to that applied by Judge White, the trial court denied certification finding that "common questions of law and fact did not predominate because [the defendant's] evidence demonstrated a strong indication of conflicting testimony at trial, which therefore precluded a finding of common questions of fact." *Id*. at 1296. Reversing the ruling, the Court of Appeal concluded that the trial court misapplied the law by "focusing on the potential conflicting issues of fact or law on an individual basis, rather than evaluating 'whether the *theory of recovery* advanced by the plaintiff is likely to prove amenable to class treatment.'" *Id*. at 1299. The Court of Appeal also concluded that the trial court's analysis amounted to an improper evaluation of the merits of the case:

> The trial court focused on the *merits* of the declarations, evaluating the contradictions in the parties' responses to the company's uniform policies and practices, not the policies and practices themselves. The determination of whether to certify a class does not contemplate an evaluation of the merits.

Id. at 1300. The Court of Appeal also made clear that "declarations from a small percentage of objectors do not bar class certification." *Id*. at 1301. The court went on to hold that plaintiff's theory of recovery was based upon policies and practices subject to common proof, and therefore the case was more amenable to class treatment than individual actions. *Id*. at 1303-05. Notably, the court concluded that common issues predominated even if the relevant employment policies did not affect each employee in the same way and damages would need to be proved individually. *Id*. at 1301, 1303-05. *Jaimez* demonstrates that, in focusing upon contradictions in the declarations rather than examining the class-wide policies

and practices evidenced by Plaintiffs, Judge White severely misapplied the class certification standard. [*See* Appx.13.3436-3438]. Moreover, in doing so, Judge White disregarded the well-established principle that common issues predominate even if uniform policies affect employees in different ways.

In another recent decision, *Bradley*, 211 Cal.App.4th at 1134, the Court of Appeal rejected the trial court's rationale that individual issues predominated, explaining that *Brinker* has "expressly rejected . . . [the idea] that evidence showing some employees took rest breaks and others were offered rest breaks but declined to take them made certification inappropriate." *Id*. at 1143. Here, Judge White relied upon the same rationale rejected in *Bradley*, basing her ruling on the fact that employee testimony varied as to whether putative class members took required breaks. [Appx.13.3437]. Therefore, as in *Bradley*, the trial court's decision must be reversed. *See Bradley*, 211 Cal.App.4th at 1152-53, 1157.

Numerous other cases echo the principle that where a plaintiff's theory of recovery is based on class-wide policies or practices which allegedly deprive class members of lawfully compliant breaks, variations in the extent to which breaks are actually taken does not undermine predominance. *See, e.g., Bluford v. Safeway Stores, Inc.*, 216 Cal.App.4th 864, 871-74 (2013) (reversing trial court's denial of certification; holding that individual issues regarding whether a driver took a rest break on any specific day did not undermine predominance); *Dilts v. Penske Logistics*, 267 F.R.D. 625, 639 (2010) (cited affirmatively in *Brinker*) ("Although drivers' circumstances varied, they were ultimately controlled by the same set of central policies, including the delivery schedules and auto-deduct system. These issues are sufficient to find predominance"); *see also Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536 (2008) (cited affirmatively in *Brinker*) (rejecting trial court's conclusion that variations in how limousine drivers spent their on-call time meant that individual issues predominated; "[a]lthough

individual testimony may be relevant to determine whether these policies unduly restrict the ability of drivers as a whole to utilize their on-call time for personal purposes, the legal question to be resolved is not an individual one. To the contrary, the common legal question remains the overall impact of [the defendant's] policies on its drivers"); *see also Jones v. Farmers Ins. Exch.*, --- Cal.Rptr.3d ---, 2013 WL 6178985, *6 (Cal.Ct.App. Oct. 28, 2013) (the trial court committed reversible error by ignoring plaintiff's theory of recovery and instead focusing on variations in the extent to which class members worked uncompensated time); *see also Martinez*, 2013 WL 5977417, at *9 (reversing trial court's denial of certification; holding that variations in the extent to which purportedly misclassified employees were entitled to unpaid overtime did not undermine certification where defendant's policies resulted in under-compensation for at least some employees). Moreover, the fact that an employer has a written policy purportedly providing for rest and meal breaks does not undermine certification. *See Bluford*, 216 Cal.App.4th at 867 (granting certification despite written policy providing for breaks); *Jaimez*, 181 Cal.App.4th at 1294; *Williams v. Superior Court*, --- Cal.Rptr.3d ---, 2013 WL 6384528, *6 (Cal.Ct.App. Dec. 6, 2013) ("At the certification stage, the concern is whether class members have raised a justiciable question applicable to all class members. Although [defendant] may have presented evidence that its policies are lawful, 'this showing does not end the inquiry.'") (citation omitted).

In the present case, as in many of the decisions cited above, the trial court's finding that putative class members sometimes received rest and meal breaks, means neither that Defendants' policies were lawful nor that individualized issues predominate. *See, e.g., Bradley*, 211 Cal.App.4th at 1143, 1150-51. Similarly, the fact that Defendants' unlawful policies may have affected some putative class members differently than others, is not a proper reason to deny certification. *See*

id., at 1143 (speculation about why breaks were missed or taken does not create individualized issues); *Benton*, 220 Cal.App.4th at 726, 728-30; *Jaimez*, 181 Cal.App.4th at 1301, 1303-05. For these reasons, the trial court applied patently improper criteria, embracing a flawed analysis that has been consistently rejected in post-*Brinker* authorities.

