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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DREW GARRETT WASHINGTON,

Plaintiff,

No. C 08-5551 PJH

v.

**ORDER DENYING MOTION FOR  
CLASS CERTIFICATION**

JOE'S CRAB SHACK, et al.,

Defendants.

Plaintiff's motion for an order certifying the class came on for hearing before this court on July 7, 2010. Plaintiff appeared by his counsel Michael Ng, Michael Von Loewenfeldt, and Daniel L. Feder, and defendants appeared by their counsel Michael S. Kun. Having read the parties' papers and carefully considered their arguments, and good cause appearing, the court hereby DENIES the motion.

**INTRODUCTION**

This is a case alleging violations of California wage and hour laws. Plaintiff Drew Garrett Washington ("plaintiff") asserts that defendant Crab Addison, Inc. ("Crab Addison"), a Texas company that operates a number of Joe's Crab Shack restaurants, has violated its employees' rights by failing to provide them with meal and rest breaks; allowing its restaurant managers to manipulate employee time records to deprive employees of pay for all hours worked (including overtime and missed meal break pay); requiring employees to perform work "off the clock" (to perform work without pay); and requiring employees to pay for their own employer-mandated uniforms.

1 Plaintiff asserts nine causes of action – (1) a claim of failure to pay overtime, in  
2 violation of California Labor Code § 510; (2) a claim of unfair business practices under  
3 California Business & Professions Code § 17200; (3) a claim of unjust enrichment; (4) a  
4 claim of failure to provide accurate itemized wage statements, in violation of California  
5 Labor Code § 226; (5) a claim of failure to provide rest breaks and meal periods, in violation  
6 of California Wage Order No. 7-2001, and California Labor Code §§ 218.5, 226.7, and 512;  
7 (6) a claim that defendant’s policy that employees purchase and wear defendant’s clothing  
8 and accessories violates California Labor Code § 2802 and California Code of Regulations  
9 § 11040(9)(A); (7) a claim that defendant’s policy that employees purchase and wear  
10 defendant’s clothing and accessories violates California Labor Code  
11 § 450; (8) a claim of failure to pay minimum wage for “off-the-clock” work, in violation of  
12 California Labor Code § 1194; and (9) a claim for declaratory relief.

13 Plaintiff now seeks an order pursuant to Federal Rule of Civil Procedure 23,  
14 certifying a plaintiff class consisting of “all non-exempt restaurant employees employed by  
15 Crab Addison at Joe’s Crab Shack restaurants in California from January 1, 2007, through  
16 the present.”

### 17 BACKGROUND

18 Crab Addison, a nationwide chain based in Texas, owns and operates 11 Joe’s Crab  
19 Shack restaurants in California. The restaurants are located in Long Beach, San  
20 Francisco, Newport Beach, Industry, Ventura, Oceanside, Rancho Cucamonga, Garden  
21 Grove, Sacramento, and San Diego (two locations).<sup>1</sup>

22 Since January 1, 2007, Crab Addison has employed approximately 3841 non-  
23 exempt employees in California, and employs approximately 800 employees in California at  
24 any given time. These include “front of the house” employees who interact with customers  
25 (servers, bartenders, hosts), and “back of the house” employees (cooks, dishwashers).

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27 <sup>1</sup> According to defendant, Joe’s Crab Shack owns two additional restaurants that are  
28 not included in the present lawsuit, one located in Redondo Beach and another in San Diego  
(third location).

1 Scheduling is done individually by each restaurant. Some employees, particularly servers,  
2 are scheduled to work shifts of four hours or less.

3 Plaintiff worked at the Joe's Crab Shack at Fisherman's Wharf in San Francisco,  
4 from September 14, 2007, to June 16, 2008. During that time he held the positions of host,  
5 server, and bartender.

6 Crab Addison uses a computerized point-of-sale system known as "Aloha" for  
7 electronically recording its employees' hours and restaurant sales. Each employee is  
8 provided with his/her own "Aloha card," which is used to "clock in" and "clock out of" the  
9 Aloha system at the beginning and end of each shift, and at the beginning and end of  
10 unpaid meal breaks. Employees are paid based on the hours worked, as electronically  
11 recorded by the Aloha system. The system also creates a report that identifies which  
12 employees on any given day clocked in and out for meal breaks (and for how long).

13 An employee cannot alter the "clock in" or "clock out" times for his/her shifts or meal  
14 breaks, once entered, although managers do have the ability to make such changes  
15 manually. The Aloha system keeps records of any such changes and can produce reports  
16 that show any changes made to a particular employee's time entry.

17 Crab Addison's "Manager's Manual for Restaurants Operating in the State of  
18 California" ("California Manager's Manual"), relevant portions of which are attached to the  
19 Declaration of Kevin Cottingim (Crab Addison's Senior Vice President for Human  
20 Resources), details the company's written policies regarding meal periods and rest breaks.

21 Crab Addison's written policy is to provide all California employees that work more  
22 than five hours with a meal period of at least 30 minutes (unless the employee works no  
23 more than six hours and agrees to waive the meal period). If an employee works more  
24 than ten hours, Crab Addison's policy is to provide the employee with a second meal period  
25 of at least 30 minutes (unless the employee works no more than 12 hours and agrees to  
26 waive the second meal period and has taken the first meal period). Crab Addison's policy  
27 is to provide all hourly California employees with a ten-minute rest period for each four  
28 hours worked.