2. The Trial Court Failed To Engage in a Comparative Analysis Weighing the Costs and Benefits of a Single Proceeding Versus Numerous Individual Lawsuits.

Compounding the legal errors in its decision, the trial court utterly failed to engage in the requisite comparative analysis, declining to compare the costs and benefits of a single proceeding with the costs and benefits of examining the same standard policies and practices in hundreds of separate lawsuits. *See Sav-On*, 34 Cal.4th at 326, 338-39 (the predominance analysis requires the court to compare the issues which may be jointly tried with those requiring separate adjudication in an expressly comparative review). The trial court never seriously considered issues of fact and law that *were* common to the class, and failed to even mention the policies and procedures which Plaintiffs argued operated to deny class members lawful breaks. [*See* Appx.13.3436-3438]. Yet the predominance analysis requires consideration of both sides of the equation – common issues and individual issues – to determine which *predominates*. Merely noting the existence of individual issues does not suffice; the common issues must be – but were not – identified and considered as well. *See id*. Moreover, the trial court never addressed "the costs and benefits of proceeding by numerous separate actions." *Jaimez*, 181 Cal.App.4th at 1299 (internal quotations and citations omitted).

Further, in examining the purported costs of proceeding on a class basis, Judge White quickly zeroed in on impermissible criteria. For example, in the hearing on the Motion for Certification, the trial court stated its concern that class certification was inappropriate because

> [T]he damages calculation will be very different plaintiff to plaintiff…. [H]ow many missed meal breaks? And what are the damages? Plaintiff by plaintiff by plaintiff. We've got over 1,000 people here.

[RT 16:1-9)]. This reasoning flies in the face of decades of jurisprudence clearly providing that the requirement of individual damages calculations in no way undermines the propriety of class certification. *See Jaimez*, 181 Cal.App.4th at 1303; *Benton*, 220 Cal.App.4th at 426; *Bradley*, 211 Cal.App.4th at 1141-42; *Leyva*, 716 F.3d at 513-14 ("[D]amages determinations are individual in nearly all wage-and-hour class actions…. Thus, [t]he amount of damages is invariably an individual question and does not defeat class action treatment") (internal quotations and citations omitted).

B. The Trial Court's Ruling Was Predicated Upon Numerous Incorrect Assumptions Concerning the Legal Standard for Certification.

1. Under *Brinker*, Breaks Not Authorized and Permitted Cannot Be Waived; Accordingly it Was Error to Conclude That Individual Issues Regarding Whether Employees Voluntarily Skipped Breaks Predominated.

In denying class certification, the trial court relied heavily upon its assumption that some putative class members voluntarily chose to forego rest and meal breaks:

> [E]ven if employees missed a break, their reasons for missing their breaks also varied, ranging from understaffing and coercive hospital policy to *simple choice*…. [I]t Is [sic] telling that Plaintiffs' statistical evidence does not account for the possibility that some (or most) of the employees *voluntarily* worked through or delayed their breaks…. Voluntarily delaying one's break in the context of a hospital seems entirely possible considering the alternative of sacrificing patient care for a prescribed "coffee break."

[Appx.13.3437-3438 (emphasis added; citations to record omitted)].

This is a fundamental misstatement of the law. California courts have clearly held that where an employer's policies and practices fail to provide legally

compliant meal and rest breaks, it cannot be concluded that employees have voluntarily skipped breaks. *Brinker*, 53 Cal.4th at 1033 ("No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it"); *Bradley*, 211 Cal.App.4th at 1151 ("[A]n employer is obligated to provide the rest and meal breaks, and if an employer does not do so, the fact that an employee did not take the break cannot reasonably be considered a waiver") (emphasis omitted); *Faulkinbury*, 216 Cal.App.4th at 236. Defendants, having adopted policies and practices that fail to authorize and permit meal and rest breaks in the first place, cannot argue that individual issues predominate because some putative class members purportedly chose to forego meal and rest breaks. Judge White's conclusion that certification is not warranted because some nursing employees "voluntarily" skipped breaks is impermissible reasoning that disregards Plaintiffs' theory of recovery.

Moreover, if – as the trial court blindly speculates – putative class members "voluntarily" chose to forego breaks in order to avoid "sacrificing patient care" [Appx.13.3438], then this is not a voluntary choice at all. To the contrary, this is exactly the type of conduct that *Brinker* proscribes as failing to provide lawful breaks. 53 Cal.4th at 1040. It is the employer's responsibility to ensure that staffing levels are sufficiently adequate, and relief is available, such that an employee would not need to put patient care at risk in order to take a meal or rest break. *See id*. Because Defendants have not done so, their uniform policies and practices do not comply with the Labor Code.

///

///

///

2. The Trial Court Erroneously Assumed that Class Certification is Not Proper Unless Class Members "Universally" Missed Breaks.

Rather than analyzing whether Plaintiffs had articulated a theory that was susceptible to common resolution, the trial court instead examined whether the evidence presented was sufficient to establish Plaintiffs' ultimate right to recovery. Indeed, Judge White was under the erroneous assumption that she could not grant class certification unless Plaintiffs showed a "*universal practice*" of putative class members being denied meal and rest periods. [Appx.13.3437]. This rationale fundamentally misunderstands the certification standard. At the class certification stage, Plaintiffs' obligation is to establish only that the *question* of whether Defendants' policies and procedures resulted in the denial of lawful breaks can be determined on a class-wide basis. Instead, the trial court concluded incorrectly that Plaintiffs were required to prove that all putative class members missed all rest and meal breaks to which they were entitled. This is an erroneous view of the class certification standard that, if correct, would prevent the certification of virtually any wage and hour class. *See e.g., Bufil v. Dollar Financial Group, Inc.*, 162 Cal.App.4th 1193, 1207 (2008) ("[A] class is not inappropriate merely because each member at some point may be required to make an individual showing as to eligibility for recovery"); *Benton*, 220 Cal.App.4th at 725-28 (reversing trial court's order denying certification despite evidence that some putative class members received breaks).

3. The Trial Court Erroneously Declined to Consider Plaintiffs' Statistical Evidence.

In support of their certification request, Plaintiffs submitted compelling expert and statistical evidence plainly demonstrating that Defendants have violated California wage and hour laws on a class-wide basis. [Appx.2.312-325;

Appx.4.740 ¶4; Appx.4.795-891; Appx.10.2425-2561].[35] Specifically, this evidence demonstrated, *inter alia*, that even among *recorded* meal breaks, Defendants' practices are clearly not legally-compliant. For example, statistical evidence demonstrates that even when meal periods were purportedly taken, Defendants routinely (1) did not provide a full 30-minute period, (2) did not provide a meal period within the first five hours of the shift, and (3) did not provide a lawfully-compliant second meal period in shifts over ten hours. The statistical evidence further shows a widespread practice of management modifying putative class members' timekeeping records, and a widespread practice of denying employees compensation for missed, late or short breaks. [*See*, *e.g.*, Appx.10.2453 ¶56; Appx.10.2463-66; Appx.2.320-321 ¶¶17(e),18; Appx.10.2481].

Judge White impermissibly declined to consider Plaintiffs' expert and statistical evidence, discounting the evidence based upon her finding that it did "not account for the possibility that some (or most) of the employees voluntarily worked through or delayed their breaks." [Appx.13.3437]. However, there is absolutely no support for the trial court's utterly speculative assertion that "most" employees voluntarily skipped or delayed breaks. Moreover, as discussed above, the trial court's assumption that employees can "voluntarily" forego a break under the circumstances presented here was reversible error.

[35] "California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." *Sav-On*, 34 Cal.4th at 333; *see also Jaimez*, 181 Cal.App.4th at 1298 (similar).

Statements by the trial court during the hearing further illustrate its misconceptions about the role of statistical evidence in the context of a certification motion:

> What I've got here is a lot of statistical evidence which appears to be at odds. The statistical data from the defense side shows that there was 96.7 percent compliance in terms of the meal breaks. And, yet, from the plaintiffs' side, I see something completely different. And how that reconciles, *I don't know. But, again, the burden is on the plaintiff.*

[RT 27:17-23) (emphasis added)]. In other words, according to Judge White, the mere fact that each party's statistical evidence contradicted the other's automatically meant that *Plaintiffs* failed to meet their burden of proof – despite the fact that the Defendants' statistical evidence was expressly untested and unanalyzed by the trial court. This rationale is erroneous on multiple levels.

First, it – again – illustrates the trial court's fundamentally incorrect assumption that Plaintiffs were required to prove the merits of their claims at the certification stage. Second, there is absolutely no authority to support the trial court's apparent view that it can disregard a plaintiff's statistical evidence based on the mere fact that the defendant has submitted contradictory statistical evidence (however incorrect or misleading).

Third, Judge White failed to consider the severe problems with the statistical "evidence" proffered by Defendants. Robert Crandall opined misleadingly that Defendants' timekeeping data showed wide variation in the percentage of missed meal breaks per employee, suggesting the need for individualized inquiry. Mr. Crandall's "analysis" omits the strikingly obvious reason for this variation: *employees worked different numbers of days*. The more days an employee works, the higher the number of missed meal periods she is likely to have. As evidence of the supposed "wide variability," Mr. Crandall opined that a sampling of records indicated that 12 employees missed over 95% of

their meal breaks while 22 employees received all required breaks. [Appx.7.1600 ¶26]. Mr. Crandall neglects to mention that, of the 22 employees whose records indicate that they received all required breaks, 21 of these employees had worked fewer than fourteen shifts, and 16 had worked fewer than five shifts. [Appx.10.2437-2438 ¶23(a)]. Given how few shifts these individuals worked, "this is hardly evidence of a widely varying meal break policy across class members." [*Id.*]

When the variation in the difference in number of days worked by employees is taken into account, 94% of the variance that Mr. Crandall trumpets is easily explained by objective information contained in the data, having nothing to do with individualized inquiries. [Appx.10.2430-2431, ¶¶ 12(a)-(d),14-40; Appx.10.2468-2481; Appx.10.2453 ¶56(a)-(c); Appx.10.2455-2457]. In fact, for both COH and LEH, there is an extremely strong correlation between the number of missed meal breaks and the number of shifts worked. [Appx.10.2441 ¶30(b)]. Nonetheless, the trial court erroneously refused to consider Plaintiffs' statistical evidence.