1 Crab Addison explains the meal-period and rest-break policies to California  
2 employees during orientation, training, and in periodic meetings. In addition, posters at  
3 each restaurant explain the employees' right to take meal and rest breaks.

4 Crab Addison's scheduling policies expressly recognize that the nature of restaurant  
5 work makes it difficult for an employee (such as a server, cook, bartender, or host) to take  
6 a 30-minute break, unless another employee is assigned the work responsibilities of the  
7 employee on break. According to the Cottingim Declaration, Crab Addison employs  
8 "breakers" to relieve employees so that they can take the breaks, and also provides  
9 payment of one hour of wages whenever an employee does not receive a meal or rest  
10 period.

11 Plaintiff claims, however, that in practice, Crab Addison ignores these written  
12 policies. Plaintiff asserts that Crab Addison's own records show that its managers do not  
13 schedule or provide meal or rest breaks on any consistent basis – and that (based on a  
14 20% sampling) a minimum of 1/3 of the eligible breaks are not taken. Plaintiff also  
15 contends that the same sample of payroll summaries reveals that Crab Addison did not pay  
16 those employees for the missed meal breaks. He asserts that this finding is consistent with  
17 his own experience at the Fisherman's Wharf Joe's Crab Shack, where he claims he was  
18 not provided with a 30-minute break for 71% of the 126 shifts for which a meal break was  
19 required.

20 Plaintiff contends, based on declarations from six employees or former employees of  
21 Joe's Crab Shack, that "[c]lass member declarations from [Crab Addison's] restaurants  
22 across California are congruent with the consistent pattern demonstrated in the class-wide  
23 data." According to those six prospective class members, they were frequently unable to  
24 take meal breaks because they could not take their breaks without abandoning a table full  
25 of customers, the bar, their hostess duties, or their kitchen responsibilities. Crab Addison  
26 asserts, however, that four of plaintiff's six declarants signed meal break waivers.

27 In addition, Crab Addison has provided declarations from 21 California employees,  
28 19 of whom state that Crab Addison made meal and rest breaks available, but that they

1 sometimes (or always) chose not to take them. Crab Addison notes that plaintiff himself  
2 admitted in his responses to requests for admission that he took timely meal breaks, and  
3 also that he had no knowledge of meal and rest break practices at any other restaurant  
4 other than the one he was employed at, and had not even been to Crab Addison's other  
5 California restaurants.

6 Crab Addison also has a written policy that warns managers that it is unlawful to edit  
7 an employee's time records to avoid paying overtime or missed break pay. Plaintiff  
8 contends, however, that because the managers have the ability to alter an employee's  
9 electronic time records, the system is subject to abuse. Three of plaintiff's six declarants  
10 state that their managers routinely engaged in such manipulations to reduce labor costs.  
11 Plaintiff himself claims that records produced by Crab Addison in discovery show that his  
12 time was shortened by managers, on at least 12 of his shifts. Plaintiff refers to this as time  
13 "shaved off," and claims that in his case, it varied from one hour to six.

14 Crab Addison's written policies also provide for payment of overtime worked, and  
15 expressly prohibit any "off-the-clock" work (work performed before an employee has  
16 clocked in, or after he/she has clocked out). Mr. Cottingim states in his declaration that he  
17 has repeatedly reiterated that employees may not be permitted to work "off the clock" and  
18 that managers will be terminated if they permit it, and that he in fact did terminate the one  
19 manager he found who allowed an employee to work "off the clock."

20 Plaintiff claims, however, that Crab Addison fails to pay its employees for all time  
21 worked, by allowing its managers to alter an employee's "clocked out" time, and by  
22 requiring employees to clock out before they complete their work. As an example, plaintiff  
23 cites to the declaration of one prospective class member, who stated that Crab Addison's  
24 managers routinely required her to clock out a few minutes before the end of her six-hour  
25 shift, and then required her to remain at work to complete her end of shift responsibilities  
26 ("side work" – filling salt and pepper shakers, cleaning tables, arranging silverware,  
27 paperwork).

28 Nevertheless, most of Crab Addison's declarants state that they have been paid for

1 all the time they worked at Joe’s Crab Shack, and that they have never been asked to work  
2 off-the-clock and have not heard of anyone else being told to do so. They state that they  
3 “punch out” only after they have completed their work.

4 Finally, Crab Addison requires its California hourly employees – bartenders, servers,  
5 hosts, and kitchen staff, to wear “Joe’s Crab Shack” T-shirts while working. The T-shirts  
6 are also sold to the public at “retail stores” located in each restaurant. Crab Addison’s  
7 written policy requires managers to provide employees with as many T-shirts as they need,  
8 but plaintiff claims that in reality this policy is ignored. According to plaintiff and five of his  
9 six declarants, employees are given at most one or two shirts when they begin their  
10 employment, but are then required to purchase, without reimbursement, any additional T-  
11 shirts they may need for work. However, a number of Crab Addison’s declarants state that  
12 they have been provided T-shirts in accordance with the written policy.