4. The Trial Court Improperly Relied Upon Depublished Decisions.

The trial court expressly relied upon numerous depublished California opinions, including *In re Lamps Plus Overtime Cases*, 209 Cal.App.4th 35 (2012) and *Faulkinbury I*, 185 Cal.App.4th 1363 (2010), in rendering its opinion:

> Although Plaintiffs argue that Defendants rely on several cases (particularly *Lamps Plus Overtime Cases*, that were de-published for applying *Brinker* incorrectly, no such rationale is given in the California Supreme Court's decision to de-publish *Lamps Plus Overtime Cases*…. *Lamps Plus Overtime* may offer some persuasive guidance as to determining commonality in a case involving facts similar to this one.

[Appx.13.3436 n.1 (citation omitted); *see also* Appx.13.3436 (citing *Faulkinbury I*)]. This reasoning is incorrect, and the trial court's admitted reliance upon the depublished decisions, which were also the basis for Defendants' opposition [*see, e.g.,* Appx.4.902-904, 908] was reversible error. *See* Cal. Rule of Court, Rule 8.1115(a).

C. The Trial Court Misconstrued the Evidence Presented in Support of Certification.

1. The Policies and Practices That Deprived Nursing Staff of Lawful Breaks Were Implemented Directly By Hospital Management.

In denying certification the trial court reasoned: "Although Defendants' [sic] may have been staffed with a few bad apples who unlawfully denied benefits to employees, Plaintiff [sic] has failed to produce sufficient evidence that the tree itself was 'bad', and thus individual questions as to liability predominate." [Appx.13.3438]. Not only is this rationale yet another example of the trial court's clear misunderstanding of class certification requirements – *i.e.,* its erroneous assumption that class certification is improper unless Plaintiffs were affirmatively able to prove the merits of their claims– it is also a gross mischaracterization of the Plaintiffs' evidence. Indeed, Plaintiffs submitted substantial evidence showing that nursing staff were denied breaks as a result of class-wide official policies and practices directly implemented by Defendants' management.

Defendants' class-wide policies indisputably provide that nursing staff are required to remain on their units absent relief,[36] and Defendants' own schedules and other documents (as well as the testimony of putative class members and staffing coordinators) illustrate that such relief was not routinely provided.[37] Hospital-wide staffing coordinators altered employees' time records when they did

[36] *See, e.g.,* Appx.9.2335:22-2336:12 (Nocon Deposition); Appx.9.2305:20-2306:1 (Cordova Deposition)].

[37] *See, e.g.,* Appx.1.83-91.

not clock out for missed breaks,[38] and actively dissuaded nursing staff from submitting requests for missed meal compensation.[39] Hospital management instructed employees to clock out for meal breaks and continue working.[40] Accordingly, while Judge White assumes that missed breaks were isolated incidents at the hands of a few "bad apples," this is simply not supported by the evidence. To the contrary, individuals such as Evaldo Casas (LEH's hospital-wide staffing coordinator) and the DONs at both Hospitals, were directly responsible for ensuring compliance with wage and hour laws, and for creating and implementing hospital-wide policies and practices. [Appx.4.917 ¶4; Appx.4.928 ¶4; Appx.1.94:9-16; Appx.1.95:19-22; Appx.1.98:5-17; Appx.1.221:21-223:20]. These individuals – who affirmatively instructed employees to forego breaks without compensation, directed supervisors to instruct employees similarly, and attempted to conceal break violations in company records – were the proverbial "tree."

Plaintiffs provided ample evidence to show that Defendants affirmatively adopted common policies and practices that "exert[] coercion against the taking of, creat[e] incentives to forego, or otherwise encourag[e] the skipping of legally protected breaks." *Brinker*, 53 Cal.4th at 1040. Accordingly, notwithstanding the fact that at this stage of the proceedings Plaintiffs have no obligation to *prove* that the "tree itself" was bad, the evidence shows that the policies and practices forming the basis of Plaintiffs' theory of recovery were sanctioned and directed by Defendants' centralized management, rather than implemented sporadically at the whims of a few rogue supervisors.

---

[38] *See, e.g.,* Appx.3.702-703 ¶34; Appx.3.549 ¶17; Appx.3.645 ¶9, Appx.10.2428-2429 ¶8; Appx.3.564-565 ¶11.

[39] *See, e.g.,* Appx.3.549 ¶16, Appx.3.631 ¶15, Appx.3.564-565 ¶11.

[40] *See, e.g.,* Appx.3.699 ¶20; Appx.3.669 ¶7; Appx.3.631 ¶15; Appx.3.575-576 ¶13; Appx.3.690 ¶18.

2. Plaintiffs' Evidence Is Not Largely "Anecdotal."

Judge White ultimately denied certification based upon her conclusion that the evidence submitted by Plaintiffs was too anecdotal: "Ultimately, the reason class certification is denied is because Plaintiff [sic] is relying too much on anecdotal evidence to prove the existence of a systemic violation of overtime and break laws." [Appx.13.3439]. The trial court also relied on this rationale as grounds for its erroneous failure to rule on Plaintiffs' objections to the evidence submitted by Defendants. [*Id*.]

The evidence submitted by Plaintiffs is far from merely anecdotal, consisting of Defendants' own policies, schedules, correspondence and other documents, as well as independent government reports (*e.g.*, concluding that LEH was understaffed and failed to provide adequate break relief for nursing staff) and expert reports. In addition, Plaintiffs have submitted evidence of unlawful practices directly implemented by Defendants' centralized management. Contrary to the trial court's apparent view, statements from Hospital executives and managers directly instructing nursing staff members to forego breaks without compensation is not "anecdotal" evidence; rather, it is direct evidence of class-wide Hospital policy that unlawfully deprived nursing employees of breaks. Nor can the Defendants' own schedules and written policies be considered "anecdotal." Plaintiffs also submitted compelling expert and statistical evidence showing widespread violations throughout the putative class that conform precisely with Plaintiffs' theory of recovery.

In any event, there is no authority supporting the trial court's apparent view that anecdotal evidence somehow operates as a bar to certification. To the contrary, numerous courts have concluded that declaration testimony from putative class members suffices to establish predominance. *See, e.g.*, *Dilts*, 267 F.R.D. at 638 (certifying rest and meal break class where the "majority of

Plaintiff's evidence as to this question is anecdotal, consisting of declarations of drivers/installers"); *Jaimez*, 181 Cal.App.4th at 1299-1305 (reversing denial of class certification where employee declarations submitted by plaintiff established predominance).

3. The Trial Court's Heavy Reliance on Defendants' Employee Declarations was Improper.

Although the trial court gave short shrift to Plaintiffs' evidence, it relied heavily on the employee declarations submitted by Defendants, contravening the well-established principle that "declarations from a small percentage of objectors does not bar class certification." *Jaimez*, 181 Cal.App.4th at 1301. Judge White's heavy reliance upon Defendants' declarations is all the more troublesome in light of her failure to acknowledge the many problems with these declarations. First, the vast majority of them are from recent current employees. Declarations from current employees claiming to be satisfied with employer policies should be heavily discounted:

> An employee has every incentive to answer "yes" when her employer's attorney asks if she likes her employer's current practice…. The incentives to answer untruthfully are even more skewed where, as here, the employer's question concerns a practice currently being litigated in a putative class action as an illegal practice.

Avilez v. Pinkerton Government Services, 286 F.R.D. 450, 458 (2012) (emphasis omitted).[41] Moreover, the bulk of the declarations do not even show the provision

[41] This incentive to answer affirmatively is magnified where, as here, Defendants have been known to retaliate against employees who advocate for their rights. [*See* Appx.9.2376:3-2377:5 (after initiation of this lawsuit, DON Cook instructed scheduling coordinator Ramirez to stop scheduling Plaintiff Shelby Eidson); Appx.4.792 ¶19; Appx.3.594-595; Appx.9.2378:11-2388:11, Appx.3.703 ¶37 (after telling LEH's attorneys that the Hospital was not compliant with California labor laws, Ms. Ramirez was removed from her position as safety officer and ultimately unfairly terminated).

of legally compliant meal and rest breaks. For example, noticeably absent from many of Defendants' declarations is any testimony that employees are regularly relieved of all duties for meal and rest breaks. Rather, numerous declarants state that they sometimes "choose" not to take their meal and/or rest breaks, typically because their units are too busy.[42] However, an employee is not truly "choosing" to forego a break if he or she feels too busy to leave, is not actually relieved of all duties, and/or is encouraged by the employer to work through breaks. *Brinker*, 53 Cal.4th at 1039-40.

For example, LEH nursing supervisor James Abbott stated in his declaration that LEH has a policy requiring employees to take one paid rest break for every four hours worked, and that he is "always able to take rest breaks" and has never been discouraged from doing so. [Appx.7.1652 ¶13]. In contrast, Mr. Abbott testified in deposition that he "typically do[es]n't take 10-minute rest breaks" so that he can complete all work in order to go home on time. [Appx.9.2292:8-24]. This demonstrates that, contrary to his declaration testimony that missing breaks is "all [his] own choice," [Appx.7.1652 ¶12], Abbott is not making a voluntary decision to skip breaks. *See Brinker*, 53 Cal.4th at 1039-40. Mr. Abott's declaration testimony regarding LEH's provision of meal breaks is also undermined by his deposition testimony. [*Compare* Appx.7.1651 ¶8, *with* Appx.9.2293:5-12, Appx.9.2296:3-19, Appx.9.2293:13-20, Appx.9.2295:14-24. Thus, Mr. Abbott's deposition testimony – ignored by the trial court – clearly reveals that his rest and meal breaks were not legally compliant.