13 According to plaintiff, Crab Addison uses an inventory program known as  
14 “CrunchTime” to record the number of T-shirts ordered by each restaurant and the number  
15 of T-shirts sold, and also gives specific guidance to managers regarding the tracking and  
16 maximization of retail sales of items (such as T-shirts). However, plaintiff asserts, the  
17 California Manager’s Manual and other training materials contain no guidance on recording  
18 the number of T-shirts provided to employees. Plaintiff claims that this confirms that Crab  
19 Addison’s hourly employees are required to purchase their T-shirts just like members of the  
20 general public. He argues that Crab Addison’s failure to provide free T-shirts to employees  
21 can be easily confirmed by comparing CrunchTime’s record of T-shirt orders against the  
22 number of T-shirts sold.

## 23 DISCUSSION

### 24 A. Legal Standard

25 The decision whether to certify a class is committed to the discretion of the district  
26 court and guided by Rule 23 of the Federal Rules of Civil Procedure. Cummings v.  
27 Connell, 316 F.3d 886, 895 (9th Cir. 2003). A plaintiff seeking to represent a class must  
28 satisfy the threshold requirements of Rule 23(a), as well as the requirements for

1 certification under one of the subsections of Rule 23(b). See Fed. R. Civ. P. 23; see also  
 2 Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001).

3 A district court may certify a class only if it determines that the plaintiff has met his or  
 4 her burden. General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 158-61 (1982); Dukes  
 5 v. Wal-Mart Stores, Inc., 603 F.3d 571, 580 (9th Cir. 2010). While it is generally improper,  
 6 in making this determination, “to advance a decision on the merits to the certification  
 7 stage,” Dukes, 603 F.3d at 586 (citation and quotation omitted), it may sometimes be  
 8 “necessary for the court to probe behind the pleadings before coming to rest on the  
 9 certification question,” id. at 580 (citation and quotation omitted).

10 B. Plaintiff’s Motion

11 Plaintiff argues that the Rule 23(a) requirements are met in this case, and that the  
 12 class is appropriate for certification under Rule 23(b)(3).

13 In opposition, Crab Addison contends that the class should not be certified, because  
 14 plaintiff has not met his burden under Rule 23(a) of showing commonality and typicality, or  
 15 of showing that he is an adequate representative. Crab Addison also asserts that the class  
 16 proposed by plaintiff does not qualify under Rule 23(b)(3), because plaintiff has not shown  
 17 that common issues predominate over questions affecting only individual members.

18 1. Rule 23(a)

19 Under Rule 23(a), a case is appropriate for certification as a class action only if it  
 20 meets four requirements:

21 (1) the class is so numerous that joinder of all members is impracticable; (2)  
 22 there are questions of law or fact common to the class; (3) the claims or  
 23 defenses of the representative parties are typical of the claims or defenses of  
 the class; and (4) the representative parties will fairly and adequately protect  
 the interests of the class.

24 Fed. R. Civ. P. 23(a). These four requirements are referred to as “numerosity,”  
 25 “commonality,” “typicality,” and “adequacy of representation.” See United Steel, Paper &  
 26 Forestry, Rubber, Manufacturing Energy, Allied Industrial & Service Workers Int’l Union,  
 27 AFL-CIO, CLC (“United Steel”), 593 F.3d 802, 806 (9th Cir. 2010).

28 The numerosity requirement “requires examination of the specific facts of each case

1 and imposes no absolute thresholds.” General Tel. Co. of the Northwest, Inc. v. EEOC,  
2 446 U.S. 318, 330 (1980). Although a plaintiff is not required to denote a precise number of  
3 class members, “[t]he central question is whether Plaintiffs have sufficiently identified and  
4 demonstrated the existence of the numbers of persons for whom they speak.” Schwartz v.  
5 Upper Deck Co., 183 F.R.D. 672, 680-81 (S.D. Cal. 1999). Here, the parties do not dispute  
6 that the proposed class is sufficiently numerous to meet the standard of Rule 23(a)(1).

7 “The commonality and typicality requirements of Rule 23(a) tend to merge,” as  
8 “[b]oth serve as guideposts for determining whether under the particular circumstances  
9 maintenance of a class action is economical and whether the named plaintiff’s claim and  
10 the class claims are so interrelated that the interests of the class members will be fairly and  
11 adequately protected in their absence.” Falcon, 457 U.S. at 157 n.13. Nevertheless, each  
12 of the two factors does “serve[ ] a discrete purpose.” Dukes, 603 F.3d at 613 n.37.

13 “Commonality focuses on the relationship of common facts and legal issues among  
14 class members.” Id. at 599. Rule 23(a)(2) is permissive, and “[a]ll questions of fact and  
15 law need not be common to satisfy the rule.” Id. (quoting Hanlon v. Chrysler Corp., 150  
16 F.3d 1011, 1019 (9th Cir. 1998)). “[O]ne significant issue common to the class may be  
17 sufficient to warrant certification,” and “[t]he existence of shared legal issues with divergent  
18 factual predicates is sufficient.” Id. (citation and quotation omitted).

19 By contrast, “typicality focuses on the relationship of facts and issues between the  
20 class and its representatives.” Id. at 613 n.37. “Representative claims are ‘typical’ if they  
21 are reasonably coextensive with those of absent class members; they need not be  
22 substantially identical.” Id. at 613 (quoting Hanlon, 150 F.3d at 1020) (internal quotation  
23 omitted). “Some degree of individuality is to be expected in all cases, but that specificity  
24 does not necessarily defeat typicality.” Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir.  
25 2003).