[42] Appx.7.1652 ¶12 ("Occasionally, I feel that I am so busy with my work duties that I am unable to take a meal break . . . This is all my own choice"); Appx.7.1663 ¶11 ("Sometimes my unit becomes very busy and I do not want to take a break while my unit is so busy"); Appx.7.1680 ¶11; Appx.7.1757 ¶10; Appx.7.1786 ¶11; Appx.7.1817 ¶9.

Finally, the vast majority of the Defendants' employee declarations testify as to *current* policies and practices, and shed no light on the policies and practices in place prior to the initiation of the present lawsuit and for the majority of the class period which goes back to August 2005. For the above reasons, the Defendants' declarations do not support their contentions that individual issues predominate, and do not undermine class certification.[43]

D. Class Certification of Plaintiffs' Claims Should Be Granted.

1. Common Issues Predominate With Respect To Plaintiffs' Rest Break Claims.

Plaintiffs' theory of recovery on their rest break claims is ideally suited to class treatment. Plaintiffs have presented overwhelming evidence that Defendants' class-wide policies have led to the denial of 10-minute rest breaks in which employees were relieved of all duties. According to hospital policies, nursing staff were not permitted to leave their units and cease patient care duties unless another staff member came to relieve them. This was of paramount importance to patient and staff safety due to the ever-present risk that patients will act out or become violent, and is common to all proposed class members.

Despite requiring nursing staff to remain on their units and constantly monitoring patients unless relieved, LEH had *no* employees assigned to provide break relief for 10-minute rest breaks. [*See, e.g.,* Appx.1.122:8-12]. Accordingly, putative class members were not provided with rest break relief. Moreover, it was the employee's – as opposed to management's – responsibility to arrange to take a rest break. [*See, e.g.,* Appx.1.145:3-6]. In combination with LEH's policies prohibiting nursing staff from leaving their units without relief, this is exactly the type of practice that *Brinker* proscribes as failing to authorize and permit rest

[43] Despite its heavy reliance on the employee declarations submitted by Defendants, the trial court erroneously declined to rule on Plaintiffs' evidentiary objections to those declarations. [*See* Appx.13.3439].

breaks. 53 Cal.4th at 1039-40. As a result of these uniform policies applicable to all nursing staff members, putative class members were routinely denied their 10-minute breaks. Furthermore, LEH had *no* mechanism through which nursing staff could seek compensation for missed rest breaks. [*See, e.g.,* Appx.9.2267].

While COH at least purported to have an extra staff person assigned to provide rest break relief, the evidence demonstrates that such relief was rarely or never provided. [*See, e.g.*, Appx.3.581 ¶8]. Rest breaks were not scheduled and therefore were subject to the availability of relief. [*See, e.g.,* Appx.9.2303:9-11]. Similar to LEH, COH had no mechanism allowing employees to request compensation for missed rest breaks. [*See, e.g.*, Appx.9.2271; Appx.9.2304:13-24].

The common evidence shows that the above policies and practices applied to all putative class members. Plaintiffs' rest break claims thus depend on one common contention: Whether the Defendants' policies and practices fulfill their obligation to provide lawful rest breaks. Accordingly, a class should be certified. *See Brinker,* 53 Cal.4th at 1033 ("Claims alleging that a uniform policy consistently applied to a group of employees is in violation of wage and hour laws are of the sort routinely, and properly, found suitable for class treatment").

Indeed, numerous courts examining company policies and procedures similar to those at issue here – *e.g.*, policies requiring employees to remain at their posts absent break relief – have found them to constitute common proof requiring certification of rest or meal break claims. For example, in *Faulkinbury II*, the Court of Appeal concluded that the employer's alleged company-wide practice requiring employees to remain at their posts throughout their shifts was a common question appropriate for certification. 216 Cal.App.4th at 237. Similarly, in *Bufil*, the court held that an alleged policy prohibiting certain store employees from locking the store or ignoring customers without relief was a common question

appropriate for certification. 162 Cal.App.4th at 1205-06. As in *Faulkinbury* and *Bufil*, the existence and lawfulness of Defendants' policies (1) requiring nursing staff to remain on their units absent relief, (2) routinely not providing such relief, and (3) failing to provide employees with any mechanism through which they could seek compensation for a missed rest break, are common questions most appropriately resolved on a class-wide basis rather than through hundreds of separate trials.[44]

For these reasons, Plaintiffs' theory of recovery of the rest break claim "is by its nature a common question eminently suited for class treatment." *See Brinker*, 53 Cal.4th at 1033. The trial court's conclusion to the contrary was an abuse of discretion. *See, e.g., id.*; *see also Faulkinbury*, 216 Cal.App.4th at 237.