26 In the present case, plaintiff contends that common questions of law and fact exist  
27 with regard to whether Crab Addison failed to provide meal breaks for its non-exempt  
28 employees, for all shifts exceeding five hours, or failed to provide rest breaks for its non-

1 exempt employees, for all shifts exceeding three and a half hours, and whether these  
2 practices are unlawful under California law; whether Crab Addison allowed its managers to  
3 alter an employee's "clocked out" time to reduce the number of hours worked for pay  
4 purposes, and whether as a result of this practice Crab Addison failed to pay overtime and  
5 failed to pay for missed meal breaks; whether Crab Addison required its employees to  
6 purchase their Joe's Crab Shack uniforms (T-shirts) without reimbursement, and whether  
7 and how many T-shirts Crab Addison was required to provide free of charge to its  
8 employees; whether Crab Addison required its employees to work "off the clock" by, and  
9 whether, as a result of this practice, employees received accurate pay statements; and  
10 whether Crab Addison's alleged Labor Code violations constitute violations of California's  
11 law against unfair competition.

12 With regard to typicality, plaintiff argues that he is an exempt hourly employee, as  
13 are the class members he seeks to represent. He contends that the claims for which he  
14 seeks certification are typical of the claims of the absent class members, because his  
15 claims arise from the same "practice or course of conduct" that forms the basis of the class  
16 claims and because the unnamed class members have injuries that are similar to his own  
17 injuries. Specifically, he contends that he was not regularly provided his required meal and  
18 rest breaks; that his managers regularly manipulated his time records to deprive him of pay  
19 for hours worked, along with overtime and missed break pay; that he had to pay for his own  
20 Joe's Crab Shack uniform (T-shirts) without reimbursement; and that he was required to  
21 clock out before completing all work.

22 The court finds that plaintiff has established, for purposes of Rule 23(a)(2), that there  
23 are "questions of law or fact common to the class." Plaintiff's claims, as pled, share a  
24 common question of law – whether any of the practices Crab Addison is alleged to have  
25 engaged in constitute violations of California law – and at least some of the facts to be  
26 analyzed with respect to this question are the same. Nevertheless, the court notes that  
27 while plaintiff has identified a list of common legal issues, he has provided little evidence  
28 that Crab Addison has adopted common policies or has engaged in common practices in

1 all its California restaurants with regard to the claims at issue.

2 In Dukes, the Ninth Circuit found that the combination of factual evidence, expert  
3 opinions, statistical evidence, and anecdotal evidence provided sufficient support to raise  
4 the common question whether Wal-Mart's female employees nationwide were subjected to  
5 a single set of corporate policies. Id. at 612. In this case, by contrast, plaintiff concedes  
6 that Crab Addison's written policies require payment of overtime, meal and rest breaks, and  
7 provision of T-shirts to employees, and prohibit "off the clock" work, but claims that those  
8 written policies were simply "ignored."

9 For example, plaintiff asserts, based on a sample of payroll summaries produced in  
10 discovery, that Crab Addison did not pay employees for missed meal breaks. However,  
11 apart from this summary of data, which plaintiff does not adequately explain, the only  
12 evidence plaintiff offers is anecdotal – his own declaration and the declarations of six  
13 employees (or former employees) of Crab Addison, and this anecdotal evidence is  
14 contradicted by the evidence presented by Crab Addison. Nevertheless, the court finds  
15 that plaintiff has alleged sufficient common issues to satisfy the requirement of Rule  
16 23(a)(3).

17 It is somewhat less clear that plaintiff's claims or defenses are "typical of the claims  
18 and defenses of the class." The purpose of the typicality requirement "is to assure that the  
19 interest of the named representative aligns with the interests of the class." Hanon v.  
20 Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted). Typicality  
21 generally "refers to the nature of the claim or defense of the class representative, and not to  
22 the specific facts from which it arose or the relief sought." Id. (quotation omitted). "The test  
23 of typicality is whether other members have the same or similar injury, whether the action is  
24 based on conduct which is not unique to the named plaintiffs, and whether other class  
25 members have been injured by the same course of conduct." Id. (internal quotation marks  
26 omitted). On the other hand, class certification is inappropriate "where the putative class  
27 representative is subject to unique defenses which threaten to become the focus of the  
28 litigation." Id.

1 Here, plaintiff's claims appear to be reasonably co-extensive with those of some of  
2 the absent class members, or at least with those class members who signed declarations in  
3 support of plaintiff's motion. On the other hand, plaintiff's claims are not co-extensive with  
4 those of the class members who submitted declarations in support of Crab Addison's  
5 opposition to the present motion. In analyzing whether the injury suffered by the plaintiff  
6 resulted from the same discriminatory practice as the injuries suffered by the absent class  
7 members, the court would first have to find that Crab Addison did in fact engage in common  
8 practices with regard to the claims at issue. Thus, plaintiff's showing under Rule 23(a)(3) is  
9 inconclusive.

10 Finally, under Rule 23(a)(4), plaintiff must show that he will "fairly and adequately  
11 protect the interests of the class." Adequate representation "depends on the qualifications  
12 of counsel for the representatives, an absence of antagonism, a sharing of interests  
13 between representatives and absentees, and the unlikelihood that the suit is collusive."  
14 Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994); see also Dukes, 603 F.3d at 614. Any  
15 conflict must be serious and irreconcilable in order to defeat certification. Breeden v.  
16 Benchmark Lending Group, Inc., 229 F.R.D. 623, 629 (N.D. Cal. 2005) (citing Sosna v.  
17 Iowa, 419 U.S. 393, 403 (1975)).

18 Plaintiff contends that he has no conflict with the proposed class, and in fact shares  
19 the other class members' interest in redressing Crab Addison's unlawful wage and hour  
20 practices. He asserts further that he is represented by qualified and competent class  
21 counsel.

22 Crab Addison's position, however, is that plaintiff would not be an adequate class  
23 representative. First, Crab Addison contends that plaintiff does not meet the required  
24 standards of honesty and integrity, because he misrepresented certain facts on his job  
25 application, and because he admits to abusing drugs and alcohol during the time he was  
26 employed at Joe's Crab Shack, which Crab Addison asserts calls his ability to remember  
27 details into question.

28 Crab Addison also asserts that while plaintiff contends that three different managers

1 instructed him to work off-the-clock, those managers all deny having ever told plaintiff or  
2 any employee to do so, and no other employee claims that those three managers told them  
3 to work off-the-clock. Crab Addison argues that plaintiff's assertion that there was a policy  
4 to require off-the-clock work therefore raises unique credibility issues and defenses.

5 The court finds insufficient evidence in the record to support a finding that plaintiff is  
6 incapable of serving as a class representative. "[C]redibility problems do not automatically  
7 render a proposed class representative inadequate." Harris v. Vector Marketing Corp., \_\_\_  
8 F.Supp. 2d \_\_\_, 2010 WL 4588967 at \*16 (N.D. Cal., Nov. 5, 2010) (quotation and citation  
9 omitted). In general, it is only when the representative's credibility bears directly on matters  
10 directly relevant to the litigation, or when the alleged conflict jeopardizes the interests of the  
11 class, that the court should find the representative inadequate. Id.

12 Crab Addison also asserts that plaintiff's counsel are not adequate, claiming that  
13 they "neglected" the case and repeatedly missed critical deadlines. The court finds,  
14 however, that plaintiff's counsel are experienced in class actions, including employment-  
15 related class actions. The record submitted by Crab Addison does not support a finding  
16 that plaintiff's counsel do not satisfy the requirements of Rule 23(a)(4).

17 2. Rule 23(b)

18 Under Rule 23(b), a case may be certified as a class action only if (1) there is a risk  
19 of substantial prejudice from separate actions; or (2) declaratory or injunctive relief  
20 benefitting the class as a whole would be appropriate; or (3) "the questions of law and fact  
21 common to class members predominate over any questions affecting only individual  
22 members, and . . . a class action is superior to other available methods for fairly and  
23 efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b). Here, plaintiff seeks  
24 certification of the class under Rule 23(b)(3), and must therefore show that common  
25 questions predominate, and that a class action would be superior to other methods of  
26 adjudication.

27 Predominance "tests whether proposed classes are sufficiently cohesive to warrant  
28 adjudication by representation," a standard "far more demanding" than the commonality

1 requirement of Rule 23(a). Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-24 & n.18  
2 (1997); see Dukes, 603 F.3d at 593. “When common questions present a significant  
3 aspect of the case and they can be resolved for all members of the class in a single  
4 adjudication, there is clear justification for handling the dispute on a representative rather  
5 than on an individual basis.” Local Jt. Exec. Bd. Culinary/Bartender Tr. Fund v. Las Vegas  
6 Sands, Inc., 244 F.3d 1152, 1162 (9th Cir. 2001). Put another way, while Rule 23(a)(2) “is  
7 about invoking common questions, . . . Rule 23(b)(3) requires a district court to formulate  
8 some prediction as to how specific issues will play out in order to determine whether  
9 common or individual issues predominate in a given case.” Dukes, 603 F.3d at 593  
10 (citations and quotations omitted).

11 Here, plaintiff argues, common issues predominate with regard to the four main  
12 claims – the meal and rest break claims, the claims arising from the policy of allowing  
13 managers to manipulate an employee’s time records, the off-the-clock claim, and the  
14 uniform claim. Plaintiff asserts that the case revolves around issues that will be proved  
15 using Crab Addison’s standardized timekeeping, payroll, and other business records.  
16 Thus, he contends, he is not asserting commonality based on written policies, but rather on  
17 the argument that common issues predominate because the class members’ identical  
18 claims can be proven (or disproved) by examining class-wide business practices and  
19 records.

20 First, with regard to the meal and rest breaks, plaintiff contends that the  
21 predominance of common issues is shown by the fact that there is a conflict among courts  
22 concerning what it means to “provide” meal and rest breaks – whether the law requires that  
23 employers affirmatively ensure that employees take breaks, or whether it is sufficient for  
24 employers to simply make breaks available. See Cicairos v. Summit Logistics, Inc., 133  
25 Cal. App. 4th 949, 962-63 (2005) (employers must affirmatively ensure that employees take  
26 breaks); Brown v. Federal Express Corp., 249 F.R.D. 580, 585 (C.D. Cal. 2008) (employers  
27 must simply make breaks available). This dispute is presently before the California  
28 Supreme Court for resolution. See Brinker Restaurant Corp. v. Superior Court, 80 Cal.