2. Common Issues Predominate With Respect To Plaintiffs' Meal Break Claims.

Plaintiffs' meal break claims should also be certified. Plaintiffs presented substantial evidence of Defendants' common practices and policies which violate California law requiring that employees be relieved of all duties for an uninterrupted 30 minutes for each five hours of work. These common policies prohibited nursing staff from leaving their units unless affirmatively provided with break relief. Defendants' own records, as well as expert testimony and declarations from putative class members, demonstrate that break relief was routinely not provided during the first five hours of an employee's shift. [*See, e.g.*, Appx.1.83-91; Appx.3.697-98 ¶¶16-17; Appx.3.581-582 ¶9; Appx.10.2464 (over

[44] In addition, Defendants' written policy purportedly providing employees with rest breaks is not even facially compliant with California law in that it does not require rest breaks for each four hours of work. [Appx.1.238]. Further, the employee handbook does not require that rest breaks be uninterrupted. [*Id.*] Though Judge White declined to seriously address this contention [*see* Appx.13.3437], this fact alone suffices to show a class-wide violation of California law.

80% of purported meal breaks recorded in the timekeeping system were either less than 30 minutes or started more than six hours after the start of the shift)].[45] Moreover, Defendants' uniform policies placed the burden on an employee who did not receive his or her meal break to seek approval to be compensated for the missed break, despite substantial evidence that employees were discouraged from seeking such payment by management and that approval for missed meal compensation was frequently denied. [*See, e.g.*, Appx.3.604 ¶12; Appx.3.699-700 ¶23].

Likewise, Plaintiffs have presented evidence that management encouraged and directed employees to clock out for breaks and continue working so that company records would show breaks that were not taken. This policy is subject to common proof including testimony from witnesses who were directed by hospital management to clock out for breaks and keep working. [*See, e.g.*, Appx.3.699 ¶20; Appx.3.669 ¶7]. When employees did not clock out for meal breaks, management would alter time records so that it appeared a break was taken. [*See, e.g.*, Appx.10.2428-2429; Appx.3.702-703 ¶34].

These common practices more than satisfy the certification requirements set forth in *Brinker* because they actively discouraged or prevented the taking of breaks, and placed severe pressure on employees not to seek compensation for missed breaks. *See* 53 Cal.4th at 1039-1040. In comparable meal and rest break cases, courts have held that evidence of classwide policies and practices allegedly

[45] Notably, Defendants' written policy regarding meal breaks is not facially compliant with California law. The employee handbook states that meal breaks are to be taken approximately halfway between the beginning and end of the shift but, contrary to state law, does not provide that breaks shall be taken within the first five hours of the shift. [Appx.1.238]. Further, the employee handbook does not provide that meal breaks shall be uninterrupted. *Id.* The employee handbook also does not inform nursing staff that they are entitled to a second uninterrupted meal period when they work more than 10 hours in a day. *Id.*

operating to discourage or prevent employees from taking breaks, is sufficient to certify a class. *See Jaimez,* 181 Cal.App.4th at 1305 ("[T]he predominant common factual question is whether [employees] missed meal breaks because [defendant's] policy and practice of designating delivery schedules and routes precluded [employees] from timely completing their routes and taking the legally required rest breaks…. This issue is subject to common proof, including evidence of schedules, a sample of the actual route times, and driver testimony) (internal quotations and citations omitted); *Bluford*, 216 Cal.App.4th at 871 (reversing trial court's denial of certification where plaintiff alleged uniform policies and procedures that prevented employees from being compensated for rest breaks); *Dilts,* 267 F.R.D. at 636-39 (granting certification of rest and meal break class where plaintiff made showing, largely on the basis of declaration evidence, of "common policies and practices which actively discouraged or prevented … employees from taking meal periods"); *Mendez v. R + L Carriers, Inc.*, Case No. C 11-2478 CW, 2012 WL 5868973, *8, 15-16 (N.D. Cal. 2012) (certifying meal and rest break class based on unofficial policies of discouraging employees from taking breaks despite existence of a written policy); *Pina v. Con-Way Freight, Inc.*, Case No. C 10-00100 JW, 2012 WL 1278301, *7 (N.D. Cal. 2012) (certifying meal and rest break class based on allegations that employees were unlawfully pressured to delay meal periods in order to make timely deliveries).

Indeed, the present case is an even more compelling one for certification than those detailed above. Here, given that the safety of patients and staff is compromised when there is insufficient staff on the units, the pressure on nursing staff to miss their breaks far exceeds that exerted on, for example, the store employees in *Bufil*, the sales representatives in *Jaimez,* or the drivers in *Bluford*. Psychiatric facilities are dangerous places and patients and staff can get seriously injured when patients act out. The numerous reported deaths, rapes and assaults

illustrate the pressure on nursing staff. Even when a hospital unit may appear quiet, anything can happen at any time. [*See, e.g.,* Appx.3.609 ¶7; Appx.3.555 ¶7; Appx.3.696 ¶13]. Thus, even if a particular shift or unit may appear less busy, staffing regulations and hospital policies requiring that staff remain on their units at all times unless relieved, apply all the same. For these reasons, Plaintiffs' claims – alleging uniform, class-wide policies – are ideally suited to class treatment.