1 Rptr. 3d 781 (Oct. 22, 2008) (vacating and granting review in Brinker Restaurant Corp. v.  
2 Superior Court, 165 Cal. App. 4th 25 (2008)); Brinkley v. Public Storage, Inc., 87 Cal. Rptr.  
3 3d 674 (Jan. 14, 2009) (vacating and granting review in Brinkley v. Public Storage, Inc.,  
4 167 Cal. App. 4th 1278 (2008)).<sup>2</sup>

5 Second, plaintiff contends that common issues predominate with regard to the  
6 claims concerning Crab Addison's alleged policy of allowing managers to manipulate an  
7 employee's time records. In particular, according to plaintiff, common issues include the  
8 preliminary question whether Crab Addison's policies and procedures allowed its managers  
9 to alter the time an employee is clocked out; as well as the proof of how many hours were  
10 deducted by managers for each class member, which plaintiff asserts can easily be  
11 determined from electronic records showing each change made by a manager.

12 Third, plaintiff contends that common issues predominate with regard to the claim  
13 that employees were required to work "off the clock." As with the other claims, plaintiffs  
14 argue that the question whether employees performed work while clocked out can be  
15 resolved by a review of Crab Addison's electronic records, which plaintiff claims will show  
16 when an employee was clocked in and out; the hours for which an employee was paid; and  
17 when an employee performed certain work tasks, such as placing orders, running credit  
18 cards, or closing checks and reconciling tabs.

19 Fourth, plaintiff argues that common issues predominate with regard to the claim  
20 that employees were required to purchase their own uniforms. Plaintiff asserts that  
21 common issues include whether Crab Addison required class members to wear Joe's Crab  
22 Shack T-shirts, and, if so, in what condition the uniform was required to be maintained;  
23 whether Crab Addison provided T-shirts to employees, and if so, how many; whether  
24 California law required Crab Addison to pay class members for T-shirts, and if so, how

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25  
26 <sup>2</sup> In response to the California Supreme Court's grant of review, the California  
27 Department of Labor Standards Enforcement issued a memo on October 23, 2008, instructing  
28 DLSE employees to follow the analysis in Brown and to disregard Cicairos because Cicairos'  
interpretation of California's meal period requirements "is not compelling." Nevertheless, the  
court notes that DLSE opinion letters are not binding and do not have the force of law. See  
Conley v. Pacific Gas & Elec. Co., 131 Cal. App. 4th 260, 270-71 (2005).

1 many in light of an employee's work schedule and job classification. Again, plaintiff  
2 contends that Crab Addison's own electronic records can answer all these questions.

3 In opposition, Crab Addison argues that plaintiff has not satisfied his burden under  
4 Rule 23(b)(3). Crab Addison contends that in determining predominance, the court must  
5 look at the substantive issues raised by plaintiff, and whether those issues require  
6 individual proof for each class member's claims. Here, Crab Addison asserts, plaintiff's  
7 own testimony does not support his claims, and the contradictions in the evidence point to  
8 a need for individualized proof with regard to each of plaintiff's claims. Thus, Crab Addison  
9 argues, class certification is inappropriate.

10 Rule 23(b)(3) also requires a finding that a class action is superior to other methods  
11 for fairly and efficiently adjudicating the controversy. Factors pertinent to the court's  
12 determination of whether a class action is superior to other methods of adjudication include

13 (A) the class members' interests in individually controlling the prosecution or  
14 defense of separate actions;

15 (B) the extent and nature of any litigation concerning the controversy already  
16 begun by or against class members;

17 (C) the desirability or undesirability of concentrating the litigation of the claims  
18 in the particular forum; and

19 (D) the likely difficulties in managing a class action.

20 Fed. R. Civ. P. 23(b)(3).

21 Plaintiff asserts that certifying this action as a class action is the superior method for  
22 adjudicating the claims at issue, because it will promote judicial economy and facilitate  
23 meaningful access to a means of redress. Plaintiff contends that class treatment is  
24 especially appropriate here, because some class members – especially those who are  
25 employed by Crab Addison or who wish to continue employment in the restaurant industry  
26 – may fear reprisal if they bring individual claims. In addition, plaintiff argues, the cost of  
27 individual litigation would be prohibitive for most, if not all, class members.

28 As for the four non-exclusive factors (Rule 23(b)(3)(A)-(D)), plaintiff asserts that no  
single class member has a significant interest in individually controlling the litigation, that he

1 is not aware of any other class action that involves similar issues, that the Northern District  
2 of California is as good a venue as any in the State of California, and that managing this  
3 class action will be relatively straightforward, in that the common questions of proof  
4 primarily relate to Crab Addison's class-wide policies and practices, and the evidence is  
5 readily available.

6 In opposition, Crab Addison contends that plaintiff has not established that class  
7 treatment is a superior means of adjudication, because if the class is certified, the court will  
8 become mired in 3,800 mini-trials on each of the issues addressed above. Crab Addison  
9 also argues that because each putative class member has different experiences, it has the  
10 due process right to raise individualized defenses against each one. Crab Addison also  
11 asserts that each individual plaintiff who feels he/she has been injured has the right to a  
12 quick and inexpensive administrative hearing before the DLSE, noting that one of plaintiff's  
13 former co-workers, Peter Collins, did just that.

14 The court finds that the motion must be DENIED. Plaintiff's position is that common  
15 questions predominate because the main issue is whether – notwithstanding Crab  
16 Addison's written policies – Joe's Crab Shack restaurants in California followed a common  
17 unwritten policy of denying meal and rest breaks, failing to pay employees who did not take  
18 breaks, failing to pay for overtime, requiring employees to purchase their own uniforms, and  
19 so forth. However, this argument confuses the question of the existence of common issues  
20 of law and fact, with the question of whether common questions predominate over  
21 individual questions.

22 Plaintiff also contends that the existence of a policy or practice that in effect  
23 contradicts Crab Addison's written policies can be ascertained by an analysis of the data in  
24 Crab Addison's computer systems. But since plaintiff has failed to adequately explain how  
25 that analysis works and exactly what the data shows, he has failed to adequately establish  
26 the existence of such a policy or practice.

27 In addition, most of plaintiff's arguments – particularly the arguments regarding the  
28 missed meal breaks and the arguments regarding off-the-clock and overtime claims – focus

1 on individualized inquiries. The fact that the information relating to individual employees  
2 may be available (or capable of being extracted) from Crab Addison's Aloha system and  
3 other computerized systems does not mean that these are issues that are not dependant  
4 on an individualized inquiry.

5 This conclusion is in line with Crab Addison's position, which is that common  
6 questions do not predominate because the only way of answering the question regarding  
7 the operation of a policy or practice in its California Joe's Crab Shack restaurants would be  
8 through individualized analyses of why, in each instance, a particular employee did or did  
9 not take breaks, and if he/she did or did not take breaks, whether Crab Addison paid the  
10 amount owing; or whether a particular employee did or did not work "off the clock;" or  
11 whether a particular employee did or did not purchase his/her own T-shirt. In other words,  
12 the only way of showing the "practice" that plaintiff claims existed at the California  
13 restaurants would be to determine how when and how it was applied in each instance.

14 With regard to the meal break claim, Crab Addison has provided evidence showing  
15 that in discovery, plaintiff was unable to describe the circumstances in which he was ever  
16 denied a meal break, and that he also testified that he had no idea whether employees  
17 were ever denied meal breaks in other Joe's Crab Shack restaurants, or whether cooks  
18 and dishwashers in the restaurant where he worked had ever been denied breaks. By  
19 contrast, plaintiff now states in his declaration that he was almost never able to take a  
20 break while he worked at Joe's Crab Shack, because it was so "busy" and there was no  
21 one to take his place with his customers – and that he "did not miss meal periods by choice  
22 [and] was almost never paid for my missed meal breaks;" and that he has also provided the  
23 declarations of six other employees who claim that they, too, did not receive breaks (though  
24 for reasons different than those advanced by plaintiff).

25 This court has previously taken the position that employers are required to make  
26 meal breaks available, but need not compel employees to take meal breaks if they are  
27 unwilling to do so. See Perez v. Safety-Kleen Sys., Inc., 253 F.R.D. 508, 512-15 (N.D. Cal.  
28 2008) (distinguishing Cicairos and citing Brown and other cases that have rejected the

1 proposition that employers are required to ensure that meal breaks are taken). Under this  
2 standard, a plaintiff must do more than show that a meal break was not taken to establish a  
3 violation. Instead, he must show that the employer impeded, discouraged, or prohibited  
4 him from taking a proper break. Id. Thus, the crucial issue with regard to the meal break  
5 claim is the reason that a particular employee may have failed to take a meal break.

6 Plaintiff does not claim that Crab Addison's written meal break policy is in violation of  
7 the law, and therefore cannot rely on that facially compliant policy to show that common  
8 issues predominate. In the absence of any common policy, an individualized inquiry will be  
9 required to determine whether any single employee failed to take a meal break because  
10 he/she was too busy, and also to determine whether a particular employee signed a waiver  
11 based on a decision not to take meal breaks. For this reason alone, common issues do not  
12 predominate with regard to the meal break claim. In addition, plaintiff's suggested solution  
13 of simply examining time records to determine when meal breaks were not taken would be  
14 unavailing, as that would not answer the question why the employees did not take breaks.

15 The individualized analyses required here would be further complicated by the fact  
16 that many employees are scheduled to work shifts of less than four hours; the fact that  
17 many have signed meal and break waivers (including at least four of the six employees or  
18 former employees who submitted declarations in support of his motion); the fact that Crab  
19 Addison provides "breakers" to relieve employees so they can take their breaks if they want  
20 to; the fact that Crab Addison has paid for missed breaks. Thus, not only would  
21 individualized analyses have to be performed to determine whether or when employees  
22 were eligible for breaks and did not take them, but the analyses into why the breaks were  
23 not taken would require the parties to delve into each employee's personal preference,  
24 whether a breaker was available, how busy the restaurant was, and whether Crab Addison  
25 did or did not pay for the missed break (as it did on at least five occasions for plaintiff).  
26 Class adjudication is not possible where such individualized determinations cannot be  
27 made through common proof.

28 With regard to the rest break claim, California law requires only that employers

1 authorize and permit employees to take rest breaks at the rate of 10 minutes for each four  
2 hours worked. Again, plaintiff does not dispute that Crab Addison's rest-break policy is fully  
3 compliant with the law. And as with the meal-break issue, plaintiff was unable to describe  
4 in discovery the circumstances under which he missed any break, and testified that he had  
5 no idea whether employees in other restaurants were denied breaks or whether  
6 cooks/dishwashers had been denied breaks. Now, he has submitted declarations from six  
7 persons claiming they did not receive breaks (but under circumstances different than those  
8 claimed by plaintiff in his own declaration).