IX. THE TRIAL COURT'S RULING DENYING CERTIFICATION OF PLAINTIFFS' OVERTIME CLAIMS REQUIRES REVERSAL.

In denying certification of an overtime class, the trial court relied upon the same erroneous reasoning purportedly supporting its denial of certification of Plaintiffs' rest and meal break claims, holding that (1) contradictions in the declarations submitted by Plaintiffs versus those submitted by Defendants meant that individual issues predominated, (2) certification was improper because Plaintiffs submitted "only anecdotal" evidence of forced off-the-clock work, and (3) "Plaintiffs fail[ed] to address the possibility of employees working off-the-clock by choice." [Appx.13.3438]. As discussed above, this reasoning amounts to reversible error. *See, e.g., Benton*, 163 Cal.Rptr.3d at 438 (variations in the extent to which individual class members are entitled to overtime is not a proper basis upon which to deny certification); *see also Martinez*, 2013 WL 5977417, at *9 (similar); *see also Bradley*, 211 Cal.App.4th at 1155; *Williams*, WL 6384528, at *9 ("It may be true that some [employees] never worked off the clock, and such [employees] were thus not injured by [defendant's] practice of [employees] working off the clock. But the existence of individuality as to damages does not defeat class certification"). Furthermore, there is no authority supporting the trial court's assumption that an employee can voluntarily "choose" to work off-the-clock. In any event, the plaintiffs' theory of recovery – that employees were forced to work off the clock due to requirements that they complete all required work

duties, yet were actively discouraged or denied compensation for doing so – is amenable to certification. *See Brinker*, 53 Cal.4th at 1033.

Finally, Judge White found that Plaintiffs purportedly failed to meet their "burden" to rebut the presumption that an employee is not working when he or she is clocked out. [Appx.13.3438 (citing *Brinker*, 53 Cal.4th at 1051)]. Again, the court's conclusion demonstrates a fundamental misunderstanding of the certification standard. The issue before the trial court was not whether Plaintiffs could definitively prove, at the present stage of the proceedings, that the presumption detailed in *Brinker* was rebutted. Rather, Plaintiffs had the burden to show only that the presumption in question was one that could be addressed through common proof. *See* 53 Cal.4th at 1051-52. In the present case, in contrast to *Brinker*, there is concrete common proof showing management knowledge of the practices alleged.

Accordingly, the trial court's decision denying certification as to Plaintiffs' overtime claims should be reversed.

X. THE TRIAL COURT'S RULING DENYING CERTIFICATION AS TO PLAINTIFFS' DERIVATIVE CLAIMS REQUIRES REVERSAL.

Plaintiffs' remaining claims regarding waiting time penalties and inaccurate wage statements are predicated on the certifiable claims for rest breaks, meal breaks and overtime, and therefore should be certified as well. *See Dilts*, 267 F.R.D. at 640.

XI. THIS CASE REQUIRES REMAND WITH INSTRUCTIONS TO CERTIFY A CLASS.

Where it is apparent that certification is proper once the trial court's erroneous conclusions are stripped away, the case should be remanded with instructions to certify a class. *See Brinker*, 53 Cal.4th at 1033 (ordering the rest break class certified); *Jaimez*, 181 Cal.App.4th at 1309 (directing trial court to

certify the sub-classes proposed by plaintiff); *Faulkinbury*, 216 Cal.App.4th at 241 (similar); *Ghazaryan*, 169 Cal.App.4th at 1549 (similar); *Bluford*, 216 Cal.App.4th at 874 (similar). Accordingly, this Court should remand the case to the trial court with instructions to certify the classes and sub-classes requested by Plaintiffs.

XII. CONCLUSION

For the aforementioned reasons, this Court should reverse the trial court's certification order and remand the case to the trial court with instructions to certify the classes and sub-classes requested by Plaintiffs.

DATED: December 16, 2013

SCHONBRUN DESIMONE SEPLOW HARRIS & HOFFMAN LLP

By: _____

Michael D. Seplow
Erin M. Pulaski

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

Counsel of record for Plaintiffs-Appellants hereby certifies, pursuant to Rule 8.204(c) of the California Rules of Court that the text of the foregoing brief, including footnotes, consists of 13,982 words, as counted by the Microsoft Word 2010 word processing program used to generate the brief.

Dated: December 16, 2013

Erin M. Pulaski

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 723 Ocean Front Walk, Venice, California, 90291.

On December 17, 2013 I served the foregoing documents described as:

APPELLANTS' OPENING BRIEF

on all interested parties in this action by placing __an original or _x_ a true copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

_X_ (BY MAIL) I caused such envelope to be deposited in the mail at Venice, California. The envelope was mailed with postage thereon fully prepaid.

___ (BY PERSONAL DELIVERY) I caused the foregoing document to be personally served on the interested party.

_X_ (BY ELECTRONIC SERVICE) I caused the foregoing document to be electronically served on the interested party.

_X_ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 17th day of December 2013 at Venice, California.

Emma Huang

Service List for Alberts, et al. v. Aurora Las Encinas, et al.

Court of Appeals Case No. B248748

By U.S. Mail:

Attorneys for Defendant:
Douglas Hart
Katherine A. Roberts
Max Fischer
Sidley Austin LLP
555 West 5th Street, #4000
Los Angeles, CA 90013-3000

By U.S. Mail:

Clerk of the Court
Superior Court
Attn: Hon. Elizabeth A. White
111 N. Hill St.
Los Angeles, CA 90012

By Electronic Mail:

California Supreme Court