9 Crab Addison has established that its time records will not show when rest breaks  
10 were taken, because these breaks are paid and employees do not punch out when they  
11 take rest breaks.<sup>3</sup> For this reason, individualized analyses must be conducted to determine  
12 whether and when rest breaks were not taken. Moreover, as with the meal breaks, the  
13 inquiries would not answer the critical question of why rest breaks were not taken – a  
14 question that will necessitate an individualized inquiry into each employee's particular  
15 circumstances.

16 With regard to the overtime claim, Crab Addison has established that it has a lawful  
17 overtime policy in place, and that it has paid its California employees for more than 28,000  
18 hours of overtime since January 2007. Thus, plaintiff cannot argue that no overtime was  
19 paid. Instead, plaintiff's current position is that employees were not paid for work done "off-  
20 the-clock" and that managers "shaved" their time.

21 Crab Addison has established that it has a lawful written policy prohibiting work off-  
22 the-clock. Moreover, 19 of Crab Addison's declarants have stated that they never worked  
23 "off-the-clock," that they received compensation for all overtime worked, and that no other  
24 employee has claimed that any manager told him/her to work "off-the-clock." Plaintiff has  
25 provided no evidence of any company-wide or class-wide policy of requiring "off-the-clock"  
26 work, and the individualized assessment necessary to ascertain whether there were in fact

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27  
28 <sup>3</sup> California law does not require employers to record rest periods. Cal. Code Regs. tit. 8, § 11070.

1 any employees who were told to work “off-the-clock” would not be susceptible to common  
2 proof.

3 With regard to the new “time-shaving” claim – which Crab Addison asserts was  
4 raised for the first time in the present motion – plaintiff nowhere claims that Crab Addison  
5 “shaved” time off his timecard or made any changes to his timecard that were not accurate.  
6 Moreover, even if there is some evidence that some manager “shaved” time off some  
7 employee’s time card, there is no common proof available for such a claim, as it would not  
8 be reflected in the time records, and would depend on individualized testimony from  
9 employees who claimed that their records had been changed.

10 With regard to the uniform claim, Crab Addison’s written policy is to provide T-shirts  
11 to employees, and to replace those T-shirts when they become worn. Plaintiff does not  
12 assert that this policy is unlawful. He also testified that he was unaware of whether  
13 employees in other restaurants were provided T-shirts, or even whether cooks and  
14 dishwashers in the Fisherman’s Wharf Joe’s Crab Shack were provided T-shirts.

15 While plaintiff provides declarations from six employees, who claim that they  
16 purchased T-shirts, the declarations provide no details of the circumstances under which  
17 they did so. By contrast, a number of Crab Addison’s declarants state that they were  
18 provided with T-shirts in accordance with Crab Addison’s written policy. This dispute in the  
19 evidence highlights the need for individualized inquiries.

20 As for plaintiff’s claim that the number of T-shirts provided to employees can be  
21 determined from subtracting the number sold to customers from the number delivered to a  
22 given restaurant, that calculation would not take into account the existing inventory of  
23 T-shirts, the fact that T-shirts are provided free of charge to customers as part of  
24 promotional events, and the fact that some T-shirts may be stolen. Moreover, plaintiff’s  
25 proposed method of proof would not answer the most important question – who purchased  
26 T-shirts, or why. The only way to determine who purchased T-shirts, and why they  
27 purchased them, is through individualized analyses, and class treatment is therefore not  
28 appropriate.

1 Plaintiff characterizes this action as a “typical wage-and-hour case of the type that is  
2 routinely certified as a class action.” It is true that courts, including this courts, often find  
3 wage-and-hour cases to be appropriate for class treatment. Nevertheless, there is no rule  
4 that requires that wage-and-hour claims be certified for class treatment regardless of the  
5 evidence submitted in support of the motion for certification. See, e.g., Spainhower v. U.S.  
6 Bank N.A., 2010 WL 1408105 (C.D. Cal., March 25, 2010) (denying class certification in  
7 wage-and-hour case because plaintiffs failed to establish predominance under Rule 23(b));  
8 Koike v. Starbucks Corp., 2008 WL 7796650 (N.D. Cal., June 20, 2008) (same), aff’d, 378  
9 Fed. Appx. 659, 2010 WL 1784727 (9th Cir., May 5, 2010); Garcia v. Sun Pacific Farming  
10 Coop., 2008 WL 2073979 (E.D. Cal., May 14, 2008) (same), aff’d, 359 Fed. Appx. 724,  
11 2009 WL 4912213 (9th Cir., Nov. 13, 2009).

12 In this case, the court finds that class certification is not warranted because plaintiff  
13 has not met his burden of showing that the questions of law and fact common to class  
14 members predominate over questions affecting only individual members, or of showing that  
15 a class action would be a superior method of resolving these claims.

### 16 CONCLUSION

17 In accordance with the foregoing, the court finds that plaintiff’s motion for class  
18 certification must be DENIED.

19  
20 **IT IS SO ORDERED.**

21 Dated: December 23, 2010



22 \_\_\_\_\_  
23 PHYLLIS J. HAMILTON  
24 United States District Judge  
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26  
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